Prof. Dr. Thomas Schmitz Semester 1, 2021/2022

An Alternative Concept to ASEAN: Integration through Law - the European Approach of Supranational Geo-regional Integration

Contribution to the course Public International Law in Asian Countries

I. Introduction

1. A changing political world order of states but an unchallenged legal world order of states
   a) The world order of states
      - a planet divided into "states", each with its own legal system
      - three legal foundations of all law and legal power on this planet: the principle of the territorial state, the self-determination of peoples and the sovereignty of the state
      - public international law as a complementing rudimentary legal world order
   b) From the solitary loner state to joint markets, inter- and supranational cooperation and integration
      - a long and slow development, starting only after World War II
      - the rise of geo-regional and global law and institutions
      - the concepts of open statehood and integrated statehood [offene Staatlichkeit, integrierte Staatlichkeit]
      - no return to the old ways without major economic and social decline
      - however, until today no challenge of the world order of states and its elements as legal foundations of all law and legal power on this planet
2. International cooperation, supranational cooperation and integration
   - see **Diagram 1** (from the course Introduction to the European Union, Semester 2, 2019/20)
   - in supranational cooperation a supranational organisation directly exercises public power in its member states
   - integration implies uniting the states as a whole to a new, exclusive general political community
3. Geo-regionalisation and globalisation
   - not competing but complementary processes
4. Why do we need geo-regional integration?
   - few states left big enough to fulfill their mission alone
   - idea of comprehensive fair and non-hegemonial cooperation only and directly at global level illusive
   - state needs embedding in and support of powerful regional community of states sharing, defending and promoting rather similar cultures, values and interests
   - geo-regionalisation a way for smaller states to maintain influence even in a globalising world
   - realistic alternative is not to be "independent" but to merge to bigger, geo-regional states

II. The integration of Europe in a supranational union, based on law

1. Understanding the European Union
   a) A *non-state but state-like* geo-regional organisation of integration, performing on a large scale public missions by the exercise of supranational public power in its member states
      - more than an intern. or supran. organisation, a confederation or a combination of both but not yet a federal state
      - accomplishes its integrative function primarily by legislation and regulation but also serves as institutional frame-work for intergovernmental cooperation and as habitat for the substantive integration law
   b) The *first representative of a new form of organisation*, emerged in the process of European integration and designed for a long transition from the nation-state to the civilisation state
      - not invented but emerged as result of many developments, reforms and compromises
      - designed for the transition to a geo-regional federal state but not necessarily leading to it
      - a *dynamic* form of organisation
   c) The debate on the legal nature: "compound of states" ["Staatenverbund"], "compound of states and constitutions" or *supranational union*?
      - the state-centred "Staatenverbund" doctrine of the German Federal Constitutional Court - Maastricht judgement of 1993 (BVerfGE 89, 155); Lisbon judgement of 2009 (BVerfGE 123, 267)
      - the "unconventional" approach of some scholars: Union, states, Treaties and constitutions as constitutional unity
      - the union-centered approach of a general theory of the supranational union
2. The member state in the European Union
   a) The unaffected sovereignty of the state
      - unlimited public power (including the legal power - not the right! - to break Union law)
      - unlimited legal capacity at public international law (including the capacity to leave the Union)
      - ultimate responsibility ["Letztverantwortung"]
      - ultimate control over all public power exercised on the state territory

b) The member states as the "masters of the treaties"
- by amending the founding treaties they can modify or repeal any Union law

c) The basic duty to respect, implement, execute and enforce Union law (cf. art. 4(3) EU Treaty)

3. The basic concept of integration through law

a) Integration based on law and the respect for law
- parts of the substantive law of the integration directly regulated in the Treaties
- Union confined to pass legal acts that member states must execute
- compliance essential - even small irregularities may cause serious distortions in the internal market jeopardizing the integration process

b) No coercive powers of the Union to enforce its law in the member states
- expulsion of the member state strongest possible sanction

c) Strong emphasis on the *rule of law*
- rule of law a fundamental value of the Union (art. 2 EU Treaty)
- prominent role of the *European Court of Justice (ECJ)*
  - ECJ jurisprudence most comprehensive and up-to-date collection of elements of the rule of law in the world
- effectiveness (*effet utile*) dominant criterium in the dealing with Union law

d) Subjective rights of the Union citizens
- see **Diagram 2** (from the course Introduction to the European Union)
- personal rights that can be defended by legal action before the courts
- fundamental rights under the EU Charter of Fundamental Rights
  - an own fundamental rights regime for the European Union
- *economic fundamental freedoms* guaranteing free economic cross-border mobility of goods, services, persons, capital and payments
- special rights deriving from the *Union citizenship*, which builds on the citizenship in a member state and complements but does not replace it
  - include general freedom of movement and residence and right to vote and stand as a candidate at local elections

e) Uneasiness in parts of public law doctrine
- reservations of some constitutional courts and a divided community of constitutionalist scholars
- in the past reluctance in some member states to give up or adapt established solutions in admin. law

III. The sources of European Union law

1. Primary law
- with primacy over secondary law

a) Founding treaties
- Treaty on European Union (EU Treaty), Treaty on the Functioning of the European Union (FEU Treaty), Treaty Establishing the European Atomic Energy Community (EURATOM) and 37 protocols

b) Charter of Fundamental Rights of the European Union

c) General principles of law
- unwritten norms, "discovered" by the European Court of Justice in the way of judicial further development of law
- mainly aspects of the rule of law (principle of legality, principle of proportionality, legal certainty and protection of legitimate expectations, state liability etc.) and in the past fundamental rights

d) Complementing customary law (rare) and general rules of international law (DISPUTED)

2. Secondary law (cf. art. 288 FEU Treaty)
- created by the institutions of the Union, based on the primary law

a) Regulation
- general rules with *direct effect* in the member states
- corresponds to statutory law in national law

b) Directive
- general rules that need to be implemented in the law of the member states

c) Decision
- binding regulation in an individual case
- corresponds mainly to an administrative decision in national law

d) Recommendation and opinion
- not legally binding

e) International treaties concluded by the European Union
- also mixed agreements concluded by the Union and its member states with a third party

f) Other legal acts (under special provisions)

IV. The characteristic features of European Union law

1. The *autonomy* of Union law
   - a distinct legal order of its own, not an annex to national law (→ ECJ, case 26/62, van Gend & Loos)
   - autonomous from the law of the member states but not from their unanimous will as "masters of the treaties"
   - no jurisdiction of national courts to declare Union acts invalid (ECJ, case 314/85, Foto-Frost)
   - Union not bound to fundamental rights in the national constitutions
2. The *direct effect* of Union law within the member states
   - all public authorities directly bound without intermediate national legislation (except for directives)
   - in particular direct application of primary law (→ ECJ, case 26/62, van Gend & Loos)
3. The *unity* of Union law
   - essential for the functioning of the Union
   - uniform validity and application in all member states without regard to the specific features of national law
4. The *primacy* of Union law over national law
   - a fundamental *rule of the game* of supranational integration (→ ECJ, case 6/64, Costa/ENEL)
     - worked out by ECJ, accepted by the institutions of the member states, confirmed by many national constitutional courts and honoured in all reforms
     - an essential element of the "acquis communautaire" to which all new member states must agree in the Accession Treaty
   - in case of conflict, authorities in the member states must not apply the national law
   - conflicts may be avoided by interpreting national law in conformity with Union law (ECJ, case 79/83, Ratti)
   - national courts may ask ECJ for preliminary rulings on the validity and interpretation of Union law (art. 267 FEU Treaty;)
   - primacy in application, not in validity
   - primacy *even over national constitutional law* (→ ECJ, case 11/70, Intern. Handelsgesellschaft), as long as the *constitutional identity* (fundamental values and ideas constituting the core of the constitution) is not affected (established jurisprudence of Italian, German and other constit. courts)

V. The requirements for the implementation of European Union law in the member states

1. Demanding requirements ensuring the uniform and effective implementation in all member states
   - *general principles of law* "discovered" by the European Court of Justice following a comparative approach with special regard to rule of law and effet utile
   - important examples:
     - duty of authorities to take coercive measures to enforce Union law (cf. ECJ, case C-217/88, vin de table)
     - duty of courts to grant interim relief to enforce Union law (cf. ECJ, case c-213/89, Factortame)
     - restricted protection of legitimate expectations in case of unlawful state subsidiaries (ECJ, case C-24/95, Alcan)
     - state liability for violations of Union law (ECJ, joint cases C-6/90, 9/90, Francovich)
     - interpretation of national law in the light of directives (ECJ, case 79/83, Harz)
     - implementation of directives through legal, not administrative provisions (ECJ, case C-361/88, TA-Luft)
     - obligation to refrain during the implementation period for the directive from taking measures liable to compromise the result prescribed (ECJ, case C-129/96, Inter-Environnement Wallonie)
     - direct applicability of directives in favour of citizen after expiration of implementation period, if directive is unconditional and sufficiently precise (ECJ, case 148/78, Ratti)
2. Inevitable side-effect: *Europeanisation of administrative law*
   - problem areas: administrative finality, right of action, interim relief, state liability
   - in the 90s resistance of some German scholars, followed by critical reflexions on the domestic law
     - no resistance against Europeanisation in other fields of law

VI. The debate over a constitution for the European Union

- a constitution for an association of states under public international law would be a novelty in world history
- a constitution would provide for higher legitimacy of the European Union and compensate for the reduced significance of the national constitutions in the integration process
- a vivid debate in the 1980s, 1990s and 2020s
  - MOST EUROPEAN LAW SCHOLARS considered already the existing EC/EU treaties as a constitution which had "emerged" in the integration process
  - MANY CONSTITUTIONALISTS objected that constitutions were reserved for states
  - OWN OPINION: State-like territorial organisations can have a constitution too but a constitution cannot "emerge" in a process but must be given in a solemn formal act and self-identify as a constitution (this is not the case with the existing treaties)
- the failed *Treaty Establishing a Constitution for Europe* of 2004
  - draft elaborated by a pluralistic European Convention
  - rejected in national referenda in France and Netherlands in 2005

VII. The controversy about the ultimate decision on the limits of the European Union's competences

- the *risk of a clash of courts* in the supranational integration through law
- under the Founding treaties, the courts of the Union have exclusive jurisdiction in all matters of Union law; this includes the interpretation of the clauses on the competences of the Union (art. 19(1) phrase 2 EU Treaty, 251 et seq. FEU Treaty)

- nevertheless, the German Federal Constitutional Court (see the Maastricht and Lisbon judgements and the Honeywell judgement of 2010, BVerfGE 126, 286) and some other national courts (e.g. Danish Supreme Court, Polish Constit. Court) have threatened to perform ultra vires reviews of the Union's legal acts; in 2020 the German court has actually declared decisions of the European Central Bank ultra vires (see the decision on the purchase of government bonds, BVerfGE 154, 17)

VIII. The European approach - a model for ASEAN integration?

- This is not easily conceivable:
  - Contrary to the hopes at the beginning of the 2010s, ASEAN and its ASEAN Communities have not moved into this direction in the last 10 years.
  - ASEAN is still trapped in the narrow thinking of non-interference. When I gave this lecture in 2019 at a conference of FISIPOL UGM, it struck the audience like a dystopian horror movie.
- However, is there a realistic alternative for an *effective* geo-regional integration that allows to master the challenges of the 21st century *efficiently*? From the European perspective, ASEAN integration is so far not yet a "success story".

Further Reading

Augenstein, Daniel (editor): "Integration Through Law" Revisited. The Making of the European Policy, 2012

Eliantonio, Mariolina: Europeanisation of Administrative Justice? The Influence of the ECJ's Case Law in Italy, Germany and England, 2008

Jans, J. H.; Prechal, S.; Widdershoven, R.J.G.M. (editors): Europeanisation of Public Law, 2nd edition 2015

Konstadinides, Theodore: The Rule of Law in the European Union. The Internal Dimension, 2017

Pliakos, Asterios; Anagnostaras, Gerogios: Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU law, European Law Review 2011, 109

Schmitz, Thomas: Integration in der Supranationalen Union. Das europäische Organisationsmodell einer prozeßhaften geo-regionalen Integration und seine rechtlichen und staatstheoretischen Implikationen [Integration in the Supranational Union. The European model of organisation for process-oriented, geo-regional integration, and its concomitant legal and theoretical implications], 2001, English summary at http://lehrstuhl.jura.uni-goettingen.de/tschmitz/SupranUnion/SupranUnion_en.htm

Schmitz, Thomas: Integration through Law - the European Approach of Supranational Geo-regional Integration, in: ASEAN Studies Center, Faculty of Social & Political Sciences, Universitas Gadjah Mada (editor): Conference Proceeding: International Conference on ASEAN Studies (ICONAS 2019): Rethinking Law, Institution and Politics in Advancing Partnership for Sustainable ASEAN Community, Yogyakarta, 13.-14.03.2019, 2019, p. 1 ff., http://asc.fisipol.ugm.ac.id/wp-content/uploads/sites/741/2020/03/CONFERENCE-PROCEEDINGS-ICONAS-2019.pdf

Schmitz, Thomas: The general principles of European Union law - a source of inspiration for the development of a modern administrative law in the Republic of Moldova, Administrarea Publică 2017, no. 1 (93), p. 26 ff., http://aap.gov.md/files/publicatii/revista/17/AP_1_17.pdf

Snyder, Francis (editor): The Europeanisation of Law. The Legal Effects of European Integration, 2000

Stępkowski, Łukasz: The notion of effectiveness in the law of the European Union, Studia nad Autorytaryzmem i Totalitaryzmem 38 (2016) no. 2, p. 81 ff., http://sfzh.wuwr.pl/download.php?id=479e62064724e01e54cc9db8f1d89788292eef8b

Voßkuhle, Andreas: "European Integration Through Law": The Contribution of the Federal Constitutional Court, in: European Journal of Sociology 58 (2017), no. 1, p. 145 ff., https://doi.org/10.1017/S0003975617000042

See also the comprehensive references to "Important decisions of the European Court of Justice" and to the "Constitutional jurisprudence in the member states on the participation in the process of European integration" in the *internet compendium* of *Schmitz, Jurisprudence on European integration / Rechtsprechung zur europäischen Integration*, updated 2011/2015, http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/Jurisprudence-on-integration.htm, with direct links to the presented decisions of the European Court of Justice and the national constitutional courts. See also the comprehensive bibliography included in the compendium.

Appendix: Important decisions of the European Court of Justice on the basic concepts, the implementation and the enforcement of Community/Union law

name	year	substance	reference
Van Gend & Loos (case 26/62)	1963	• Community law as an independent (distinct) legal order • direct applicability of primary Community law	[1963] ECR 1
Costa/ENEL (case 6/64)	1964	• primacy of Community law - also over *later* national law	[1964] ECR 585
Internationale Handelsgesellschaft (case 11/70)	1970	• primacy of Community law also over national constitutional law[1]	[1970] ECR 1125
Ratti (case 148/78)	1979	• direct applicability of directives in favour of the citizen after expiration of the implementation period - if the directive is unconditional and sufficiently precise	[1979] ECR 1629
Deutscher Milchkontor (joint cases 205-215/82)	1983	• obligation of member states to implement Community law - application in accordance to national law; this must not, however, affect the scope and effectiveness of Community law	[1983] ECR 2633
Harz (case 79/83)	1984	• national law to be interpreted in the light of the directives	[1984] ECR 1921
Foto-Frost (case 314/85)	1987	• national courts have no jurisdiction to declare community acts invalid	[1987] ECR 4199
vin de table (case C-217/88)	1990	• If necessary, the member states have to take coercive measures to enforce Community law	[1990] ECR I-2879
Factortame (case C-213/89)	1990	• national courts must grant interim relief to enforce Community law (regardless of adverse provisions of national law)	[1990] ECR I-2433
TA-Luft (case C-361/88)	1991	• no implementation of directives through administrative practice or administrative provisions	[1991] ECR I-2567
Francovich[2] (joint cases C-6/90 and 9/90)	1991	• state liability pursuant to Community law for non-implementation of directives[3]	[1991] ECR I-5357
Inter-Environnement Wallonie case C-129/96	1997	• precursory effect of directives: during implementation period member states must refrain from taking measures liable seriously to compromise the result prescribed	[1997] ECR I-7411

(Datei: Course material (Integration-through-Law))

1 Since this judgement and its acceptance by the then member states, the primacy over national constitutional law constitutes a central *component of the acquis communautaire*. Only its limits (the identity of the national constitution) are disputed. All later joining states recognized it in the accession treaties as a legal condition for their membership. Nevertheless, it is challenged in the constit. jurisprudence in Greece, Spain, Poland and Lithuania.

2 Confirmed and developed in ECJ, joint cases C-46/93 and 48/93, Brasserie du Pêcheur/Factortame, [1991] ECR I-5357.

3 Also for incorrect implementation of directives, ECJ, case C-392/93, British Telecommunications, and for violation of directly applicable Union law, ECJ, joint cases C-46/93 and 48/93, Brasserie du Pêcheur/Factortame.