

Political Community and EU Law

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The False Trilemma

- Full application of EU law necessary for operation and credibility of Union
- Balance of Competences central to securing authority of Union both across the Union and within Member States
- Public opinion about the Union driven by variety of narratives which include elite cues, politics of memory, accountability of government and grid/group relations within domestic societies

Disruptions to the Trilemma

- Salient case studies which do not touch on any aspects of the trilemma, *Vnuk v Triglav*
- Comparisons which cut across the logic of the trilemma, *Bear Scotland v Fulton/Budget Surcharge Row*
- Longitudinal questions
 - Judicial resistance to EU law emerged since 2004 (Germ, UK, Cz, Pol, Malta, Rom, Est, Lv, Port, Greece, Hung, Cyp, France)
 - EU does very things from 20 years ago. Does this change basis on which citizens express preferences?

Hypothesis of this Lecture I

- Debates about EU activities take place against institutional context and legacy which shape assumptions and views on EU
- Institutional context/legacy quite strongly shared but set out narrative both about what EU should do/does and national settlement should do/does
- EU less articulated narrative but central relationship is that must not transgress domestic narrative of political community which sets out political theology of member States

Hypothesis of this Lecture II

- Domestic narratives of political community mediated by national executives and judges for most of EU history but principle of non-transgression threatened to break down in 1990s and did break down around 2000
- More opportunistic and less institutionalised narratives became attached to EU law after 2000 and the Union settlement becoming more vulnerable to these
- Important to re-institutionalise political community and provide new institutional setting for containing conflicts

Political Community

System of rule which orders and describes a way of life in a particular place across a particular period of time (*what we are*)

Values, narratives and activities which symbolise and seek to realise

- **Enclosure:** appropriation, distribution, civilisation
- **Human association:** Intersection between communities of co-presence and communities of shared activity (*who we are*)

EU law's Challenge to Political Communities

EU law challenges political community
when destabilises institutional ordering and
description of order (rule)

... and

Carries out activities which destabilise
understandings of co-presence (human
association)

Sovereignty and Political Community

- Vehicle for identifying political community as rule and community is **sovereignty**.
- **Foundation of political system:** potestas/auctoritas; Kompetenz-Kompetenz
- **Subjecthood:** Right to let live; Establishment of subjects
- **Body Politic (people , territory and political system considered as single body):**
 - Organological (society, crime, tax)
 - dignity (office, territory)
 - eternal (fundamental rights, citizenship, religion)
 - lived experience (culture, tradition, family, education)

History of EU legal Authority and Political Community

- Enclosure (-1950-ish)
- Notional European Rule (1950-1970)
- Splitting (1970-1993)
- Ring-fencing Political Community (1993-2004)
- Persistent Disobedience (2004 - ...)
- Relative Democratic Authority? (2016 - ...☺)

Enclosure and the Questioning of Domestic Political Community (1900-1945)

- Scepticism about international treaties marked by strong monism, divisions about their authority and about international jurisdiction
- Idea of international coordination and limitation predominantly an academic concern (Kelsen, Duguit)
- Political community most legally challenged by private international law which split off certain doctrines (ie vested rights, nationality) as not challenging territoriality

Notional European Rule (1945-1970)

- National constitutional amendments grant power to international law over national law or allow for transfer of powers of government to international organisation (Lux, Fr, Italy, Germany, NL)
- *Van Gend en Loos* (1963) and *Costa* (1964) claim power of rule for EU law
- Transitional period up until 1970 made this largely a notional question with EU case law ignored or contested by national courts
- BUT paves way for indeterminate contestation of political community

Splitting between 1970 and 1993

EU law seen as confined and no troubling central elements of political community

Foundation

- All national courts saw EU law as only authorised law

Subjection

- Restricted direct obligations on individuals (ie debate on Directives in Fr, Germ, NL)
- Limited material scope of direct rule Only 55 reported EU decisions in UK in 1992: 26 on Sixth VAT Directive; 10 on sex discrimination law; 4 on agricultural and labour law.
- Mediated negotiation of most EU obligations, 30/1322 cases started by Commission in 1990-2 won before Court. Average of 18 month delay before compliance with judgment

Body Politic

- Limited direct government Only 55 reported EU decisions in UK in 1992: 26 on Sixth VAT Directive; 10 on sex discrimination law; 4 on agricultural and labour law.
- Strong early decisions by French, German & Italian constitutional courts that EU law not to affect political community. Continued decisions on immigration policy by British and French courts and foreign policy by Irish courts

I Ring-fencing of Political Community 1993-2000: Continuation of Confined Rule

Subjection

- EU obligations on individuals mediated by national law except where criminal liability

Confined Intrusion on Body Politic

- Continued limited material scope of direct rule: 147 judgments in 1998 (five fields, free movement of persons, environment, intellectual property, harmonisation of laws, competition involve 4+ cases)
- 263 references of which ten fields account for 235 references (taxation and economic freedoms 137 references)
- Albeit note 1994 Belgian Cour 'd Arbitrage ruling on education

II Ring-fencing of Political Community: Protection from Impending Encroachment

- Euro, citizenship and afsj encroach on political community
- **Denmark:** complete protection of us by EU Institutions
- **France:** encroach on political community and require constitutional amendment
- **Germany:** democratic splitting. Stable currency basis for democratic community so many encroach but not problematic

Disorganised Protection of Political Community (2003 ...)

- Impending developments which enacted but not fully in force during 1990s now come in to force (euro, citizenship, area of freedom, security and justice) and acceding States have to consider State of play
- Laws strongly expressing features of body politic to be protected from EU law
 - Collective and indivisible order : health, pensions, fiscal, budgetary, criminal (Germany, Czech, Portugal, Greece, Italy, Poland, Czech, UK, Estonia, Norway(?))
 - Eternal and secular: citizenship, fundamental rights immigration, asylum (Poland, Cyprus, Greece, Germany, Czech(?), Latvia, Hungary, Czech, Malta)
 - Unique and acclaimed: foreign policy, defence, external frontiers, public office (Germany, UK, Ireland)
 - Common lived experience: education, religion, family, charity (Germany, Ireland. Poland)

Political Community and Challenges of EU law

- **Estrangement:** Quality of endeavoured imaginary, autonomy, kinship, fundamental rights, justice, representation offered by EU law
- **Dislocation:** Exaggeration of displacement lead to over-defensive or malignant representations of domestic political community

Relative Democratic Authority

Democratic Authority: 2/3 of national parliaments approve any EU law against test of whether democratic authority

Democratic Responsiveness:

- Proposal for revision if 1/3 of national parliaments request
- National parliament can ask for suspension of EU law
- National constitutional council can receive citizens initiative to consider whether estranging qualities sufficient to justification disapplication

Democratic Situating: National Disapplication must be sent to COSAC to consider whether effects on unrepresented have been considered and minimised sufficiently. Sent to European Council for resolution or counter-measures if not.