

CONSTITUTIONAL ARGUMENTS: NATURE & ORIGINS

Responsible Faculty Instructor: Anshuman Shukla

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Associate Professor

Credits: 4

Credits Type: Law

Cross-registration: Yes

Pre-requisites: Core course in either Constitutional Law/ Jurisprudence/ Politics/ History

COURSE DESCRIPTION (COURSE VISION):

Of Visions: The Ant & the Bird

History's dominant motivation is revealed in its curiosity for non-scientific causality. Aesthetical judgements are guided by the discernment of "the fine and the mundane". Politics is mostly understood through the metric of power, and religious experience is a sentiment of faith before reason or doctrine. In this account of moral sentiments that define and organize any knowledge-field, justice and normativity appear to be the peculiar concerns of law, including constitutional law. This yearning for justice and normativity is revealed across the prominent debates and discourses within legal and constitutional theory. Some argue for their decoupling, and others canvass for both as a seamless web. The normative and the just seem to be the two north stars of the law.

Ideological Origins of Constitutional Normativity

This elective explores these two visions of justice and normativity within constitutional law through an exploration across law, politics, and history of ideas. It examines the normative features of constitutional law as manifested in its doctrines, maxims, reasoning and arguments by recovering their ideological origins. Normativity comprises of those core concepts and doctrines, which are applied by prominent constitutional actors, like the government, courts, and relevant non-state actors. These doctrinal justifications may be identified through recurring themes of rulership, citizenship, political freedom, political obligations, and public interest. These concepts have emerged and evolved within certain dominant ideological traditions, which furnish the semantic and rhetorical value for

constitutional doctrines. Some of these major ideological traditions include republicanism, liberalism, welfarism, regulatory state, and postcolonialism.

The Constitutional Universe

The elective construes modern constitutional law as an eclectic and complex field. It is complex owing to its large machinery of institutions and territorial scale of operations. It is eclectic, because its modern arguments are grounded in wide ranging historical traditions, often conflicting with each other. This eclectic nature of modern arguments also underscores the multimodal nature of constitutional interpretation, which is not limited by the scope of legal positivism. This course studies federalism as an eclectic principle, particularly defined by the tradition of modern regulatory and administrative state. Constitutional founding is analyzed within the three traditions of republicanism, postcolonialism, and welfare state. The eclectic nature of constitutional interpretation is addressed through the issues of religious freedom and affirmative action.

In this context, the elective primarily focuses upon five core concepts of modern constitutional law, which are public law, original constitutional founding, constitutional interpretation, institutional designs, and rights. It grounds these core concepts in broader ideological traditions, like republicanism, cosmopolitanism, liberalism and administrative state. These ideological traditions have built the major elements of modern constitutional law, ranging from practical elements of institutional design to the moral and rhetorical elements of freedoms and rights. If the fundamental distinction between constitutional law (high offices) and administrative law (departmentalism) is granted, then republicanism and liberalism may be fairly conceived as the grounding ideologies of modern constitutional law, including the Indian Constitution. While welfarism and regulatory state may be identified as the constitutive paradigms of administrative law.

Realism as History of Ideas

The elective is primarily nestled within the tradition of moral realism [*Aristotle, Wittgenstein, Nussbaum, Polanyi, Oakeshott, Bernard Williams etc.*], and it follows the methodology of history of ideas [*Skinner, Pocock, Charles Taylor, Bevir etc.*]. It will explore the substantive and technical/ methodological moves of realism as compared to the other dominant intellectual-moral traditions. From the perspective of history of ideas, ideological examination of constitutional concepts requires a ‘complete history’ method [*Pocock; Bevir*]. This demand of utilizing a comprehensive range across epochs, thinkers, and systems is

because the semantic and rhetorical value of relevant ideas partly depends upon its social, economic, and cultural context.

However, the course is not itself a social, cultural, or economic history of constitution. Its foreground is primarily concerned with examining the building blocks of relevant ideas, concepts, and doctrines within constitutional law. This elective, therefore, will follow the dictum of “ideas as performative deeds” [Skinner; Akhil Amar; Bailyn]. Constitutional ideas or concepts are not purely driven by abstract theorization (internal systematic *coherence*) [Kant, Rawls, Habermas, Dworkin; Walzer]. Rather, they also have strong relations with practice, conventions, and traditions (external *correspondence* with tacit unarticulated reality) [Aristotle; Polanyi; Oakeshott]. Normative justification and legitimacy of constitutional doctrines and ideas is a dynamic negotiation with these *two fundamental sources* of meaning-value- coherence & correspondence (realism as dualism): “theory-practice” [Oakeshott], “idea-history” [Skinner; Pocock; Taylor], “rule-convention” [Loughlin; Bellamy; HLA Hart], “government-judiciary” [Waldron], “public policy-judicial process” [Justice KK Mathew], “Self-Other” [Bernard Williams; Martha Nussbaum].

TEACHING METHODOLOGY:

The course will be primarily conducted through lecture-discussion mode led by the faculty. Students will be aided with reference materials and classroom PowerPoint slides. While cold calling will be discouraged, students are encouraged to actively participate in brainstorming, analogies, lateral thinking and other similar mental heuristics to optimize the learning experience. Laptop use and class notes are left to the discretion of the enrolled students.

INTENDED LEARNING OUTCOMES:

| Course | Intended Learning Outcomes | Weightage in % | Teaching and Learning Activities | Assessment Tasks/ Activities |
|---------------|---|-----------------------|--|--|
| (i) | Conceptual and critical understanding of schools, styles, and implications of constitutional arguments. | 70% | The course instructor will lead lectures and discussions. Students are encouraged to actively apprise themselves with the designated readings to participate constructively in the | Topically relevant research paper/ response paper/ literature survey beyond the prescribed readings. |

| Course Intended Learning Outcomes | | Weightage in % | Teaching and Learning Activities | Assessment Tasks/ Activities |
|-----------------------------------|--|----------------|---|--|
| | | | discussion sessions. | |
| (ii) | Identify discursive linkages among various discussed themes and attempt to frame written arguments and conceptualizations through a brief essay in the end-term examination. | 30% | The course instructor would communicate the relevant question paper and broad expectations from the written analysis. Students are expected to employ their holistic understanding from the duration of the seminar and apply them in their writing skills. | Students will be required to attempt the end-term examination, where they would attempt a brief essay (1500 words approx.) on a thematic question pertaining to the various aspects of the course. |

READING LIST (upto 10 select readings):

1. *Martin Loughlin*, THE IDEA OF PUBLIC LAW (Oxford, 2003), Introduction.
2. *Quentin Skinner*, A Genealogy of the Modern State, Proceedings of the British Academy, 162, pp. 325-370, 2009.
3. *Edward Rubin*, BEYOND CAMELOT: RETHINKING POLITICS & LAW FOR THE MODERN STATE (Princeton, 2005), Introduction.
4. *David Garland*, THE WELFARE STATE (Oxford, 2016), Ch. 1 & 6.
5. *Laurence Tribe & Michael Dorf*, ON READING THE CONSTITUTION (Harvard, 1991).
6. *Ran Hirschl*, "The Strategic Foundations of Constitutions", in *D.J. Galligan & M. Versteeg* (eds.), SOCIAL & POLITICAL FOUNDATIONS OF CONSTITUTIONS, Ch. 6, pp. 157-177.
7. *Udit Bhatia* (ed.), THE INDIAN CONSTITUENT ASSEMBLY: DELIBERATIONS ON DEMOCRACY (Routledge, 2018), Ch. 1 & 2.
8. *Aditya Nigam*, "A Text Without Author", in *Rajeev Bhargava* (ed.), POLITICS & ETHICS OF THE INDIAN CONSTITUTION, Oxford (2008).
9. *Bernard Bailyn*, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (Harvard, 2017), Ch. 2.

10. *Granville Austin*, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, Ch. 1 & 2, (Oxford, 1966).

WEEKLY READING PLAN (WEEKLY OUTLINE):

A weekly plan is provided below:

| MODULES | WEEK(S) |
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| <p>MODULE 1: <u>Applied Jurisprudence & Public Law</u></p> <ul style="list-style-type: none"> • Argumentative Heuristics: Categories, Disagreements, & Mixed Reality • Categories: relational knowledge [<i>Aristotle</i>] & family resemblances [<i>Wittgenstein</i>] - eg. Social sciences-classical humanities, law-politics, ethics-morality, reason-emotion, beautiful-sublime. • Neologisms (ideas as “new words”- eg. property, territory, equality, state) [<i>Quentin Skinner</i>; <i>Charles Taylor</i>] • “Saying” (<i>episteme</i>) vs. “Showing” (<i>nous</i>)- [<i>Wittgenstein</i>, <i>Justice KK Mathew</i>, & <i>Tarunabh Khaitan</i>] • Constitutional Polymorphism (architectonic landmark conflicts as multi-factored)- eg. <i>Bennett Coleman</i>; <i>Puttaswamy</i>. • Interpretive & Jurisprudential Implications: Interfaces between positivism, natural law, realism, and critical theory. • Disagreements; [<i>Aristotle</i> vs. <i>Rawls</i>- Realism vs. Liberalism] • Legal vs. Political Constitutionalism [<i>Ran Hirschl</i>; <i>Richard Bellamy</i>] | 1-3 |
| <p>MODULE 2: <u>Constitutional Founding- Liberal, Postcolonial & Republican</u></p> <ul style="list-style-type: none"> • Legality & legitimacy problems in Original Founding • <i>Tuche-Techne</i> (Luck-Skill) Paradox in human projects. [Platonic-Kantian Origins of Liberal Constitutional Founding] • Postcolonial critique: Founding myths & hegemonic entrenchment of interest groups [<i>Aditya Nigam</i>; <i>Arvind Elangovan</i>; <i>Sandipto Dasgupta</i>] • Postcolonial Critique: “Assembly” vs. “Assembling” [<i>Granville Austin</i> vs. <i>Rohit De</i>] • Republican tragedy: Time-Narrative critique of the Liberal & | 4-7 |

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|---|---------|
| <p>Postcolonial Interpretations [<i>Homeric tradition</i> on tragedy]</p> <ul style="list-style-type: none"> • Republican founding as existential ethics: risk-narrative & intrinsic morality [<i>Oscar Wilde's DE PROFUNDIS; Aristotle's POETICS</i>] • Mimetic or pedagogical value of constitutional founding. [<i>Aristotle; Pocock; Kaufmann</i>] | |
| <p>MODULE 3: <u>Design of Constitutional Institutions</u></p> <ul style="list-style-type: none"> • Republican design: Home, Fellowship, <i>Oikos</i>, <i>Universitas</i> [<i>Aristotle; Machiavelli; James Madison</i>] • Liberal & Regulatory design: Lever, Contract, <i>Societas</i> [<i>Locke; Michael Mann; Edward Rubin</i>] • Separation of powers; Checks & Balances; Mixed Constitution; Public Office; Social Contract • Gandhian vs. Nehruvian design: Panchayat & Parliament • Illustrations: doctrine of state action, federalism, cabinet government, judicial appointments. | 8-10 |
| <p>MODULE 4: Interpretation: Positivism, Textualism & Living Tree</p> <ul style="list-style-type: none"> • Interpretive Fallacies; Interpretive Sources & Methods [<i>Aristophanes' critique of Plato, Wittgenstein's critique of Analytical Philosophy</i>] • Ideological ideals: procedural vs. substantive interpretation. • Interpretive robustness across sources: text, structure, history, doctrine, policy, morality. [<i>Philip Bobbit, Akhil Amar, KK Mathew, Ruma Pal etc.</i>] • Illustrations in Federalism, Art. 370 (J&K), 7th Schedule, Common Law. • Ideological visions: Interpretation as "Progress or Limits". • Illustration in Basic Structure doctrine. | 11-13 |
| REVISION WEEK | Week 14 |