LAWS 526 – Comparative Constitutionalism

(40 points)

COURSE OUTLINE

2nd and 3rd Trimesters

Course Coordinator

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Office 302

Prescription and Course Content

An exploration of the theory and practice of constitutionalism in New Zealand and selected jurisdictions. A particular emphasis will be placed on comparisons between systems based on the principle of parliamentary sovereignty and systems based on entrenched constitutions, and on the ways these systems attempt to balance constitutionalism and democracy. The course will place a special emphasis on the ways in which selected jurisdictions (New Zealand, the United States, the United Kingdom, Canada and several Latin American countries) attempt to balance these ideals. Constitutionalism is generally conceived as requiring some form of democracy, as providing the tools for peoples to govern themselves. By examining the ways in which different constitutional systems seek to realise the democratic ideal, we will be able to gain a better understanding of the relationship and tensions between constitutionalism and democracy.

Possible seminar topics include: popular participation in constitution-making and constitutional change; the constitutional role of the courts; the place of human rights in constitutional law; majority rule and representative government; the relationship between constitutionalism and international law; the enforcement of social and economic rights. Students will also be free to explore other topics related to the general theme of the course in their papers. Throughout the course students will be encouraged to reflect on the theory, practice and methodology of comparative public law.

The seminar will begin by a discussion of the following topics, led by the Lecturer:

- Week 1: A Brief Introduction to Democracy and Constitutionalism
- Week 2: The Constitutionalism-Democracy Dilemma
- Week 3: The Theory and Practice of Constituent Power
- Week 4: Constitutional Change and its Limits

After these four lectures (in which active student participation is expected), we will reconvene on 12 September for the first round of student presentations (Seminar Paper 1). These presentations will normally take place during 5 weeks and will cover some or all of the topics listed below (efforts will be made to accommodate each student’s particular interests).

- Topic 1: Making a New Constitution
- Topic 2: The Legitimacy of Judicial Review of Legislation
- Topic 3: Constitutionalism, Democracy, and the Enforcement of Positive Rights
- Topic 4: International Constitutionalism
• Topic 5: Student Selected

Students will be provided with a set of materials for each of the previous topics (these materials are contained in the course notes and are also listed below), but you are welcome to suggest alternative readings/topics in consultation with the Lecturer. Ideally, your first seminar paper will be on a topic that is related to your final paper, but this is not necessary. This first round of presentations will end on 10 October.

We will reconvene on 21 November for the second round of presentations (Seminar Paper 2), which will normally be related to the individual research topic of each student. This second round of presentations will end on 19 December.¹

Course Learning Objectives

At the conclusion of the course, students should be able to:
1. explain the key issues in comparative constitutionalism;
2. recognise the aims that are common to different theories and formulations of constitutionalism and democracy and how they are reflected in actual constitutional practice;
3. analyse the relationship between constitutionalism and democracy, and think critically about different attempts to solve the apparent tension between these two ideals;
4. demonstrate analytical, critical, and legal writing skills, after researching in depth a topic within the course prescription;
5. demonstrate the ability to lead and to participate effectively in seminars.

Workload

Approximately 40 hours for your own seminar paper presentation. Master’s research essays will take longer. Allow 2-3 hours for each seminar paper presentation of other students.

For a statement on the workload expected see Section 2.8 in the booklet Information for Postgraduate Law Students (2013 edition).

Assessment

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<thead>
<tr>
<th>Assessment items and workload per item</th>
<th>%</th>
<th>CLO(s)</th>
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<tbody>
<tr>
<td>1 Seminar 1 (papers will be marked 60:40 for content:presentation)</td>
<td>10%</td>
<td>2, 3, 5</td>
</tr>
<tr>
<td>2 Seminar 2 (papers will be marked 60:40 for content:presentation)</td>
<td>10%</td>
<td>1, 2, 3, 5</td>
</tr>
<tr>
<td>3 Participation in other seminars</td>
<td>10%</td>
<td>3, 4, 5</td>
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<tr>
<td>4 Research essay (15,000 words)</td>
<td>70%</td>
<td>1-4</td>
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Seminar Papers

The first seminar paper will normally consist in a discussion of one or more of the readings listed below under “Seminar Paper 1: Suggested Topics and Readings”. These discussions should synthetise the author’s main argument(s), and include a critical reflection on the strengths and weaknesses of those arguments. The second seminar paper will normally consist in an exploration of the topic selected by the student for their final research essay. This paper should identify the chosen topic of research, review some of the main literature on that topic, and contain an indication of the ideas/arguments to be developed in the research essay. At the end of both seminar papers, there should be a list of 3-4 questions for class discussion. Both seminar papers will be due a week before being discussed in class, and they will be distributed to all students at least three days before the paper is presented. You are encouraged to send me a draft of your seminar papers, and in most cases, I will provide you comments within 48 hours. For further guidance on seminar papers, you can consult Section 3.5 of the Information for Postgraduate Law Students booklet (2013 Edition).

Oral Presentations

This is an integral part of the seminar and should be well thought out by each presenter. The seminar paper must not be simply read out but should be used as a springboard for discussion. You should highlight the main arguments in a form which encourages debate and analysis. During your presentation, you should guide

¹ This structure is subject to change depending on the number of students enrolled in the course.
class discussion. Teaching aids, such as blackboards, whiteboards, overhead projectors and handouts may be used.

**Class Participation**
A large percentage of class time should be devoted to discussion. Because of the small size of the class, the success of each session will greatly depend on the amount of preparation and interest of each of us. In addition to your personal interest in getting a good participation grade, it is also in your collective interest as a class to complete the readings (including your colleagues’ seminar papers) before the class meetings, attend all class meetings, and participate actively. I have made an effort to keep the required readings relatively short, in order to allow you to read the papers closely and to consider the weaknesses and strengths of the arguments presented by an author or court.

**Final Research Essay**
Normally, the final research essay should engage with one or more of the topics of the course (that is, those listed in the weekly programme and reflected in the course materials). If you are interested in a topic that, while related to the main themes of the course is not included in that list, please discuss it with me before you begin writing. I consider an excellent essay to be one that shows a critical and careful reflection of the relevant literature, offers a clear and persuasive argument, considers and responds to possible counter-arguments, and is well written (this includes spelling and grammatical errors). When writing your paper, think about the ways other authors (e.g. those whose work you read through the course) present their ideas and arguments. I strongly encourage you to submit outlines and rough drafts, and I will read them and provide comments generally within a week. Research essays should not be longer than 15,000 words (including footnotes but excluding abstract, tables, bibliography and appendices). **Research essays must be handed in to the Law School/Faculty Office by 5.00 pm on Monday 3 February.** The handbook *Information for Postgraduate Law Students* provides for limited circumstances in which students are entitled to submit their paper on Monday 17 March rather than 3 February. (Note that students completing their degree may not be in a position to graduate in May 2014 if they hand in their research essay on 17 March.)

* All papers (that is, seminar papers and the final research essay) must also be submitted electronically to the Postgraduate Administrator, Jonathan Dempsey, by the due date (jonathan.dempsey@vuw.ac.nz).


**Penalties**
Penalties will be imposed for work that is handed in late or if there is a failure to hand in the required hard copy or e-copy of research essays. Penalties will also be applied for exceeding word limits.

**Late work** Major research papers handed in after the deadline will be subject to an automatic 5 percent minimum penalty and an additional 5 per cent will be deducted for each day or part-day thereafter. These penalties will apply unless prior permission has been granted or unless proof of [exceptional circumstances](#) can be produced. Failure to hand in the required hard copy or e-copy may incur a penalty of 5 per cent. Penalties may also be imposed for a failure to distribute seminar papers by the required time.

**Word limits.** Penalties will be imposed if the word count exceeds 10 percent of the maximum. One mark will be lost for each additional 50 words or part thereof. The word limit includes substantive material in footnotes – if the reader has to refer to the footnote to understand or appreciate a point made that is substantive.

**Exceptional circumstances** are those that cannot reasonably have been anticipated in advance and which justify the work being handed in late, do not include work demands, sporting events, overseas trips, holidays (surprise or otherwise) that your parents/partner decided to shout you or anything else that should or could have been worked around. If exceptional circumstances do arise you should make contact as soon as possible to arrange an extension. Unforeseen medical and personal emergencies must be supported by appropriate evidence.
Course Materials*

- **Week 1: Introduction to Comparative Constitutionalism and Overview of the Course**

- **Week 2: The Constitutionalism-Democracy Dilemma**
  3. Excerpt Reference re Secession of Quebec [1998] 2 SCR 217 [paragraphs 61-78] [1-5].

- **Week 3: The Theory and Practice of Constituent Power**
  3. Excerpt Constitutions of Ecuador (Art 444), Venezuela (Art 347), and Bolivia (Art 411) [1 page]

- **Week 4: Constitutional Change and its Limits**

**Seminar Paper 1: Topics and Readings**

- **Topic 1: Making a New Constitution**

- **Topic 2: The Legitimacy of Judicial Review of Legislation**

* Assigned pages are in brackets (note, however, that in some cases the entire article/chapter has been included in the course notes).

• **Topic 3: Constitutionalism, Democracy, and the Enforcement of Positive Rights**

• **Topic 4: International Constitutionalism**

• **Topic 5: Student Selected**
  1. Subject to Lecturer’s approval, students may work on an article/chapter from the list below (materials for further reading).

**Extended Bibliography**

The following list includes some materials for further readings. They provide other perspectives and analysis on the main topics of the course and may be helpful in the preparation of assignments, as well as for general class discussion. In addition to this list, students might want to consult the following textbooks, which have been placed on reserve in the Law Library, for additional background information and foreign materials:


**Materials for further reading:**


**Topic Selection**

A number of students, especially those from other jurisdictions, prefer to do comparative research and choose a topic which enables them to compare their own country’s approach to an issue with the approach of another country. Where appropriate to the topic the Faculty’s expectation is that one of the comparator countries should be New Zealand. This is to encourage students studying at Victoria to engage with the laws of New Zealand. If your topic involves comparative work you should speak to the course coordinator to discuss whether New Zealand content is or is not appropriate.
Overlap in Research Work

It is expected that each piece of work submitted as part of the requirements for an LLB(Hons), LLM or GCertLaw is not only your own work but also does not contain more than very limited material from other papers you have submitted in completion of your degree. Some overlap is permissible, at the discretion of the Director of Postgraduate Studies; however, it is your responsibility to ensure that unacceptable overlap does not occur.

Attendance

Apart from exceptional circumstances, you are expected to attend all seminars. Pressure of other work is not generally considered an acceptable reason for absence. Where attendance is impossible (for example due to short-term overseas work) you may be requested to present additional seminars, or essays on any topics which have been missed. Inadequate attendance will result in failure to fulfil the mandatory course requirements (terms). Any difficulties should be discussed with the Director of Postgraduate Studies.

Class Representative

The class representative provides a useful way to communicate feedback to the teaching staff during the course. A class representative will be selected at the first lecture of the course.