

CONSTITUTIONAL AMENDMENT, CHANGE AND DESIGN***Responsible Faculty Instructor:*****Anujay Shrivastava** [anujay.shrivastava@jgu.edu.in]

Assistant Professor and Assistant Dean (Policies and Compliance), JGLS

Credits: 4Credits Type: LawCross-registration: Not allowedPre-requisites: 'Constitutional Law I & II' (B.A., LL.B. (Hons.), B.B.A., LL.B. (Hons.), B. Com., LL.B. (Hons.) and three-year LL.B.)Level: B.A./B.B.A./B. Com., LL.B. (*Hons.*); three-year LL.B.; LLM (General); LLM (Constitutional and Administrative Law)[Note: Not suitable for three-year JGLS Arts (B.A.) Programmes.]COURSE DESCRIPTION (COURSE VISION):

Globally, the principles and promises (whether aspirational or guaranteed) that govern most of the modern nation-states are understood with reference to their constitutions (whether accompanied by a written or unwritten text). Constitutions may be understood in different jurisprudential ways whether be it as the 'grundnorm' (Hans Kelsen), the 'rule of recognition' (HLA Hart), or the 'common good of the entire political community' (John Finnis). It is axiomatic that all constitutions undergo 'change' in the forward flow of time.

The change of a Constitution or its contents is ubiquitous across nation-states. It is visible in *formal* mechanisms facilitating such change (e.g., Constitutional Amendments; Executive-initiated Formal Constitutional Change), less visible *informal* phenomena leading to change (e.g., Judicial Interpretation), and in rare cases, an absence of any mechanisms (formal or informal) to institute a change – particularly true for major revisions or an outright constitutional replacement (such as in case of The Constitution of India, which lacks a mechanism to replace the constitution). Often, Constitutions also *formally* limit and resist constitutional change by 'design' such as through incorporation of express unamendability, exceptional and tiered amendment thresholds, entrenchment provisions, sunset clauses, and even sunrise clauses.

Evidently, constitutional design by express incorporation or later amendment is not the only method of limiting change. It has been observed that constitutional courts across globes have – controversially – developed and recognised methods to *informally* limit constitutional change such as by introduction of doctrine of *unconstitutional constitutional amendments*, or the doctrine of the *basic structure* of the Constitution. Such doctrines aim to target what scholars call '*unconstitutional constitutional amendments*', '*abusive constitutionalism*' and more recently, '*constitutional dismemberment*'. It is also notable that significant historic-political movements such as 'revolutions' can

informally bring about the death of Constitutions along with a potential birth of new constitutional orders and regimes.

This course shall delve into delineating the different forms and methods through which constitutional change can be facilitated, beginning with the distinction between *formal* and *informal* ways of constitutional change. Significant focus will be initially given to the form, types, content, and appraisal of formal methods of constitutional change, including constitutional amendments, with reference to India, USA and other nation-states in a comparative context. Thereafter, we will explore the different ways in which formal constitutional change, including constitutional replacement, can be limited using intelligent constitutional design. Building upon this discussion, we will also explore judicially developed doctrines that, while not self-executing, do limit formal constitutional change and consider the legitimacy of such informal ways to limit change. Finally, we will consider topical issues on constitutional change and constitutional design including potential future for both formal and informal processes of constitutional change.

TEACHING METHODOLOGY:

The course will comprise lectures and class discussions. Students are expected to read the assigned materials in advance of the class so that the lectures are made more fruitful by class discussions (although they are free to attend the class and to do the literature readings thereafter).

INTENDED LEARNING OUTCOMES:

1. Students will be able to differentiate between formal and informal modes of constitutional change, with a focus on distinguishing constitutional amendments from judicial interpretation and other forms of informal constitutional change, and analyse the specific mechanisms of each in a comparative context.
2. Students will be able to identify various mechanisms of constitutional design that limit or control constitutional amendment or change. They will be able to appraise the role of constitutional design in both facilitating and resisting change, by analysing formal design elements like entrenchment clauses and tiered amendment thresholds, and appreciate their practical application in global constitutional systems including obtaining essential knowledge to craft such provisions.
3. Students will be able to assess and evaluate the legitimacy and effectiveness of judicially created doctrines that limit constitutional change, such as the basic structure doctrine by critically examining key case law and scholarly debates from multiple jurisdictions.

4. Students will be able to undertake self-directed research and synthesize a coherent legal argument on any topical issue of constitutional change, demonstrating an understanding of the interplay between historical, political, and legal factors that shape constitutional evolution in a modern nation-state.

READING LIST (select ten readings):

1. RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* (Oxford University Press 2019) (select excerpts).
2. RICHARD ALBERT & BERTIL EMRAH ODER (eds), *AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES* (Springer 2018) (select excerpts).
3. TOM GINSBURG, *COMPARATIVE CONSTITUTIONAL DESIGN* (Cambridge University Press 2012) (select excerpts).
4. YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (Oxford University Press 2019) (select excerpts).
5. REHAN ABEYRATNE AND NGOC SON BUI (eds), *THE LAW AND POLITICS OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ASIA* (Routledge 2022) (select excerpts).
6. David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis L Rev 189.
7. Emmett Macfarlane, 'Judicial Amendment of the Constitution' (2021) 19(5) *International Journal of Constitutional Law* 1894.
8. Anujay Shrivastava and Sarbani Sen, 'Constitutional Change' in APARNA CHANDRA, GAUTAM BHATIA AND NIRAJA GOPAL JAYAL (eds), *CAMBRIDGE COMPANION TO THE INDIAN CONSTITUTION* (Cambridge University Press forthcoming) (a pre-print is available [here](#)).
9. Nicola Tommasini, 'Judicial self-empowerment and unconstitutional constitutional amendments' (2024) 22(1) *International Journal of Constitutional Law* 161
10. Sarbani Sen, 'The Struggle of Constitutional Amendments in India' in Ngoc Son Bui and Mara Malagodi (eds), *Asian Comparative Constitutional Law, Volume 2* (Bloomsbury 2024) 337.

CASE LAW (select ten illustrations with a comparative perspective):

1. *Marbury v Madison* 5 US (1 Cranch) 137 (1803) (USA).
2. *IC Golaknath v State of Punjab* AIR 1967 SC 1643 (India).
3. *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 (India) (Khanna, J.).
4. *Anwar Hossain Chowdhury v Bangladesh* (1989) 18 CLC (AD) 1 (Bangl.) (Bangladesh).
5. Corte Suprema de Justicia—Sala de lo Constitucional [Supreme Court of Justice—Constitutional Chamber], *F-165, Poder Judicial De Honduras [Judiciary of Honduras]* (2015) (Honduras).
6. *Supreme Court Advocates-on-Record Association v Union of India* (2016) 5 SCC 1 (India).
7. *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1 (Chandrachud, J.) (India).
8. *Government of Bangladesh v Asaduzzaman Siddiqui* 71 DLR (AD) (2019) 52 (Bangl) (Bangladesh).
9. *Dobbs v Jackson Women's Health Organization* 2022 US LEXIS 3057 (USA).
10. *Kaushal Kishor v State of Uttar Pradesh* (2023) 4 SCC 1 (India).

WEEKLY READING PLAN (WEEKLY OUTLINE):

A weekly reading plan for this proposed elective may be incorporated and shared by the Faculty Instructor to the Executive Dean, JGLS and the JGLS Academic Review Board (ARB) at the stage of the drafting of the Course Manual as per the JGLS Faculty Rules and Regulations 2025 and in compliance with the template for elective courses.

However, I am providing an indicative weekly teaching structure below (full-set of readings to be included in the final Course Manual):

WEEK(S)	MODULES (INDICATIVE)
Week 1	CONSTITUTIONAL AMENDMENT, BUILDING, CHANGE, AND DESIGN: 'ABCD' OF 'CHANGE' <ul style="list-style-type: none"> • Why Constitutional Change? • What is 'change'? • Formal Constitutional Change • Informal Constitutional Change
Weeks 2-4	FORMAL CONSTITUTIONAL CHANGE: <ul style="list-style-type: none"> • Constitutional Amendment • Constitutional Replacement • Executive-made Constitutional Change • Assessment of Constitutional Amendments • Comparative Overview of select jurisdictions including India, U.S.A., South Africa and Bangladesh
Weeks 5-6	INFORMAL CONSTITUTIONAL CHANGE: <ul style="list-style-type: none"> • Judicially-made Constitutional Amendments • Unconstitutional 'Informal' Constitutional Change • Constitutional Change by Norms
Weeks 7-8	CONSTITUTIONAL DESIGN: <ul style="list-style-type: none"> • Express Unamendability • Express Entrenchment (Eternity Clauses) • Tiered-Amendment Provisions • Sunset Clauses • Sunrise Clauses
Weeks 9-11	IMPLIED LIMITATIONS AND CONSTITUTIONAL ERASURE: <ul style="list-style-type: none"> • Constituent Power v. Amending Power (Primary Constituent Power

	v. Secondary or Derived Amending Power) <ul style="list-style-type: none"> • Doctrine of Unconstitutional Constitutional Amendments and the Basic Structure Doctrine • Abusive Constitutionalism • Constitutional Dismemberment
Weeks 12-13	Constitutional Replacement, Revolutions and Future of Constitutional Change: <ul style="list-style-type: none"> • How to execute a Constitutional Replacement? • Revolutions and the death or rebirth of Constitutions • Future of Constitutional Change and Topical Developments
Week 14	Revision Week