

Constitutional Adjudication – Morphology, Genealogy and Legitimacy

Spring 2014

Syllabus

Lecturer: David Kosar (4775@mail.muni.cz)

Class: [DAY], [HOUR], Room [TBA]

Office hours: [TBA]

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Course Summary:

Constitutional democracy is nowadays the dominant form of representative government in the world. Of this regime there is no comprehensive political theory. Next to political branches, elected and accountable to the voters through competitive elections, this form of government encompasses judicial organs exercising normative power through constitutional adjudication. This aspect of the judicial review will be analyzed considering the functions of Constitutional/Supreme courts in the world (focusing mainly on the countries that have, outside the US, the longest experience). Using an ideal typical taxonomy based on mechanisms of referral we will distinguish different effects of Courts' decisions on the working of the political and constitutional system. Some attention will be devoted at the historical origin of constitutional adjudication. Next to the main descriptive dimension of the seminar we will discuss the old question of the legitimacy of non-elected and non-accountable (to the voters) organs in democratic societies.

The institution that we will spend the most time studying is the Constitutional Court, which was invented in Austria following World War I, as a part of the new Austrian constitutional government. It was then "reinvented" following the Second World War in Germany and Italy and has been copied widely. But there are also other traditions of constitutional adjudication which locate the power to conduct constitutional review in a Supreme Court (which has also other judicial functions) as is done in the United States and Canada. Indeed there are much older traditions of constitutional adjudication that can be traced far back in history.

Course Outline:

Class 1: Introduction – typology of constitutional adjudication

Class 2: Italy – the Constitutional Court as judge of applied law

Class 3: Germany – constitutional complaints

Class 4: France – from *saisine parlementaire* to *QPC*

Class 5: United States – judicial review

Class 6: Commonwealth model I. – Canada ("moderate judicial review")

Class 7: Commonwealth model II. – New Zealand, UK, Australia ("weak judicial review")

Class 8: South Africa – constitutional court in the one-party State

Class 9: Israel – strong judicial review without a written constitution

Classes 10-11: student presentations of outlines

Class 12: Legitimacy of constitutional adjudication – summation and reflections

Requirements:

Prerequisite: An introductory course in constitutional law in student's home country (can be waived under exceptional circumstances).

Recommended: Acquaintance with the basic constitutional history and architecture of one or more countries other than the student's home country is recommended, as are keen interest in comparative constitutionalism. Throughout the course, we will occasionally touch upon essentials of constitutional theory. No prior background in this area is required.

Evaluation:

- Class attendance and participation (15%): The first seminar meeting will be devoted to an introductory survey that will briefly map constitutional adjudication worldwide, its historical origins and evolution, key issues and themes, epistemology and methodologies. From Week 2 onward, class meetings will be based on guided collective discussion of each week's jurisdiction and reading materials. Students are expected to come ready for class. Class participation includes preparation for class, regular attendance, and substantive contribution to weekly discussions.

- Comment paper (10%): The comment paper (1,500 words) will be a critical, integrative assessment of at least two of the sources on the reading list for a given class. Comment papers are due by 5 p.m. on the day before the class readings are scheduled to be discussed and shall be emailed to me as well as to all students in the class. Each student is expected to use the comment paper to illuminate an important question in the reading or to develop their own coherent argument based on the readings. Students will briefly present their comment paper in class. Students must sign up for the submission of their comment papers by [TBA].

- Final paper outline (10%): Each student will present in class (for approximately 10-12 minutes) an outline of his/her final paper topic, the project's main arguments/findings. Outline presentations will take place towards the end of the semester (in class 10 and 11).

- Final essay (65%): Students may choose one of two options for the final paper (3.000-5.000 words, excluding footnotes): 1) an integrative, critical book review of at least two books dealing with constitutional adjudication; or 2) a research paper on one of the jurisdictions covered in this course or another jurisdiction of the student's choice. The seminar paper's topic or choice of reviewed books must be pre-approved by the instructor by TBA. Actual submission of the final paper must comply with pertinent Masaryk University School of Law rules and regulations. As with the comment paper, good substance-per-ink ratio is always a plus. **Deadline for the final essay is 20 June 2014. Please include your name and a word count at the beginning of the paper.**

Readings: Reading materials are available via the course website at IS.MUNI.CZ. Depending on student interest, a few additional materials, handouts, and court rulings may be distributed in class.

Please note: The first class will be held in the week starting 3 March 2014.

Class 1: Introduction – typology of constitutional adjudication [DATE TBA]

- Peter Häberle, Role and Impact of Constitutional Courts in a Comparative Perspective, in: Ingolf Pernice/Juliane Kokott/Cheryl Saunders (eds.): *The Future of the European Judicial System in a Comparative Perspective*, (ECLN Conference Berlin 2005), European Constitutional Law Network Series, Vol. 6, NOMOS Verlag, Baden-Baden, Germany, 2006, pp. 65-77.
- V. F. Comella, *Constitutional Courts and Democratic Values: A European Perspective*, Yale University Press, 2009, pp. 55-70
- J. Ferejohn/P. Pasquino, “Constitutional Adjudication: Lessons from Europe”; in *Texas Law Review*, vol. 82, N.7, 2004, p. 1671-1704

Class 2: Italy – concrete review of constitutionality [DATE TBA]

- T. Groppi, The Italian Constitutional Court: Towards a ‘Multilevel System’ of Constitutional Review?, *JCL* 3:2 (2008), 100-117
- J. Ferejohn/P. Pasquino, “Constitutional Adjudication, Italian Style”, in Tom Ginsburg (ed.), *Comparative Constitutional Design*, Cambridge University Press, 2012, pp. 294-316;
- *How the Court Works*, in Italian Constitutional Court document, at: http://www.cortecostituzionale.it/versioni_in_lingua/eng/lacortecostituzionale/cosaelacorte/cosaelacorte.asp
- Judgment No. 224 of 2009 *Impartiality of the Magistrate*

Class 3: Germany – constitutional complaints [DATE TBA]

- D. Grimm, How the Constitutional Court decides, Milan conference, May 25th 2007
- Gertrude Lübke-Wolff, The German Federal Constitutional Court from the point of view of complainants in search of their constitutional rights, 2006
- D. Kommers and R. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, *JCL* 3:2 (2008), 194-211

Class 4: France – from *saisine parlementaire* to QPC [DATE TBA]

- Before 2008
 - Décision 74-54 DC of 15 January 1975 – Abortion
 - Marie-Claire Ponthoreau and Fabrice Hourquebie, The French *Conseil Constitutionnel*: An Evolving Form of Constitutional Justice, *JCL* 3:2 (2008), **only pp. 269-277**
 - A. Stone Sweet, “Judicialization and the Construction of Governance,” in Shapiro & Stone Sweet 2002, **only pp. 78-84 and the table at p. 89**
- After 2008
 - Décision n°2010-1 QPC of May 28th 2010 – Burqa Ban
 - O. Pfersmann, Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective, *European Constitutional Law Review*, 6: 223–248, 2010
 - A. Dyevre, [75% Millionaire Tax Rate Ruled Unconstitutional: Are Good Judges Bad for Democracy?](#), I-CONNECT blog, 25. 1. 2013
 - A. Dyevre, The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask), 2012 (unpublished manuscript)

Class 5: United States –judicial review [DATE TBA]

- *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)
- R. Dahl, Decisionmaking in a Democracy: The Supreme Court as a National Policymaker, 6 J. PUB. POL. 279 (1957)
- J. H. ELY, DEMOCRACY AND DISTRUST, 73-104, (1980)
- E. Chemerinsky, Constitutional Law: Principles And Policies, 4th ed., Aspen Publishers (2011) (on case and controversy requirement et al.) – **only pp. 49-64, 103-105, 113-116, 129-132**)

Class 6: Commonwealth model I. – Canada (“moderate judicial review”) [DATE TBA]

- **reread** R. Hirschl, *Towards Juristocracy*, Harvard U.P., 2004, **only pp. 75-82**
- Hogg, Peter; Bushell, Allison (1997). "The Charter Dialogue between Courts and Legislatures". *Osgoode Hall Law Journal* 35 (1): 75–124 (extracts)
- Stephen Gardbaum, “Reassessing the new Commonwealth Model of Constitutionalism”, *International Journal of Constitutional Law*, Vol. 8, No. 2, 2010, pp. 1-41
- T. Kahana, “The Notwithstanding Mechanism and Public Discussion”, *University of Toronto Law Journal*, Vol. 52, No. 2 (Spring, 2002), pp. 221-274 **or** T. Kahana, “The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter”, *Canadian Public Administration*, (2001) 44: 255–291.

Class 7: Commonwealth model II. – New Zealand, UK, Australia (“weak judicial review”) [DATE TBA]

- **reread** R. Hirschl, *Towards Juristocracy*, Harvard U.P., 2004, **only pp. 82-89**
- **recall** from the previous class Stephen Gardbaum, “Reassessing the new Commonwealth Model of Constitutionalism”, *International Journal of Constitutional Law*, Vol. 8, No. 2, 2010, pp. 1-41
- James Kelly, “Judicial Review as ‘No-fault’ Insurance: The New Zealand Bill of Rights Act, 1990”, A Paper Presented at RC 09 (Comparative Judicial Studies) International Political Science Association, June 21-23, 2010 , University of Bologna, Italy
- Ian Leigh, “The standard of judicial review after the Human Rights Act”, in *Judicial Reasoning Under the UK Human Rights*, Helen Fenwick, et al., eds. 2007, pp. 174-205
- J. L. Pierce, D. L. Weiden & R. D. Wood, “The changing role of the High Court of Australia”, Prepared for delivery at the IPSA Interim Meeting, 2010, Bologna, Italy

Class 8: South Africa – constitutional court in the one-party State [DATE TBA]

- **reread** R. Hirschl, *Towards Juristocracy*, Harvard U.P., 2004, **only pp. 89-99**
- H. Klug, South Africa’s Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid, *JCL* 3:2 (2008), 174-193
- T. Roux, “Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court”, *Democratization*, Volume 10, Issue 4, 2003, pp. 92–111
- T. Roux, “Principle and Pragmatism on the Constitutional Court of South Africa”, *International Journal of Constitutional Law*, Volume 7, Number 1, 2009, pp. 106-138

Class 9: Israel – strong judicial review without a written constitution [DATE TBA]

- **reread** R. Hirschl, *Towards Juristocracy*, Harvard U.P., 2004, **only pp. 89-99**
- Joshua Segev, Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel, 70 *Alb. L. Rev.* 409 (2006-2007)
- Ran Hirschl, Another chapter in Israel's constitutional wars, <http://www.comparativeconstitutions.org/2011/11/another-chapter-in-israels.html>
- H.C. 4676/94 Meatrael v. The Knesset of Israel, 50(5) P.D. 16 (1997)

Class 10: Student presentations of outlines [DATE TBA]

Week 11: Student presentations of outlines [DATE TBA]

Week 12: Legitimacy of constitutional adjudication – summation and reflections [DATE TBA]

- J. Waldron, “The core of the case against judicial review”, *Yale Law Journal*, 2006, 115 (6): 1346ff;
- J. Bertomeu, Against the Core of the Case: Structuring the Evaluation of Judicial Review, *Legal Theory*, 17 (2011), 81–118.