

Colloquium Comparative Constitutionalism – Syllabus WS 2007/08

Date	Questions for the Session	Reading	Method
17 Oct	<p>Introduction</p> <p>brief outline: approach, material, subject</p> <p>more detailed explanation of the structure of the course</p> <p>information on exams and course requirements</p> <p>proceeding, how to find cases</p> <p>planning of presentations</p>		<p>input: outline of course</p> <p>input: intro to materials and to case research</p> <p>questions</p> <p>presentation of worksheet for leading questions</p>
24 Oct	<p>Comparative Law: Functionalism</p> <p>what is comparative law? a method? a science with its own method? what is a method, what is a science?</p> <p>how do we compare, and what do we compare? why do we compare at all?</p> <p>are we looking for the “best solution”?</p> <p>what is the function of a constitution, are there shared problems?</p> <p>can there be a <i>praesumptio similitudinis</i> in constitutions, or are they “more different” than private law? why?</p> <p>is there a “best constitution”, and are we looking for it?</p>	<p>Anne Peters/ Heiner Schwenke, <i>Comparative Law Beyond Post-Modernism</i>, 49 <i>Int'l & Comp. L Quarterly</i> 4 (2000), 803-810</p> <p>Konrad Zweigert/ Hein Kötz, <i>Einführung in die Rechtsvergleichung: auf dem Gebiete des Privatrechts</i>, Tübingen: Mohr, 3rd edn. 1996, pp 31-47</p>	<p>Task: Develop 5-10 leading questions for comparative analysis.</p>
31 Oct	<p>Comparative Constitutionalism: Criticism</p> <p>can there be objective comparison, or is our perception too tainted by our cultural preconceptions? what is an objective <i>tertium comparationis</i>?</p> <p>what, outside of the law, needs to be considered?</p>	<p>Günther Frankenberg, <i>Critical Comparisons: Re-thinking Comparative Law</i>, 26 <i>Harvard Int'l L Jnl</i> (1985), 411-455</p> <p>German version: Frankenberg, <i>Autorität und Integration</i>, Frankfurt/M: Suhrkamp, 2003, pp 299-363</p> <p>Tushnet, Mark, <i>Some reflections on method in comparative constitutional law</i>, in: Choudhry, S., <i>The Migration of Constitutional Ideas</i>, Cambridge: Cambridge University Press 2006, 67-83</p>	<p>close reading and discussion of “Critical Comparisons” (bring English version as a basis for discussion)</p>
07 Nov	<p>Cultural Relativism and Universal Standards</p> <p>Are there universal laws, especially universal rights? or do they have to be adapted to the cultures that use them?</p>	<p>Amartya Sen, <i>Identity and Violence: The Illusion of Destiny</i>, New York: Norton, 2007 pp 88-95 (optional: 10-12, 23-28,</p>	<p>brief presentation</p>

- Does this mean giving up a universalist claim? Consider S. Engle Merry's position. Are you convinced? 112-117)
(German version: Die Identitätsfalle. Warum es keinen Krieg der Kulturen gibt, München: Beck, 2007),
- Which role for culture with respect to the law? Kwame Anthony Appiah, *The Ethics of Identity*, Princeton Univ. Press, 2005, pp 65-83, 105-110, 130-138 (pp 141-154 optional)
- Should traditional ways of living and traditional laws be protected? To what extent, and how? Which developments can be expected of traditional legal systems? What is culture, anyway? Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago 2006, Ch. 1: Culture and Transnationalism, pp 1-35
- If there are universal laws, what if they conflict with the norms of the culture that is protected? Is there a right to difference within a protected community, or does the protection of culture trump individual concerns? optional:
- What does this mean for comparative constitutionalism? Consider the functionalist approach: Does its project of convergence assume a universalist stance? Will Kymlicka, *Multicultural Citizenship*, Oxford: Clarendon Press, 1995, Ch. 8 – optional
- 14 Nov **Comparative Constitutionalism: "Enlightened" Functionalism**
- Consider the positions discussed so far. Anne Peters/ Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 *Int'l & Comp. L Quarterly* 4 (2000), 800-803, 811-834 re-work your lead questions
- Can there be an "enlightened" (Teitel) version of Comparative Constitutionalism? Norman Dorsen et.al., *Comparative Constitutionalism*, West 2003, pp 1-16 (Ch. 1.A.-B.) = **Casebook**
- What would it look like, which questions should it ask? remember Frankenberg, *Critical Comparisons*, pp 440-455
Choudhry, Sujit, *Migration as a new metaphor in comparative constitutional law*, in: Choudhry, Sujit, *The Migration of Constitutional Ideas*, Cambridge: Cambridge University Press 2006, 1-35
optional:
Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 *Harvard L Rev.* (2004), 2570-2596
- 21 Nov **Functionalism Where? Legal Pluralism: Intrinsic Conflicts in Protected Groups**
- Do we have to go far to compare legal systems? Sally Engle Merry, *Legal Pluralism*, 22 *Law & Society Rev.* 5 (1988), 869-96 brief presentation?
- In which situations do pluralist legal systems evolve? Do they exist only in other societies, or also "at home"? remember Appiah, pp 105-113, 130-138, 141-154 beginning of case analysis
- Which role do minority rights and cultural rights play? Can they trump individual rights, e.g. as laid out in a constitution? *Bhe & Others v. The Magistrate, Khayelitsha & Others / Charlotte Shibi v. Mantabeni, Freddy Sithole & Others /*

tion? How can minority rights be protected while safeguarding constitutional rights? Consider multiculturalism.

Which role does gender play in "tradition" and "culture"?

Which role does colonialism play? How has colonialism shaped perceptions and realities of "customary" law? Consider Frankenberg.

South African Human Rights Commission & Others v. The President of the RSA & Others (2005) – Constitutional Court of South Africa

Santa Clara Pueblo v. Martinez (1978) – United States Supreme Court

Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Cambridge/ London: Harvard Univ. Press, 1987, pp 63-70

28 Nov **Legal Pluralism II: Religious Rules and the Individual**

What is the relation between law and society? Are there normative systems beyond written state as "law"? Is religion such a system, and what would be others? Can we find legal pluralism "at home"? or: How far do we really have to go to compare?

Are there different types of legal pluralism, e.g. minority rights, religious self-determination? ("Legal Pluralism I")

Which role should religion have in a state? Consider different concepts (neutrality, laicism, religious states)

What is "Islam" in the courts? The "other"? Consider post-colonial criticism and Frankenberg.

Why do cases on Muslim clothing dominate? What about other religions? Which religions might not be concerned?

Which role do sex and gender play in these decisions? Which role does the (female) body play in discussions around religion? Who is claiming it, and for what?

Which rights are implied? Is religious clothing an issue of religious rights, of privacy rights, of liberty, of equality?

Case No. 8 of Judicial Year 17 (May 18, 1996), Supreme Constitutional Court of Egypt, annotated translation by N.J. Brown and C.B. Lombardi, 21 *Am.U. Int'l L Rev.* (2006), 437-460

R (on the application of Begum) v. Headteacher and Governors of Denbigh High School (UK, 2006)

Leyla Şahin v. Turkey (ECHR, 2005)

Susanne Baer/Nora Markard, (K)ein deutsches Problem: Religiöse Kleidung vor Gericht. Ein internationaler Vergleich, in: Haug, Frigga/ Reimer, Katrin (Hg.), *Politik ums Kopftuch*, Hamburg 2005, S. 151-165.

case analysis

intensive discussion of lead questions

05 Dec **Sex, Gender and the Body**

→ questions from casebook

Casebook 576-583

Sheffield & Horsham v. UK (ECHR) – failure of state to recognize sex change

Transsexuals Case (BVerfG) – birth certificate

Laura Adamietz, *Latest Twists in German Transgender Jurisprudence*, LSA Conference 2007

find other, related cases

case analysis

presentation from students

12 Dec **Reproductive Rights**

Casebook 527-557

	→ questions from casebook	<p><i>Roe v. Wade (US SC) – abortion</i></p> <p><i>Planned Parenthood v. Casey (US SC) – informed consent</i></p> <p>comment: Ronald Dworkin, <i>The Center Holds, New York Review of Books</i>, 13 Aug 1993, 29-33</p> <p><i>(R. v. Morgenthaler (CAN) – doctors performing abortions – optional)</i></p> <p><i>Daigle v. Tremblay (CAN) – father</i></p>	<p>find other, related cases</p> <p>case analysis</p> <p>presentation from students</p>
19 Dec	<p>Intimate Partners</p> <p>→ questions from casebook</p>	<p>Casebook 597-609</p> <p><i>Loving v. Virginia (US SC) – mixed-race marriage</i></p> <p><i>Zablocki v. Redhail (US SC) – minor issue</i></p> <p><i>Ontario v. M & H. – spouse</i></p> <p>Catharine A. MacKinnon, <i>Sex Equality</i>, West 2001, pp. 428-434, 1143-1149</p>	<p>Find other, related cases.</p> <p>case analysis</p> <p>presentation from students</p>
09 Jan	<p>Families</p> <p>→ questions from casebook</p>	<p>Casebook 598-603</p> <p><i>Elsholz v. Germany (ECHR) – unmarried separated father</i></p> <p><i>Moore v. East Cleveland (US SC) – grandparents</i></p> <p><i>Sex Education case (BVerfG) – parents' rights in education</i></p> <p>Catharine A. MacKinnon, <i>Sex Equality</i>, West 2001, pp. 556-558</p>	<p>Find other, related cases.</p> <p>case analysis</p> <p>presentation from students</p>
16 Jan	<p>Sexuality and Procreation</p> <p>→ questions from casebook</p> <p>what is public concern, what is private? what is normal?</p>	<p>Casebook 610-616</p> <p><i>Griswold v. Connecticut (US SC) – contraceptives</i></p> <p><i>Toonen v. Australia (AUS) – crime of 'sodomy'</i></p> <p><i>ADT v. UK (ECHR) – sex at home</i></p> <p><i>Bowers v. Hardwick (US SC) – sex at home</i></p> <p><i>National Coalition for Gay & Lesbian Equality v. Minister of Justice and others (RSA) – crime of 'sodomy'</i></p> <p>Kendall Thomas, <i>The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick</i>, 79 <i>Virginia L Rev.</i> 7 (Oct., 1993), 1805-1832</p> <p>Catharine A. MacKinnon, <i>Sex Equality</i>, West 2001, pp. 1153-1155</p>	<p>Find other, related cases.</p> <p>case analysis</p> <p>presentation from students</p>

23 Jan	Pornography	<p>→ questions from casebook MacKinnon what is normal sex? Should this issue be covered in the casebook? Or is pornography too sensitive of an issue? Why (not)? Which rights are implied: speech, equality, dignity, ...?</p>	<p><i>American Booksellers Ass., Inc., v. William H. Hudnut, III (US SC, 1985)</i> <i>Little Sisters CAN</i> <i>Butler CAN</i> Catharine MacKinnon, <i>Sex Equality</i>, West 2001, pp. 1506-1512, 1562-1592, 1600-1610</p>	<p>Find other, related cases. case analysis presentation from students</p>
30 Jan	Informational Self-Determination and Anonymity	<p>→ questions from casebook Which information may the state obtain, which information may it pass on to others, and which information is it required to provide? Discuss in relation to the issues previously covered. Which issues are related?</p>	<p>Casebook 583-595 <i>Lustration case (HU) – public servants</i> <i>Tax data case (PL) – information from banks</i> <i>M.S. v. Sweden (ECHR) – medical information and insurance</i> <i>Gaskin v. UK (ECHR) – own childhood</i></p>	<p>Find other, related cases. case analysis presentation from students</p>
06 Feb	Drugs	<p>→ questions from casebook</p>	<p>Casebook 569-576 <i>Hashish case (BVerfG) – right to smoke recreational drugs</i> <i>R. v. Malmo-Levine (CAN) – right to smoke recreational drugs</i> <i>New Jersey v. TLO (US SC) – search of school child</i></p>	<p>Find other, related cases. case analysis presentation from students</p>
13 Feb	Back to the Beginning: Is there an ideal Constitution?	<p>Rethink the uses of comparative constitutional law. Reconsider comparative constitutionalism. Is there a project of convergence? Rconsider your lead questions.</p>	<p>Evaluation, Feedback Which suggestions do you have for the casebook? Why?</p>	<p>What did you learn? What did you not learn? Did the class meet your expectations? What did you (not) like about this class? Why?</p>