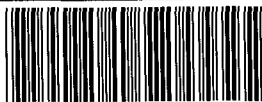


EUROPEAN MONOGRAPHS



A 367317

The European Union in Search of a Democratic and Constitutional Theory

Amaryllis Verhoeven



KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Table of Contents

Introduction	xi
Acknowledgements	xv
List of Abbreviations	xvii
Part I. DEMOCRATIC AND CONSTITUTIONAL THEORY AT THE CROSS-ROADS	
I. Democracy, legitimacy and constitutionalism: basic notions	3
1. ON DEMOCRATIC LEGITIMACY	3
a. The elusiveness of the democracy concept	3
b. Democratic legitimacy and conceptions of the self	6
(i) Democracy as a condition for legitimacy	6
(ii) Legitimacy, formal and social	10
c. The public philosophy of a democracy	11
d. Conclusion: democracy as an ideal of self-rule	14
2. ON CONSTITUTIONS AND CONSTITUTIONALISM	15
a. What does to live under a constitution mean?	15
b. Constitutionalism and the rule of law	18
II. Beyond the state: current challenges to democratic and constitutional theory	21
1. THE SOCIAL CONTRACT AS THE BASIS FOR THE MODERN DEMOCRATIC STATE	21
a. Introduction	21
b. The emergence of the sovereign state	22
c. The social contract as conceptual foundation	24
d. The rise of popular sovereignty	26
e. Nationalism as a way to ensure allegiance	28
f. The challenge ahead	29
2. THE QUESTION OF SOVEREIGNTY	30
a. Introduction	30
b. Internal sovereignty: the question of self-governance	31
c. External sovereignty: the question of autonomy	32

TABLE OF CONTENTS

3. SELF-RULE UNDER CONDITIONS OF DIVERSITY	34
a. Shortcomings of the traditional social contract model	34
b. Self-rule minimised: liberal, pluralist and pragmatic approaches to democracy	37
c. Revitalising self-rule under conditions of diversity	39
(i) Deliberative democracy as a revitalisation of the ideal of self-governance	39
(ii) Outline and critique of Habermas' concept of democratic participation	41
(iii) Dworkin's 'community of principle'	48
4. CONCLUSION: NEW PERSPECTIVES ON CONSTITUTIONALISM	51
Part II. THE DEMOCRACY DEFICIT AND THE CONSTITUTIONAL DEFICIT	
I. Diagnosing the democracy deficit of the European Union	57
1. DEMOCRACY DEFICIT: WHAT'S IN A NAME?	57
a. The classical deficit thesis	57
b. Current accounts of the democracy deficit	60
2. THE DEMOCRACY DEFICIT AS A CRISIS OF LEGITIMACY	63
a. Origins of the legitimacy crisis	63
b. The public outburst at the occasion of the ratification of the Maastricht Treaty	68
3. THE CHALLENGE AHEAD: CURING A DEFICIT AT THE CONSTITUTIONAL LEVEL	70
a. The heart of the matter: the constitutional deficit	70
b. The methodological challenge: how to tackle of problem with two variables?	72
II. Overcoming the standard vision on European constitutionalism	75
1. WHAT IS AT STAKE IN THE CURRENT DEBATE ON THE EUROPEAN CONSTITUTION?	75
2. CRITIQUES OF THE CONSTITUTIONAL ACCOUNT	79
a. A product of undemocratic judicial activism?	80
b. A top-down account resisted by national courts?	85
c. No <i>demos</i> , no constitution?	90
(i) The 'no <i>demos</i> ' thesis	90
(ii) A non-ethnic, non-national European <i>demos</i> as an alternative?	93
d. Not special enough to separate itself from international law?	98
e. An administrative or regulatory structure?	100
(i) Origins and main tenets of the regulatory model	100
(ii) Descriptive shortcomings	104

(iii) Normative shortcomings	111
f. Too messy and dispersed to be constitutional?	113
3. CONCLUSION: THE NEED TO RE-ASSESS CONSTITUTIONALISM	114
Part III. THE CONSTITUTION OF THE EUROPEAN UNION REVISITED	
I. What constitution does the European Union have?	119
1. A FRESH START: THE EUROPEAN UNION AS A LEGAL SYSTEM	119
a. Introduction	119
b. Beyond the pillar divide: the unity of the Union	120
c. A constitutional order of states?	122
d. The European Union as a legal system	124
2. THE EU AS A SUPRANATIONAL INTEGRATION PROJECT	132
a. Essential features of the EU constitution: an overview of the argument	132
b. The meaning of supranationalism	134
c. Supranationalism as a form of federalism	136
II. The European Union as process towards an ‘ever closer union’	141
1. THE DYNAMIC NATURE OF THE EU CONSTITUTION	141
2. THE <i>ACQUIS</i> AS A CONSTITUTIONAL HARD CORE	144
a. The meaning of the phrase <i>acquis communautaire</i>	144
b. The <i>acquis</i> as a ‘supra-constitutional’ constraint	147
3. ON THE ROLE OF OBJECTIVES	149
a. Why objectives?	149
b. Functional limits to competence: the establishment and functioning of the internal market as an example	152
c. Objectives as standard-setters for EU action	156
III. Citizenship as supranational <i>demos</i>	159
1. THE <i>DEMOS</i> CHALLENGE: A PROBLEM OF CHICKEN AND EGGS	159
a. <i>Demos</i> , citizenship and identity: some conceptual clarifications	159
b. The national approach to citizenship: first a <i>demos</i> , then a constitution	161
c. First a constitution, then a <i>demos</i> ?	165
2. CONCEPTUALISING EUROPEAN CITIZENSHIP	166
a. What does the EU constitution say about citizenship?	166
b. European citizenship as constructive, transformative and multiple identity	168
3. EU CITIZENSHIP AND NATIONAL BOUNDARIES	171
4. PERSONAL MOBILITY AND THE ETHOS OF MUTUAL RECOGNITION	177

a. Personal mobility as a factor of citizenship	177
b. An analysis of the <i>Martinez Sala</i> line of cases	180
(i) The right to equal treatment: reserved to money-spending EU migrants?	180
(ii) Should Union citizenship mean a basic entitlement to fundamental rights?	185
5. BY WAY OF CONCLUSION: THE POSITION OF THIRD COUNTRY NATIONALS	187
Part IV. MANAGING UNITY IN DIVERSITY: THE CHALLENGE OF VARIABILITY	
I. Introduction: variability as a challenge to democratic constitutionalism	193
II. Decisional variability: the question of democratic representation	196
1. AN INSTITUTIONAL BALANCE APPROACH TO UNION GOVERNANCE	196
a. What does representation mean in the EU context?	196
b. The concept of governance	199
c. The legal basis requirement as a guarantee for democratic governance	202
d. Institutional balance and <i>trias politica</i>	205
2. FUNCTIONAL REPRESENTATION: GIVING VOICE TO CIVIL SOCIETY?	211
a. Overview of functional representation mechanisms in EU governance	211
b. On the role of civil society: an historical and theoretical account	213
c. Why functional representation in the European Union?	216
d. Problems of representativity	219
(i) The Economic and Social Committee	219
(ii) The social dialogue: lawmaking by social partners	222
3. DOES THE EUROPEAN COMMISSION CONTRIBUTE TO DEMOCRATIC GOVERNANCE?	228
a. The ‘most original and unprecedented of institutions’ in search of legitimacy	228
b. The Commission’s task of ensuring ‘the proper functioning and development of the common market’	230
c. Legitimacy of Commission action revisited: representativity and accountability issues in balance	237
4. DELEGATED RULE-MAKING IN SEARCH OF A CONSTITUTIONAL FRAMEWORK	240
a. Umpiring delegated rule-making: a statement of the problem	240
(i) What is delegated rule-making?	240
(ii) The constitutional deficit of delegated rule-making	243
b. How to tackle the problem of delegation? A comparison of different approaches	247
(i) Delegation as a threat to the legislative prerogative	247
(ii) Delegation as a threat to the Member States’ implementing powers	250

(iii) Delegation as a problem of faction	251
(iv) The way forward: an institutional balance approach	253
c. Hierarchy of norms	254
(i) Hierarchy of norms and democratic legitimacy in pluralist societies	254
(ii) Towards a content- and/or subject-matter hierarchy of EU rules?	256
d. How representative are the settings in which delegated rule-making takes place?	263
e. Procedural guarantees	266
(i) General observations	266
(ii) Openness as an example	268
III. On territorial variability	274
1. ACCOMODATING DIFFERENCE THROUGH THE MANY FORMS OF TERRITORIAL DIFFERENTIATION	274
2. CAN CLOSER CO-OPERATION FURTHER THE OBJECTIVES OF THE UNION?	278
3. THE LEGAL FRAMEWORK OF CLOSER CO-OPERATION: HOW TO SAFEGUARD THE VALUES OF EQUALITY AND INTEGRATION?	284
Part V. EUROPEAN AND MEMBER STATE LAW: AUTONOMOUS SYSTEMS IN A COMMON CONSTITUTIONAL AREA	
I. Towards a pluralist understanding of the relationship between the European and national legal orders	291
1. A SHIFT OF FOCUS: FROM A COMMAND TO A RECOGNITION PERSPECTIVE	291
a. Introduction	291
b. Revisiting the story of constitutionalisation	292
c. The ‘rule of recognition’ as determinant in the interface between the European and national legal orders	296
d. A (moderate) pluralist interpretation of the European constitutional area	299
2. LOYALTY NOT HIERARCHY AS A PARADIGM	304
a. The meaning and scope of Article 10 EC	304
b. Primacy as an instance of loyalty	309
(i) What does primacy mean?	309
(ii) Primacy and direct effect	311
(iii) Primacy and <i>Kompetenz-Kompetenz</i>	314
(iv) Primacy’s penumbra, or how loyalty ensures the effective functioning of EU law in the absence of direct conflicts	315
c. Loyalty, mutual recognition and constitutional conflict	317
3. CONSTITUTIONAL HOMOGENEITY AS A PRECONDITION FOR LOYALTY	319
a. Why homogeneity?	319
b. Constitutional dynamics underlying the EU homogeneity requirement: an analysis of Article 6 TEU	321

II. Fundamental rights protection in a moderate pluralist setting	326
1. FUNDAMENTAL RIGHTS PROTECTION IN THE EUROPEAN UNION AS A CHALLENGE TO CONSTITUTIONAL THEORY	326
a. Fundamental rights protection and the autonomy of the EU legal order	326
b. Divergent fundamental rights standards: the case for a pluralist understanding	329
2. STANDARD-SETTING FOR FUNDAMENTAL RIGHTS COMPLIANCE BY THE EUROPEAN UNION	335
a. The equivalent protection requirement and the Court of Justice's response	335
b. Institutionalising the equivalent protection condition in EU law	340
3. FUNDAMENTAL RIGHTS CONTROL BY THE EUROPEAN UNION OVER MEMBER STATE ACTION	347
a. Reversing the roles: the EU as standard-setter in the fundamental rights field	347
b. EU control on national democracy and fundamental rights records	349
c. Fundamental rights control of Member State action by the Court of Justice	354
4. BY WAY OF CONCLUSION: THE FUNCTION OF LOYALTY IN THE EU LEGAL AREA	358
General conclusion	361
References	367
Table of Cases	395
Subject Index	401