

## Sensorveiledning – Evaluation guidelines

### JUS 5560 International Constitutional Law and Democracy – Exam Spring 2022

1. How do each of the EU institutions (the Parliament, the Commission, the Council of Ministers, the European Council and the CJEU) contribute or not contribute to democratic qualities of the EU? Do they have other qualities such as effectiveness, co-decision-making, coordination, subsidiarity or others?
2. Give one example of a Regime-Collision in Gunther Teubner and Andreas Fischer-Lescano's article. Explain and discuss the example.
3. Discuss what is meant by the concept of 'legal pluralism' in Kaarlo Tuoris article on Transnational Law.

All questions must be answered. Question 1 counts for ½, question 2 and 3 for ¼ each.

*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.

1. How do each of the EU institutions (the Parliament, the Commission, the Council of Ministers, the European Council and the CJEU) contribute or not contribute to democratic qualities of the EU? Do they have other qualities such as effectiveness, co-decision-making, coordination, subsidiarity or others?

EU institutions are covered in several parts of the curriculum (primarily by the articles and chapters by Weiler and Craig, but also referred to in other articles on constitutionalism by Grimm, Loughlin and others) and in the three lectures on EU law, institutions and constitutionalism.

(Relevant texts on 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 can be found primarily in: 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. But also in: - Dieter Grimm, "The Achievement of Constitutionalism and its Prospects in a Changed World", and Martin Loughlin, "What is Constitutionalism", both in *The Twilight of Constitutionalism?* eds. Petra Dobner and Martin Loughlin, Oxford University Press, 2010; in Weiler, 1999, and in other articles.)

To answer the question it is necessary to first say something about the competences of the institutions in the EU treaties, the relations between the institutions, and on the supra- or international relations between the EU institutions and the member states. The reflections and assessments on the qualities of the institutions must be done on the basis of their formal competences and on how they are appointed or elected. The treaty texts are the basis for this, but the curriculum texts must also be used and referred to. Examples from constitutional, legal or political practice can also be referred to. The candidates can refer to statements in the curriculum texts, but also make their own reflections and assessments. 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.

In the texts and the lectures the EU treaties as well as the different institutions with their various competences are covered together and specifically. The different institutions are covered and discussed both in terms of formal competences and qualities such as democratic and efficient, but not necessarily in full for all qualities mentioned in the question. 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.

The EU institutions have different competences. They interact, depend on, overlap and supplement each other. The European Council is the meeting of heads of member states, which can discuss vital political questions and proposals for treaty changes. Treaty changes must be decided in each member state according to their respective constitutional regulations. There is no majority vote on this in the Council. All member states can veto new treaty changes. The Council of Ministers make decisions 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.

Democratic qualities are close to the core competences and relative formal position of the institutions, in relation to the democratic quality of the EU as such and in the participation of the member states, including elections to the European Parliament. The curriculum does not always give comprehensive or final answers to the assessment of the institutions. The students will have to work with the curriculum texts to interpret statements of the qualities of the institutions and should also give their own assessments of the qualities of the institutions mentioned. Democratic and effective are qualities so closely connected to the basic formal competences of the institutions that the students should be able to give basic reflections of their own in addition to using the descriptions and reflections in the texts.

It must be honoured if the students are able to use the curriculum texts on democratic theory and connect the assessments of the institutions to these theories, but the students may also use other references to democratic theory or democratic qualities. For the master students more emphasis should be put on references to the curriculum articles on democratic theory.

2. Give one example of a Regime-Collision in Gunther Teubner and Andreas Fischer-Lescano's article. Explain and discuss the example.

Andreas Fischer-Lescano og Gunther Teubner: *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, in Michigan Journal of International Law, vol.25, 2004, (the pages in the curriculum: p.999-1008, 1017-1032). (online at UiO library)

The article refers to several examples, but the main examples in the article are on p.1019-1023 on transnational copyright, and on p.1024-1032 on patent protection for medicine. There are two more main examples in the article, but not part of the curriculum: p.1034-1039 on Lex Constructionis, and p.1040-1045 on Desparicion. The examples in the text, but outside of the curriculum may also be used in the exam. It is particularly the example on patent on medicines which has been discussed in the lectures.

The examples are complex, and the students do not have very much time for this question. The test is again on the reading and understanding of a text, in itself, but also read in the context of the other curriculum texts and relevant treaties. One cannot expect too much here. The emphasis must be on the understanding of the interaction between different legal systems, and the differences between these systems. This may both create certain problems and enable solving problems in different ways than in one national legal system.

3. Discuss what is meant by the concept of 'legal pluralism' in Kaarlo Tuoris article on Transnational Law.

(The article referred to is a part of the chapter by Kaarlo Tuori, "Transnational law: On legal hybrids and perspectivism", in *Transnational Law: Rethinking European Law and Legal*

*Theory*, eds. Miguel Maduro, Kaarlo Tuori, Suvi Sankari, Cambridge University Press, 2014, p.11-49 (38p) )

This chapter is a key text in the book which it is part of. The theme is transnational law and current methodological theories and changes relevant for transnational law. The terms legal hybrids, perspectivism and legal pluralism are central methodological issues in the chapter. The whole chapter has parts which are relevant for a discussion on 'legal pluralism'. The term is specifically dealt with on p.23-26, but also the following pages are relevant.

Tuori refers to the anthropological origins of the term. It was first applied on the legal situation in states which were colonized for longer or shorter periods. It is now increasingly applied on the current situation with overlapping combinations of domestic law, regional law (such as European law) and inter- and transnational law. It can be used on pluralism of legal sources, legal orders and legal systems. Pluralism of legal sources may also be called polycentricity. Section 5 to 8 in the chapter includes several examples and normative discussions on legal pluralism concerning the relations between the different legal orders or systems referred to above. It may be seen as boundary disputes or as more serious fundamental conflicts of authority. The students should be able to use examples of conflicts of law between particularly EU law and member state domestic law. Legal pluralism may be seen as a *descriptive* term on the existence of different levels or orders of law which are able to co-exist even if there are different traditions or patterns of interpretation. It may also be seen as a more *evaluative or normative* term opening up for different views on whether legal pluralism is a realistic situation which can be dealt with, or if it refers to conflicts which are problematic and should be solved by common courts or other dispute settlement bodies. In section 6 of the article Tuori discusses three version of what he calls 'radical pluralism'. This tendency is represented by the theories of such diverse authors as Hans Kelsen, Niklas Luhmann and Martti Koskenniemi. Tuori clearly opts for a more pragmatic and moderate view on legal pluralism and criticizes the three authors.

Students referring to the discussion of legal pluralism on p.23-26 and the concepts used there should be rewarded for that. Students who manage to see and discuss the role of legal pluralism in relation to other changes in the chapter (perspectivism, legal hybridity, and the global meta-principles mentioned at p.40), should be rewarded for that.

For all three questions:

The assessment must also 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.

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