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## **Evaluation guide for JUR 1560 and JUS 5560 exam – spring 2020**

### **General regulations on the exams spring 2020 – home exams**

The exams this year are different from previous years by being ‘stay at home exams’ and with pass/fail as the only evaluation grades. The information given to the students on the exam is here:

<https://www.jus.uio.no/english/studies/student-news/exam-decisions-25march.html>;

The exam time will be the same as previously. The students have also previously been allowed to bring books and other material to the exam room, but with the home exam the students will obviously have more help from other sources. Assistance from other persons is strictly forbidden. Submitted exam papers will be processed by UiO’s plagiarism tool. Direct quotations from the curriculum books should be detected by this tool. I have informed the students that they can make short quotations, but with clear references.

Parts of the UiO decision on spring 2020 exams:

1. During the exam, communication with other persons regarding the assignment; distribution of the exam papers in any form; and distribution of answers or draft answers in any form, is prohibited. Such communication will be regarded as cheating.
2. Submitted papers will be processed in UiO’s plagiarism tool.

The students were given ordinary lectures until March 13. The last three lectures were given digitally with online lectures using slides with oral lecturing. The additional workshops could not be given this term due to the corona situation. They were given a mock exam which was corrected and followed by an online supervising lecture with slides. Some of the podcasts available are on the web course site. Other course resources with slides etc are on the Canvas course site. I answered some questions by mail from the students. This means that the students did not have direct access to the teachers after March 13, and that small group teaching was offered. I announced one q&a session in the week before the exam, but which was used only by a couple of students. Obviously, however, this has been a particular and stressful term for all students, and international students especially have had more difficult conditions than previously. This should in general be taken into account.

This is from the Faculty guideline on spring 2020 exams and the particular situation:

5. The changed teaching- and exam-conditions shall be taken into consideration when the spring semester exams are drafted. The closing of the Faculty’s premises and how this affects the teaching shall be described in the sensor-guidelines. Sensors will be required to take the difficult situation this semester into consideration.

## Grade assessment spring 2020 – from letters to pass/fail

All exams at the Faculty of law spring 2020 will be assessed by the pass/fail distinction and not by the letters A – F. Previous to 2020 there have been general statutory regulations on how pass/fail should be applied when used for exam assessment, and we have to abide with these regulations even if they often were applied at particular types of exams such as longer essays etc. The application of pass/fail is addressed in spring 2020 exam regulations in this way:

4. For all exams where the grading scale has been decided changed from letter grades to “pass/failed”, the following scale shall be used: “In order to acquire the result “Pass”, the candidate must fulfill the requirements of learning outcome as stated in the course description, and demonstrate satisfying knowledge, skills and methodological competence.”

For course content, learning outcome, curriculum and syllabus:

<https://www.uio.no/studier/emner/jus/jus/JUR1560/index.html>;

<https://www.uio.no/studier/emner/jus/jus/JUS5560/index.html>;

<https://www.uio.no/studier/emner/jus/jus/JUS5560/v20/pensumliste/index.html>; (also for 1560)

If the censors find the pass/fail distinction difficult to apply, please contact the course responsible teacher.

## General guidelines for assessing exams of JUR 1560 and JUS 5560

The home exam situation means that the students have access to curriculum articles and other material. The emphasis in the evaluation must then be on whether the students show a good *understanding* of the curriculum and the questions, and an ability to express the answers in their own words and with a degree of *independence*. The latter will obviously be more important for the 5560-students. For 1560-students it is difficult to expect more than *descriptive* answers, but with the ability to combine knowledge from the different texts. Both 5560 and 1560 students must show an ability to *combine* knowledge of and references to the organisations in question with the descriptions, assessments and analysis in the curriculum articles.

This is a relatively the theoretical elective course with more analytical articles than the students are used to in most other courses. The focus is on an analysis of changes in international law, in treaties as well as organisations and courts, on the introduction of new concepts to frame these changes and an understanding of the processes of change. To compensate for the challenging curriculum and the complexity of the questions which are analyzed, the exam exercises have always dealt with *central questions and concepts* in the curriculum and not with details.

The exam question for 1560 and 5560 are partly overlapping. Where the curriculum and questions are much the same a higher and more precise level of understanding, and more sophistication in the argumentation is expected of JUS 5560-students.

The questions are central to the curriculum and to what has been taught. This is the third time we have an open book exam in this course, and the first time we have a home exam. This has to be taken into consideration. They have the literature available and should be able to refer to more theories explicitly and with references.

Citations must be marked as such and with references. Direct plagiarism is controlled digitally by the administration.

## **JUR 1560 International Constitutional Law and Democracy.**

1. *How can the EU, the UN and the WTO be said to have democratic qualities? What are their main democratic deficits?*
2. *What can be said to be the constitutional qualities of the UN?*

### **Question 1.**

The three organisations are presented in the articles by Doyle, Fassbender, Dunoff, Howse, Craig and Weiler (book on EU). There have been lectures on all three organisations. Democratic theory is presented primarily in the articles by Habermas and Held (book). There are no articles in the curriculum which systematically combine the theories by Habermas and Held with the organisations.

Question 1 asks of the students to combine the knowledge of the organisations and the theories. It varies to what extent the democratic qualities of the organisations are explicitly discussed in the substantive articles, but the theme is discussed during lectures.

Variations in answers will be expected and accepted. The focus must be on an understanding of the various qualities of democracy. To pass the students must somehow be able to combine knowledge of organisations and democratic qualities and not only present them separately.

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,
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David Held- is not so much referred to in the lectures, but is in the curriculum:

- Republican democracy, active citizens, (active participation)
- Liberal representative democracy, (rights-based, counting the votes,)
- The one-party model is not referred in the lectures,
- The complexity of governance with globalization of economic, social, scientific and other spheres is dealt in connection with other themes.

The discussion of how to apply these theories to existing international organizations is often difficult because the organizations are so far apart from traditional democratic models. It is

acceptable that they take the organisations and their qualities as the starting point and discuss how they can be related to democratic ideals and theories. The EU Parliament is the most democratically representative of the relevant international bodies. In the Council of Ministers government members are the representatives of the peoples. Accountability mechanisms in relation to the Commission and the Council are complex, but the Commission can be held accountable by the Parliament. In the UN the representatives of the General Assembly are the states. The Security Council is the most important politically decision-making body, but has a very selective representation, with the permanent members going back to 1945. The WTO is run according to its treaties and agreements. State members must change the treaties. There is no democratic body. The Dispute Settlement Bodies have a judicial function and contributes to a more judicial accountability than the previous conflict resolution systems.

There can be great variations as to what the students write on the examples. The most important thing to assess is what the answers reveal on understanding of how the organizations function. The students should also comment on how international organisations and their cooperation may contribute to the coordination and the solving of cross-boundary factual problems and thus add to the qualities of the governance of democratic states. International organisations may have democratic deficits, but they can also contribute in ways which each state alone cannot.

## Question 2:

What a constitution and constitutionalism is, are comprehensively addressed in the articles by Dieter Grimm and Martin Loughlin (both in *The Twilight of Constitutionalism*), and by JHH Weiler, particularly on the EU (ch.6, 8 in the *Constitution of Europe*).

Some of the vital qualities are: - a set of legal norms with the purpose to regulate public and state powers, - lex superior status, - a comprehensive law including all state constitutional powers (legislative, executive, judicial), - originality, - popular legitimacy.

The UN is presented as an organization in the articles by Doyle and Fassbender in the book *Ruling the World* (2009). The UN is more like an international organisation, than a constitutional organisation. It does however have elements of constitutional qualities and both the General Assembly and the Security Council can be assessed according the criteria of constitutionality. The students answer skeptically concerning the constitutionality of the UN, but they must try to compare its institutions to the criteria.

Grimm on constitutions and constitutionality:

- - «constitutions» could not emanate from the ruler, but had to **find its source in «the people»**, - more than «the social contract», - «popular sovereignty» as main principle,
- - a set of legal norms,
- - to establish **legitimate rule**: - *by the people*, - *and by law*,
- - **catalogues of rights**, not only state powers,
- - **the constituting powers**, and **the constituted powers**,
- - the constituted powers and their competences,
- - the purpose to regulate public powers, - comprehensive legal systems,
- - constitutions: monopolies of state/public power, - the higher law,

- - **limitations to state power, by law,**
- - **the border between public and private,** and external/internal,

Loughlin:

- **Nation-state constitutions :** - ‘the people’ of ..... (Loughlin)
- **Social-contract-like theories,**
- **Legally based and legally limited government,**
- **Constituent powers :** - creating the constitution, and the state,
- **The people:** - **fundamental freedom rights for all citizens,** - citizenship,
- **The constituted powers,** - the state powers, - right to vote,
- - sovereignty (comprehensive), - monopoly of state powers,
- Constitutions as **fundamental law.**
- **Values:** - democracy, - freedom rights, - equality, - rule-of-law,
- **Constitutions as the basis of the legitimacy of legality,**

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,
- problemsolving must increasingly be handled internationally,
- the problem is how to do this legitimately,

Grimm and Loughlin describe relatively traditional theories based on the state and sovereign constitutional model. They go on to discuss inter- and supranational forms of constitutionalism and the erosion of state constitutions.

## **JUS 5560 International Constitutional Law and Democracy.**

1. *How can the EU, the UN and the WTO be said to have democratic qualities? What are their main democratic deficits? In addition to discussing the specific organisations you can use the theories and concepts of liberal, republican and deliberative democracy in the analysis.*
2. *What can be said to be the constitutional qualities of the EU?*

### **Question 1.**

The first part of this question is the same as for 1560, cfr comments above.

For 5560-students I have included a specific reference to the concepts applied by Habermas and Held. I have consciously formulated the question in an open way “you can use the concepts and theories...”. These concepts are presented mainly in the Habermas article in Constellations and to some extent in Held’s chapter. An exam exercise should not rely only on the knowledge of one article. I would thus argue that students in order to pass must say something on concepts and theories of democracy, but that they do not have to explicitly use

the concepts and theories in the Habermas article. It is an understanding of the concepts, ideas and institutions of democracy as applied to organisations we are after, including that democratic organisations can be different, and not dogmatic knowledge of specific articles.

## Question 2.

This is not a general question on constitutionalism, but on the constitutional qualities of the EU. A risk with questions on the EU is that the students may have very different previous background knowledge of the EU. Students from EU member states may have an advantage here. Students from other continents may be disadvantaged. This risk can however not mean that we must avoid questions on the EU. It is a vital example of an international organization with constitutional qualities and central in the curriculum. Censors should however be aware of the fact that some students may have insufficient knowledge of the EU. They may still have a good understanding of the questions on constitutionalism. The curriculum and the course description are the framework of what the students must be assessed by.

Vital aspects of constitutional qualities of the EU are thoroughly discussed in the chapters in Weilers book. This book is however from 1999. The curriculum on the EU is to some extent updated with the chapter from Craig's book. Much of the theoretical discussion on the constitutional qualities of the EU has however been the same from the 1990-ies with the Maastricht treaty, but also going back to the very start of the Rome treaty and the early case-law from ECJ.

Constitutions and constitutionality in general are analyzed in the articles by Grimm, Loughlin and Dunoff/Trachtmann.

Weiler analyzes the constitutionality of the European Union with an emphasis on the relations between the inter-, supra- and infra-national aspects of its constitution. Direct effect and supremacy are vital qualities in defining the EU treaties as having constitutional qualities. The reference to not only the states, but also the peoples of Europe in the preamble, and as mentioned in Van Gend en Loos is important to include. Additionally the comprehensiveness of the treaties, the vertical integration of institutions and powers, and the judicial review of the Court also in relation to the treaties are important arguments.

### Arguments in favour of the constitutionality of the EU :

- *Supranationality*: - treaties transferring member state constitutional competences, such as legislative, executive and judicial, to an international organisation,
- *Comprehensive*, but enumerated, legislative competences,
- *Direct effect for citizens* of regulations and directives,
- Treaty not only for the government, *also for the peoples*,
- *Supremacy* of EU law,
- *Vertically integrated legislative, executive and judicial powers* in the EU,
- Comprehensive administration, - de lege and de facto powerful Commission with comprehensive administrative and executive powers,
- Administrative and judicial decisions directly sanctionable in member states,
- *Judicial review* of directives in relation to treaties, by the CJEU,
- **But: not constitutional competence to change the treaties for the EU as an organisation,**