



## Topics in Comparative Constitutionalism

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Trinity Term Seminar Series

15.00-17.00 on Fridays weeks 3-8

Law Boardroom, Faculty of Law

In this seminar series, we will discuss some key topics in comparative constitutionalism, drawing out some of the theoretical questions which underpin them.

The seminars will be led by Aileen Kavanagh and various visiting speakers. Each seminar will start with a short presentation by each of the speakers, followed by a roundtable discussion. The seminars will look closely at just two or three readings, mostly from recently published work or work-in-progress by the speakers. The readings are hyperlinked below so that people can read them in advance and join in the roundtable discussion.

The seminar is not associated with any particular course or examination, but **all are welcome** to attend. The seminar may be of interest to graduate students in the Law Faculty, especially BCL/MJur students taking Constitutional Theory, Comparative Human Rights and Comparative Public Law, or to research students working in the areas of constitutional law, constitutional theory or comparative constitutional law.

### Seminar Programme

Friday Week 3 (12<sup>th</sup> May) **Dialogue, Finality and Legality** (with **Jeff King**)

Friday Week 4 (19<sup>th</sup> May) **Strong-Form and Weak-Form Review** (with **Tamas Gyorfi**)

Friday Week 5 (26<sup>th</sup> May) **The Craft of Judging in a Constitutional Democracy** (with **Kate O'Regan**)

Friday Week 6 (2<sup>nd</sup> June) **Political and Legal Constitutionalism** (with **Graham Gee**)

Friday Week 7 (9<sup>th</sup> June) **The Culture of Justification** (with **Murray Hunt & Dimitrios Kyritsis**)

Friday Week 8 (16<sup>th</sup> June) **Situating the Strike-Down Power** (with **Chintan Chandrachud**)

## Topics in Comparative Constitutionalism TT17

### Outline and Reading List

#### **Seminar 1: Dialogue, Finality and Legality (with Jeff King)**

The relationship between judges and legislatures under Bills of Rights is often described as a form of 'dialogue'. In this seminar, we will take a critical look at the connotations and implications of the idea of dialogue, examining both the insights and possible distortions it can produce.

Reading:

\*Jeff King, ['Dialogue, Finality and Legality'](#) (draft paper)

\*Aileen Kavanagh, ['The Lure and the Limits of Dialogue'](#) (2016) 66 UTLJ 83.

#### **Seminar 2: Strong-Form and Weak-Form Review**

In comparative constitutionalism, scholars often distinguish between systems of strong-form and weak-form review. Strong-form systems are those where judicial decisions on what rights require are final and unreviewable by ordinary legislative majorities. In weak-form review systems, on the other hand, courts can assess legislation for compliance with constitutional norms, but their decisions can be overridden by ordinary legislative majorities. The UK, Canada and New Zealand are often taken to be instances of 'weak-form review', because in each of these jurisdictions, the legislature can ignore, reject or override judicial decisions under the respective Bill of Rights.

In this seminar, we will discuss this distinction, exploring whether it provides a useful taxonomy for constitutional systems and whether so-called 'weak form review' embodies a valuable constitutional ideal.

Reading:

\*Tamas Gyorfi, ['A Theory of Weak Judicial Review'](#), Chapter 5 of Gyorfi, *Against the New Constitutionalism* (Edward Elgar, 2016)

\*Aileen Kavanagh, ['What's So Weak about Weak-Form Review? The Case of the UK Human Rights Act 2009'](#) *International Journal of Constitutional Law* (2015) 13 ICON 1008 (and see also the ICON Debate on this issue with Stephen Gardbaum)

### **Seminar 3: The Craft of Judging in a Constitutional Democracy (with Kate O'Regan)**

In this seminar, we will discuss some judicial and scholarly perspectives on judicial craft under Bills of Rights. Using the example of the *Fourie* same-sex marriage case in South Africa, we will explore some of the challenges which judges face when approaching difficult constitutional issues. In particular, we will look at the role of the courts vis-à-vis the other branches of government, exploring how best to characterise the relationship between these branches.

Reading:

\*Kate O'Regan, [Minister of Home Affairs v Fourie](#) (Same-Sex Marriage Case, Constitutional Court of South Africa, CCSA, 2005) and [Bato Star v Minister for Environmental Affairs](#) (CCSA, 2004), esp judgments by Justice Kate O'Regan

\*Aileen Kavanagh, ['Judge as Partner'](#) (draft paper)

### **Seminar 4: Political and Legal Constitutionalism (with Graham Gee)**

Ever since John Griffith delivered his 1979 Chorley Lecture entitled 'The Political Constitution', it has been commonplace to describe the British constitution as a political constitution. In contemporary British constitutional thought, the idea of 'political constitutionalism' is often contrasted with so-called 'legal constitutionalism'. In this seminar, we will discuss what these terms mean and what light they shed – if any - on the nature of the UK constitution.

Reading:

\*Graham Gee & Gregoire Webber, ['What is a Political Constitution?'](#) (2010) 30 OJLS 273-299

\*Aileen Kavanagh, ['British Constitutionalism Beyond Polarities'](#) (draft paper)

### **Seminar 5: The Culture of Justification (with Murray Hunt & Dimitrios Kyritsis)**

When the Human Rights Act 1998 was enacted, it was sometimes said that it would usher in 'a culture of justification' where 'exercise of power is expected to be justified by reference to reasons which are publicly available to be independently scrutinised for compatibility with society's fundamental commitments' (Hunt, 2015, 15-16). In this seminar, we will probe the idea of 'the culture of justification', examining how it relates to upholding rights in the UK and beyond.

Reading:

\*Murray Hunt, ['Introduction'](#) and [Conclusion](#) in Hunt, Hooper & Yowell (eds) *Parliaments and Human Rights* (Hart Publishing 2015)

\*David Dyzenhaus, ['Law as Justification: Etienne Mureinik's Conception of Legal Culture'](#) 1998 *South African Human Rights Journal*.

## **Seminar 6: Situating the Strike-Down Power (with Chintan Chandrachud)**

In both theoretical and comparative law scholarship on constitutional judicial review, there is much focus on the judicial strike-down power. In theoretical debates about the justification for constitutional judicial review, it is often suggested that it is unjustifiable in a democracy for judges to have the power to strike down legislation enacted by a democratically elected legislature. In comparative constitutional law, it is often thought that the strike-down power is the emblem of so-called 'strong-form review' and, therefore, worrying from a democratic point of view. By examining the constitutional systems of the United Kingdom, United States and India, we will explore the nature and significance of the strike-down power in these systems, questioning whether it really is the strongest tool in the judicial toolkit.

\*Chintan Chandrachud, '[Judicial Review in the Shadow of Remedies](#)', Chapter 4 of Chandrachud, *Balanced Constitutionalism* (OUP, 2016)

\*Aileen Kavanagh, '[Situating the Strike-Down](#)' (draft paper)

## **Seminar: How to Have the Last Word: Some Thoughts toward Renewed and Proper Use of the Canadian Notwithstanding Clause**

Reading:

Dwight Newman, '[The Canadian Notwithstanding Clause, Dialogue and Constitutional Identities](#)'

FURTHER READING:

Jeff King, '[Parliament's Response to Declarations of Incompatibility](#)'

## Speakers

**Jeff King** is Professor of Law at UCL and author of *Judging Social Rights* (CUP, 2014)

**Tamas Gyorfi** is Senior Lecturer in Law at the University of Aberdeen and author of *Against the New Constitutionalism* (2016, Edward Elgar)

**Graham Gee** is Professor of Public Law at the University of Sheffield.

**Kate O'Regan** is a Professor of Law, University of Oxford, Director of the *Bonavero Institute of Human Rights* and formerly a judge of the Constitutional Court of South Africa.

**Murray Hunt** is Professor of Law, University of Oxford, former Legal Advisor to the Joint Committee on Human Rights, and Director of the Bingham Centre for the Rule of Law.

**Aileen Kavanagh** is an Associate Professor, University of Oxford and author of *Constitutional Review under the UK Human Rights act 1998* (CUP 1998)

**Dimitrios Kyritsis** is Associate Professor at the University of Reading and author of *Shared Authority* (2015, Hart).

**Chintan Chandrachud** is a solicitor and author of *Balanced Constitutionalism* (OUP, 2016)