

LAW 312/512

Comparative Constitutional Law

Sabancı University (Spring 2022)

Oya Yegen
zoyayegen@sabanciuniv.edu
Tues 10: 40- 12:30
Thurs 8: 40 – 9: 30
<https://sabanciuniv.zoom.us/j/98024461827>

Office Hours: Mondays 9:00-11:00
and by appointment
<https://calendly.com/oyayegen>

Course Description and Objectives:

The purpose of this course is to introduce students the conceptual and theoretical foundations of constitutional law from a comparative perspective. Throughout the course, we will study similarities and differences between different constitutional systems and analyze how they address similar constitutional problems. We will begin the course with an introduction on concepts, then examine the comparative method in the study of constitutional law and discuss how constitutions work in different social, political and economic systems. We will proceed to a comparative examination of institutional arrangements and focus on how features of institutional design impact the political system and democratic performance. The third part of the course will review processes of constitution-making and constitutional change. Throughout the seminar, we will focus on how these theoretical debates operate in practical settings and study different jurisdictions to observe how law and politics interact. We will finish the course by examining cases of constitutional backsliding taking place across the world. By the end of this course, students should have a solid understanding of different constitutional systems, be able to analyze how constitutions functions in different settings, identify the role of constitutional law in effective government and have a full grasp of contemporary constitutional developments in the world today.

Course Requirements

Throughout the course, the main expectation is that the students come to class ready to discuss the readings and comment on the lecture. Additionally, students are expected to follow the current developments on constitutional law and politics, as we will devote the first 15 minutes of each class to discuss what is happening and how it relates to general theoretical debates.

I encourage you to keep yourself updated about current developments by following blogs on constitutional law and politics, including I-CONnect (<http://www.iconnectblog.com>), Constitutionnet (<http://constitutionnet.org>), Verfassungsblog (<https://verfassungsblog.de>) and DEM_DEC (<https://www.democratic-decay.org>)

Additional short readings (such as newspaper articles and blog posts) may be assigned over the course of the semester.

There is no assigned textbook. However, students are encouraged to read the relevant chapters from Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012).

Articles from book chapters and journals are available on the SuCourse + website.

| Undergraduate students | | Graduate students | |
|-------------------------------|-----|--------------------------|-----|
| Class participation | 20% | Class participation | 20% |
| Midterm Exam | 20% | Take-Home Exam | 30% |
| Reflections Paper (2) | 20% | Response Papers (2) | 20% |
| Short Assignments (2) | 10% | Research Paper | 30% |
| Final Exam | 30% | | |

Class attendance and participation (20%): We will discuss reading assignments in class and students are expected to participate actively. You will be evaluated on contributions to class discussions, both in terms of quality and quantity. See course policies for further details.

Reflection paper (10%): Undergraduate students will be writing two reflections on a current event that falls within the realm of constitutional politics. Please consult me before deciding on your topic. Late papers will be penalized with one letter grade per day.

Short Assignments (5%): Undergraduate students will be doing two short assignments after we finish Part II and Part III of the course.

Response papers (10%): Graduate students will be writing two written responses of approximately 2 -3 pages in reaction to a week's readings material. The response papers are due on Tuesdays (uploaded to SuCourse+). Note that you must choose a week from Part II of the course and another one from Part III.

Midterm and Final Exam (20/30 %): The midterm and final exams will cover the readings. The exam format will include keyword identifications and short essays. The final exam date will be announced later in the semester.

Research paper (30%): Graduate students will be writing a proposal for a research paper of app. 15 pages on a topic of your interest. It is advised that you set up a time with the instructor to discuss your research topic and present an outline. You may submit your draft paper by the end of Week 11 if you would like feedback before you submit the final version by the end of Week 13. All papers are due on **June 5**.

Take- Home Exam: For graduate students, there is going to one take-home exam that will cover the semester readings. It will be some time during the finals week, but we will decide the exact dates of the exam.

Course Policies:

For the Spring 2022, the teaching mode will be physical classes on Tuesdays and online classes on Thursdays.

Attendance is mandatory and unless you have a valid excuse, absences will result in point deductions from participation grade. This means that attendance to Tuesday classes count only if you are physically in class, unless you cannot attend because of a medical situation.

Attendance to Thursday online classes count only if you have your cameras on. Having said that, if you have a foreseeable valid reason for recurring absences, such as a technological problem, you should tell me as soon as possible, so that we can find alternative ways to make up for it.

Please attend Zoom lectures with your SU email account and with camera, be respectful of your fellow classmates during class discussions and be mindful of zoom etiquette- meaning mute yourself if you are not speaking and do not interrupt one another when speaking.

If you feel like you are not able to participate as much as you like during Zoom sessions, you can make up by responding to discussion questions posted for that week or by posing your own questions in the course forum.

Electronic recordings of course materials are for personal use only, do not share them outside of the class.

There is not going to be an extension or make up unless truly extenuating circumstances prevent the student from completing the work on time. In case you do encounter problems, please let me know as early as you can.

Please always feel free to e-mail me at any time. I will do my best to respond to your emails within 24 hours. If you have a matter that requires extended discussion, please meet me during office hours (over Zoom). You can email me to set up a time at the designated office hours or another convenient time that works for both of us.

I will keep you updated about the course, including additional short readings through e-mail and communicate any changes to the syllabus or deadlines through Sucourse+ announcement board.

It is imperative that students follow the standards and provisions set by Sabancı University. Students' cheating, plagiarism and other academic offences will not be tolerated. Cases of academic misconduct will be reported. Cheating and plagiarism will also result in failing that exam/assessment. See the university's policies: <https://www.sabanciuniv.edu/en/academic-integrity-statement>. If you have any questions about what constitutes an academic offense, you can ask the instructor in advance.

Course Schedule

Week 1 (March 1 & 3): Introduction to main concepts

- Russell Hardin. 1989. "Why a Constitution?" eds. Bernard Grofman et al. in *The Federalist Papers and the New Institutionalism* (Representation Vol 2).
- Stephen Holmes. 2012. "Constitutions and Constitutionalism," *The Oxford Handbooks of Comparative Constitutional Law*, Michel Rosenfeld and András Sajó (eds.)

- Tim Horley, Anne Meng and Mila Versteeg. 2020. "The World Is Experiencing a New Form of Autocracy," *the Atlantic*. March 1, <https://www.theatlantic.com/ideas/archive/2020/03/new-authoritarianism/607045/>

Grad:

- Zachary Elkins and Tom Ginsburg. 2021. "What Can We Learn from Written Constitutions," *Annual Review Political Science*. 24:16.1–16.23.
- Tom Ginsburg and Aziz Huq. 2018 "Chapter 6: Making Democratic Constitutions that Endure," in *How to Save a Constitutional Democracy*, The University of Chicago Press.

Week 2 (March 8 & 10): Comparative Method in Constitutional Law

- Ran Hirschl. 2014. "How Universal is Comparative Constitutional Law," *Comparative Matters: The Renaissance of Comparative Constitutional Law*, pp. 192-223.

Grad:

- Ran Hirschl. 2014. "Case Selection and Research Design in Comparative Constitutional Studies," *Comparative Matters: The Renaissance of Comparative Constitutional Law*, pp. 224-281.
- Zachary Elkins, Tom Ginsburg and James Melton. 2009. *The Endurance of National Constitutions*, Cambridge University Press, pp. 47-64.

II. Institutional design and variation

Week 3 (March 15 & 17): Systems of government

- Juan Linz. 1990. "The Perils of Presidentialism," *Journal of Democracy*, Vol. 1, no. 1, pp. 51-69.
- John M. Carey. 2005. "Presidential vs Parliamentary Government" in Ménard C., Shirley M.M. (eds) *Handbook of New Institutional Economics*. Springer, Berlin, Heidelberg
- Recommended: Scott Mainwaring and Matthew Shugart "Juan Linz, Presidentialism, and Democracy, A Critical Appraisal," *Comparative Politics*, Vol. 29, No. 4 (Jul., 1997), pp. 449-471

Grad:

- Matthew S. Shugart and John M. Carey. 1992. *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, Cambridge University Press. Chapter 1, 2 and 3.
- Robert Elgie. 2005. "From Linz to Tsebelis: three waves of presidential/parliamentary studies?," *Democratization*, 12:1, 106-122,

Week 4 (March 22 & 24): Executive-legislative relations

- Matthew S. Shugart and John M. Carey. 1992. *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*. Chapter 8.
- Ronald J. Krotoszynski, Jr. 2011. "The separation of legislative and executive powers," *Comparative Constitutional Law*, Tom Ginsburg and Rosalind Dixon (eds.)
- Recommended: Bertil Emrah Oder. 2017. "Turkey's ultimate shift to a presidential system: the most recent constitutional amendments in details", *Constitutionnet*, January 31. <http://constitutionnet.org/news/turkeys-ultimate-shift-presidential-system-most-recent-constitutional-amendments-details>

Grad:

- José Antonio Cheibub, Zachary Elkins and Tom Ginsburg. 2014. "Beyond Presidentialism and Parliamentarism". *British Journal of Political Science*, 44(3), 515-544.
- Petra Stykow. 2019. The devil in the details: constitutional regime types in post-Soviet Eurasia, *Post-Soviet Affairs*, Vol.35, no. 2, pp. 122-139.
- Mila Versteeg et. al. 2020. "The Law and Politics of Presidential Term Limit Evasion," *Columbia Law Review* Vol. 120, No. 1, pp. 173-248.

Week 5 (March 29 & 31): Territorial structures

- Thomas O. Hueglin and Alan Fenna. 2005. *Comparative Federalism: A Systematic Inquiry*. University of Toronto Press. Chapter 2 and 3.
- Nancy Bermeo. 2002. A new look at federalism: The import of institutions. *Journal of Democracy*, 13 (2), 96-110.

Grad:

- Barry R. Weingast. 2005. "The Performance and Stability of Federalism: An Institutional Perspective." In *Handbook of New Institutional Economics*. Eds. Menard, Claude, and Marry M, Shirley. Dordrecht: Springer, 149-172.
- Sujit Choudhry. 2014. "Classical and post-conflict federalism: Implications for Asia," in *Comparative Constitutional Law in Asia*, Rosalind Dixon and Tom Ginsburg (eds.) Edward Elgar Publishing.

Week 6 (April 5 & 7): Constitutional Rights

- Juan Fernando Jaramillo Perez. 2002. "Colombia's 1991 Constitution: A rights Revolution" in Detlef Nolte and Almut Schilling-Vacaflor (eds.) *New Constitutionalism in Latin America: Promises and Practices*. Routledge: 2002. (skim)

- Javier Couso. 2017. "The 'economic constitutions' of Latin America: between free markets and socioeconomic rights" in *Comparative Constitutional Law in Latin America*, Rosalind Dixon and Tom Ginsburg (eds.). Edward Elgar Publishing.

Grad:

- Christian A. Davenport. 1996. "Constitutional Promises and Repressive Reality: A Cross-National Time- Series Investigation of Why Political and Civil Liberties are Suppressed " *Journal of Politics* 58 (3): 627-54.
- Adam S. Chilton and Mila Versteeg. 2016. "Do Constitutional Rights Make a Difference?," *American Journal of Political Science*, Vol. 60, No. 3, pp. 575–589

Week 7 (April 12 & 14): Models of Constitutional Review and Designing the Judiciary

- John Ferejohn, 1998. "Independent Judges, Dependent Judiciary: Explaining Judicial Independence." *Southern California Law Review* 72.2-3: 353-384.
- Tom Ginsburg. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge, UK: Cambridge University Press. Intro and Chapter 1.
- Recommended: Hootan Shambayati and Esen Kirdiş. 2009. "In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey" *Political Research Quarterly*, Vol 62, Issue 4, pp. 767 – 780.

Grad:

- Tom Ginsburg and Mila Versteeg. 2014. "Why Do Countries Adopt Constitutional Review?," 30 *Journal of Law, Economics and Organization* 587.
- Aylin Aydin. 2013. "Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition," *Law & Society Review*, Volume 47, Number 1.
- David Landau and Rosalind Dixon. 2020. "Abusive Judicial Review: Courts Against Democracy," *UC David Law Review*, Vol. 53:1313.

Midterm Exam April 12

Week 8 (April 19 & 21): Emergency Powers

- John Ferejohn and Pasquale Pasquino. 2004. "The Law of the Exception: a Typology of Emergency Powers," 2 *Int'l J. Const. L.* 210.
- Tom Ginsburg and Mila Versteeg. 2020. "The Bound Executive: Emergency Powers During the Pandemic". Virginia Public Law and Legal Theory Research Paper No. 2020-52, U of Chicago, Public Law Working Paper No. 747.

Grad:

- Giorgio Agamben. 2005. *State of Exception*, University of Chicago Press : 2005), pp. 1-41.
- Mert Arslanalp & T. Deniz Erkmen. 2020. “Repression without Exception: A Study of Protest Bans during Turkey’s State of Emergency (2016-2018)”, *South European Society and Politics*.
- Anna Lührmann and Rooney, Bryan, Autocratization by Decree: States of Emergency and Democratic Decline (April 22, 2020). V-Dem Working Paper 85, 2nd Edition.

III. Constitution-making: processes and actors

Week 9 (April 26 & 28): Constitutional change: amendment vs replacement

- Thomaz Pereira. 2017. “Constituting the Amendment Power: A Framework for Comparative Amendment Law,” in *The Foundations and Traditions of Constitutional Amendment*, eds. Richard Albert, Xenophon Contiades and Alkmene Fotiadou, Hart Publishing.
- Tom Ginsburg and James Melton. 2015. “Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty,” *I•CON* (2015), Vol. 13 No. 3, 686–713.
- Watch: the 13th (2016)

Grad:

- Gabriel L. Negretto. 2012. “Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America.” *Law & Society Review*, vol. 46, no. 4, pp. 749–779.
- George Tsebelis. 2020. “Constitutional Rigidity Matters: A Veto Players Approach” <https://sites.lsa.umich.edu/tsebelis/wp-content/uploads/sites/246/2020/07/Constitutional-Rigidity-Matters.pdf>

SPRING BREAK

Week 10 (May 10 & 12): The Process of Making a Constitution

- Gabriel L. Negretto. 2017. “Constitution-Making in Comparative Perspective,” Oxford Research Encyclopedia of Politics.
- Tom Ginsburg, Zachary Elkins, and Justin Blount. 2009. “Does the Process of Constitution-Making Matter?,” *Annual Review of Law and Social Science*. 5: 201–23
- Felix Petersen and Zeynep Yanasmayan. 2020. “Explaining the Failure of Popular Constitution Making in Turkey (2011–2013)” in *The Failure of Popular Constitution-Making in Turkey*, Cambridge University Press, pp. 21-56.
- Watch: The Democrats (2014).

Grad:

- Gabriel L. Negretto “Democratic constitution-making bodies: The perils of a partisan Convention” *I•CON* (2018), Vol. 16 No. 1, 254–279.
- Todd A. Eisenstadt, A. Carl LeVan and Tofiq Maboudi. 2015. “When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-Making, 1974–2011” *American Political Science Review* Vol. 109, No. 3

Week 11 (May 17): Post-authoritarian

- Yanina Welp. 2013. “Transition from Above the constitution making process and consolidation of democracy Spain Brazil Poland” in *Patterns of Constitutional Design: The Role of Citizens and Elites in Constitution-Making*, ed. Jonathan Wheatley.

Grad:

- Michael Albertus and Victor Menaldo. 2014. “Dealing with Dictators: Negotiated Democratization and the Fate of Outgoing Autocrats”, *International Studies Quarterly*, 58, pp. 550-565.

Week 12 (May 24 & 26): Constitutional Borrowing, External actors, and Post-conflict constitution-making

- Sujit Chaudhry, “Introduction” in *The Migration of Constitutional Ideas*. Cambridge: Cambridge University Press: 2007.
- Tom Ginsburg, Zachary Elkins & James Melton, "Baghdad, Tokyo, Kabul: Constitution Making in Occupied States," 49 *William and Mary Law Review* 1139 (2007).
- Shamshad Pasarlay. 2021. “Afghanistan’s 2004 Constitution and the Collapse of Political Order,” *Verfassungsblog*, September 9. <https://verfassungsblog.de/fatal-non-evolution/>

Grad:

- Arend Lijphart, 2004. “Constitutional Design for Divided Societies,” *Journal of Democracy*, Volume 15, Number 2, April 2004, pp. 96-109.
- Jennifer Widner. 2005. “Constitution writing and conflict resolution,” *The Round Table: The Commonwealth Journal of International Affairs*, 94: 381, pp. 503-518.
- TBA

Week 13 (May 31 & June 2): Abusive and Authoritarian Constitutionalism

- David Landau. 2013. “Abusive Constitutionalism” *UC Davis Law Review*.
- Tom Ginsburg and Alberto Simpser. 2013. “Introduction: Constitutions in Authoritarian Regimes” and Zachary Elkins, Tom Ginsburg and James Melton “The Content of Authoritarian Constitutions” in Tom Ginsburg and Alberto Simpser (eds.) *Constitutions in Authoritarian Regimes*. Cambridge University Press.

- Bertil Emrah Oder. 2021. "Turkey's Democratic Erosion: On Backsliding and the Constitution," *Social Research: An International Quarterly*, Volume 88, Number 2, pp. 473-500.

Grad:

- Tamir Moustafa and Tom Ginsburg. 2008. "Introduction: The Functions of Courts in Authoritarian Politics" in Tom Ginsburg and Tamir Moustafa. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge University Press.
- Michael Albertus and Victor A., Menaldo. 2012 "Dictators as Founding Fathers? The Role of Constitutions Under Autocracy," *Economics & Politics*, Volume 24(3).

Week 14 (June 7 &9): Course wrap up

- David Landau and Rosalinda Dixon. 2015. "Constraining Constitutional Change" *Wakeforest Law Review*, Vol 50: 859.
- Aziz Huq and Tom Ginsburg. 2017 "How to lose a constitutional democracy", Vox Feb 21, available at <https://www.vox.com/the-big-idea/2017/2/21/14664568/lose-constitutional-democracy-autocracy-trump-authoritarian>.
- Steven Levitsky and Lucan Way. 2022. "America's Coming Age of Instability Why Constitutional Crises and Political Violence Could Soon Be the Norm" *Foreign Affairs* January 20. <https://www.foreignaffairs.com/articles/united-states/2022-01-20/americas-coming-age-instability>.

Grad:

- Aziz Huq and Tom Ginsburg. 2018. "How to Lose a Constitutional Democracy" 65 *UCLA L. Rev.* 78.