

Course Title	European Constitutional Law: National Identities Between Unity and Plurality
Category	Religion, Ethics & Law
Class Time	Session 2, July 20nd – August 14th 2020 Track B Weekly schedule Monday: 9 am – 10.30 am & 11 am – 12.30 pm Wednesday: 9 am – 10.30 am & 11 am – 12.30 pm Thursday: 1.30 pm – 3 pm & 3.30 pm – 4.15 pm
Course Level & Target Group	Undergraduate students of all relevant subjects with a strong interest in the course topic.
Course Language	This course is taught in English, including readings in English. For the understanding of the texts and the discussions in class a language level B2 (Common European Framework of Reference for Languages) is required.
ECTS	5 ECTS (45 contact hours)
Instructor	Jakob Gašperin

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. 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 take a look into the basic features of a modern liberal democratic nation-state and its constitutional commitments. Second, it will examine the foundations of the EU, its governing principles and values and its *sui generis* nature as a supranational form. Third, it will highlight a notion of national constitutional identity from a 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 parallels with an uneasy relation between the Member States and the EU.

Course Objective & 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 deriving out of the current EU design. Concretely, students will be able to:

- 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 commitments and the possible legal and political boundaries of the European legal integration; and

- analyze the difference between legitimate and undermining resistance / 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 quite complicate readings. Thus, students will improve their critical thinking, having an opportunity to carry out numerous debates and improve their legal writing in English.

Course Schedule and the Readings

Part I: Liberal Nation-State, Constitutionalism and Multiculturalism

20.7.2020, Introduction to the Course, Liberal Democratic State

22.7.2020, Constitutionalism (Democracy, Rule of Law and HR)

23.7.2020, 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, dominant culture)?
- 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. 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. 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

27.7.2020, The Nature of the EU and its Founding Principles

29.7.2020, Principle of Primacy and Constitutional Pluralism

30.7.2020, 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

3.8.2020, National Constitutional Identity

5.8.2020, Constitutional Identity in the EU Law (Article 4 (2) TEU)

6.8.2020, 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 a 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]
- 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

10.8.2020, Resistance and Dissent

12.8.2020, Conscientious Objection and Civil Disobedience

13.8.2020, 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. 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=TEXT&ancre=> 15 p.
-

Assignments

In order to be granted 5 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 either prepare a short presentation of one of the readings (10 minutes) or to participate in the game of “arguments battle” based on given reading materials. Everybody will have to submit a short paper (1.000 words) at the end of the class presenting her own original arguments / reasoning in relation to the distributed topics.

Assessment Components

The final grade will be composed of active participation in the class discussions (20%), having read the prescribed readings (20%), presentation or arguments battle (30%) and the final paper (30%).

A minimum of 80% class attendance is required. Failure to fulfil one of the mentioned components results in failure of the class.

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 schedule including handing over to the lecturer.

Commitment in class: pay particular attention to the lecturer and respect differences of opinions (classmates', lecturers, locals engaged with on the visits).

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 (see FAQs on www.huwisu.de).

Attendance policy: No unexcused absences are permitted. Students must contact their class teachers to catch up on missed work – to excuse absence please contact the HUWISU office (80% class attendance are required).

Field trips: if classes involve a field trip or other external visits, these require attendance as well as appearance in time – transportation difficulties are never valid reasons for an excused absence.

Extra-curricular Activities

HUWISU offers a fine selection of interesting extra-curricular activities and aims to give all participants an unforgettable stay in Berlin. Your program includes excursions, sport activities and social gatherings providing you the opportunity to get to know the city, the university and your classmates better and to meet students from all parts of the world. The costs for these offers are included in the program fee.

Below you will find examples of previously offered cultural activities. You will be informed about the respective cultural program after your enrolment via email as well as during the course period.

Political and historical guided tours:

- **Federal Chancellery (Bundeskanzleramt):** It's the central coordination point for the entire government policy. The office is in constant contact to departments and other authorities.
 - **German Parliament (Bundestag):** As the highest organ of the legislative in Germany it's elected by the German people. In practice Germany is governed by a bicameral legislature, of which the Bundestag serves as the lower house and the Bundesrat equals the upper house.
 - **House of Representatives (Abgeordnetenhaus):** It's the state parliament (Landtag) of Berlin and located in the center of the reunified city. Together with the Martin Gropius Bau, the Topography of Terror and the Bundesrat, it presents an arresting contrast to the flair of the new Potsdamer Platz.
-

- **Topography of Terror:** A permanent exhibition with focus on the central institutions of the SS and police during the “Third Reich” and the crimes they committed throughout Europe. With the help of mostly photographic material, visitors are led through the major themes of the exhibition’s five main segments.
- **Political Archive:** As the “memory” of the Federal Foreign Office it preserves the files on German diplomacy since 1867, as well as the international treaties signed by the Federal Republic of Germany and its predecessors in title. The records are preserved, processed and made available for academic research.

Cultural guided tours:

- **Kreuzberg Tour:** Kreuzberg has emerged from its history as one of the poorest quarters in Berlin in the late 1970s to a cultural center of today’s Berlin. A unique area and one of the hippest neighborhoods in Berlin with many bars, pubs and clubs.
- **Museum Island (Museumsinsel):** was awarded UNESCO World Heritage Status in 1999 and is an ensemble of five museums: Old Museum, New Museum, Old National Gallery, Pergamon Museum and Bode Museum.
- **Berlin Cathedral (Berliner Dom):** Berlin’s largest and most important Protestant church is located on the Museum Island.
- **Daytrip to Potsdam:** Be inspired by the illustrious attractions of the UNESCO’s World Heritage while underway through the city of Potsdam. Immerse yourself in the history and present of Potsdam and discover many palaces, gardens, and historic quarters such as the “Holländisches Viertel” or the “Nikolaikirche”.
- **Exhibitions:** Berlin is known for its unique galleries and exhibitions, that is why we will visit at least one during the Winter University.

Social gatherings

- **Welcome Get-Together:** We invite you to meet all participants as well as the HUWISU staff in a relaxed atmosphere.
- **Boat trip:** Get to know Berlin from a completely new perspective and see Berlin’s famous sights while floating along the river Spree.
- **Beach Volleyball:** A fun outdoor sport activity on long warm summer evenings for those who love to play and everyone who just want to enjoy watching the others play, lying in the sand, meet friends for some drinks, or simply relax in the middle of Berlin.
- **Farewell Party:** At the end of the Summer University we will come together to celebrate the exciting time with HUWISU.

Your Instructor

Jakob Gašperin, univ. dipl. iur. (Ljubljana), LL.M. (Humboldt), is a PhD candidate at Humboldt University in Berlin and affiliated member of the Doctoral Programme »Unity and Difference in the European Legal Area« (EPEDER) at Humboldt European Law School (HELS).

Jakob had been studying law in Slovenia (at Ljubljana University) and in the Netherlands (at Utrecht University) and has completed his master studies in German and European law in Berlin (at Humboldt University). Subsequent to few years of working in an international law firm he is currently doing a PhD research under the supervision of professor Matthias Kumm in the field of European law, constitutionalism and jurisprudence with the specific focus on national constitutional identities and European constitutional pluralism, wherein he has researched several months at European University Institute in Florence (EUI).

Jakob speaks fluently Slovenian, German and English and has working knowledge of French and Croatian / Serbian.

Please note that the course and its syllabus are subject to change. Last update: February 2020