

**Constitutionalism of The Global South:
Critical Comparative Perspectives
International Summer School of the Universidad de los Andes Law School
(Course Proposal Nov 2022)**

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Dr. Sujith Xavier (U. Windsor – Canada)**

Description of the course:

The central aim of this course is to introduce students to the constitutionalization of democratic values in the Global South (values such as independence of the judges, delineation and separation of the various branches of government, the protection of fundamental rights, and the role of judges in policing the boundaries of public power). We want to demonstrate how these values, enshrined and protected in the Global North, are much more contested and open to change in the Global South. For example, the recent trends to provide constitutional protection to the environment diverges from, and stands in direct contrast to, constitutional approaches in the Global North.

In order to fully grasp the realities of the Global South, we employ a historical and comparative method as the basis of our pedagogy. Such an approach brings forward the history of colonization (and the spread of western values) and the role of international law in the construction of the colonies. Moreover, the lens of comparativism allows us to explore the effects of colonization on various jurisdictions in Latin America and South Asia. Through the lens of history and comparativism, the course intends to introduce students to the ways in which constitutions have been deployed in select jurisdictions in Latin America (especially Chile, Bolivia & Colombia) and South Asia (especially India & Sri Lanka).

Course objectives and outcomes:

The learning objectives for our intensive course are as follows:

- Understand the context and history of constitutionalism, constitutions and constitutionalization, and comparative law;
- Recognize and situate the broader debates in constitutionalism, constitutions, and constitutionalization;
- Appreciate the content and evolution of constitutionalism of the Global South and Global North;
- Critically assess contemporary understandings of constitutionalism, constitutions and constitutionalization based on historical knowledge and context;
- Learn legal reasoning, legal writing and legal research skills.

Course Schedule:

TBD

Teaching and Course Evaluation:

The classes will be taught in person (totalling 40 hours).

This is a seminar. Class will be conducted using lectures, class discussions, and guest lectures, guest lectures via pre-recorded interviews from scholars from various Global South jurisdictions.

Summary of Evaluation Method

- A) 55%: Research Paper (TBD);**
- B) 10%: Research Paper Outline and In Class Outline Presentation;**
- C) 30%: Two Comments (20%) on a Reading & Two Responses to the Comment (10%);**
- D) 5%: In Class participation**

A) Research Paper: 55%

Students must write a research paper (not exceeding 20 pages) on a selected topic (based on the course syllabus and reading materials). Papers are due (electronically) on: **TBD**. Submission details TBD

Late Submission: TBD

B) Research Paper Outline & Paper Presentation: 15%

Paper outline: Students must submit a research paper outline (not exceeding one page) and present their respective topics in an in-class presentation on TBD, see below for schedule). The outline must include a thesis statement with two supporting arguments. The outline must include sources (above and beyond those listed in the syllabus). Please submit outline to course Professors before your presentation.

Presentation (15-20 minutes): Students must set out the rationale for their interest in the topic. Students must clearly identify their thesis statement and set out at least two central arguments that they plan to marshal in support of their thesis. There is an expectation that the central thesis and the supporting arguments will be situated within the debates that the paper will engage with. Finally, students are expected to identify some of the challenges they may encounter.

Students should plan to speak for at least 10-15 minutes leaving enough time for feedback and engagement.

C) Comments on course readings and Responses to comments: 30%

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Students will be expected to submit two (2) reading comments (20%) and two (2) responses (10%) to the comments. Students are to email comments and responses to Prof. Alvez and Prof. Xavier, CCing all your classmates. Emails can be found under resources.

- A reading comment will engage with one of the assigned readings by:
 - summarizing the argument (short summary of the main argument(s));
 - engaging critically with the author's idea(s);
 - proposing a new approach, critique or adding a new dimension to the author's central claims;
 - a comment will not exceed two pages double spaced.
- A response will include:
 - Engaging with the author's claims through a circulated student comment and the ideas proposed in the student comment;
 - In the response, students are expected to engage with their colleagues' ideas and proposals in a respectful and collegial manner;
 - a response will not exceed one page double spaced.

D) In Class participation: 5%

Students will be expected to contribute regularly to class discussions and the final mark will be based on class participation, which includes class preparedness (i.e. comments and responses). Students are encouraged to ask questions, articulate arguments, and engage in respectful dialogue with the materials and colleagues.

Active participation also includes listening and fostering an atmosphere of collegiality and respect. As such, active participation necessitates allowing others the space to speak, not taking up too much space and, at times, not speaking. Class participation includes class preparedness and arriving on time.

Course Syllabus (with readings, subject to change):

<p><u>Part 1 (2 sessions, 4 hours):</u> Introduction</p>	<p>In this session, we will introduce students to the course, the major themes, and the roadmap. The purpose of this session is to introduce the various topics and to understand the broad thematic pillars of the course.</p> <p>Part A: Introduction, course method and overview of syllabus.</p> <p>Part B: Constitutions, Constitutionalism and Constitutionalization Required readings: <ul style="list-style-type: none"> • Martin Loughlin, “What is Constitutionalisation” in Petra Dobner and Martin Loughlin eds, <i>Twilight of Constitutionalism</i> (Oxford, Oxford University Press 2010) at 47-67; Suggested readings: <ul style="list-style-type: none"> • James Tully, “Modern Constitutional Democracy and Imperialism” (2008) 46:3 Osgoode Hall LJ461; </p> <p>Part C: History as a method: Required readings: <ul style="list-style-type: none"> • Irene Watson, <i>Aboriginal Peoples, Colonialism and International Law: Raw Law</i> (New York: Routledge, 2015), pps 11-25; • National Inquiry Into Missing and Murdered Indigenous Women and Girls (Final Report), <i>Reclaiming Power and Place</i> at 231-259; Suggested readings: <ul style="list-style-type: none"> • Truth and Reconciliation Commission, <i>The Final Report of the Truth and Reconciliation Commission of Canada</i> (Montréal: McGill-Queen’s University Press, 2015) at 43-50; • Antony Anghie, <i>Imperialism, Sovereignty and Making of International Law</i> (Cambridge: Cambridge University Press, 2004) at 1-28; </p> <p>Guiding questions:</p> <ul style="list-style-type: none"> • What is constitutionalism? What is constitutionalization? What is a constitution? • What is history as a method?
<p><u>Part Two (3 sessions; 6 hours):</u> <u>History as a legal Discipline</u></p>	<p>We will study the role and importance of history in law through Third World Approaches to International Law (TWAIL).</p> <p>Part A: Mapping Out TWAIL Class Video: <ul style="list-style-type: none"> • Usha Natarajan, “<i>What is TWAIL</i>” (video) </p>

	<p>Suggested readings:</p> <ul style="list-style-type: none">• Usha Natarajan et al, "Introduction: TWAIL - on praxis and the intellectual" (2016) 37 (11) Third World Quarterly 1946; <p>Part B: Locating TWAIL</p> <p>Required readings:</p> <ul style="list-style-type: none">• Luis Eslava, "TWAIL Coordinates" Critical Legal Theory Blog <online> <p>Suggested readings:</p> <ul style="list-style-type: none">• Antony Anghie and BS Chimni, "Third World Approaches to International and Individual Responsibility in Internal Conflicts" (2003) 2:1 Chinese J Intl L Law 71;• Makau Mutua, "What is TWAIL?" (2000) 94 Am Society Intl L Proceedings 31; <p>Part C: TWAIL's Others</p> <p>Required readings:</p> <ul style="list-style-type: none">• Amar Bhatia (2012) The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World', Oregon Review of International Law, 14(1) at pps 156-174;• Srinivas Burra, "Twail's Others: A Caste Critique of Twailers and their Field of Analysis" (2016) 33 (3) Windsor Yearbook of Access to Justice
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<p>Part three (3 sessions; 6 hours): <u>Comparative Law as a Legal Discipline</u></p>	<p>We will study the role and importance of comparison in law.</p> <p>Part A: Comparative Law as method:</p> <ul style="list-style-type: none"> • Class Discussion: What is comparativism as a method? <p>Part B: Expressivism in Comparative Law</p> <p>Required readings:</p> <ul style="list-style-type: none"> • Alan Watson, <i>Legal Transplants: An Approach to Comparative Law</i> (Athens: University of Georgia Press, 1993), Afterword at pp.107-118. <p>Part C: Critical Perspectives on Comparative Law</p> <p>Required readings:</p> <ul style="list-style-type: none"> • Gunter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law", (1985) 26 Harv. Int'l L. J., p. 440-455. <p>Part D: Politics of Comparative Law</p> <p>Required readings:</p> <ul style="list-style-type: none"> • David Kennedy, "Methods and the politics" in in Pierre Legrand & Roderick Munday, <i>Comparative Legal Studies: Traditions and Transitions</i> (Cambridge: Cambridge University Press, 2003) at pps. 345-369; <p>Part E: Class discussion on TWAIL as a method & comparison as method</p> <p>Guiding Questions:</p> <ul style="list-style-type: none"> • What is comparativism as a method? • What are the aims and objectives of comparative law? • What are the challenges and opportunities of legal transplants?
<p>Part Four (4 sessions; 8 hours): <u>Latin America as a Unity of Comparative Constitutional Law</u></p>	<p>We will focus on Latin America as a site of constitutionalism.</p> <p>Part A: Creole and Mestizo as Starting Points of A Latin American Analysis</p> <p>Required readings:</p> <ul style="list-style-type: none"> • Arnulf Becker Lorca (2006) 'International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and political Imagination', <i>Harvard Journal of International Law</i>, 47(1): pps 283-305; • Arnulf Becker Lorca (2014) <i>Mestizo International Law, A Global Intellectual History 1842-1933</i>, Cambridge University Press, págs. 22-25. <p>Part B: The Possibility of A Latin American Constitutionalism</p> <p>Required readings:</p>

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	<ul style="list-style-type: none"> Amaya Álvarez Marín, “Constitutional Challenges of The South: Indigenous Water Rights in Chile - Another Step in the “Civilizing Mission?” (2016) 33 (3) Windsor Yearbook of Access to Justice 87; <p>Suggested readings:</p> <ul style="list-style-type: none"> Liliana Obregón, “Regionalism Constructed: A Short History of ‘Latin American International Law”, (2012) ESIL Conference Paper Series, 2(1) 2; <p>Part C: Conversations with Global South Scholars: Deconstructing Latin America Guest Videos: Dr. Liliana Obregón & Dr. Arnulf Becker Lorca</p> <p>Part D: Group Discussion</p> <p>Guiding Questions:</p> <ul style="list-style-type: none"> What was the Latin American Perspective on International Law? Where are these Latin American perspectives now? How have the various universalizing international law projects erased the local or peripheral Latin American perspectives?
<p>Part Five (4 sessions; 8 hours): <u>South Asia as a Unity of Comparative Constitutional Law</u></p>	<p>We will focus on South Asia as a site of constitutionalism.</p> <p>Part A: The Possibility of South Asian Constitutionalism Required readings:</p> <ul style="list-style-type: none"> Sunil Khilnai et al, “Reviving South Asian Comparative Constitutionalism” in Sunil Khilnai et al, eds., <i>Comparative Constitutionalism in South Asia</i> (New Delhi, OUP, 2013)1-14; Uppendra Baxi, “Modelling ‘Optimal’ Constitutional Design for Government Structures: Some Debutant Remarks” in Sunil Khilnai et al, eds., <i>Comparative Constitutionalism in South Asia</i> (New Delhi, OUP, 2013) at pps-23-44; <p>Suggested readings:</p> <ul style="list-style-type: none"> Uppendra Baxi, “Preliminary notes on transformative constitutionalism” in Oscar Vilhena Vieira, Uppendra Baxi and Frans Viljoen, Introduction in Oscar Vilhena et al, <i>Transformative Constitutionalism</i> (Pretoria, Pretoria University Press, 2013) pps 19-47; <p>Part B: Transitions from a Violent Past in Sri Lanka Required readings:</p> <ul style="list-style-type: none"> Sujith Xavier, “Looking for ‘Justice’ in all the Wrong Places: Creating an International or Hybrid Criminal Tribunal for Sri Lanka?” in Amarnath Amarasingam & Daniel Bass eds, <i>Sri Lanka: The Struggle for Peace in</i>

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	<p>the Aftermath of War (Oxford: Oxford University Press, 2016) at pps. 53-71</p> <p>Part C: On the ground examples of South Asian Constitutionalism: India</p> <p>Required readings:</p> <ul style="list-style-type: none">• Kanad Bagchi, “Of Constitutional Subterfuge and the ‘Integration’ of Kashmir” Verfassungsblog <online> <p>Suggested Readings:</p> <ul style="list-style-type: none">• Menaka Guruswamy & Bipin Aspatwar, <i>Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court</i>, in: Daniel Bonilla (ed.), <i>Constitutionalism of the Global South</i> (Cambridge University Press, 2012) at pps TBD <p>Guiding Questions:</p> <ul style="list-style-type: none">• Can constitutionalism of the global south bring about systemic change?• What are the possibilities and challenges of the constitutionalism of the global south?• Can constitutional amendments heal violent pasts?
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<p>Part Six (4 sessions; 8 hours): <u>Challenging Global Constitutionalism of the Global South</u></p>	<p>In day six, we focus on the critiques of Constitutionalism of the South</p> <p>Part A: Exclusionary nature of constitutionalism Required readings:</p> <ul style="list-style-type: none">• Mazen Masri, <i>The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State</i> (London: Hart Publishing, 2017) at pps 161-191, <p>Part B: False Western Universalism in Constitutionalism Required readings:</p> <ul style="list-style-type: none">• Sujith Xavier, "False Western Universalism in Constitutionalism? The 1867 Canadian Constitution & the Legacies of the Residential Schools" in <i>Richard Albert et al., eds, Canada at 150: New Frontiers in Constitutional Law</i> (Toronto: U of T Press, 2017) at 270-287.
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