

Discipline Specific Elective (DSE) Courses for Sem – VIII

DISCIPLINE SPECIFIC ELECTIVE COURSE – 12: Comparative Constitutionalism

CREDIT DISTRIBUTION, ELIGIBILITY AND PRE-REQUISITES OF THE COURSE

| Course title & Code | Credits | Credit distribution of the course | | | Eligibility criteria | Pre-requisite of the course (if any) |
|--------------------------------------|---------|-----------------------------------|----------|--------------------|----------------------|--------------------------------------|
| | | Lecture | Tutorial | Practical/Practice | | |
| Comparative Constitutionalism DSE-12 | 4 | 3 | 1 | - | NA | NA |

Learning Objectives

This course intends to make students comprehend differentiated forms of constitutional practices and provide students to:

- Distinguish between constitutions as historical texts and constitutionalism as the ideological site providing justification for specific constitutional theory and practices with multiple sites of constitutional politics across jurisdictions.
- Compare inferences from different countries that addresses questions such as, what is a constitution, what are the processes through which constitutions evolve, and what are the different underlying principles they pledge, what rights are incorporated in the constitutions and what are the implications of their incorporation, are constitutions static/stagnant or do they embody principles of transformative change?
- Analyse the relationship with culture and democracy and the conception of transformative constitutionalism in societies transitioning from colonial to postcolonial constitutionalism.

Learning outcomes

On successful completion of the course, students would demonstrate:

- An understanding of the conceptual difference between constitutions and constitutionalism
- Awareness of varied forms of constitutional practice
- Awareness of the historical evolution of constitutions as texts and constitutionalism as the theory and philosophy of these texts, in a comparative perspective
- An understanding of the relationship between constitutionalism and democracy on the one hand and constitutionalism and emergency on the other.

SYLLABUS OF DSE-12

UNIT – I (7 Hours)

What is constitutionalism?

- Difference between constitution and constitutionalism
- Evolution of Constitutionalism

UNIT – II (8 Hours)

Democracy, Emergency and Constitutionalism

UNIT – III (8 Hours)

Transformative Constitutionalism

UNIT – IV (7 Hours)

Gendering Constitutionalism and Environmental Constitutionalism

Essential/recommended readings

Unit I-

Gerhard Casper, Constitutionalism, *Occasional Papers- Law School Publications*, University of Chicago Law School, Chicago Unbound, 1987, pp.3-17.

Dieter Grimm, Types of constitutions, in Michel Rosenfeld and Andras Sajo (eds), *Comparative Constitutional Law, The Oxford handbook of comparative constitutional law*, Oxford University Press, 2012.

Stephen Holmes, Constitutions and Constitutionalism, in Michel Rosenfeld and Andras Sajo (eds), *Comparative Constitutional Law, The Oxford handbook of comparative constitutional law*, Oxford University Press, 2012.

Larry Alexander, Constitutionalism, *Legal Studies Research Paper Series*, Research Paper No.07- 04, September 2005.

Kim Lane Schepple, 'The Agendas of Comparative Constitutionalism,' *Law and Courts*, Spring 2003, pp.5-22. <http://www.law.nyu.edu/lawcourts/pubs/newsletter/spring03.pdf>

Unit II

Jon Elster and Rune Slagstad. Introduction, in *Constitutionalism and Democracy*. 2012.

Richard Bellamy and Dario Castiglione, Constitutionalism and Democracy - Political Theory and the American Constitution (Review Article), *British Journal of Political Science*, Vol. 27, No. 4, 1997, pp. 595-618

Gunter Frankenberg, Democracy, in Michel Rosenfeld and Andras Sajo (eds), *Comparative Constitutional Law, The Oxford handbook of comparative constitutional law*, Oxford University Press, 2012.

Ronald Dworkin, 'Constitutionalism and Democracy', *European Journal of Philosophy*, 1995, 3, pp. 2–11

J Ferejohn, Emergency Powers and Constitutionalism, *International Journal of Constitutional Law*, Volume 2, Issue 2, 2004, pp. 207–209,

Venkat Iyer, States of Emergency and International Law, in *States of Emergency, the Indian Experience*, Butterworths, 2000, pp. 1-21

Anil Kalhan, 'Constitution and 'Extraconstitution': Emergency powers in postcolonial Pakistan and India', Drexel University Earle Mack School of Law Legal Studies Research Paper Series 2009 – A-16, <http://www.ssrn.com/link/Drexel-U-LEG.html>

Clement Fatovic, Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives, *American Journal of Political Science*, Vol. 48, No. 3, 2004

Melbourne Forum on Constitution-building, 'Legal Approaches to Responding to Emergencies: Covid-19 as a Case Study', *Constitutional Insights* no. 6, September 2021.

Unit III

Pius Langa, 'Transformative Constitutionalism', 17 *Stellenbosch Law Review*, 351, 2006.

Anupama Roy (Transformative Constitutionalism and Constitutional Insurgencies- sub section, pp. 16-22) Making Citizenship Familiar, in *Gendered Citizenship, Historical and Conceptual Exploration*, Orient BlackSwan, 2013.

Hailbronner, Michaela, Transformative Constitutionalism: Not Only in the Global South *American Journal of Comparative Law*, Volume 65, Issue 3, 2016, Available at SSRN: <https://ssrn.com/abstract=2777695>

Gautam Bhatia, Prologue- The Past is a Foreign Country, in *Transformative Constitutionalism- A radical Biography in Nine Acts*, Harper Collins Publishers India, 2019.

Unit IV

Helen Irving, Introduction, in *Gender and the Constitution, Equity and Agency in Comparative Constitutional Design*, Cambridge University Press, Cambridge, 2008.

Catharine Mackinnon, 'Gender in Constitutions', Michel Rosenfeld and Andras Sajo (eds), *Comparative Constitutional Law, The Oxford handbook of comparative constitutional law*, Oxford University Press, 2012.

Beverley Baines, 'Introduction', in Daphne Barak-Erez, and Tsvi Kahana (eds). *Feminist Constitutionalism, Global Perspectives*. Cambridge University Press, 2012.

Arnold Kreilhuber. "New Frontiers in Environmental Constitutionalism in New Frontiers in Environmental Constitutionalism, United Nations Environment Programme (UN Environment), 2017, <https://www.informeia.org/sites/default/files/imported-documents/Frontiers-Environmental-Constitutionalism.pdf>.

Erin Daly, Louis Kotzé, James R. May. "Introduction to Environmental Constitutionalism in New Frontiers in Environmental Constitutionalism, United Nations Environment Programme (UN Environment) May, 2017, <https://www.informeia.org/sites/default/files/imported-documents/Frontiers-Environmental-Constitutionalism.pdf>

James R. May and Erin Daly. Judicial Handbook on Environmental Constitutionalism, United Nations Environment Programme (UN Environment), 2017, https://www.iucn.org/sites/dev/files/content/documents/2_judicial_handbook_on_environmental_constitutionalism_march_2017.pdf

Additional Readings:

Charles Howard McIlwain, *Constitutionalism, Ancient and Modern*, Cornell University Press, Ithaca, New York, 1947.

Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process', *Duke Law Journal*, Vol.45, No, 364, 1995, pp. 364-396.

Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Edward Elgar, Cheltenham, 2014 [Introduction and Conclusion].

Charles Howard McIlwain, *Constitutionalism, Ancient and Modern*, Cornell University Press, Ithaca, New York, 1947.

Jeremy Waldron, 'Constitutionalism: A Skeptical View,' *Public Law and Legal Theory Research Paper Series*, Electronic copy available at: <http://ssrn.com/abstract=172277>

Carl J. Friedrich, *Constitutional Government and Democracy, Theory and Practice in Europe and America*, Oxford and IBH Publishing, New Delhi, 1974 (first Indian reprint)

Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia*, Oxford University Press, New Delhi, 2013.

Bruce Ackerman, 'The Emergency Constitution', *The Yale Law Journal*, Vol. 113, No. 5 (Mar., 2004), pp. 1029-1091.

James Tully, *Strange Multiplicity, Constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, 1995.

Julian Go, 'A Globalizing Constitutionalism? Views from the Postcolony', 1945–2000, *International Sociology*, March 2003, Vol 18(1).

Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices', 21 *Cardozo Law Review*, 1183, 2000.

Upendra Baxi, 'Postcolonial Legality', in Henry Schwartz and Sangeeta Ray (eds.), *A Companion to Postcolonial Studies*, Blackwell, 2000.

Upendra Baxi, 'Alternate Constitutionalisms under Signatures of Capitalism', *Modern Law review Symposium on Globalisation and Constitutionalism*, 6 June 2003.

Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism', *BISA Conference: Courting Justice*, Delhi, April 27-29, 2008