

Integration through Law - the European Approach of Supranational Geo-regional Integration

I. Introduction

1. A changing political world order of states but an unchallenged legal world order of states
 - from the solitary loner state to joint markets, inter- and supranational cooperation and integration
 - the rise of geo-regional and global law and institutions
 - no return to the old ways without major economic and social decline
 - however, no challenge of the 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
2. International cooperation, supranational cooperation and integration
 - 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

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 framework 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

¹ DAAD Lecturer in Law at Universitas Gadjah Mada, Yogyakarta; Außerplanmäßiger Professor (adjunct professor) at the University of Göttingen; www.jura.uni-goettingen.de/schmitz, www.thomas-schmitz-yogyakarta.id; E-Mail: tschmit1@gwdg.de.

- 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)*
 - effectiveness (*effet utile*) dominant criterium in the dealing with Union law
- d) 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 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)
 - 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)

IV. 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*)
 - direct applicability of directives in favour of citizen after expiration of implementation period (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

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

- exclusive jurisdiction of the Union's courts in all matters of Union law (art. 19(1) phrase 2 EU Treaty, 251 et seq. FEU Treaty)
- nevertheless, threat of *ultra vires* review by the German Federal Constitutional Court (Maastricht and Lisbon judgements; Honeywell judgement of 2010, BVerfGE 126, 286) and some other national courts (e.g. Danish Supreme Court, Polish Const. Court)
- decades-long intensive controversial debate but so far no serious case of conflict

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

- not easily conceivable - but is there a realistic alternative for an *effective* integration allowing to master the challenges of the 21st century *efficiently*?

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 staatsrechtlichen 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: 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

Stepkowski, 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.

Integration through Law - the European Approach of Supranational Geo-regional Integration

Important decisions of the European Court of Justice on the basic concepts, the implementation and the enforcement of Community/Union law²

Preliminary remark: Since European Union law is a continental European and not a common law system, there is *no "case-law"* in the proper sense *but only jurisprudence of the European Court of Justice*. The doctrine of precedent (*stare decisis*) does not apply. However, the ECJ often refers to dogmatic statements in previous judgements. Therefore, the practical effect of its jurisprudence can be rather similar.

name	year	substance	reference
Van Gend & Loos (case 26/62)	1963	<ul style="list-style-type: none"> • Community law as an independent (distinct) legal order • direct applicability of primary Community law 	[1963] ECR 1
Costa/ENEL (case 6/64)	1964	<ul style="list-style-type: none"> • primacy of Community law - also over <i>later</i> national law 	[1964] ECR 585
Internationale Handels-gesellschaft (case 11/70)	1970	<ul style="list-style-type: none"> • primacy of Community law also over national constitutional law³ 	[1970] ECR 1125
Ratti (case 148/78)	1979	<ul style="list-style-type: none"> • direct applicability of directives in favour of the citizen⁴ 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	<ul style="list-style-type: none"> • 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 • when recovering unduly paid Community aids, exceptions (with regard to the protection of legitimate expectation etc.) may be applied, but the Community's interests must be "taken fully into account" 	[1983] ECR 2633
Harz (case 79/83)	1984	<ul style="list-style-type: none"> • national law to be interpreted in the light of the directives 	[1984] ECR 1921
Foto-Frost (case 314/85)	1987	<ul style="list-style-type: none"> • national courts have no jurisdiction to declare community acts invalid 	[1987] ECR 4199
vin de table (case C-217/88)	1990	<ul style="list-style-type: none"> • If necessary, the member states have to take coercive measures to enforce Community law 	[1990] ECR I-2879
Factortame (case C-213/89)	1990	<ul style="list-style-type: none"> • national courts must grant interim relief to enforce Community law (regardless of adverse provisions of national law) 	[1990] ECR I-2433
Zuckerfabrik Süderdithmarschen (joint cases C-143/88 a.o.)	1991	<ul style="list-style-type: none"> • interim relief also against the implementation of Community law - restrictive conditions: <ul style="list-style-type: none"> • serious doubts as to the validity of the Community act, • question referred to the ECJ, • applicant threatened with serious and irreparable damage, • due account of the interest of the Community that its acts have full effect 	[1991] ECR I-415

¹ DAAD Lecturer in Law at Universitas Gadjah Mada, Yogyakarta; Außerplanmäßiger Professor (adjunct professor) at the University of Göttingen; www.jura.uni-goettingen.de/schmitz, <http://home.lu.lv/~tschmit1>, www.thomas-schmitz-hanoi.vn; E-Mail: tschmit1@gwdg.de.

² See also the more extensive compilation at <http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/Jurisprudence-on-integration-1.htm> with links to publications of the decisions in the internet.

³ 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.

⁴ No direct application of directives *against* the citizen, cf. ECJ, case 152/84, *Maarshall I*; case C-91/92, *Faccini Dori*.

TA-Luft (case C-361/88)	1991	• strictly no implementation of directives through administrative practice or administrative provisions	[1991] ECR I-2567
Francovich ⁵ (joint cases C-6/90 and 9/90)	1991	• state liability pursuant to Community law for non-implementation of directives ⁶	[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 ⁷	[1997] ECR I-7411

(Date: Integration through law (ICONAS 2019 - additional materials))

⁵ Confirmed and developed in ECJ, joint cases C-46/93 and 48/93, Brasserie du Pêcheur/Factortame, [1991] ECR I-5357.

⁶ 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.

⁷ See also ECJ, case C-422/05, airport noise, [2007] ECR I-4749.