

## **Comparative Constitutional Law**

**Pre-requisites:** Constitutional Law I and II; Jurisprudence

**Credits Type:** Law

**Not cross listed**

- **Course description**

This course is a study of constitutional law and politics from a comparative perspective.

The first part of the course focusses on developing a foundational understanding of the field of comparative constitutional law; methodological challenges to doing comparison and certain key concepts underlying the field such as constitutionalism; democracy and constitutional identity.

The second part of the course will focus on the dynamic and interdisciplinary issue of how constitutions are founded; how they change both formally and informally and evolve and transition to new regimes; and what contributes to their legitimacy and success.

The third part of the course looks at structural issues of institutional power sharing within different constitutional systems, both horizontally (separation of powers) and vertically (federalism) and the implications of these institutional arrangements on democracy; accountability and efficiency in governance. We will also look at the role of constitutional courts and try to assess the phenomenon of “juristocracy” from a contextual perspective.

Based on time constraints, the course may also examine certain important constitutional rights through the format of debate and mooting on some seminal cases from different jurisdictions.

In covering these areas the course seeks to examine comparative constitutional law through the lens of plurinational and deeply divided societies; keeping in mind that constitutions are supposed to enshrine the priority of institutional and legal mechanisms over violence to channelize conflict. We will, therefore, draw our examples not only from constitutionally influential jurisdictions (such as United States, United Kingdom and Germany), but also from constitutions of plurinational or deeply divided societies (such as South Africa, Israel, and India). The course will

also include material from jurisdictions outside the ‘canon’ of comparative constitutional law, such as China, Afghanistan; Hungary and Colombia.

Second, this course will require reading a lot of secondary material (perhaps some case law as well). Some of this material can be a bit theoretical and ‘abstract’. If you have mainly studied law through case law until now, this may seem a challenging but this will help to expand the boundaries of legal understanding significantly.

Third, the course goes beyond a focus on courts and legal norms. Apart from constitutional courts, it includes a study of other constitutional institutions (such as legislatures, executives, and guarantor institutions such as electoral commissions, ombudsman offices etc). Examining these structural issues in different constitutional contexts will lead to an understanding of how different systems try to solve similar problems differently, and an insight into some cutting-edge developments in the practice of constitutionalism.

- **Course Aims**

This course aims to foster an understanding of :

- The field of comparative constitutional law; methodologies of comparison, migrations of constitutional law ideas across boundaries.
- Concept of constitutionalism and its relationship to constitutional law and democracy.
- Processes of establishing a constitutional order and paths of constitutional change and amendment; constitutional identity and legitimacy issues of constitution making and amendments.
- Structural issues such as forms of horizontal power sharing (separation of powers between the various branches of government) and federalism; new institutional developments such as guarantor institutions; the role of constitutions in channeling conflict in deeply divided societies.
- Structure and functions of constitutional courts, including different models of judicial review.
- Varying approaches to the adjudication and enforcement of fundamental rights.

- **Teaching Methodology**

The class format will combine lecture and discussion, with a primary focus on the latter. Students are expected to participate in class discussion on a regular basis.

They should review the delineated course materials in advance of each class and to raise questions and present their thoughts on the material during the course of class discussions. There will also be internal assessments based on student research and presentations.

- **Intended Learning Outcomes**

Course Intended Learning Outcomes	Weightage in %	Teaching and Learning Activities	Assessment Tasks/Activities
(1) One objective is for students to gain a solid understanding of comparative constitutional law as a field of study and the methodologies that can be used for constitutional comparison	5%	(1)Response Paper	The paper will be assessed on the following criteria: (i) Comprehension of course materials (ii) Depth of analysis (iii) Logical structure (iv) Grammatical correctness/writing style
(2) Examining the relationship between constitutionalism and transitional justice, the idea of constitutional borrowings and transplants, and of the migration of constitutional ideas across borders.	5%	(2) Original research and presentation	(i) Comprehension of the course materials (ii) Creative/original research and relevance for class discussions (iii) Strength of analysis (iv) Logical structure of the main themes/ideas (v) (vi) Style of oral presentation and response to questions.
(3) Another objective is for the students to consider	15%	(3) Debate/moots	(i) Identifying key issues (ii) Analysis of

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and examine the concept of constitutionalism and its relationship to constitutional law and democracy; we will examine the advantages/disadvantages of a written bill of rights; judicial review; amendments and the idea of “entrenchment” of important constitutional provisions.			judicial reasoning on key issues (iii)Analysis and assessment of final decision/order (iv) Comparative analysis with similar cases globally.
(4) Examining the various paths of constitutional foundings including in politically unstable regimes; regime changes and issues of transitional justice.	20%	(4) End term examinations	This will be an open book exam in person sit in examination and will consist of two essay questions; critical analysis required of the issues raised in the questions based on readings in the course materials and class discussions.
(4)Learning how to measure constitutional legitimacy and success	5%		
(5) Learning how to compare and contrast constitutional structures and their functions across jurisdictions; power sharing through separation of powers, bicameralism and federalism;	20%		

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(6) How constitutional structures can be used to channelize social conflicts in deeply divided societies and to create more inclusive and plural societies.	5%		
(7) Understanding the structure and function of constitutional courts; the legitimacy and efficacy of judicial review.	15%		
(8) Comparing select constitutional rights across jurisdictions; examining the content and judicial interpretation of a right and the scope of government prohibition and regulation of each right.	10%		

### **Weekly break up of modules**

<b>Week 1</b>	<b>Comparative constitutional law as a field of study</b>
<b>Week 2</b>	<b>Methodologies</b>
<b>Weeks 3-4</b>	<b>Constitutionalism; Constitutional law and democracy</b>
<b>Weeks 5 - 6</b>	<b>Establishing a constitutional order; paths of constitutional change.</b>

Week 7	Constitutional Legitimacy
Weeks 8-9	<b>Structural issues of power sharing</b>
Weeks 10-11	<b>Constitutional Courts</b>
Weeks 12-13	<b>Constitutional Rights</b>
Week 14	Revision week

## Ten essential readings

- (1) "Comparative Constitutional Law" (Oxford: Oxford University Press, 2012)
- (2) V. Jackson and M. Tushnet, "Comparative Constitutional Law" 2nd ed. (New York: Foundation Press, 2006)
- (3) Ran Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies', International Journal of Constitutional Law, 2013: <https://academic.oup.com/icon/article/11/1/1/776238>
- (4) Dann, Philipp, Michael Riegner, and Maxim Bönnemann (eds), 'The Southern Turn in Comparative Constitutional Law: An Introduction', in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law*, Oxford Comparative Constitutionalism (Oxford, 2020)
- (5) N.W. Barber, Constitutionalism: Negative and Positive, ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2565721](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2565721)) (2015)
- (6) Yaniv Roznai, Nature of constitutional amendment power, *in* Unconstitutional Constitutional Amendments (2017)
- (7) Tom Ginsburg & Aziz Huq, Assessing Constitutional Performance (2016),
- (8) Tarunabh Khaitan, "Guarantor Institutions" *Asian Journal of Comparative Law*, Volume 16, Supplement S1, December 2021, pp. S40 - S59

(9) Ran Hirschl, "Towards juristocracy: the origins and consequences of the new constitutionalism" (Harvard: Harvard University Press, 2007).

(10) David Landau, "Political Institutions and Judicial Role in Comparative Constitutional Law", Harvard International Law Journal (2010).