

LA3D2-15 Constitutional Theory

24/25

Department

School of Law

Level

Undergraduate Level 3

Module leader

Daniel Matthews

Credit value

15

Module duration

10 weeks

Assessment

50% coursework, 50% exam

Study location

University of Warwick main campus, Coventry

Description

Introductory description

This module introduces students to some of the key theorists of the modern constitutional state. Through the close reading of canonical texts, students will examine the genesis of constitutional norms, principles and institutions. Students will examine rival conceptions of sovereignty, assess the relationship between the constitution and democracy, as well critically evaluate constitutional principles like the rule of law and separation of powers. In addition, the module assesses the extent to which modern constitutional forms are capable of addressing contemporary challenges like globalisation, climate change and populism.

Module aims

The course has three principal aims.

- (1) To illustrate the importance of constitutional theory for understanding the modern state. Theoretical materials will be paired with practical developments in the history of constitutionalism in order to underscore the way in which legal and political theory is both analytically and normatively useful in relation to real-world constitutional problems.
- (2) To introduce students to a set of canonical thinkers, each of whom provides a distinctive perspective on the modern state and the function of the constitution. Rather than rely on textbook summaries or secondary literature, through the close reading of primary texts, students will be

introduced to some of the most influential theorists of the constitution. These texts will be situated in relation to the history of ideas and the evolution of the modern state form.

(3) To critically examine how contemporary socio-political phenomena like globalisation, climate change and populism challenge dominant conceptions of the constitution. Students will examine whether these (indicative) challenges can be accommodated within existing constitutional models, or whether their impact is so disruptive that paradigmatic constitutional change in theory and practice is required.

Outline syllabus

This is an indicative module outline only to give an indication of the sort of topics that may be covered. Actual sessions held may differ.

The first half of the module (weeks 1-5) will introduce students to a range of perspectives on the constitution and its function vis-a-vis the modern state. This will involve the close reading of canonical texts of constitutional theory. We will take in a broad historical sweep, moving from early-modern conceptions of the state to contemporary challenges to constitutional design. Throughout, attention will be paid to how these thinkers engage with enduring constitutional questions around the meaning and significance of sovereignty, democracy and the rule of law. Indicative topics include:

1. Thomas Hobbes and the authoritarian constitution
2. Emmanuel Sieyès, popular sovereignty and nationhood
3. Carl Schmitt and the state of exception
4. Michel Foucault, bio-power and necro-power

In the second half of the module (weeks 7-10) the focus will shift to examine contemporary challenges to constitutions in practice and in theory. Indicative topics include:

1. Global constitutionalism
2. The populist challenge to constitutionalism
3. The post-colonial constitution
4. The climate crisis and the green constitution
5. The aesthetic constitution (i.e. the constitution's reliance on myth, representation and symbolism)
6. The material constitution (i.e. the constitution's relation to political economy)

Learning outcomes

By the end of the module, students should be able to:

- Demonstrate a critical understanding of the work of canonical constitutional theorists
- Demonstrate an understanding of how constitutional theory relates to constitutional practice
- Demonstrate skills in close reading, conceptual analysis and critical evaluation
- Demonstrate an understanding of how contemporary socio-political phenomena (like globalisation, climate change or populism) challenge existing constitutional theory
- Articulate their own views (informed by existing scholarship) on the constitutional theorists, theories and challenges introduced in the course

Indicative reading list

Indicative texts:

Neil Walker, 'The Sovereignty Surplus' *ICON* (2020) 18(2) 370-428.

Bob Jessop, *The State: Past, Present, Future* (London: Polity, 2016), 1-52.

Deiter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (New York: Columbia University Press, 2015), 1-10.

Paul W. Khan, "The Question of Sovereignty" *Stanford Journal of International Law* (2004) 40: 259-282.

Martin Loughlin, "Ten Tenets of Sovereignty" in Neil Walker (ed.) *Sovereignty in Transition* (Oxford: Hart, 2003), 55-86.

Thomas Hobbes, *Leviathan* [1651] (Oxford: Oxford University Press, 1996), 82-89; 106-122 (chapters 13, 14 [abridged], 16, 17 & 18).

Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1996), chapters 19, 21, 26, 29-31.

Quentin Skinner, "Hobbes on Representation" *European Journal of Philosophy* (2005) 13(2), 155-184.

Giorgio Agamben, "Leviathan and Behemoth" from *Stasis: Civil War as a Political Paradigm* (Edinburgh: Edinburgh University Press, 2015), 19-54.

Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Dipicta as the Vision of Governance* (Cambridge: Cambridge University Press, 2015), 89-124.

Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford: Hart Publishing, 2000), 125-140.

Emmanuel-Josef Sieyès, *What is the Third Estate* (1789) [Abridged].

Bernard Yack, "Popular Sovereignty and Nationalism" *Political Theory* (2001) 29(4), 517-536.

Lucia Rubinelli, 'How to Think Beyond Sovereignty: On Sieyès and Constituent Power' *European Journal of Political Theory* (2019) 18(1), 47-67.

William Sewall, *A Rhetoric of Bourgeois Revolution* (Durham: Duke University Press, 1994), 1-65.

Margaret Canovan, *The People* (London: Polity, 2005), 1-37.

Martin Loughlin, "The Concept of Constituent Power" *European Journal of Political Theory* (2014) 13(2), 218-237.

Illan rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Abingdon: Routledge, 2012), 46-53.

Judith Butler, "'We, the people': Thoughts on Freedom of Assembly" in Bruno Bosteels (ed.), *What is a People?* (New York: Columbia University Press, 2016), 49-64.

Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume I* (London: Penguin, 1998), 135-145.

Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Vintage Books, 1995), 195-228.

David Runciman, 'The Coronavirus has not suspended politics, it has revealed the true nature of power' *The Guardian* (March 2020)

Daniele Lorenzi, 'Biopolitics in the time of the Coronavirus' *Critical Legal Thinking Blog* (2020)

Thomas Lemke, "The government of living beings: Michel Foucault" from *Biopolitics: An Advanced Introduction* (New York: New York University Press, 2011), 33-52.

Catherine Mills, *Biopolitics* (Abingdon: Routledge, 2018), 13-36.

Paul Rainbow and Nikolas Rose, "Biopower today" *BioSocieties* (2006) 1, 195-217.

Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2014), 7-42.

Martin Loughlin, "The Erosion of Sovereignty" *Netherlands Journal of Legal Philosophy* (2017) 2016(2), 57-81 [abridged].

Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (New York: Columbia University Press, 1996).

Neil McCormick, "Beyond the Sovereign State" *Modern Law Review* (1993) 56(1), 1-18.

Neil Walker, "Late Sovereignty in the European Union" in Neil Walker (ed.) *Sovereignty in Transition* (Oxford: Hart, 2003), 3-32.

Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review*, 317-59.

Peer Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2013) 76(2) *Law and Contemporary Problems*, 117.

Bruno Latour, 'Ornus Orbis Terrarum: About a Possible Shift in the Definition of Sovereignty' *Millennium: A Journal of International Studies* (2016) 44(3) 305-320.

Daniel Matthews, 'Reframing Sovereignty for the Anthropocene' (2021) *Transnational Legal Theory* 12(1), 44-77.

Henrik Enroth, 'Declarations of Dependence: On the Constitution of the Anthropocene' *Theory, Culture & Society* (2020), 1-22.

Dipesh Chakrabarty, 'The Planet: An Emergent Humanist Category' *Critical Inquiry* 46 (Autumn 2019), 1-31.

Bruno Latour, "On a possible Triangulation of some present Political Positions" *Critical Inquiry* (2018) 44(Winter), 213-226.

Geoff Mann and Joel Wainwright, *Climate Leviathan: A Political Theory of Our Planetary Future* (London: Verso, 2017), 3-49.

Will Steffen et al, "The Anthropocene: Conceptual and Historical Perspectives" *Philosophical Transactions of the Royal Society* (2011) 369, 842-867.

Dipesh Chakrabarty, "The Climate of History: Four Theses" *Critical Inquiry* (2009) 35(2), 197-222.

Bruno Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime* (London: Polity, 2017), 220-292.

Carl Schmitt, "Definition of Sovereignty" in *Political Theology* (Boston MA: MIT Press, 1985)

Giorgio Agamben, *State of Exception* (Chicago: Chicago University Press, 2005), 1-31.

Bob Jessop, *The State: Past, Present, Future* (London: Polity, 2016), 211-237.

Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford : Stanford University Press, 2003), 1-29.

Alex Murray, Giorgio Agamben (Abingdon: Routledge, 2010), pp. 56-77.

Stephen Humphreys, "Legalizing Lawlessness: On Giorgio Agamben's State of Exception" *European Journal of International Law* (2006) 17(3), pp. 677-687.

Judith Butler, *Frames of War: When is Life Grievable?* (London: Verso, 2016), pp. 33-62.

Mabo v Queensland (No. 2) (1992) HCA 23 [abridged]

Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon: Routledge, 2007), 96-107.

Richard Bartlett, 'Mabo: Another Triumph for the Common Law' 15 *Sydney Law Review* (1993) 178.

In Re Southern Rhodesia (1919) A.C. (PC) 210.

Coe v Commonwealth (1993) HCA 42.

Irene Watson, 'Buried Alive' *Law and Critique* (2002) 13(3), 253-269.

Shaunnagh Dorrsett, 'Mapping Territories' in Shaun McVeigh (ed.) *Jurisprudence of Jurisdiction* (Abingdon: Routledge, 2007), 137-158.

C. F. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous*

Jurisprudence (Abingdon: Routledge, 2010).

Desmond Manderson, *Dance Macabre: Temporalities of Law in the Visual Arts* (Cambridge: Cambridge University Press, 2019), 82-93.

Stewart Motha, 'The Failure of 'Postcolonial' Sovereignty in Australia' *Australian Feminist Law Journal* (2005), 107-125.

Peter Fitzpatrick, 'No Higher Duty: Mabo and the Failure of Legal Foundation' *Law and Critique* 13 (2002), 233-252.

Subject specific skills

Students will be introduced to the close and contextual reading of works of constitutional theory.

Transferable skills

Students will develop skills in critical evaluation, close reading and conceptual analysis. Students will develop their written and oral presentation skills.

Study

Study time

Type	Required
Lectures	1 session of 2 hours (1%)
Seminars	9 sessions of 2 hours (12%)
Online learning (scheduled sessions)	9 sessions of 30 minutes (3%)
Private study	97 hours 30 minutes (65%)
Assessment	28 hours (19%)
Total	150 hours

Private study description

Reading primary texts, preparing for class.

Costs

No further costs have been identified for this module.

Assessment

You do not need to pass all assessment components to pass the module.

Assessment group C

	Weighting	Study time
Coursework essay	50%	14 hours
Coursework essay on one aspect of the course. Questions will be circulated in advance.		
Oral exam	50%	14 hours
Students will be provided with questions in advance. Students will chose one question to answer in the oral exam. The assessor will ask questions.		

Feedback on assessment

Written feedback will be provided following both assessment components

[Past exam papers for LA3D2](#)

Availability

Courses

This module is Optional for:

- Year 3 of ULAA-M130 Undergraduate Law
- Year 3 of ULAA-M131 Undergraduate Law (4 Year)
- Year 4 of ULAA-M132 Undergraduate Law (Year Abroad)
- Year 3 of ULAA-M135 Undergraduate Law and Sociology
- Year 4 of ULAA-M133 Undergraduate Law with French Law
- Year 4 of ULAA-M134 Undergraduate Law with German Law
- Year 3 of ULAA-M136 Undergraduate Law with Humanities (3 Year)
- UPHA-V7MW Undergraduate Politics, Philosophy and Law
 - Year 3 of V7MW Politics, Philosophy and Law
 - Year 3 of V7MW Politics, Philosophy and Law