

US and European Constitutional Law from a Comparative Perspective (cases) (Sommermann) – Seminar

Term May-June 2019

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 religion or freedom from discrimination.

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, US students are invited to choose European topics and German students to present on American topics.

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.

Seminar papers

All papers must be submitted by July 1 and at the latest by July 4.

Students are expected to take one of the cases or texts in the list below as a departure point for their presentations and their seminar papers. In the oral presentations, it is important to explain clearly the facts of the case, the legal questions, the reasoning followed by the courts and the ruling. For seminar papers, students are expected to write also about the context of the decision. They can, for instance, refer to and examine related case law on the same or similar issues. Detailing the political, social or economic context in which the legal dispute emerged is another possibility. For example, if the case is about an Act that was declared unconstitutional, the student may write about the political and social debate preceding the approval of the Act. Another possibility is to look at the political, social or economic consequences in the aftermath of the decision, or at its impact on subsequent case law. A seminar paper can take the core question of the court case and study that question more in general. For example, a student with a case on affirmative action as part of the admission

policies of a particular University may, after having covered the particular case, write about affirmative action in the United States in general.

Session 1: Introduction to US and European Constitutionalism

May 28 2019

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

1. Introduction by the course Instructor

2. 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*, 2nd edition, Oxford: Hart Publishing, 2015, pp. 9-41.

Recommended reading

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

Griffin, Stephen M.: *American Constitutionalism*, New Jersey: Princeton University Press 1996, pp. 9-58;

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

3. German and European Constitutionalism

Required reading

Bogdandy, Armin von: *Constitutional Principles for Europe*, in: E. Riedel/R. Wolfrum (ed.), *Recent trends in German and European Constitutional Law. German Reports Presented to the XVIIth International Congress on Comparative Law (Utrecht, 16 to 22 July 2006)*, Berlin, Heidelberg, New York: Springer, 2006, pp. 1-35;

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

Recommended reading

Heun, Werner: *The Constitution of Germany. A Contextual Analysis*, Oxford/Portland (Or.): Hart Publishing, 2011, pp. 25-48;

Nolte, Georg: *Introduction – European and U.S: Constitutionalism: Comparing Essential Elements*, in: G. Nolte (ed.), *European and US Constitutionalism*, Strasbourg: Council of Europe 2005, pp. 9-24.

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

Starck, Christian: The Legitimacy of Constitutional Adjudication and Democracy, in: C. Starck (ed.), *Constitutionalism, Universalism and Democracy – a comparative analysis*, Baden-Baden: Nomos 1999, pp. 13-23.

Session 2: Democracy

May 28 2019

Objectives: Comparison of conceptual approaches towards democracy with a special focus on the dichotomy direct democracy-representative democracy; study of jurisprudence on particular democratic principles; role of freedom of speech in democracies.

4. Representative democracy and direct democracy

Required reading

Sommermann, Karl-Peter: Citizen Participation in Multi-Level Democracies: An Introduction, in: Fraenkel-Haeberle, C./Kropp, S./Palermo, F./Sommermann, K.-P. (ed.), *Citizen Participation in Multi-Level Democracies*, Leiden: Brill/Nijhoff, 2015, pp. 1-12;

Van Vechten, Renée B.: *California Politics. A Primer*, fifth edition, Thousand Oaks: CQ Press, 2019, Chapter 3: Direct Democracy, pp. 25-41.

Recommended reading

Bowler, Shaun/Donovan, Todd: Direct Democracy in the United States, in: Leighley, J.E. (ed.), *The Oxford Handbook of American Elections and Political Behavior*, New York: Oxford University Press, 2010, pp. 531-554;

Gabriel, Oscar W.: Direct and Representative Democracy: The perspective of German citizens, in: Fraenkel-Haeberle, C./Kropp, S./Palermo, F./Sommermann, K.-P. (ed.), *Citizen Participation in Multi-Level Democracies*, Leiden: Brill/Nijhoff, 2015, pp. 85-113.

5. Democratic principles: cases

Required reading

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

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of February 26, 2014, - 2 BvE 2/13 - Unconstitutionality of three-percent electoral threshold in the elections to the European Parliament (English translation);

European Court of Human Rights (Grand Chamber), Judgement of October 6, 2005, *Hirst v. The United Kingdom (N° 2)* – Blanket ban on convicted prisoners from voting in elections.

Recommended reading

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

United States Supreme Court, Judgement 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;

United States Supreme Court, Judgement of June 14, 2018, Minnesota Voters Alliance et al. v. Mansky et al., 585 U.S.__(2018) – Ban on political apparel inside polling places on election day;

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of March 3, 2009, 2 BvC 3/07 – Use of voting computers in 2005 Bundestag election unconstitutional (English translation);

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;

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, Decision of June 13, 2017, Moohan and Gillon v. the United Kingdom – Exclusion of convicted prisoners from voting in the Scottish independence referendum of 2014.

Session 3: Freedom of Religion

May 29 2019

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.

6. US perspective

Required reading

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

United States Supreme Court, Judgement of June 4, 2018, Masterpiece Cakeshop Ltd. et al. v. Colorado Civil Rights Commission et al., 584 U.S. __ (2018) – Dismissive treatment by the Civil Rights Commission of the religious views of a baker who refused to bake a wedding cake for a homosexual couple.

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;

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

United States Supreme Court, Judgement of June 26, 2017, *Trinity Lutheran Church of Columbia, inc. v. Comer, Director, Missouri Department of Natural Resources*, 582 U.S.__(2017) – Exclusion of a welfare activity of the Lutheran Church from state funding.

7. 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 Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, Berlin/Ampang: Konrad Adenauer Stiftung 2010, pp. 287-300);

Federal Constitutional Court of the Republic of Germany (BVerfG), Order of January 27, 2015, BVerfGE 138, pp. 296 et seq. (ban on headscarf for school teachers) (English translation);

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;

European Court of Human Rights, Judgment of December 5, 2017, *Hamidović v. Bosnia and Herzegovina* – Expulsion from courtroom for wearing a skullcap.

Recommended reading

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 Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, Berlin/Ampang: Konrad Adenauer Stiftung 2010, pp. 301-317);

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/Refusal by a civil servant to officiate civil partnership ceremonies for homosexual couples.

Session 4: Freedom from Discrimination

June 4 2019

Objectives: Examination of relevant case law in the United States and in Europe (both from the European Court of Human Rights and from national supreme and constitutional courts) concerning the right to freedom from discrimination and its application to historically discriminated minorities.

8. US perspective

Required reading

United States Supreme Court, Judgement of June 23, 2003, 536 U.S. 306 (2003), Grutter v. Bollinger et al. – Affirmative action measures in the admission policy of the University of Michigan Law School;

United States District Court for the District of Columbia, Memorandum Opinion of October 30, 2017, Doe v. Trump – Injunction against the prohibition for transgender persons to serve in the U.S. Army.

United States Court of Appeals for the District of Columbia Circuit, Judgement of January 4, 2019, Jane Doe 2, et al., v. Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense, et al. - Judgement vacating the injunction of the District Court for the District of Columbia of 30 October, 2017.

Recommended reading

United States Supreme Court, Judgement of March 8, 1971, Griggs v. Duke Power Co., 401 U.S. 424. – Discrimination in employment: need to provide justification for indirectly discriminatory measures;

United States Supreme Court, Judgement of June 23, 2016, Fisher v. University of Texas at Austin et al., 579 U.S.__(2015) – Affirmative action as part of the University of Texas' admission scheme.

9. European perspective

Required reading

Federal Constitutional Court of the Republic of Germany (BVerfG), Order of October 10, 2017, -1 BvR -2019/16 – Legislator needs to provide a third option for registration for persons not identifying themselves as male or female (English translation);

European Court of Human Rights, Judgement of April 6, 2017, A.P., Garçon and Nicot v. France – Legal requirements for rectification of civil status for transgender persons.

Recommended reading

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

European Court of Human Rights (Grand Chamber), Judgement of December 22, 2009, Sejdić and Finci v. Bosnia and Herzegovina – Prohibition imposed on a Rom and a Jew to run for Presidency and Parliament.

Session 5: Migration and Asylum

June 11 2019

Objectives: Examination of relevant case law in the United States and in Europe concerning entry and treatment of aliens, especially the access of refugees to protection procedures and to social services.

10. U.S. perspective

Required reading

United States Supreme Court, Judgement of June 26, 2018, Trump, President of the United States, et al. v. Hawaii et al., 585 U.S.__(2018) – Entry ban on citizens from certain countries;

United States District Court for the Northern District of California, Order granting preliminary injunction of December 19, 2018, East Bay Sanctuary Covenant et al. v. Donald J. Trump et al. – Injunction against policy which makes ineligible for asylum anyone not crossing the southern border of the United States by designated ports of entry.

Recommended reading

United States Supreme Court, Judgement of February 27, 2018, Jennings et al. v. Rodriguez et al., individually and on behalf of all others similarly situated, 583 U.S.__(2018) – Right to a bond hearing while in immigration detention.

11. European perspective

Required reading

European Court of Human Rights (Grand Chamber), Judgement of February 23, 2012, Hirsi Jamaa and Others v. Italy – Push-backs of migrants on high sea by the Italian coastguard;

European Court of Human Rights, Judgement of December 11, 2018, M.A. and Others v. Lithuania – Chechen refugees prevented from filing asylum applications in Lithuania and pushed back at the border with Belarus.

Recommended reading

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of July 18, 2012, - 1 BvL 10/10 – Unconstitutionality of provisions of the Asylum Seekers Benefits Act governing basic cash benefits (English translation);

Court of Justice of the European Union, Judgement of December 21, 2011, N.S. v. Secretary of State for the Home Department (C-411/10) and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (C-493/10) – Prohibition to transfer asylum seekers under the Dublin Regulation to Greece owing to systemic deficiencies in the Greek asylum system;

Court of Justice of the European Union, Judgement of September 27, 2012, Cimade and GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, C-179/11 – Obligation to provide reception conditions to asylum seekers subjected to transfer to other EU Member State under the Dublin Regulation.

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*: *Constitutional Principles for Europe*, in: E. Riedel/R. Wolfrum (ed.), *Recent trends in German and European Constitutional Law. German Reports Presented to the XVIIth International Congress on Comparative Law (Utrecht, 16 to 22 July 2006)*, Berlin, Heidelberg, New York: Springer, 2006, pp. 1-35;
- Bogdandy, Armin von/Bast, Jürgen* (eds.): *Principles of European constitutional law*, 2nd ed., Oxford: Hart Publishing, 2010;
- Bowler, Shaun/Donovan, Todd*: *Direct Democracy in the United States*, in: Leighley, J.E. (ed.), *The Oxford Handbook of American Elections and Political Behavior*, New York: Oxford University Press, 2010, pp. 531-554;
- Bröhmer, Jürgen/Hill, Clauspeter* (Eds.): *60 Years German Basic Law: The German Constitution and its Court*, Berlin/Ampang: Konrad-Adenauer-Stiftung 2010;
- Bumke, Christian/Voßkuhle, Andreas*: *German Constitutional Law. Introduction, Cases and Principles*, Oxford 2019.
- Dorsen, Norman/Rosenfeld, Michel/Sajó, Andrés/Baer, Susanne/Mancini, Susanna*: *Comparative Constitutionalism*, third edition, St. Paul: West Group, 2016;
- Gabriel, Oscar W.*: *Direct and Representative Democracy: The perspective of German citizens*, in: Fraenkel-Haeberle, C./Kropp, S./Palermo, F./Sommermann, K.-P. (ed.), *Citizen Participation in Multi-Level Democracies*, Leiden: Brill/Nijhoff, 2015, pp. 85-113.
- Griffin, Stephen M.*: *American Constitutionalism*, New Jersey: Princeton University Press, 1996;
- Grimm, Dieter*: *The Basic Law at 60 – Identity and Change*, in: *German Law Journal*, 2010, Vol. 11, No. 1, pp. 33-46;
- 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;
- Kommers, Donald P./Miller, Russell A.*: *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed., Durham/London: Duke University Press 2012;

- 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 A.:* American constitutional law, 2 vol., tenth ed., Boulder: Westview, 2017;
- Salvadori, Massimo (ed.):* European Liberalism, New York: Wiley 1972 (Chapter I: European Liberalism: An introduction, pp. 1-24);
- Sommermann, Karl-Peter:* Citizen Participation in Multi-Level Democracies: An Introduction, in: Fraenkel-Haeberle, C./Kropp, S./Palermo, F./Sommermann, K.-P. (ed.), Citizen Participation in Multi-Level Democracies, Leiden: Brill/Nijhoff, 2015, pp. 1-12;
- 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;
- 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, 2nd edition, 2015, pp. 9-41;
- Tushnet, Mark:* Constitution, in: M. Rosenfeld /A. Sajó (ed.), Comparative Constitutional Law, Oxford: Oxford University Press, 2012, pp. 217-232;
- Van Vechten, Renee B.:* California Politics. A Primer, fifth edition, Thousand Oaks: CQ Press, 2019, Chapter 3: Direct Democracy, pp. 25-41.

Relevant case-law

- United States Supreme Court, Judgement of March 8, 1971, Griggs v. Duke Power Co., 401 U.S. 424;*
- 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 24, 1992, Lee v. Weisman, 505 U.S. 577;*
- United States Supreme Court, Judgement of June 23, 2003, 536 U.S. 306 (2003), Grutter v. Bollinger et al.;*
- 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, Judgement of June 23, 2016, Fisher v. University of Texas at Austin et al., 579 U.S.__(2015) – Affirmative action as part of the University of Texas' admission system.*

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

United States Supreme Court, Judgement of June 26, 2017, Trinity Lutheran Church of Columbia, inc. v. Comer, Director, Missouri Department of Natural Resources, 582 U.S.__(2017);

United States Supreme Court, Judgement of June 4, 2018, Masterpiece Cakeshop Ltd., et al. v. Colorado Civil Rights Commission et al., 584 U.S.__(2018);

United States Supreme Court, Judgement of June 14, 2018, Minnesota Voters Alliance et al. v. Mansky et al., 585 U.S.__(2018);

United States Supreme Court, Judgement of June 26, 2018, Trump, President of the United States, et al. v. Hawaii et al., 585 U.S.__(2018);

United States District Court for the District of Columbia, Memorandum Opinion of October 30, 2017, Doe v. Trump – Injunction against the prohibition for transgender persons to serve in the U.S. Army;

United States District Court for the Northern District of California, Order granting preliminary injunction of December 19, 2018, East Bay Sanctuary Covenant et al. v. Donald J. Trump et al.

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of October 16, 1979, BVerfGE 52, pp. 223 et seq.;

Federal Constitutional Court of the Republic of Germany (BVerfG), Judgement of May 16, 1995, BVerfGE 93, pp. 1 et seq.;

Federal Constitutional Court of the Republic of Germany, Judgement of March 3, 2009, - 2 BvC 3/07 -;

Federal Constitutional Court of the Republic of Germany, Judgement of July 18, 2012, - 1 BvL 10/10 -;

Federal Constitutional Court of the Republic of Germany, Judgement of February 26, 2014, - 2 BvE 2/13 -;

Federal Constitutional Court of the Republic of Germany (BVerfG), Order of January 27, 2015, BVerfGE 138, pp. 296 et seq.;

Federal Constitutional Court of the Republic of Germany (BVerfG), Order of October 10, 2017, -1 BvR -2019/16.

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

European Court of Human Rights (Grand Chamber), Judgement of February 18, 1999, Matthews v. The United Kingdom;

European Court of Human Rights (Grand Chamber), Judgement of October 6, 2005, Hirst v. The United Kingdom (N° 2);

European Court of Human Rights (Grand Chamber), Judgement of December 22, 2009, Sejdić and Finci v. Bosnia and Herzegovina;

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

European Court of Human Rights (Grand Chamber), Judgement of February 23, 2012, Hirsi Jamaa and Others 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, Judgement of April 6, 2017, A.P., Garçon and Nicot v. France;

European Court of Human Rights, decision of June 13, 2017, Moohan and Gillon v. the United Kingdom;

European Court of Human Rights, Judgment of December 5, 2017, Hamidović v. Bosnia and Herzegovina;

European Court of Human Rights, Judgement of December 11, 2018, M.A. and Others v. Lithuania.

Court of Justice of the European Union, Judgement of December 21, 2011, N.S. v. Secretary of State for the Home Department (C-411/10) and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (C-493/10);

Court of Justice of the European Union, Judgement of September 27, 2012, Cimade and GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, C-179/11.