

Florian Meinel, Universität Göttingen, Juristische Fakultät

Comparative Constitutional Law (Summer Semester 2023)
Course Information and Syllabus

General Information: Thursdays 8:30-10:00 am, ZHG 002

Course material: available on Stud.IP

Course Description: This course will provide an introduction to the comparative analysis of constitutional law. We will examine different types of constitutions and ask how these differences can be explained (history? culture? social structure? etc.). We will explore the various models of judicial review and the role of constitutional courts, different types of federalism, theories of democracy, and constitutional approaches to the administrative state. We will talk about the political economy of constitutionalism and ask how its institutions are related to economic and social structures. The course will also cover the rise of authoritarianism and the present transformation of constitutional law it indicates.

To point at two of the many shortfalls and limitations of the syllabus: The course has a focus on (1) institutions, democracy, and the political process while not covering constitutional rights (free speech, dignity, equality) in sufficient depth.

(2) Western constitutionalism, both because constitutionalism is for many reasons essentially a Western concept and because I don't have the knowledge and language skills to teach constitutional law of non-Western countries in any reliable way. Nevertheless, I will include a session on how postcolonial theory challenges our understanding of constitutional law.

Office Hours: Wed, 1-2pm (please make an appointment with my assistant Karolin Schwarz: staatsl@gwdg.de)

Reading:

Any serious engagement with comparative constitutional law requires a considerable amount of reading. For each week, one or two key texts (cases and/or scholarly articles) are assigned, which should be read before class.

No additional textbook is required for this course. The following are suggestions only.

1) A short and easy to read introductions is:

- Mark Tushnet: *Advanced introduction to comparative constitutional law* 2nd ed. 2018

2) For a more detailed introduction to particular topics such as rights, courts, democracy, federalism etc., the following two research handbooks are essential to consult (or just to skim through to get a rough idea what kind of questions comparative constitutional deals with):

- András Sajó/Michel Rosenfeld (eds.): *The Oxford Handbook of Comparative Constitutional Law*, 2012
- Robert Schütze (ed.): *The Cambridge Companion to Comparative Constitutional Law*, 2nd edition 2019.

3) Textbooks that cover key cases and other materials are:

- Vicky Jackson/Mark Tushnet: *Comparative Constitutional Law* [previous editions available at the SUB]
- Norman Dorsen/Michel Rosenfeld/András Sajó/Susanne Baer/Susanna Mancini: *Comparative Constitutionalism: Cases and Materials*, 4th ed. 2022 [ordered; a copy will be available for study at the Institut für Grundlagen des Rechts, Nikolausberger Weg 17 soon]

Supplementary readings will be recommended throughout the semester. Also, this syllabus will be amended throughout the semester. Check the course website for updates regularly.

Syllabus and reading assignments

1 Introduction: Why constitutional law is inherently comparative and why we study comparative constitutional law (April 13)

- Mark Tushnet, Some Reflections on Method in Comparative Constitutional Law, in *The Migration of Constitutional Ideas* (Sujit Choudhry, ed., 2006).
- Christoph Schönberger: Verfassungsvergleichung heute. Der schwierige Abschied vom ptolemäischen Weltbild, in: *Verfassung und Recht in Übersee* 43 (2010), 6-27.

2 Some fundamental categories: Types of constitutions and constitutional ideologies (April 20)

- Dieter Grimm: Types of constitutions, in: Michel Rosenfeld/András Sajó (eds.): The Oxford Handbook of Comparative Constitutional Law, Oxford: Oxford University Press 2012, 98-132.
- Bruce Ackerman: Revolutionary Constitutions. Charismatic Leadership and the Rule of Law, Cambridge, Mass.: Harvard University Press 2019 [excerpt]

3 Democracy I: Separation of powers; varieties of parliamentary democracy (April 27)

- Steffen Ganghof: Beyond Presidentialism and Parliamentarism. Democratic Design and the Separation of Powers, Oxford: Oxford University Press 2021 [excerpt]
- Christoph Möllers: Separation of Powers. Cambridge Companions to Law, in: Robert Schütze/Roger Masterman (eds.): The Cambridge Companion to Comparative Constitutional Law, Cambridge: Cambridge University Press 2019, 230-257.

4 Democracy II: Elections, political parties, citizenship (May 4)

- Miller v. Johnson, 515 U.S. 900 (1995)
- Shelby County v. Holder, 570 US 529 (2013)
- BVerfG, Election case 2012
- (optional:) Yasmin Dawood: Democracy, power, and the Supreme Court, in: International Journal of Constitutional Law 4 (2006), 269-293

5 Democracy III: Emergency powers, war powers

- John Ferejohn/Pasquale Pasquino: The law of the exception, in: International Journal of Constitutional Law 2 (2004), 210-239
- Hennette Vauchez, Stéphanie: Taming the exception? Lessons from the routinization of states of emergency in France, in: International Journal of Constitutional Law (2023).

May 18: no class (*Himmelfahrt*)

6 Federalism and second chambers (May 25)

- Daniel Halberstam: Of Power and Responsibility: The Political Morality of Federal Systems, in: *Virginia Law Review* 90 (2004), 731-834

7 Foundations and scope of judicial review (June 1st)

- UK Supreme Ct, R (on the application of Miller) v The Prime Minister, [2019] UKSC 41 (Gina Miller II)
- Ran Hirschl: The Judicialization of Mega-Politics and the Rise of Political Courts, in: *Ann. Rev. Pol. Sci.* 11 (2008), 93-118.
- (Optional:) Dieter Grimm: Proportionality in Canadian and German Constitutional Jurisprudence, in: *The University of Toronto Law Journal* 57 (2007), 383-397

8 The administrative state (June 8)

- *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)
- *West Virginia v. EPA*, 597 U.S. ____ (2022)
- BVerfG, Judgment of the Second Senate of 7 November 2017 - 2 BvE 2/11 (Federal Agencies and Public Railways case)

9 Freedom of speech and the public sphere (June 15)

- *Citizens United v. FEC*, 558 U.S. 310 (2010)
- BVerfG, Judgment of the Second Senate of 15 June 2022 - 2 BvE 4/20 (Merkel)
- CJEU, *Russia Today France v. Council of the European Union* (2022)
- (optional) Michel Rosenfeld: Hate Speech in Constitutional Jurisprudence. A Comparative Analysis, in: Michael Herz/Peter Molnar (eds.): *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Cambridge: Cambridge University Press 2012, 242-289

10 Constitutional Law and Political Economy I: Institutions and property rights (June 22)

- *Cedar Point Nursery v. Hassid* (2021)
- BVerfG, Co-Determination case (1979)

- Gregory S. Alexander: Property as a Fundamental Constitutional Right, in: Cornell L. Rev. 88 (2003), 733-778

11 Constitutional Law and Political Economy II: The constitutional framework of the welfare state (June 29)

- US Supreme Court, National Federation of Independent Business v. Sebelius (2012)
- BVerfG, Judgment of the First Senate of 5 November 2019 - 1 BvL 7/16
- Optional: Peter C. Caldwell: Democracy, capitalism, and the welfare state. Debating social order in postwar West Germany, 1949-1989, Oxford: Oxford University Press 2019, pp. 13–44

12 Postcolonialism and constitutional law (July 6)

- Norwegian Supreme Court: Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy (People v Arctic Oil)
- Sigrid Boysen: Postcolonial constitutional law, in: Anthony F. Lang/ Antje Wiener (eds.): Handbook of Global Constitutionalism, Edward Elgar 2023 (forthcoming)

13 Authoritarianism, constitutional backsliding, militant democracy (July 13)

- Jan-Werner Müller: Citizens as Militant Democrats, Or: Just How Intolerant Should the People Be?, in: Critical Review 34 (2022), 85-98
- Adam Przeworski: Crises of democracy, Cambridge: Cambridge University Press 2019 [excerpt]