Prof. Dr. Tilmann Altwicker

Fall Semester / 2022

Comparative Constitutional Law

13 January 2023

Duration: 120 minutes

- Please check at receipt of the exam the number of question sheets. The examination contains 3 pages and 5 questions (some with sub-questions).

Notes on solving the questions

- Be careful: In question no. 3, you can choose which sub-question you want to answer (3.a or 3.b). In these cases, if you answer more than one sub-question, only the answer to the first sub-question will be evaluated.

Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	20 points	20 %
Question 2	20 points	20 %
Question 3	20 points	20 %
Question 4	20 points	20 %
Question 5	20 points	20 %
Total	100 points	100 %

We wish you a lot of success!

General comments:

- *It is advisable to write full sentences whenever possible (in order to be better understood).*
- *Take care of legible hand-writing. A barely legible hand-writing makes correction much harder. You bear the burden of doubt in these cases.*
- *Try to take care of the nice outer appearance of your written work (there is a correlation between substance and outer appearance). You do not want your work to come across as being carelessly written down.*
- *If necessary, improve your written English.*
- *Only answer what you are asked about (e.g. if you are asked about the function of CCL arguments in the excerpt, do not talk about the case at length, but talk about the function CCL fulfills in the excerpt given).*
- *Problem in open-book exams: Do not simply copy & paste lecture slides or parts of the assignment texts. It is always advisable to summarize these texts in your own words and focus on the essential elements.*
- *Especially if you know a lot about a certain problem or case, then concentrate on the most important aspects, on what is most relevant to fully answer a given question, and leave out the less important aspects.*
- *If your task is to interpret a quote (as in 3.b), you should - initially - stick as close to the text as possible (i.e. give a summary of it in your own words) and analyze it bit by bit.*
- *Do not use rhetorical questions as an argument, e.g. "The judges of the court are only a few individuals, why would they have the power to interpret and pronounce what the constitutions says?"*
- *Do not write sentences without a meaning: "However the written Constitution Fokus [sic] on the Constitution, what is written mostly."*

1. a) Describe the relationship between a written constitution and constitutionalism. In your answer, please provide a definition of "constitution" and of "constitutionalism".

A **constitution** is a legal concept referring to a set of **fundamental legal norms** (the basic structure of a political community), usually in **codified**, **written** (or unwritten) form, that are emanating from the **will of the people (popular sovereignty)** and **foundational** to public power (in the sense of establishing it), creating **effective limitations** for its **exercise** and that are **superior** to other domestic legal norms. Written constitutions usually contain the fundamental norms of a political community, encompassing (usually) a **bill of rights of individuals** and norms relating to **state organization** (e.g. rules on the form of government, rules on the separation and distribution of powers, rules on elections and voting, rules on competences and state goals). *[Comment: The following is not mandatory but was considered as valid additions: Previously, the concept of constitution was also used in a descriptive sense, denoting the "state of affairs in a political community" or the "state of a person/human body". Today, it is usually used in a normative / prescriptive sense. Constitutions differ from ordinary laws in being harder to modify (often due to the requirement of a qualified majority for amendments). Often, constitutions are considered to comprehensively regulate public power.*

Constitutions rest on the idea of a constituted public sphere, i.e. the difference between society (and private individuals) and state (the public sphere). A constitution is not a philosophical construct, the source of its norms are political decisions (not some pre-ordained truth). Constitutions are usually considered to make a difference in the "real world" (effective, not sham or symbolic constitutions). One can also distinguish between "written" and "codified" constitutions: Codified constitutions are sets of constitutional law norms assembled in a single document (e.g. German Basic Law, US Constitution). Some constitutions are (sometimes partially) written, but not codified (e.g. UK, New Zealand, both of which have several statutes that contain constitutionally relevant legal norms). Another variant is the Austrian Constitution, which is partially codified but also contained in several bylaws of constitutional status.]

Constitutionalism is not defined. Its sources are difficult to identify. Commonly, it is suggested to find the sources of constitutionalism in the political philosophy of the Enlightenment (Locke, Montesquieu, Kant, Rousseau and the socialists), the French and the American Revolutions in the 18th century, in the US Constitution and its Bill of Rights, and in the international Bill of Rights (UDHR, ICCPR, ICESCR). The relationship between constitution and constitutionalism is also subject to debate: Some view constitutionalism to be an ideal to which constitutions may or not conform (or only conform to some degree) (see e.g. Henkin). Others consider constitutionalism to be a (socio-)legal process of power distribution, meaning that the political process is more or less oriented towards public rules and institutions that define and constrain the exercise of political authority; that it is socially influenced by extralegal factors, and that constitutionalism serves middle class interests (see e.g. Lev). Yet others view constitutionalism to be a descriptive, historical process that is deeply connected to the French and American Revolutions (e.g. Grimm); constitutionalism is not identical with legalization of public power. There are historical achievements of constitutionalism (e.g. the idea of popular sovereignty).

[Comment: In several cases, even the basic characteristics of a modern constitution were not mentioned. Some students failed to clearly note the difference between "constitution" and "constitutionalism".]

b) Describe how comparative constitutional law (CCL) is used in the reasoning of the court in each of the two case-excerpts:

(i) *Glossip v. Gross*: *«I rely primarily upon domestic, not foreign events, in pointing to changes and circumstances that tend to justify the claim that the death penalty, constitutionally speaking, is «unusual». … I note … that many nations, – indeed 95 of the 193 members of the United Nations – have formally abolished the death penalty and an additional 42 have abolished it in practice.»*

(ii) Concurring opinion by Judge Bonello in *Ceylan v. Turkey*: *«[T]he common test employed by the court seems to have been this if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient. I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create «a clear and present danger». … (footnote: Wendell Holmes in Abrams v. United States, 250 U.S. 616, 630 (1919)).*

Are there other functions not covered by the two excerpts above that comparative constitutional law-arguments can serve in adjudication?

In *Glossip v. Gross*, CCL is used to **support the argument** that the death penalty is "unusual". To this end, a comparison of numbers regarding the practice of states in relation to the death penalty is carried out. From the excerpt, a cautious approach to CCL emerges, as primacy is clearly given to domestic legal "events". CCL thus has a merely auxiliary function in the interpretation of a domestic legal norm. This is a rather "light" version of CCL, as it is merely concerned with incorporating numbers in order to demonstrate how "unusual" the death penalty has become globally. It is thus not a "real" legal argument that is taken from CCL, but CCL is rather used as a source of reflection of one's own legal tradition/norms in a new light. It is often used as a way to learn from the experiences of others.

[Comment: It was accepted when students argued that CCL was used to criticize the majority opinion in the excerpt from Glossip v. Gross*. It was also accepted when students wrote that in excerpt (i) CCL is merely used for self-reflection or better understanding of one's own constitution. It was also accepted when students argued that underlying the quote could be some form of universalist thought, or the numbers could be used to prepare a universalist argument in favor of abolishing the death penalty.]*

In the concurring opinion by Judge Bonello in *Ceylan v. Turkey*, CCL is used **to criticize the interpretation** of the European Convention on Human Rights as per the court majority. In fact, Judge Bonello argues that the majority should have adopted a test used by the USSC. Bonello advocates for what be called a "constitutional transplant" / "migration of constitutional ideas". This is a very strong use of CCL, as Judge Bonello aims at a replacement of the standard test that is traditionally used by the court majority.

[Comment: It was also accepted when students wrote that in excerpt (ii) CCL is used as a means to develop best practices on a particular constitutional law problem/constellation or as a means to learn from others.]

There are several other functions not mentioned in the excerpts: A function of CCL not mentioned in the excerpts above is that of **differencing**. This means that a court refers to foreign (constitutional) law in order to distinguish domestic (constitutional) law from it. This was done by the South African Constitutional Court in *S. v. Makwanyane and Another Case, Constitutional Court (South Africa) 1995 (3) SALR 391 (CC) [Makwanyane]*. Sometimes, CCL arguments serve to show **how not to interpret the constitution** ("disasters to be avoided"). In particular, the court distinguished the South African constitutional situation from that under the Indian Constitution. Furthermore, CCL arguments can be used by courts (and legislators) as **inspiration for constitutional change** (see the idea of "migration of constitutional ideas") or, more generally, as an ideational **resource** for generating new arguments about domestic constitutional law, to enhance the understanding of one's own legal system (self-reflection) by comparing it to others. In addition, CCL arguments can be used to **identify a common**

constitutional heritage, transnational or even universal constitutional norms. Also, CCL arguments can be used to find or to denote the absence of a **consensus** (or "best practice") in respect of a constitutional problem (see margin of appreciation-doctrine in the ECtHR). Finally, in some case (especially in EU law), the EU courts are required to engage in comparative constitutional reasoning in the **context of EU fundamental rights** (see Art. 6(3) TEU: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law).

[Comment: Some students failed to notice that what was required here was a functional analysis of CCL arguments, i.e. how did the courts employ CCL, for what purposes? Students often failed to give a suitable label to the function identified, such as supportive, critical, etc.]

2. a) Define judicial review. Should courts have the power of judicial review of legislation (including the authority to invalidate laws)? Give three reasons in favor, and three reasons against.

Judicial review means a legal process by which, in particular, legislative (but also executive and administrative) acts may be reviewed by the judiciary. If a court finds a legislative act incompatible with a higher authority (usually the Constitution), it (usually, but not always) has the power to invalidate that act or specific provisions of that act. If a constitutional court invalidates a statutory law, it acts as a "negative legislator" (H. Kelsen). Judicial review is a means of checks and balances and part of the separation of powers-doctrine. Judicial review can be **centralized** in one constitutional court (e.g. in Germany, Italy) or it can be **decentralized** (e.g. in the U.S.).

Reasons **in favor** (see, e.g., USSC, Marbury v. Madison): "Pouvoir constituant" of the people, fundamentality of the Constitution, permanency of the Constitution, supremacy of the Constitution, otherwise legislature would be given practical and real omnipotence, nature of a written Constitution. Judicial review is a weapon against undemocratic forces (see Supreme Court of Israel, Mizrahi Bank); it is a way to prevent the accumulation of power by other branches of government. It can contribute to "better" laws because an independent body reviews the laws made by the legislator, e.g. on their compatibility with fundamental rights (this is especially important with respect to minority protection, which can be inadequate in the majority system of democracy). Judicial review (especially in fundamental rights cases) can serve the protection of minorities that are less represented in the ordinary democratic process.

Reasons against (see e.g. discussion on Art. 190 of the Swiss Const.): counter-majoritarian difficulty: (often) unelected judges overrule laws made by elected representatives / the sovereign (in direct democracies); principle of democracy; the law-makers are also bound by the Constitution and through their laws interpret the Constitution; this interpretation must be taken seriously; it is not self-evident that the tension between the democracy-principle and the rule of law-principle must necessarily be solved in favor of the rule of law-principle; ultimately, there is no solution to the problem of who watches the watchmen. Standing rules may act as hurdles, no easy access to the judiciary. *[Common mistake: Students list arguments for/against*

a constitutional court with constitutional review powers, such as the insurance model; however, the question asks for arguments in relation to judicial review. Judicial review and constitutional review are not the same. Constitutional review can be exercised by a non-judicial body (e.g. a council, parliament in cases of checking whether a popular initiative is compatible with certain provisions of the Bundesverfassung*).]*

b) Argue against the constitutionality of the death penalty:
(i) Give one example of a textual argument.
(ii) Give one example of a systematic argument.
(iii) Give two examples of teleological arguments.

Textual argument: "Capital punishment is abolished" (Art. 102 of the German Basic Law), "No one shall be sentenced to death" (Art. 66-1 of France's Constitution of the Fifth Republic), "The death penalty shall be abolished. No one shall be condemned to such penalty or executed" (Art. 1 Prot. 13 to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances).

[Comment: Note that the "prohibition of cruel and unusual punishment" in Am. 8 of the US Const. is not interpreted as prohibiting the death penalty by the majority of commentators. It is therefore not a textual argument against the death penalty. Similarly, Art. 9(1) of the Constitution of Singapore states: No person shall be deprived of his life or personal liberty save in accordance with law. From this provision, no textual argument against the death penalty can be derived, because there is a procedure in place that allows capital punishment. Also, it was sometimes erroneously claimed that the existence of the right to life in international or domestic constitutional law itself was a textual argument against the death penalty. This is not the case (but the right to life can be used as a systematic argument, see below). It was accepted when students argued that the constitution contained the right to life in unqualified/absolute terms. It was accepted when students wrote that the silence on the constitutionality of the death penalty, e.g. in South Africa, was a textual argument.]

Systematic argument: The death penalty is unconstitutional due to a systematic interpretation of the right to life and the right to dignity. The argument is that there is no means for the state to take away, by way of punishment, someone's life in such a manner that would be compatible with his or her right to dignity. This line of argument was used by the South African Constitutional Court in Makwanyane when interpreting the section 11(2) in context of other provisions of the Constitution.

Teleological arguments: (1) Right to life and right to dignity are the most important rights in the constitution; this must have repercussions also on how the state punishes criminals. (2) Even criminals do not forfeit their rights under the constitution. (3) Similarly: The death penalty annuls all rights of the individual. However, rights cannot be taken away altogether. (4) Similarly: Death penalty is a violation of the essential content of the right to life and the right

to dignity. No violation of the essential content of a right is permissible. (5) Death penalty does not advance valid penological objectives. (6) Death penalty is inhuman form of punishment as it involves a denial of the executed person's humanity; it is a degrading form of punishment as it strips the person of all dignity and treats him/her solely as an object to be eliminated by the state.

[Comment: Surprisingly many students struggled with this task to construct legal arguments according to the typology given in the question.]

3. a) Compare *R v. Latimer* [Dorsen 756 et seq.] with the *Life Imprisonment Case* [Dorsen 758 et seq.]. In your answer, briefly also state the facts, the issue, the holding and the reasoning of the courts.

(a) The cases differed on the **facts**. *R. v. Latimer*, decided by the Canadian Supreme Court, was about a father who killed his 12-year-old daughter who suffered since birth from severe case of cerebral palsy. This "mercy killing" was motived "by love for his daughter", not have her endure more pain. He was sentenced to life. The **issue** was whether the sentence constituted cruel and unusual punishment. The court **held** that it did not and that the conviction must be upheld. In the **reasoning**, the court, applying the "grossly disproportionate"-test, stated that denouncing murder was important (although other penological goals and sentencing principles like rehabilitation, specific deterrence not called for here).

The *Life Imprisonment Case*, decided by the German Federal Constitutional Court (FCC), was about the constitutionality of life imprisonment. Lower courts considered section 211 and 212 to be incompatible with the German Basic Law and referred the problem to the FCC. The **issue** was whether life imprisonment violated the human dignity right in Art. 1 of the German Basic Law. The court **held** that life imprisonment was not contrary to Art. 1. In its **reasoning**, the court relied mostly on the object-formula, stating that treat human beings may not be treated solely as an object of the state. The court states that - as science (psychology) evolve - the constitutionality of life imprisonment may have to be reassessed at one point.

The **basis for the constitutional challenge** in *R. v. Latimer* was the prohibition of cruel and unusual punishment, in the *Life Imprisonment Case* it was Art. 1(1) of the Basic Law, i.e. the right to dignity. These are only seemingly different, as also the prohibition of cruel and unusual punishment is commonly interpreted in the light of human dignity. The **tests** used were, in *R. v. Latimer,* whether the effect of the punishment was grossly disproportionate to what would have been appropriate (para. 73). To this end, the court must assess the gravity of the offense, the personal characteristics of the offender and the particular circumstances of the case (para. 74); as well as actual effect on individual. In the *Life Imprisonment Case* the FCC used the object-formula: The offender may not be turned into a mere object of (the state's) fight against crime under violation of his constitutionally protected right to social worth and respect [Dorsen 759]. In the context of human dignity, the FCC does not rely on proportionality reasoning.

Conceptually, the **different bases do not make a great difference** because it is accepted that the concept of dignity lies at the core of the prohibition of cruel and unusual punishment (see *Makwanyane*, citing USSC, *Trop v. Dulles*; Dorsen 744). However, the tests are dissimilar: grossly disproportionate effects *(R. v. Latimer)* vs. "object-formula" *(Life Imprisonment)*. There is a similarity also in that the courts in both cases make **significant deference to the legislator**: In *R. v. Latimer* (para. 76 et seq), the court states that Parliament has a great discretion with respect to the gravity of various offences and the range of penalties. In *Life Imprisonment* [Dorsen 759] the court states that constitutional review must exercise restraint; but that court has duty to protect basic rights against infringements from legislator; but court will only overrule legislative acts if assessments by legislator (legal and factual) are refutable.

OR

b) Answer all of the following questions:

> (i) Explain: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence" (Brandeis J in *Whitney v. California* [Dorsen 1006]).
> (ii) Is a law criminalizing any depiction of an unclothed person overbroad or vague? Define both terms and then classify the law accordingly.
> (iii) "There is little room for restrictions on political speech or on debate on matters of public interest." Comment.

(i) The quote contains a **defense of free speech**. It is a manifestation of the liberal idea of a **marketplace of ideas**, the free competition of ideas with which the state should not interfere. Even false ideas must be allowed. The reason is that it is believed that by discussing falsehood the truth will emerge even brighter and clearer (see J. St. Mill). Based on this, the quote by Brandeis J claims that an open discourse also **serves education aims** and, therefore, the state should not limit speech but allow more speech, and implicitly, for a more **diversity** of viewpoints. The only limitation made by Brandeis J is **time**: Although this is not made explicit in the quote here, if time is too short for the full process to happen, there may be room for the curtailment of speech (in cases of "clear and present danger"). However, this exception should be understood narrowly.

(ii) A law is **overbroad** if it not only prohibits conduct that should be prohibited (e.g. selling pornography to minors), but also conduct that should not be prohibited (e.g. because it is allowed by the constitution, because it is a legitimate exercise of individual rights). In other words, a law is overbroad if it indiscriminately reaches both constitutionally protected and unprotected activity. A law is **vague** if people of common intelligence would have to guess at the statute's meaning. Vagueness therefore pertains to the interpretation of a legal norm or a legal concept, whereas overbreadth relates to the scope of a norm. In the example, the law is overbroad because one may think of depictions of unclothed persons that are constitutionally protected, e.g. as pieces of art.

(iii) Courts usually afford the **greatest protection to political speech**. The reason is that, historically, freedom of speech was often curtailed in the field of politics and it is this field where restrictions are particularly likely. At the same time, freedom of speech on political affairs is necessary in order to **control the government** and to the **prevent abuse of public pow**er. There is a connection with the freedom of the press; if free political speech is curtailed, then the press cannot exercise its function as **public watchdog**. Free political speech is important for the **legitimacy** and **public trust in the government**; free political discourse, the opportunity to have a controversial debate on political affairs, is ultimately a way to foster **political stability**.

The **USSC** has a long tradition in protecting free speech. Already in the famous dissent of Justice Holmes in *Abrams v. US* a great willingness to offer a wide protection is visible: According to Holmes, government may only restrict freedom of expression where there is present danger of immediate evil or an intent to bring it about. This even applied in war times according to Holmes. The mere advocacy of ideas, even racist ideas, may not be punished as per *Brandenburg v. Ohio*. The prohibition of political speech, even if it constituted hate speech in the European perspective, is very difficult; it is likely to constitute viewpoint discrimination, see *R.A.V. v. City of St. Paul*. That political speech enjoys special protection is also accepted by the **European Court of Human Rights** (see e.g. *Ceylan v. Turkey*).

[Comment: Some students answered both 3 a) and b). In these cases, only the answer to the first question was evaluated.]

4. Describe the equality problem involved in each of the following cases. In your answer, determine whether the case involves an equal protection-problem or a non-discrimination problem, refer to the "subject of equality", the "domain of equality", the equality-test used, and argue whether the case presents a formal or a substantive equality problem:

   a) Loving v. Virginia [Dorsen 881]

   b) The French Professor's Case [Dorsen 844 et seq.]

   c) Thlimmenos v. Greece [Dorsen 884]

a) Loving v. Virginia:

- non-discrimination problem: disadvantage based on race (abridging fundamental right to marry based on race)
- subject of equality (who is equal to whom): persons marrying within their racial group vs. persons marrying outside their racial group *[Comment: Note that this is a discrimination case, i.e. it is about disadvantaging persons, not about disadvantaging institutions, such as interracial marriage. It is also – at least not facially – not about persons of color as individuals.]*
- domain of equality (what is the context): freedom to marry

- equality test: strict scrutiny (differential treatment based on race; presumption of invalidity)
- substantive equality: treating people as equals; equal opportunity (to marry whom one wants to marry is curtailed) *[Comment: Many students considered this case to be about formal equality. Note that - on a purely formal account - both black and white marriages are treated equally (inter-racial marriage is forbidden for both). Also note that it is a discrimination case, i.e. about disadvantaging persons. It is not primarily about treating the institution of marriage differently. The law (and its context of adoption) makes clear that it is meant to protect some form of white supremacy, i.e. there is an odious discrimination in the law itself. It serves an illegitimate purpose and it does not treat people as equals, i.e. equal in a substantive sense.]*

b) French University Professors Case:

- equal protection problem: equal treatment of essentially dissimilar situations
- subject of equality: Professors vs. teachers/non-tenured researchers
- domain of equality: representation in university organs / allocation of seats in electoral body
- test: rational basis/reasonableness test *[Comment: This was not mentioned in the text excerpt.]*
- formal equality (problem: professors and teachers/non-tenured researchers are treated equally whereas they are not in a similar situation)

c) Thlimmenos v. Greece:

- non-discrimination: disadvantage based on religion *[Comment: Some voices in the literature have argued that this is a case of indirect discrimination. However, one may also regard it as a case of (non-intentional) direct discrimination by not accommodating religion/by not creating an exemption for religion.]*
- subject of equality: Persons objecting to military service out of reasons of religion vs. persons objecting to military service out of other reasons
- domain of equality: punishment of conscientious objection
- equality test: proportionality
- formal equality (problem: equal treatment despite differences in the situations, formal equality requires to treat different situations differently; no accommodation of conscientious objection for reasons of religion; criminal law did not allow for exceptions)

[Common mistake: Students did not use the analytical concepts provided in the question - subject/domain of equality etc. Also, several students had problems applying the formal/substantive equality-distinction properly (which is, of course, not easy).]

5. a) What are essential characteristics of representative democracy? List and briefly explain three of them and, in your answer, make references to the excerpts of case-law analyzed in class!

1. All power must be founded on the **self-determination of the people (popular sovereignty)**: *Lisbon Treaty Case* [Dorsen 269]; 2. Important decisions must be made by parliament, not by the executive (US: non-delegation doctrine): *Industrial Union Department, AFL-CIO v., American Petroleum Institute* [Dorsen 289]; *Kalkar I Case* [Dorsen 291]; 3. Competition between political forces of accountable government and parliamentary opposition: *Lisbon Treaty Case* [Dorsen 270]; 4. Will of electorate must be reflected as proportionally as possible in allocation of seats: *Lisbon Treaty Case* [Dorsen 270]; 5. Every member of parliament is a representative of all the people (and thus a member of an assembly of equals who have gained their mandate under conditions governed by equality): *Lisbon Treaty Case* [Dorsen 270]; 6. Every citizen is entitled to an equal part in the exercise of state authority which must continue to apply at further levels of the development of democratic opinion-forming: *Lisbon Treaty Case* [Dorsen 270]; 7. Will of majority that has come about freely and taking due account of equality is formed, either in the constituency or in the assembly which has come into being proportionally, by act of voting: *Lisbon Treaty Case* [Dorsen 270]; 8. From act of voting a decision on political direction must result: *Lisbon Treaty Case* [Dorsen 270]; 9. Parliament usually has the right to a vote of no confidence (sometimes qualified): *Parliamentary Dissolution Case* [Dorsen 278]. 10. Undistorted means of communication between government the governed; freedom of expression (see *Australian Television Case).*

[Comment: Many students did not focus on the essential characteristics of representative democracy, as required by the question. Rather, often simply some elements that are associated with representative democracy were copy & pasted from a lecture slide. Often, there was no reference to the case-law as required by the question.]

b) Discuss the proper role of courts in a political conflict over prime ministerial appointments. In your answer, make references to the *Competence Dispute Between the President of the Republic and Members of the National Assembly* [Dorsen 328 et seq.] and to the *Presidential Appointments Case* [Dorsen 330 et seq.].

Option 1: Courts should have no say in that conflict.
- Constitutional Council of France: has no opportunity to intervene
- no judicial solution to an essentially political conflict
- courts should not interfere: *Competence Dispute Between the President of the Republic and Members of the National Assembly* [Dorsen 329]

Option 2: Courts should have a say, but exercise judicial restraint.
- Constitutional Court of Hungary in *Presidential Appointments Case* [Dorsen 330 et seq.]
- role of courts is to safeguard that all actors play by the rules of the game
- there are unreviewable decisions for which no one bears political responsibility
- to pronounce/interpret on principles derived from the constitution that guide the solution to the conflict, e.g. the criterion of the grave disruption to the democratic functioning of the system of governance in *Presidential Appointments Case* [Dorsen 332]

- establish basic duties of the organs involved, e.g. duty to cooperation, duty to give reasons in *Presidential Appointments Case* [Dorsen 333]
- courts should only step in when all other available remedial avenues have been exhausted *Competence Dispute Between the President of the Republic and Members of the National Assembly* [Dorsen 329]

Option 3: Courts should have full review powers regarding the conflict of political organs
- diss.op. of Justices Moon-Hee Kim etc. in *Competence Dispute Between the President of the Republic and Members of the National Assembly* [Dorsen 328 et seq.]: appointment of Prime Minister without the National Assembly's consent is unconstitutional

c) Why is the *Television I Case* often quoted as an example of "cooperative federalism" under the German Basic Law?

The *Television I* case was about Chancellor Adenauer's effort to establish a second – federally operated – television channel in addition to the one operated by the Laender. He did so by decree. The case is cited as a case manifesting the principle of "cooperative federalism" because the German Federal Constitutional Court applied the **"principle of profederal behavior"**. This is an **unwritten constitutional principle** "of the reciprocal obligation of the federation and the states to behave in a profederal manner". It "governs all constitutional relationships between the nation as a whole and its members and the constitutional relationships among its members" [Dorsen 443]. **Concrete legal obligations** can be derived from it, e.g.
- that financially strong states must give financial assistance to the weaker states;
- there is an increased obligation to cooperate if an understanding between the federation and the Laender is required;
- obligation of the Laender to observe international treaties concluded by the federation;
- there can be an obligation of the Laender to intervene if local communities encroach upon an exclusive federal competence.

In the *Television I* case, the German Federal Constitutional Court further developed the principle of profederal behavior to also "govern the **procedure and style of the negotiations** required in constitutional life between the federation and its members as well as between states" [Dorsen 443]. In particular, the federation may not treat differently the states based on their party orientation in particular. Since Adenauer had only consulted the Laender that were governed by his party peers, and not the Laender that were governed by the opposition, there was a **violation of the procedural dimension of the principle of profederal behavior** in this case.