International Constitutional Law and Democracy

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Outline of the course:
Constructing a new field of law:
   International constitutional law.
Presentation of some main concepts:
• What is the function of international law today?
• Overlapping areas between international and domestic law,
• An increasing trend of international cooperation,
• The expansion of international treaties, organisations, courts,
• Constitutional law, – constitutionalism, - constitutionalization,
• Sovereignty, - autonomy, - originality,
• Democracy, - Legitimacy
• International constitutional law
• International law, - supranational law, - transnational law,
Course content:

The increasing Europeanization and internationalization of law have resulted in increasingly international processes of legislation. This is also occurring on areas which previously have been considered to be primarily of internal interest for the nation states and their legislative institutions. Several and very comprehensive treaties have been made into national legislation or have given supranational organizations the competence to legislate with direct internal effect. Parts of the EC/EU treaties are supranational in character. Several treaties have also established courts or other conflict-resolution mechanisms which have contributed significantly to the increased efficiency of the implementation of international law. The meaning of the concepts of sovereignty and democracy relating to the constitutions of the nation-states are thus distinctly influenced. The same would be true for the status of the democratic legitimacy of law.

Questions are thus raised and discussed about the relations between the nation-states and the various international and European treaties and conflict-resolving mechanisms within a constitutional framework and regarding the demands for a democratic legitimacy of law. It is suggested in international constitutional theory that instead of a dichotomy between national and international law we are now increasingly seeing forms of combination, overlapping and interdependence between several constitutional levels of law.
• JUR 1560 Bachelor level / JUS5560 - Master level

• **Knowledge**
  
  • Acquire advanced knowledge of **the expansion of international law** to an increasing number of areas and to the formation of an increasing number of **international organizations and courts** with competences in legislation and adjudication.

  • Overlapping between domestic and international law.

  • Acquire advanced knowledge of **the differentiation of international law and of the concepts of international, supranational and transnational law**.

  • Acquire advanced knowledge of **the concepts of constitutions and constitutionalization and of the emerging processes of constitutionalization** of some of the most advanced international organizations and their treaty regimes, in casu the EU, the WTO and the UN.

  • Be well acquainted with the concept of and the processes of multi-level governance. (only in JUS 5560)

  • Acquire knowledge of central **theories of democracy and of the legitimacy of law**.
• Skills JUR 1560 – JUS 5560

• Understanding the current processes of change and expansion of international law, and of the relations and the systematic differences between international and domestic law.

• Understanding the function of the concept of constitutionalization in a legal regime.

• Distinguishing between different levels of analysis in legal science, including legal dogmatic analysis, legal policy analysis, democratic theory, legal theory and sociological analysis of international law. (leg theory and soc analysis only in JUS 5560)

• Understanding how the different levels of analysis interact in the understanding of specific legal regimes. (only JUS 5560)

• Assess the methodological quality of relevant scholarly work. (only on JUS 5560)

• Discuss academic questions connected to the processes of the expansion and the constitutionalization of international law.

• Understanding the concepts of democracy and legitimacy in relation to international law.
• List of articles and books:


• Joseph Weiler; *The Constitution of Europe*, Cambridge University Press, 1999, ch. 6, 8-10 (p.221-234, 264-349) (100 p). (not available electronically)


• Jeffrey Dunoff and Joel Trachtman, “A Functional Approach to International Constitutionalization”, in *Ruling the World*, eds. Jeffrey Dunoff and Joel Trachtman, Cambridge University Press, 2009, s.3-35 (32s)


• Robert Howse, “From Politics to Technocracy – and back again: The Fate of the Multilateral Trading Regime”, in *American Journal of International Law*, vol.96, 2002, s.95-117 (23s)


• Only for master-students: JUS 5560


• Martti Koskenniemi, *The Fate of Public International Law: Between Technique and politics*, in Modern Law Review, vol.70, no.1, 2007 (30s.)

• How we will work:

• Lectures in plenary,

• With exercises, questions, discussions,

• Student colloquiums

• TULSA seminars – additional workshop-like teaching with Ph.D-researchers,

• Mock exam,

• Exams: 4 hour written exam – based on the curriculum and skills requirements,
• New themes – the relations between international and domestic law:
• Expansion of international law into fields which were previously domestically regulated.
• Overlapping between international and domestic law.
• Fragmentation of international law (different treaties) leading to:
  - Legal pluralism?
  - Constitutionalism within one treaty, or among several?
  - Relation between nation-state and international treaty,
• What is a constitution, - what is constitutionalism, - what is constitutionalization?
• Can we speak of an international constitutional law?  Concepts (unitary):
  - originality, - consensus, - legitimacy, - vertically integrated systems
• Other more pluralistic theories: - Conflict-of-laws theories
  - Multi-level governance, - supranational law, - transnational law,
• Legitimacy of law: - democratic government by the peoples and for the peoples, - rule-of-law, - effectiveness, - human rights,
• Democratic theory:
• - liberal democrcay, - communitarian democracy, - deliberative democracy, (republican)
• **The modern state**: (David Held)
  • Territoriality,
  • **The people**: citizens, rights,
  • **The state**: Control on the means of power, constitutions,
  • Sovereignty - Impersonal structure of power,
  • Constitution and legislation: originality
  • Division of powers
  • Democracy
  • Legitimacy, (individual rights and democracy, citizenship),
  • Increasing factual interaction, complex interdependencies,
  • Increasing number of international treaties and organisations,
International law developing – over time:

• The Westphalian model, 1648:
  • nation-state sovereignty vs. international law: - cooperation among states on a minimum level,

• The UN model, 1945:
  • an increased ambition of cooperation:
  • international human rights: 1948 UN Declaration,

• The Cosmopolitan model, (1990-ies onward):
  • The realization that many political and economic problems cross the boundaries of the nation-states,
  • Trade, environmental and climate problems, human rights are in fact international, - The number of treaties increases,
• Dieter Grimm, «The Achievement of Constitutionalism»:
  • - establishing new political systems, which are *legitimate*,
  • - from «divine» law to «the prince» to «the state» (sovereignty),
  • - from regulating privileged groups to society as a whole,
  • - «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,
  • - to establish *legitimate rule*: - *by the people*, - *and by law*,
  • - *catalogues of rights*, not only state powers,
  • - *the constituting powers*, and *the constituted powers*,
  • - monopolies of state/public power, - the higher law,
  • - limitations to state power, by law,
  • - the border between public and *private*, and external/internal,
  • - *political decisions*, not pre-established truths,
1. The constitution in the modern sense is a set of legal norms, not a philosophical construct. The norms emanate from a political decision rather than some pre-established truth.

2. The purpose of these norms is to regulate the establishment and exercise of public power as opposed to a mere modification of a pre-existing public power.

3. The regulation is comprehensive in the sense that no extra-constitutional bearers of public power and no extra-constitutional ways and means to exercise this power are recognised.

4. Constitutional law finds its origin with the people as the only legitimate source of power. The distinction between pouvoir constituant and pouvoir constitué is essential to the constitution.

5. Constitutional law is higher law. It enjoys primacy over all other laws and legal acts emanating from government. Acts incompatible with the constitution do not acquire legal force.
with respect to the five criteria that were found to be constitutive for the modern institution the consequences are the following:

1. The constitution remains a set of legal norms which owe their validity to a political decision.
2. Their object continues to be the establishment and exercise of the public power, but only insofar as it is state power.
3. Since public power and state power are no longer congruent, the constitution ceases to regulate public power coherently and comprehensively.
4. Consequently, the primacy of constitutional law is no longer exclusive. It prevails over ordinary domestic law and acts applying domestic law, not in general.
5. The constitution still emanates from or is attributed to the people. But it can no longer secure that any public power taking effect within the state finds its source with the people and is democratically legitimised by the people.
What is constitutionalism (according to Grimm):
• 1) a set of legal norms,
• 2) the purpose to regulate public powers,
• 3) comprehensive legal system.
• 4) the people as the ultimate source,
• 5) a higher law, lex superior,

What is constitutionalization?
• Processes towards constitutionalism.
• «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,
• What are the consequences for constitutions and constitutionalism of the erosion of state constitutions?

• Grimm: structural reasons for the change,

• So: how do we cope with the changes in order to secure legitimate governance?

• Can «constitutionalism» be achieved on international levels,
  - «constitutionalisation of international treaties»,
  - the internationalisation of public power poses new challenges, in terms of legitimacy of politics and law,
  - how do international organisations function?
• the UN: - what is its function, and powers? – a very different type of power than the states’,
• The ICJ, - the international criminal law tribunals,
• The EU and the Council of Europe are different, with deeper mandates in relation to citizens,
• «...no state remains sovereign the way it did before 1945.....», Grimm, p.14,
• «..the state is no longer the exclusive source of law within its territory...», p.15
• Grimm: state constitutions are less comprehensive and legally superior than previously,
• **Constitutionalisation:** - constitution-building processes beyond the state,
• **Constitutionalism:** closer to constitutional processes,
• The comprehensive international treaties (UN, EU, WTO) still lack the origin of a particular popular sovereignty, - they are not an expression of the self-determination of a people,

• Their treaties are in many ways different from state constitutions,

• But: they complement state constitutions in vital ways:
  • 1) international trade and cooperation is vitally important and rely on international treaties,
  • 2) International organisations are given specific powers (WTO, IMF etc)

• Grimm: there is still a gap between real public power and its constitutional legitimacy,
• What are constitutions and constitutionalism?
• 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,
• The comprehensive and binding competences of state powers,
  - legislative, - executive, - judicial,
  - independent / self-sufficient legal systems,
• originality, - self-referential,
• vertically integrated, (legislative, executive, judicial review)
• Legitimacy,
• Lex superior: Should constitutions bind future generations?
• What is the function and the role of constitutions?
• Republican vs liberal constitutionalism
• Constitutionalism as a meta-theory of legitimate exercise of public power, (Loughlin, p.61)
• «The process of constitutionalisation is born of the reconfiguration of the values of constitutionalism...» (Loughlin, p.68)
• State, government, civil society:
  • What is the relation between state/constitutions and civil society,
  • And how does this change over time with more active markets, international markets, international technologies, knowledge society, risk society etc?
  • The role of human rights in constitutions.
  • Does civil society protect human rights and equality or enable inequality?
• **International treaties,**

  • *voluntary* enacted,
  
  • legal and political cooperation,
  
  • *enumerated competences,*
  
  • increasingly comprehensive,
  
  • an increasing number of courts and dispute-settlement bodies, - and thus increasingly legally binding decisions,

• requirements of originality?

• what is originality?
• **Legitimacy in law:**
  • - Citizens’ inalienable freedom rights,
    - secured by constitutions and legislation,
  • - Democratic elections,
  • - Democratic representative assemblies, - legislation,
  • - Rule-of-law, - autonomous courts,
  • - Accountability,
  • - Transparency, - freedom of information,
  • - Effectiveness,

  • - Input legitimacy (dem.) - Output legitimacy (results),
  • - Procedural legitimacy,
• Vital democratic qualities contributing to legitimacy:
  • - individual basic (freedom) rights,
  • - citizenship – right to vote,
  • - open and democratic elections,
  • - democratic parliaments,
  • - majority voting,
  • - publicity, transparency in decision-making,
  • - constitutional, (predictable, authoritative, supreme)
  • - executive accountability,
  • - autonomus courts, rule-of-law,
  • - a common civil society,
• Theories on Democracy:
• - liberal democracy – rights,
• - communitarian democracy – cooperation,
• - deliberative democracy – procedures and qualitative discussions,
Social, economic, cultural, scientific activities are becoming increasingly inter- and transnational – and cross-boundary:

- international trade,
- financial markets,
- economic interdependence,
- international pollution and environmental and climate change,
- international trade means that we may place our pollution in other parts of the world,
- science, technologies and knowledge,
- the internet,
- international migration,
- international human rights,
- international cultural exchanges,
• The distinction between internal and external problems (and responsibility) is becoming increasingly blurred and dissolving,

• Factual globalization may mean that international problemsolving on a political and legal basis is needed:

  • - Environmental and climate problems. (factual)
  • - International trade and international financial markets. (constructed)
  • - International human rights standards. (normative)
  • - International migration. (factual, constr., normative)
International law developing – over time :

• **The Westphalian model, 1648**:  
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• **The UN model, 1945**:  
  - an increased ambition of cooperation:  
  - international human rights: 1948 UN Declaration,

• **The Cosmopolitan model, (1990-ies onward)**:  
  - The realization that many political and economic problems cross the boundaries of the nation-states,  
  - Trade, environmental and climate problems, human rights are in fact international, - The number of treaties increases,
• Different legal regimes and different logics:
  • Nation-states – states, - citizens,
  • - sovereignty, – constitutions, - fundamental rights,
  • - legislative competence, - monopoly on coercive force,
    • - democratic organisations,
  • International law – international law between states,
    • - customary law, - jus cogens, - treaties , - by consent,
    • - non-intervention, - international cooperation, - organisations
    • - more indirect democracy / international cooperation,
  • Supranational law - state competences transferred to international organisations, - with direct effect to citizens,
    • - more indirect democracy / supranational government,
  • Transnational law - civil society org., - NGOs, - transnational corporations, - governance, - the level ‘below’ government,

• International cooperation / constitutionalism ?
• The relations between the different legal regimes:
  • National – domestic law
  • **International law** (treaties)
    • – the law between nation-states, (UN) (and citizens)
    • - in substance, - and in legal validity.
  • **Supranational law** v (treaties)
    • - law by international organizations which has been delegated specific parts of the constitutional power of the nation-states, (EU)
    • - the legislation has direct effect on citizens,
  • **Transnational law** (contracts, informal cooperation)
    • - law or legal practice which has been developed among non-state actors, - such as experts, NGOs, standardization committees, (ISO)
    • - lex mercatoria : private international law,**(customary law)**
• Different logics of law:

• **International law**
  - the law between nation-states, (UN)
  - in substance, and in legal validity.

• **Supranational law**
  - law by international organizations which has been delegated specific parts of the constitutional power of the nation-states, (EU)
  - the legislation has direct effect on citizens,

• **Transnational law**
  - law or legal practice which has been developed among non-state actors, such as experts, NGOs, standardization committees, (ISO)
  - lex mercatoria: private international law
• **International / supranational treaties:**
  • **International treaties** overlapping the competences of nation-states,
  • **Supranational treaties:** - states transferring parts of their constitutional competences to an international organisation:
    • - legislative,
    • - adjudicative,
    • - executive,
  • Supranational competences, (EU)
  • Close to supranational competences, (EEA)
  • ”De facto” supranational,
  • **Cross-boundary factual dynamics** – and the pressure this exerts on law and politics,
  • - trade, environment, internet, migration, technologies, travelling, cultural exchange, climate change etc.
• Different types of interaction and relations between legal regimes and different levels of law:
  • - Treaty-based – *international law*: based on consent,
  • - cooperation based on treaties, and in addition to,
  • - cooperation within international organisations,
  • - interaction, conflicts and competition
  • - conflicts between different treaties,

• - *Customary international law*,
• - Informal political international cooperation,
• - Conflicts between states and international organisations (who is the final interpreter of treaties?)
• - Conflict-of-law norms (between different values),
• New treaties and international organizations, post 1945 – legal globalization:

• the UN – 1945, - increasing ambitions for international political and legal cooperation, - the UN Charter, the Security Council, art.39,

• 1948 - The Universal Declaration, and later the UN Conventions on civil and political rights, and on economic, social and cultural rights,

• Sub-UN: - FAO, WHO, UNICEF, UNDP, UNCTAD,

• The environment : Stockholm, 1971, and Rio Declarations, 1992,

• The climate : - the UN Framework Convention on Climate Change, - the Kyoto protocol, 1997

• The International Criminal Court, ICC, 2004,
New treaties and organizations, trade, environment:

- **1950** - *European Convention of Human Rights*, - and its Court, the Council of Europe,

- **1958** - *The European Community*, - the Rome treaty, - creating a common market, and closer cooperation among the peoples of Europe, - new and more ambitious institutions: The Council, the Commission, the Court,

- **1986** : qualified majority voting, Single European Act,

- **1992** – European Union, Maastricht (the Euro), Schengen,

- **2012** the Lisbon treaty, with Charter of Human Rights,

- Other regional treaties,

- **GATT**, 1947, (the Washington Consensus)

- IMF, the World Bank,

- **1994 WTO/GATT**, TBT, SPS, TRIPS

- the Dispute Settlement Understanding (DSU),
The UN

• Goals: - peacekeeping, security, - deal with international disputes, - economic/social cooperation, - human rights,
• General Assembly, - all members,
• - political forum for discussions,
• Security Council, - 15 members,
• - binding decisionmaking on peace and security,
• - 5 permanent members with veto power,
• Secretariat and the General Secretary,
• International Court of Justice, - between states,
• **Peace and security :**

• the lack of an “army” at the disposal of the UN,

• UN Charter ch.VII, art.39

• “The Security Council shall determine the existence of any threat to the peace, breach of peace or act of aggression and shall recommendations or decide what measures to be taken in accordance with art.41 and 42.”

• Art. 41 – measures not involving use of armed force,

• Art. 42 – measures involving armed forces, if necessary,

• Example : - The Iraq – Kuwait conflict 1990/91,

• The Iraq war, 2003 -

• Resolutions may the SC decide ”when there are acts of aggression” and where ”armed forces” may be used,

• Failures: - Middle East, Kashmir, Darfur, Somalia etc.
• **Human Rights :**
  
  • - 1948 – The Universal Declaration of International Human Rights,
  
  • - 1966 – The two covenants of Economic, Social and Cultural Rights, and Civil and Political Rights,
  
  • - Later : Covenants on the elimination of discrimination against women, - on the protection of the rights of children, - on the elimination of discrimination,

• **Monitoring :**
  
  • - reports submitted by the States,
  
  • - Inter-state complaints,
  
  • - monitoring committees,
• The constitutionality of the EU:
  • - *direct effect* of regulations, directives and treaties,
  • - not only the governments, but also the peoples,
  • - *supranationality*,
  • - *comprehensive* legislative competences,
  • - *comprehensive* administrative apparatus/ Commission with comprehensive execut powers,
  • - admin and judicial decisions sanctionable in member st.,
  • - any conception of a *common good*?
  • - *judicial review* of directives in relation to treaties,

• Vertically integrated politico-legal systems,
• Judicial review, but no legislative/constitutional ”kompetenz-kompetenz”,
• Originality?
WTO

- GATT – 1947,
- “general elimination of quantitative restrictions”,

- WTO 1992
  - Dispute settlement understanding
  - Panel and Appellate Body,
- From “diplomatic to judicial problemsolving”,
- Cases: - meat hormones (97), GMO (2006)
- SPS, TBT,
- TRIPS,
United Nations Framework on Climate Change and Control, Kyoto Protocol:

- goal: to achieve stabilization or reduction of greenhouse gas concentration in the atmosphere,
- present and future generations,
- precaution, sustainable development,
- developed and developing countries,
- market-based instruments,
ICC – International Criminal Court

• - individual responsibility for state leaders,
• - autonomus international court,
• - ”crimes against humanity, mass murders etc.”
• Ruwanda and Yugoslavia tribunals,
• **Multi-level governance** – and the new international law:
  • *overlapping and combined legal treaties* and national constitutions,
  • different modalities: overlapping, combined, cooperating, competing, exclusive,
  • interpretive tools: margin-of-appreciation, proportionality, principles of interpretation,
• Example:
  • European nation-state and their constitutions,
  • European Union treaties, legislative, adjudicative, executive competences,
  • European Convention of Human Rights,

• *How do we describe this in terms of constitutionality?*
• **What is International constitutional law?**

• What is constitutionalism – in law?

• - a comprehensive juridical order, - of its "own",

• - vertically integrated, (legislation, executive, judicial)

• - what is originality, and can there be originality in international law,

• - unified and unique, - no higher order, - accountability,

• - nation-state sovereignty – and international law,

• What is constitutionalism in "the new international law"?

• - increased international cooperation is needed in order to solve problems,

• - increasing number of international treaties and courts,

• - increasingly effective, in terms of sanctions and cooperative legislation, - supranational treaties, - effective courts,

• - comprehensive legal competences for internat. org. in matters which are also internal, and cross-boundary,
• Constitutionality in international organisations and treaties:
  • - comprehensive powers,
  • - vertically integrated: legislative, adjudicative, executive,
  • - effective judicial review, (supremacy)
  • - kompetenz-kompetenz (constitutional or judicial)
  • - direct effect in relation to citizens,
  • - supremacy,
• New problem: - overlapping and parallel competences,
• Effects of the expanding international law:
• (1) The constitutions of nation-states are affected by the more comprehensive and supranational treaties,
• - overlapping competences with constitutional relevance,
• (2) International organizations – emerging with constitutional qualities,
• - vertical integration of institutions and competences,
• - legislative, adjudicative, executive,
• (3) The fragmentation of international law
• - fragmentation, legal pluralism, constitutionality,
New aspects of international law:

- The increasing internationalization and globalization of law,
  - treaties and organizations,
- Functioning international courts,
  - WTO/DSB, ICJ, ICC, ECJ, ECHR,
- Multi-level governance,
  - several levels of government and governing working together, but not always coordinated,
- The fragmentation of law,
  - not one constitution, but several parallel treaties,
  - 125 tribunals or courts,
  - more effective and competing courts,
• Regime collisions:
  • - WTO / WHO,
  • - UN / WTO,
  • - ICJ / ICTY,
  • - EU / ECHR,

• Transnational communities, lex Mercatoria,
  • - professional, technical, expertise bodies,
  • - developing international standards,
  • - examples: ISO, Helsinki declaration,
• "Global legal pluralism”, Koskenniemi,
• - the increasing number of international treaties, organizations, courts etc.,
• - the lack of international "supra-treaties”,
• - the fragmentation of international law into various "sector”-regimes,
• - the same themes may be dealt with by several legal institutions, on the basis of different legal texts,
• - possible solutions to fragmentation :
  • - constitutionalism, - developing connections between the various treaties and institutions,
  • - legal pluralism, - developing the different legal regimes,
• What are the consequences of the different options?