



COURSE MANUAL

Name of the Elective Course: Comparative Constitutional Law – Cutting Edge Issues

Course Code:

Name of the Faculty Member: Gautam Bhatia

**Spring 2026
(AY2025-26)**

This document is prepared by the course instructor and contains basic information relevant to the execution of the course. It is the official record for all intents and purposes as far the elective course, *Comparative Constitutional Law: Cutting Edge Issues*, is concerned.

This course manual can be used as a general guide to the subject. However, the instructor can modify, extend or supplement the course (without tampering its basic framework and objectives) for the effective and efficient delivery of the course. The instructor will provide students with reasons for such changes.

Part I

Course Title: *Comparative Constitutional Law: Cutting Edge Issues*

Course Code:

Course Duration: **One Semester (15 Weeks)**

No. of Credit Units: **4 Credits**

Level: **UG or PG or Both**

Medium of Instruction: **English**

Pre-requisites: Students should have completed undergraduate constitutional law – I and II courses.

Equivalent Courses:

Timetable: Saturday, 10 30 AM – 1 30 PM. The default **replacement schedule** is Friday, 2 30 PM – 5 30 PM. As replacements can happen because of working Saturdays, please only take this seminar if you intend to keep both time slots free.

Part II

1. Course Description

This seminar will study cutting-edge issues in contemporary constitutional law. These include amendments and constitutional change, the struggle between the legislature and the executive, land and evictions, public participation, constitutional pluralism, and so on. We will study leading contemporary cases from around the world, including jurisdictions that might not always be in focus, such as Kenya and Colombia.

Where relevant, we will situate these developments in the context of Indian constitutional law, and how Indian courts have responded to such issues. However, this is a *comparative* constitutional law course, and the focus is not Indian constitutional law.

2. Course Aims

At the end of the course, the students should have both an understanding of some of the major contemporary issues in comparative constitutional law, as well as major methods of comparative constitutional analysis.

3. Teaching Methodology

The format of the seminar will be conversational and participatory. The instructor will set out the framework of the discussion, followed by a conversation between the students and the instructor.

4. Intended Learning Outcomes

Course Intended Learning Outcomes	Weightage in %	Teaching and Learning Activities	Assessment Tasks/ Activities

5. Grading of Student Achievement

To pass this course, students must obtain a minimum of 40% in the cumulative aspects of coursework, i.e., internal assessment (including moot, mid-term exam, internal assignment) and end term examination. **End of semester exam will carry 50 or 30 marks, as the case may be, out of which students have to obtain a minimum of 30% to fulfil the requirement of passing the course.**

The details of the grades as well as the criteria for awarding such grades are provided below:

PERCENTAGE OF MARKS	GRADE	GRADE VALUE	GRADE DESCRIPTION
80 and above	O	8	Outstanding – Exceptional knowledge of the subject matter, thorough understanding of issues; ability to synthesize ideas, rules and principles and extraordinary critical and analytical ability
75 – 79	A+	7.5	Excellent - Sound knowledge of the subject matter, thorough understanding of issues; ability to synthesize ideas, rules and principles and critical and analytical ability
70 – 74	A	7	Very Good - Sound knowledge of the subject matter, excellent organizational capacity, ability to synthesize ideas, rules and principles, critically analyze existing materials and originality in thinking and presentation
65 – 69	A-	6	Good - Good understanding of the subject matter, ability to identify issues and provide balanced solutions to problems and good critical and analytical skills
60 – 64	B+	5	Fair – Average understanding of the subject matter, limited ability to identify issues and provide solutions to problems and reasonable critical and analytical skills
55 – 59	B	4	Acceptable - Adequate knowledge of the subject matter to go to the next level of

PERCENTAGE OF MARKS	GRADE	GRADE VALUE	GRADE DESCRIPTION
			study and reasonable critical and analytical skills.
50 – 54	B-	3	Marginal - Limited knowledge of the subject matter and irrelevant use of materials and, poor critical and analytical skills
45 – 49	P1	2	Pass 1 – Pass with basic understanding of the subject matter
40 – 44	P2	1	Pass 2 – Pass with rudimentary understanding of the subject matter
Below 40	F	0	Fail - Poor comprehension of the subject matter; poor critical and analytical skills and marginal use of the relevant materials. Will require repeating the course
Absent	Ab	0	Absent - “Extenuating circumstances” preventing the student from taking the end- semester, or re-sit, examination as the case may be; the Vice Dean (Examinations) at their discretion assign the “Ab” grade. If an “Ab” grade is assigned, the student would appear for the end-semester, or re-sit examination, as the case may be, as and when the subsequent opportunity is provided by the University.

6. Criteria for Student Assessments

Internal assessment of the participants will be based on the following criteria. In case any of the participants miss the IA tests, alternative internal assessments will be conducted (Please specify the alternative assessment)

Assessment	Weightage	Remarks
Type of Assessment	60 marks	
Internal: response papers		
Type of Assessment	40 marks	This course was conducted last year as a “continuing assessment course”, so instead of an examination,

Assessment	Weightage	Remarks
External: term paper		there is a term paper as the external component.
Type of Assessment	Marks	

Part IV

Course/Class Policies

Academic Integrity and Plagiarism

Learning and knowledge production of any kind is a collaborative process. Collaboration demands an ethical responsibility to acknowledge who we have learnt from, what we have learned, and how reading and learning from others have helped us shape our own ideas. Even our own ideas demand an acknowledgement of the sources and processes through which those ideas have emerged. Thus, all ideas must be supported by citations. All ideas borrowed from articles, books, journals, magazines, case laws, statutes, photographs, films, paintings, etc., in print or online, must be credited with the original source. If the source or inspiration of your idea is a friend, a casual chat, something that you overheard, or heard being discussed at a conference or in class, even they must be duly credited. If you paraphrase or directly quote from a web source in the examination, presentation or essays, the source must be acknowledged. The university has a framework to deal with cases of plagiarism. All form of plagiarism will be taken seriously by the University and prescribed sanctions will be imposed on those who commit plagiarism.

Disability Support and Accommodation Requirements

JGU endeavours to make all its courses inclusive and accessible to students with different abilities. In accordance with the Rights of Persons with Disabilities Act (2016), the JGU Disability Support Committee (DSC) has identified conditions that could hinder a student's overall well-being. These include physical and mobility related difficulties, visual and hearing impairment, mental health conditions and intellectual/learning difficulties e.g., dyslexia, dyscalculia. Students with any known disability needing academic and other support are required to register with the Disability Support Committee (DSC) by following the procedure specified at <https://jgu.edu.in/disability-support-committee/>

Students who need support may register before the deadline for registration ends, as communicated by the DSC via email each semester. Those students who wish to continue receiving support from the previous semester, must re-register every semester prior to the deadline for re-registration as communicated by the DSC via email. Last minute

registrations and support are discouraged and might not be possible as sufficient time is required to make the arrangements for support.

The DSC maintains strict confidentiality about the identity of the student and the nature of their disability and the same is requested from faculty members and staff as well. The DSC takes a strong stance against in-class and out-of-class references made about a student's disability without their consent and disrespectful comments referring to a student's disability. With due respect for confidentiality, faculty and students are encouraged to have honest conversations about the needs of students with disabilities and to discuss how a course may be better tailored to cater to a student with disability.

All general queries are to be addressed to disabilitysupportcommittee@jgu.edu.in

Safe Space Pledge

This course may discuss a range of issues and events that might result in distress for some students. Discussions in the course might also provoke strong emotional responses. To make sure that all students collectively benefit from the course, and do not feel disturbed due to either the content of the course or the conduct of the discussions. Therefore, it is incumbent upon all within the classroom to pledge to maintain respect towards our peers. This does not mean that you need to feel restrained about what you feel and what you want to say. Conversely, this is about creating a safe space where everyone can speak and learn without inhibitions and fear. This responsibility lies not only with students, but also with the instructor.

P.S. The course instructor, as part of introducing the course manual, will discuss the scope of the Safe Space Pledge with the class.

Cell Phones, Laptops and Similar Gadgets

Part V

Keywords Syllabus

Comparative Constitutional Law, constitutional interpretation

Course Design and Overview (Weekly Plan)

Part A: Constitutional Change and the People

Week 1: Constitutional Change - I: Basic Structure/Unamendability

Judgement(s)

1. David Ndii and Ors vs Attorney-General and Ors, Petition No. E282 of 2020 (High Court of Kenya) [Read the introductory part and the passages on the basic structure doctrine].
2. Attorney-General and Ors vs David Ndii and Ors, Petition No. 12 of 2021 (Supreme Court of Kenya). [Read all judgments on the basic structure doctrine, but especially that of CJ Koome].

Secondary Literature

3. David Otieno Ngira, 'Some Passing Reflections on the Building Bridges Initiative' (2020) 5(1) *Kabaraka Journal of Law and Ethics* 279.
4. David Landau and Rosalind Dixon, 'Tiered Constitutional Design' (2018) 86 *George Washington Law Review* 438.

Indian Comparison

5. Kesavananda Bharati vs State of Kerala, AIR 1973 SC 1461.

Questions

1. Is the basic structure doctrine primarily a safeguard against parliamentary super-majorities? How do you think the doctrine applies in case of tiered amendment systems?
2. What do you think of the four-step sequential process outlined in the High Court judgement, from the point of view of (a) conceptual plausibility, (b) historical analysis, and (c) the end-goal of protecting constitutional integrity?
3. Do you read CJ Martha Koome's judgement at the Supreme Court as incorporating the four-step process, but within the text of Article 257? What do you think of it, keeping in mind the tiered structure of the Kenyan amendment process?

Week 2: Constitutional Change - II: Popular Initiatives and Referenda

Judgement(s)

1. [David Ndii and Ors vs Attorney-General and Ors](#), Petition No. E282 of 2020 (High Court of Kenya) **[Read the passages on the popular initiative and the referendum]**
2. [Attorney-General and Ors vs David Ndii and Ors](#), Petition No. 12 of 2021 (Supreme Court of Kenya). **[Read the passages on the popular initiative]**.

Secondary Literature

3. Christina Murray, '[Making and Remaking Kenya's Constitution](#)'
4. The Constitutional Court of the Republic of Lithuania, "On Organising and Calling Referendums: Summary", available at <https://www.lkt.lt/en/court-acts/search/170/ta859/summary>.
5. Roberto Gargarella, '[From "Democracy to Distrust" to a contextually situated dialogic theory](#)' (2020) 18(4) International Journal of Constitutional Law 1447.

Questions

1. How do you understand the interplay of direct and representative democracy in Article 257 of the Constitution of Kenya?
2. How do you understand the way in which the High Court and the Supreme Court read the constitutional silences in Article 257 with respect to the role of the President/executive?
3. Do you think the judgments of the High Court and the Supreme Court do enough to set guardrails to prevent the top-down subversion of Article 257?
4. Are you convinced by the High Court's holding that every proposed amendment must be put to a separate referendum?

Week 3: Public Participation

Judgement(s)

1. [Doctors for Life International vs Speaker of the National Assembly](#), [2006] ZACC 11 (Constitutional Court of South Africa).
2. [Matindi vs CS, National Treasury & Planning](#), [2023] KEHC 1144 (esp paras 112 - 125) (High Court of Kenya).

Secondary Literature

3. Roberto Gargarella, "[From 'democratic erosion' to 'a conversation among equals'](#)" (2022) 47 *Revus*.
4. Juan C. Herrera, "[Judicial Dialogue and Transformative Constitutionalism in Latin America: the Case of Indigenous Peoples and Afro-descendants](#)", (2019) 43 *Revista Derecho del Estado* 191.

Indian Comparison

5. [Rajeev Suri v Delhi Development Authority](#), 2021 SCC Online 7 (paras 173 - 198).

Questions

1. What do you think of the South African Constitutional Court's attempt to balance the right of public participation with the imperatives of representative democracy/legislative efficiency? What other doctrines would you lay down to achieve this balance?
2. "Consultation" and a "veto" are not at two ends of a binary, but on a spectrum of participation - how do you understand this in the context of the Latin American secondary literature?
3. Compare *Doctors for Life* and *Central Vista* (Rajeev Suri). Is the difference between the two entirely due to the distinction in constitutional text?

Part B: Constitutional Structure

Week 4: Separation of Powers/Legislature-Executive Relations

Judgement(s)

1. Institute for Social Accountability vs The National Assembly, Petition No. 1 of 2018 (Supreme Court of Kenya).

Secondary Literature

2. Yash Pal Ghai, 'Chimeras of Constitutionalism: State, Economy, and Society in Africa,' Unpublished Paper, University of Pretoria, available at <https://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/15338/chimera_of_constitutionalism_yq1.pdf>.
3. Jeremy Waldron, "Separation of Powers in Thought and Practice", (2013) 54(2) *Boston College Law Review* 433.

Indian Comparison

4. Bhim Singh vs Union of India, (2010) 5 SCC 538.

Questions

1. How do you understand the interplay between the separation of powers and devolution in the *CDF* judgement?
2. Even though the Kenyan Constitution has a much weaker form of devolution than the federalism under the Indian Constitution, the *CDF* case seeks to preserve that (weaker) devolution, while *Bhim Singh* adopts a blasé attitude towards federalism. What do you think explains this distinction?

Week 5: Implied Limitations

Judgement(s)

1. R (Miller) vs The Prime Minister, [2019] UKSC 41 (Supreme Court of the United Kingdom).

Indian Comparison

2. Re: Article 370 of the Constitution, [2023] INSC 1058.

Questions

1. Compare the approach of the UKSC in *Miller* and the Indian SC in *Re: 370*, with respect to (a) implied limitations, and (b) executive power.

Part C: Rights

Week 6: Horizontal Rights Judgement(s)

1. [Maurice Tomlinson vs Television Jamaica Ltd.](#), [2020] JMCA Civ 52 (Court of Appeal of Jamaica).
2. [AB v Pridwin Preparatory School 2020 \(9\) BCLR 1029](#) (CC) (Constitutional Court of South Africa)
3. [Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others](#) [2014] eKLR (High Court of Kenya).

Secondary Literature

4. Gautam Bhatia, "[Horizontal Rights, Political Economy, and the Limits of Constitutional Adjudication.](#)"
5. M Finn, '[Befriending the Bogeyman: Direct Horizontal Analysis in AB v Pridwin](#)' (2020) 137 South African Law Journal 591.

Indian Comparison

6. [Kaushal Kishor vs State of UP](#), WP 113/2016 (2023).

Questions

1. What set of underlying presumptions about rights appear to be at play in *Tomlinson*?
2. Do you see a gap between the arguments raised by Tomlinson about institutional commercial strength, and the analysis of the Court?
3. If you were to decide *Tomlinson* in favour of Tomlinson, what doctrine of horizontal rights application would you lay down to do so?

Week 7: Evictions, Housing, and Land

Judgement(s)

1. [Dladla vs City of Johannesburg](#), [2017] ZACC 42 (Constitutional Court of South Africa).
2. [Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa \(Amicus Curiae\)](#) (Petition 3 of 2018) [2021] KESC 34 (KLR) (Supreme Court of Kenya).

Secondary Literature

3. Mandisa Shandu and Michael Clark, '[Rethinking Property: Towards a Values-Based Approach to Property Relations in South Africa](#)' (2021) 11(1) *Constitutional Court Review* 1.
4. Amy Kapczynski, "[The Right to Medicines in an Age of Neoliberalism](#)" (2019) *Humanity Journal*.
5. Victoria Miyandazi, '[Setting the record straight in socio-economic rights adjudication: the Mitu-Bell Welfare Society Supreme Court of Kenya judgment](#)' (2022) 6(1) *Kabarak Journal of Law and Ethics* 33.
6. Ian Mwiti Mathenge, '[A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in Mitu-Bell Welfare Society](#)' (2022) 6(1) *Kabarak Journal of Law and Ethics* 1.

Indian Comparison

7. [Olga Tellis vs Bombay Municipal Corporation](#), AIR 1986 SC 180.
8. [Ajay Maken vs Union of India](#), AIROnline 2019 Del 523.

Questions

1. How do notions of property rights and socio-economic rights intersect in *Dladla* and *Mitu Bell*?
2. What do you think of a “transformative” vision of property rights, as outlined by Shandu and Clark?
3. Do you think that *Dladla* - and especially, *Mitu-Bell* - reflect the limits of enforcing socio-economic rights under a capitalist political economy, as argued by Amy Kapczynski?

4. Compare *Dladla*, *Mitu-Bell*, and *Olga Tellis*. What, in your opinion, explains the absence of any further development of law after the minimalist approach of *Olga Tellis*, barring outliers such as *Ajay Maken*?

Week 8: Discrimination and Equality

Judgement(s)

1. [Mahlangu vs The Minister for Labour](#), [2020] ZACC 24 (Constitutional Court of South Africa).
2. [Dunmore v. Ontario \(Attorney General\)](#), [2001] 3 S.C.R. 1016 (Supreme Court of Canada).

Secondary Literature

3. Kimberle Crenshaw, “[Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics](#)” (1989) 1 University of Chicago Legal Forum 139.
4. Shreya Atrey, “[Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation](#)” (2021) International Journal of Discrimination and the Law 75.

Indian Comparison

5. [Supriyo vs Union of India](#), [2023] INSC 920.

6. Jahnavi Sindhu and Vikram Aditya Narayan, “[Equality under the Indian Constitution: Moving away from Reasonable Classification](#)”

Question

1. Compare the analysis of “under-inclusion” as a violation of equality in *Mahlangu*, *Dunmore*, and *Supriyo* (majority opinion). Do you find the analysis in *Supriyo* convincing?
2. Indian constitutional law formally recognises “intersectionality.” Is the failure in *Supriyo* to consider the constitutionality of the notice-and-objection regime a failure to actually apply intersectionality where it matters?

Week 9: Free Speech, Public Order and National Security

Judgement(s)

1. Kwok Wing Hang and Ors vs Chief Executive in Council, [2019] HKCFI 2820. (Hong Kong Administrative Court).

Indian Comparison

2. Anuradha Bhasin vs Union of India, WP No. 1031/2019.

Questions

1. Compare the reasoning in *Kwok Wing Hang* and *Anuradha Bhasin* on the issue of civil liberties in a time of conflict.
2. Compare, in particular, the deployment of the doctrine of proportionality by both courts.

Week 10: Freedom of Expression and Hate Speech

1. [Qwelane vs South African Human Rights Commission](#), [2021] ZACC 22 (Constitutional Court of South Africa).
2. [Saskatchewan vs Whatcott](#), [2013] 1 SCR 467 (Supreme Court of Canada).

Indian Comparison

3. [Amish Devgn vs Union of India](#), WP No. 160 of 2020.

Questions

1. How do the South African and Canadian courts navigate the space between free speech and social fault-lines in their judgments?
2. How do the constitutional values of free speech and equality intersect in the two judgments?
3. Does *Amish Devgn* lay down a coherent doctrine of hate speech? Is its subsequent non-enforcement more a function of a lack of clarity within the judgement, or simple executive unwillingness?

Week 11: Privacy and Surveillance

1. Julian Robinson vs The Attorney-General, [2019] JMCC Full 5 (Supreme Court of Jamaica).

Secondary Literature

2. Privacy International, "A Guide to Litigating Identity Systems."

Indian Comparison

3. Justice K.S. Puttaswamy vs Union of India (Aadhaar) (2019) 1 SCC 1.

Questions

1. Compare the attitudes of the Supreme Court of Jamaica and the Supreme Court of India to the question of techno-optimism.
2. How does *Julian Robinson* deal with difficult and disputed questions of fact?
3. How does *Julian Robinson* apply the doctrine of proportionality?

Week 12: Affirmative Action
Judgement(s)

1. United Organisation for Batwa Development in Uganda vs Attorney-General, [2021] UGCC 22. (Constitutional Court of Uganda)

Indian Comparison

1. NALSA vs Union of India (2014).

Questions

1. What do you think of the Ugandan Constitutional Court and the Indian Supreme Court crafting a remedy of affirmative action for a history of *discrimination* that is not reducible to an absence of *representation*?

Week 13: Tax and Constitutional Rights

Judgement(s)

1. [Sentencia C-117/18](#) (Constitutional Court of Colombia). (Use Google Translate, it's quite accurate)
2. [Symes vs Canada](#) [1993] 4 SCR 695 (Supreme Court of Canada).

Secondary Literature

3. Monica Arango Olaya, "[Blood, Taxes, and Equality.](#)"

Questions

1. Given how much influence tax law has on individual behaviour, what do you think explains the doctrine of judicial deference to challenges to tax laws?
2. How does the Constitutional Court of Colombia displace or question this presumption?
3. Are you convinced by the manner in which Symes analyses the question of discrimination? What do you think of the dissenting judgments?

Weeks 14 and 15

Discussion on the course themes.

