

# European Constitutional Law: National Identities Between Unity and Plurality

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17 June – 12 July 2024

**CATEGORY** Law & Economics

## COURSE STRUCTURE

You will receive a total of **45 hours of academic lessons** (one lesson equals 45 minutes; 15 hours per week). Lessons will comprise lectures, group work, discussion sessions, and excursions.

## WEEKLY SCHEDULE

HUWISU courses are grouped into different time tracks. Your course will take place in **Track C**

Tuesday: 1.30 pm – 3.00 pm & 3.30 pm – 5.00 pm  
Wednesday: 1.30 pm – 3.00 pm & 3.30 pm – 5.00 pm  
Friday: 9.00 am – 10.30 am & 11.00 am – 11.45 am

## COURSE LANGUAGE

This course is taught in **English**, including the readings. For the understanding of the texts and the discussions in class, a language-level of B2 (Common European Framework of Reference for Languages) is required.

## TARGET GROUP

**Undergraduate law students and students of other academic** backgrounds with a strong interest in the course topic.

## CREDITS & CERTIFICATES

Participants will receive **6 ECTS** credit points and a certificate if they attend regularly (at least 80% attendance), participate actively and fulfil all course assignments. Additionally, six weeks after the end of the course a Transcript of Records is issued by Humboldt-Universität zu Berlin. All courses are accredited according to the European Credit Transfer System (ECTS).

## CULTURAL ACTIVITIES

You are invited to **join our cultural and social program**. We offer a fine selection of interesting activities that aim to give you an unforgettable stay in Berlin. Through excursions, social gatherings, and sport activities, you have the opportunity to get to know the city, the university, and to meet students from all parts of the world. **Costs for these offers are included in the program fee**. Below, you find examples of previously offered cultural activities. You will be informed about the respective cultural program shortly before the start of the program via email as well as during the course period.



### POLITICAL AND HISTORICAL GUIDED TOURS

- Federal Chancellery (*Bundeskanzleramt*)
- German Parliament (*Bundestag*)
- House of Representatives (*Abgeordnetenhaus*)
- Topography of Terror exhibition
- Political Archive of the Federal Foreign Office

### CULTURAL GUIDED TOURS

- Kreuzberg Tour
- Museum Island (*Museumsinsel*)
- Berlin Cathedral (*Berliner Dom*)
- Daytrip to Potsdam
- Exhibitions

### SOCIAL GATHERINGS

- Welcome Get-Together
- Beach Volleyball
- Farewell Party

## EXPECTATIONS & POLICIES

**Preparation for lively discussions in the classroom:** Be on time, have at least the required readings completed, and points in mind for discussion or clarification.

**Assignments:** Complete all assignments according to the specified requirements on the schedule including handing them over to the lecturer.

**Commitment in class:** Pay particular attention to the lecturer and respect differences of opinions (classmates', lecturers').

**Academic guidelines:** Comply with academic integrity policies (such as no plagiarism or cheating, nothing unethical) especially the academic honor code and the student code of conduct.

**Attendance policy:** No unexcused absences are permitted. Students must follow teachers' instructions to catch up on missed work – to excuse absence please contact the HUWISU office.

## **COURSE DESCRIPTION**

The EU is set to achieve an ever closer union among the peoples of Europe, and at the same time bound to respect national cultural, linguistic and also national constitutional identities. The Member States are thus facing the tension between diversity and harmonization. How can these two seemingly opposing aims be properly accommodated? Who is claiming to have the last word about it? What are the challenges and where lie the possible boundaries of the European legal integration?

The course will be combined from four thematic parts. First, it will critically highlight the basic features of a modern liberal democratic nation-state and its constitutional commitments. Second, it will comparatively examine the foundations of the EU, its governing principles and values, and its sui generis nature as a supranational formation. Third, it will explore a notion of national constitutional identity from national as well as from the European perspective. And finally, it will delve into the questions of resistance and dissent in legal theory and try to find potential parallels with an uneasy relationship between the Member States and the EU.

## **COURSE OBJECTIVES AND LEARNING OUTCOMES**

The course objective is to understand the fragile and seemingly contradictory relationship between national and supranational legitimate legal and political authority from a legal perspective. Hence, by the end of the course, participants will be able to better understand the challenges as well as the advantages concerning the current EU design. Concretely, students will be able to:

- Critically demonstrate liberal foundations of a modern democratic state;
- Understand the nature, common elementary values and the governing principles of the EU and its democratic challenges;
- Learn about the national constitutional identity and the possible legal and political boundaries of the European legal integration; and
- Analyze and evaluate the difference between legitimate and undermining resistance and/or dissent within the European legal integration.

In addition, students will learn how to deliver a short summary of arguments in a clear and simple language, based on highly abstract readings. Thus, students will improve their critical thinking, having an opportunity to carry out numerous debates, and improve their legal writing in English.

## **READINGS**

Reading materials will be available via Moodle during the course.

## ASSIGNMENT INFO

In order to be granted 6 ECTS, students are required to attend classes regularly, complete the compulsory reading assignments before the classes and actively participate in the debates during the sessions.

Moreover, students will have to prepare a short presentation of one of the readings (10 minutes) and to participate in the game of "arguments battle" based on given reading materials and the lectures. Finally, everybody will have to submit a short paper (1.000 words) at the end of the class presenting its own original arguments and reasoning in relation to the distributed topics.

**The final grade will be composed of active participation in the class discussions (20%), having read the prescribed readings (20%), presentation or arguments battle (20%) and the final paper (40%). A minimum of 80% class attendance is required. Failure to fulfil one of the mentioned components results in failure of the class.**

## YOUR INSTRUCTOR

**Jakob Gašperin Wischhoff** wrote his PhD on the subject of national constitutional identity in the EU as a structural comparison with civil disobedience and conscientious objection at the Humboldt University of Berlin, where he was a research fellow at the DFG-Research Group DynamInt (Dynamic Integration in the EU). He is a senior editor for German and European constitutional law at Verfassungsblog and has co-edited a book in the Routledge series Comparative Constitutional Change: Accommodating Diversity in Multilevel Constitutional Orders: Legal Mechanisms of Divergence and Convergence.

Jakob studied law at Ljubljana University, Utrecht University, and Humboldt University in Berlin. He worked in several renowned law firms and was an affiliated member of the Research Group »Unity and Difference in the European Legal Area« (EPEDER) at the European Law School. He was a visiting researcher at the European University Institute in Florence (EUI) and the King's College in London.

His research focuses on European constitutional law, international public law, constitutional theory and legal philosophy. Jakob speaks fluent Slovenian, German, and English and has a working knowledge of French and Croatian.

## COURSE SCHEDULE AND READINGS

### **Part I: Liberal Nation-State, Constitutionalism and Multiculturalism**

18.6.2024, Introduction to the Course, Liberal Democratic State

19.6.2024, Constitutionalism (Democracy, Rule of Law and Human Rights)

21.6.2024, Multiculturalism vs. Homogeneity

*Liberal Democratic State, Constitutionalism, Democracy, Rule of Law, HR, Authority of Law, Sources of Law, Pouvoir Constituent, Sovereignty, Leitkultur, Multiculturalism, Homogeneity*

- The origins and essentials of a liberal democratic state (French and American revolutions)
- The role of homogeneity v. multiculturalism in a liberal nation-state
- What is Constitutionalism? (Democracy, Rule of Law and HR)
- Where the political or / and legal authority comes from? What is *pouvoir constituent*?
- Differences between legal positivism (Kelsen, Hart) and post-natural school of law
- What is sovereignty? Are the states still (fully) sovereign or is sovereignty in a transition?
- What is it meant by a *Leitkultur* (prevailing culture)? What kind of role does it have?
- What happens when a majority tries to "protect" their self-viewed majoritarian culture?
- What role has a liberal state (and its institutions, including political parties) when it comes to questions of prevailing culture?

### **Readings:**

- Waldron, Jeremy. "Theoretical Foundations of Liberalism." *The Philosophical Quarterly* (1950-), vol. 37, no. 147, 1987, pp. 127–150. JSTOR, [www.jstor.org/stable/2220334](http://www.jstor.org/stable/2220334). Accessed 24 Feb. 2020.
- Williams, Bernard. "Realism and Moralism in Political Theory." In *In the Beginning Was the Deed*, 1–17. Princeton: Princeton University Press, 2008.
- Political Liberalism: Legitimacy and Stability within a Liberal Society (John Rawls), <https://plato.stanford.edu/entries/rawls/> (Chapter 3, 3.1 – 3.6). 7 p.
- Bezemek, Christoph, Potacs, Michael, Somek, Alexander. *Vienna Lectures on Legal Philosophy*. Oxford: Hart Publishing, 2018, (Chapter 7. The Rule of Law, Legitimate Authority and Constitutionalism, Mattias Kumm, 113-126). 13 p.
- Habermas, Jürgen. "Address: Multiculturalism and the Liberal State." *Stanford Law Review*, vol. 47, no. 5, 1995, pp. 849–853, JSTOR, [www.jstor.org/stable/1229176](http://www.jstor.org/stable/1229176). 5 p.
- Kymlicka, Will. *Contemporary political philosophy: an introduction*. Oxford; New York: Oxford University Press, 2002, (Chapter 8, Multiculturalism: Introduction, 8.4, 8.5 and 8.6) 327-336 and 348-370. 32 p.
- Halmai, Gabor, EUI Blog: Constitutionalism and Politics, Fidesz and Faith: Ethno-Nationalism in Hungary, 29th June 2018, [<https://blogs.eui.eu/constitutionalism-politics-working-group/fidesz-faith-ethno-nationalism-hungary/>] 3 p.
- The New York Times, Leadership and Leitkultur, Jürgen Habermas, October 28, 2010, <https://www.nytimes.com/2010/10/29/opinion/29Habermas.html> 4 p.

Further Voluntary Readings:

- Locke, John. Two Treatises of Government; and, A letter concerning toleration. New Haven; London: Yale University Press, 2003, (Book II: Second Treatise, Chapter I, II and VII, 100-106 and 133-141). 15 p.
- Anderson, Benedict R. O'G. 1991. Imagined Communities: Reflections on the Origin and Spread of Nationalism. London; New York: Verso.
- Hobsbawm, E. J. Nations and nationalism since 1780: programme, myth, reality. Cambridge [England] ; New York: Cambridge University Press, 1990.
- Walker, Neil. Sovereignty in Transition. Oxford; Portland, Or.: Hart, 2006.
- Rawls, John. Political liberalism. New York: Columbia University Press, 2005.
- Bogdandy, Armin von; Bast, Jürgen. Principles of European constitutional law. Oxford: München: Hart; CH Beck, 2009, (Christoph Möllers, Pouvoir Constituant-Constitution-Constitutionalisation) 169-205.
- Kymlicka, Will. Liberalism, community, and culture. Oxford [England]: New York: Clarendon Press; Oxford University Press, 1991, (Chapters 2, 3 and 7) 1-9, 9-21, 135-162. 39 p.

**Part II: Nature and Foundations of the European Union: Principles and Values**

25.6.2023, The Nature of the EU and its Founding Principles

26.6.2023, Principle of Primacy and Constitutional Pluralism

28.6.2023, European Democratic Legitimacy

*International Organisation, Sui Generis, European Constitutional Pluralism, Primacy of EU Law, Principle of Referral, Subsidiarity, Cooperation, Proportionality*

- Is the EU closer to an international organisation or to a federal state? Why?
- Why is it (un)necessary to think about it in dualistic terms? What would be an alternative?
- What are the common foundational values of the EU?
- Where are they written in the Treaties? Can we enforce them judicially?
- How are these common values different as compared to the values of the Member States?
- What is a constitutional pluralism? Can we better explain the EU in such terms?
- How are the competences of the EU and the MSs delineated?
- Basic legal principles of the EU (conferral, subsidiarity, proportionality, cooperation, etc.)
- What is the principle of primacy of the EU law? Where is it written down?
- When it was developed and by whom? Do MSs comply with it?
- What are the reactions of the national apex courts to the primacy principle? (Solange I, II, Maastricht, Lisbon Decision)

### Readings:

- Kumm, M. (2012-10-11). The Moral Point of Constitutional Pluralism 1 : Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection. In (Ed.), *Philosophical Foundations of European Union Law*. : Oxford University Press,. Retrieved 25 Oct. 2018, from <http://www.oxfordscholarship.com.ezproxy.eui.eu/view/10.1093/acprof:oso/9780199588770.001.0001/acprof-9780199588770-chapter-9>. 31 p.
- Halberstam, Daniel and Möllers, Christoph, The German Constitutional Court Says 'Ja Zu Deutschland!' (November 2, 2009). *German Law Journal*, Vol. 10, No. 8, 2009; U of Michigan Public Law Working Paper No. 170. Available at SSRN: <https://ssrn.com/abstract=1498527> 18 p.
- Claes, M. (2015-07-23). The Primacy of EU Law in European and National Law. In (Ed.), *The Oxford Handbook of European Union Law*.: Oxford University Press,. Retrieved 26 Oct. 2018, from <http://www.oxfordhandbooks.com.ezproxy.eui.eu/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-8>. 24 p.
- Grimm, D. (2017-06-29). Europe, Yes—But Which Europe?. In (Ed.), *The Constitution of European Democracy*. : Oxford University Press, 1-19. 19 p.

### Further Voluntary Readings:

- Claes, M. (2016). The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union. *Maastricht Journal of European and Comparative Law*, 23(1), 151–170. <https://doi.org/10.1177/1023263X1602300109> 20 p.
- Grainne De Burca and Paul P. CRAIG (eds), *The Evolution of EU Law*, 2nd ed, Oxford, Oxford University Press, 2011, (Direct Effect, Primacy and the Nature of the Legal Order, De Witte, Bruno) 323-362. 40 p.
- Bogdandy, Armin von, Bast, Jürgen. *Principles of European constitutional law*. Oxford: München: Hart ; CH Beck, 2009. *Founding Principles*, von Bogdandy, 11–54. 43 p.
- Armin von Bogdandy; Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law, *International Journal of Constitutional Law*, Vol. 6, Issue 3-4, 1 July 2008, Pages 397–413, <https://doi.org/10.1093/icon/mon015> 17 p.
- Craig, P. P. *EU law: text, cases, and materials*. Oxford: Oxford University Press, 2015, (*Relationship between EU Law and National Law: Supremacy*), 256–300. 45 p.
- Walker, N. (2015-07-23). The Philosophy of European Union Law. In (Ed.), *The Oxford Handbook of European Union Law*: Oxford University Press. 21 p.

### **Part III: Constitutional Identity**

2.7.2023, National Constitutional Identity

3.7.2023, Constitutional Identity in the EU Law (Article 4 (2) TEU)

5.7.2023, Claims of Identity Beyond Liberal Commitments

*Constitutional Identity, Eternity Clause, Article 4(2) TEU, Tarico II, Sayn-Wittgenstein, Lisbon Decision, Illiberal Democracy (Hungary)*

- What is constitutional identity? How can be construed from a national perspective?
- What is constitutional unamendable core or constitutional idiosyncrasies?
- Identity as a difference v. identity despite difference (*specificity, singularity, existentiality*)
- Identity as a social fact v. constitutional identity as a legal concept
- What is the meaning and the scope of national identity clause in the EU law, Art. 4(2) TEU?
- Case law of the CJEU (*Tarico II, Gauweiler, Ilonka Sayn-Wittgenstein*)
- Which institution has an authority to determine the meaning of a constitutional identity?
- How should a dialog between the highest national courts and the CJEU in the light of European constitutional pluralism take place?
- Can a national understanding of a constitutional identity draw the line to further European legal integration? (e.g. Lisbon decision [2 BvE 2/08] of the German FCC)
- Claims of constitutional identity within and beyond common constitutional commitments
- Hungarian new constitution and its "illiberal" constitutional identity?
- How religion, globalisation and migration affect the conception of a nation and its identity?

### **Readings:**

- Blanke, Hermann-Josef, Mangiameli, Stelio. *The Treaty on European Union (TEU): A Commentary*. Heidelberg; New York: Springer, 2013. [Article 4 TEU The Relations Between the EU and the Member States] (185-231) 46 p.
- Bogdandy / Schill. "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty." *Common Market Law Review* 48 , no. 5 (2011): 1417-1453. 37 p.
- Faraguna, Pietro, *Constitutional Identity in the EU— A Shield or a Sword?* (June 30, 2017). *German Law Journal*, Vol. 18, Issue 7. Available at SSRN: <https://ssrn.com/abstract=2995416> or <http://dx.doi.org/10.2139/ssrn.2995416> 24 p.
- Orgad, Liav. *The cultural defense of nations: a liberal theory of majority rights*. Oxford: Oxford University Press, 2015 (6 National Constitutionalism 203-229). 16 p.
- Halmai, Gábor. *National(ist) constitutional identity? Hungary's road to abuse constitutional pluralism*. Florence: European University Institute, 2017. 17 p.



Further Voluntary Readings:

- Case C-42/17, Judgment of the Court (Grand Chamber) of 5 December 2017, Criminal proceedings against M.A.S. and M.B., (Tarico II), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0042&qid=1540823816813&from=EN> 11 p.
- Michał Krajewski, 'Conditional' Primacy of EU Law and Its Deliberative Value: An Imperfect Illustration from Taricco II, December 18, 2017, [[https://europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii/?subscribe=success#blog\\_subscription-2](https://europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii/?subscribe=success#blog_subscription-2)]
- Case C-208/09, Judgment of the Court (Second Chamber) of 22 December 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, [<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540824339848&uri=CELEX:62009CJ0208>] 31 p.
- Claes, M., & Reestman, J. H. (2015). The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case. German law journal: review of developments in German, European and international jurisprudence, 16(4), 917-970. 55 p.
- Saiz Arnaiz, Alejandro. National constitutional identity and European integration. Cambridge: Intersentia, 2013.
- Geiger / Khan / Kotzur. European Union Treaties. A Commentary. München: Oxford: Beck; Hart, 2015. [Article 4 TEU] (21-34) 14 p.
- Chalmers / Davies / Monti. European Union law: text and materials. New York: Cambridge University Press, 2014. [5 The Authority of EU Law] (199-246) 24 p.

**Part IV: Resistance and Dissent**

09.7.2023, Resistance and Dissent

10.7.2023, Conscientious Objection and Civil Disobedience

12.7.2023, EU and Constitutional Degeneration

*Conscientious Objection, Civil Disobedience, Rawls, Raz, Dworkin, Constitutional Identity, Majoritarian Legalistic Autocracy, Illiberal Democracy*

- 3 different theories of conscientious objection and civil disobedience (Rawls, Raz, Dworkin)
- What is conscientious objection and civil disobedience? What are the differences?
- What are the underlying foundations and principles for such actions of resistance? Do they differ?
- Analogous thinking: How can constitutional democracy protect itself from (majoritarian) legalistic autocracy?
- Can the EU (itself lacking a sufficient democratic pedigree) prevent constitutional decay of a MS?
- Constitutional identity in the light of dissent and resistance within the EU law

**Readings:**

- Rawls, John. A theory of justice. Cambridge, Mass.: Belknap Press of Harvard University Press, 1999, (Chapters 53 - 59) 308-343. 36 p.
- Raz, Joseph. The authority of law: essays on law and morality. Oxford ; New York: Oxford University Press, 2009, (Chapters 14 and 15, Right to Dissent I and II) 256-289. 33 p.
- Dworkin, Ronald. Taking rights seriously. London: Duckworth, 1978, (Chapter 8, Civil Disobedience) 365-389. 24 p.
- Arendt, Hannah. Crises of the republic. San Diego, Calif.; London: Harcourt Brace Jovanovich, 1972, (Civil Disobedience) 51-102. 51 p.

Further Voluntary Readings:

- Habermas, Jürgen. "Civil Disobedience: Litmus Test for the Democratic Constitutional State." Berkeley Journal of Sociology, vol. 30, 1985, pp. 95–116. JSTOR, JSTOR, [www.jstor.org/stable/41035345](http://www.jstor.org/stable/41035345). 18 p.
- Celikates, R. (2016), Rethinking Civil Disobedience as a Practice of Contestation—Beyond the Liberal Paradigm. CONSTELLATIONS, 23: 37-45. doi:10.1111/1467-8675.12216 9 p.
- CELMAR case, C-216/18 PPU, Judgment of the Court (Grand Chamber) of 25 July 2018, <http://curia.europa.eu/juris/celex.jsf?celex=62018CJ0216&lang1=en&type=TXT&ancre=> 15 p.

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*The course and its syllabus are subject to change. Last update: January 2024*