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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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PROPOSAL TO HOLD A UNIDEM SEMINAR ON "EUROPEAN AND AMERICAN CONSTITUTIONALISM"

by

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Proposal to hold a UniDem-Seminar on
"European and American Constitutionalism"

1. The identification of the European constitutional heritage is not only a question of intra-European exchange, but also a question of the European identity in relation to other actors. United States constitutional law plays a major role in global constitutional thinking and practice. It is not clear, however, whether European and American constitutionalism are at all comparable concepts. While „American constitutionalism" is a household term, „European constitutionalism" is a more diffuse concept.

1. European Constitutionalism

2. European constitutionalism concerns comparative law and international law. From a comparative perspective European constitutionalism is a framework term which encourages the comparison of the constitutional law of different European states in order to find their common ground (be it for normative or for purely academic purposes). From an international perspective, European constitutionalism is a term which refers to the process of European integration from the specific perspective of constitutional law. Increasingly, however, the comparative and the international perspectives on European constitutionalism merge. Certain constitutional rules and principles which member states have in common are projected onto the international level as general principles of European Community law. The European Court of Justice and the European Court of Human Rights have been developing European law in this fashion for quite a while. Common European rules and principles have not only been identified in the area of human rights, but also in the area of internal state organisation (separation of powers). The current Brussels Convention on the reform of European treaties, for example, has been given the task of making proposals on how to „constitutionalise" the European Union, in particular its system of separation of powers. The Venice Commission of the Council of Europe has been given the task of identifying the European constitutional heritage in order to provide standards for the constitutions and related legislation of the Central and Eastern European states.

2. American Constitutionalism as compared to European Constitutionalism

3. European constitutionalism appears to be a distinctly domestic European phenomenon. One hesitates to compare the term to American constitutionalism. Traditionally, American constitutionalism is compared to French or German or other national constitutional systems. The reason for this is obvious since the American, French and German constitutional systems, with their respective characteristic judicial practice and cultures of interpretation (their constitutionalism), concern the same object: the rules concerning the working of an independent self-governing political community of human beings and their fundamental rights. European constitutionalism, on the other hand, seems to embody something which is both more removed from „the people" and more vague than national constitutional law.

4. The development of European integration, however, has started to make these clear-cut differences disappear. This is not only because a European entity is beginning to develop which more closely resembles a state. It is also because the European state itself and its characteristic constitutionalism is being transformed by the process of European integration.

This is most clearly visible in the jurisprudence of the European Court of Human Rights. The Court‘s jurisprudence necessarily influences and harmonises national human rights jurisprudence. To a more limited extent, similar developments are taking place in the area of state organisation.

3. Self-contained Constitutionalisms

5. The process of European constitutional integration is interesting and important in itself. It is, however, largely self-contained. The same is true, albeit for different reasons, of American constitutionalism. It is well-known that, so far, the judges of the U.S. Supreme Court have only rarely taken notice of other constitutional systems, both in their judgments and in their preparation. This self-constained nature of both European and American constitutionalism is not necessarily a problem, at least not for the functioning of the respective systems as such. It does, however, pose a challenge for constitutional lawyers, and perhaps for international relations scholars.

4. The Mutual Relationship of American and European Constitutionalism

6. The mutual relationship of American and European constitutionalism is not merely an academic question. During the Cold War, comparative constitutional lawyers and political scientists tended to emphasise the common ground within the North Atlantic region. Their view was perfectly legitimate and it is still firmly grounded in the cross-fertilizing historical development of North America and Western Europe which has taken place since at least the eighteenth century. With the end of the socialist systems in Eastern Europe, however, it seems that a change of emphasis from the similarities to the differences between the constitutionalisms in the United States and Europe may be underway. Over the last five or ten years, some issues have emerged which indicate that the formerly heterogenous European constitutionalisms might merge into a somewhat more unified entity and develop certain rules and qualities which are distinctly different from American constitutionalism.

5. Aspects and Questions

7. The most obvious examples of such differing rules are the respective regulations concerning the death penalty and hate speech. Whether these two subjects are merely limited issues or whether they reflect deeper differences between the respective constitutionalist spheres seems to be worth exploring.

8. One might identify other important differences. While the European Court of Human Rights has embraced the concept that the state has „positive obligations“ with respect to ensuring the effective exercise of fundamental rights, the U.S. Supreme Court has rejected this notion (e.g. DeShaney v. Winnebago County). This difference is not only important for a limited number of practical cases, but it also affects how the constitution conceives the role of the state in relation to the individual. Another important difference concerns the issue of equal protection. It seems that the European Court of Human Rights and other European constitutional courts have adopted a more flexible approach towards this issue than the U.S. Supreme Court whose jurisprudence is characterised by a strict level of protection with respect to a limited number of suspect classifications but a rather lenient approach towards others.

9. The suspected differences in the area of equal protection may not be limited to this particular subject. Comparative research has asserted that the preferred method of fundamental rights interpretation by the U.S. Supreme Court is so-called definitional balancing which involves the development of easily applicable tests designed to ensure a uniformity of decisions. On the other hand, one tends to find a more specific form of balancing in the jurisprudence of the European Court of Human Rights, as well as in the jurisprudence of a number of European constitutional courts. The latter method encourages the lower courts to take „all relevant factors of the case" into account. This approach may be more just in the invidual case, but makes court decisions more difficult to predict. A related issue is the question of the role of the highest court. While the U.S. Supreme Court may conceive itself as an umpire for the proper working of the democratic process, European constitutional courts seem to ascribe to a more substantive, or perhaps, more paternalistic role. The increasing retreat by the US Supreme Court since the seventies from an activist (liberal) interpretation of fundamental rights in favour of a more restricted approach which emphasises democratic choice and states' rights appears (generally) not to have been followed in Europe.

10. Another issue concerns the relationship between (specific) rules and (general) principles. It appears that this relationship is not the same in American and European constitutionalism. In Europe courts tend to derive specific rules and decisions from general principles, such as the the principles of the rule of law and democracy. By contrast, courts in the United States seem to prefer a more specific basis in the constitution. If this is indeed the case, this would have important implications for the role of the constitution and the highest courts in the respective legal systems. One particularly important sub-issue of this question is the relation between rules and values. Although the term „American values" is a household term in political discourse, it seems that the U.S. courts have not made active use of such terms while interpreting the law. In Europe, on the other hand, constitutional „values" seem to play an important role, at least in judicial rhetoric.

11. A last set of questions relates to the character of the constitutional system in its temporal and international context. The first aspect concerns the flexibility of the constitution. The US Constitution is difficult to amend while European constitutions can be more easily amended. Even European treaties are frequently amended in practice. This difference is important for the character of the constitutionalism concerned. If amendment is impossible, this may contribute to a vision of greater importance of the constitution, but it may also impose a greater responsibility upon the judiciary to keep the constitution a living document. The possibility of amendment is particularly important with respect to the relationship between the respective constitutional system and international law. While European constitutions have been amended in order to confirm or permit certain intense forms of international (European) integration and while they are generally open for the application of international law, the same cannot be said for the United States. It is conceivable that the rules and the attitude of a constitutional system may influence its character, or at least its self-conception with respect to the questions of flexibility and international law.

6. Proposed Subjects of Discussion

12. The following subjects are therefore proposed for discussion:

I. Issues
   1. The Death Penalty
   2. Hate Speech

II. Functions
   1. Positive Obligations
   2. Equal Protection

III. Methods
   1. Balancing
   2. The Highest Court

IV. Rules
   1. General Principles
   2. Rules and Values

V. Context
   1. Flexibility
   2. International Law

7. A Dialectical Relationship and the Question of Identity

13. In its most recent decision concerning the admissibility of the death penalty for mentally disabled persons, the US Supreme Court referred to the attitude of European and other states, thereby recognizing to a certain extent that a dialectical relationship exists between the different constitutional systems of the world. Today, the existence of such a dialectical relationship is generally accepted within Europe, although there is still disagreement with respect to its specific workings and the degree to which there is a process of harmonisation. In any event, the results of this process of harmonisation contribute to what is sometimes called the „European identity". It is a characteristic feature of the United States that the „American identity" is determined to a large extent by the American Constitution and its specific constitutionalism. Given the current situation in the United States, in Europe, between these two entities, and, finally, given their respective importance as a role model for many other states, regions and communities on the globe, it would seem desirable that a project be undertaken to determine whether it is indeed reasonable to distinguish between American and European constitutionalism and, if so, to reflect on the extent of possible antagonism between the two and its likely implications.

8. Speakers and Participants

14. The main speakers (8-10) should be lawyers with knowledge of American constitutional law and of important aspects of European constitutionalism (in practice or theory, on the national or the international level). In principle, about half of the main speakers should come from Europe, the other half from the United States. It might also be desirable to include colleagues from other states with highly developed forms of constitutionalism, such as Canada, Israel, and South Africa. Those states tend to follow the developments in both the United States and Europe closely in order to look for the most convincing solutions for themselves.