

US and European constitutional law from a comparative perspective (cases) (Sommermann) – Seminar

Term May-June 2017

Overview

The seminar “US and European Constitutional Law from a Comparative Perspective” aims at identifying and analyzing structural differences and similarities in the constitutional law of the US on the one hand and of Germany and select other European states on the other hand. It will examine to which extent constitutional arguments or patterns of argumentation are transferable from one system to the other. Special regard will be paid to select fundamental rights such as freedom of speech or freedom of religion.

The sessions will cover:

- Introduction to US and European Constitutionalism
- General principles of Constitutional Comparativism
- Comparison of fundamental rights in the US and in Europe
- Analysis of select case law

Each session is composed of at least two student presentations which will be the basis for the following plenary discussion. For a more sensitized understanding and a broader knowledge about the constitutional traditions of the respective countries, it is intended to change roles and perspectives: US students will be asked to represent the European position, German students, in contrast, will take the US view.

This method is meant to reveal differences in the legal cultures of both continents and to review commonly used argumentation patterns in the US as well as in the European constitutional tradition.

Session 1: Introduction to US and European Constitutionalism

Objectives: Introduction to general principles of US and European Constitutionalism and identification of common constitutional concepts.

1. US Constitutionalism

Required reading:

Tushnet, Mark: An overview of the history of the US Constitution, in: M. Tushnet, The Constitution of the United States of America. A contextual analysis, Oxford: Hart Publishing, 2008, pp. 9-41.

Recommended reading:

Tushnet, Mark: Constitution, in: M. Rosenfeld /A. Sajó (ed.), Comparative Constitutional Law, Oxford: Oxford University Press, 2012, pp. 217-232.

Griffin, Stephen M.: American Constitutionalism, New Jersey: Princeton University Press 1998;

Balkin, Jack: Living Originalism, Cambridge/MA: Harvard University Press 2011.

2. European Constitutionalism

Required reading:

Grimm, Dieter: The Basic Law at 60 – Identity and Change, in: German Law Journal, 2010, Vol. 11, No. 1, pp. 33-46.

Recommended reading:

Nolte, Georg (ed.): European and US Constitutionalism, Strasbourg: Council of Europe 2005;

Starck, Christian (ed.): Constitutionalism, Universalism and Democracy - A Comparative Analysis, Baden-Baden: Nomos 1999.

Salvadori, Massimo (ed.): European Liberalism, New York: Wiley 1972 (Chapter I: European Liberalism: An introduction, pp. 1-24).

3. The European systems for the protection of human rights

Required reading:

Bond, Martin: The Council of Europe and Human Rights, Strasbourg: Council of Europe 2010 (pp. 62-67).

Recommended reading:

Kaczorowska, Alina: European Union Law, second edition, Oxon: Routledge 2011, Chapter 9, Protection of Human Rights in the EU (pp. 241-248);

Leach, Philip: Taking a case to the European Court of Human Rights, third edition, New York: Oxford University Press 2011, Chapter 5, Underlying Convention Principles (pp. 59-64);

Tomuschat, Christian: Human Rights between Idealism and Realism, third edition, New York: Oxford University Press 2014. Chapter 14, Supervision by International Tribunals, Europe (pp. 286-302).

Session 2: Federalism

Objectives: Reflection on the origins and the conceptualization of federalism; identification of centralizing and decentralizing forces and strategies; comparison between the guiding principles of US, German and British federalism.

4. US perspective

Required reading

United States Supreme Court, Judgement of June 27, 1997, Printz v. United States, 521 U.S. 898 – Authority of the Congress for enacting the Handgun Violence Prevention Act 1993;

United States Supreme Court, Judgment of April 19, 2016, Hughes, Chairman, Maryland Public Service Commission, et al. v. Talen Energy Marketing, LLC, FKA PPL Energyplus, LLC, et al., 578 U.S.__(2016) – Pre-emption of Maryland’s regulatory plan for energy prices through federal regulation.

Recommended reading:

United States Supreme Court, Judgement of May 15, 2000, United States v. Morrison, 529 U.S. 598 - Federal civil remedy for the victims of gender-motivated violence;

United States Supreme Court, Judgement of June 28, 2012, National Federation of Independent Business v. Sebelius, 567 U.S. __ (2012) – Obamacare (Social policy as a matter of competences?).

5. European perspectiveRequired reading

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of February 28, 1961, BVerfGE 12, pp. 205 et seq. - Television Case (English translation and summary taken from Bröhmer/Hill (eds.), 60 Years German Basic Law: The German Constitution and its Court. Landmark Decision of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, Berlin/Ampang: Konrad Adenauer Stiftung, 2010, pp. 423-451).

Recommended reading:

UK Supreme Court, Judgement of July 9, 2014, Agricultural Sector (Wales) Bill, [2014] UKSC 43;

Dorsen, Norman/Rosenfeld, Michel/Sajó, Andrés/Baer, Susanne: Comparative Constitutionalism, St. Paul: West Group, 2003, pp. 350-372.

Session 3: Democracy and Freedom of speech

Objectives: Comparison of conceptual approaches towards democracy; analysis of supranational implications; comparison of the US and the European perspective on aspects of the freedom of speech; taking a closer look at ground-breaking case-law of EU and US constitutional jurisprudence.

6. US perspectiveRequired reading:*Democracy*

United States Supreme Court, Judgement of April 5, 1982, Brown v. Hartlage, 456 U.S. 45 - Commitment to lowering county commissioners' salaries if elected.

United States Supreme Court, Judgment of June 27, 2016, McDonnell v. United States, 579 U.S. __ (2016). Sentence for a Governor of a State for accepting gifts from a businessman in exchange of facilitating access to public officials of interest for him.

Freedom of Speech

United States Supreme Court, Judgement of March 9, 1964, New York Times v. Sullivan, 376 U.S. 254 – Chilling effect of liability in case of criticism of government and public officials based on erroneous or false statements (required).

Recommended reading:*Democracy*

United States Supreme Court, Judgement of June 25, 2013, *Shelby County v. Holder*, 570 U.S. ... - Requirement (only for selected States) to obtain federal permission before enacting any law related to voting;

United States Supreme Court, Judgment of April 4, 2016, *Evenwel et al. v. Abbott, Governor of Texas, et al.*, 578 U.S. (2016) - Constitutional rule of districting based on total population and not on voter population.

Freedom of Speech

United States Supreme Court, Judgement of June 22, 1992, *R.A.V. v. City of St. Paul*, 505 U.S. 377 – Municipal ordinance against hate speech;

United States Supreme Court, Judgement of June, 26, 2014, *McCullen et al. v. Coakley*, 573 U.S. ... - Buffer zones at abortion clinics.

7. European perspective

Required reading:

Democracy

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of June 30, 2009, BVerfGE 123, pp. 267 et seq. (Lisbon Treaty) (English translation).

Freedom of Speech

European Court of Human Rights, Judgement of June 24, 2004, *Caroline von Hannover v. Germany* – Freedom of press vs. right to privacy;

European Court of Human Rights (Grand Chamber), Judgement of June 16, 2015, *Delfi AS v. Estonia* – Liability of the managers of an internet portal for allowing hate-inciting comments on their website;

European Court of Human Rights (Grand Chamber), Judgement of October 15, 2015, *Perincek v. Switzerland* – Conviction for denial of Armenian genocide.

Recommended reading

Democracy

European Court of Human Rights (Grand Chamber), Judgement of February 18, 1999, *Matthews v. The United Kingdom* – Right of the citizens of Gibraltar to take part in the elections to the European Parliament.

Freedom of Speech

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of January 15, 1958, BVerfGE 7, pp.198 et seq. (Lüth Case) – Fundamental rights as an order of values (English translation and summary taken from Donald P. Kommers: *The Constitutional Jurisprudence of the Federal Republic of Germany*, second edition, Durham and London: Duke University Press, 1997, pp. 360-369);

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of May 24, 2005, BVerfGE 113, pp. 63 et seq. - Report of the Office for the Protection of the Constitution of a Land referring to a suspicion that a press publishing house has shown tendencies hostile to the constitution (English translation).

Session 4: Freedom of religion

Objectives: Comparison of the US and the European perspective on aspects of the freedom of religion. Special attention will be paid to possible conflicts between particular religious convictions or practices on the one hand and diverging basic constitutional and societal values on the other hand.

8. US perspective

Required reading:

United States Supreme Court, Judgement of June 24, 1992, Lee v. Weisman, 505 U.S. 577 – Prayers at graduation ceremonies (required).

Recommended reading:

United States Supreme Court, Judgement of June 16, 1977, Trans World Airlines, inc. v. Hardison, 432 U.S. 63 – accommodation of religious needs of employees unless unreasonable for employer (religious belief prohibiting working on Saturdays –Sabbath);

United States Supreme Court, Judgement of May 5, 2014, Town of Greece v. Galloway – Prayers in town board meetings.

9. European perspective

Required reading:

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of October 16, 1979, BVerfGE 52, pp. 223 et seq. (School Prayer Case) (English translation and summary taken from Bröhmer/Hill (eds.), 60 Years German Basic Law: The German Constitution and its Court. Landmark Decision of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, Berlin/Ampang: Konrad Adenauer Stiftung 2010, pp. 287-300);

European Court of Human Rights (Grand Chamber), Judgement of July 1, 2014, S.A.S. v. France – Ban on wearing burqa or niqab in public places.

Recommended reading:

European Court of Human Rights (Grand Chamber), Judgement of November 10, 2005, Sahin v. Turkey - Regulations on wearing the Islamic headscarf in institutions of higher education;

European Court of Human Rights (Grand Chamber), Judgement of March 18, 2011, Lautsi v. Italy – Classroom Crucifix;

European Court of Human Rights, Judgement of January 15, 2013, Eweida and others v. The United Kingdom – Protection against employers prohibiting the wearing of religious symbols;

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of May 16, 1995, BVerfGE 93, pp. 1 et seq. - Classroom Crucifix English translation and summary taken from Bröhmer/Hill (eds.), 60 Years German Basic Law: The German Constitution and its Court. Landmark Decision of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, Berlin/Ampang: Konrad Adenauer Stiftung 2010, pp. 301-317);

UK Supreme Court, Judgement of November 27, 2013, *Bull and another*, (2013) UKSC 73 – Behaviour of Christian hotel keeper towards homosexual couples.

Session 5: The challenge of Secession or Withdrawal from a Union of States

Objectives: Identifying different degrees of integration of States, taking the US and the EU as reference; examination of the prerequisites for a secession or a withdrawal respectively; reflecting on the consequences of a secession, withdrawal or dissolution of a Union.

10. US perspective

Required reading

United States Supreme Court, Judgement of April 12, 1869, *Texas v. White*, 74 U.S. 700 (1869) – indissoluble relation of the United States.

Recommended reading

Mancini, Susanna: *Secession and Self-Determination*, in: M. Rosenfeld /A. Sajó (ed.), *Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, pp. 481-500.

11. European perspective

Required reading

The High Court of Justice, Queen’s Bench Division, Divisional Court, Judgement of November 3, 2016, *R. (Miller) v. Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin) – “Brexit” and the role of Parliament;

UK Supreme Court, Judgement of January 24, 2017, *R. (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5.

Recommended reading

Feldman, David: ‘Brexit, the Royal Prerogative, and Parliamentary Sovereignty’ UK Const. L. Blog (8th Nov 2016) (available at <http://ukconstitutionallaw.org>);

Gordon, Richard/ Moffatt, Rowena: *Brexit: The Immediate Legal Consequences*, London: The Constitution Society, 2016 (available at <https://www.consoc.org.uk/wp-content/uploads/2016/05/Brexit-PDF.pdf>).

Bibliography

Balkin, Jack M./Siegel, Reva B (ed.): *The Constitution in 2020*, Oxford/New York: Oxford University Press, 2009;

Balkin, Jack M.: *Living Originalism*, Cambridge/MA: Harvard University Press 2011;

- Bogdandy, Armin von/Bast, Jürgen* (eds.): Principles of European constitutional law, 2nd ed., Oxford: Hart Publishing, 2010;
- Bond, Martin*: The Council of Europe and Human Rights, Strasbourg: Council of Europe 2010;
- Bröhmer, Jürgen/Hill, Clauspeter* (Eds.): 60 Years German Basic Law: The German Constitution and its Court, Berlin/Ampang: Konrad-Adenauer-Stiftung 2010;
- Dorsen, Norman/Rosenfeld, Michel/Sajó, Andrés/Baer, Susanne*: Comparative Constitutionalism, St. Paul: West Group, 2003;
- Feldman, David*: 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' UK Const. L. Blog (8th Nov 2016) (available at <http://ukconstitutionallaw.org>);
- Greer, Stevan*: The European Convention on Human Rights, 1st ed., Cambridge: Cambridge University Press, 2006;
- Griffin, Stephen M.*: American Constitutionalism, New Jersey: Princeton University Press, 1998;
- Grimm, Dieter*: The Basic Law at 60 – Identity and Change, in: German Law Journal, 2010, Vol. 11, No. 1, pp. 33-46;
- Gordon, Richard/ Moffatt, Rowena*: Brexit: The Immediate Legal Consequences, London: The Constitution Society, 2016 (available at <https://www.consoc.org.uk/wp-content/uploads/2016/05/Brexit-PDF.pdf>).
- Hall, Kermit L.* (ed.): The Oxford Guide to United States Supreme Court Decisions, 2nd ed., Oxford/New York: Oxford University Press, 2009;
- Heun, Werner*: The Constitution of Germany. A Contextual Analysis, Oxford/Portland (Or.): Hart Publishing, 2011;
- Kaczorowska, Alina*: European Union Law, second edition, Oxon: Routledge 2011;
- Kommers, Donald P.*: The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd ed., Durham/London: Duke University Press 1997;
- Leach, Philip*: Taking a case to the European Court of Human Rights, third edition, New York: Oxford University Press 2011;
- Mancini, Susanna*: Secession and Self-Determination, in: M. Rosenfeld /A. Sajó (ed.), Comparative Constitutional Law, Oxford: Oxford University Press, 2012, pp. 481-500;
- Nolte, Georg* (ed.): European and US Constitutionalism, Cambridge: Cambridge University Press, 2005;
- Riedel, Eibe* (ed.): Constitutionalism - Old Concepts, New Worlds, Berlin: Berliner Wiss.-Verlag, 2005;
- Rossum, Ralph A./Tarr, George Alan*: American constitutional law, 2 vol., 8th ed., Boulder: Westview, 2010;
- Salvadori, Massimo* (ed.): European Liberalism, New York: Wiley 1972 (Chapter I: European Liberalism: An introduction, pp. 1-24);
- Starck, Christian* (ed.): Constitutionalism, Universalism and Democracy - a comparative analysis, Baden-Baden: Nomos, 1999;

- Starck, Christian* (ed.): *Studies in German Constitutionalism*, Baden-Baden: Nomos, 1995;
- Strauss, David A.*: *The Living Constitution*, Oxford: Oxford University Press, 2010;
- Tomuschat, Christian*: *Human Rights between Idealism and Realism*, third edition, New York: Oxford University Press 2014;
- Tribe, Laurence H.*: *American constitutional law*, 3rd ed., Mineola (NY): Foundation, 2000;
- Tushnet, Mark*: *The Constitution of the United States of America. A contextual analysis*, Oxford: Hart Publishing, 2008, pp. 9-41;
- Tushnet, Mark*: *Constitution*, in: M. Rosenfeld /A. Sajó (ed.), *Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, pp. 217-232;
- White, Robin C. A./Ovey, Clare*: *The European Convention on Human Rights*, 5th ed., Oxford: Oxford University Press 2010.

Relevant case-law

- European Court of Human Rights (Grand Chamber), Judgement of February 18, 1999, Matthews v. The United Kingdom;*
- European Court of Human Rights, Judgement of June 24, 2004, Caroline von Hannover v. Germany;*
- European Court of Human Rights (Grand Chamber), Judgement of November 10, 2005, Sahin v. Turkey;*
- European Court of Human Rights (Grand Chamber), Judgement of March 18, 2011, Lautsi v. Italy;*
- European Court of Human Rights, Judgement of January 15, 2013, Eweida and others v. The United Kingdom;*
- European Court of Human Rights (Grand Chamber), Judgement of July 1, 2014, S.A.S. v. France;*
- European Court of Human Rights (Grand Chamber), Judgement of June 16, 2015, Delfi AS v. Estonia;*
- European Court of Human Rights (Grand Chamber), Judgement of October 15, 2015, Perincek v. Switzerland.*
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- Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of January 15, 1958, BVerfGE 7, pp.198 et seq. (Lüth Case);*
- Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of February 28, 1961, BVerfGE 12, pp. 205 et seq. (Television Case);*
- Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of October 16, 1979, BVerfGE 52, pp. 223 et seq., (School Prayer Case);*
- Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of May 16, 1995, BVerfGE 93, pp. 1 et seq. (Classroom Crucifix Case);*

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of May 24, 2005, BVerfGE 113, pp. 63 et seq. (Report of the Office for the Protection of the Constitution of a Land);

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of June 30, 2009, BVerfGE 123, pp. 267 et seq. (Lisbon Treaty);

United Kingdom Supreme Court, Judgement of November 27, 2013, Bull and another, [2013] UKSC 73;

United Kingdom Supreme Court, Judgement of July 9, 2014, Agricultural Sector (Wales) Bill, [2014] UKSC 43;

UK Supreme Court, Judgement of January 24, 2017, R. (Miller) v. Secretary of State for Exiting the European Union, [2017] UKSC 5;

The High Court of Justice, Queen's Bench Divion, Divisional Court, Judgement of November 3, 2016, R. (Miller) v. Secretary of State for Exiting the European Union [2016], EWHC 2768 (Admin).

United States Supreme Court, Judgement of April 12, 1869, Texas v. White, 74 U.S. 700 (1869);

United States Supreme Court, Judgement of March 9, 1964, New York Times v. Sullivan, 376 U.S. 254;

United States Supreme Court, Judgement of June 16, 1977, Trans World Airlines, inc. v. Hardison, 432 U.S. 63;

United States Supreme Court, Judgement of April 5, 1982, Brown v. Hartlage, 456 U.S. 45;

United States Supreme Court, Judgement of June 22, 1992, R.A.V. v. City of St. Paul, 505 U.S. 377;

United States Supreme Court, Judgement of June 24, 1992, Lee v. Weisman, 505 U.S. 577;

United States Supreme Court, Judgement of June 27, 1997, Printz v. United States, 521 U.S. 898;

United States Supreme Court, Judgement of May 15, 2000, United States v. Morrison, 529 U.S. 598;

United States Supreme Court, Judgement of June 28, 2012, National Federation of Independent Business v. Sebelius, 567 U.S. __ (2012);

United States Supreme Court, Judgement of June 25, 2013, Shelby County v. Holder, 570 U.S. __ (2013);

United States Supreme Court, Judgement of May 5, 2014, Town of Greece v. Galloway, 572 U.S. __ (2014);

United States Supreme Court, Judgement of June, 26, 2014, McCullen et al. v. Coakley, 573 U.S. __ (2014);

United States Supreme Court, Judgment of April 4, 2016, Evenwel et al. v. Abbott, Governor of Texas, et al., 578 U.S. __ (2016).

United States Supreme Court, Judgment of April 19, 2016, Hughes, Chairman, Maryland Public Service Commission, et al. v. Talen Energy Marketing, LLC, FKA PPL Energyplus, LLC, et al., 578 U.S._(2016);

United States Supreme Court, Judgment of June 27, 2016, McDonnell v. United States, 579 U.S._ (2016);