

**Central European University  
Political Science Department  
MA Program  
Winter 2009**

## **Course Description**

### **CONSTITUTIONALISM AND DEMOCRACY**

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#### **Course overview**

This course explores the meaning of constitutionalism, its basic features, and its relationship to democracy. It is assumed that the central categories of constitutionalism – the rule of law, limited government, basic rights, constitutional judiciary, the constitution – are relevant for political science and political theory as well. Thus, the aim of the course is to introduce students of politics to theoretical concepts, institutional arrangements and practices of constitutional democracy, in a manner that would enable them to use this knowledge in pursuing their more specific academic interests.

While the course is organized largely around fundamental categories rather than country-specific case studies, the readings and lectures will raise topics that students are encouraged to apply to analysis of their own or other countries, both in seminar discussions and in written work.

We begin with a conceptual and normative inquiry into the notions of constitutionalism and constitution. Next we discuss the politics of constitution-making, where our focus will be on the issues of constitutional design and choice. Within this framework, special attention will be devoted to the questions of constitutional authorship (who makes the constitution), timing (when, in what social and political contexts, constitutions are typically made), procedural rules of constitution-making (how constitutions are made), and to the choice of the constitutional content (what constitutions constitute).

We proceed by exploring basic elements of the constitutional content: fundamental rights and formal institutional arrangements. Following the premise that the constitutional text matters to the extent it effectively promotes liberty, equality and the rule of law, we will pay attention to both 'law in books' and 'law in action'. Upon these analyses, we will address the precarious relationship between universal demands of constitutionalism and particular cultural context. Next we deal with the question of the relationship between constitutionalism and democracy, asking specifically whether these two categories contradict each other. We close with reflections on emerging European constitutionalism.

#### **Course requirements and evaluation**

[A note: please do not get upset by what is stated below. The purpose of the following policy is not to constrain your academic or personal freedom, nor to create an unnecessary burden for you. The

idea is rather to provide transparency regarding the character of the course, the way it will unfold, and your rights and responsibilities.]

This is a four-credit course. A lecture and a seminar will cover every topic. One of you will be asked to prepare a short presentation for each seminar class, as the basis for a more concentrated discussion. Your presentation will take approx. 20 minutes, and it will be based on a short position paper (2-3 pages), that you will distribute electronically to all class participants and to me before 3 pm, on the day preceding the seminar class. Your presentation should contain short critical evaluation of the topic and of the way it is presented in the assigned readings, as well as questions that you think need to be raised in the seminar discussion. Each presentation will be followed by a comment lasting approx. 10-15 minutes (ideally, comments would also be distributed electronically to everyone before the seminar class; however, if due to time constraint you cannot accomplish this, please submit your written comment to the lecturer no later than 48 hours after the class). The commentator is supposed to reflect on the questions posed by the presenter, and s/he is most welcome to challenge presenter's views. A general class discussion will follow.

Classes are mandatory. I will take attendance. You are allowed no more than two unexcused absences for the semester. Beyond these two 'free' absences you will need to provide written documentation or adequate oral explanation of legitimate circumstances that prevented you from attending class. Legitimate circumstances include illness, serious family emergencies and participation in group activities sponsored by CEU. The same is required in case you fail to submit your written assignment on time. Should you fail to provide required excuse, you will not receive credits for the course.

You are expected to be familiar with the CEU policies on scholarly dishonesty.

Questions and comments during lectures are welcome. Active participation in seminars is required. You are expected to come prepared for in-depth discussion of the topics and the required readings. The readings classified as 'optional' are for your further consideration and reference – you may find them particularly useful when preparing your presentation or final paper. If it becomes evident after a few course meetings that many of you are not doing readings, I reserve the right to give short tests. Such tests would take only 15 minutes and would contain questions that directly relate to the readings.

There will be a mid-term exam after we complete topic six. You will be asked to answer six short questions that will address issues raised in first six topics.

There will be a final exam in the last week of the course. You will be asked to answer six short questions that will address issues raised in all of the eleven topics.

Grading will depend on the above presented features, in the following way:

- class participation: 25%
- mid-term exam: 35%
- final essay: 40%

### **Learning outcomes**

By the end of the course students will have an understanding of the key categories of constitutional democracy: the rule of law, limited government, basic rights, constitutional judiciary. In this way students of politics will master theoretical concepts, institutional arrangements and practices of constitutional democracy, in a manner that would enable them to use this knowledge in pursuing their more specific academic interests.

## **Topic 0 Introducing the course**

Outlining the focus and the goals of the Course. Identifying fundamental questions. Presenting the topics. Discussing requirements.

## **Topic 1 Constitution and Constitutionalism**

### Mandatory readings:

1. T. Grey, "Constitutionalism: an Analytic Framework", in: J. Peenock and J. Chapman (eds.), *Constitutionalism*, Nomos XX (New York: New York University Press, 1979)
2. D. Kommers and W. Thompson, "Fundamentals in the Liberal Constitutional Tradition", in: J. J. Hesse and N. Johnson (eds.), *Constitutional Policy and Change in Europe* (Oxford: Oxford University Press, 1995)
3. U. Preuss, "The Political Meaning of Constitutionalism", in: R. Bellamy (ed.), *Democracy and Sovereignty: American and European Perspectives* (Aldershot: Avebury, 1996)

### Optional readings:

1. N. Dorsen et al (eds.), *Comparative Constitutionalism*, (St. Paul: West Group, 2003)
2. J. Kis, *Constitutional Democracy* (Budapest, CEU Press, 2003)
3. G. Sartori, "Constitutionalism: A Preliminary discussion", *The American Political Science Review*, Vol. 56, No. 4, 1962
4. L. Alexander (ed.), *Constitutionalism. Philosophical Foundations* (Cambridge: Cambridge University Press, 1998)

## **Topic 2 Politics of constitution-making**

### Mandatory readings:

1. U. Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution", in: M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy* (Durham and London: Duke University Press, 1994)
2. E. McWhinney, *Constitution-Making: Principles, Process, Practice* (Toronto: University of Toronto Press, 1981)

### Optional readings:

1. C. Sunstein, *Designing Democracy. What Constitutions Do* (New York: Oxford University Press, 2001)
2. S. Holmes, *Passions and Constraint. On the Theory of Liberal Democracy*, (Chicago: University of Chicago Press, 1995)
3. A. Arato, *Civil Society, Constitution, and Legitimacy*, (New York: Rowman & Littlefield, 2000)

4. J. Elster, *Ulysses Unbound. Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000)

### **Topic 3 Fundamental rights I**

#### Mandatory readings:

1. A. Sajo, *Limiting Government. An Introduction to Constitutionalism*, Chapter VIII (Budapest: CEU Press, 1999)

#### Optional readings:

1. A. Kaufman, "Rights and Disagreement", Conference paper, 2003 (*on file* with N.D.)
2. E. Denninger, "State Tasks and Human Rights", *Ratio Juris*, Vol. 12, No. 1, 1999
3. T. Marshall and B. Bottmore, *Citizenship and Social Class* (London: Pluto Press, 1992/1950)
4. S. Holmes and C. Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes* (New York : W.W.Norton, 1999)

### **Topic 4 Fundamental rights II: Controversies over social rights**

#### Mandatory readings:

1. B. Toebes, "The Diminishing State and Basic Social Rights", in: D. Elzinga et al (eds.), *Constitutionalism, Universalism and Democracy* (Groningen: University Press, 1999) [in this reader as a manuscript]
2. D. Beetham, "What Future for Economic and Social Rights?", *Political Studies*, Vol. 43, 1995

#### Optional readings:

1. F. Twine, *Citizenship and Social Rights: The Interdependence of Self and Society* (London: SAGE, 1994)
2. F. Michelman, "The Constitution, Social Rights and Liberal Political Justification", *International Journal of Constitutional Law*, Vol. 1, No. 1, 2003
3. C. Fabre, "Constitutionalizing Social Rights", *The Journal of Political Philosophy*, Vol. 6, No. 3, 1998

### **Topic 5 Fundamental rights III: Group-specific rights**

#### Mandatory readings

1. C. Offe, "Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights", *Journal of Political Philosophy*, 2/1998
2. N. Dimitrijevic, "Ethno-Nationalized States of Eastern Europe: Is There a Constitutional Alternative?", *Studies in East European Thought*, No. 54, 2002

#### Optional readings:

1. J. Kis, "Beyond the Nation State", *Social Research*, Spring 1995
2. Y. Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims", *Cardozo Law Review*, Vol. 21, No 4, 2000
3. D. Plotke, "Democracy and Groups", *Social Research*, Vol. 70, No. 2, 2003
4. A. Eide, "Minorities in a Decentralized Environment", Background conference paper, Yalta, 1998 (available at: [www.riga.lv/minelres/publicat/Eide-Yalta.98](http://www.riga.lv/minelres/publicat/Eide-Yalta.98))

### **Topic 6 Constitutionalism beyond the nation state? Constitutional Patriotism**

#### Mandatory readings:

1. J-W. Müller, *Constitutional Patriotism*, Chapters I and II (Princeton: Princeton University Press, 2007)

#### Optional readings:

1. J. Habermas, *The Postnational Constellation: Political Essays* (Cambridge, Mass.: Polity Press, 2001)
2. P. Markell, "Making Affect Safe for Democracy? On Constitutional Patriotism", *Political Theory*, 28/2000

### **Topic 7 Institutional structure I. Foundations: The rule of law and the separation of powers**

#### Mandatory readings:

1. G. Q. Walker, *The Rule of Law. Foundation of Constitutional Democracy*, Chapter I (Melbourne: Melbourne University Press, 1988)
2. R. Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy", in R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (Aldershot: Ashgate/Dartmouth, 2005)

#### Optional readings:

1. A. Sajó, *Limiting Government. An Introduction to Constitutionalism*, (Budapest: CEU Press, 1999)
2. I. Shapiro (ed.), *The Rule of Law, Nomos XXXVII* (New York: New York University Press, 1994)
3. A. Sajó and V. Losonci, "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?", in: D. Greenberg et al (eds.), *Constitutionalism and Democracy. Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993)

### **Mid-term exam in the week following the Topic Six**

### **Topic 8 Institutional structure II: Forms of government**

#### Mandatory readings:

1. G. Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes* (Houndmills: Macmillan Press, 1994)

Optional readings

1. B. Ackerman, "The New Separation of Powers", *Harvard Law Review*, Vol. 113, 2000
2. A. Arato, "The New Democracies and American Constitutional Design", *Constellations*, Vol. 7, No. 3, 2000
3. M. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998/1967)
4. C. Friedrich, *Constitutional Government and Democracy* (Waltham: Blaisdel, 1968)

**Topic 9 Constitutional adjudication**

Mandatory readings:

1. A. Sajo, *Limiting Government. An Introduction to Constitutionalism* (Budapest: CEU Press, 1999)
2. H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chapter II (Chicago: University of Chicago Press, 2000)

Optional readings:

1. A. Bragyova, "Constitutional Review and Democracy", *Acta Juridica Hungarica*, Vol. 40, 1999
2. M. Troper, "The Logic of Justification of Judicial Review", *International Journal of Constitutional Law*, Vol. 1, No. 1, 2003
3. C. Starck, "The Legitimacy of Constitutional Adjudication and Democracy" (Manuscript, *on file* with N.D.)
4. R. Dworkin, *Law's Empire* (London: Fontana Press, 1986)

**Topic 10 Constitutional culture, or constitution(alism) as culture?**

Mandatory readings:

1. R. Ludwikowski, "Constitutional Culture in the New East-Central European Democracies", in: M. Wyrzykowski (ed.), *Constitutional Cultures* (Warsaw: Institute of Public Affairs, 2001)
2. J. Johnson, "Inventing Constitutional Traditions: the Poverty of Fatalism", in: J. Ferejohn et al (eds.), *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2001)

Optional readings:

1. M. Rosenfeld, "Modern Constitutionalism as Interplay Between Identity and Diversity", in: M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy* (Durham and London: Duke University Press, 1994)

## Topic 11 *Back to basics: constitutionalism and democracy*

### Mandatory readings:

1. H. Koechler, "A Theoretical Examination of the Dichotomy Between Democratic Constitutions and Political Reality", Conference Paper, 1995 (available at: [www.hans.koechler.com/DEM.CON.HTM](http://www.hans.koechler.com/DEM.CON.HTM))
2. N. Dimitrijevic, "Constitutional Democracy, or How to Prevent the Rule of the People", in: A. Sajo (ed.), *Out of and Into Authoritarian Law* (The Hague: Kluwer, 2003)

### Optional readings:

1. J. Kis, *Constitutional Democracy* (Budapest: CEU Press, 2003)
2. J. Habermas, "Constitutional Democracy, A Paradoxical Union of Contradictory Principles?", *Political Theory*, Vol. 29, No. 6, 2001
3. F. Michelman: *Brennan and Democracy* (Princeton: Princeton University Press, 1999)