

**Central European University
Political Science Department
MA Program
Academic year 2010/2011
Winter Semester**

Course Description

CONSTITUTIONALISM AND DEMOCRACY

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Meeting time:

Office hours:

Number of credits : 4 (8 ECTS credits)

Teaching format : a lecture and a seminar cover each topic

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 – basic rights, the rule of law, limited government, constitutional judiciary, the constitution – are relevant for political science and political theory. 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 the 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. 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 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 two issues that feature importantly in the contemporary constitutionalist discourse: the state of emergency and the EU constitutionalism.

Expected 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.

Course requirements and evaluation

This is a four-credit course. A lecture and a seminar will cover each 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. 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, or fail to show up for exam. 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 presentations. 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: 30%
- final exam: 45%

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, Constitutionalism, and Democracy (Basic concepts. Legal and political identification of constitution. Analytical and normative features of constitutionalism. On the tension between constitutionalism and democracy)

Mandatory readings:

1. 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)
2. U. Preuss, "The Political Meaning of Constitutionalism", in: R. Bellamy (ed.), *Democracy and Sovereignty: American and European Perspectives* (Aldershot: Avebury, 1996)

Optional readings:

1. B. Breslin, *From Words to Worlds. Exploring Constitutional Functionality* (Baltimore: John Hopkins UP, 2010)
2. W. Waluchow, "Constitutionalism", *Stanford Encyclopedia of Philosophy*, 2007, <http://plato.stanford.edu/entries/constitutionalism/>
3. N. Dorsen et al (eds.), *Comparative Constitutionalism*, (St. Paul: West Group, 2003)
4. 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)
5. J. Habermas, "Constitutional Democracy, A Paradoxical Union of Contradictory Principles?", *Political Theory*, Vol. 29, No. 6, 2001
6. L. Alexander (ed.), *Constitutionalism. Philosophical Foundations* (Cambridge: Cambridge University Press, 1998)
7. T. Grey, "Constitutionalism: an Analytic Framework", in: J. Peenock and J. Chapman (eds.), *Constitutionalism, Nomos XX* (New York: New York University Press, 1979)
8. G. Sartori, "Constitutionalism: A Preliminary Discussion", *The American Political Science Review*, Vol. 56, No. 4, 1962

Topic 2 Politics of constitution-making (Who makes the constitution. Procedural rules of constitution-making. Timing. Types of constitutional revision)

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. J. Elster, "Forces and Mechanisms in the Constitution-Making Process", *Duke Law Review*, Vol. 45, 1995-1996.

Optional readings:

1. L. E. Miller (ed.), *Framing the State in Times of Transition. Case Studies in Constitution Making* (Washington: US Institute of Peace, 2010)
2. W. F. Murphy, *Constitutional Democracy. Creating and Maintaining a Just Political Order* (Baltimore: John Hopkins UP, 2007)
3. M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford: OUP, 2007)
4. A. Arato, *Civil Society, Constitution, and Legitimacy*, (New York: Rowman & Littlefield, 2000)
5. J. Elster, *Ulysses Unbound. Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000)
6. S. Holmes, *Passions and Constraint. On the Theory of Liberal Democracy*, (Chicago: University of Chicago Press, 1995)
7. E. McWhinney, *Constitution-Making: Principles, Process, Practice* (Toronto: University of Toronto Press, 1981)

Topic 3 Fundamental rights I (An analytical perspective: what we have when we have rights. Rights as protective and empowering rules. Rights-holder and rights-addressee. Types of rights. Conflicts among rights)

Mandatory readings:

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

Optional readings:

1. C. R. Beitz, *The Idea of Human Rights* (Oxford: OUP, 2009)
2. C. R. Beitz and R. Goodin (eds.), *Global Basic Rights* (Oxford: OUP, 2009)
3. A. Kaufman, "Rights and Disagreement", Conference paper, 2003 (*on file with N.D.*)
4. E. Denninger, "State Tasks and Human Rights", *Ratio Juris*, Vol. 12, No. 1, 1999
5. T. Marshall and B. Bottmore, *Citizenship and Social Class* (London: Pluto Press, 1992/1950)

6. S. Holmes and C. Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes* (New York : W.W.Norton, 1999)
7. C. Sunstein, "Three Civil Rights Fallacies", *California Law Review*, Vol. 79, No. 3, 1991.
8. W. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," *23 Yale Law Journal* 16 (1913).

Topic 4 Fundamental rights II: Controversies over social rights (Are social rights real rights? Weak states, poverty and social rights. Do social rights protect equality, or create inequalities? Are social rights specifiable? Justiciability)

Mandatory readings:

1. D. Beetham, "What Future for Economic and Social Rights?", *Political Studies*, Vol. 43, 1995
2. D. Bilchitz, "Towards a Theory of Content for Socio-Economic Rights", Paper for Presentation at IACL Conference, Athens 2007

Optional readings:

1. F. Coomans (ed.), *Justiciability of Economic and Social Rights. Experiences from Domestic Systems* (Antwerpen: Inserentia, 2006)
2. C. Fabre, *Social Rights Under the Constitution. Government and the Decent Life* (Oxford: Clarendon Press, 2004)
3. F. Michelman, "The Constitution, Social Rights and Liberal Political Justification", *International Journal of Constitutional Law*, Vol. 1, No. 1, 2003
4. F. Twine, *Citizenship and Social Rights: The Interdependence of Self and Society* (London: SAGE, 1994)

Topic 5 Fundamental rights III: Group-specific rights (Abstract liberal autonomy and group-specific identities. Agents and types of minority rights. A question of justification: do minorities need 'more rights'? Controversies and objections. Possible liberal responses)

Mandatory readings

1. M. Jovanovic, "Recognizing Minority Identities Through Collective Rights", *Human Rights Quarterly*, 27/2005
2. J. Levi, "Classifying Cultural Rights", In W. Kymlicka and I. Shapiro (eds.), *Ethnicity and Group Rights*, Nomos XXIX (New York: New York University Press, 1997)

Optional readings:

1. C. Offe, "Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights", *Journal of Political Philosophy*, 2/1998
2. J. Kis, "Beyond the Nation State", *Social Research*, Spring 1995

3. N. Dimitrijevic, "Ethno-Nationalized States of Eastern Europe: Is There a Constitutional Alternative?", *Studies in East European Thought*, No. 54, 2002
4. Y. Ghai, "Public Participation and Minorities", MRG, London 2003 (available at www.minorityrights.org/download.php?id+112)
5. A. Singh, "Minority, Justice and Security in Post-Communist Europe: Continuing the Debate with Will Kymlicka", *Journal on Ethnopolitics and Minority Issues in Europe*, 4/2002
6. C. Taylor "The Politics of Recognition", In A. Gutmann (ed.), *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992)
7. S. Wheatley, "Non-Discrimination and Equality in the Right of Political Participation for Minorities", *Journal on Ethnopolitics and Minority Issues in Europe*, 3/2002.
8. Y. Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims", *Cardozo Law Review*, Vol. 21, No 4, 2000
9. 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 6 Institutional structure I. Foundations: The rule of law and the separation of powers (Politics within the limits of law. Legal, political, and normative features of the rule of law: can they be separated? The separation of powers, requirements: personal, functional, and organizational divisions. Checks & balances)

Mandatory readings:

1. G. Q. Walker, *The Rule of Law. Foundation of Constitutional Democracy*, Chapter I, pp. 1-42 (Melbourne: Melbourne University Press, 1988)
2. E. Barendt, "Separation of Powers and Constitutional Government", in R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (Aldershot: Ashgate/Dartmouth, 2005)

Optional readings:

1. M. J. Radin, "Reconsidering the Rule of Law", in R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (Aldershot: Ashgate/Dartmouth, 2005)
2. M. Neumann, *The Rule of Law. Politicizing Ethics* (Burlington: Ashgate, 2002)
3. I. Shapiro (ed.), *The Rule of Law, Nomos XXXVII* (New York: New York University Press, 1994)
4. A. Sajo 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)
5. M. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998/1967)

Mid-term exam in the week following Topic Six

Topic 7 Institutional structure II: Forms of government (Parliamentarism. Presidentialism. Semi-, and super-presidentialism)

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 ad Democracy* (Waltham: Blaisdel, 1968)

Topic 8 Institutional structure III: Constitutional adjudication (What is constitutional interpretation: protecting or re-writing the constitution? Who is the guardian? American and European models? Constitutional courts in post-communism)

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. K. L. Scheppele, "Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe", in *Constitutionalism and Political Reconstruction*, Ed. by S.A. Arjomand (Leiden and Boston: Brill, 2007)
2. E. Chemerinsky, *Constitutional Law. Principles and Policies* (New York: Aspen, 2006)
3. W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe* (Dordrecht: Springer, 2005)
4. M. Troper, "The Logic of Justification of Judicial Review", *International Journal of Constitutional Law*, Vol. 1, No. 1, 2003
5. R. Prochazka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Bdapest: CEU Press, 2002)
6. A. Bragyova, "Constitutional Review and Democracy", *Acta Juridica Hungarica*, Vol. 40, 1999
7. R. Dworkin, *Law's Empire* (London: Fontana Press, 1986)

Topic 9 Constitutional culture, or constitution(alism) as culture? (On the relationship between particular cultural environments and requirements of constitutionalism: local circumstances vs constitutional universalism. Determinism of culture vs constructivism. Constitution-making as a balancing act?)

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, *The Identity of Constitutional Subject. Selfhood, Citizenship, Culture, and Community* (London and New York: Routledge, 2010)
2. P. Mouritsen and K. Jorgensen (eds.), *Constituting Communities. Political Solutions to Cultural Conflict* (Houndmills: Palgrave, 2008)
3. G. Frankenberg, "Tocqueville's Question. The Role of a Constitution in the Process of Integration" *Ratio Juris*, Vol. 13 No. 1, 2000
4. 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 10 Responding to Crisis: State of Emergency (Democracy and threats. Security vs liberty. State of emergency: defending or compromising democracy? Procedural conditions)

Mandatory readings:

1. R. Deskoska, "Restrictions of Human Rights in Emergency Situations", Paper for Presentation at IACL Conference, Athens 2007
2. V. Ramraj, "No Doctrine more Pernicious? Emergencies and the Limits of Legality", in V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008)

Optional readings:

1. B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006)
2. M. Tushnet (ed.), *The Constitution in Wartime. Beyond Alarmism and Complacency* (Durham, Duke University Press, 2006)
3. D. Dyzenhaus, *Constitution of Law. Legality in a Time of Emergency* (Cambridge: CUP, 2006)

4. C. Rossiter, *Constitutional Dictatorship. Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948)

Topic 11 *Beyond the Nation-State: EU Constitutionalism* (Political and constitutional evolution. The legal and political character of the Union. Membership. Constitutionalism and democratic legitimacy)

Mandatory readings:

1. E. Eriksen and J. Fossum, "Europe in Transformation. How to Reconstitute Democracy?", *RECON Online Working Paper 2007/01* www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html
2. H. Brunkhorst, "A Polity Without a State? European Constitutionalism Between Evolution and Revolution" *ARENA Working Paper 14/2003*

Optional readings:

1. A. Wiener, *The Invisible Constitution of Politics. Contested Norms and International Encounters* (Cambridge: CUP, 2008)
2. A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford and Portland: Hart, 2006)
3. P. Eleftheriadis, "The Idea of a European Constitution". *Oxford Journal of Legal Studies*, Vol. 27, No. 1, 2007.
4. E. Eriksen *et al* (eds.), *Developing a Constitution for Europe* (London: Routledge, 2004)
5. U. Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism, in the European Imagination", *European Law Journal*, Vol. 9, No. 1, 2003.

Final exam in the last week of the course.