

Sensorveiledning

Exam spring 2021 International Constitutional Law and Democracy JUR 1560/JUS 5560

International Constitutional Law and Democracy JUR 1560

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2. How is constitutionalism defined in the articles by Dieter Grimm and Martin Loughlin in the curriculum.

International Constitutional Law and Democracy JUS 5560

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Question 1 1560/5560

1. To what extent can the EU be said to have constitutional qualities? Analyze and discuss the different EU institutions. Use the different views in the literature.

The *constitutional qualities of the EU* are analysed and discussed in several of the texts of the curriculum: J. Weiler, "The Constitution of Europe", ch.6, 8-10; Paul Craig, "The Evolution of EU law", ch.2, 3, and in "The Lisbon Treaty", ch.1; Bruno de Witte, "The Evolution of EU law", ch.12. In addition *the concept of constitutionalism* is analysed and discussed in Dieter Grimm, "The Achievement of Constitutionalism", and Martin Loughlin, "What is Constitutionalism", both in "The Twilight of Constitutionalism", and in Dunoff and Trachtmann, "A Functional Approach to International Constitutionalism", in "Ruling the World". Both themes have been comprehensively covered in the lectures and with slides.

The master students, 5560 exams, have additionally an article by Hauke Brunkhorst in the curriculum, "Constitutionalism and Democracy in World Society".

The concept of constitutionalism is first presented in its original nation-state constitutional context. Here constitutions are the legal framework for nation states and their sovereignty. National constitutions are normally *lex superior*, but in different ways. Constitutions include the principle of sovereignty, the definitions of and competences of the constitutional authorities, statutes on elections, basic principles of constitutions, statutes on citizenship and the most fundamental human rights. Constitutional authorities generally have comprehensive powers, not enumerated, and superiority in relation to other authorities. National constitutions are seen as original. They are created by the 'constituting powers', and they authorize the 'constituted powers'. The constituted powers have specific and different mandates, but relate to each other vertically. Democracy, rule-of-law, independent courts and human rights are in

Western and liberal legal systems seen as the most basic principles and values of constitutions and as securing legitimacy for the constituted authorities.

In Grimms article there is an emphasis on the one hand on ‘the achievements of constitutions’ and on the other hand on the emerging ‘erosion of nation states and their constitutional powers. Loughlin’s article generally defends the idea of constitutionalism as particular for nation state constitutions.

In the course we have discussed the various concepts on constitutions: - *constitutions*, - *constitutionality (quality)*, - *constitutionalism (quality)*, - *constitutionalisation (process)*. Some students may include discussions on the difference of these concepts.

J.H.H.Weiler was one of the first lawyers who started writing on the treaties of the EC or EU as “The Constitution of Europe”. The chapters in his book include a summary of his arguments. The main argument has been the comprehensive powers of the EC/EU treaties and the statutes on *the supranational character* of the treaties in relation to the member states’ constitutional and statutory powers. The EU treaties are seen as supranational. The member states of the EU have *transferred parts of their constitutional powers* to the EC/EU, legislative, executive and judicial. Some of the EC/EU decisions based on these powers have *direct effect and superiority* in relation to member states’ domestic law. Regulations have direct effect. Directives did not have that originally, but have later been interpreted to include obligations for member states to implement and secure relevant rights for their citizens.

The EU institutions have *not fully comprehensive powers, they are enumerated*, but relatively comprehensive. The powers include *legislative, executive and judicial competences* which also are *vertically related* to each other. The students can in answering this question go more detailed into description and analysis of the constitutional qualities of the various EU institutions.

The European Council has constitutional qualities, even if it does not have the formal constitution-changing competences. *The Council of Ministers* is vital in its legislative authority, but it cannot be held collectively accountable. Each minister is accountable to her domestic government and Parliament. *The European Parliament* is *directly elected* by the peoples of the member states, and its representatives are thus held directly accountable at elections. The Parliament contributes to the democratic legitimacy of the EU, and the constitutionality, even if participation at elections have been low. The power of *the CJEU* can be seen as contributing to rule-of-law, but as being democratically problematic in its use of dynamic interpretation. The Court does however contribute to *full judicial review* within the EU treaty system. The Court can hold the other institutions, and the member states, accountable to the treaties. There is thus a relatively well developed *vertically integrated* constitutional infrastructure in the EU institutions.

Their supranational qualities are vital, but the EU does not have constitutional competence-competence of its own. Changes to the EU treaties are proposed and discussed by the European Council with heads-of-state meeting, but *the Council cannot make the decisions to change the treaties*, only recommend. It is still up to the member states to make decisions on whether to accept treaty change proposals or not. The EU treaties are thus also not seen as having ‘*originality*’ in the same sense as the member states’ own constitutions.

The EU has citizenship for all citizens of the member states. It is a different citizenship than the domestic ones, but it is still vital in its difference to other international organisations lacking it. The original Rome treaty preamble including phrases on ‘not only for the states, but also the peoples of Europe’ has also been referred to as vital formal signs of the EC/EU treaties being different than traditional international organisations in including the peoples, and thus the citizens, as bearing rights directly under an international treaty.

The relevance of values and of legitimacy may also be included in an analysis of the constitutionality of the EU institutions.

The EU institutions can be analysed and assessed in terms of *institutional qualities, constitutionality and legitimacy*. Several different assessments of the EU institutions in terms of constitutionality and legitimacy can be accepted as long as the descriptions are correct and reasonable.

These are some of the main arguments concerning whether the EU institutions have constitutional qualities. The word limits in the exam will mean that the students will have to make some choices concerning what they will include under this question. They should say something on the definitions of constitutions and constitutionalism, and the problems of applying them on an international organization, but the main part of the text should be on an analysis of the EU institutions and their constitutional qualities. The most important is that they show an understanding of constitutionalism and the institutions, not on whether all arguments mentioned above or in other texts are included, and that they use argumentation pro et contra actively. Different priorities might be accepted on what institutions and arguments are included, but the choices made, may show the degree of understanding.

In the course we have not always used much time on mentioning the treaty articles, but if the students include this, that should be highly positively valued. They should absolutely include references to the texts of the curriculum, particularly when they make assessments of the institutions, and when meanings are expressed. This has been emphasized in class.

This question is the same for 1560 and 5560 students. The latter should show a better understanding of the analysis of constitutionalism in general and when applied to EU institutions. More simple analysis will be accepted for the 1560 students, they also have fewer words to use. In general one should ask for more developed and mature analysis from the 5560 students than from the 1560.

Question 2 / 1560

2. How is constitutionalism defined in the articles by Dieter Grimm and Martin Loughlin in the curriculum.

This is already commented on above, p.1-2, the four first sections.

Constitutionalism is in these articles seen as crucial part of the Western and liberal legal systems. Constitutions are legal frameworks on a lex superior level and include the most important values and principles, fundamental rights and the competences of the constitutional authorities. Through the combination of these elements the two authors write about ‘the achievements of constitutionalism’ in stabilizing an ‘ambitious form of legalisation’ (p.9 in

DG) and legal domestic systems in general. Constitutionalism is described as including:- legal norms emanating from political decisions, - law as regulating public power, - constitutions as comprehensive, - the people as the only legitimate source of power, - superiority (p.9 DG). Constitutionalism implies that there is only one set of constitutional powers on a specific territory, not competing powers. Grimm then talks about the two forms of erosion of public power: - partly the changing relations between public and private actors and competences, - and partly the expansion of international treaties overlapping and competing with domestic law (p.13). The effects on constitutionalism by these trends are described on p.16. On p.16-22 the different consequences for constitutionalism are further analysed and assessed. International law plays a more important part in legal systems also domestically. It is however unclear whether international organisations can be said to be constitutionalized. Democratic participation as a fundament for legitimate law is challenged.

Loughlin describes constitutions as a formal contract between the people and the state. He sees social contract theories as vital explanations for the legitimacy of constitutions (p.47-48). Constitutionalism is connected to theories on rights and on limited government (p.49, 55). He emphasizes the distinction between the constituting (the people) and the constituted powers (the government), and juridification as a vital quality of legitimate states. Loughlin discusses republican (or political) constitutionalism vs liberal constitutionalism (more emphasis on the role of courts). Constitutionalisation is described as the process of including an increasing range of public life under constitutionalism (p.61). Constitutionalisation of treaty-based bodies is a vital topic. There is a theoretical trend on multi-level constitutionalism. Loughlin argues however that international constitutionalism still has gaps and uncertainties. He accepts that there is a trajectory of change in constitutionalism, but also that inter- and transnational development is different from the liberal-legal constitutionalism of nation states.

Both articles are written by main constitutional professors in the UK and Germany. They show sophisticated and concentrated analysis. 1560 students cannot be expected to understand all themes dealt with in the articles, but hopefully they are able to understand some of the main themes and analysis.

Question 2 / 5560

2. What is meant by the terms fragmentation and pluralism in Koskenniemi's article "The Fate of Public International Law". Give examples of the fragmentation of international law.

Fragmentation is described as a general trend in international law. International law has expanded to many different areas of law and of society, but without an overarching constitution and court, or common set of authorities or values. Different treaties cover different areas with different purposes. Different international organisations and treaties have different courts or conflict resolution bodies. The result may be and has to some extent been that different courts develop conflicting directions of law and interpretations of common concepts. Koskenniemi further describes a tendency of *deformalisation* partly as a result of the increasing specialisation in international legal instruments and close connections between law and scientific, economic and other societal regimes. Koskenniemi then discusses two possible strategies on how to deal with the fragmentation of law: constitutionalism and legal

pluralism. *Constitutionalism* may be developed generally in international law and within specific international regimes in order to cope with the expansion of law. *Legal pluralism* is the opposite strategy in embracing the expansion and differentiation of law rather than working towards integration in law. Legal pluralism is partly descriptive of what is occurring, but can also be a positive assessment of the trend. International law has for a long time included a variety of inter- and transnational regimes. *Lex mercatoria* is one example. Legal pluralism is also connected to diagnoses of a societal differentiation where scientific, economic and other societal regimes also include formal and informal norms. Many examples of *the fragmentation of law* can be referred to by the students. Some are mentioned in this and in other articles in the curriculum, but the students must also be free to come up with examples of their own as long as they are appropriate examples.

A good answer to this question must include both theoretical analysis of the concepts and illustrating examples.

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Both questions must be answered and with an equal or close to equal emphasis on the two.

Different compositions of the answers must be accepted. There are not ideal versions of the answers. The curriculum includes a variety of approaches, perspectives and theories. With the word limitations no student can cover everything. A good understanding should be valued above numerous details. References to the curriculum literature is important particularly when they refer to assessments and values.

This is a home exam. The students have the literature available. Independent assessments and summaries should be valued, also examples beyond the literature, and assessments of the examples. All lectures have been digital. Several of the lectures have been combinations of one hour of slide-based lecture and one hour of zoom-based questions and answers. So the students have been given ample opportunities to pose questions and give comments. For all exams this term the Faculty wants to emphasise the difficult learning situation for the students all term. Parts of the term they have been allowed to use the reading halls, and for parts of February/March they were not allowed at campus at all. Many students of this course are international students far from home. The difficult situation due to the pandemic should be taken into consideration in the assessment of the exams.

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21.05.2021

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