

MUNI
LAW

"New" (German) Constitutionalism

Constitutionalism v. 2.0.

Evolution of Constitutionalism

- Constitutionalism 1.0. "U.S."
- Constitutionalism 2.0. "German"
- Constitutionalism 3.0. "Peer review"
- Differences between 1.0 and 2.0. (U.S. and German)
- Alexander Somek, *The Cosmopolitan Constitution: "The constitution is no longer deemed to originate from the free choice of of a people. Rather, it originates from an act of reasonable recognition concerning the supreme value and authority of human dignity and human rights."*

Basic, but specific, features of the "new constitutionalism"

- Strong centralized constitutional court
- Supremacy of the constitution and the Eternity Clause
- Human dignity and supremacy of rights, plus different understanding of human rights (individual/collective balance)
- Objective order of values
- Possibly also "guarded (militant) democracy,"
- Substantive Rechtsstaat, incl. values, public reason etc.
- Social state

- *Constitutional patriotism? The identity of people and their constitution, its values, (Habermas, Müller, cf. also Masaryk's emphasis on humanity, not ethnicity).*

Constitutional courts in the "new constitutionalism"

- Centralized nature (why?)
- Interpretation of rights connected to the notion of *moral necessity* the discovery of what is morally and constitutionally necessary is "rational", thus the judges are understood to discover, almost as scientists, some objective order of values
- No a real problem with the „counter-majoritarian difficulty“
- Key position of **proportionality**, practical concordance

Eternity Clause

- *Pouvoir constituant* and *pouvoir constitué*
- Even "a people" within the constitution is not sovereign: the sovereign sleeps, it is dormant
- Rather, the "objective order of values" and the rational discovery of moral and constitutional necessity must prevail (cf., as mentioned by Kommers, the "*unwritten*" or "*supra-positive*" norms that presumably govern the entire constitutional order.)
- RP: "On what grounds do we consider our democracy to be the best solution?"

Human dignity and primacy of rights

- Human dignity at the top of the "objective order of values"
- Human rights as positive and negative rights (vs. the defensive conception)
- Human rights as values (Drittwirkung, cf. Positive obligations under ECHR, *Deshaney*, 489 U.S. 189 (1989))

Guarded democracy

- Proactive defence of the existing system
- Limitation of political rights (speech, assembly, association)
- Different understanding of the "causal link" vs. the U.S.

Social state

- Different models of social rights protection
- In Germany, it is centered around the notion of human dignity, the social-market state principle and the Rechtsstaat principle
- *Hartz IV* judgement as an example of social rights protection by a constitutional court