European Constitutionalism

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Lecture Overview

1. Theoretical Background
- EConst as the third model of integration
- Legal Theories of Integration

2. Practical Aspects
- the Structure of EConst
- the EU and constitutional metaphors
- gaps in EConst
- role of judicial dialogs in building EConst

EConst as the third model of integration

1. Two dominant paradigms of integration: **supranational and intergovernmental**

- Law as an instrument of integration

2. **Constitutionalism** as a third paradigm

- Law as a method and substantial aim of integration
- Diverse mechanisms of delegations of power and competences based on limitations, horizontal and vertical checks and balances (criticisms for deficits and lacks of them)

New narratives of the beginings

- Constitutional paradigm has occured from the very beginning of integration, it is not a new view (references to constitutional basis of EC in the negotiations of Rome treaties (German and French delegations)
- Initial case-law of ECJ – decisions Van Gend en Loos and Costa v. ENEL: the treaties are more than just a parts of international treaties, they represent the „constitution“ of the Community
- Academic discourse in the 60s and 70s (esp. American one – Eric Stein, Joseph H. Weiler – Americans projected their own federal constitutional experience into integration)

Debates between Maastricht and EU Const. Agreement/Lisbon

- direct reactions to Maatsricht Decision of GFCC (Maastrich Urteil, 1993): criticism of lack of own legitimacy and democratic deficits of EU
- between international and constitutional approaches
- main topic: how to deal with the problem of legitimacy

Legal Theories of Integration

Otto Pfersmann (The New Revision of the Old Constitution, 2005, International Journal of Constitutional Law, No. 2/3, pp. 383 – 404)

- the most crucial question on legitimacy is who keeps the initial and at the same time final competence to decide on the delegation of competences (who is the master of the constitution/treaty, who is the constitution giver, who possess the *pouvoir constituant):*

a) external constitutional competence (constitutional heteronomy) – the „master“ of the constitution is an actor that is situated outside the constitutional system

b) internal constitutional competence (constitutional autonomy) – the master of the constitution is an actor that is situated inside the constitutional system – by passing the constitution it imposes the rules upon itself

Legal Theories of Integration

The situation in the EC/EU:

- the delegation of a line of competences from the member states takes place and the range of delegated competences is still broadening
- but: the member states still possess the most substantial competence – to decide what competences will be delegated (they still keep the „constitutional competence upon the EC/EU
- the situation would change if the states passed on this competence to the European institutions (it would mean that the European institutions itself would decide on the changes of the treaties/European constitution) and it would absolutely transform the EU from the international organisation into the kind of constitutional European state

Legal Theories of Integration

Joseph H. H. Weiler (The Constitution of Europe – "Do the New Clothes have an Emperor?" And CUP, 1999)

- theory of constitutionalised system

– legal order established by international treaties giving birth to an international organization that behaves as if its founding instrument was not a treaty governed by international law, but a constitutional charter governed by a form of constitutional law

low intensity constitutionalism: lack of own legitimacy, gaps in HR protection, lack of constitutional momentum (EU has got nothing like Philadeplhia or Bastilla)

Legal Theories of Integration

- constitutional conflicts (Christian Joerges)
- constiotutional tolerance (Joseph Weiler)
- constiotutional synthesis (Eric Fossum)
- constitutional pluralism (Neil Walker, Miguel Maduro)

- based on non-hierarchical relations, no institution has the last word in decision-making

- pluralism of constitutional sources (national, European)
- pluralism of constitutional actors and their non-hierarchical relations
- pluralism in government, in political institutions

Legal Theories of Integration

- criticism of constitutional pluralism:
- pluralism represents a contraposition to law and order – constitutionalism must be based on authority, hierarchy, order, effectivness, not on heterarchy, fragmentarisation and chaos
- theory deals with just a temporary phase of integration, not a final one (as it presumes)
- does not solve the problem of legitimacy, clash of athorities, priority of one order above others
- it is therefore dangerous for the future of integration

Practical Aspects – the structure

Multilevel:

- national,
- EU institutions,
- COE institutions

EU institutions and constitutional metaphors

- Eparliament – lower chamber
- Council of Ministers – second chamber
- Ecommission - government
- ECJ – constitutional and administrative court

Gaps in EConst

- Legitimacy: who is the master of integration?
- Authority: who is superior to whom?
- Kompetenz-kompetenz doctrine
- Democratic deficits in legislation
- Deficits in HR protection („So-lange“ Saga)

Role of judicial dialogs in building EConst

- „dialogs“ between ECJ and national constitutional courts on constitutional issues
- through their decisions (ECJ in preliminary ruling procedures, CC in procedures on review of legal acts or European founding treaties and there revisions)

Role of judicial dialogs in building EConst

Examples:

- GFCC: So-lange Saga, Maastricht Urteil, Lisabon Urteil
- French Constitutional Council: Maastricht, Amsterdam, Lisbon Decisions
- Czech CC: Sugar Quotas decisions, Lisbon Treaty decisions

Role of judicial dialogs in building EConst

Stone, A. – Caporaso, J.: From Free Trade to Supranational Polity: The European Court and Integration, 1996

- the constitutionalization was not influenced by the member states (that have not intended to create such an entity), but it was a specific constellation between the private actors (individuals, private enterprises and European pressure groups), domestic courts and ECJ that shifted the project further!
- every actor in this constellation followed his own interest, but the point of intersection created the pressure for supranationalisation irrespective of the will of member states

Actors	Objectives and Preferences	Limitations and Constraints
European Court of Justice	To promote its own prestige and power by increasing the effectiveness of EU law and developing a constituency for EU law and litigants and national courts To advance the objectives of the Treaty of Rome	Consistency with substantive legal doctrine and methodological constraints imposed by legal reasoning Extent of „information asymetry“ between ECJ and member state governments Institutional rules governing EC decision making Public attitudes toward EU integration
Individual litigants a) „one-shotters“ (individuals) b) „repeat players“ (large corporate actors, public interest pressure and lobbying groups)	To minimize loss by winning case (thus coercing compliance with EU rules in a given case) To maximize trade gains and individual rights by seeking new (or expanded) EU rules	Limited resources and relatively short time horizon Inherent difficulties of case, „selection and litigation timing“
National courts	To gain and solidify power of judicial review To improve institutional power and prestige relative to other courts within the same national judicial system To increase power to promote certain substantive policies through the law	Consistency with substantive legal doctrine and methodological constraints imposed by legal reasoning Minimum democratic accountability