Chapter 1

‘Constitution’, and its Association with the Modern State

The fundamental law which determines the manner in which the public authority is to be exercised is what forms the constitution of the state. In it can be seen the organization by means of which the Nation acts as a political body; how and by whom the people are to be governed, and what are the rights and duties of those who govern.30

Emer de Vattel

At the beginning of the twenty-first century, ‘the triumph of constitutionalism appears almost complete. Just about every state in the world has a written constitution’.31 Or, in the words of Neil Walker, ‘[t]he currency of constitutionalism may never have been more in demand than today’.32 But what is or makes a ‘constitution’? As is true for many other fundamental notions of law, the term, even if limited to public communities, is used in many different ways. Definitions vary from period to period, place to place, and author to author. Today, positivist ideas compete with those of legal realism, critical legal studies, and fragments of continental pre-World War II teachings. It seems that continental scholars have been more interested in the abstract question of how to define a constitution than British or American authors. (Similarly, Europeans have been more disposed to

30 Emer de Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains (1758), at 31 (= Livre I, chapitre III, § 27); photographic reproduction in ‘The Classics of International Law’ (James Brown Scott ed. and Charles G. Fenwick transl., 1916). In the original, Vattel wrote: ‘Le règlement fondamental qui détermine la manière dont l’Autorité Publique doit être exercée est ce qui forme la Constitution de l’Etat. En elle se voit la forme sous laquelle la Nation agit en qualité de Corps Politique; comment & par qui le Peuple doit être gouverné, quels sont les droits & les devoirs de ceux qui gouvernent.’
identify the nature of ‘the state’.) Great Britain does not have a written (or ‘documentary’) constitution, and the citizens of the United States live for more than two hundred years under an instrument the constitutional quality of which they have no reason to question. Europeans, on the other hand, have experienced many constitutional breaks and instances of constitution-making since the end of the eighteenth century. The pragmatism of common law lawyers, who are less inclined to fall under the spell of abstract notions, may also account for the relative absence of a pertinent Anglo-American debate. The question of how a constitution works is deemed more important than that of what a constitution is.

In the following, I will not try comprehensively to describe and compare the different historical and contemporary concepts of a constitution. First, I will leave aside two older non-normative notions of constitution. Second, I will limit myself to an outline of those schools of thought which have a bearing on the subject of this book (the possible existence of an international constitution), and an exposition of what can be learned from constitutions actually being in force. The cardinal question of whether the notions of (modern) state and constitution are tied together in a way that only a state can have a constitution is dealt with at a later stage.

Constitutional Theory in Europe between the two World Wars

In Germany and Austria, the years between the two World Wars saw a few scholars whose differing approaches continue to influence constitutional thought in Europe and beyond—Hans Kelsen, Rudolf Smend, Hermann Heller, and Carl Schmitt. Their teachings reveal the variety of ideas, notions and historical

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34 I.e., (1) constitution as a description of how a community is actually constituted or, in Carl Schmitt’s language, as a community’s actual general condition of political unity and social order, and (2) constitution as the mode in which a state is organized, especially as to the location of the ultimate or sovereign power, i.e., constitution as a form of government (monarchy, aristocracy, republic, etc.). Here, as in the case of the first meaning, constitution is a status or continuum, something which exists and not something which ought to exist because of a legal directive. Cf. Carl Schmitt, Verfassungslehre 4–5 (1928). In addition, the term (in its English and French form, as well as the German Verfassung) describes (3) the action of constituting something. See Constance Grewe & Hélène Ruiz Fabri, Droits constitutionnels européens 33 (1995) and, generally, ‘constitution’, in 3 The Oxford English Dictionary (2d ed.) 789–90 (1989).

35 See infra ch. 3, The Traditional Dichotomy between ‘The International’ and ‘The Constitutional’.