Comparative Constitutional Law and Theory

Module Handout

Introduction

The purpose of this module is to enable us to reflect theoretically on constitutions, what they are, what they do, what functions they play in contemporary societies and political communities. This theoretical reflection is informed by the consideration of a range of issues in comparative constitutional law, exploring constitutional jurisdictions from all around the world. Constitutional systems manifest similar problems; they also benefit and suffer from a transnational migration of constitutional ideas. Through exploring a wide range of examples, we can really push our theoretical understanding of constitutions.

The module is structured around a consideration of one of the most pressing phenomena in contemporary constitutionalism: democratic backsliding and its (contested) relationship to populism. The 1990s and early 2000s saw many countries transition to democracy. The 2010s however have been a period of democratic and constitutional retrenchment. Respect for constitutional rights and the rule of law has lessened; democratic processes have weakened. Different responses to this phenomenon have been practised and explored in the academic literature. We shall consider both the phenomenon and responses (implemented or proposed) in order better to understand the state of constitutionalism in the world.

In the course of the module, we shall touch on many of the most important debates in comparative constitutional law generally: the role of the people in constitutional systems, the importance of constitutional amendment and limits thereto, transnational constitutionalism, the migration of constitutional ideas, the role of judges as protectors or aggressors of democracy, the tension between legal constitutionalism and political constitutionalism.

Learning outcomes

Having successfully completed this module, students should be able:

- To formulate their own account of the nature of constitutions and constitutional law;
- To understand the benefits and dangers of comparative analysis in constitutional law;
- To assess critically different modes of constitutional change, including informal constitutional change, court-led change through interpretation, and popular change in referendums;
- To identify key issues of legitimacy in the concept of constitutionalism;
- To chart and critique the global doctrine of unconstitutional constitutional amendments;
- To assess the contemporary challenges of democratic backsliding and populism.

**Classes**

There will be one two-hour class each week from 12 noon to 2pm in Room 11, House 39. Classes will proceed in a seminar style on the basis of all students having read the assigned reading in advance. Each week, individual students will be required to make short (3-4 minute) presentations on the assigned articles or other readings. As well as facilitating class discussion, this will be useful preparation for both the assessment components.

**Assessment**

The module will be assessed by way of two written components: a response paper of no more than 1500 words (25%) and a module essay of no more than 3000 words (75%). Both word limits are inclusive of footnotes. Both the response paper and the essay must be submitted through Blackboard. You must use one of the following fonts: calibri, arial, trebuchet ms, seravek, with 11pt or 12pt font for main text and 9pt or 10pt font for footnotes. The lines should be 1.5 spaced.

By 3pm Wednesday 6 March, you must submit a response paper addressing one of the articles assigned for reading during the first six weeks of class. A response paper does not involve any additional reading or research. Instead, you identify one or two key arguments being made in the article, present the argument(s) clearly and concisely, and offer your own critique in response.

By 3pm Friday 26 April, you must submit your module essay. The module essay should involve a research-based critical analysis of a topic in comparative constitutional law and theory addressed during the module. You must submit your module title to me for approval by 3pm Thursday 4 April, although I strongly encourage you to do so earlier than this. For the module essay, you will need to do research beyond the materials listed in this handout. I suggest that you build up a reading list by (a) consulting the electronic resources on Blackboard (particularly the bibliography on the Democratic Decay website) and (b) following up on interesting references in the articles you have read (the snowballing approach). You must submit a module essay plan, following the template provided on Blackboard, by 3pm on
Tuesday 9 April. All essay plans will be made available to all members of the class to facilitate peer-to-peer feedback in the final class of term.

Office hours

I will be available to meet students to discuss issues relating to the module from 10am to 11am on Friday mornings during Hilary Term (apart from study week). This is a drop-in time so there is no need to make an appointment. You may also email me at oran.doyle@tcd.ie.

Class 1 – Diagnoses and Frameworks

Friday 25 January

In this class, we will consider a number of analyses and framing devices for constitutional malaise. Academics have come up with different terms to describe the general phenomenon. To some extent, these focus on slightly different things. But for the most part, they are different ways of conceptualising the same thing. Through reading the assigned articles, you will both get a better sense of what is happening in the world and take the first steps towards your own conceptualisation of it. For shorthand in this handout, I will refer to ‘democratic backsliding’ but you should use whichever term you find most helpful.

Assigned reading:


Jack Balkin, ‘Constitutional Crisis and Constitutional Rot’ in Mark Graber, Sanford Levinson and Mark Tushnet (eds), Constitutional Democracy in Crisis (Oxford, Oxford University Press, 2018) 13 [available on SSRN]

Class 2 – Democracy, Rule of Law, and Populism

Friday 1 February
In Class 1, we considered a number of different ways of understanding the current malaise in constitutionalism. Whether we talk of backsliding, decay, abuse or rot, however, we need also to understand the positive value that is deteriorating. These are most commonly presented as democracy and the rule of law. Deterioration of democratic standards and the rule of law is often attributed to populism. In Europe, populism has become almost synonymous in public debate with democratic backsliding, but it is a more subtle phenomenon. In this class, therefore, we will consider the core concepts of democracy, the rule of law and populism, with a particular focus on understanding the proper role for the people in the constitutional order.

**Assigned reading**


**Class 3 – Examples 1**

**Friday 8 February**

Through our consideration of the framing devices in class 1, we touched indirectly on a number of examples of democratic backsliding. In this class and the next one, we are going to focus in more detail on a number of particular examples of democratic backsliding. Through doing this, we will learn more about the diversity of constitutional arrangements in the world. But we will also start to explore whether there is a coherent phenomenon of democratic backsliding to which there can be a common response or set of responses. In this class, we will focus on Hungary, Poland, and Venezuela.

**Assigned reading**


Class 4 – Examples 2

Friday 15 February

In the previous class, we started to explore examples of democratic backsliding in order to push forward our theoretical understanding of this practice. A good conceptualisation requires clear parameters: what is the boundary between democratic backsliding and normal democratic competition and contestation? How can we anticipate democratic backsliding? We shall begin by looking at the constitutional situation in Turkey. We shall then consider the USA. In public discourse on the left side of the political spectrum, many have treated the Trump administration as a constitutional crisis. But is it? Finally, we shall consider two Irish examples. In the 1930s, Ireland witnessed the sort of constitutional dismantling that many would now see as the forerunner to democratic decay. But this did not happen. Why? More recently, the Irish courts have been critical of changes to the judiciary in Poland. But the Polish authorities responded with a critique of the way in which Irish judges are appointed. Was this Polish response justified? If not, what are the parameters of legitimate political involvement in appointing judges?

Assigned reading


Class 5 – Constraining constitutional amendment

Friday 22 February

We have seen that one of the ways in which democratic backsliding can occur is through constitutional amendment. In prevalent accounts of constitutionalism, a constitution provides a stable framework for political contestation between different groups in society. If one group gains control of the amendment power, it can alter the framework to its own advantage. One way of preventing this, perhaps, is to make constitutional provisions unamendable. This could occur in the text of the Constitution or could be a judicially created doctrine. In this class, we will explore examples of this constitutional manoeuvre. I will assign different constitutional provisions to different members of the class. There are some constitutions I definitely want us to look at, but as far as possible I will ask class-members to research and present their own constitution. This can be done on the website https://www.constituteproject.org.

I will also ask one member of class to report on India and a number of other countries, using the following article:


Optional class - Presentation by LLB Research Group on Democratic Decay

Thursday 28 February, 5-7pm South Leinster Street Law Seminar Room

I am the academic leader of a group of nine final year LLB students who are completing individual research projects on different topics related to democratic decay. Their work overlaps considerably with the syllabus for this module. As part of their assessment, they are required to make a group presentation to other members of the Law School of all their
findings. It would be good—both for you and for them—if you were in a position to attend this presentation. You are the people best placed to challenge them on their work but you will also learn from it: both through giving feedback to them and through gaining additional perspective on the subject-matter of this module. I am solely responsible for the grade awarded.

**Class 6 – Justifying and theorising amendment constraints**

**Friday 1 March**

In the previous class, we explored a number of examples of constraints on amendment powers. These constraints raise some of the most fundamental questions about constitutionalism. Who are constitutions for? What values are served by the possibility of amendment? What is the basis for constraining amendment? In this class, we will attempt a more systematic approach to this topic, while further exploring how it has been deployed in respect of a common instance of democratic backsliding, particularly in Latin America: changes to presidential term limits.

**Assigned reading**


**Class 7 – Militant Democracy**

**Friday 15 March**

In previous classes, we explored an approach that seeks to stop democratic backsliding by immunising critical components of the constitutional order from change. But perhaps this occurs too late in the process. Should we instead seek to stop the emergence of parties that seek to dismantle democratic safeguards? There is a contradiction or at least a tension here. What could be more democratic than political parties standing for election and putting their
proposals to the people? Can we be militantly democratic and protect our vision of democracy from those who seek to use democratic means to challenge it?

**Assigned reading**


Carlo Invernizzi Accetti, Ian Zuckerman, ‘What’s Wrong with Militant Democracy?’ (2017) 65 (1S) *Political Studies* 182

**Class 8 – Political parties**

**Friday 22 March**

In this class, we will look at political parties in a different way. Rather than focus on banning anti-democratic political parties, we will explore how more positively minded political parties can help curb populism and democratic backsliding. We will look back to the experience of Weimar Germany and consider the failure of political parties as part of the explanation for democratic backsliding. Even more so than the previous class, this directs our attention away from the legal constitution (the formal master-text document interpreted by the courts) towards the political constitution (the laws and practices that constitute the governance function of the state). Political parties play a hugely important role in how constitutions actually operate. Constitutional lawyers, however, may have a tendency to over-concentrate on legal solutions for problems. In this class, we redress that balance to some extent.

**Assigned reading**


NW Barber, ‘Some Thoughts on Populism and Political Parties’ (2019) 20(3) *German Law Journal* XX (forthcoming)

Kim Lane Schepple, ‘The Party’s Over’ in Mark Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis* (Oxford, Oxford University Press, 2018) 495

**Class 9 – International and supranational institutions**
Friday 29 March

Many of the measures considered in previous classes to combat democratic backsliding may transpire to be problematic because they depend on one national institution to check another national institution, whether it is the courts or political parties. One possible solution to this problem is to look to supranational or international institutions. The most effective institutions in this regard exist at regional level, the EU (which we will primarily consider in the next class) being by far the most powerful. As we shall see, however, supranational institutions have not to date proven hugely successful in combatting democratic backsliding. Indeed, they can provide fuel for populist argumentation by making the democratic choices of a particular polity subject to a foreign elite. As well as exploring the role of supranational institutions in checking democratic backsliding, we will explore how they can contribute to populism.

Assigned reading


Class 10 – European Union Responses

Friday 5 April

As we have seen, some prominent examples of democratic backsliding exist within the European Union. Hungary and Poland receive most attention, perhaps because they have failed to live up to their early promise as liberal constitutional democracies, but Romania and Bulgaria raise causes for concern. However, the EU (even more so than the supranational actors considered in the previous class) has considerable powers that it can exercise to disincentivise democratic backsliding. It has generally been slow to do so. In this class, we shall explore the powers of the EU and the institutional decisions that would be necessary to exercise these powers.

Assigned reading


Class 11 – Recapitulation and essay preparation

Friday 12 April

In this class we will not consider any new material. We will instead try to draw together some of the themes from across the module. You are required to submit a one-page (max) bullet-pointed plan for your essay by Tuesday 9 April at 3pm through Blackboard. You must use the template for the plan that is provided on Blackboard. These plans will be shared with all your classmates and there will be an opportunity for peer-to-peer feedback in class, as well as feedback from me.