

Sensorveiledning – Evaluation Guide

JUS5560 International Constitutional Law and Democracy

Spring 2023

1. Analyze and discuss the democratic and other qualities of the EU institutions – specifically and one by one, and in how they relate to each other: - the European Council, - the Council of Ministers, - the Commission, - the European Parliament, and the Court of Justice of the EU.

Use the different models and ideas on democracy and sovereignty which are referred to in the articles by Habermas, Grimm, Loughlin or others, in the curriculum.

2. Analyse the organisation and the mandate of the UN Security Council, based on the UN Charter art.23-32, and discuss its abilities to make decisions in current conflict situations. You may use terms such as effectiveness, representativeness, democratic and legitimate, or others, in the analysis.

Use the text from the General Assembly Resolution A/RES/76/262 of April 26 2022, ‘Standing Mandate for a General Assembly debate when a veto is cast in the Security Council’ concerning the situation in the Ukraine, when responding to the question.

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Both questions must be answered. Question 1 counts for ½ and question 2 for ½ the grade.

To the censors: This is a 24 hour home exam, from the start when the exam questions are available until the site is closed, but the exercise is given as a 4 hour exam. The students should be able to answer the questions in 4 hours, and that is how it should be corrected. The students have all texts etc available.

Students have a maximum word count of 3000. Footnotes should be included in the word count of the main text. Not included in this count: front page (with name and title etc.), summary, table of contents and references (bibliography). (If relevant for the paper). Assignments/papers with text exceeding the word limit will not be accepted.

The assessment should be based on an overall impression on the solidity of description, assessments, discussions and references, and an emphasis on the understanding of the basic concepts, norms and questions.

Question 1

1. Analyze and discuss the democratic and other qualities of the EU institutions – specifically and one by one, and in how they relate to each other: - the European Council, - the Council of Ministers, - the Commission, - the European Parliament, and the Court of Justice of the EU.

Use the different models and ideas on democracy and sovereignty which are referred to in the articles by Habermas, Grimm, Loughlin or others, in the curriculum.

Relevant texts in the curriculum on the EU institutions:

- Joseph Weiler; *The Constitution of Europe*, Cambridge University Press, 1999, ch. 6, 8, p.221-234, 264-285;
- Joseph Weiler, “Prologue: global and pluralist constitutionalism – some doubts”, in *The Worlds of European Constitutionalism*, eds. Grainna de Burca and Joseph Weiler, Cambridge University Press, 2012;

- Paul Craig, “Integration, Democracy and Legitimacy”, ch.2, and “Institutions, Power and Institutional Balance”, ch.3 in *The Evolution of EU Law*, eds. Paul Craig and Grainne de Burca, Oxford University Press, 2011,
- Bruno de Witte, “Direct Effect, Primacy and the Nature of the Legal Order”, ch.12 in *The Evolution of EU Law*, eds. Paul Craig and Grainne de Burca, Oxford University Press, 2011

Relevant texts on democratic theory in the curriculum:

- Jürgen Habermas, “Three Normative Models of Democracy”, in *Constellations*, no.1, vol.1, 1994, and Habermas, "Postscript" in *Between Facts and Norms*, p.447-451.
- Dieter Grimm, “The Achievement of Constitutionalism and its Prospects in a Changed World”,
- Martin Loughlin, “What is Constitutionalism”, both in *The Twilight of Constitutionalism?* eds. Petra Dobner and Martin Loughlin, Oxford University Press, 2010; in Weiler, 1999.

There are no articles in the curriculum which combine the democratic theories with the organisations so students will have to combine their knowledge of the organisations and the theories. As such, answers are likely to vary, but must show an understanding of the various qualities of democracy and how those qualities are reflected in the five EU institutions. The question is formulated so that the students must combine descriptive and reflective discussions of the institutions applying treaty texts, the different texts in the curriculum and their own reflections on the formal and descriptive qualities of the institutions and the more evaluative qualities which are mentioned in the question. As master students, more emphasis should be put on references to the curriculum articles on democratic theory.

As the discussion of how to apply these theories to existing international organisations can be difficult since they do not represent traditional democratic models, students can take the organisations and their qualities as the starting point. Students should discuss the competencies of the five EU institutions and the relations between them, as well as their impact on the supra- or international relations between the EU institutions and the member states. The discussion should be based on the EU treaty texts, but relevant curriculum texts and examples from constitutional, legal or political practice of the EU can also be referred to. As both use of curriculum texts and students’ own statements may have elements of subjective assessments and conclusions, references to treaties and curriculum texts will be vital parts of the students’ texts in order to document the different parts of their description, discussion and reflections. Students’ own reflections on the democratic and other qualities of the EU institutions are welcome, but the solidity of the argumentative style and the references will be important in the evaluation of more independent comments.

The question specifically asks students to analyze the democratic qualities of the institutions. Other qualities that the students may also discuss, which have been brought up in the lectures, include effectiveness, co-decision-making, coordination, subsidiarity, among others. The question tells students to use different models and ideas on democracy and sovereignty, including by Habermas, Grimm, Loughlin or others in the curriculum. Students should be rewarded if they are able to use the curriculum texts on theory and connect the assessments of the institutions to these theories, but the students may also use other references to democratic theory, democratic qualities and sovereignty.

Habermas: Theories on Democracy – central in the lectures,

- Liberal democracy: – individual liberal inalienable rights, - votes count,
- Communitarian democracy: – cooperation is necessary in order to create a functioning society,
- Deliberative democracy: – procedures and qualitative discussions in order to include and assess all relevant knowledge, interests, arguments etc, - before making the final decision,

Grimm and Loughlin describe traditional theories based on the state and sovereign constitutional models, but also go on to discuss inter- and supranational forms of constitutionalism and the erosion of state constitutions.

Grimm:

- the erosion of state constitutions:
 - erosion between internal and external powers, (UN, EU, ECtHR, WTO etc)
 - internal erosion between public and private spheres/actors,
 - markets, negotiations, privatisation, consultants etc, -
 - other forms of social and economic power,
- the state is no longer the exclusive source of power within its territory», but democratic states are main source of legitimacy
 - blurring boundaries between forms of power,
 - problem solving must increasingly be handled internationally,
 - the problem is how to do this legitimately,

The EU institutions have different competences and students should discuss how they interact, depend on, overlap and supplement each other, in terms of democratic and sovereignty ideas.

- European Council: the meeting of heads of member states, which can discuss vital political questions and proposals for treaty changes. Any treaty changes discussed will still be subject to domestic constitutional regulations for adoption of new treaties. There is no majority vote on this in the Council. All member states can veto new treaty changes.
- Council of Ministers: decides on new legislation and several political questions. In formal legislation, there is a co-decision procedure with the European Parliament. Each proposal must have qualified majority in both institutions to pass. The members of Council of Ministers are ministers from each member state government, and can be instructed by their government. They are both member state representatives and part of an EU institution. The qualified majority requirement is a compromise between unanimity and simple majority and thus respecting democratic principles for both member states and the EU. Unanimity may respect member state democracies more than qualified majority, but was very inefficient for the EU as a governing and regulatory body.
- The European Parliament has a weighted number of parliamentarians from each member state depending on the population of each state. They are elected from political parties in each member state, but elections are held simultaneously. The parliamentarians only have an EU function based on the EU treaties, but they are free to take up various national interests when EU matters are decided. Their mandate is however the EU treaties and their purposes and institutional and regulatory system. The Parliament has a qualified majority procedure and also decides on EU budgets. EU parliamentarians do not have a member state mandate and cannot be instructed by the government or parliament of their home states.
- The Commission consists of one commissioner from each member state. They are proposed by their home states, but the Commission must be accepted by the EU Parliament. There are hearings after each Parliamentary election of each Commissioner who are proposed for the new Commission. The Commissioners do only have a mandate as EU Commissioners and as part of the Commission. They do not have any mandate from their home state governments. The Commission proposes new legislation. They are accountable to the EU Parliament.
- Court of Justice of the EU plays an important role in the enforcement and judicial control of EU law. The Court ensures EU law is interpreted and applied the same in every EU country, ensuring member states and the EU institutions abide by EU law. The Court is divided into two

2 courts: the Court of Justice which deals with requests from national courts, actions for failure to fulfil obligations or actions of annulment of EU measures adopted by EU institutions and is made up of 1 judge from each EU country, and the General Court which primarily deals with competition law, state aid, agriculture etc and is made up of 2 judges from each EU country.

Students may also comment on how such institutions may contribute to democracy on an international level, for example, the role of the institutions in solving cross-boundary problems, how institutional organisations contribute to democracy in ways that an individual state cannot and how they may contribute to the qualities of the governance of democratic states.

Question 2

2. Analyse the organisation and the mandate of the UN Security Council, based on the UN Charter art.23-32, and discuss its abilities to make decisions in current conflict situations. You may use terms such as effectiveness, representativeness, democratic and legitimate, or others, in the analysis.

Use the text from the General Assembly Resolution A/RES/76/262 of April 26 2022, ‘Standing Mandate for a General Assembly debate when a veto is cast in the Security Council’ concerning the situation in the Ukraine, when responding to the question.

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Relevant texts in the curriculum on the UN:

- Doyle, “The UN Charter – A Global Constitution?” in *Ruling the world?: constitutionalism, international law and global governance* (Trachtman, Joel P.; Dunoff, Jeffrey L. eds.)
- Fassbender, “Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order” in *Ruling the world? Constitutionalism, international law and global governance*

To answer this question, students should begin with a discussion of the organisation and mandate of the UN Security Council, based on the treaty texts.

- Composition (Article 23): 15 members, 5 permanent members
- Functions and powers (Article 24 – 26): primary responsibility for the maintenance of international peace and security, acts on behalf of all members. Specific powers given in relation to settlement of disputes and actions in relation to threats to the peace
- Voting (Article 27): decision by 9 out of 15, veto by permanent members (some members to abstain in certain situations)
- Procedure (Articles 28-32): functions continuously, develops its own rules of procedure, non-members of the Security Council may participate in discussion

The question refers students to terms that could be used to analyse the Security Council, including effectiveness, representativeness, democracy and legitimacy.

- Representativeness and democracy: the Security Council is made up of 15 members, 5 permanent members and 10 non-permanent members, making the Security Council one of the least democratically- composed bodies of the UN. However, the non-permanent members should be equitably geographically divided. UN members who are not on the Security Council but are involved in a dispute under consideration by the Security Council may participate (without vote) in the discussion. Decisions are made by 9 out of 15 members, although the permanent members have veto powers.

- Effectiveness: the Security Council functions continuously and can make binding resolutions. The majority vote may also assist the effectiveness of the Security Council.
- Legitimacy: the representativeness as well as the veto of the permanent members are issues for the legitimacy of the Security Council. On the other hand, the effectiveness of the Security Council in situations of conflict is important for the legitimacy of the UN.

The question also asks students to discuss the Security Council's abilities to make decisions in current conflict situations. The question specifically asks students to address the text of the General Assembly Resolution of 26 April 2022, which makes discussion of the permanent members and use of the veto in the Security Council one of the central aspects in answering this question. This resolution refers to the mandate of the General Assembly in relation to the maintenance of international peace and security and sets out a procedure for the General Assembly to be automatically convened after the casting of a veto in the Security Council. The resolution was introduced in order to the membership of the UN as a whole a voice when the Security Council is unable to act, although the resolution cannot give the General Assembly any formal powers in this regard. Students are specifically referred to the situation in Ukraine, which requires a discussion of one of the parties to the conflict as a permanent member of the Security Council. Students may also draw on other examples on the use of veto by one of the permanent members to support their analysis, or other conflicts in which a permanent members was not involved as a comparison. When referring to different conflicts, students should be aware of how the involvement of permanent members in conflicts affects the Security Council's abilities.