



HIGHER SCHOOL OF ECONOMICS
NATIONAL RESEARCH UNIVERSITY

LAW FACULTY

Department of Public Law Disciplines

POLITICAL RIGHTS IN COMPARATIVE PERSPECTIVE

MASTER'S PROGRAM "PUBLIC LAW"

Course Syllabus

Author of the Course / Course Instructor
Tatiana Khramova, PhD, Associate Professor
thramova@hse.ru

Moscow
2018-2019

COURSE DESCRIPTION

Political Rights in Comparative Perspective is an advanced master's course that explores the nature and extent of political rights in various constitutional jurisdictions. The course examines approaches adopted by constitutional courts in mature and young democracies towards establishing a fair balance between political rights and other legitimate interests. It develops students' analytical thinking by engaging them in a comparative study of cases of high controversy involving restrictions of such rights as freedom of political association, freedom of speech and assembly, voting rights, and a right to equal participation. The course enables students to compare and reflect upon the courts' reasoning and generate compelling arguments for the benefit of each side of the dispute.

The course is conducted in English.

PREREQUISITES

Students are expected to have good command in theory of law and constitutional law, be familiar with comparative methodology taught at Comparative Constitutional Law during the first year of master course. Students are expected to be confident in English (Levels B1-B2 and higher).

The course is *elective* and designed particularly for students interested in performing comparative research and/or fancying a career in constitutional and human rights litigation.

COURSE OBJECTIVES

The course aims at enabling the students to analyse and evaluate legal texts (court decisions, legislative acts, international treaties) related to political rights. Specific goals of the course are:

- to put political rights into a broad legal, political, historical and comparative context and identify their role in a contemporary democratic society;
- to examine major doctrines and techniques related to striking a balance between political rights and other legitimate interests;
- to compare and reflect upon alternative approaches of constitutional courts and the European Court of Human Rights to defining the scope of fundamental political rights;
- to enable the students to substantiate arguments favouring and opposing specific restrictions of political rights.

INTENDED LEARNING OUTCOMES

Students who have successfully completed the essential learning activities are expected to be able to:

- identify and explain the concepts of proportionality, content-based / content-neutral restrictions, horizontal (third-party) effect of constitutional rights, political pluralism, militant democracy, positive and negative discrimination, global constitutionalism, constitutional identity;

- apply theoretical concepts and methodological framework to particular cases on restrictions of political rights;
- justify and criticize a legal position on a controversial issue involving the exercise of a right to vote, freedom of political communication, freedom of assembly, freedom of political association and a right to equal participation;
- professionally communicate – in both oral and written forms – a possible solution to a legal case involving restrictions of political rights.

DISTRIBUTION OF HOURS

№	Topic	Number of hours	Contact hours		Self-study
			Lectures	Seminars	
1.	Political rights: theoretical framework	12	2	2	8
2.	Restrictions of political rights: comparative challenges	14	4	2	8
3.	Political rights in the era of globalization	12	2	2	8
4.	Freedom of political association	14	2	4	8
5.	Voting rights	18	4	4	10
6.	Right to equal participation	14	2	4	8
7.	Freedom of political communication	16	4	4	8
8.	Right to protest	14	2	4	8
	Total	114	22	26	66

ASSESSMENT

Intermediate assessment. Students are required to pass intermediate quizzes, submit a home assignment (case note) and engage in class debates.

Home assignment. Students are expected to perform a comparative analysis of two or more cases related to a particular restriction of a political right. Topics are selected according to the student's individual interest. Home assignment is evaluated according to the following criteria:

#	Grading criteria	Grade (out of 10)
1.	Relevance to the topic of the course	
2.	Clearness of the problem statement: what does the author want to compare	
3.	Appropriateness of case selection (are cases comparable)	
4.	Factual correctness	
5.	Providing a context for selected cases (historical, political, institutional)	
6.	Conceptualization of the problem (application of relevant legal doctrines)	
7.	Interpretation of the results (whether approaches are similar or different and why)	
8.	Critical thinking (student's contribution to the discussion)	
9.	Text structure (introduction, analysis, conclusion)	
10.	Formatting (typos, accuracy, references, citations, data sources, etc.)	

All grades (1 to 10) are added together and divided by 10 to form the final grade for home assignment.

Debates. Students will be divided into groups and presented with a controversial statement regarding a restriction of one of the covered political rights. Debates are organized in the format of Karl Popper's debates. Specific instructions, time restrictions and criteria for assessment of oral arguments will be given to the students one week before the debates.

Final assessment is performed in the form of a group project. Students are presented with a legal case 1 month prior to the day of the final presentation. Each group (2-4 students) must submit a formal constitutional complaint or amicus brief on the case and prepare a presentation stating its main arguments. Presentations and formal documents must be submitted 2 days prior to the final presentation. Groups are required to prepare questions (2-3 questions per group) to be raised during Q&A session at the final presentation.

Criteria for assessment. There are three types of activity that contribute to the success of the group work and are directly assessed:

- 1) Legal analysis (formulating the claim, selection and justification of arguments, proportionality analysis)
- 2) Presentation (oral communication)
- 3) Discussion (questions to other groups, Q&A session)

Analytical skills are assessed by the teacher primarily on the basis of the content of submitted legal documents according to the following criteria:

1. Ability to identify a problem of constitutionality (proportionality) of restrictions of political rights;
2. Ability to select relevant and convincing arguments to justify the general claim;

3. Ability to incorporate a comparative component into the complaint (amicus brief);
 4. Ability to organize professional written communication using appropriate legal style.
- More specific grading instructions will be provided to the students together with the case.

Presentation skills of each speaker are assessed according to the following criteria:

1. Ability to hold attention of the audience;
2. Clarity and persuasiveness;
3. Inner logic of the presentation;
4. Time and role management (distribution of the roles among group members, total time – 12 minutes)

Participation in discussion is assessed on the basis the quality of questions addressed to other groups and the quality of answers to the questions stated by the teacher and other groups.

GRADE DETERMINATION

The final grade (FG) is determined according to the following formula:

$$FG = 20\% * G_{\text{quizzes}} + 20\% * G_{\text{case note}} + 20\% * G_{\text{debates}} + 40\% * G_{\text{final project}}$$

where:

G_{quizzes} is a grade earned for active participation in seminar discussions (50%) + an average grade for quizzes (50%);

$G_{\text{case note}}$ is a grade acquired for submitting a home assignment in the form of a case note;

G_{debates} is a grade acquired for participation in class debates;

$G_{\text{final project}}$ is a grade earned for submitting a final group project, presenting it in class and participating in Q&A session.

METHODS OF INSTRUCTION

Most classes are conducted in the format of interactive lectures or discussion seminars. A model of “flipped classroom” is implemented; meaning that all essential readings (literature, slides, cases, additional materials) are done outside of the classroom in the form of self-study, while class discussions are devoted to unclear and problematic theoretical concepts and case analysis. Unresolved questions may be addressed to the teacher on appointment during office hours. The course intends to implement various forms of group work, including group discussions, debates, group project, etc.

COURSE OUTLINE

Topic 1. Political Rights: Theoretical Framework

Political rights as constitutional rights. Approaches to interpretation and classification. Political rights and political regime. The role of constitutional and supranational courts in the protection of political rights.

Introduction to comparative method. Controversial nature and challenges in defining the scope of political rights.

Cases:

ECHR: Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Judgment of 22 December 2009. Applications nos. 27996/06 and 34836/06.

Readings:

Alec Stone Sweet. Constitutional Courts. Oxford, UK in Oxford Handbook of Comparative Constitutional Law (2012). Available at: http://works.bepress.com/alec_stone_sweet/43/.

Federico Fabbrini. Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective. OUP, 2014.

Ran Hirschl. The Question of Case Selection in Comparative Constitutional Law // The American Journal of Comparative Law. 2005. Vol. LIII. No. 1.

Sadurski, W. (ed.) Political Rights Under Stress in 21st Century Europe. Oxford University Press, 2006.

Topic 2. Restrictions of political rights: comparative challenges

Lawful and unlawful restrictions of rights. Proportionality and balancing. Legitimate aims of restricting political rights. The doctrine of militant democracy. Case study: desecration of flag.

Cases:

US Supreme Court:

- *Texas v. Johnson*, 491 U.S. 397 (1989), <https://supreme.justia.com/cases/federal/us/491/397/case.html>;
- *Snyder v. Phelps*, 562 U.S. 443 (2011), <https://supreme.justia.com/cases/federal/us/562/443/>;

Germany: BverfG, Beschluss des Ersten Senats vom 7. März 1990, 1 BvR 266/86 und 913/87 <http://www.servat.unibe.ch/dfr/bv081278.html>.

Readings:

Alexy, R. A Theory of Constitutional Rights. Oxford University Press. 2009.

Aleinikoff A.T. Constitutional Law in the Age of Balancing // The Yale Law Journal. 1987. Vol. 96. No. 5. Pp. 943 – 1005.

Barak, A. Proportionality: Constitutional Rights and Their Limitations. Cambridge University Press, 2012.

Krudewagen U. Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court. *Arizona Journal of International and Comparative Law*, 2002, vol. 19, no. 2, pp. 679–712.

Macklem P. Militant Democracy, Legal Pluralism, and the Paradox of Self-determination, *International Journal of Constitutional Law*, Volume 4, Issue 3, 1 July 2006, pp. 488–516.

Sajó, A., Uitz, R. Constitutions Under Stress. Chapter 11 in *The Constitution of Freedom. An Introduction of Legal Constitutionalism*. New York: Oxford University Press, 2017.

Sajó A. (ed.), *Militant Democracy*. Eleven International Publishing, 2004.

Grimm D. Proportionality in Canadian and German Constitutional Jurisprudence // The University of Toronto Law Journal, Vol. 57, No. 2, 2007, pp. 383-397.
Schlink B. Proportionality In Constitutional Law: Why Everywhere But Here? // 22 Duke Journal of Comparative & International Law 291-302 (2012) Available at: <https://scholarship.law.duke.edu/djCIL/vol22/iss2/5>.

Topic 3. Political Rights in the Era of Globalization

Global constitutionalism. Judicial dialogue and legal implants. Competition between national and international standards for protection of political rights. Constitutional identity as a limit for globalization. Worldwide security “mania”: political rights under threat. Populist slogans and democracy as a challenge

Cases:

Constitutional Court of South Africa, *State v. Mhlungu and Others*, (CCT25/94) [1995] ZACC 4

Readings:

Saunders, C. Towards a Global Constitutional Gene Pool // National Taiwan University Law Review. 2009. Vol. 4. No. 3. P. 2- 38.

Donnelly, J. The Relative Universality of Human Rights // Human Rights Quarterly. 2007. Vol. 29. No. 2.

Peters, A. The Merits of Global Constitutionalism // Indiana Journal of Global Legal Studies. 2009. Vol. 16. No. 2.

Law, D. S., Versteeg, M. The Evolution and Ideology of Global Constitutionalism // California Law Review. 2011. Vol. 99. No. 5. Pp. 1163-1257.

McCrudden, C. A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights // Oxford Journal of Legal Studies. 2000. Vol. 20. No. 4. Pp. 499–532.

Levinson, S. Looking Abroad When Interpreting the U.S. Constitution: Some Reflections // Texas International Law Journal. 2004. Vol. 39. Pp. 353 – 365.

Halmai, Gabor. Nationali(ist) Constitutional Identity? Hungary’s Road to Abuse Constitutional Pluralism. May 2017. Available at https://www.researchgate.net/publication/316645908_Nationaliist_Constitutional_Identity_Hungarys_Road_to_Abuse_Constitutional_Pluralism;

Sledzinska-Simon, A., Ziólkowski, M. Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty? (July 5, 2017). Available at SSRN: <https://ssrn.com/abstract=2997407>.

Topic 4. Freedom of Political Association

Political pluralism. Right to association and political competition. Prohibition of political parties and alternative measures to fight the “enemies” of democracy. Political extremism. Funding political parties: direct and indirect. The role of state financing in the activity of political parties. Political parties and media.

Cases:

Israel: Moshe Neiman et al. v. Chairman of the Central Elections Committee For the Eleventh Knesset (1985) EA 2/84. Available at: http://elyon1.court.gov.il/files_eng/84/020/000/z01/84000020.z01.pdf.

Germany:

- BVerfG, Judgment of the Second Senate of 17 January 2017, 2 BvB 1/13. Available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html;
- Communist Party Case (1956) 5 BVerfGE 85;
- Socialist Reich Party Case (1952) 2 BVerfGE 1. Available in German at: <http://www.servat.unibe.ch/dfr/bv002001.html>;

Poland: Judgment of 8th March 2000, Pp 1/99 Available at: http://trybunal.gov.pl/fileadmin/content/omowienia/Pp_1_99_GB.pdf;

Supreme Court of the USA:

- Buckley v. Valeo, 424 U.S. 1 (1976) <https://supreme.justia.com/cases/federal/us/424/1/>;
- Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) <https://supreme.justia.com/cases/federal/us/558/310/>;

Canada: Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827, 2004 SCC 33 <https://www.canlii.org/en/ca/scc/doc/2004/2004scc33/2004scc33.html>;

Australia: McCloy v. New South Wales ((2015) 89 ALJR 857;

ECHR:

- Herri Batasuna and Batasuna v. Spain, Applications nos. 25803/04 and 25817/04, Judgment of 30 June 2009;
- Refah Partisi (the Welfare Party) and Others v. Turkey, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003.
- Bowman v United Kingdom, Application No. 24839/94, Judgment of 29 January 1998;
- Animal Defenders International v United Kingdom, Application No. 48876/08, Judgment of 22 April 2013.

Readings:

Brems, E. Freedom of Political Association and the Question of Party Closures in Wojciech Sadurski (ed), Political Rights Under Stress in 21st Century Europe. Oxford University Press, 2006.

Issacharoff, S. Fragile Democracies // 120 Harv. L. Rev. 2007. Pp. 1405-1467.

Hasen, R. Regulation of Campaign Finance in Global Perspectives on Constitutional Law (ed. by Vikram Amar, Mark V. Tushnet). OUP, 2009.

Molier G., Rijpkema B. Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans // European Constitutional Law Review. 2018. Vol. 14, pp. 394 - 409.

Tyulkina, S. 2015. *Militant Democracy: Undemocratic Political Parties and Beyond*. London, New York: Routledge.

Vírgala Foruria E. The banning of political parties in Spain (the Batasuna case) // Revista Ballot - Rio de Janeiro, V. 1 N. 1, Maio/Agosto 2015, pp. 1-20.

Topic 5. Voting rights

Voting rights in a democratic state. Qualifications. Compulsory voting. Dilemma of prisoners' voting. Direct v. indirect democracy. Constitutional referendums and constitutional change. Independence referendums and a right to self-determination (Quebec, Scotland, Catalonia, Crimea). Problems around Brexit.

Cases:

ECHR:

- Hirst v. the United Kingdom (no. 2), Application No. 74025/01, Judgment of 6 October 2005;
- Greens and M.T. v. the United Kingdom, Applications nos. 60041/08 and 60054/08, Judgment of 23 November 2010;
- Alajos Kiss v. Hungary, Application No. 38832/06, Judgment of 20 May 2010.

Canada:

- *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519.
- *Reference re Secession of Quebec*. [1998] 2 S.C.R. 217

USA: *Richardson v. Ramirez*, 418 U.S. 24 (1974)

South Africa: *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04)* [2004] ZACC 10

Russia: Judgment of the Constitutional Court of the Russian Federation of 19 April 2016 N 12-P in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* in connection with the request of the Ministry of Justice of the Russian Federation. Available at:

http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf

Australia: *Vickie Lee Roach v Electoral Commissioner & Commonwealth of Australia* [2007] HCA 43.

Readings:

King J. Should prisoners have the right to vote? // <https://ukconstitutionallaw.org/2011/05/18/jeff-king-should-prisoners-have-the-right-to-vote/>.

Ziegler R. The case for letting prisoners vote // <https://ukhumanrightsblog.com/2012/05/24/the-case-for-letting-prisoners-vote-reuven-ziegler/>.

Prisoners' Right to Vote Factsheet

http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf

Oklopčić Z. Constitutionalize This: Catalan Referendum as Political Surprise and Theoretical Disruption, *International Journal of Constitutional Law Blog*, Oct. 6, 2017, <http://www.iconnectblog.com/2017/10/constitutionalize-this-the-catalan-referendum-as-political-surprise-and-theoretical-disruption>.

Partlett W., Khramova T. Interpretation and the Impossibility of Implementation in Russian Prisoner Voting, *IACL - AIDC Blog*, 18 August 2016. Available at: <https://blog->

iacl-aidc.org/2016-posts/2016/8/18/analysis-interpretation-and-the-impossibility-of-implementation-in-russian-prisoner-voting.

Stephen Tierney: Was the Brexit Referendum Democratic?

<https://ukconstitutionallaw.org/2016/07/25/stephen-tierney-was-the-brexit-referendum-democratic/>.

Topic 6. Right to equal participation

Formal and substantive equality. Equality, non-discrimination, equal treatment. Positive discrimination. Gender (in)equality in politics: the problem of feminine quotas. Equality in elections. Prohibition of discrimination as an argument in court: burden of proof.

Cases:

Constitutional Court of South Africa: South African Police Service v. Solidarity obo Barnard [2014] ZACC 23

Supreme Court of the USA:

- Fisher v. the University of Texas, 136 S. Ct. 2198 (2016)
- Bush v. Gore 531 U.S. 98 (2000).

India: State of Uttar Pradesh v. Pradip Tandon & Ors, Judgment of 18 November 1974, 1975 AIR 563, 1975 SCR (2) 761.

France: Feminine Quotas Cases, Constitutional Council 82-146 DC of 18 November 1982, 2000-429 DC of 30 May 2000.

Italy: Constitutional Court judgments no. 422/1995 of 12 September 1995; no. 49/2003 of 10 February 2003; no. 4/2010 of 27 January 2010.

Spain: Constitutional Court Judgment No. 12/2008 of 29 January 2008.

Readings:

Baer, S. Equality: The Jurisprudence of the German Constitutional Court. Colum. J. Eur. L. 5, no. 2 (1999): 249-79.

Fredman, S. Substantive equality revisited. I•CON (2016), Vol. 14 No. 3, 712–738.

Lenoir N. The Representation of Women in Politics: From Quotas to Parity in Elections. The International and Comparative Law Quarterly. Vol. 50, No. 2 (Apr., 2001), pp. 217-247.

Blanca Rodríguez Ruiz, Ruth Rubio-Marín, The Gender of Representation: On Democracy, Equality, and Parity, International Journal of Constitutional Law, Volume 6, Issue 2, 1 April 2008, Pp. 287–316.

Topic 7. Freedom of political communication

General approaches to defining the scope of freedom of speech. “State action” doctrine and third-party effect. Content-based and content-neutral restrictions. Balancing free speech against other interests. Communicating information and expressing opinion. Criticizing the government and the role of the press. Self-censorship and chilling effect. Special targets, specific figures.

Cases:

Supreme Court of the USA:

- Reed v. Town of Gilbert, 576 U.S. ____ (2015);
- Garcetti v Ceballos, 547 U.S. 410 (2006);

- Heffernan v. City of Paterson, 578 U.S. ___ (2016)
- Hustler Magazine v. Falwell (1988), 485 U.S. 46 (1988)
- New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Germany:

- Luth case (1958) 7 BVerfGE 198,
- Blinkfuer case (1969) 25 BVerfGE 256
- Political Satire Case, 75 BVerfGE 369 (1987)

UK: Reynolds v Times Newspapers Ltd [2001] 2 AC 127;

South Africa: Du Plessis and Others v. De Klerk and Another, 1996 <http://www.saflii.org/za/cases/ZACC/1996/10.html>;

Australia: Lange v. Australian Broadcasting Corporation [1997] HCA 25, (1997) 189 CLR 520.

ECHR:

- Karácsony and others v. Hungary (Applications nos. 42461/13 and 44357/13), Judgment of 17 May 2016;
- Castells v. Spain, Application No. 11798/85. Judgment of 23 April 1992.

Readings:

Barendt, E. Freedom of Speech. Oxford University Press, 2007.

Stone, A. The Comparative Constitutional Law of Freedom of Expression in Comparative Constitutional Law. Edward Elgar Publishing. 2011. Available at: <https://www.jura.uni-hamburg.de/media/ueber-die-fakultaet/personen/albers-marion/seoul-national-university/course-outline/stone-2011-the-comparative-constitutional-law-of-freedom-of-expression.pdf>.

Stone, A. Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication. University of Queensland Law Journal. Vol. 30. No.1 2011. Available at: <http://www5.austlii.edu.au/au/journals/UQLawJl/2011/6.pdf>.

Stone, Geoffrey R. Restriction of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions // University of Chicago Law Review. 1978. Vol. 46. Pp.81-115.

Stone, Geoffrey R. Content-Neutral Restrictions // University of Chicago Law Review. 1987. Vol. 54. Pp.46-118.

Tushnet M. The issue of state action/horizontal effect in comparative constitutional law // *International Journal of Constitutional Law*, Volume 1, Issue 1, 1 January 2003, Pages 79–98.

Topic 8. Rights to protest.

Elements of the right to protest. Individual and collective rights. A right to peaceful assembly. Protecting public order, public morals and public health. Real, potential and “fake” threats. Counter-demonstrations, spontaneous demonstrations, simultaneous demonstrations. Demonstrations on private property.

Cases:

USA:

- Chaplinsky v. New Hampshire, 315 U.S. 568 (1942);
- Cohen v. California, 403 U.S. 15 (1971);
- National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

UK: *Jordan v. Burgoyne*, [1963] 2 QB 744, [1963] 2 All ER 225;

Poland: Judgment of the Constitutional Tribunal Kp 1/04, 10 November 2004. Available at: <http://trybunal.gov.pl/en/case-list/judicial-decisions/art/5832-zakaz-maskowania-sie-przez-uczestnikow-demonstracji-odpowiedzialnosc-jej-organizatora-za-wyrza>;

Constitutional Court of the Russian Federation:

- Judgment of 23 September 2014 N 24-P;
- Judgment of 14 February 2013 N 4-P.

ECHR:

- *Alekseyev v. Russia*, Applications no. 4916/07, 25924/08, 14599/09, Judgment of 21 October 2010;
- *Lashmankin and others v. Russia*. Application nos. 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12, 37038/13. Judgment of 7 February 2017;
- *Plattform "Ärzte für das Leben" v. Austria*, Application No. 10126/82, Judgment of 21 June 1988.

Readings:

Free To Protest: Constituent Power and Street Demonstration / Ed. by Andras Sajó. Eleven International Publishing, 2009.

Sajó A. *Constitutional Sentiments*. Yale University Press, 2011;

ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly: Second Edition, 2010. Available at: <https://www.osce.org/odihr/73405>.