

Judicial Studies Program University of Nevada at Reno

History and Theory of Jurisprudence – Week 1
July 6-9, 6:30 pm to 9:00 pm, NJC 116

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Constitutional Issues of European Law

What kind of polity is evolving in Europe in form of the European Union – as a form of economic and political integration, as an actor at the global scene and as an interlocutor of the United States of America? What is its relationship to its Member States? How is it organized? What do democracy, citizenship, fundamental rights mean to the EU? The course is designed to help better understanding this organization “*sui generis*” as a new kind of a federal constitutional system “beyond statehood”, in discussing its political roots and objectives, its legal foundations and its development – comparing it to the US constitution.

The seminar is based upon case law of the ECJ, on academic writings on the constitutional process of the EU and on the practical experience of the instructor who served more than ten years as a legal advisor at the Legal Service of the European Commission (Brussels), advises the German Parliament on the constitutional reform of the European Union and represents the parliament before the German Federal Constitutional Court in the case brought against the ratification of the Treaty of Lisbon.

The course is divided into four sessions each for which some readings are highly recommended for preparation. A short introduction to each subject by the instructor will be followed by a discussion of the material indicated below. In preparing the session, each participant should draft a short set of remarks and questions regarding the readings (not more than ten lines) and e-mail it to the instructor, who will take them as a basis for organizing the discussion.

You may click on the names of the cases mentioned in order to find the text for reading; other [decisions](#) from the Member States’ highest or constitutional courts on constitutional issues are collected on the [ECLN](#)-website, where you also find the most recent texts of the Member States’ [Constitutions](#). For an excellent online introduction to European law and sources for study you may consult Joseph H.H. Weiler and M. Cocjan’s [teaching materials](#) on European Union law (2006). You may also consult *Koen Lenaerts/Piet Van Nuffel, Constitutional Law of the European Union*, 2nd ed., Sweet & Maxwell 2005, as well as in depth studies in: *Armin von Bogdandy/Jürgen Bast* (eds.) [Principles of European Constitutional Law](#). Modern Studies in European Law, Oxford, 2006 (new edition in preparation).

A key to European Law – contrary to common law – lies in the legal texts. Therefore it is to have a copy of the [Treaties](#). But also the jurisprudence of the ECJ are of particular value. The entire case law of the ECJ as well as the legislation are accessible at the [EurLex](#)-website. You may search for jurisprudence by inserting the case number and year.

Session 1:

Establishing the European Union: National constitutions and pooling sovereignty at the European level (first reading of the Treaties)

This is the session where we will discuss the constitutional foundations and the structure of the European Union as it stands. We will look at the “integration-clauses” of some of the Member States’ constitutions, see what are the peculiarities of the European Treaties and find out what is the justification for the national constitutions to contain special provisions for the conclusion of these treaties. In looking at the decisions of the German Federal Constitutional Court (BVerfG) on the Treaty of Maastricht and of the French Conseil Constitutionnel on the Treaty of Lisbon we will find out also how the concept of national sovereignty is understood with a view to the establishment of legislative, executive and judicial bodies at the European level.

Read for preparation:

- French Conseil Constitutionnel, Decision no 2007-560 DC of December 20th, 2007 - [Lisbon](#)
- German Federal Constitutional Court (BVerfG) – [Maastricht](#), also in: 1994 CMLRev 57 (read particularly chapters. B.2 and C)
- [Ingolf Pernice](#), The Treaty of Lisbon: Multilevel Constitutionalism in Action, in: Columbia Journal of European Law, 3/2009

Session 2:

Making a Constitution for Europe: Constitutionalism versus Intergovernmentalism (leading cases of the ECJ and academic critics)

In the second week we will take a first look at the earlier ECJ case-law, for getting some understanding of what this Court has made out of the founding treaties of the EU. There is an ongoing controversy on the qualification of what really is European law. Constitutionalism or institutionalism is one approach, Internationalism or intergouvernementalism is the other. The Courts’ position seems to be clear at first sight, but what is the concept behind? Was it the ECJ and its case-law, by which the treaties were “constitutionalised”? And what are the implications of each of the approaches for the construction of European law, and for its future development?

Read for preparation:

- ECJ Case 26/62 - [Van Gend](#), 6/64 - [Costa/ENEL](#).

- Daniel Halberstam, Constitutionalism and Pluralism in *Marbury and Van Gend*, in: Miguel Poiares Maduro/Loïc Azoulay (eds.), *The Past and the future of EU Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty*, forthcoming (2009)
- Andrew [Moravcsik](#), The European Constitutional Settlement, in: Kathleen McNamara and Sophie Meunier, eds. *Making History: European Integration and Institutional Change at 50 (State of the European Union, Vol. 8, 2007)*.

Session 3:

Three pillars of fundamental rights' protection: Understanding the need for, and the system of fundamental rights in the EU

Fundamental rights determine the legal status of the citizens in the EU, but not only. Most of them are general and applicable to all persons, only some of them are reserved to the citizens of the Union. We will find out how the protection of fundamental rights in the Union is ensured under the present treaties and the case law of the ECJ, but then turn to the system as it will be established under the Treaty of Lisbon. We will examine, therefore, the case-law based upon the general principles of law as found in the common constitutional traditions of the Member States, and turn to the question how the European Convention of Human Rights is made part of the system. As the European [Charter](#) of Fundamental Rights proclaimed by the Heads of State and Government at the Nice summit in December 2000 is not legally binding yet, we will find out what difference it may make when the reference made to the Charter in Article 6 of the EU-Treaty after Lisbon will come into effect.

Read for preparation (to be completed):

- ECJ Case 44/79 – [Hauer](#).
- [Francis Jacobs](#), The European Convention on Human Rights, The EU Charter of Human Rights and The European Court of Justice, in: Ingolf Pernice/Juliane Kokott/Cheryl Saunders (eds.): *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2006), p. 291-296
- [Ingolf Pernice](#), The Treaty of Lisbon and Fundamental Rights, in: S.Griller/J.Ziller (eds.), *The Lisbon Treaty*, 2008, p. 235-256.

Session 4:

The European Model: Designing a “new world order” in the light of multilevel constitutionalism (rule of law and global governance)

Given the European experience of preserving peace among the EU Member States we will determine conceptual changes in international relations to serve as guidelines for the design of a future global system. The new [International Criminal Court](#) and quasi-legislative activities of the UN Security Council seem to indicate a fundamental change in international law. The ECJ having made clear in “Kadi” that funda-

mental rights must be protected also when global security law is applied, the question is what could be the function of the rule of law at the global level.

Read for preparation:

- ECJ Case 402/05 – [Kadi](#) and Al Barakaat (in particular: summary and para's 331-380).
- Daniel Halberstam/Eric Stein, The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order (December 5, 2008). *Common Market Law Review*, forthcoming; U of Michigan Public Law Working Paper No. 134.
- Grainne De Burca, The European Court of Justice and the International Legal Order after *Kadi*, *Harvard International Law Journal*, Vol. 1, No. 51, 2009 (forthcoming), Fordham Law Legal Studies Research Paper No. 1321313.