

Constitutional Justice and the Democratic Principle: Germany and Italy compared

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“A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy” – wrote Antonin Scalia, former Justice in the US Supreme Court, in a famous dissenting opinion. Following Scalia’s argument, one could question the democratic nature of both the German and the Italian legal order. In both countries, indeed, powerful constitutional courts consisting of qualified lawyers not directly elected by the people have been established by the post-World War Two Constitutions. Through the decades, the *Bundesverfassungsgericht* and the *Corte costituzionale* have consolidated their authority and they are now key institutions having a say in nearly all major issues of public concern.

This Kolloquium aims at discussing the role of the constitutional court in a democracy by comparing the system of constitutional adjudication in Germany and in Italy. It focuses, in particular, on the constitutional court’s most characterizing power, namely that of striking down legislation passed by a democratically elected Parliament. It discusses the reasons that justify, both theoretically and historically, the establishment of such an institution and examines the different techniques to which the constitutional courts have resorted in Germany and in Italy to strike a fair balance between the protection of the Constitution and the respect for the autonomy of the democratically elected Parliament. Particular emphasis is placed on the role of the constitutional courts in the European legal space and on their interaction with the European Court of Justice and the European Court of Human Rights.

The course intends to provide students with a first-hand understanding of the methodology of comparative law, guiding them to identify the similarities and the differences between the two systems of constitutional justice, and to give reason of them. Furthermore, it aims at making them familiar with the concrete operation of the most common techniques of constitutional adjudication, such as the balancing of rights and the proportionality review.

Classes include both traditional lectures and the discussion of selected judgments of the two courts. At the end of the course, students will be given the opportunity to attend a seminar at the Max Planck Institute for Comparative Public Law and International Law with two judges of the *Bundesverfassungsgericht* and of the *Corte costituzionale*, Prof. Dr. Peter Huber and Prof. Dr. Marta Cartabia.

Each student is further required to write a short essay of roughly 10 pages comparing two decisions of the two courts on similar crucial topics, such as, for instance, the principle of equality, religious freedom, freedom of expression. Essays will be discussed in the last class. This exercise is meant to help students improve their skills in discussing legal issues and in writing and presenting their own essays. To this end, the lecturers will constantly supervise and

support the students in choosing the topic and in the whole process of studying, collecting materials and writing the essay.

All classes are held in English. Students can write and discuss the paper either in English or in German. Previous knowledge of German and Italian is not required.

DATES AND TOPICS

Wed 11 April 2018, h. 12.00-14.00

At the origins of constitutional adjudication

Bundesverfassungsgericht and *Corte costituzionale* in the work of the Constituents: their composition and jurisdictions compared

Wed 18 April 2018, h. 12.00-14.00

The foundational judgments

Constitutional courts' self-empowerment

Wed 25 April 2018, h. 12.00-14.00

The golden principle of constitutional review

The test of proportionality in Germany and in Italy

Wed 2 May 2018, h. 12.00-14.00

Constitutional courts and the legislature

The typology of constitutional courts' decisions

Wed 9 May 2018, h. 12.00-14.00

Constitutional courts and ordinary courts

Between cooperation and correction

Wed 16 May 2018, h. 12.00-14.00

The rules of democracy

Judicial review of election law

Wed 23 May 2018, h. 12.00-14.00

Constitutional courts and international law

Compliance and resistance

Wed 30 May 2018, h. 12.00-14.00

Constitutional courts and the European Integration Process

Constitutional identity and primacy of EU law in constitutional courts' view

Mon 9 July 2018

Max Planck Institute for Comparative Public Law and International Law (Heidelberg)

***Bundesverfassungsgericht* and *Corte costituzionale*: two archetypes of Constitutional Justice?**

A conversation with two prominent judges of the German and Italian constitutional courts

July 2018, date tbc: Presentation and Discussion of the Students' Papers at the Max Planck Institute in Heidelberg