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Welcome to this year’s ICON•S conference in Copenhagen, iCourts, Centre of Excellence for International Courts, is both proud and honoured to host this year’s annual conference of the International Society of Public Law at the brand new premises of the Faculty of Law, University of Copenhagen. ICON•S has in recent years established itself as a key hub for international, national and transnational studies of public law. And by its uniquely inclusive approach, it has facilitated encounters between junior and senior scholars of many fields of law and connected disciplines.

Everything should be in place for new and critical encounters between scholars of public law. For years, Denmark has been assessed as the happiest place on earth by numerous studies. The much celebrated movement of New Nordic cuisine started in Denmark a decade ago. And Copenhagen, a small but cosmopolitan capital city, has been good at projecting its image as the place of bicycles and fun. Copenhagenerize is even the name of an organisation seeking to globalise the Copenhagen way of life: High trust in public institutions and an egalitarian and democratic culture seemingly epitomised by the abundance of bicycles.

Things are perhaps slightly more complex in the home country of the little mermaid. Already in 1603, Shakespeare famously noted that something was “rotten in the State of Denmark”; in 2015, another Englishman published the bestseller “The Almost Nearly Perfect People” which zoomed in on the less than perfect parts of Danish and Nordic society. For scholars of public law, and particularly those specialising in EU law, Denmark has been a reluctant traveler since the 1970s. And the country has in recent years made the news with its strict measures on immigration.

The complexities of contemporary society – from the global challenges to the Danish model to the refugee crisis – are at the heart of the discipline of public law. This year’s theme Courts, Power, Public Law speaks directly to these and other current challenges. We welcome your contribution to these debates. And we welcome you to experience a little hygge – another recent Danish export – while contemplating the future of law and society.

GRÆINNE DE BÚRC A
New York University
Co-Presidents, ICON•S, the International Society of Public Law

RAN HIRSCHL
University of Toronto & Universität Göttingen

MIKAEL RÅSK MADSEN
Director of iCourts
Centre of Excellence for International Courts

Local host
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<td>10:30 – 11:00</td>
<td>Coffee Break</td>
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<td>PANEL SESSIONS III SESSIONS 67 – 101</td>
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<td>12:30 – 14:00</td>
<td>Lunch Break</td>
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<td>14:00 – 15:30</td>
<td>PLENARY PANEL II HIGH COURTS AND POLITICAL POWER: A CONVERSATION WITH THREE PROMINENT JURISTS</td>
<td>Faculty of Humanities (Aud. 23.0.50, Aud. 23.0.49 / overflow hall) → Faculty of Law (Aud. 9A-1-01 + Aud. 9A-3-01 / overflow hall)</td>
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<td>15:30 – 16:00</td>
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### FRIDAY 7 JULY 2017

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<tr>
<td>10:30 – 10:45</td>
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<td>Snack Break</td>
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<td>12:30 – 14:00</td>
<td>PLENARY PANEL III INTERNATIONAL COURTS IN THE 21ST CENTURY</td>
<td>Faculty of Humanities (Aud. 23.0.50, Aud. 23.0.49 / overflow hall) → Faculty of Law (Aud. 9A-1-01 + Aud. 9A-3-01 / overflow hall)</td>
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III PLEINARY EVENTS

OPENING REMARKS
WED 13:00

GRÁINNE DE BÚRCA
New York University,
Co-President, ICON•S

Gráinne de Búrca is Florence Ellinwood Allen professor of law at New York University law school. She is director of the Hauser Global Law Faculty program and co-director of the Jean Monnet Center at NYU. Prior to joining NYU, she held tenured posts as professor at Harvard Law School, Fordham Law School, and at the European University Institute in Florence, and was Fellow of Somerville College at Oxford University. Her main fields of research are in European Union law, human rights and discrimination, and international and transnational governance. She studied law at University College Dublin and the University of Michigan and was admitted to the bar at Kings Inns, Dublin. She is co-editor of the leading OUP textbook: EU Law, currently in its sixth edition, and co-editor of the International Journal of Constitutional Law.

MIKAEL RASK MADSEN
Director of iCourts, University of Copenhagen

Mikael Rask Madsen is the founder and Director of iCourts, The Danish National Research Foundation’s Centre of Excellence for International Courts, Professor of European Law and Integration at the University of Copenhagen and member of the Danish Royal Academy of Sciences and Letters. He has been a visiting scholar at numerous universities, including Berkeley, Oxford, Sorbonne, EHESS and Strasbourg. Trained as both a lawyer and sociologist, he has helped pioneer the sociology of international law, notably by empirical studies of processes of legal globalization. He is currently directing a systematic empirical exploration of the causes and consequences of the proliferation of international courts, which includes field work on three continents. He is the author of numerous books and articles. Recent articles include ‘How Context Shapes the Authority of International Courts’, Law and Contemporary Problems, (2016), co-authored with K. Alter and L. Heller, and ‘Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems’, ICON, International Journal of Constitutional Law (forthcoming), with A. Huneeus.

KEYNOTE ADDRESS
13:20 – 14:30

BRYAN STEVENSON
Professor, Equal Justice Initiative / New York University

Bryan Stevenson is the founder and Executive Director of the Equal Justice Initiative in Montgomery, Alabama. Mr. Stevenson is a widely acclaimed public interest lawyer who has dedicated his career to helping the poor, the incarcerated and the condemned. Under his leadership, EJI has won major legal challenges eliminating excessive and unfair sentencing, exonerating innocent death row prisoners, confronting abuse of the incarcerated and the mentally ill and aiding children prosecuted as adults. Mr. Stevenson has successfully argued several cases in the United States Supreme Court and recently won an historic ruling in the U.S. Supreme Court banning mandatory life-without-parole sentences for all children 17 or younger are unconstitutional. EJI has also initiated major new anti-poverty and anti-discrimination efforts challenging the legacy of racial inequality in America. Mr. Stevenson’s work fighting poverty and challenging racial discrimination in the criminal justice system has won him numerous awards including the ABA Wisdom Award for Public Service, the MacArthur Foundation Fellowship Award Prize, the Olaf Palme International Prize, the ACLU National Medal Of Liberty, the National Public Interest Lawyer of the Year Award, the Gruber Prize for International Justice and the Ford Foundation Visionaries Award. In 2015, he was named to the Time 100 recognizing the world’s most influential people. Recently, he was named in Fortune’s 2016 World’s Greatest Leaders list. He is a graduate of the Harvard Law School and the Harvard School of Government, has been awarded 26 honorary doctorate degrees and is also a Professor of Law at the New York University School of Law. He is the recent author of the critically acclaimed New York Times bestseller, Just Mercy, which was named by Time Magazine as one of the 10 best books of nonfiction for 2014 and has been awarded several honors including the Carnegie Medal by the American Library Association for the best nonfiction book of 2014 and a 2015 NAACP Image Award.
GLOBA L EC ONOMIC INJUS TICE

GLOBA L EC ONOMIC INJUS TICE: A NOTE

The paper argues that the problem of global economic injustice (GEI) is multifaceted and calls for multidisci- plinary analysis. It then proceeds to identify and touch upon several dimensions of the problem including the ways of evidencing GEI, the internal and external causes of GEI, the question of global economic justice (GEJ) in the absence of a global demos, the different types of duties the international community owes weak economies, the practical measures or reforms that can be undertaken, the social forces and actors that can make this possible, the role of international lawyers in this process and the need to explore alternative visions of a just global economic order.

BHU PINDER CHIMNI
Professor, Jawaharlal Nehru University, Delhi

Prof. Dr. B. S. Chimni is Professor of International Law, School of International Studies, Jawaharlal Nehru University. He has served as Vice Chancellor of the West Bengal National University of Juridical Sciences, Kolkata (2004 – 2006). He has been a Visiting Professor at Brown and Tokyo Universities and was visiting scholar and professor in several Italian universities and in the National Science Foundation.

KATHARINA PISTOR
Professor, Columbia Law School

Katharina Pistor is the Michael I. Sovern Professor of Law at Columbia Law School and director of the Law School’s Center on Global Legal Transformation. Her research and teaching spans corporate law, corporate governance, money and finance, property rights, comparative law and law and development. She has published widely in legal and interdisciplinary journals and is the author and co-author of several books. Her most recent co-edited volume is “Governance Access to Essential Resources” (Columbia University Press, 2015). In 2012 she received the Max Planck Research Award on International Financial Regulation and in 2015 she was elected member of the Berlin-Brandenburg Academy of Sciences. She is also the recipient of research grants by the Institute for New Economic Thinking and the National Science Foundation.

There is economic injustice galore and we rightly bristle at such. Turning against the principal global existing and proposed regulatory regimes such as the WTO, NAFTA, TTIP and TPP is, I shall argue, misconceived.

JOSEPH H. H. WEILER
Professor, New York University

J. H. H. Weiler is University Professor, NYU School of Law. He serves, too, as Editor-in-Chief of the European Journal of International Law and Co-Editor-in-Chief of the International Journal of Constitutional Law (I+CON).

MON EY’ S LEGAL HIERARCHY
This paper discusses the way in which global money is legally constructed and hierarchically structured. In financial markets, participants trade different forms of money, some of which is state-issued and some privately issued. A form of money is closer to the “apex” of the system the closer it is to entities with unlimited power to issue money. During financial crises, market participants close to the “apex” are at a systematic advantage compared to participants at the “periphery.” The way in which access to the setting of the “rules of the game” happens, reveals questions of justice at the very core of the financial system, both with regard to its unchecked hierarchies and to the unjustified distribution of losses it creates.

MODERATOR

ERIKA DE WET
Professor, University of Pretoria

Since January 2016 Erika de Wet is the SARChI Professor of International Constitutional Law in the Faculty of Law, University of Pretoria, South Africa. Since July 2015 she is also Honorary Professor in the Faculty of Law, University of Bonn, Germany. Between 2011 and 2015 she was founding Co-Director of the Institute for International and Comparative Law in Africa and Professor of International Law in the Faculty of Law of the University of Pretoria. Erika De Wet obtained her B. Iur and LL. B as well as her LL. D at the University of the Free State (South Africa). She holds an LL.M from Harvard University and completed her Habilitationsschrift at the University of Zurich (Switzerland) in December 2002. Since 2014 she is a member of the General Council of the International Society of Public Law (ICON•SI).

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HIGH COURTS AND POLITICAL POWER:
A CONVERSATION WITH THREE PROMI-
NENT JURISTS INJUSTICE

BEVERLEY MCLACHLIN
Chief Justice, Supreme Court of Canada

Chief Justice McLachlin spent her formative years in Pincher Creek, Alberta and was educated at the University of Alberta, where she received a B.A. (Honours) in Philosophy in 1965. She pursued her studies at the University of Alberta and, in 1968, received both an M.A. in Philosophy and an LL.B. She was called to the Alberta Bar in 1969 and to the British Columbia Bar in 1971 and practised law in Alberta and British Columbia. Commencing in 1974, she taught for seven years in the Faculty of Law at the University of British Columbia as a tenured As- sociate Professor. Her judicial career began in April 1981 when she was appointed to the Vancouver County Court. In September 1981, she was appointed to the Supreme Court of British Columbia. She was elevated to the British Columbia Court of Appeal in December 1985 and was appointed Chief Justice of the Supreme Court of British Columbia in September 1988. Seven months later, in April 1989, she was sworn in as Justice of the Supreme Court of Canada. On January 7, 2000, she was appointed Chief Justice of Canada. She is the first woman in Canada to hold this position. In addition to her judicial duties at the Supreme Court, the Chief Justice chairs the Canadian Judicial Council, the Advisory Council of the Order of Canada and the Board of Governors of the National Judicial Institute. The Chief Justice is the author of numerous articles and publications.

MARTA CARTABIA
Justice, Vice President of the Constitutional Court of Italy

Marta Cartabia is full professor of constitutional law. In September 2011, she was appointed at the Italian Constitutional Court and since November 2014 she is serving as Vice-President.

Her research focuses on national and European constitutional law, constitutional adjudication and protection of fundamental rights. She taught in several Italian Universities and was visiting scholar and professor in France, Spain, Germany and US. She was Inaugural Fellow at Straus Institute for Advanced Study in Law and Justice and Clynès Chair in Judicial Ethics at Notre Dame University, Indiana, USA (2012). She is a member of the Inaugural Society’s Council of ICON•S – The International Society of Public Law. She sits in the scientific and editorial board of a number of academic legal journals. Among many books, articles and chapters, in 2015, with V.Barsotti, PCarozza and A.Simoncini, she co-authored the book Italian Constitutional Justice in Global Context (Oxford).
INTERNATIONAL COURTS IN THE 21ST CENTURY

SILVIA FERNÁNDEZ DE GURMENDI
President, International Criminal Court (ICC)

Judge Silvia Fernández de Gurmendi has over 20 years of practice of international and humanitarian law and in human rights. Coming to the Court from the Ministry of Foreign Affairs where she was the Director General for Human Rights, Judge Fernández de Gurmendi active in cases before the Inter American Commission of Human Rights and the Inter American Court of Justice. Judge Fernández de Gurmendi contributed to the creation and set up of the Court. She was also instrumental in the negotiations of the complementary instruments of the Rome Statute as chair of the Working Group on Rules of Procedure and Evidence and the Working Group on Aggression. Her academic experience includes professorships of international criminal law at the universities of Buenos Aires and Palermo and as an assistant professor of international law at the University of Buenos Aires.

THE STRASBOURG COURT AND THE UK

The Human Rights Act 1998 makes it unlawful for public authorities, including courts, to act incompatibility with certain ECHR rights and requires courts “to take into account” Strasbourg judgments. The role of the Strasbourg Court and the fact that its judgments have been scrutinised as a result of this “domestication” of the ECHR. Some of that scrutiny has challenged the legitimacy and credibility of the Court, and led to calls for the repeal of the 1998 Act. This paper will analyse those challenges and consider the future relationship between the Court, the UK executive and the UK courts.

AUTHORITY IN QUESTION: INTERNATIONAL COURTS IN THE CHANGING WORLD ORDER

Over the past two decades scholars have observed a great expansion of international courts, more courts, more judgments and generally more influential and consequential courts and judgements. Yet this expansion is now being challenged both in Europe and many other regions where the authority of international courts is increasingly questioned. In Europe, the reform-agenda of the European Court of Human Rights has radically changed from a concern with improvement of the Court, the UK executive and the UK courts.

DRAWING ON a set of new empirical studies of international courts, this presentation will address these key questions and propose a set of interpretations of the current situation of international courts and the glo bal legal order of the 21st century.

MIKAEL RASK MADSEN
Director of ICourts, University of Copenhagen

Shafeed Fatima Q.C. is a barrister at Blackstone Chambers, London. She specialises in international law, public law and commercial law. Her practice extends beyond English courts and includes the European Court of Human Rights, UN treaty bodies, arbitral tribunals and the EU courts. In January 2017 The Lawyer magazine named her one of its ‘Hot 100’ leading lawyers; in December 2013 she was listed in Chambers UK’s Top Junior Bar 100; in October 2013 she was awarded Junior of the Year in Human Rights and Public Law (by Chambers Bar Awards; having been shortlisted in the same category in 2011) and in 2005 she was awarded the Human Rights Lawyer of the Year Award (by Liberty and Justice). Prior to being appointed Queen’s Counsel in 2016, Shafeed was a member of the Attorney General’s Public International Law ‘A’ Panel (2014 – 2016) and the Attorney General’s ‘X’ Panel (2011 – 2016), having previously been on the ‘B’ Panel (2009 – 2011). She is working on the second edition of her book, International Law and Foreign Affairs in English Courts (anticipated 2017/2018, Hart Publishing) and is a founding editor of the transatlantic national security blog, “Just Security”. She has taught law at Pembroke College/University of Oxford, Harvard Law School, NYU School of Law and the Graduate Institute in Geneva. In April 2017 she was appointed chair of the legal panel of the Inquiry on Protecting Children in Conflict, chaired by Gordon Brown (the UN Special Envoy for Global Education and former UK Prime Minister).

SHAFEED FATIMA
Senior Counsel, UK

András Sajó is well known for his substantial contribution as a professor of Constitutional Law and, as such, he has taken part in the drafting of the post-communist constitutions of several Eastern European countries as well as those of Ukraine, Georgia and South Africa. He is currently a University Professor at Central European University, Budapest. His most recent publication “The Constitution of Freedom” will be published in November 2017 with OUP. In his homeland, Hungary, he has occupied several high-level positions working on the country’s constitutional development. Since 2008 he has been a judge of the European Court of Human Rights and, in this capacity, he has dealt with a number of cases concerning the presence of religious symbols in public space. Moreover, he has worked in his own country and at the international level for the abolition of the death penalty. He has worked as a consultant for both the United Nations and the World Bank and is Global Visiting Professor at New York University.

RAN HIRSCHL
Professor, University of Toronto

Ran Hirschl (PhD, Yale University) is Professor of Political Science & Law at the University of Toronto and holder of the Alexander von Humboldt Professorship in Comparative Constitutionalism at the University of Göttingen. He is the co-president of ICON-S, the International Society of Public Law. Hirschl is the author of Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004); Constitutional Theocracies (Harvard University Press, 2010) — winner of the 2011 Mahoney Prize in Legal Theory; and Comparative Matters: The Renaissance of Comparative Constitutional Law (Oxford University Press, 2014) — winner of the 2015 APSA C. Herman Pritchett award for the best book on law and courts, as well as over 100 articles and book chapters on comparative constitutionalism and judicial review. Professor Hirschl is the recipient of several prestigious research and scholarly awards in five different countries: Canada, Israel, the United States, Australia and Germany. In 2014, he was elected Fellow of the Royal Society of Canada — the highest academic accolade in that country.
IV CONCURRING PANELS

OVERVIEW

PANEL SESSION I
WEDNESDAY, 5 JULY 2017
17:00 – 18:30

p. 29 1 CONSTITUTIONAL ACTORS AND CONSTITUTIONAL CHANGE: COMPARATIVE PERSPECTIVES
Participants: Jurgen Goossens, Yvonne Tew, Nadiv Mordechay, Gonzalo A. Ramirez-Cleves, David Landau / Moderator: Yaniv Roznai

Participants: Jeff King, Timothy Endicott, Gavin Phillipson, Stephanie Palmer / Moderator: Grainne de Burca

p. 32 3 ECONOMIC JUSTICE
Participants: Tarunabh Khaitan, Katie Young, Rosalind Dixon and Julie Suk / Moderator: Rosalind Dixon and Richard Holden

p. 33 4 COURTS AND THE WORLD
Participants: Paul Craig, Oliver Lepsius, Lorne Sossin, Peter Strauss / Moderator: Anne Peters

p. 34 5 BEYOND BALANCING: ASSESSING ALTERNATIVE APPROACHES IN JUDICIAL PROPORTIONALITY REVIEW
Participants: Janneke Gerards, Ingrid Leijten, Jochen von Bernstorff, Aaron Baker, Moshe Cohen-Eliya / Moderator: Aaron Baker

p. 36 6 COMPARATIVE FEDERALISM: CONSTITUTIONAL ARRANGEMENTS AND CASE LAW – BOOK DISCUSSION
Participants: Francesco Palermo, Karl Kössler, Eva Maria Belser, James Gardiner, Patricia Popelier, Nico Steytler / Moderator: Marco Dani

p. 36 7 CAN LITIGATION SAVE THE ENVIRONMENT? ACCESS TO JUSTICE AND THE EFFECTIVENESS OF ENVIRONMENTAL LAWS
Participants: Andreas Hofmann, Agnes Hellner, Yaffa Epstein / Moderator: Andreas Hofmann

p. 38 8 CAUGHT IN BETWEEN: HOW INTERNATIONAL AND DOMESTIC COURTS RECONFIGURE POLITICAL CONTESTS INTO LEGAL QUESTIONS
Participants: Emily Kidd White, Tamar Megiddo, Rocío Lorca Ferrecio / Moderator: Emily Kidd White

p. 39 9 CHALLENGING RACIAL MARGINALITY IN PUBLIC INSTITUTIONS – MARGINALITY IN PRACTICE
Participants: Tanya Hernandez, Mathilde Cohen, Hilary Sommerlad / Moderator: Iyiola Solanke

p. 40 10 COMPARATIVE CONSTITUTIONAL LAW AND CROSS BORDER CONSTITUTIONALISM
Participants: Eduardo Moreira, Luis Claudio Araujo, Marcio Pugliesi, Guilherme Pena de Moraes / Moderator: Eduardo Moreira

p. 41 11 COMPETITION LAW AS PUBLIC LAW PRIVATE, POWER, AND COURTS
Participants: Elias Deutscher, Maria-José Schmidt-Kessen, Stavros Makris, Maria Ioannidou / Moderator: Ioannis Lianos

p. 43 12 COMPLYING, CREATING AND CONTESTING: THE MULTIPLE ROLES OF DOMESTIC COURTS IN THE INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS SYSTEMS
Participants: Raffaela Kunz, Leiry Cornejo Chavez, Yota Negishi, Jorge Contesse / Moderator: Antoine Buyse

p. 44 13 COURTS AND DEMOCRACIES IN COMPARATIVE PERSPECTIVES
Participants: Po-Jen Yap, Swati Jhaveri, Sam Issacharoff, Stephen Gardbaum / Moderator: Po-Jen Yap

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<td>Constitutional Rights in the Policy Making Domain: Normative and Empirical Perspectives</td>
<td>Mordechai Kremnitzer, Talya Steiner, Raanan Sulitzeau-Kenan</td>
<td>Moderator: Mordechai Kremnitzer</td>
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<td>Challenging Racial Marginality in Public Institutions – Method</td>
<td>Terry Smith, Audrey McFarlane, Gregory S. Parks</td>
<td>Moderator: Iyiola Solanke</td>
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<td>p.90</td>
<td>Courts, the Rule of Law and Europe’s Changing Administration</td>
<td>Deirdre Curtin, Joana Mendes, Filipe Brito Bastos, Michal Krajewski</td>
<td>Moderator: Diana-Urania Galetta</td>
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<td>Constitutional Courts and Constitutional Adjudication in East Asia</td>
<td>Albert H.Y. Chen, Wen-Chen Chang, Cora Chan, Po-Jen Yap</td>
<td>Moderator: Po-Jen Yap</td>
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<td>High Courts and Executive Power in Latin America: An Ambivalent Relationship</td>
<td>Sabrina Ragone, Gonzalo Ramirez Cleves, Sergio Verdugo, Juan Manuel Mecinas Montiel, Juliano Zaiden Benvindo, Diego Wernick</td>
<td>Moderator: Elizabeth Trujillo and David Landau</td>
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<td>Institutional Dialogue: Courts and Parliaments</td>
<td>Sarah Verstraeten, James Kelly, Josephine De Jaegere, Nicola Lupo, Sarah Lambrecht</td>
<td>Moderator: Patricia Popelier</td>
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<td>Between Policy-Makers and Bystanders: Constitutional Courts of the Former Yugoslav and Democratic Transition</td>
<td>Sanja Baric, Tatjana Papic, Edin Hodzic</td>
<td>Moderator: Tatjana Papic</td>
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<td>p.102</td>
<td>International Courts and Politics</td>
<td>Zane Rasnač, Juha Tuuvinen, Haukur Karlsson</td>
<td>Moderator: Haukur Karlsson</td>
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<td>International Courts at a Crossroads: Regional Integration in Crisis?</td>
<td>Salvatore Caserta, Micha Wiebusch, Maksim Karlik, Pola Cebulaik</td>
<td>Moderator: Pola Cebulaik</td>
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<td>Investment Court System in Recent EU Free Trade Agreements: Goals and Prospects</td>
<td>Joanna Jemieliñak and Shai Dothan, Güneş Ünür, Pawel Marcisz and Joanna Jemieliñak, Anna Aseeva</td>
<td>Moderator: Shai Dothan and Joanna Jemieliñak</td>
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<td>p.112</td>
<td>Judicial Protection of Social Rights: Opportunities and Challenges</td>
<td>Olga Chelsalina, Kyriaki Pavlidou, Tania Abbiata, Andrea Bagiati, Alexandre de le Court, Anastasia Poulo</td>
<td>Moderator: Veronica Federico</td>
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1 CONSTITUTIONAL ACTORS AND CONSTITUTIONAL CHANGE: COMPARATIVE PERSPECTIVES

This panel will bring together scholars from diverse jurisdictions to discuss some of the most cutting-edge issues in constitutional change from their comparative perspective. Are constitutional amendment procedures exclusive or do the people have an inalienable right to alter the Constitution outside the formal process? What is the relationship between constitutional change and constitutional identity or religion, and can constitutional change be influenced by extra-textual means? And how does international involvement of international actors influence courts’ involvement (and activism) in shaping the constitution? Indeed what is – and should be – the role of courts in major and delicate constitutional decisions, such as peace agreements, which have been agreed by political actors? Bringing a comparative insights and experience of the U.S., Malaysia, Israel, and Colombia, this panel will shed light on these questions.

Participants
- Jurgen Goossens
- Yvonne Tew
- Nadiv Mordechay
- Gonzalo A. Ramirez-Cleves
- David Landau

Moderator
- Yaniv Roznai

Room
4B-2-22

Jurgen Goossens: Direct Democracy and Constitutional Change

Do the People have an inalienable right to alter or abolish the Constitution? Scholars and policymakers have indicated that there is a “crisis of democracy”, as reflected in democratic deficits, distrust towards political representatives, and indifference to political affairs. At the same time, however, a profound debate is going on about revitalising democracy through citizen participation and deliberative law-making. In particular, there has been a proliferation of direct democracy via referendums to pursue constitutional change. The recent wave of citizen involvement in constitutional change will probably continue given the observed dissatisfaction with traditional methods of constitutional amendment often originating from the rigidity of formal amendment procedures. Moreover, constitution-writing can traditionally be considered as a rather elitist and secretive process. In the US, there has already been a vigorous debate about the question whether the rigid federal amendment procedure in Article V of the Constitution should be read as the exclusive way to alter the Constitution. Article V only involves legislatures and does not provide any form of direct democracy. Nevertheless, it remains an open and important question whether an amendment procedure should be read as the exclusive way to alter a Constitution. Although a majority of legal scholars seems to support an exclusive reading of amendment procedures, one could rely on a non-exclusive reading of amendment procedures and invoke the principle of popular sovereignty to argue that the People have an inalienable right to alter or abolish their Constitution. Excluding the People from constitutional law-making might create a democratic legitimacy problem. Could the Catalanian Parliament, for example, further pursue independence without the organisation of a new referendum?

Yvonne Tew: Stealth Theocracy: Malaysia’s Religion Clauses and Constitutional Change

When theocracies are born, they tend to emerge through constitutional revolution, not evolution. This Article explores a subtler phenomenon of constitutional transformation involving the expansion of the place of religion through less transparent means of constitutional change. The Article offers an account of this phenomenon, which I call “stealth theocracy.” It focuses on the fundamental alteration of a constitutional order’s religious or secular character through informal judicial and political engagement, rather than through formal constitutional amendment or replacement. Using Malaysia as a detailed case study, this Article examines the elevation of Islam’s position in the constitutional sphere, which has shifted the Malaysian state from its secular foundations to an increasingly religious public order. Courts have played a key part in this phenomenon. First, civil courts tend to decline jurisdiction in favor of the religious Sharia courts using a mechanism of “jurisdictional deference.” A second means has been through the “judicial Islamization” of the civil courts reflected in judicially expansive interpretations of Malaysia’s Islamic constitutional clause. Taken together, these judicial mechanisms have fueled a profound shift in the broader Malaysian political-legal context toward a more Islamic constitutional order. This Article challenges the prevailing view in the literature of courts as secularizing bulwarks against the effects of incorporating religion in constitutions. The story this Article tells shows the inverse phenomenon: courts have served as theocratizing forces that have acted to expand, not limit, the role of religion in the public order. This account of stealth theocracy also has implications for broader comparative constitutional understandings on constitutional change, constitutional history, and constitutional identity.

Nadiv Mordechay: Borrowed international legitimacy and robust domestic judicial review: an Israeli case-study

This article aims to establish an international explanation for the preservation (and even expansion) of judicial review in Israel in 2002–2012. This period marks the years following the establishment of a ‘strong’ model for constitutional judicial review on civil and political rights in the “Gal” case (the Israeli “Mar-
The article argues that this effect exists in times of an increased international involvement but even before a declared threat of international intervention, and ‘in its shadow’. Disaggregating the interests of adversarial branches within the State in situations of international criminal legalization can explain the puzzle of expansion of the powers of a constitutional court in times of a decline in domestic public trust and strong and continuous intra-branch conflict with the dominant political player. Maintaining the strong model of judicial review is explained by the unique role of the HCJ as a legitimacy generator in the international arena. After dealing with alternative explanations, the article discusses several positive and normative implications of the analysis to show that this may not be an idiosyncratic Israeli phenomenon, but rather a more general pattern of dynamics between Constitutional Courts and abusive Executive authorities in “fragile” democracies.

Gonzalo A. Ramírez-Cleves: Constitutional Reform and Peace process in Colombia: the role of the constitutional Court

2016 will be remembered as the most important year for Colombia in the searching and consolidation of peace. After more than 50 years of armed conflict, the negotiation between the Government and the FARC guerilla ended after four years of negotiations. The parties decided that the agreement must be ratified by a popular plebiscite and after that will be a special referendum process in order to enable a rapid mechanism to approve constitutional and legal reforms for the implementation of the peace agreements “fast track”. The Colombian Constitutional Court has played a very important role in the revision of the constitutional and legal reforms that made possible the peace agreement. The thesis that I will argue is that the active role of the Constitutional Court in the revision of the constitutional reforms for the implementation of the agreements will be exceptional and the Court has to balance between constitutional structural principles such as the searching of peace, the rights of the victims for justice, truth, reparation and non-repetition.

David Landau: discussant


The Miller Article 50 case, which went to the UK Supreme Court last year, confronted fundamental questions about the limits of executive power, the character of EU law as national law and the role of courts in determining such questions. It not only raised key questions around separation of powers – the interaction of executive and legislative power as policed by the judiciary – but ended up hinging on a much broader issue – the role of EU law in national constitutions or orders, a role strongly contested as either transforming, or as tightly controlled by the domestic order. Miller – a case that attracted unprecedented political and media attention around the world – was also remarkable in that it divided the public law academy more than the judiciary. Considered a radical judgment by its critics, and as grounded in four hundred years of constitutional orthodoxy by its supporters, the case starkly revealed prominent fault-lines between competing visions of public power within the UK constitution that arguably go back to the Civil War. But it was also the case that is a Federalized by academics, over eight months of active blogging, article-writing and speaking, in including particular those on this panel.

Participants
Jeff King
Timothy Endicott
Gavin Phillipson
Stephanie Palmer
Gráinne de Burca

Moderator
Room 4B-2-34

Jeff King: Miller: dividing scholars more than judges

In the first paper, Professor Jeff King (University College London) will examine the background to the Miller litigation, including the crucial role that legal blogging played in the development of the arguments ultimately tested in the Divisional and Supreme Court decisions. As a co-author of a blog that helped launch the case, he will endorse the finding but not reasoning of the majority of the Supreme Court and offer a critique of some aspects of the dissenting judgment. He will also reflect briefly on how the affair exposes the weakness of the Federal constitutional and the fragility of constitutionalism in a time of populism. Jeff King is a Professor of Law at University College London, Co-Editor of the United Kingdom Constitutional Law Blog, Executive Member of the UK Constitutional Law Association, Co-Editor of the Journal of Public Law, and Co-Editor of the Journal Current Legal Problems. He has co-authored blog ‘Pulling the Article 50 Trigger: Parliament’s Indispensable Role’ (27 June 2016) can be found on the website of the UK Constitutional Law Blog. He is also the author of Judging Social Rights (CUP 2012), The Doctrine of Odious Debt in International Law (CUP 2016), and co-editor of the forthcoming volumes The Cambridge Handbook of Sovereignty and the Rule of Law in European Union Law and Parliament and the Law (2nd Edn) (Hart 2017)

Timothy Endicott: Miller and the Necessity of Constitutional Executive Power

In the second paper, Professor Timothy Endicott will address the British constitutional tradition of realoting power from the executive branch of government to legislative and judicial authorities. That tradition has proceeded with remarkably little attention to the reasons why it can be constitutionally appropriate to allocate powers to executive agencies. In fact, there has been little attention to the question of why the executive should have any power whatsoever. He will argue that the majority decision in the UK Supreme Court in the Miller case depends for its justification on the proposition that the executive branch could not responsibly exercise the authority to signify the United Kingdom’s intention to withdraw from the European Union, and that there is no such Justification. Timothy Endicott is a Fellow at Balliol College, Oxford and has been Professor of Legal Philosophy since 2006. Professor Endicott writes on Jurisprudence and Constitutional and Administrative Law with special interest in law and language and interpretation. He served as the Dean of the Faculty of Law for two terms, from October 2007 to September 2015. He is the author of Vagueness in Law (OUP 2000) and Administrative Law 3rd ed (OUP 2015). He was appointed by Universidad Carlos III de Madrid to a Catedra de Excelencia during 2016. He has been General Editor of the Oxford Journal of Legal Studies since 2015.

Gavin Phillipson: Miller in the Supreme Court: how we realised (or not) how far EU law had changed the character of the UK Constitution

In the third paper, Gavin Phillipson will confront criticisms of the majority judgment, arguing that doctrinally it better reflects the role the key incorporating statute ‘the European Communities Act 1972’ gives Parliament in relation to changes to the EU Treaties, as opposed to EU legislation. More broadly, he will contend that the much-praised minority judgment of Lord Reed (which draws on the view of several senior public law scholars) is highly formalist narrowly focused on the textual generis nature and significance of EU law as a set of EU-sourced, but domesticated rights, powers and obligations. He will contend that Lord Reed’s insistence on the complete control of EU law by national law is divorced from reality and fails to appreciate the role of the British constitutional order that was accomplished by and during British membership of the EU. In contrast, he will explain how the majority’s recognition of this
3 ECONOMIC JUSTICE

Poverty and income inequality are some of the greatest challenges of our time. Constitutions also respond to these challenges in a variety of ways – including via the protection of a range of social rights. This panel, however, considers other, less-noticed ways in which constitutions address questions of economic injustice – i.e. the role of directive principles of state policy, principles enshrining a commitment to greater economic equality, and constitutional commitments to equality.

Tarunabh Khaitan: Securing Losers' Consent for India's Constitution: The Role of Directive Principles

This paper argues, using India as a case study, that constitutional directives can be a useful tool for the expressive accommodation of ideological dissenters who would otherwise lose out in constitutional negotiations in deeply divided societies. The strategy of expressive accommodation was tempered in the Indian case through containment and constitutional incrementalism. A calibrated expressive accommodation of ideological dissenters can give them enough (and genuine) hope of future victories to keep them on board, without going so far that the majority rejects the accommodation or their ideological opponents in turn leave the constitutional negotiation table. By focusing on the accommodational needs of ideological dissidents, this paper adds to existing literature on constitutional consensus-building techniques, which has largely focussed on political insurance for ethnocultural minorities.

Katie Young: The Constitutional Principle of the Social State

The principle of the social state is reflected in many constitutions, and stands as a symbol of the divide between German constitutionalism (where the Sozialstaatprinzip orients the state towards its protective function) and Anglo-American models. There is much made of substance to this symbol, particularly in nesting values of solidarity, human dignity, social justice and/or substantive equality into constitutional law. And yet, as the social state principle has migrated across constitutions (introduction of the individual complaint) the ECHR to decide on civil rights issues. Since 1999 the new EU Court has extended its civil rights jurisprudence substantially. Additionally there is the jurisprudential heritage on constitutional equality guarantees. The article equalizes ways in which a constitutional economic equality guarantee will need to be enforced by courts in an appropriately “weak”, i.e. open-ended, or structural rather than “strong” or concrete and individualized approach to the enforcement of social rights guarantees, or guarantees of minimum economic protection. But it is less well recognized as an approach to the enforcement of constitutional equality guarantees. The article equally explores ways in which a constitutional economic equality guarantee could appropriately be weakened both at the level of constitutional design and judicial doctrine. It also notes the challenges and contingency inherent in such an approach.

Rosalind Dixon and Julie Suk: Economic Inequality in Comparative Constitutional Law

Income inequality is rising in democracies worldwide. Many commentators also point to this trend as a contributor to the rise of newly populist, anti-democratic forms of constitutional politics. Yet despite hints of a different path, few legislatures have adopted socio-economic status as prohibited ground for discrimination, and even fewer constitutions expressly list wealth or income as prohibited grounds. This article explores whether this current pattern is inevitable, or whether there is a potential case for a significant expansion in the current scope of constitutional equality law – to embrace a distinctly economically focused form of constitutional equality jurisprudence. The article suggests that there are in fact strong arguments for constitutionalism as a commitment to greater economic equality, even in countries with strong background commitments to liberalism and free-markets. The challenge, in realizing greater constitutional economic equality in this context, is that there are certain kinds of individualized judicial relief that can be counter-productive to the achievement of greater economic equality: In a market-based context, where private as well state actors are involved, court decisions that attempt to redistribute economic resources on a case-by-case basis are not only ineffective. They will be counter-productive. This is the key insight of the law and economics movement and its critique of common law and equitable doctrines that seek to provide individualized, case-by-case relief. Economy is the underlying reason for the need for broader remedies. To succeed in actually promoting greater equality, therefore, a constitutional economic equality guarantee will need to be enforced by courts in an appropriately “weak”, i.e. open-ended, or structural rather than “strong” or concrete and individualized approach familiar in civil rights jurisprudence. Since 2009 the new EU Court has extended its civil rights jurisprudence substantially. Additionally there is the jurisprudential heritage on constitutional equality guarantees. The article equalizes ways in which a constitutional economic equality guarantee will need to be enforced by courts in an appropriately “weak”, i.e. open-ended, or structural rather than “strong” or concrete and individualized approach to the enforcement of social rights guarantees, or guarantees of minimum economic protection. But it is less well recognized as an approach to the enforcement of constitutional equality guarantees. The article equally explores ways in which a constitutional economic equality guarantee could appropriately be weakened both at the level of constitutional design and judicial doctrine. It also notes the challenges and contingency inherent in such an approach.
That said, the Courts’ aversion to incorporating foreign/ international law into Canadian law (absent statutory authority) also demonstrates the limits of Canada’s approach to legal pluralism.

Peter Strauss: Courts and the World

Peter Strauss, drawing on Justice Breyer’s recent book on this theme, and also the changes that might be anticipated in decisions by federal courts whose make-up will be influenced by the presidency of Donald Trump, will consider some of the ways in which American courts may make use of law from other legal systems – national, transnational, and international – in their decisions. In the US as in the UK and elsewhere, there is a tension between a desire/willingness to learn and draw from diverse sources, and a desire to preserve the independent character of American law, associated not only with sovereignty, but also its written Constitution. The more conservative voices on the Supreme Court, as Justice Breyer’s book makes clear, have been particularly resistant to learning from/ reliance on foreign law, and fearful of treaty obligations (e.g. the North American Free Trade Agreement) that may appear both to surrender elements of national sovereignty and to expand the domain of federal, as distinct from state, legal authority beyond the legislative powers the Constitution confers on Congress.

5 BEYOND BALANCING: ASSESSING ALTERNATIVE APPROACHES IN JUDICIAL PROPORATIONALITY REVIEW

Proportionality review has become the central methodology to organize judicial reasoning in human rights adjudication. The metaphor and practice of balancing interests – as the decisive step of the test – plays a core role in the increasingly globalized practice of proportionality review. Judicial “ad hoc” balancing has at its heart weighted factors, as political arbitrary and unpredictable. This panel will challenge the primacy of balancing approaches and investigate improvements and alternatives to ad hoc balancing. Examples from various constitutional systems demonstrate that ad hoc balancing is avoidable and that alternative methodologies can work. US and Israeli courts have used “probability tests” or “intervention thresholds” in place of ad hoc balancing; the German Constitutional Court famously applies “absolute limits” to contain the scope of ad hoc balancing. Courts elsewhere have used “analogous interpretation”, “core rights review”, “instrumentality review”, “categorization” and others. These alternatives can constrain balancing or can completely replace the proportionality framework with more concrete options setting three cases for alternatives against one argument for saving balancing through extensive reforms.

Participants

Janneke Gerards
Ingrid Leijten
Jochen von Bernstorff
Aaron Baker
Moshe Cohen-Elijia
Moderator
Aaron Baker
Room 7C-2-12

Janneke Gerards: The problems of balancing review and some alternatives

Judicial argumentation has to be clear and persuasive, and preferably as rational and objective as possible. Reverting to rhetoric is not problematic, but lawyers are sensitive to fallacies and sophisms, and judges need to understand that their natural audiences will recognize and reject any flaws in their reasoning. In addition, in shaping their reasoning, judges have to be aware of the capacities and legitimacy of the different institutions in the democratic system, as well as of their own roles and they need to express that awareness in their judgments. In ‘hard’ cases concerning fundamental rights, this poses special challenges for courts – how can they design the reasoning of their judgments in such a way as to meet the above requirements? The answer to be given often seems to be ‘by saying that there is a conflict of interests, and by balancing these interests’. As this paper will strive to demonstrate, however, even using the balancing rhetoric, seldom provides for clear, persuasive and flawless reasoning, and in many cases balancing language does not help to do justice to the courts’ constitutional position. If that argument is accepted, the question arises as to whether there are alternatives that courts can use to avoid the pitfalls of balancing review. This paper claims that there are – at least to a certain degree. It will base this claim on a tour d’horizon of the potential of three methods or instruments of judicial argumentation that can be used to decide in fundamental rights cases: analogical reasoning, categorization, and instrumentality review. Professor Dr Christoph Möllers (Humboldt University Germany) will act as discussant to this paper.

Ingrid Leijten: Core rights review as an alternative to balancing

The potential of core rights protection as form of judicial reasoning is largely underestimated. World-wide ‘balancing’ has become the way for courts to deal with conflicts between individual rights and general rules and interests. In turn ‘core rights protection’ is seen as inflexible and ill-suited to the legitimate role of courts amidst different powers. Yet as the criticism directed at balancing – i.e. that it is subjective and too ad hoc – cannot easily be countered completely, it is worth looking at core rights reasoning, and the way in which it can form an alternative or at least an addition to balancing techniques. This paper will show several underdeveloped characteristics of core rights reasoning; namely that it not necessarily determines absolute and inflexible limits to limitations of rights, and can also be useful for interpreting i.e. giving prima facie content to rights norms. Core rights, as well as being shown, may help to demarcate the fundamental rights sphere. In this way, they illuminate the legitimate scope of courts’ interference with democratically legitimized policy and practice. Albeit that the content of core rights is hard to determine, techniques can be identified to work with cores that are workable and dynamic at the same time. Arguably, though the promise of core rights protection is depends on the specific legal context. It is submitted in this paper that a ‘core rights alternative’ is worth considering especially in the context of human rights (as opposed to constitutional fundamental rights; a distinction often neglected in the academic discussion on rights reasoning) and when it comes to socio-economic rights protection.

Jochen von Bernstorff: Probability Thresholds as deontological constraints on balancing and proportionality

Effective risk management that is also respectful of human rights must take into account the probability that the catastrophe will strike again. Drawing from the psychological research on the cognitive bias of “probability neglect”, I call for the introduction of probability tests, such as the abandoned American “clear and present danger” test or the Israeli “near certainty” test, and for their integration into contemporary models of rights adjudications in global constitutionalism. The imposition of the judicial requirement that the government meet a certain pre-defined probability threshold after engaging in means-ends analysis and prior to engaging in balancing, serves as a useful and important deontological constraint. This reduces the priority of rights. Professor Aaron Baker (Durham Law School, United Kingdom) will act as discussant for this paper.

Aaron Baker: Can balancing be tamed?

Balancing in human rights and fundamental rights cases has rightly attracted criticism, but responding to that criticism could require more emphasis on balancing, not less. The dominant criticism suggests that balancing requires judges to weigh often incommensurable interests without any predictable or transparent formula, which results in making value judgments on matters which might (it is argued) be better decided by legislatures. In practice, almost certainly with some of those concerns in mind, judges in the UK and elsewhere resist the full implications of balancing, and look for reasons to exclude it in some cases and keep it vague and “broad-brush” in others. Meanwhile, this panel explores alternatives to balancing, which will allow courts to define the limits of state intrusions on individual rights, making concrete and foreseeable results. Such alternatives might offer the only answer, but this paper attempts the defence of another: do balancing better through extensive reform of doctrine and institutional cooperation.

Moshe Cohen-Elijia: Probability Thresholds as deontological constraints on balancing and proportionality

Alexy, along with other scholars who have developed or modified his ideas, has argued that the application of proportionality can answer most critics simply by rendering the balancing exercise more careful, complex, and scientific. This paper argues that this both overstates and understates the possibilities; that it might be correct to say that judges can make balancing better through more complex doctrine but that (a) the critics hold unrealistic expectations, which might not be met by suggested alternatives to balancing, and (b) balancing could arguably come the closest of all of the options, but only if other elements of the government embrace and support it. Incommensurability is a straw-man: it will always feature in judicial line-drawing about rights, as it does in ordinary human decision-making and rendering the incommensurable own role, and the whole point of what adjudication does for society. Similarly judges must make value judgments when defining the contours of rights protection whether by differentiating the core of a right from its ambit or by distinguishing a compelling state interest from a merely important one. We cannot render these exercises scientific or value-neutral. so we must aspire to the possible – to transparency and adherence to predictable criteria.
7 CAN LITIGATION SAVE THE ENVIRONMENT? ACCESS TO JUSTICE AND THE EFFECTIVENESS OF ENVIRONMENTAL LAWS

Growing concern about the underperformance of environmental rules and obligations has led policy-makers to emphasise an increased "enforceability" of such rules, primarily by enabling citizens and non-state actors to access courts. One example of such efforts is the other EU member states, signed both by the European Union and its member states. It’s implementation has deeply affected procedural rules for environmental litigation in Europe. This panel investigates whether such procedural changes necessarily serve environmental protection. The first paper juxtaposes centralised public enforcement with de-centralised private enforcement to highlight which procedures promises the greater effectiveness of environmental laws. The second paper takes a closer look at the concept of ‘access to justice’ as employed by environmental lawyers raising the question whether better protection of the environment really is the primary intended outcome. The third paper investigates the emergence of a European form of adversarial legalism in the environmental sector by comparing interest group litigation on biodiversity issues in the European Union and the United States. By combining lawyers and political scientists, this paper adopts a decidedly inter-disciplinary outlook on its subject matter.

CONCURRING PANELS

Participants
Francesco Palermo
Karl Kössler
Eva Maria Belser
James Gardner
Patricia Popelier
Nico Steytler
Moderator
Marco Dani
Room
7C-2-02

Francesco Palermo: Presentation of the book’s findings (together with Participant 2)
See panel’s description
Karl Kössler: Presentation of the book’s findings (together with Participant 2)
See panel’s description
Eva Maria Belser: Book Discussion
See panel’s description
James Gardner: Discussant with particular consideration of the US experience
See panel’s description
Patricia Popelier: Discussant with particular consideration of the Belgian experience
See panel’s description
Nico Steytler: Discussant with particular consideration of the South African experience
See panel’s description

Andreas Hofmann: Left to interested groups? On the prospects for enforcing environmental law in the European Union
Is EU environmental law viable without the active promotion and enforcement of the Commission? Starting from the twin observations that the Commission has recently been accused of de-prioritizing environmental policy, and that the Commission has generally retreated from extensively enforcing EU law, this paper asks whether environmental interest groups can step up to the plate where the Commission steps off it. The paper investigates whether better protection of the environment would automatically guarantee access to justice, that agreement may not extend to the reasons for doing so. In embracing access to justice, do environmental lawyers rationalize actions that primarily serve other interests than that of stopping environmental degradation? In my paper I describe access to justice in environmental matters in a way that goes beyond the mere wish that a wider interpretation of access to justice would automatically guarantee better protection of the environment.

Yaffa Epstein: Adversarial Legalism in the European Union and the Conservation of a Controversial Carnivore
The article argues that through litigation, NGOs assist the EU to delimit Member States’ competence to manage the wildlife within their borders. It compares species protection laws in the EU and US, and locate the responsibility for their implementation, administration, and enforcement at different levels of government, or governance. The division of responsibility between the Federal authority, state governments, and non-government actors is perhaps the most significant distinction between these two systems. As the EU continues to gain federation-like competences, it is not surprising that responsibility for biodiversity protection has shifted from the states to the central authority. This responsibility is also shifting from the state to the non-state actors. The EU’s reorientation has increased possibilities for the de-centralisation and democratization of the EU Commission’s mission to foster EU environmental protection. The EU Commission has recently been accused of de-prioritising biodiversity protection in the European Union, and as a result, environmental protection or migrant integration. Nevertheless, the book incorporates in the text case law boxes on the perspective of constitutional law. The discussion’s opportunity for the de-centralised enforcement of environmental rules and obligations has led policy-makers to emphasise an increased 'enforceability' of such rules, primarily by enabling citizens and non-state actors to access courts. One example of such efforts is the other EU member states, signed both by the European Union and its member states. It’s implementation has deeply affected procedural rules for environmental litigation in Europe. This panel investigates whether such procedural changes necessarily serve environmental protection. The first paper juxtaposes centralised public enforcement with de-centralised private enforcement to highlight which procedures promises the greater effectiveness of environmental laws. The second paper takes a closer look at the concept of ‘access to justice’ as employed by environmental lawyers raising the question whether better protection of the environment really is the primary intended outcome. The third paper investigates the emergence of a European form of adversarial legalism in the environmental sector by comparing interest group litigation on biodiversity issues in the European Union and the United States. By combining lawyers and political scientists, this paper adopts a decidedly inter-disciplinary outlook on its subject matter.

Participants
Andreas Hofmann
Agnes Hellen
Yaffa Epstein
Moderator
Andreas Hofmann
Room
8A-2-17

AND the EFFECTIVENESS of ENVIRONMENTAL LAWS

Growing concern about the underperformance of environmental rules and obligations has led policy-makers to emphasise an increased ‘enforceability’ of such rules, primarily by enabling citizens and non-state actors to access courts. One example of such efforts is the other EU member states, signed both by the European Union and its member states. It’s implementation has deeply affected procedural rules for environmental litigation in Europe. This panel investigates whether such procedural changes necessarily serve environmental protection. The first paper juxtaposes centralised public enforcement with de-centralised private enforcement to highlight which procedures promises the greater effectiveness of environmental laws. The second paper takes a closer look at the concept of ‘access to justice’ as employed by environmental lawyers raising the question whether better protection of the environment really is the primary intended outcome. The third paper investigates the emergence of a European form of adversarial legalism in the environmental sector by comparing interest group litigation on biodiversity issues in the European Union and the United States. By combining lawyers and political scientists, this paper adopts a decidedly inter-disciplinary outlook on its subject matter.

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ConCurring panels

8 CAUGHT IN BETWEEN: HOW INTERNATIONAL AND DOMESTIC COURTS RECONFIGURE POLITICAL CONTENTS INTO LEGAL QUESTIONS

Law is politics by other means. Courts (or court-like entities) both at the international and domestic level rely on institutional mechanisms, and procedures, rhetorical strategies, and modes of operation that both channel and transform political conflicts into legal questions that they have the standing and legitimacy to address. Each of the panels in this page aims to deepen the insight that institutions, for good or ill, regularly operate in ways that bolster their own claims to legitimacy and/or power. Each paper offers a functional investigation into the ways in which political contests are reconfigured into fodder for adjudicative processes, pressing questions about how the subject matter before a court is drawn and cast, how legal procedures operate to transform the very forum of the question and how certain practices adhered to, or seen to be adhered to, impact perceptions of the adjudicative process. At times, the reconfiguration of political disputes via judicial institutions presents more as a transmutation than a mere channeling. Each paper will examine the adjudication from a specific vantage point: in the interpretation of int’l law in domestic courts, in the purposes attributed to the ICC, and within a set of legitimacy-conferring judicial practices.

Participants
Emily Kidd White
Tamar Megiddo
Rocio Lorca Ferreccio
Moderator
Emily Kidd White
Room
8A-2-27

Emily Kidd White: The Judicial Virtues and Role Legitimacy in Public Law Adjudication

One of the sources of legitimacy for the judicial role comes from the idea of judicial character. On such an account, judicial or judicial-type decisions appear legitimate where judges regularly adhere, or are seen to adhere, to a publicly supported cannon of judicial virtues. The legitimacy of a judicial or administrative process, especially with respect to politically contentious matters, is often seen to depend, at least to a certain extent, on the degree to which role-specific judicial virtues are upheld. This is might be particularly true at the international and domestic administrative level where the legitimacy of the commission tribunal, or inquiry in question appears to more clearly draw on the character, integrity, and practices of its principal decision-makers. This paper will also begin to map how the traditional cannon of the judicial virtues (impartiality, duty, fastidiousness, incorruptibility, judicial temperament, courage) might require revision where judges are expected either to actively fulfill the purposes of rights guarantee, or, more broadly, adjudicate in line with the “constraints and normative commitments that are immanent in public law” (Kingsbury EJIL 2009).

Tamar Megiddo: The Court as an Arena: The Adjudication of International Law by Domestic Courts

Faced with an international law case that threatens to spill over into international politics or diplomacy, a domestic court may hesitate to rule on the merits for reasons of institutional deference or fear of political backlash. It might then choose to keep the case pending on its docket, and require the parties to engage in one or more additional rounds of negotiation. The court thus gives preference to its function as an arena or a facilitator of engagement between the parties over its function as an arbiter, one which is not devoid of impact on the situation that gave rise to the litigation.

Rocio Lorca Ferreccio: The Transformative Capacity of Courts: Some considerations on the International Criminal Court

The International Criminal Court was established to fight impunity through the implementation of a global rule of law that would supplement domestic courts, where those responsible for crimes against human rights remained consistently beyond the reach of the law. In practice, however, it has been vulnerable to criticisms questioning its legitimacy and its capacity to fulfill the role it was meant to serve. In order to understand the source of this alleged lack of legitimacy, the paper looks at the essential functions that courts serve. It argues that the punishment of crimes and enforcement of laws is not a court’s primary function in the establishment or maintenance of a rule of law. Rather, the essential role of courts is one of transformation – turning violence and bare power into something attaining to “the just.” This analysis will allow us to take a new approach to the challenges of international criminal justice.

9 CHALLENGING RACIAL MARGINALITY IN PUBLIC INSTITUTIONS – MARGINALITY IN PRACTICE

In addressing the conference theme of courts, power and public law, the papers in these panel will consider the production and consequences of homogeneity in law and politics. This is not only relevant as a result of shocking public events in 2016 such as Brexit in the UK and Trump in the USA. Over the last few years, questions such as ‘where are the Black Judges’ or ‘where are the Black lawyers’ have been raised in the UK and other parts of the EU, where there are significantly fewer black legal female or male professionals – in higher education, in practice or the courts – than in the USA. However, this issue is equally resonant beyond the nation state: Where are the Black international lawyers? In addressing this, papers in this panel will also consider questions such as: What is the role of the black lawyer in public or public international law? Who will give legal arguments of their absence – would Brexit or the election of Trump had happened with less homogeneity? The panels will seek to address this topic from multiple perspectives.

Participants
Tanya Hernandez
Mathilde Cohen
Hilary Sommerlad
Moderator
Iyiola Solanke
Room
8B-2-03

Tanya Hernandez: Latino/a Perspectives on Law Faculty Diversity

Despite the improvements in Latino student enrollment numbers in the United States, the low level of Latino representation continues to be even more severe at the faculty hiring level. Within the context of law professor hiring where the credentials of Latino law professors often exceed those of other faculty hired over the same period, a crisis of exclusion exists. The issue of academic colonialism and inaccessibility remains a stubborn and diffuse problem justified by a high-demand/low-supply mythology about minorities persists, in the face of a more-than-adquate supply. Diversity practices and faculty hiring systems that implicate racial exclusion will be considered.

Mathilde Cohen: Where Are the Black Judges In France?

Despite the critical importance of judicial diversity for litigants and the broader public, no previous study has examined this issue within the French judiciary. Significant practical and normative barriers exist in studying judicial diversity in France. French society sees itself as “color-blind,” going as far as prohibiting the collection and analysis of “sensitive data”-defined as including race and ethnicity. To bypass these hurdles, I collected original qualitative data shedding light on judges’, prosecutors’, and other legal actors’ discourses on racial and ethnic diversity. I found that these professionals deploy various strategies to dodge or downplay the relevance of race and ethnicity to the judicial work. How should one understand the role of racial identities when the majority of research subjects refuse to see them as relevant to their work? This paper focuses on some of the concrete obstacles to entry in the judiciary for blacks in particular but also for Maghrebis and other French minorities, starting with educational barriers, all the way until judicial selection, transfer, and promotion.

Hilary Sommerlad: Challenges for Diversity in the Legal Profession: minorities, merit, and misrecognition

This presentation will focus on the effect that globalization has had on social inequalities within large corporate professional firms, in England and Wales. While globalization is an imprecise term, there is general agreement about its destructive impact on traditional society. Some see this as producing a range of negative effects (such as psycho-social fragmentation and insecure employment). Others, however, have viewed it as opening up the possibility for individuals to create their own biography. This is due in part to globalization’s “capitalization of everything” which, in the case of the legal profession, has transformed the large law firm from a relatively parochial organization, in which personal relations remained highly significant, into a multinational organization governed by Human Resource Management (HRM), commonly employing Diversity Management (DM) techniques and dominated by discourses of entrepreneurialism. These developments could be expected to have resulted in significant progress toward a more socially representative profession. Yet statistical surveys and qualitative research suggest that gender, race, and class remain strongly determinant of career progress in the English legal profession, including in the globalized corporate sector. This paper will consider some of the theoretical models which might explain the persistent salience of social categories for legal careers. It then draws on these models in a discussion of qualitative research conducted for the U.K. Legal Services Board (LSB).
Moreover, the classical concept of nation-state sovereignty raised from the peace of Westphalia in 1648 (treaties of Osnabrück and Münster), after the end over, by any means, the right to do so. Beyond the mechanisms constructed by neoliberalism of concessions tending to establish a formal equity (like those of individual rights remedies and social rights) proposed in legal texts in the system of power managed by the government in its different meanings – it is necessary to obtain legitimacy through the systematic persecu- tion of the promises made (by those who have the power) in legal texts.

Guilherme Pena de Moraes: Processual Autonomy of Constitutional Justice: limits and possibilities of the legislative activity of constitutional courts
This work tries to look into the processual autonomy of constitutional justice, following methodological techniques of Law Science. The hypothesis of this study is that the defense of Constitution and the differentiated position of constitutional courts as ultimate interpreters of Constitution also as arbiters of territorial and functional divisions of political power, besides being top institutions of processual protection of civil rights, end up requiring a greater processual freedom. Thus, the objective was to affirm the possibilities inherent in the very legislative activity of constitutional justice set up on self-creative principles and processual rules, together with material norms which present themselves as irreplaceable or immanent parts of the former, without falling in imposing formal and material limits to it. The main result obtained with this research made it evident that the constitutional process can take, in some circumstances, ductile, flexible nature and above all be open to constitutional courts needs. The conclusion of this thesis should be addressed to the concrete manifestations of processual autonomy of constitutional justice in the field of action of contemporary juridical systems.

Elias Deutscher: Nudging and the accountability of private power
This paper analyses how EU courts and competition authorities address the issues of accountability and democratic legitimacy of private actors by applying competition law in the context of private and semi-public regulation. More precisely, it examines the recent phenomenon of nudging by private entities. Relying on techniques, such as default settings, which steer market actors’ choices into a certain direction, nudging by private parties carries the promise of reducing compliance and enforcement costs, enhancing welfare and encouraging more sustainable forms of production and consumption. Nudging by private parties has, therefore, been heralded as innovative, liberty-enhancing and cost-reducing alternative to the traditional model of public command-and-control regulation. Irrespective of its allegedly beneficial outcomes, we argue in the present paper that nudging by private parties raises fundamental constitutional issues about the accountability, democratic legitimacy and transparency of private power, as it empowers private companies to regulate consumer and business behaviour pursuant to self-defined ‘public interest’.
goals. In our paper, we, therefore, examine how EU courts and enforcement authorities could use competition law to address these issues of accountability, legitimacy and transparency of private nudging, while ensuring policy-space for an increased participation of the civil society and private entities in public interest regulation.

Maria-José Schmidt-Kessen: A fundamental rights approach to the substance of EU competition law?

The elevation of the European Charter of Fundamental Rights to an instrument of primary EU law by the Lisbon Treaty has become a constant source of inspiration and support in the legal reasoning of the CJEU, even in cases squarely falling into the realm of private law. This paper analyses the potential of using fundamental rights reasoning when it comes to questions of substance in competition law cases before the CJEU, in particular in abuse of dominance cases where the interest of safeguarding undistorted competition conflicts with other (non-economic) interests. Advocate General Wathelet undertook a first cautionary attempt in this direction in Huawei. He articulated the substantive inquiry into whether there was an abuse under Article 102 TFEU cases, which implications this would have for the CJEU, even in cases squarely falling into the realm of antitrust enforcement. In particular, it has been argued that the substantive inquiry into whether there was a hybrid competition law enforcement provided that these commitments meet its concerns.

Stavros Makris: Commitments and Consensual Antitrust: Shifting the Paradigm?

Under Art. 9 of Regulation 1/2003, the Commission is able to accept commitments offered by the investigated undertakings after a preliminary assessment provided that these commitments meet its concerns. Antitrust enforcers can, therefore, via commitments swiftly and effectively restore and promote competition in the market. This enforcement tool has allowed the Commission to develop a proactive, learning-based and consensual enforcement style that leads to flexible, negotiated, tailor-made remedies. However, the proliferation of commitments in conjunction with their idiosyncrasies may create a tendency for privatizing antitrust enforcement. In particular, it has been argued that commitments have triggered a paradigm shift towards consensual antitrust. Courts are deprived of the opportunity to clarify and develop the law, while market players negotiate and tailor antitrust enforcement with competition enforcers behind closed doors and in the shadow of law. This consensual and more bureaucratic-technical turn may undermine “the struggle for law” and bring antitrust enforcement closer to regulation. The present paper evaluates the merit or demerit of the said criticisms and, after casting some doubt on the paradigm shift argument, explains how commitments could contribute to legal clarity and allow antitrust intervention become responsive.

Maria Ioannidou: Hybrid Competition Law Enforcement: Antidote to legitimacy and accountability concerns in EU competition law?

With evolving social and economic realities the substantive goals of competition law are far from settled. They range from the economic goals of efficient resource allocation and consumer welfare to a diverse array of public interest considerations. Irrespective of the difference in substantive goals, they all restrain private power through established mechanisms of public and private enforcement depending on the jurisdiction. This paper embarks from this traditional enforcement paradigm and argues that a hybrid competition law enforcement approach, and public redress in particular, could be more effective in restraining private power and countenance various legitimacy and accountability concerns. The paper first untangles the traditional paradigm. It discusses the aims of competition law enforcement and argues that these aims should not be placed in silos of the public/private division. In particular, it advances the theoretical argument for promoting “public redress” and discusses different regulatory and enforcement theories to justify this remedy. In addition, it offers a practical account of “public redress” potential to enhance competition law enforcement. Building on this decisional practice, the paper seeks to build a new theoretical and practical approach to competition law enforcement that would enhance direct participation, and bring benefits to affected parties, thereby contributing to the “democratization” of markets.

12 COMPLYING, CREATING AND CONTESTING: THE MULTIPLE ROLES OF DOMESTIC COURTS IN THE INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS SYSTEMS

At a time when international courts and tribunals are more active than ever, applying and interpreting international law alongside the domestic judiciary, the question of the relationship between domestic and international courts has become increasingly important. How do domestic courts address and react to co-existing authority claims when matters also fall under their jurisdiction? What have we observed that domestic courts oscillate between contestation and compliance.

Participants

Raffaela Kunz
Leiry Cornejo Chavez
Yota Negishi
Jorge Contesse
Moderator
Antoine Buyse
Room
8B-2-33

Raffaela Kunz: Between Compliance and Contestation: The Implementation of Human Rights Judgments Through Domestic Courts

In times of much increased activities of the international human rights courts, domestic courts in Europe and the Americas are more than ever confronted with judgments of the ECHR and IACHR. It is widely known that domestic courts are key actors for the implementation of the judgments of these bodies. But the dual role domestic courts fulfill at the intersection of legal orders, acting as pivotal safeguards for the effectiveness of international law and gatekeepers for fundamental domestic values at the same time, does not come without problems. Given the increased potential for frictions and the seemingly more confrontational courses some courts recently took towards the ECHR, this contribution discusses problems domestic courts encounter when implementing judgments of both ECHR and IACHR and the limits they set to the implementation.

Leiry Cornejo Chavez: The Influence of Comestic Courts’ Rulings on the Determination of Reparations by Regional Human Rights Courts and Treaty Bodies

Yota Negishi: The Interaction between Human Rights Courts and Domestic Courts In Transnational Justice

This paper studies the roles of domestic courts in the regional transitional process from dictatorship or internal wars to democratic regime. It particularly shows to what extent the jurisprudence of human rights courts regarding amnesty law, varying from self-amnesty to democratically-supported amnesty, has been implemented by domestic counterparts.

Jorge Contesse: Supraconstitutionalism and Backlash in Inter-American Human Rights Law

Recently two conflicting trends in inter-American human rights law are surfacing. On one hand, the Inter-American Court has increasingly adopted the stance of a regional constitutional court, one that aims at transforming social practices through constitutional law. On the other hand, some states question – directly and indirectly -- the Court’s authority. This paper is an initial effort to expose these two approaches and reflect on how they may reshape the contours of inter-American constitutionalism, for which I mean the interaction between domestic constitutional case law and regional, human rights law. In previous work, I have examined one salient feature of the Inter-American Court’s trend toward judicial maximalism, the conventionality control doctrine, first as a problematic doctrine for the implementation of the dialogic relation among States and the Court – an approach that the Court itself and many commentators fervently embrace – and later as a demonstration of the inter-American human rights system’s reluctance to adopting any mechanisms for subsidiarity – a notion that international courts should not rule out ab initio. Here I look at the Court’s influence on states, through the articulation of the anti-impeunity doctrine as reflected in cases on states’ self-amnesty laws and the recent judicial pushback that the Court has experienced at the hands of one of its (traditional) strongest allies, the Argentinean Supreme Court.
This panel explores how courts around the world have enhanced or impeded democratization within their political systems. In “Courts and Democracies in Asia”, Po-Jen Yap explores the symbiotic relationship between democracy and judicial power, and how they mutually reinforce each other. In “Re-democratization by Courts”, Swati Jhaveri examines the role that courts play in unraveling aspects of popular majoritarianism in favour of “thicker” conceptions of democratic values or aspirations. Stephen Gardbaum and Samuel Issacharoff will serve as Discussants for both papers.

**Participants**

Po-Jen Yap
Swati Jhaveri
Sam Issacharoff
Stephen Gardbaum

**Groups**

Moderator: Po-Jen Yap
Room: 8B-2-43

Po-Jen Yap: Courts and Democracies in Asia

This paper explores the role that Asian courts play in the democratization of their political systems and illuminates how law and politics interact in the judicial construction of constitutional doctrines. In dominant-party democracies (e.g., Singapore, Malaysia, and Hong Kong), courts can only take a limited range of actions adverse to the government’s interests before the latter retaliates by deploying constitutional or unconstitutional means to discipline the courts. While their courts are unable to successfully challenge the core interests of their governments, they must pursue “dialogic” pathways to constrain the institutional pathologies of authoritarian politics. On the other hand, raises legitimacy issues for the Constitutional Court of Italy. The Court struck down certain legislative reforms on the basis that they undermine a system of proportional representation in the lower house of parliament. The tension in such cases is between a particular national democratic status quo, which may comply with a definition of democracy and thicker democratic aspirations, centring on ideas of broad representation. This paper evaluates the courts’ role in such contests. It looks at the possibility of legitimising the judicial role in this contest on the basis that, by revisiting aspects of an electoral system, the courts are able to revile faith in it so that it remains a vital and functioning part of the democratic process.

Sam Issacharoff: Discussant
Stephen Gardbaum: Discussant

13 COURTS AND DEMOCRACIES IN COMPARATIVE PERSPECTIVES

14 COURTS POLITICS & POLICIES

The Panel “Courts Politics and Policies” aims at exploring the complex array of relationships between judicial bodies and the exercise of administrative and political powers. The Panel brings contributions interested in examining the triangulation between the exercise of judicial power, political activities, and administrative tasks in a vast spectrum of areas, ranging from immigration and visa policy, to quasi-judiciary remedies, electoral laws and the European Banking Union. The Panel, proposed as part of the activities organized by Irpa (Institute of research on public administrations), aims at becoming a permanent panel of future CONC-S Conferences. The goal is to foster a vibrant and stimulating debate about the many challenging questions posed by “Politics and Administration”, exploring the answers from heterogenous points of view.

**Participants**

Adriana Ciancio
Marco Pacini
Ilaria Ottaviano
Leonardo Parona
Andrea Magliari

Moderator: Elisa D’Alterio and Andrea Magliari

Room: 8B-2-49

Adriana Ciancio: Electoral laws judicial review and the principle of “Communicating Vessels”

The hybridization path of constitutional justice – ongoing in the European continent at least since the end of WWII – has gained new vigor in recent times. Evidence of this trend can be found, for instance, in the “introduction of the so-called “qualification prioritaire de constitutionnalité” in France and the connected mitigation of the traditional “preventive” nature of the French system of judicial review; further examples are the reforms – actually implemented or merely proposed – of the Italian Constitutional Court. Indeed, such reforms have pushed the Italian judicial-review system from the typical sort of actual and ex-post review to (also) a different kind of abstract review. Actually, this paper starts with a brief assessment of the preventive judicial review mechanism of electoral laws, included in the now-failed reform proposal so-called “Renzi-Boschi”, as a missed opportunity to “rationalize” the Italian Constitutional Court’s interventions on electoral laws. Indeed, recently the Court found itself to stand in for policy-makers’ inertia, at the price of a peculiar twist of the ordinary mechanism to access judicial review, as regulated by laws 1/48 and 87/53. Such outcome, on the one hand, raises legitimacy issues for the Constitutional Court’s direct democracy role that are entrusted (also) to compliance with procedural rules established by lawmakers. On the other hand, it provides further confirmation of the odd functioning of the Italian democratic system, which on occasion inspires itself to a principle of “communicating vessels” among functions (decision-making and control) instead of the more traditional principle of separation, with inevitable consequences on the running of the rule of law.

Marco Pacini: The migrant crisis and the dynamics of public power between courts and politics

The migrant crisis epitomizes the dynamics implied in the exercise of public power by governments and administrations and courts within the European legal space. Until the outburst of the crisis, the European immigration law displayed a trend of steady expansion towards ever wider recognition of the rights of migrants. This largely depended on relatively small migrant flows and convergent long-term strategic objectives of the main institutional actors. Following the exceptional rise in migrant arrivals, such trend seemingly has come to a stop and is being supplemented or replaced by measures aimed at strengthening frontier controls and promoting external relations with third countries of origin or transit. This has been contingent on a medium-term change in governments’ strategic objectives, which lends a lower house of parliament, whose interests are pursued by courts. Thus, contrary to what is ongoing in other constitutional environments (as in the US), public power in Europe is highly fragmented and distributed across governments, administrations and courts, each being ligated to a specific role in such a system of interconnected structural objectives, in the context of a game of reciprocal influences difficult predict and hard to govern.

Ilaria Ottaviano: The extraterritoriality in the assessment of elections

Traditionally, national administrative law has been considered subject to the principle of strict territoriality. It is well known, however, the evolution that has enabled to recognize the extraterritorial effects to a national administrative act. In the EU system, such result has been achieved firstly by applying the principles of mutual recognition (art. 49 TFUE) and freedom of establishment (art. 54 TFUE). However, administrative law has continued to remain subject, also in a supranational system, to the legality checks of its own State. In terms of their validity check, these acts remain strictly territorial. But in the EU system also, this well-established principle seems to experience a partial evolution. One example of such evolution can be found in the area of visa policy and immigration, with particular reference to the Schengen system. The system allows, as well known, the free movement within the EU without border controls, even for third-country nationals, who are nationalized by the member state of the entry into its territory. The system is, however, accompanied by an information system consisting of a non-EU citizens database (Schengen Information System).
Leonardo Parona: Courts Politics & Policies: the case of the “appeal process” within U.S. federal agencies

The paper addresses the relationship between Courts, Politics and Policies within the specific context of the appeal process operating in most U.S. federal agencies.

Andrea Magliari: Challenging the European Central Bank supervisory decisions: Administrative review supervisory discretion and accountability

Due to the expansion of the Administrative State, the increase in the number and functions of federal agencies led to the development of alternative appeal systems. The judge hearing the case, even if a judge of a State other than the one having issued the contested decision, could be asked to assess on a preliminary basis the regularity of the appeal decision, at least in respect of the compatibility with the requirements of the Schengen system. The traditional position of the Schengen system was focused on the correctness of the act of the Schengen information system. While as a rule the judge was to assess the compliance of a foreign act decision adopted by the authority of another Member State. Having regard to Article 111 of the Convention implementing the Schengen Agreement, the decision of the Conseil d’Etat was focused on the correctness of the act carrying out the decision of the Schengen authorities.

Hence, the French administrative court was focused on the correctness of the Schengen system. In these cases, however, the control mechanisms at the disposal of the administrative court were focused on the correctness of the act of the Schengen system. In these cases, therefore, the Schengen system was focused on the correctness of the act of the Schengen information system. Thus, while as a rule the judge was to assess the compliance of a foreign act decision adopted by the authority of Member State. Having regard to Article 111 of the Convention implementing the Schengen Agreement, the decision of the Conseil d’Etat was focused on the correctness of the act of the Schengen information system.
The combination of populism and constitutionalism, a phenomenon originally particularly related to experiences in Latin America, is increasingly evident in some of the new EU member states (notably Hungary and Poland and perhaps also Romania). In a somewhat astonishing set of developments, populist constitutionalism now even threatens what were widely seen as the most durable, established constitutional democracies of the Western world, that is, the United Kingdom and the United States. The peculiar, and worrying tendency in constitutional politics and practice that populist constitutionalism represents, leads to significant tensions in democratic regimes grounded in fundamental values, human rights, representative democracy and the rule of law. But the relation between populism and constitutionalism seems more complex than one that is simply reducible to the latter being undermined by the former. The papers have set out to contribute to more robust theoretical and conceptual understandings of constitutionalism, while comparatively reflecting on a variety of ‘really existing’ cases of populistconstitutionalism.

Participants
Paul Blokker
Bojan Bugaric
Mark Tushnet
Kim Lane Scheppelle
Tom Ginsburg
Michael Wilkinson

Moderator
Paul Blokker and Bojan Bugaric
Room 8A-3-27

Paul Blokker: Populist Constitutionalism in Europe: Anti-Constitutional or Popular-Constitutional?

Populist parties are increasingly part of European governments and governing power. One particularly significant dimension of this is populists reforming domestic constitutions or even adopting a wholly new one (Hungary). Populists ordinarily claim to represent the ordinary people and to promote their interests. It is not surprising therefore that in populist constitutionalism “the people” is a central dimension. Populist constitutionalism regards processes of constitution-making and constitutional reform and is increasingly upfront in the constitutional developments in countries such as Hungary and Poland causing significant tensions in a European Union that endorses as its fundamental values democracy and the rule of law. The populist-constitutional phenomenon spawns debates on the democratic backsliding in illiberal democracies in Europe and on the supranational monitoring of democracy. At the same time, there are good indications that one can also find important manifestations of populist constitutionalism elsewhere, including in so-called established democracies, but in a more implicit and less upfront manner than in a case such as Hungary. The paper will attempt to start conceptualizing populist constitutionalism in a more systematic way. While populism is increaser some literature emerging on the phenomenon (Mudde 2013; Thio 2012; Mueller 2016), a more robust and theoretical treatment of populist constitutionalism stills seems absent. The paper will provide a first step towards such an attempt.

Bojan Bugaric: Populism: A threat or a corrective for liberal democracy?

Western democracies are facing a surge of national populist that represents the most serious challenge to the liberal international order and its core constitutional form, liberal democratic constitutionalism. Capitalizing on the European sovereign debt crisis; backlash against refugees streaming in from the Middle East; Brexit; victory of Trump in the US elections and public angst over the growing terror threat, prevalent form of populism and xenophobia is on the rise. The article examines the constitutional implications of the populist surge, situating it in a broader theoretical legal framework where first, different versions of populism are identified ( ‘varieties of populism’, and second, their varied impact on core constitutional structures of liberal democracy is analyzed. Following Taggart’s definition of populism (2000), I argue that populism is like a chameleon, adopting the colors of its environment. It has no core values and a very thin ideological foundation. Populism is driven by a variety of forces, ranging from agrarian, political, reaction- ary, authoritarian and revolutionary populism (Canovan 1981). What distinguishes the current form of populism are two characteristics: first, current populism is pre- dominantly nationalist and xenophobic (exceptions Syriza in Greece Podemos in Spain) and, second, like many older versions of populism, it is anti- liberal but not necessarily anti-democratic. Moreover, the new populism represents a novel adaptation of populism using democracy as a form but skilfully eroding its substance and turning it into various forms of illiberal and authoritarian regimes.

Mark Tushnet: Populist Constitutionalism: Thick and Thin

As I think of it, populist constitutionalism is a practice of political discourse (that is, primarily outside the context of litigation and adjudication) in which the broad statements about a nation’s fundamental constitution and values are deployed and in general provisions in bills of rights (as distinct from provisions that are highly detailed) are offered to motivate and justify exercises of national power, and
17 COURTS AND CONSTITUTIONALISM IN CONTEMPORARY ASIA

This panel seeks to explore the role of courts and how and why they do (or do not) contribute to building constitutionalism in contemporary Asia. The last few decades have seen the creation of a range of new and specialized courts in Asia, including constitutional courts. The role, function and authority of courts and the extent of judicial review powers varies across the region. What is accomplished to these courts is the potential and risk of becoming deeply involved in matters of politics. In some countries, courts have come to play a critical role in building constitutionalism, but more often in Asia courts remain peripheral to the project of building constitutionalism. This panel seeks to explore and explain the role of courts in Myanmar, China, Singapore, Thailand and the Philippines.

Participants
Melissa Crouch
David Law
Wen-Chen Chang
Justie Rajah
Khemthong Tonsakulrungruang
Bjoern Dressel
Bjoern Dressel
Sarah Bishop
Moderator
Melissa Crouch
Room
8A-3-45


Myanmar is one of the most recent countries in the world to have legalized a constitutional Tribunal. Yet the operation of the Tribunal flies in the face of assumptions common to global constitutionalism. Myanmar at present remains outside the influence of globalised judicial networks. Instead the Tribunal is determined by its role and function in dialogue among dictators. The operation of the Tribunal has in many respects been a victim of its design and has left the Tribunal’s role highly dependent on the political powers of the day. I demonstrate this by looking at the different lives of the Constitutional Tribunal: its first (2011-2012), second (2013-2015) and third life (2016-). As a monumental shift has taken place from direct military rule to military-led constitutionalism in Myanmar, this article offers an important reflection on the main role of the Tribunal as a limited forum for dialogue among dictators.

David Law and Wen-Chen Chang: Chinese Constitutionalism: An Oxymoron?

Is it a mistake to both field of comparative constitutional law and the development of constitutionalism in China? To define the core concepts of ‘constitution’ and ‘constitutionalism’ in a manner that excludes China. Even if such a move is well intended, it is likely to have the effect of marginalizing the comparative study of China by constitutional scholars. The marginalization of China as an object of study has deleterious effects not only for the field of constitutional law, but potentially for the development of constitutionalism in China itself. The goal should be to place China at the core of a genuinely comparative constitutional discourse rather than relegating it to the domain of China specialists. Indeed, this may contribute to shifting the focus away from constitutionalism as a superficial ideology that swept them into power. I argue that populism is simply a cover for something else going on – which is the destruction of constitutionalism as such.

Kim Lane Scheppel: The Opportunity of Constitutional Populists

Populism is under attack from a new breed of politicians who identify with populism. But a closer analysis of these “populists” reveal that few are really committed to populism in any serious sense. Instead, these new leaders have a history and practice of opportunism and they have used the current popularity of populism to ride a wave of political discontent with stagnating “politics as usual” to a position where they can begin to dismantle checks on power. Populism is not necessarily associated with a constitutional program like this; therefore I tend to see opportunism and populism as two separate forces sweeping constitutional democracies these days. By peeling back the cover of the populist ideology, we can see that the new breed of autocrats has a remarkable similar to a critical role in building constitutionalism, but more often in Asia courts remain peripheral to the project of building constitutionalism. This panel seeks to explore and explain the role of courts in Myanmar, China, Singapore, Thailand and the Philippines.

Tom Ginsburg: Trumpian Constitutionalism: A Non-Sequitur?

Michael Wilkinson: Discussant

Worthington’s 2001 assessment that the judicial system to assist with constitutional noncompliance. To the list of functions that other scholars have imputed to constitutionalists, we nominate an additional function – namely, that of constructive irritant. Thanks to its extreme dissonance with the actual practice of constitutionalism, China’s formal constitution generates a dialectical and critical discourse that is uniquely difficult for the regime to suppress.

Jothis Rajah: Cultural Texts as Constitutional Critics: People Giving Public Power for Singapore

In the context of Singapore’s authoritarian politics, are courts the sites in which constitutional issues most potently and publicly unfold? This paper argues that, rather than the courts Singapore’s cultural texts – specifically, the theatre of playwright Kuo Pau Kun – offer a rich and revealing record of constitutional contestation. The constitutional jurisprudence of Singapore courts continues (overwhelmingly) to illustrate the acuity of Kuo Pau Kun’s observation that the ‘theatrical system’ negotiates a balance between “the need for a reputable judiciary with the requirement by the political executive for the judicial system to assist with the control of political opposition”. Turning therefore away from the courts, this paper moves into the public power of masked constitutional challenges through a discussion of the theatre of Singapore playwright Kuo Pau Kun. Detained without trial from 1976 to 1980 Kuo’s scripts express the struggle to be a rights-bearing citizen in the face of bureaucratic and sacrosanct accounts of law; accounts that annihilate the emblematic fundamental freedoms guaranteed by the Constitution. At the same time, the theatre enables an engagement with publics advocacy for rights, and a sub-textual critique, of the state that the courts might not facilitate. Tracing the constitutional challenges articulated through cultural texts – from Kuo’s theatre to more contemporary instances – this paper illuminates public power and constitutional discourses situated beyond the walls of Singapore’s courtrooms.


In the last 200 years they have created 25 constitutional reforms, Thailand’s Constitutional Court (CC) has since become embroiled in major political controversies. Since the 2006 coup, because a number of high-profile decisions have favoured one political camp, its work has been questioned. Observers have attributed this to close and long-standing relations between the judiciary and traditional political elites. Is this view justifiable? To answer this question, we first analyse how the court has behaved across political administrations in 32 constitutional challenges arising from three phenomena of considerable and increasing import to the field of comparative constitutional law: (1) the role of statutes in the constitutional order; (2) the availability and operation of political rather than judicial forms of constitutional implementation and (3) the relation to domestic constitutional and international law. Finally, we conclude by theorising as to the potential long-term impact of the Chinese Constitution on an authoritarian regime that seems at times committed to constitutional noncompliance. To the list of functions that other scholars have imputed to constitutionalists, we nominate an additional function – namely, that of constructive irritant.

Tsongkrueng and Bjoern Dressel: The Opportunity of Constitutional Populists

Tom Ginsburg: Trumpian Constitutionalism: A Non-Sequitur?

Michael Wilkinson: Discussant

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Björn Dressel: The Informal Dimension of Constitutional Politics in Asia: Insights from the Philippines and Indonesia

As expanded powers of judicial review and constitutional separation of powers have made courts major actors in the political landscape of Asia, their uneven performance has considerably puzzled observers. This article argues that a concern with formal institutional roles alone is not sufficient to explain how judicialities deal with constitutional matters in countries not as institutionalized as Western democracies. Instead, to understand how courts in Asia actually operate, it is necessary to explore the informal dimensions of judicial politics, building on a growing body of work based on a variety of theoretical and methodological approaches. Supplementing what is already known about the informal dimension of judicial politics with specific evidence from high courts in the Philippines and Indonesia, the chapter assesses how informal ties influence aspects of judicial behaviour and the consequences. For justices in Asia there is a dynamic tension between professionalism and informality that clarifies inconsistencies in high-profile constitutional matters. The findings illuminate larger issues at the intersection of courts and society throughout the region in ways that advance theoretical understanding.

Sarah Bishop: Building constitutionalism? The Role of the Thai Constitutional Court leading up to the 2014 Coup

The line dividing actions of courts seen as contributing to building constitutionalism and those seen as undermining constitutionalism is often narrow, and defined not only by factors internal to courts but also factors external to courts, including the way that actions of courts are responded to. The role of the Thai Constitutional Court in the lead up to the 2014 military coup is often seen to have been one that undermined constitutionalism, with some commentators going so far as to suggest that the court in the period was acting in concert with the military and traditional elite and that the military coup in May 2014 only formalized a judicial coup which had already occurred. This paper, by analysing decisions issued by the Constitutional Court in the lead up to the 2014 coup, will challenge this representation. It will show that within decisions of the court in the period there were not only elements which frustrated government objectives but also elements which frustrated elite aims, and that while there were elements of decisions which made it difficult for governance to proceed there was also evident a concern to avoid creating constitutional or political deadlock. It will argue that because of these features court decisions in the period had potential, had events played out differently, to help build and reinforce constitutionalism. It will suggest the fact they did not was, whilst in part attributable to imperfections in court action, largely also attributable to the way commentators and politicians responded and, ultimately, to untimely military intervention. As such it will suggest that the 2014 coup should not be seen simply as the military formalizing what the court had begun or the military stepping in following institutional failure, as the role played by the court leading up to coup was much more ambiguous than such representations suggest.

18 COURTS AS INSTIGATORS OF CONSTITUTIONAL CHANGE

Courts wield considerable power over individuals and institutions. The primary check on this power is that their role is restricted to the interpretation and application of duly enacted laws. Law reform is left to the political, democratically accountable branches of government. Constitutional change in particular, with its capacity to shift the foundations of state power and individual rights, traditionally exists in the hands of political mechanisms such as parliamentary action or referendum. But sometimes, constitutional change is not merely directed or assisted but instigated by the courts. This panel considers clear, and less clear, scenarios in which superior courts have instigated change in constitutions or quasi-constitutional documents. Drawing on case studies from different corners of the globe, the panelists reveal the reality of court initiated constitutional change and debate the difficult questions of democracy, legitimacy, effectiveness, and the rule of law that arise.

Participants
Rebecca Ananian-Welsh
Dana Burchard
Miles Jackson
Caitlin Goss

Moderator
Thomas John

Room
8B-3-03

Rebecca Ananian-Welsh: Interpretation, Invention, Invention: The Australian High Court on Human Rights

Dr Rebecca Ananian-Welsh looks to Australia, where the absence of a national Bill or Charter of Human Rights has given rise to a vibrant and controversial implied rights jurisprudence. Much of this jurisprudence amounts to constitutional reform through interpretation. However, the kinds of cases brought before the Court and the manner in which they are argued, reflects that the Court faces consistent pressure to instigate constitutional change – thereby deriving robust protections for individual rights from a Constitution that contains no such rights.

Dana Burchard: Constitutional identity and the German Constitutional Court

Dr Dana Burchard will discuss the German constitutional court’s impact on constitutional change. Through its jurisprudence on European integration and the limits thereof, the court has shaped and continues to shape not only the German constitution but also the constitutional landscape in other Member States and the EU itself. Particularly the recent cases on the notion of constitutional identity and its procedural implementation highlight the renewed emphasis of the court to impose domestic constitutional standards more strongly, thereby altering the established constitutional design of the relationship between EU law and the law of its Member States.

Miles Jackson: Torture, amnesties, and positive obligations under the ECHR

This paper aims to connect three streams of scholarship – each of which has received renewed attention recently. The first concerns the value of amnesties in peace and transitional negotiations. The second concerns the so-called anti-impunity turn in international human rights law. The third concerns how rights, and in particular absolute rights, are structured under the European Convention on Human Rights. Its underlying intuition is that the ECtHR’s current approach to the procedural obligation to investigate and prosecute violations of Article 3 ECHR (the prohibition on torture) will leave it unable to properly reason through the conflicting values at stake during transitions. The absence of justified limitation and derogation, as well as the decreased deference that follows from the implication of an absolute right, underpin this claim.

Caitlin Goss: Certification revision and extension: courts and interim constitutions

Dr Caitlin Goss considers how constitutional courts in interim constitutional environments have contributed to constitutional change. In particular, in a number of transitions that have involved interim constitutions, constitutional courts have played an active role in approving and shaping both interim and permanent constitutional texts, and the broader constitutional law of the states they govern. This analysis draws upon the jurisprudence of a number of constitutional courts operating in interim periods, including those of South Africa, Albania, and Nepal.
Domestic, regional and international courts play an increasingly important role in post-conflict transitions with implications for the balance to be struck between competing demands of peace, justice, and transition. This panel brings together three papers dealing with various stages of transitions, including the negotiation, interim, and implementation phases, with a view to critically examining the role and instrumentalisation of courts during transitions from armed conflict to peace.

Participants

Asli Ozcelik Olay
Emmanuel De Groof
Luis Viveros Montoya

Moderator
Ebrahim Afsah

Room
88-3-09

ConCurring panels

The relation between transitional authorities and the 19 court systems during post-conflict transitions, including the negotiation, domestic, regional and international courts play an increasingly important role in post-conflict transitions. The International Criminal Court (ICC) is case-dependent. The Court's jurisdiction is either searched for or, on the contrary, carefully avoided. This creates also a predictable violation of rights guaranteed by the Charter of Fundamental Rights of the European Union and problems of discrimination between EU citizens, according to the Charter, only a EU-based solution seems predictable. Conditionality measures in assistance plans have been positively evaluated and security of person" seem like the better options to configure some way to involve supra-national components in assistance plans is configured in a way that seems to solve our research question. The Court fixes this frame: when it had to sign MoU the Commission had to balance social rights and overall economic interest of Eurozone. A restriction of social rights is admissible only if it could pass the proportionality test.

Emmanuel De Groof: The ICC used as a weapon in state transformation processes

Especially since 1898, external actors have imposed state transformation processes in countries such as Central African Republic (CAR), Côte d'Ivoire, the Democratic Republic of Congo (DRC), Kenya, Libya, Mali, Sudan & Uganda. The International Criminal Court (ICC) has played a role in all these transition processes. The relation between transitional authorities and the ICC is case-dependent. The Court's jurisdiction is either actively searched for or, on the contrary, carefully avoided. Two scenarios are particularly relevant in the context of transitional governance. First, a 'transitory situation' may be invoked to challenge the jurisdiction of the ICC. This, then, triggers the question of how to define whether the judiciary of a state in transition is able and willing to discharge its duties. Second, the particular context of transitional governance can be invoked for instrumentalizing the ICC.

Luis Viveros Montoya: Peace Against Humanity: Colombia’s Peace Process Conundrum and International Justice as a way Forward

After years of negotiations, FARC and the Colombian Government signed an agreement which was submitted to a plebiscite. On 2 October the Colombian people narrowly rejected the agreement (50.2%/49.8%). After a re-negotiation of some terms in contention, a new accord was signed establishing a Transitional Justice (TJ) framework. However, the new deal does not significantly alter the international law-related issues of the rejected one. Colombia’s TJ process, as many others before, engages complex issues which are dilemmatic (Féteis) in nature: how to harmonise victims’ expectations of justice and retribution expressed as reparations and prison sanctions on the one hand, with perpetrators’ expectation of reengagement with society and participation in politics, on the other? Moreover, how solve these questions when, like in the case of members of armed non-state actors forcibly conscripted as children, the labels of victim and perpetrator coincide in the same person? These dilemmas should be analysed within a larger one: how to shape society’s expectations that future victimisation be avoided with past’s victims’ rights to truth, justice, and reparation?

Francisco Javier Romero Caro: Sections 7 and 15 of the Charter and the quest for new social rights in Canada: building the social state one brick at a time

Since the global financial crisis started in 2007 there has been an increase in unemployment and a downgrade of the labour conditions in most of the western world. Although on a smaller scale than in other countries, Canada is not an exception in this matter. According to Canada Health 7.7% of Canadian households were food insecure in 2007-2008. Other reports show that this figure has increased to 10% in 2014. Therefore, food poverty is a significant social and health problem in Canada. The Canadian Constitution dates from 1867, and it did not have a Bill of Rights entrenched in the Constitution till 1982. The Canadian Charter of Rights and Freedoms does not contain any explicit provision concerning social rights or any mention to the Covenant on Economic, Social and Cultural Rights. This lack of explicit recognition of social rights constitutes a vacuum that needs to be filled by the case law of the Supreme Court. In light of the Charter’s wording and historical application of the Charter’s provisions that needs to be filled by the case law of the Supreme Court. In light of the Charter’s wording and historical application of the Charter’s provisions that needs to be filled by the case law of the Supreme Court.
in section 7 has important potential to develop a key role in the constitutional entrenchment of social rights in the Canadian system. As the Supreme Court stated in Gosselin v. Quebec (Attorney General) 2002 SCC 84, section 7 of the Canadian Charter of Rights and Freedoms were intended as much as anything to ensure the uniform application of law and equality before the law. Although Bosnia and Herzegovina belongs to the countries of Continental European law, its constitutional and legal construction contains certain particularities with regard to the judiciary. Complete judicial systems have been established in the entities and the Brčko District. Nevertheless, the Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Constitution) has not provided the existence of the judiciary at the state level. In other words, the constitution has not provided prerequisites for the establishment of the integral judicial system. In the course of 2002 the Law on the Court of Bosnia and Herzegovina established the necessary legal framework for the establishment of the courts in the entities and the Brčko District. The Court of Bosnia and Herzegovina has been functioning as a special court at the state level. The Constitutional Court of Bosnia and Herzegovina has been, indeed, established by the constitution, and, needless to say, as a sui generis institution. However, due to a narrow and specific jurisdiction and non-hierarchical relationship towards the courts in the entities and the Brčko District the Court of Bosnia and Herzegovina could not compensate for the lack of the supreme court. Strictly speaking, the Court of Bosnia and Herzegovina has a specific jurisdiction over appellations based on Articles VI 3 b) and VI 3 c) of the Constitution of Bosnia and Herzegovina. This refers to the jurisdiction over issues arising out of a judgment of any other court in Bosnia and Herzegovina and issues referred to any court in Bosnia and Herzegovina concerning whether a law is compatible with the Constitution of Bosnia and Herzegovina, with the European Convention on Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina, or concerning the existence of or the scope of a general rule of public international law pertinent to the court’s decision. Even though the constitutional norms do not provide a law is compatible with the Constitution as de facto the recognition of fundamental rights protected as international and national levels. Thus, in the case AP 775/08 the Constitutional Court embarked in deciding on how the courts have interpreted and applied laws, even though, by its nature, has no jurisdiction for such. This paper seeks to explain how human rights and freedoms have been provoking the Constitutional Court to gain a vigor to flow through its sui generis status and as a surrogate judiciary in order to fill in gaps. Drawing on the previous, the paper analyses the prominent Constitutional Court decisions in order to demonstrate the reasons purpose and effects of its decision-making. In comparative perspective, the paper explores whether similar challenges exist elsewhere. Finally, the paper argues in favor of necessity to establish the supreme court at the state level in Bosnia and Herzegovina.

Giovanna Spanò: Waiting for asylum seeking (fundamental) rights. An insight beyond Law and Courts

Courts continue to play a crucial role in the specification and reformulation of fundamental rights, beyond providing a mere substantive protection of the latter. What if, however, this sort of substitution is absent as well? The issue may become quite pragmatic when the question is raised to the courts in the absence of a surrogation mechanism. As a matter of fact, the judgments of ECHR bind all members State. So the dialogue between the ECHR and national Courts, having the judgments of ECHR as the basis of the proceeding itself, taking into account that the decision of the authorities serves the purpose to "create" or "reject" the recognition of fundamental rights protected at European as well as international level. Obviously a Court is able to intervene in the single application, though at a later time and (again) on the basis of a territorial relevance. All of the above raises more than one issue owing to the significant devolution carried out on matters concerning fundamental rights, potentially leading to differing solutions and contradictory case law. The aim of the proposal then is to try to address the hybrid nature of this committee that can be observed throughout several European countries, such as France and Germany, though with some differences that will be underlined. Despite the administrative core of the request, on one hand, their rulings can significantly impact the individual’s fundamental rights but on the other hand, the appeal is not carried before an administrative court, because fundamental rights are at stake! Can policy urgencies justify the sacrifice of fundamental rights? The adjective “political”, which defines the concept of “asylum” seems to be as assumed as the leading criteria in this regard it is of paramount importance to pave the way towards a greater uniformity of responses. Simple “circumstances” in fact, can confine fundamental rights beyond the law and the Courts as well.

Mimma Rospo: Constitutional gaps new fundamental rights and the role of Courts. The case of end-life

Current social, economic and cultural changes highlight the shortcomings of the legal tools that have been created to address new fundamental rights. In particular, there are new claims of protection, but several actual constitutions don’t seem to guarantee them thoroughly. So the role of Courts is important because they recognize the fundamental rights, may enhance or re-define the content of a fundamental right itself. The supranational dimension indeed is binding only as to the result to be achieved and not to the precise means to strive towards the same objectives. So there exists a huge discretion in order to choose how to meet the obligations, not enabling a thorough verification of the concrete degree of harmonization. The main problem, though, can be retrieved in the procedure for the recognition of refugee status itself, which seems more focused on the request rather than the obligation to confer the recognition of the right. As a matter of fact, the recognition of "asylum" seems to be assumed as the leading criteria in this case. The adjective “asylum” seems as assumed as the leading criteria in this regard it is of paramount importance to pave the way towards a greater uniformity of responses. Simple “circumstances” in fact, can confine fundamental rights beyond the law and the Courts as well.

therapeutic obstinacy" recognized the right to die with dignity as a facet of the right to life. In particular, in the dialogue between the ECHR and national Courts, the judgments of ECHR bind all members State. So national Courts can presumably introduce this new right in their constitutional frameworks, without a precise constitutional review procedure and through conformation with supranational case law. “Juristocracy” is a typical feature within common law systems because of stare decisis, though it would be a quite innovative tool in civil law one. Then, a question may arise: do Courts own an autonomous costitutive power facing constitutional gaps in order to recognize new fundamental rights and in spite of legislative inertia? Has a new era of constitutionalism begun?

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21 DEFENDING THE RULE OF LAW – EFFORTS TO ASSESS THE QUALITY OF JUSTICE

Evaluations of court quality have focused on statistical data (e.g., clearance rate, number of judges and lawyers per capita, IT infrastructure of courts etc.). This statistical approach has been criticized by some political and legal analysts for being insufficient to get the whole picture on the real strengths and weaknesses of different justice systems. From this experience one can conclude that the data and figures that focus mostly on efficiency issues cannot answer the fundamental question of how justice systems serve the values of rule of law (e.g., creating legal certainty, guaranteeing human rights, controlling the exercise of political power). In order to carry out a true and valid assessment we need to improve the existing evaluation methods in two steps. First, a significant improvement in terms of reliable and relevant indicators of court performance is needed if we want to have exact information about how judicial systems fulfill their most fundamental tasks. Then we need to find ways to enhance the use of performance statistics and quality indicators in the management of judicial systems. The implemented management solutions need to take into account different aspects of quality, as well as incorporate the specific nature and requirements of justice operations.

Matyas Bencze: Obstacles and opportunities: Measuring the quality of judicial reasoning

How can we “measure” the quality of judicial reasoning? Can we measure it at all? Or should we be satisfied with the “softer” method of assessment when it comes to the quality of judicial motivation? These are the questions I address in this paper. In the first part I justify the importance of quality assurance of judicial reasoning itself, independently from the other elements of adjudication. After that I recoup the possible objectives of the project for assessing the quality of justification (judicial independence, diversity of judicial styles, problem of measurability). I try to answer these challenges and outline some examples of the possible forms of quality control on the reasoning activity of judges.

Elena Alina Ontanu: EU Justice Scoreboard: Steps Towards A Comprehensive Approach to Quality Evaluation

The Justice Scoreboard is an initiative to assess the functioning of the Member States justice systems. The underlying assumption is that more effective and efficient justice systems will drive stronger economic growth. A systematic overview of justice functioning is a pre-requisite for formulating recommendations and support actions to improve the quality effectiveness and efficiency of justice. The 2016 Scoreboard evaluation is structured around 57 comparison charts. The data presented appears as a systematic ranking of EU judiciaries in different fields, shaming the less well performing ones, while not offering detailed information on the systems scoring high in achievements. Further research, therefore, is required to explain the quality and independence of justice. The paper analyses the Scoreboard from a three-pillar approach grouping existing indicators around legality, efficiency and democracy. It explores whether existing indicators address the three pillars and offer sufficient information to promote legal reforms inspired by better-performing systems. Thus, sharing better practices to improve the quality of justice systems and monitoring the results of implemented reforms.

Petra Pekkanen: Operations Management view to court quality: Analyzing features challenges and improvement opportunities

In court quality work, it is important to find ways to improve the use of statistics and quality indicators in the management of judicial systems. The need to improve the management practices has been highlighted in quality and performance improvement approaches undertaken in courts, for example Total Quality Management (TQM) and Caseflow Management (CFM). Central challenge in TQM and CFM efforts has been the low acceptance of indicators and targets among legal personnel. Operations Management (OM) is an area of management concerned with designing the processes of production. It involves ensuring that operations are efficient in terms of using as few resources as needed and effective in terms of meeting quality standards and customer requirements. Even though OM is originally introduced in manufacturing environment, also many professional service organizations are facing pressures to improve operation management. The need to improve and take into account the specific features of OM in professional work has resulted in the research field of Professional Service Management (PSM). Because all managerial solution need to take into account the specific features of the operations in question, the implemented management solutions in courts need to incorporate different aspects of quality, the specific nature of stakeholder involvement, and the requirements of work and processes. The objective of the study is to analyze the distinct characteristics of courts as professional service organizations and the special features and challenges of operations management in courts. Based on the identified challenges, possible approaches for improving operations management are discussed. The study aims to increase the success of quality management projects and process improvement initiatives by increasing the understanding of operation management in courts. The study is based on data and findings of a development program aiming to improve operations management approaches in Finnish justice system.

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22 DESTRUCTIVE OR INTEGRATIVE? CONFLICT MANAGEMENT BY COURTS DURING THE EUROZONE CRISIS

The Eurozone crisis has altered the structure of conflicts in the EU. Crisis-related decisions by European institutions have been highly visible in the public realm and new conflict parties have emerged. The fundamental change in the structure of conflicts in the EU puts the Union at a crossroad, as conflicts can be seen to have the potential for both: jeopardizing the European integration project or serving as catalysts for the deepening of European integration. Whether a conflict turns out to be destructive or constructive depends on various parameters one being the mechanisms of conflict resolution. Notably courts, both at the domestic and at the supranational level, are important actors in this regard. In this panel, we seek to address the question, how selected courts have managed crisis-related conflicts and whether they can be seen to harvest the constructive potential of conflicts or – at least – mitigate destructive effects. We will focus on two domestic courts, namely the Spanish and the Portuguese constitutional courts, and the European Court of Justice. Since a key question in this regard concerns the relationship between courts and the European and national legislators, the Panel will also include one presentation focusing on parliaments’ role during the crisis.

Jenny Preunkert: Conflicts over EU public authority after the crisis and their constructive or deconstructive potential

Cristina Fason: The role of national parliaments and the European Parliament during the Eurozone crisis: Unable to manage conflicts?

The roles of national parliaments and of the European Parliament (EP) during the Eurozone crisis have been shaped by the respective competences in matters of economic governance and by the specific economic situation in place in a Member State. The way the austerity measures have been adopted both at European and national level appeared at first to have sidelined parliaments as budgetary authorities. The proposed paper investigates if and, in case, how national parliaments and the EP were able to

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Tomás de la Quadra-Salcedo J anini: An area that seems prima facie unrelated to crisis Court in times of crisis value of international treaties in interpreting the rights Spanish Constitutional Court has formally accepted aspect will be addressed in this contribution. activism by other constitutional courts such as the constitutionality of most of the reforms introduced.

In this presentation, we want to analyse how the European Court of Justice is managing conflicts in times of crisis, in particular how it has dealt with the increasingly politicized nature of the conflicts brought before it during the Eurozone crisis and the emergence of new conflict parties. We argue that the ECJ has only reluctantly accepted the challenges arising from these conflicts. After its initial denial of jurisdiction, the ECJ only recently accepted its responsibility for the fundamental constitutional changes resulting from the Eurozone crisis, when it accepted a claim for damages against the Commission in a case concerning Cypriot banks. Today, the ECJ seems to be moving slowly toward taking its role as an EU constitutional court seriously. It increasingly focuses on the protection of the balance of power between EU institutions and the Member States. To also restrict the power of these institutions to the advantage of domestic legislators and their peculiar welfare state arrangements. This suggests that the ECJ is increasingly aware of the politicized nature of conflicts it is confronted with in an increasingly political environment. If this is true, the ECJ may indeed contribute to the productive potential of conflicts or at least mitigate their destructive effects.

Theorists of interinstitutional relations are the prevailing orthodoxy) do not lend themselves to lively constitutional dialogue. Despite these barriers, there is the potential for both written and unwritten aspects of the Constitution. The political branches ought to responsibly push at the edges of established constitutional rights. This focus is understandable given the origins of the metaphor as a reply to scepticism about litigation, clarifying and consolidating the effect of constitutional principles. The political branches ought to be the main drivers of the evolution of constitutional doctrine and the power of these institutions to the advantage of domestic legislators and their peculiar welfare state arrangements. This suggests that the ECJ is increasingly aware of the politicized nature of conflicts it is confronted with in an increasingly political environment. If this is true, the ECJ may indeed contribute to the productive potential of conflicts or at least mitigate their destructive effects.

Gabrielle Appleby and Anna Olijnyk: Constitutional Uncertainty and Legislative and Executive Constitutional Deliberation in Australia

There is a growing debate in Australia around the responsibilities of the political branches to upholding constitutional norms. These debates have arisen when the legislature or executive has sought to act within the context of doctrinal uncertainty often caused by judicial development of nascent constitutional principles. This paper analyses these debates through the lens of dialogue theory: a branch of scholarship that has rarely been applied to the Australian context outside the rights context. In some respects, Australia’s constitutional framework (including parliamentary government, strong-form judicial review and no bill of rights), and legal culture (in which legalism and judicial supremacy are the prevailing orthodoxy) do not lend themselves to lively constitutional dialogue. Despite these barriers, there is the potential for both written and unwritten aspects of the Constitution. The political branches ought to responsibly push at the edges of established constitutional rights. This focus is understandable given the origins of the metaphor as a reply to scepticism about litigation, clarifying and consolidating the effect of constitutional principles. The political branches ought to be the main drivers of the evolution of constitutional doctrine and the power of these institutions to the advantage of domestic legislators and their peculiar welfare state arrangements. This suggests that the ECJ is increasingly aware of the politicized nature of conflicts it is confronted with in an increasingly political environment. If this is true, the ECJ may indeed contribute to the productive potential of conflicts or at least mitigate their destructive effects.
paper highlights how institutional integrity is preserved in the face of close contact between the government branches. It argues that while the dialogue metaphor rightly frames constitutional interpretation as a coordinate responsibility, institutional distinctness— and inevitable interdependence— remain essential to the project. The paper thus advocates restrained use of the dialogue metaphor, supporting its core value in highlighting the dynamic interinstitutional and ongoing nature of constitutional interpretation, but cautioning that it should not be allowed to undermine the individual distinctness and accountability of the branches of government.

Mary Liston: Unpacking the Conceptual Baggage: Dialogue Theory in Context

This paper looks at recent criticisms of dialogue and takes seriously two key charges: 1) that all systems with bills of rights inevitably end up with judicial supremacy instead of institutional dialogue (Kuo 2016); and 2) that dialogue metaphors tend to underforce fundamental rights (Leckey 2015). Both of these claims stand in stark contrast to the now global theory of institutional dialogue and its positive adoption in key jurisdictions (Gardbaum 2013 Sathanapally 2012). One way to think about this is to say the metaphorical approach is to make clearer the conceptual baggage that accompanies these positions: baggage such as; preferences for weak versus strong form judicial review; positions on the optimality of weak or strong dialogue when considering the principle of deference; normative stances between parliament and the courts, and the political and legal worlds more broadly. This chasm appears to undermine the dialogue metaphor. The very fact that it has been so unusual for a constitutional case to have such political significance has revealed the limits of the phrase and mutual understanding between parliament and the courts, and the political and legal worlds more broadly. This paper examines the interaction between Parliament and the courts over the constitutional questions arising from Brexit. The contrast between the Supreme Court's consideration of the mechanics of the constitution working well under pressure and enhancing the level of justification for a major constitutional change. At the same time, the episode has brought the contrasting institutional approaches to the constitutional issues raised by Brexit into sharp relief. In terms of procedure and substance, but also in terms and the space and time permeability in which institutions of internationalized criminal justice in potentially yield symbolic and material power.

24 THE REGIONALIZATION OF INTERNATIONAL CRIMINAL JUSTICE: REGIONAL POWER BALANCES AND THE TRANSFORMATION OF AN INTERNATIONAL FIELD OF LAW

The core idea of the panel has two elements: 1) that the efforts to redirect the practices of international criminal law towards regional forms of governance remain too distant. The dynamics of power in this field, and 2) that only by clearly identifying the field of power around the courts the actual power of these institutions themselves can discern clearly, whether symbolic or material. Key questions posed by the papers concern the perceived differences between national and international adjudication and their respective power among the groups pushing for regionalization, the social and political structures that format the space in which international, regional and hybrid courts operate. This section of a field of stakeholders around these institutions that itself has specific power dynamics. From this point of departure, the papers will investigate how regional power dynamics affect the field of international criminal law and how these balances shape the materiality in which institutions of internationalized criminal justice can potentially yield symbolic and material power.

Participants

Mikkel Jarle Christensen and Astrid Kjeldgaard-Pedersen
Nandor Knust
Gieb Bogush
Moderator
Mikkel Jarle Christensen
Room
8B-3-52

Mikkel Jarle Christensen and Astrid Kjeldgaard-Pedersen: Competing Perceptions of Hybrid Justice: International Regional and National Institutional Criminal Chambers of the Courts of Cambodia

Recent years have seen an increased debate about the regionalization of criminal law, its potential and pitfalls. This paper will discuss competing perceptions of justice formed around the Extraordinary Chambers in the Courts of Cambodia (ECCC). Mixing insights from critical sociology and legal scholarship, the paper analyzes how regional and international power dynamics influenced the development of the Chambers, the different lines of argument and the conflicting narratives written into its legal financial and professional structure. Specifically, the paper investigates how international diplomatic battles and the historical power dynamics of the region shaped the legal and institutional design of the Chambers and, consequently, professional battles that affect the day-to-day work environment. Building on this analysis, the paper will then relate its findings to broader regional power dynamics as reflected in particular approaches to international legal questions and to the deployment of funds and human resources from this region to international criminal justice positions. Through the example of the ECCC – and drawing also on material relating to other internationalized criminal courts – this paper will investigate potential for progressive initiatives in this region, a regional institution, but was deeply impacted by regional and international power struggles.

Nandor Knust: The Regionalization of International Criminal Justice: Different Legal Answers to International Crimes

This paper will discuss Regional Criminal Justice Mechanisms (RCJMs) by focusing on a case study of Kosovo and the newly created Kosovo Reformed Specialist Judicial Institution (KRSJI). Through this paper, the analysis will examine the influence of regional organizations on the system of international criminal justice (ICJ) – and how those impulses have changed the more general legal landscape of ICJ. To do this, the paper will investigate how the creation of different regional approaches to ICJ and their linkages to regional political and legal institutions in Asia Africa Latin America and Europe. This comparison will provide new perspectives on different regional responses to the limited crossover and mutual understanding put in specific sites of justice dominated by distinct regional power dynamics. Based on the collected and evaluated data about the legal foundation, structure and integration into the national or regional system the paper will point to the recognition and cultural integration of regional and international legal institutions into the holistic and pluralistic system of ICJ.

Gieb Bogush: Flight MH17: A Quest for International Criminal Justice in a New Regional Setting

Almost three years ago, a civilian Malaysian airplane was shot down over the zone of armed hostilities in eastern Ukraine, killing all of the 298 people on board. Significant progress has been reached in the international investigation of this crime. However, after a failure of the UNSC to establish a special criminal tribunal in July 2015, a decision on the most effective prosecution and adjudication mechanism yet has to be made by the affected States. The paper discusses the advantages and disadvantages of regionalized international criminal courts and trial of those responsible for the tragedy of MH 17, including the national trial and organization of a special tribunal. While discussing the advantages and disadvantages of the said options, particular attention is paid to the impact of regional organizations and triggering the potential of Chapter VIII of the UN Charter. This option is investigated as part of a wider trend of regionalizing international criminal
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25 ERNST-WOLFGANG BÖCKENFÖRDE’S CONSTITUTIONAL THOUGHT IN COMPARATIVE PERSPECTIVE: CAN IT PROVIDE THE BASIS FOR A EUROPEAN PUBLIC LAW?

Ernst-Wolfgang Böckenförde (born 1930) is one of Germany’s foremost legal scholars and political thinkers. As a scholar of constitutional law, Böckenförde has been a major contributor to the conceptual framework of the modern state, and to political and ethical controversies from vexed questions about potential states of emergency to the ethics of genetic engineering. As a judge on Germany’s Federal Constitutional Court (1983 – 1996) and the author of the highest number of dissenting opinions in the court’s history, Böckenförde has significantly influenced the way law and politics are conceived of in Germany. This panel re-visits Böckenförde’s work as a late beacon of the German statist tradition and probes its relevance amid contemporary debates about the constitutional implications of a globalized world order, where notions of a post-state, post-sovereign, and multi-level ordering, have taken center stage. Böckenförde is unique in that he confronts the basic concepts and constitutional presuppositions of the old Staatslehre with the challenges of an interdependent world. Focusing on his notions of the state and of the constitution, participants explore the timeliness of Böckenförde’s work and ask whether and to what extent it can serve as a basis for a European public law.

Participants Tine Stein and Mirjam Künkler Sabino Cassesse Alexander Somek Michaela Haibronner Kai Möller
Moderator Mirjam Künkler Room 8A-4-3.5

Tine Stein and Mirjam Künkler: Between Schmitt and Heller: The Legacies of Law and Sociology in Böckenförde’s Staatslehre

law is Böckenförde’s constitutional thought in comparative perspective, whereby the first two papers focus on his notion of the state, and the remaining four on various aspects of his notion of the constitution and constitutionalism. In his thinking about the state, Böckenförde is heavily influenced by the works of five thinkers: Thomas Hobbes, Georg Wilhelm Friedrich Hegel, Lorenz von Stein, Hermann Heller, and Carl Schmitt. The paper will review how these different political thinkers are consolidated in Böckenförde’s work. Special attention will be paid to the heritage of Carl Schmitt and Hermann Heller: is their work to a large extent reconciled in Böckenförde’s thought and writings, or do tensions remain?

Sabino Cassesse: Böckenförde’s notion of the state in comparative reflection with Italian state and constitutional theory

The paper will analyse Böckenförde’s notion of the state as a constitutional state, and highlight the parallels and differences in German and Italian constitutional and political thinking.

Alexander Somek: Böckenförde’s Staatsrechtsslehre as a basis for a European public law?

The contribution will discuss the extent to which Böckenförde’s work can provide (at least in part) the basis for a European public law. It seeks to illustrate why Böckenförde’s notion of the constitution as providing a framework order rather than an ambitious normative program lends itself particularly well to an emergent European public law where value generation still (and recently with renewed fervor) takes place within the national unit.

Michaela Haibronner: Böckenförde’s view of the Constitution as a Framework Order: Fit for Germany futile for democratizing societies?

The paper will analyse Böckenförde’s view that the constitution is normatively best understood as a framework order (Rahmenordnung) in contrast to the idea which the Federal Constitutional Court established in its early jurisprudence whereby the Basis Law constitutes an “objective order of values”. The latter view, Böckenförde criticises, leads to judge-made law and undermines separation of powers. The paper will discuss this critique in the light of constitutions charged with normative propositions and examine if (contrary to Böckenförde) these constitutions are better equipped to deal with the challenges of institutional failure.

Kai Möller: Böckenförde, the objective order of values, and the provincialism of Staatsrechtsslehre

The paper will make two claims. First, Böckenförde’s critique of the German Federal Constitutional Court’s characterisation of the Basic Law as embodying an “objective order of values” is in large parts analytically brilliant but ultimately unconvincing: no coherent conception of constitutional rights can do without the objective order of values which must, however, be interpreted in a more imaginative way than Böckenförde allows for. Second, Böckenförde’s failure in this regard is symptomatic of the ongoing critique of Staatsrechtsslehre which, Böckenförde’s work does not appreciate that an engagement with political philosophy and comparative law is not an afterthought but rather at the very core of any doctrinal interpretation of the Basic Law.

26 THE CONTINUOUS AUTHORITY OF INTERNATIONAL LAWYERS IN MODERN INTERNATIONAL POLITICS. THE “INTERNATIONAL-LAW POLITY” HYPOTHESIS

The last two decades have seen the emergence of a rich literature in the fields of history, political science, and critical legal studies regarding the critical role played by international law and lawyers in world affairs ever since the early 20th century. Although sharing an interest in international law and lawyers, these studies have provided strikingly different – and conflicting – accounts and periodizations of the rise (and sometimes fall) of international law and lawyers. Many of these differences in interpretation are due to differences in disciplinary approach. With a view to both foster dialogue across disciplines and to discuss the contradicting views, the organizers of the present panel suggest a new interdisciplinary conceptual framework for understanding the role of international law and lawyers since the beginning of the 20th century: “International Law-Polity” (ILP). This model underlines the strikingly stable relationship between law and the government of global affairs that has been consolidated since the creation of the League of Nations. In the panel, the ILP model will be presented and contrasted with other accounts of the rise of international law.

Participants
Mikael Rask Madsen
Antoine Vauchez
Karen J. Alter
Jan Klubbers
Moderator
Mikael Rask Madsen
Room 8A-4-47

Mikael Rask Madsen: The Genesis and Perpetuation of the International Law-Polity (ILP): A Theory of the Power and Evolution of International Law

International law (IL) and international lawyers have come to play a major role in world affairs since the beginning of the 20th century. We argue that this rise to power of international law and lawyers is closely linked to the institutionalization of world affairs around international organizations and courts that started to take form at that historical moment. The specific power of international lawyers, we further contend, is due to the way they provided both the intellectual apparatus and imagination for legalizing world affairs and the human resources to exercise the function of governing world affairs. We argue that this, what we term the international law-polity (ILP), produces a double-faced model as it is both programmatic and operational. The combination of both a utopian and a practical dimension implies that the model is never fully realized, but nevertheless continuously being
Jan Klabbers: Functionalism in International Institutional law

The presentation outlines how functionalism came about by focusing on the ‘pre-history’ of International institutional law. To that end, the presentation analyses the work of a number of late 19th, early 20th century authors on the law of international organizations. It turns out that functionalism, as developed by notably Reinsch, was inspired by his familiarity with colonial administration; colonialism and international organization both manifested cooperation between states. The presentation further contrasts the perspective of functionalism with the ILP project.

Antoine Vauche: The Genesis and Perpetuation of the International Law-Polity (ILP): A Theory of the Power and Evolution of International Law

International law (IL) and international lawyers have come to play a major role in world affairs since the beginning of the 20th century. We argue that this rise to power of international law and lawyers is closely linked to the institutionalization of world affairs around international organizations and courts that started to take form at that historical moment. The specific power of international lawyers, we further contend, is due to the ways in which they provided both the intellectual apparatus and imagination for legalizing world affairs and the human resources to exercise the function of governing world affairs. We argue that this, what we term the international law-polity (ILP), produces a double-faced model as it is both programmatic and operational. The combination of both a utopian and a practical dimension implies that the model it is never fully realized, but nevertheless continuously being practiced. Interestingly, the ILP model has turned out to be very resilient and is to this day still the dominant framework global legal governance.

Karen J. Alter: The Contested Authority of International Law

Where the rule of law exists, legal communities become the keepers of the keys to legal authority, collectively defining what law means, and how law applies to a specific issue or case. The first part of this paper argues that international law’s authority meaningfully resides in the national based legal communities, the actors who interpret, apply and give meaning to the law. The second part of the paper focuses on contestation over international legal authority; International law coexists with overlapping and competing domestic law, which can be preferred because it is more local. And it coexists with parallel, overlapping and competing international legal regimes. Because there is no agreed upon mechanism to resolve hierarchy questions when higher-order legal rules clash, international legal constraints can be legally circumvented through appeals to these rival higher-order legal authorities. Contestation over international takes three forms: 1) contestation among legal actors within the legal field seeking to define the content of international law and the relation of specific international law to specific national laws; 2) state based claims that the national constitution is superior to international law; and 3) states maneuvering around the authority of specific international laws by creating or appealing to competing international legal norms.

27 EXPLORING THE POTENTIAL OF HORIZONTAL JUDICIAL DIALOGUE: SECTORIAL CASE STUDIES IN PRIVATE AND PUBLIC LAW

Judicial dialogue is a matter of fact, whether it is between national and European courts, foreign domestic courts, direct or indirect. The extent of judicial dialogue and its effects on legislation, institutional relations, and ultimately on fundamental rights is not yet fully explored. Courts are not in charge of defining the law but rather of interpreting it; however, in interpreting the law, they may affect the way in which other courts will apply the same provision, and this may have exponential effects if these decisions emanate from the supranational courts. On the other hand, the lack of a deeper analysis of the ways in which other relevant actors (e.g. private parties, legislators and regulators) may interact and be involved in the dialogue hinders the ability of courts to engage in a fruitful exchange. The contributions of this panel address such issues, aiming to provide answers and, most importantly, examples in different areas of law, showing the added value of judicial dialogue.

Participants

- Karolina Podstawa
- Madalina Moraru
- Nicole Lazarini
- Federica Casarosa
- Elena Carpanelli

Moderator
- Deirdre Curtin

Room
- 8B-4-09

Karolina Podstawa: Weak courts in need of support? – the EU-business partnership in defence (?) of online freedom of speech

The paper explores the potential answers that may be lay between the lines of judicial dialogue between European Courts and the national courts for the full-fledged protection of fundamental rights. In particular we are dealing with instances where the Courts or the executive assigned special role for private companies. Starting off with the recent ECtHR (Delfi v Estonia and MTE v Hungary) and the older CJEU (Google Spain) case law, the paper attempts at defining the standards of material and procedural protection, which must be foreseen in order to make the participation of private actors violation-proof and pressure-proof.

Madalina Moraru: Judicial dialogue clarifying abstract EU concepts limiting fundamental rights: the case study of the “risk of absconding” as legal grounds for immigration detention

The paper will investigate the contribution of horizontal and vertical judicial dialogue to the clarification of the concept of “risk of absconding” as grounds for administrative detention in the field of asylum and immigration. It will also explore the implications that the status of judges (administrative civil criminal) may have on their control of the administration and judicial interactions not only vertically as in the procedure of preliminary rulings involving the Court of Justice but also horizontally between judges of different Member States.

Nicole Lazarini: Horizontal judicial dialogue as a duty (and its limits): the case of cooperation within the Euronet System

Interpreting the European Arrest Warrant Framework Decision in light of fundamental rights, in the Ararosy and Caldararu judgment (Joined Cases C-404/15 and C-659/15 PPU) the European Court of Justice introduced specific duties of cooperation between the judicial authorities of the issuing and executing Member States, aimed at establishing whether the requested person runs the risk of being subject to inhuman or degrading treatment following to the surrender. The presentation will focus on the problematic implications stemming from this “duty of judicial dialogue”. These have a strictly practical dimension (concerning notably the impact on the procedure for the execution of the warrant and on its overall lenght) but also a more conceptual one (insofar as the judge of execution is requested to cooperate, in essence, with the authorities of a State that is allegedly violating – or allowing the violation of – fundamental rights).

Federica Casarosa: Judicial dialogue in consumer protection area: when the CJUE is only the tip of the iceberg

The analysis of judicial interactions among courts within the EU law context is usually taken from the perspective of the interaction between two courts, the one presenting the preliminary ruling and the CJUE responding. This exchange then leads to an effect on the subsequent decision of the referring court. However, neither the preliminary ruling nor the subsequent decision of the referring court impact also on foreign actors. These actors include not only courts (lower and constitutional ones) but also legislators and regulators which may have different incentives to participate and react. Using as example the Spanish jurisprudence related to the over-indebtness of consumers (in particular the Aziz and Sanchez Morcillo cases) and Italian jurisprudence on mandatory mediation (following the Allassini case) the paper will provide a description of the wider concept of judicial dialogue.

Elena Carpanelli: Mass-surveillance in the case law of the ECJ and the ECtHR: towards dialogue or not?

Recently the Court of Justice of the European Union and the European Court of Human Rights have practiced. Interestingly, the ILP model has turned out to be very resilient and is to this day still the dominant framework global legal governance.
been called more and more frequently to scrutinize indiscriminate data collections and mass surveillance practices vis-à-vis privacy and data protection concerns. Whilst both Courts are currently in the process of consolidating their case law on the subject with several cases still pending, some of their most recent decisions (see, in particular, ECJ Schrems; Digital Rights Ireland; ECtHR Zakharov v. Russia) already allow questioning whether we are now assisting to a new instance of ‘horizontal judicial dialogue’. In this perspective, the proposed paper aims at exploring the issue by going beyond formal textual ‘cross-references’ and rather focusing on whether the emerging approaches of the two European Courts converge in substance.

28 FIDUCIARY CONSTITUTIONALISM

There are few areas in EU integration law and policy in which the Court of Justice of the European Union has not played a major role as a vehicle of integration and the ‘Area of Freedom Security and Justice’ (AFSJ) is no exception. Arguably, the Court of Justice considers itself to be not only at the apex of the judicial integration chain but also as a court with fiduciary obligations to protect EU law rights in all Member States via its extensive case law on trust in the autonomous European legal order. Therefore, according to some scholars (Stone-Sweet and Brunel), the Court of Justice is not a simple agent of the Member States, but also a trustee Court of EU law at large. A trustee court is then a kind of super agent empowered to enforce the law against the Member States themselves. The paper looks at the question of fiduciary obligations and trusteeship for courts from a constitutional perspective. A tentative expression of trusteeship might be found in the AFSJ where the Court of Justice has to balance freedom security and justice. The paper explores this question and to what extent national constitutional courts have the same fiduciary obligation (Criddle and Fox-Decent) as the Court of Justice when the EU standard is not deemed robust enough according to their constitutional culture and human rights protection.

Participants
Joshua Segev
Bas Schotel
Eljalill Tauschinsky
Ester Herlin-Karnell
Moderator
Joshua Segev
Room
8B-4-19

Joshua Segev: The Historical Origin of the Fiduciary-Based-Judicial-Review

This article ventures into the historical origin of fiduciary-based-judicial-review (hereinafter: FBJ). The proponents of FBJ argue repeatedly that it is more fundamentally embedded in ancient Western political thought and the Anglo-American constitutional tradition. The article shows the indeterminate nature of the historical argument of FBJ. The article focuses especially on the writings of Plato and Locke and identify them as the “founding fathers” of FBJ. A careful examination of the heritage of Plato and Locke shows that while some features of FBJ can be supported historically by the writings of Plato and Locke, other central features of FBJ go against the grain of ideas associated with Plato and Locke in contemporary discussions about judicial review.

Bas Schotel: the jus inculendi et excludendi trust and colonial empire: migration law as fiduciary powers

The paper explores the state’s power to include and exclude migrants seeking admission without the need to consider them as members equals let alone would be citizens.


There are few areas in EU integration law and policy in which the Court of Justice of the European Union has not played a major role as a vehicle of integration and the “Area of Freedom Security and Justice” (AFSJ) is no exception. Arguably, the Court of Justice considers itself to be not only at the apex of the judicial integration chain but also as a court with fiduciary obligations to protect EU law rights in all Member States. The paper will look at the question of fiduciary obligations to protect EU law rights in all Member States. The paper will look for structural features when applied to the structure of contemporary migration law which may paradoxically enhance the legal protection of migrants. Today there are roughly speaking two dominant paradigms in law and political theory to understand and critically analyse migration law. On one end of the spectrum there is the particularistic view whereby migration law is understood as a means to establish and maintain the autonomy of a particular legal and political community. Its typical legal categories are sovereignty and citizenship. On the other end of the spectrum there is the universalistic or cosmopolitan view whereby migration law is contrasted with the autonomy of individual human beings. The typical legal category here is human rights. Both opposing views share two common values: autonomy and equality. Either migrants are not to be treated as equals and their (individual or political) autonomy should not be promoted fully because they are not citizens (particularistic view). Or migrants should be treated as autonomous citizens because all human beings are equal (universalistic view). To escape this perennial controversy the paper seeks legal frameworks that offer protection that do not rely on equality or even openly endorse inequality. Fiduciary powers may be an alternative way to legally account for the interests of migrants seeking admission without the need to consider them as members equals let alone would be citizens.

Eljalill Tauschinsky: Being a Subject to EU Law: What we should all learn from the Inuit Cases

EU law is (in)famous for its difficulties in showing proper regard for individuals. For this the Inuit cases are paradigmatic, not only because of their discussion of standing requirements, but more fundamentally for the lack of concern for the grievance that brought the Inuit before Court. Throughout the various cases brought, the Court not once went to the heart of what the Inuit experienced as a result of EU action, and which they describe as the harm suffered. Fiduciary law is famous for its conceptualisation of the position of the “fiduciary”. However, just as fundamental is its insight that fiduciaries act in a relationship. This insight is useful in relation to the EU, which, with its focus on ‘objectives’, too often undermines the position of its human subjects. The fiduciary perspective helps to explain why it is important to have a clear role for the persons subject of EU action, and which consequences should be drawn from this. This contribution argues that the question of the role of individual subjects is fundamental for the EU legal order and fundamental for possibilities of judicial protection. This contribution aims to give a novel perspective on what fiduciary theory can contribute to the study of the EU and its legal system. The consequence of employing such a perspective are a new and more central role for those targeted by EU law, including a strengthening of their position before Court.


There are few areas in EU integration law and policy in which the Court of Justice of the European Union has not played a major role as a vehicle of integration and the “Area of Freedom Security and Justice” (AFSJ) is no exception. Arguably, the Court of Justice considers itself to be not only at the apex of the judicial integration chain but also as a court with fiduciary obligations to protect EU law rights in all Member States via its extensive case law on trust in the autonomous European legal order. Therefore, according to some scholars (Stone-Sweet and Brunel), the Court of Justice is not a simple agent of the Member States, but also a trustee Court of EU law at large. A trustee court is then a kind of “super agent”, empowered to enforce the law against the Member States themselves. The paper looks at the question of fiduciary obligations and trusteeship for courts from a constitutional perspective. A tentative expression of trusteeship might be found in the AFSJ where the Court has to balance freedom, security and justice. The paper explores this question and to what extent, national constitutional courts have the same fiduciary obligation (Criddle and Fox-Decent) as the Court of Justice when the EU standard is not deemed robust enough according to their constitutional culture and human rights protection.
GENDER, COURTS AND CONSTITUTIONS

This panel aims to investigate how gender power structures are reflected and dealt with by constitutional law across the globe. It discusses some of the most important aspects of constitutionalism where the social gender power structures play a decisive role: the participation of women in constitution-making, gender representation on the benches of constitutional courts and the adjudication of constitutional issues affecting gender equality. For courts to challenge gender power relations, they need an equality-friendly constitution, which as Suteu argues, is achieved by incorporating women and men’s interests into the constitution-making process. Moreover, towards the same purpose, Baines argues women justices merit much increased representation on “constitutional” courts. And lastly, as Havelková and Brodealé show, the courts need a favorable political and historical context in which to adjudicate. The panel does not have a local or regional focus, but rather a global one, and discusses examples from Western Europe and North America as well as from the Middle East Asia, Africa and Central and Eastern Europe.

Participants
Silvia Suteu
Beverley Baines
Barbara Havelková
Elena Brodealé
Moderator
Ruth Rubio Marin
Room
8B - 4 - 33

Silvia Suteu: Women and Participatory Constitution-Making

This paper critically analyses the capacity of participatory mechanisms of constitutional reform to incorporate and respond to the views of women. It aims to provide initial answers to the question of whether and how participation in constitution-making delivers for women. I first outline the contours of the debate surrounding popular participation in constitution-making, identifying the benefits and potential pitfalls such participation may yield. I then examine three case studies: the 2014 Scottish independence referendum, the 2012-14 Irish Constitutional Convention, and the 2011-2014 Tunisian constitution-making experience, analyzing the level and nature of women’s participation in all these processes. Subsequently, I evaluate the success of participatory mechanisms such as referendums, constitutional conventions, and public consultations in empowering women as equal participants, and their ability to ensure gender-sensitive deliberations. I also raise questions as to whether participation should be resorted to in all cases of constitutional reform and the propensity for it to be an obstacle to rather than a vehicle for gender equality. Past experience tells us that opening up to citizen input issues such as abortion or reform of divorce law, essentially reframing them from questions of gender equality into ‘moral issues’, has not fared well for women. Relying on courts asguardians of women’s rights in these cases, whether to greenlight the participatory process or to certify its result, are mixed results and, occasionally, backlash. I conclude that careful institutional design, comparative learning, and looking beyond tokenism remain necessary in order to ensure that participatory mechanisms do indeed empower rather than fetter women as agents of constitutional change.


We should take Justice Ruth Bader Ginsburg’s question “Why not nine women?” seriously. Justice Ginsburg has served on the United States Supreme Court since 1992 and her proposal is for an all-women Court. Western democracies do not appear poised to adopt her proposal, nor have they endorsed the prevailing proposals for parity by feminist scholars Erika Rackley and Sally Kenney or for feminist judges Rosemary Hunter and Beatriz Kohen. To explain why these proposals had some initial successes but are now stagnating, I frame them as deploying a “strategy of containment”, a strategy defined by Jane R. Abrams to explain the loss of efficacy of feminist domestic violence reform. Situating Justice Ginsburg’s proposal as “moving beyond the strategy of containment”, I draw on women’s judgments in Australian, Canadian, German, Indian, Indonesian, Israeli, South African, British and American constitutional cases about or with significance for women’s equality. Whether writing as the only, often the first, woman on a national constitutional Court, or deciding cases where more than one woman justice wrote a judgment, the richness of their adjudicatory diversity demonstrates that women can comprehensively perform the tasks of adjudicating constitutional cases. Far from posing a threat to democracy or the rule of law, the legacy of women justices’ voices illustrates how they promote constitutional justice for women and men.

Barbara Havelková: The Hidden Cases – What Can Admissibility Decision in Sex Equality Cases Reveal?

The paper looks at the sex equality case-law of the Czech Constitutional Court (‘CCC’) in the almost 25 years of its existence. It discusses not only cases which have been decided on merit, but also admissibility decisions. The second subject is what could have been decided by the CCC in the past, but was not done due to the procedural requirement on ordinary courts to shift the burden of proof when reviewing the substantive question of sex discrimination in employment. The small sample size makes it difficult to come to any firm conclusions about the CCC’s understanding of sex equality and non-discrimination. The picture that emerges from the available cases, is of a court that is capable of declaring unconstitutional clearly stated disparate treatment, but whose sensitivity to structural bias and capability of understanding substantive equality is yet to be seen. The paper will look – for the first time – at all the CCC decisions in which a breach of the sex equality guarantee was pleaded by applicants. It will aim to answer the question whether the limited sample is itself not an accident, but whether it means that the CCC has stayed away from more complex cases brought by women, which challenge deeper structural inequalities and require a more substantive understanding of equality than do challenges to clearly differentiating provisions or practices which benefit women. This question is, of course, tied to the wider question about the role of the Constitutional Court and how active it is in reviewing state action, especially of lower courts which impacts human rights. At a more general level, the paper will also reflect on the usefulness of a method which looks at admissibility decisions.

Elena Brodealé: Gender and Family Power Structures under scrutiny before the Romanian Constitutional Court

2016 was a year without precedent for the Romanian Constitutional Court. Not only that the Court asked the Court of Justice of the European Union for a preliminary ruling for the first time in its history, but it did so in a case regarding the recognition of same-sex marriage in Romania. Moreover, last year the Court also issued a decision on the constitutionality of the first citizens’ initiative meant to review the Romanian Constitution. The initiative, backed by donor-funded organisations and financed with US conservative organizations, specialized the constitutional litigation, aimed to replace the term ‘spouses’ from the text of Article 48 on family with the expression ‘a man and a woman’. The purpose of this revision would have been to ban same sex marriages in Romania and protect what in the US context are called ‘traditional family values’. The amicus curie sent to the Romanian Constitutional Court by human rights organizations like Amnesty International or ILGA Europe emphasized that such a change was not needed, since the Romanian Civil Code adopted in 2009 already prohibited same sex marriages. Yet, the US trained lawyers argued the contrary. In their view, such a definition was needed in the constitutional text to conform towards women. The first case was brought by a man claiming discrimination in the practice of ordinary courts to grant child custody to mothers. In the fifth case, the male claimant challenged what he felt was the improper application of the procedural requirement on ordinary courts to shift the burden of proof when reviewing the substantive question of sex discrimination in employment. The small sample size makes it difficult to come to any firm conclusions about the CCC’s understanding of sex equality and non-discrimination. The picture that emerges from the available cases, is of a court that is capable of declaring unconstitutional clearly stated disparate treatment, but whose sensitivity to structural bias and capability of understanding substantive equality is yet to be seen. The paper will look – for the first time – at all the CCC decisions in which a breach of the sex equality guarantee was pleaded by applicants. It will aim to answer the question whether the limited sample is itself not an accident, but whether it means that the CCC has stayed away from more complex cases brought by women, which challenge deeper structural inequalities and require a more substantive understanding of equality than do challenges to clearly differentiating provisions or practices which benefit women. This question is, of course, tied to the wider question about the role of the Constitutional Court and how active it is in reviewing state action, especially of lower courts which impacts human rights. At a more general level, the paper will also reflect on the usefulness of a method which looks at admissibility decisions.

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Immigration law is an important source of public law. This should come as no surprise; immigration law engages the core of state power, with border policing, detention and deportation all within its ambit. Immigration law can also be an important site for the development of human rights principles, particularly where it is argued that the removal of a person to a third country would result in the violation of their fundamental rights in that country. The perpetual tension between the sovereign power to regulate migration and citizenship, and individual rights, is at the heart of most immigration decisions. Against this background, this paper will explore trends in judicial decision-making in asylum and immigration cases in European and Irish law and will examine the extent to which the courts refer to the rule of law and human rights in imposing limits on state action in this sphere.

Participants

Violeta Moreno-Lax
Clodhna Murphy
Patricia Brazil

Moderator
David Fennelly

Room
8B 4 - 43

Clodhna Murphy: Testing the Limits of State Power: Human Rights or the Rule of Law as a Deciding Factor in Immigration Cases?

Immigration law is an important source of public law as illustrated by the far-reaching implications of the recent Supreme Court decisions in Meadows v Minister for Justice Equality and Law Reform and Malak v Minister for Justice Equality and Law Reform. This should come as no surprise; immigration law engages the core of state power with border policing, detention and deportation all within its ambit. Immigration law can also be an important site for the development of human rights principles, particularly where it is argued that the removal of a person to a third country would result in the violation of their fundamental rights in that country. The perpetual tension between the sovereign power to regulate migration and citizenship, and individual rights, is at the heart of most immigration decisions. Against this background, this paper will explore trends in judicial decision-making in asylum and immigration cases in Ireland and examines the extent to which the courts refer to: (1) the rule of law; and (2) human rights, in imposing limits on state action in this sphere. It is shown that in immigration cases, the Courts are most comfortable in “saying no” to the State when it is argued that the removal of a person to a third country would result in the violation of their fundamental rights. Immigration law also matters, be it their specific impact or the short-term dynamics shaping them. Institutional models may obviously matter, but are not of direct concern in this paper. Rather, this paper will critically assess the limits of each court’s competence in this important, but highly contested, context.

Simone Benvenutti: Images of Judicial Self-governance, Normative Justifications and Socio-political Roots

The panel addresses judicial self-governance, understood as any kind of participation of judges in courts’ administration. Under this meaning, the concept is broader than that of self-government, i.e. the domination of judges in judicial administration. The aim is to have a broader picture of the role of self-governance, which is not per se a new or exceptional phenomenon. The panel focuses on: a) the normative values on which self-governance arrangements are grounded and justified; b) the substantive relationship between political and judicial life within the broader socio-political context under which self-governance arrangements have been strengthened or reduced or changed over time. Besides avoiding explicit reference to the normatively charged concept of self-governance, the proposal stays back from mainstream analysis based of formal typified models of judicial governance, be it their specific impact or the short-term dynamics shaping them. Institutional models may obviously matter, but are not of direct concern in this paper. Rather, this paper will critically assess the limits of each court’s competence in this important, but highly contested, context.
Giulia Aravantinou Leonid: Peculiarities of the Greek jurisdiction within the Southern European tradition: the weight of political and economic environment on self-governance

The Greek jurisdiction is often neglected when it comes to studies on judicial administration; still it is a very instructive one when it comes to highlighting the interplay between normative values, relations between the political and the judicial elite and related judicial governments arrangements. This paper will retrace the lines of developments of these three interconnected dimensions in the last forty years. The starting point is the incorporation in the then new democratic Constitution of provisions relating to a body of judicial governance in which judges are represented, inspired by the Italian judicial council. Going beyond a static picture, the paper aims at stressing the dynamic framework characterizing the Greek jurisdiction between 1974-75 and 2015, and how judicial governance reforms and debates on judicial governance reforms underwent different phases in which the problematic relationship of the judicial elite with the components of a bipolar political system entered into play. Secondly, it will also show how this in turn influenced the discourse on the normative groundings of (possible) reforms in judicial governance, and the differences and similarities in this respect with other Southern European countries. A specific focus will be in the end devoted to how the last ten years’ political crisis, including the repercussions on the party system, and economic crisis affected the debate on reforms of judicial governance, and how they interacted with existing normative and institutional traditions.


The paper will address the factors determining reforms in Norwegian judicial administration in the last twenty years, within the context of the Northern European traditions. The governance of Norwegian courts, including the de facto appointment of judges in all instances, was done by the Civil Division of the Ministry of Justice. Reforms were made in 1990 in the appointment procedure to secure independence of the judiciary, and in 1996 in the general governance of the courts, all in light of the European Human Rights Convention. However, in 1999 a broad government appointed committee by a tiny majority suggested to establish an independent Norwegian Court Administration. While emotions ran high in the debates in the committee, the Parliament without much ado passed the necessary legislation. For the majority in the committee the decisive argument was the independence of the judiciary. More independence would enable the judiciary to perform review of administrative and legislative acts, and in this way contribute to the modern democracy. The minority found the independence of

United Kingdom, and United States. By referring to specific moments of their judicial history, its aim is to highlight the relation between judges’ participation in judicial governance and the underlying normative and socio-political motivations. Specific attention will be specifically devoted to two phenomena, as revealing of the long-term developments in courts’ administration. First, the increasing formalization of self-governance mechanisms in contemporary legal systems, which arguably serves different purposes. From a normative perspective, the need is there to promote the values of independence, accountability, legitimacy, or to accomplish a specific understanding of separation of powers. From a socio-political perspective, there is a need to make explicit a proper systemic balance in politico-judicial relation, within increasingly complex and fragmented societies. Second, the extension of the search for balance to the society at large, with the hesitant but still meaningful formal inclusion of civil society and legal professions representatives in the administration of courts.

Nino Tsereteli: Learning from the post-soviet constellation: Russia, Ukraine, and Georgia

This paper will address the evolution of judicial self-governance in the post-Soviet countries since early 1990s until now. Specifically, it will focus on (still ongoing) judicial reforms in Russia, Ukraine and Georgia. It will explain how the need for breaking away from the past dependency of judges on political and judicial superiors (or creating the appearance thereof) shaped the agenda of judicial reforms and made judicial empowerment relevant. It will follow up subsequent waves of reforms (some of which could have been labelled as “counter reforms”) in the three countries, up to the latest significant changes in Ukraine in early January 2017 and in Georgia in February 2017. In addressing these reforms, it will look into how views of external and internal actors blended and influenced their outcome. It will highlight how the values, such as independence, accountability and legitimacy of judiciary, informed regulation of judicial participation in matters of court administration and observe how the risk of granting too much or not enough powers to judges motivated the search for more balanced solutions (e.g. engaging not only political and judicial elites, but also the public). It will identify the correlation between changes in composition and in powers of the bodies responsible for court administration to see whether increased representation of judges in the relevant bodies of court administration also led to granting them meaningful decision-making power. Finally, it will assess how the soviet heritage (existence of informal practices and socio-political motivations. Specific attention will be specifically devoted to two phenomena, as revealing of the long-term developments in courts’ administration. First, the increasing formalization of self-governance mechanisms in contemporary legal systems, which arguably serves different purposes. From a normative perspective, the need is there to promote the values of independence, accountability, legitimacy, or to accomplish a specific understanding of separation of powers. From a socio-political perspective, there is a need to make explicit a proper systemic balance in politico-judicial relation, within increasingly complex and fragmented societies. Second, the extension of the search for balance to the society at large, with the hesitant but still meaningful formal inclusion of civil society and legal professions representatives in the administration of courts.
South Africa’s transformation from apartheid state to constitutional democracy is widely celebrated and studied. But existing accounts of South Africa’s constitutionalism focus on the Constitutional Court, while the ruling African National Congress has been consigned to the role of threat. This panel critically examines this view from a comparative perspective, taking as its starting point a revisionary account, Building the Constitution, published in December 2016 by Cambridge University Press. The book draws on historical and empirical sources to show how support from the ANC government and other political actors has underpinned the work of the Court, including many of its landmark cases standardly understood as judicial achievements. Current accounts see the Court as overseer of a negotiated constitutional compromise or as the looked-to guardian against the rising threat of the ANC. In reality, Building the Constitution, South African successes have been built on a broader and more admirable constitutional politics to a degree no previous account has acknowledged. The panel will assess this argument in conversation with the book’s author, and consider its implications for our understanding of the South Africa case and of courts in emerging systems more generally.

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Jeff King: The Requirement of Interpretive Finality and Judicial Restraint

The first paper by Professor Jeff King (University College London) will explore some of the difficulties of the dialogue metaphor and with some of the proposals at the core of the New Commonwealth Model of constitutionalism as articulated in Gardbaum’s approach. King’s central critique of both will focus on the need for interpretive finality provided by courts of law and the need for political bodies to respect legal findings in a system respecting the separation of powers. The iterative aspect of dialogue theory – which is also central in Gardbaum’s approach – risks undermining the importance of both legality and the perceived (and justified) political perception that the rule of law requires accepting legal findings on matters of process as well as on rights. Nevertheless, as the paper will explain, the critique of the New Model is something of internal one insofar as King broadly supports the idea of collaborative constitutionalism (as expressed in his
ConCurring panels

Dialogue isn’t working: the case for collaboration as a model of legislative-judicial relations

Carolan is Associate Professor in University College London, Co-Editor of the United Kingdom Constitutional Law Blog, Executive Member of the UK Constitutional Law Association, Editorial Committee Member of the journal Public Law, and Co-Editor of the journal Current Legal Problems. He is also co-authored the Social Rights (CUP, 2012), and co-editor of the forthcoming volumes The Cambridge Handbook of Deliberative Constitutionalism (CUP 2018) and Parliament and the Law (2nd Edn) (Hart 2017). He has published a substantial review-article of Stephen Gardbuam’s work entitled ‘Rights and the Rule of Law in Third World Constitutionalism’ (2015) 30(1) Constitutional Commentary 101.

Eoin Carolan: A metaphorical muddle: why conflict (not dialogue) is the point of judicial power

The second paper, by Eoin Carolan (UCD), is concerned with the conference call’s reference to an en- 
during question of public power: how, and under what conditions, do courts enjoy the power, legitimacy and independence necessary as a meaningful check on national actors? The traditional dichotomy between legal or political constitutionalism has been challenged in recent times by the development of new more nuanced models of legislative-judicial relations. The need for a reconceptualisation of constitutionalism and other dialogical accounts have been the most influential in the field. One of their chief attractions has been the way that these models de-emphasise the conflict between legislative and judicial supremacy in the way that they try to accommodate the conflict that is inherent in the dialogue between legal and political constitutionalism. This paper argues that this approach (while welcome) rests on the same assumption that a constitutional model must ultimately privilege either judicial or political supremacy, that conflict between these institutions is capable of being normatively and democratically justified in a way that speaks to the conference call’s concern about the legitimate authority of courts. Eoin Carolan is Associate Professor in University College Dublin, where he lectures and researches in constitutional law and theory, media law, and privacy and data protection. His recent work in the field includes ‘Dialogue isn’t working: the case for collaboration as a model of legislative-judicial relations’ (2016) 36 Legal Studies 864–909; ‘Living behind the Commonwealth model of rights review: Ireland as a model of collaborative constitutionalism’ in Marie Luce Paris & John Bell (eds), Rights-Based Constitutional Review – Constitutional Courts in a Changing Landscape (2016); and ‘The relationship between judicial Remedies and the separation of powers: collaborative constitutionalism and the suspended declaration of invalidity’ (2011) 46 Irish Jurist 180.

Gavin Phillipson: Getting real about dialogue and collaboration: the reality of the political contestation of rights

In the third paper, Gavin Phillipson will explain how his previous work has found instances where dialogue has become negative (Phillipson, 2011) or has simply not existed – as where the political response to judicial findings of rights violations has been to ‘weaponise’ them, in order to attack the legitimacy of the judicial role in protecting rights and of the rights instruments under which judges make such rulings (Phillipson, 2013). But he has also recently shown how some in- stances of judicial protection of rights through interpretation can be regarded as successful instances of ‘dialogic’ protection (Phillipson, 2014). From this he will seek to suggest that theories like ‘dialogue’ or ‘New Commonwealth’ need to become more nuanced and granular, in order to identify particular issues or circumstances in which fruitful collaboration between the judicial role and the democratic branches is possible and those in which outright conflict, or misuse of judicial rulings, are to be expected. In this regard, he will claim that aspects of both of Gardbuam’s model and some of King’s criticism of it both rest on idealised premises. While a turn to stressing collabor- ative constitutionalism would be a welcome one, he will suggest that it needs to engage fully with, rather than glossing over, the sometimes uncomfortable re- alities of political engagement with rights issues and the judicial role. Gavin Phillipson is Professor of Law at University College London, Co-Editor of the United Kingdom’s Statutory Bill of Rights: Constitutional and Democratic retrospect (OUP, 2013). But he has also recently shown how some instances of judicial protection of rights through interpretation can be regarded as successful instances of ‘dialogic’ protection (Phillipson, 2014). From this he will seek to suggest that theories like ‘dialogue’ or ‘New Commonwealth’ need to become more nuanced and granular, in order to identify particular issues or circumstances in which fruitful collaboration between the judicial role and the democratic branches is possible and those in which outright conflict, or misuse of judicial rulings, are to be expected. In this regard, he will claim that aspects of both of Gardbuam’s model and some of King’s criticism of it both rest on idealised premises. While a turn to stressing collabor- ative constitutionalism would be a welcome one, he will suggest that it needs to engage fully with, rather than glossing over, the sometimes uncomfortable re- alities of political engagement with rights issues and the judicial role. Gavin Phillipson is Professor of Law at University College London, Co-Editor of the United Kingdom’s Statutory Bill of Rights: Constitutional and Democratic retrospect (OUP, 2013).

34 CONSTITUTIONAL REVIEW ON THE GROUNDS OF FUNDAMENTAL RIGHTS AND THE RULE OF LAW IN THE MEMBER STATES AND IN THE EU LEGAL ORDER

In the transnational constitutional discourse, national constitutional courts have typically come to be per- ceived in a negative light as obstacles to closer inte- gration and co-operation. At the same time, a small but also well-documented body of scholars is con- cerned that the constitutional courts have in fact been silent, especially with regard to the erosion of rights, the rule of law and democracy in the EU economic crisis governance. This panel brings together some of these scholars and explores the suggestion that the problem is even more severe if the starting point is the continental European constitutional tradition rather than autonomous EU constitutional law. The panel aims to start a discussion about the future role of constitutional courts in the context of EU governance and the consequences if constitutional review by them is increasingly displaced.

Participants

Anneli Albi
Mariana Rodrigues Canitoliho and Rui Lanceiro
Aida Torres Perez
Dimitry Kochenov
Christian Joerges

Moderator

Room

Anneli Albi: Constitutional review on the grounds of rights and the rule of law in the three main constitutional cultures of the EU Member States: The impact of relocation to the ECJ

The paper presents some of the findings of the ERC funded large-scale comparative research project ‘The Role of National Constitutions in European and Central and Eastern European Constitutions: Interpreting Rights and Duties’, which has explored the innovative approaches of some that in European economic co- 
operation, a shift has occurred towards a thin, weak, procedural version of judicial review, with increased difficulty for individuals to challenge public decisions (Harlow Galera). The paper outlines the three main approaches to constitutional review within the EU Member States, along with statistical data regarding the rate and grounds of annulment of legal measures. The paper observes that the relocation of judicial re- view to the ECJ has put under considerable pressure the previously established standard of constitutional review in the post-totalitarian European constitutional tradition from Germany and Southern Europe to Central and Eastern Europe, while it has enhanced judicial review in the evolutionary/political type of constitutional systems (e.g. the UK the Netherlands Nordic countries). The paper invites discussion on to what extent uniformi- 

eous legal and policy standards can be identified across the Member States, and if the ECJ has or has not added value to the quality of constitutional judicial review of EU law and policy and decisions. The paper provides further analysis on the extent to which ECJ cases can be said to have created a new constitutional dialogue in the Member States.

Mariana Rodrigues Canitoliho and Rui Lanceiro: The Portuguese Constitutional Court and fundamental rights: the features of the con- tinental European constitutional tradition

The Portuguese Constitutional Court has become famous over the last six years for its so-called ‘crisis jurisprudence’: a series of constitutional decisions re- garding legislative measures approved in the context of the economic and social crisis, many of them as a consequence of the Memoranda of Understand- ing that the country signed with the infamous Troika (European Commission ECB and IMF). The Court’s decisions were heavily discussed by scholars, politi- cians and in the media, at times in stronger terms than is usually seen in such contexts. The Court was even accused of ‘judicial activism’ and it was said that its actions could potentially lead to a default or a sec- ond bailout, representing additional ‘political costs’. Time has proven the critics wrong so far, at least with regard to these latter fears. Looking at these events from the perspective of 2017 in an EU shaken by uncertainty and vast political problems, there is now sufficient distance to analyse the above case law. In the face of an apparent conflict, the Court has upheld constitutionally guaranteed fundamental rights and principles against measures seen as imperative to good economic governance by EU institutions and the governments, but also against interference by EU institutions in the democratic sovereignty of the country. The Court has left open important questions concern- ing issues that belong to the academic debate. First of all, the Court has never justified its reasoning with any kind of Euro-sceptic framework. On the contrary, it has always followed the line that decisions taken by EU institutions are to be approved by national courts and that the national courts are bound to respect the rule of law and approved that the executive and legisla- tive powers are committed to the European integration process. However, it has declared the unconstitution- ality of laws that have enacted public policies openly demanded by the EU, justifying its decisions not by any constitutional norms that could be regarded as country-specific and part of the national constitutional identity, but on the basis of fundamental principles that are common to the European constitutional tradition: democracy, the rule of law, and the prohibition of discrimination. The way in which these principles have been inter- preted is not uncommon, at least not in the context of continental European law. Is it then the case that the national legal orders are more effective than the ECJ in terms of the protection of fundamental social rights especially in the areas of access to education and healthcare, or protection of workers’ rights? Can such national protection function in the context of EU
ConCurring panels

Judicial Review by the CJEU

The goal of this paper is to examine the role of the CJEU in reviewing measures adopted in the context of the economic and social crisis in Europe. Judicial review of the acts of public authorities to check that they do not overstep their powers or encroach upon fundamental rights is an essential feature of the rule of law. At the same time, the exceptionality of the crisis has led to the heterogeneous array of sources of Euro-crisis law, and the blurring line between the national supranational and international spheres has hindered a robust review by the CJEU and the full protection of fundamental rights. First, the paper will analyse the evolution of the CJEU case law in this field to understand the mode of review exercised by the CJEU and the way in which the CJEU demarcates its own jurisdiction. In Pringle (C-370/12), the CJEU declared that it lacked jurisdiction since the domestic courts had failed to specify the connection with EU law. The same time, in a recent and unprecedented judgment (Ledra Advertising C-875/15 P to C 10/16 P) the CJEU opened a new door by confirming the application of the Charter of the Member States. One of the curious outcomes of the current reading of the Rule of Law in the EU is that this principle can be presented as demanding to trump the values of the Treaties as well as of the national constitutions in the name of upholding formal organisational considerations which seemingly underpin the EU legal system, resulting in anarchical confusion. Once the rhetoric of the promotion of democracy is added to the picture, the problematic essence of the EU’s Rule of Law acquires even more visible and potentially dangerous undertones.

ConCurring panels

35 DIALOGUES BETWEEN COURTS: HUMAN RIGHTS CONSTITUTIONALISM

Plural and multilevel constitutionalism implies internal dialogues within each constitutional domain and external dialogues among each one of them having in mind the Ius commune idea and the centrality of human rights. Constitutional jurisdiction is no longer a matter of local constitutionalism but it has to deal with human rights and EU constitutionalism or rather a “human rights constitutionalism”. A new agenda for public law in the twentieth century merges the global and the local by means of constitutional incorporation of international human rights. The challenge is given to International Courts, Supreme Courts and local tribunals in order to accomplish this new agenda in a dialogical way.

Participants

Melina Girardi Fachin
Vera Karam de Chueiri
Estefania M. de Queiroz Barboza
Rodrigo Kanayama, Tomio Fabrício, Angela Costaldeillo and Ilton Robi Filho
Maria Francisca Miranda Coutinho
Moderator
Melina Girardi Fachin and Vera Karam de Chueiri
Room
7C-2-24

Melina Girardi Fachin: Democratic dialogues on human rights constitutionalism

The contemporary conception of human rights inaugurated a new sphere of responsibility in the institutional setting of the constitutional courts and the two biggest Latin American federations (Brazil and Mexico) forged or expanded the abstract judicial review in their Supreme Courts in the 1980’s and 1990’s, which were the democratic consolidation decades. Despite the similarities between these countries, the degree of influence on the decisional process (the relationship between government and parliament, and parliamentary majorities) are not identical, as is the degree of political consensus. In this sense, the central question is how effective is the abstract judicial review on the decisional process? What are the differences? Do the Constitutional Courts interfere and cancel the decisions of the other branches and political institutions with no distinction or prejudice or they support the decisions of the majority? How autonomous are the Courts and their decisions? Is the abstract judicial review an important ingredient for the democracy stability, for the decisions capabilities of the government and majorities, and for the institutional consensus? And the Political Science achieved a degree of knowledge about the participation of Courts on the decisional process. However, the comparative studies about Latin American and Iberian Courts, which use empirical data, are rare. Therefore, the aim of this paper is to show how comparable these courts are looking at their judicial review system and how they impact in the transitional process to democracy and in the engines of powers.

Estefania M. de Queiroz Barboza: The (non) use of a comparative constitutional method in the case selection of Brazilian Constitutional Court.

This paper discusses the experience of “migration of constitutional ideas” as far as Brazilian Supreme Court has been moving towards expanding a methodological consistence. Brazilian Supreme Court has constantly made use of foreign constitutional cases in its decisions but it rarely pays due attention to the context and nuances that have given rise to similar or alternative interpretation or practice of constitutive norms, which becomes a random selection of cases to support a decision or an academic argument. Recently, Brazil’s Supreme Court decision on the presumption of innocence referred to foreign precedents without having in account the necessary methodology to do it and the difference among constitutional contexts.

Rodrigo Kanayama, Tomio Fabrício, Angela Costaldeillo and Ilton Robi Filho: Comparative studies on the role of abstract judicial review at consensualism of decisional process and on democratic stability in Brazil, Mexico, Spain and Portugal

The Iberian Countries (Spain and Portugal) created the Constitutional Courts on the end of the 1970’s, after the democratic transitions. Spain established a model of consensualism, which is the degree of political consensus in the decisional process (the relationship between government and parliament, and parliamentary majorities) and the difference among constitutional contexts.

The (non) use of a comparative constitutional method in the case selection of Brazilian Constitutional Court.

This paper discusses the experience of “migration of constitutional ideas” as far as Brazilian Supreme Court has been moving towards expanding a methodological consistence. Brazilian Supreme Court has constantly made use of foreign constitutional cases in its decisions but it rarely pays due attention to the context and nuances that have given rise to similar or alternative interpretation or practice of constitutive norms, which becomes a random selection of cases to support a decision or an academic argument. Recently, Brazil’s Supreme Court decision on the presumption of innocence referred to foreign precedents without having in account the necessary methodology to do it and the difference among constitutional contexts.
ConCurring panels

1988-2016); 2) Acciones de Inconstitucionalidad in Mexico (1,146 lawsuits, 1994/2015); 3) Recursos de Inconstitucionalidad in the Supreme Courts, whose are capable to realize the importance and strength of what remains and re-stitution, broadening of public political debate in private spheres and strengthening of the Constitution's role after the process of redemocratization post 1988) and the increasing discredit in the ability of rulers to act accordingly to public interest and to consider the heterogeneity of perspectives involved. However, in a complex society like the Brazilian one, the complete overcoming of the category of representation can not be sustained. The present article intends to approach the impossibility of the representation to be thought by the philosophers principle of the identity, like a closed total and zero sum. It also maintains that legitimacy of constitutional change and its inter-play with the normative and institutional evolutions are key elements of contemporary constitutionalism and of the way that a legal order is evolving in terms of a living organism/text. Giving emphasis on the various ways and means and especially on the amending formulas (formal or informal) of the constitution, constitutional theory aims at explaining the constitution-making processes and introduc-ing a certain (meta-normative) understanding of the constitution and its normativity.

Juliano Zaiden Benvindo: Conceptual Constitutional Change in Latin America

Political crises are a rich source for constitutional and political etc.). Consequently, it goes without say-ing that the theory and its analytical categories are of great explanatory value, in particular when it comes to comparative research. Nevertheless, at the same time, the constitutional change theory seems to adopt a normative idea about the constitution per se. In fact, the theoretical models of constitutional change serve to classify the constitutions and their different perceptions (i.e. I shall address, in particular, the lines, the constitutional change theory change seems to embrace a specific concept of the constitution as a method-ological condition for the very notion of change. In this sense, the theory reproduces a traditional distinction of formal/informal change or amendment/transfor-mation, in that time creates a divergence between the constitutional change theory from a realist/hermeneutical point of view to provide concrete examples, mainly from the field of judicial review, that verify the above mentioned hypothesis and imply an interpretative concept of the constitution and its normativity.

Juliano Zaiden Benvindo: Conceptual Constitutional Change in Latin America

Nadiv Mordechay: Discussant

The Legitimacy of Informal Constitutional Amendment and the “reinterpretation of Japan’s War Powers”

The government of Japan has purported to rein-terpret the famous war-renouncing provision of the Constitution in a controversial process to immediately circumvent the formal amendment procedure. This article argues that these developments should be of great interest to constitutional law scholars in America because they bring into sharp focus is-sues that remain underdeveloped in the debate over informal amendment. Theories on informal amendment suggest that there are some constitutional changes that exceed the reasonable range of normal interpretive development, but which are not implemented through formal amendment procedures. The existence, scope, and legitimacy of such informal amendments remains hotly contested. This article focuses on the key issue of legitimacy, using the Japanese reinterpretation as the lens through which to explore the relationship between the intent of the agents of change, and the passage of time as factors affecting the legitimacy of any particu-lar informal amendment. It also suggests a new way of conceptualizing the relationship among authority, legitimacy, and the meaning of constitutional change.
During the past few decades both Latin America and the Caribbean have experienced major institutional changes that have been translated either into the enactment of new Constitutions or into profound constitutional reforms. This panel aims to offer explanatory and critical accounts about a broad variety of issues pertaining constitutional change in these regions that range from the role of Constitutional/Supreme Courts in these transformations and the influence of external factors on the amendment power, to new solutions to traditional dilemmas drawing on the experience of the field outside of the region itself. In this Article, I seek to explain some of these major reforms and situate their consequences of this sort of transitional constitutionalism. In this context, this paper aims to analyze the role of the constitutional court in this new wave of transitional constitutionalism. In fact, the Colombian Constitutional Court has played a very substantial role since the very beginning of the peace process. Instead of being absent or playing a static or discreet role, this Court of Law has actively participated in the definition of the framework of the negotiation, the reviewing of constitutional amendments for peace, and the laws and executive orders enacted to implement those peace compromises. Having such and active Constitutional Court in this momentous process has many advantages as well as risks, which are analyzed and assessed in this paper.

Diego Andrés González Medina: The Colombian Constitutional Court and the Peace Process

Colombia is currently the most relevant case of transitional constitutionalism all over the world. The peace process between the Colombian Government and the Colombian Revolutionary Armed Forces – The People’s Force (FARC-EP) has challenged several ways Colombian constitutionalism and the very role of the most significant Colombian institutions. Even though the inner value of the peace process has partially eclipsed those constitutional changes, it is time to analyze and evaluate the consequences of this sort of transitional constitutionalism. In this context, this paper aims to analyze the role of the constitutional court in this new wave of transitional constitutionalism. In fact, the Colombian Constitutional Court has played a very substantial role since the very beginning of the peace process. Instead of being absent or playing a static or discreet role, this Court of Law has actively participated in the definition of the framework of the negotiation, the reviewing of constitutional amendments for peace, and the laws and executive orders enacted to implement those peace compromises. Having such and active Constitutional Court in this momentous process has many advantages as well as risks, which are analyzed and assessed in this paper.

Richard Albert: Constitutional Reform in the Caribbean

Some of the most fascinating developments in constitutional law in the Caribbean have occurred over the last generation in the countries of the Caribbean, many having completed, successfully or not, historic processes of constitutional reform. Yet these developments have remained largely unexplored by scholars in the field outside of the region itself. In this Article, I explore some of these major reforms and situate their significance in comparative perspective. My objective is twofold: first, to explain some of the momentous constitutional changes that may await the region; and second, to invite scholars of comparative public law to become more closely engaged with the Caribbean, a region that is ripe for comparative study and one that offers new possibilities for the study of constitutionalism beyond the conventional list of countries that today feature all too frequently in most if not all major studies of comparative public law.

Mariana Velasco Rivera: Contributing to abusive constitutionalism: is the Supreme Court incen-
tivizing constitutional hyper-reformism Mexico?

In the last 30 years in Mexico, constitutional amendment has been used as a hegemonic preservation tool through which political actors have been entrenching their interests’ many times running counter public interest. In such contexts constitutional courts and substantive judicial review of constitutional amendments represent quintessential elements to deter politicians engaging in abusive practices and denounce the destructive value of those democratic values. In the case of Mexico, the Supreme Court has failed to do so, setting the right incentives for political parties to continue their abusive practices. In this paper, I explore the question why despite having the institutional means to engage in transformative judicial action, the Mexican Supreme Court has been so reluctant to engage in it.

Diego Andrés González Medina: The Colombian Constitutional Court and the Peace Process

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Joel Colón-Ríos: What is the Constitution of Puerto Rico?

There are two main ways of thinking about what a constitution is. The first, and more legalistic one, focuses on form: a constitution is a document that contains rules that are more difficult to change than ordinary laws. This is what constitutional theorists usually refer to as ‘the constitution in the formal sense’. The second approach, the constitutional review of economic measures must be subjected to different intensity tests (light, moderate, serious). This, depending on the impact that the economic regulation has produced or might reasonably produce in an ordinary law. The criterion used for economic regulatory and environmental constitutional values, that were not considered during the political debate and that can be measured by legal standards or its effectiveness.
After having exposed the merits and shortcomings of each judicial strategy the paper claims that no single strategy fits with the role assigned to national constitutional courts in European public law. This justifies the elaboration a comprehensive doctrine identifying the different circumstances in which national constitutional courts should defer or resist to Union normative claims.

The public law of our time is a law in multiple layers. While this multi-layered structure is usually examined in its vertical spread (international – European – national dimension). Horizontal relationships between legal orders have various forms, ranging from mutual trust and recognition to more nuanced modes of transnational interaction. One such mode is comparison. Comparison has been a key factor for designing law ever since the first legal orders have emerged in human history. Considering modern constitutional courts would not have been thinkable without comparing. Against this backdrop this contribution explores the shaping force of comparison in public law. While the practice of comparison heavily influences the process of designing and interpreting legal norm, it does not in general establish normative requirements. Neither does it compel the legislator to opt for a particular design of rules nor does it coerce the judge in interpreting the law in a specific sense. Hence, the notion of “shaping force” is intentionally broadly framed, in order to encompass modes of influence that do not reach the level of a normative impact. However, comparative public law can also entail normative consequences as well, although constitutional courts have possibly to address the discontent with some elements of NC, particularly those related to the rise of governmental structures ‘beyond the state’ and more broadly globalization. Finally, and most importantly, it needs to be seen how New Constitutionalism has affected the legitimacy of constitutional courts in the EU.

Concluding panels

Beyond the state and more broadly globalization. Finally, and most importantly, it needs to be seen how New Constitutionalism has affected the legitimacy of constitutional courts in the EU.

Marco Dani: Deference, correction and resistance: in search of the terms of engagement between national constitutional courts and Union law

The paper examines deference correction and resistance the judicial strategies inspiring the activity of German political and public discourse. In defending judicialization national constitutional courts reinforce the normative claims the policy agenda and the institutional framework of Union law. In correcting judgments national constitutional courts engage with Union law with a view to make more sustainable its impact on national democratic order. In resistance national constitutional courts oppose national constitutional principles against Union law encroaching on national constitutional democracies. After having exposed the merits and shortcomings of each judicial strategy the paper claims that no single strategy fits with the role assigned to national constitutional courts in European public law. This justifies the elaboration a comprehensive doctrine identifying the different circumstances in which national constitutional courts should defer or resist to Union normative claims.

Mattias Wendel: The shaping force of comparison in public law

The shaping force of comparison in public law

The shaping force of comparison in public law

The shaping force of comparison in public law

The shaping force of comparison in public law

39 CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCEDURE

The constitutional revolution in Israel has led to a broad discourse regarding rights of suspects and victims in the criminal proceedings. Israeli law recognizes that to due process rights are protected by the Basic Law: Human Dignity and Liberty being part of the right to dignity. There is an extensive writting and case law recognizing rights such as the right against self-incrimination, the right to a defense counsel, and the right to be present at trial as constitutional rights. The implications of the recognition of constitutional rights relate mainly to the validity of laws and admissibility of evidence. This panel will address constitutional rights and constitutional values which are less discussed in the context of criminal proceedings i.e. in wide circles of the right to human dignity and its derivatives in the context of criminal law and procedure. For example, what is the role of truth in a present-day criminal process? Is truth a constitutional right? And consequently, do lies during interrogation violate constitutional rights? Do innocent persons have a constitutional right not to be convicted and whether and how safety can promote it?

Participants

Rinat Kitai-Sangero
Boaz Sangero
Roni Rosenberg
Michal Tamir
Moderator
Michael Tamir
Room
8A–2–17

Boaz Sangero: Safety from False Confessions

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In certain fields the meaning of a “safety-critical system” is well understood and resources are therefore invested in modern safety methods which reduce significantly the rate of accidents. This is the case for example in the aviation field which abandoned the obsolete “Fly-Fix-Fly” approach and developed more advanced safety methods that generally follow an “Identify-Analyze-Control” model and are aimed at “First-Time-Safe.” Under the latter approach there is a critical evaluation of the probability of their occurrence and a complete neutralization of the risk or at least its reduction to an acceptable level. A false conviction is no less a systemic error and accident than a plane crash. Yet in criminal processes i.e. in wide circles of the right to human dignity and its derivatives in the context of criminal law and procedure, and the overwhelming majority of false convictions are never detected. Consequently no thought has ever been given to safety in the system. Empiric studies based on the Innocence Project’s findings point to a very high false-conviction rate: at least 5% for the most serious crimes. About one-quarter of those convictions had been based on a false confession. Current conviction law – in particular the Miranda rules – only addresses the possibility of an involuntary confession. It does not seriously deal with the existing possibility of false confessions (which may be voluntary). This article proposes a theory and some initial tools for incorporating modern safety into the criminal justice system. Specifically I demonstrate how the innovativeness of democratic legal process (STAMP) safety model can be applied in the criminal justice system by developing constraints controls and barriers against the existing hazards in the context of convictions grounded on the defendant’s confession during police interrogation.

Roni Rosenberg: Sexual Harassment

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In early 2014, Amendment 10 of the Prevention of Sexual Harassment Law came into effect. Under key German laws in certain circumstances taking a photograph, video, or recording of a sexual nature, without the consent of the suspect, constitutes sexual harassment and is punishable by a maximum of five years in jail. The amendment was passed, in part, in response to the growth in sharing via social media, motivated by revenge. This lecture will present some of the legal difficulties inherent in Amendment 10 and proposes appropriate solutions. These potential solutions are intended to assist both the legislature and the courts. Some of the issues discussed relate to inconsistencies between the provisions of this Amendment and statutory provisions relating to the protection of individuals. It will be argued that such inconsistencies will spur the legislature to enact further amendments. Other solutions, may assist the courts in interpreting the Amendment as they apply it, with regard to such issues as: the scope of the crime, the scope of the defenses provided. The importance of appropriate application of the this Amendment is obvious in that it can and should be a key tool in deal-
ConCurring panels

Michal Tamir: Selective legislation

Enforcement authorities supposed to enforce the law in a way that fulfill the main goals of the law. Thus, they are limited in creating enforcement categories. Otherwise they might act selectively. But is the Legislature not restricted in making classifications? Can the legislature act a selective law? The subject of selective enforcement is very developed in Israel. However, the phenomenon of selective legislation rarely gets discussed. The fundamental principle of the rule of law in its substantive sense, requires that the norms will be general in nature, namely refers to non-specific group of people. The rationale is to reduce the fear of harassment of someone, on the one hand; or unjustified preference of others, on the other. Selective legislation – that is legislation that addresses some person or persons using the name or characteristic distinguishes – contradicts the rule of law. Selective legislation contradicts the separation of powers principle too. Personal legislation intervenes with the realm of the Executive (if the matter is administrative) or with the realm of the Judiciary (if the matter is judicial). Moreover, selective legislation impedes the ability to direct people conduct and hence constitutes a retroactive application of the law. Although selective legislation is contrary to the basic foundations of a democratic, the Supreme Court refrains from enforcing the restriction that the legislation should be general, limiting the judicial review to situations where the constitutional right to equality is infringed. The practical result is allowing situations where the law meets the demands of proper purpose and proportionality. However not all the selective laws discriminate. Moreover, it is important to have judicial review of selective legislation regardless of the violation of rights, since the separation of powers is a bouncer from the tyranny of government. The article will argue that this is where the court need to use meta-textual judicial review, based on the fundamental principles of democracy and the social contract.

40 CONSTITUTIONAL RIGHTS IN THE POLICY MAKING DOMAIN: NORMATIVE AND EMPIRICAL PERSPECTIVES

Conflicts between constitutional rights and public interests are at the heart of public law and subject for much debate and dispute. Academic scholarship has traditionally focused on the perspective of the Legislature in its role of reviewing limitations of constitutional rights. This panel is dedicated to exploring rights-restricting policy from the perspective of policy makers extracting the balancing debate from the sterile environment of judicial opinions and analyzing it in the context in which it first takes place. This shift of focus from the judicial evaluation ex-post to policy design ex-ante calls for a diversification of methodology. The papers on this panel adopt different approaches: A normative approach challenges whether the proportionality framework as developed by courts is beneficial as a conceptual framework for policy making. A descriptive approach accounts for the roles that different institutional actors play in the policy process with regard to rights and conceptualizes the interactions and dynamics that ultimately determine the final balance struck between competing considerations. We explore the role perceptions of different actors in the process with regard to constitutional rights and the interactions between them as they play out throughout the process. Finally, we demonstrate the variety of implicit conceptions of the proportionality principle held by different participants in the policy arena.

Talya Steiner: Conflicts of Constitutional Rights and Public Interests: Perspectives of the Participants in the Policy Making Process

This paper is inspired by insights gained from a series of two dozen interviews with current and former participants in the policy making process in Israel, revolving around the question of proportionality and the consideration of rights. Based on the interviews we conceptualize particular characteristics of the policy making process (i.e. its being a group endeavor, an iterative process) and their implications for the final balance struck between competing considerations. We explore the role perceptions of different actors in the process with regard to constitutional rights and the interactions between them as they play out throughout the process. Finally, we demonstrate the variety of implicit conceptions of the proportionality principle held by different participants in the policy arena.

Raanan Sulitzeanu-Kenan: Enhancing the Protection of the Otherwise Favored: An Empirical Analysis of the Effect of the Label “Rights” on Balancing Between Considerations

Constitutional rights are conceived of as restraining policy makers, signaling to provide special weight to an interest that is in danger of under-protection. For example, in the context of speech, the right is required particularly in order to protect the expression of unpopular views that challenge prevailing political status quo. Our experimental study shows that the addition of the label “right” to the consideration of free speech strengthened its protection when the decision maker identified with the ideology of the group whose speech was to be protected but had no effect when he was ideologically opposed. These findings suggest that in the realm of decision making the rights discourse may have the opposite affect than that intended: enhancing the protection of favored, rather than un-favored interests.

Mordechai Kremnitzer: On the perils of “governing like judges”: Judicial review and the practice of rights-consideration in the policy process

A common implication of judicial review is the notion that policy makers should, and indeed apply the legal criteria implemented by judges, captured by the saying that “governing with judges also means governing like judges” (Stone-Sweet 2000: 204). In this paper we critically review the implications of applying the criteria of judicial review in policymaking. Our analysis focuses on the challenge of rights-consideration in the policy process in comparison to judicial review based on proportionality analysis. We review various aspects entailed by the differences in goals and in the challenges involved in policy making and judicial review. Based on this comparative analysis, we demonstrate the incompatibility of the analyses adopted in judicial review to the public process, and conclude with several alternative practices for rights-consideration in the policy making.

CONCURRING PANELS

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41 CHALLENGING RACIAL MARGINALITY IN PUBLIC INSTITUTIONS - METHOD

In addressing the conference theme of courts, power and public law, the papers in this panel will consider the production and consequences of homogeneity in law and politics. This is not only relevant as a result of shocking public events in 2016 such as Brexit in the UK and Trump in the USA. Over the last few years, questions such as ‘where are the Black Lawyers’ or ‘where are the Black law professors’ have been raised in the UK and other parts of the EU, where there are significantly fewer black legal female or male professionals – in higher education in practice or the courts – than in the USA. However, this issue is equally resonant beyond the nation state: Where are the Black international lawyers? In addressing this, papers in this panel will also consider questions such as: What is the role of the black lawyer in public or public international law? What are the consequences of their absence? Would Brexit or the election of Trump had happened with less homogeneity? The panels will seek to address this topic from multiple perspectives. Papers will highlight factors of debate on arenas of opportunity and oppression – from schools to universities firms and courts – that link power and public law in ways that may be detrimental to the interests of marginalised people.

Participants

Terry Smith
Audrey McFarlane
Gregory S. Parks

Moderator

Iyiola Solanke

Room

8B-2-03

Terry Smith: Donald Trump, the Supreme Court and the Culture of White Grievance

Audrey McFarlane: Race Class & Moral Claims for Justice

Gregory S. Parks: Race Cognitive Biases and Law Student Teaching Evaluations

CONCURRING PANELS

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Europe’s administration is changing. New challenges to the preservation of the rule of law are posed by increasingly pervasive secrecy, growing fragmentation along different jurisdictions and the outdated overall design of available judicial control mechanisms. The panel inquires into the role of courts in responding to these challenges. The panel will begin by exploring the challenges of courts in ensuring legal accountability in the secretive cross-border data exchanges that occur between EU, international and state bodies in the context of Europe’s interoperable information systems. The panel then explores the role national and EU courts in scrutinizing rulemaking power in instances of regulatory cooperation between EU and international bodies. Doubts are also raised by how EU courts have attempted to preserve the rule of law in joint administrative decision-making by national and EU authorities, when the EU’s judicial review system is designed for decisions taken by only one of the two levels. Lastly, relying on quantitative analysis of the litigation initiated by private applicants before EU courts the panel will examine whether EU courts have indeed gone beyond their initial role of administrative courts to assume a more mature constitutional role.

Participants
Deirdre Curtin
Joana Mendes
Filipe Brito Bastos
Michał Krajewski
Moderator
Diana-Urania Galetta
Room
BB-2-09

Deirdre Curtin
EU Security Handshakes and Information Control: Below the Radar of Judicial Review

Citizens’ trust in law enforcement took a massive dive when the invisible security handshake became visible through leaking by Edward Snowden. The main driver for this initially secret private-public collaboration presupposes that any given act of authorization may be revealed in different ways and with regard to different components of the information. This paper explores the secrecy effects of the principle of origination control over classified information in the context of foreign affairs by the EU and in CFSP. European and national legislation on mandatory data retention by private actors (banks, mobile phone operators and airline companies) has been the setting for litigation by privacy activists in Europe and European judges have been particularly outspoken on the general right of access to data. But the question remains whether the action can cause or reveal further layers of invisibility. This is in particular revealed to be the case where the principle of inter-operability spreads in European and national data-bases and seems to fall below the radar of any possible judicial control, perhaps systematically.

Joana Mendes
EU Executive Rulemaking in International Perspective: Legal Challenges and Judicial Review

Rules and decisions adopted at the international level define substantive aspects of EU regulation concerning health and safety standards of pharmaceuticals, chemicals, food products, parameters of environmental protection, among other issues. The intertwined role of the international and domestic sites of authority is such that safeguarding the effectiveness of the respective procedural guarantees may justify approaching the respective decision-making procedures as segments of a broader regulatory cycle. Yet, they are subject both to different and to different controls, potentially opening gaps in law’s ability to structure public authority and leading to instances of unrestrained authority. Taking these premises as a starting point, this paper will, first, examine the ways in which the EU Courts have approached the legal problems arising out of the circular effects between international and domestic rulemaking. Its aim is to assess whether judicial review by EU Courts has prevented or contributed to instances of unrestrained authority and to examine how they have handled the decisions of domestic (EU) institutions and bodies the substance of which is defined via international regulatory cooperation. The paper will, secondly, address the legal position of holders of rights and legally protected interests excluded from international rulemaking procedures.

Filipe Brito Bastos
A divided judiciary for a joint administration? Composite procedures and the limits of judicial review

The EU system of judicial review relies on a strict separation between the jurisdiction of national and EU courts whereby only EU courts may review the exercise of national powers. That system presupposes that any given act of authority may be attributed to either the EU or national level. This assumption is challenged by a decision-making form which has become increasingly pervasive in recent decades in areas as different as structural funds and GMO governance. Such composite administrative procedures combine national and EU measures into unitary final decisions. Since the administrative acts resulting from composite procedures do not fall exclusively to either level of judiciary, gaps in judicial review may arise which compromise the principle of the rule of law. The paper explores how EU courts have addressed this problem. It argues that EU courts have found a way to guarantee that the actions involved in composite procedures does not evade judicial control. They have done so by respecting as much as possible the limits of the jurisdiction of EU courts. The paper further argues that the case law has shown that the location of discretion at the national or EU stages of a composite procedure is decisive in determining the competent judiciary for judicial review. Lastly, the paper demonstrates that the creation of composite procedures has obliged EU courts to face an unexpected dilemma between respecting the limits of EU and national judicial jurisdictions and ensuring the full guarantee of the rule of law at the Member State level. From the answer to this dilemma, a new doctrine of judicial review emerged that addresses the unique challenges of decision-making.

Michał Krajewski
An administrative or constitutional court? A quantitative analysis of private applicants’ direct access to the EU courts

The EU Court of Justice was designed primarily as a forum for the settlement of legal disputes between the member states and EU institutions. In contrast, the admissibility criteria of annulment actions laid down in Article 263(4) TFEU do not make the mechanism for judicial review of EU acts widely available to private parties. The latter can challenge only the EU acts addressed to them on a direct and individual basis, whereas private challenges to generally applicable legislative and executive acts as well as challenges by workers’ organisations, social actors and the interest groups are excluded. High hopes expressed with regard to a new limb of Article 263(4) TFEU, added in the Lisbon Treaty, have been swiftly dispelled due to its strict interpretation by the EU courts. The admissibility criteria of annulment actions determine what type of cases come before the EU courts. Interestingly, despite fundamental changes in the EU legal order – the inclusion of fundamental rights standards, development of general principles, expansion of EU law, the removal of derogatory clauses – the admissibility criteria have never been substantially revised by the member states or interpreted by the EU courts. Moreover, in practice the procedure for preliminary reference from a national court on the validity of an EU act does not fill in the gaps left by the annulment procedure. The paper will present the quantitative analysis of the type of private applicants and subject-matter of their cases completed by the

European courts between 2014 and 2016. It will argue that most of the EU courts activity under scrutiny can be classified as the judicial review of individual administrative decision-making, carried out at the request of economic operators. In contrast the constitutional review of legislation, the judicial review of executive rule-making as well as the challenges to any EU acts by social actors and public interest groups remain rare or almost inexisten. In conclusion, the paper will claim that the EU courts, by applying the strict interpretation of Article 263(4) TFEU, refuse to fully use their potential as administrative and constitutional courts. This, in turn, undermines the rule of law in the EU.
Recent developments in Africa indicate that the federal idea that was never given a chance to develop is now re-entering the theoretical and political discourse of several African countries, above all as a response to communal tensions. Despite constitutions that provide for a robust and dynamic federation, the federal or semi-federal systems in Africa operate in centralised manner. In many of those countries, the federal arrangement that by definition multiplies opportunities for offices and helps to promote subnational democracy has been undermined by a political practice that largely ignores the system. This begs the question whether the gap between the Constitution and the practice can be partly explained by the absence of constitutionalism. Can it be explained by the fact that most African countries, even after the adoption of the Constitution, have not seen the emergence of independent institutions that could buttress constitutionalism and challenge the constitutionality of government actions? This session focuses on one particular independent institution that can curtail government actions that flout the basic principles of constitutionalism: the Courts. It focuses on the impact of courts on the operation and functioning of the federal system in Africa.

Conrad Bosire Muguya: The Courts and Devolved Governance in Kenya

In 2010, Kenya joined other states with federal and quasi-federal arrangements by adopting a system of government composed of 47 county governments. While legislative and executive power is devolved to these units, judicial power is retained at the centre and bestowed on a unitary judicial structure. Devolution of power was one of the contentious issues in the entire review process; however, at no point was the issue of devolving judicial power strongly mooted. Kenya’s legal system (common law) and general legal tradition is inherited and firmly rooted in the British legal system that is unitary. Even when the British bequeathed a semi-federal system of government at independence, they left the judicial structure unitary. This may well explain why the federal debate did not extend to the Judiciary. While the Judiciary is structurally part of the national government structure, it is functionally a shared institution that plays an “umpire role” in Kenya’s devolved government structure. The Judiciary’s role is set against a political and institutional culture that is centralised, a culture which the Constitution seeks to change into one where there is shared horizontal as well as vertical state power. It is therefore inevitable that courts are confronted with disputes whose content is the balance of national and county powers. While courts have applied the Constitution to such disputes or matters, there are a few factors limiting the ability of courts, including the newness of the devolved system, to declare the constitutionality of the “federal balance”. This paper will argue that while the Constitution establishes an independent judiciary that can maintain federal balance, and while courts have largely demonstrated keenness to assert the principle of “federal balance” in the Constitution, capacity limitations have impeded effectiveness of ensuring the “federal balance”.


A democratic South Africa opted for a hybrid federal system of governance in which the fact that a single party, the African National Congress (ANC) dominated most provinces (and at one time all), the provincial sphere of government did not become the de facto administrative arm of the national government. Provinces in opposition hands have used the courts, with the Constitutional Court at the apex, strategically to protect their autonomy. The Constitutional Court has not, however, adopted a pro-provincial interpretation of the constitutional provisions establishing provincial autonomy (however limited it was). Over the years it followed a restrictive approach that favoured the national government. Also when interpreting the division of powers between provinces and municipalities, it mainly favoured the latter. However, when it came to the adoption of national legislation affecting provinces, the Court has been robust in protecting the role that the National Council of Provinces plays in the national legislative process. The reasons for such judicial behaviour are further explored.

Yonatan Fessaha and Zemelak Ayele: Umpiring Federalism in Ethiopia

With the adoption of the 1995 Constitution, Ethiopia has implemented what is often referred to as a dual federal system in which political, fiscal, and judicial powers are divided between the federal and the nine state governments, with the explicit aim of managing the ethno-linguistic diversity that characterizes the Ethiopian society. Despite the constitutional commitment to promote subnational autonomy, the federation, by and large, functions in a centralized manner. The division of powers between the federal and state government has not led to a dynamic interaction between these two autonomous units of government. The national government has translated state governments into implementing agents. This begs the question whether the current judicial system provides for an umpire that promotes vertical constitutionalism. This paper focuses on the Ethiopian judiciary and looks into the role of the courts in the promotion or erosion of the federal partnership.

It also looks into the dual nature of the Ethiopian judiciary and investigates its contribution to the management of ethnic diversity. It also looks into the role of the House of Federation, the second chamber of the Ethiopian federal parliament, in upholding disputes between the federal and state governments.

Karl Kössler: Courts in Federal Systems: A Global Perspective

Many federal systems are characterised by a wide gap, sometimes a chasm even, between how the system is designed in the constitutional text and how it actually operates. The fact that in constitutional terms relatively decentralised federations are often rather centralised in practice or more rarely vice versa, is not least due to the impact of constitutional jurisprudence. The potential to shape the effects of a federal system’s constitution on its actual operation is, of course, a natural corollary of the role of apex courts as ultimate interpreters of the legal order and as (supposedly) impartial umpires between different levels of government. This paper explores various drivers that seem to determine whether a court exploits this potential or not. Among these possible drivers, which appear important, in particular but not exclusively in the African case, are the following: the dual or unitary structure of the court system, the organisation of the apex court and the issue of subnational participation in the appointment of judges as well as several factors affecting its jurisprudence (e.g. the embeddedness in a system and its constitutional implications of the degree of rigidity of the federal constitution, the scope of judicial review, the detaileness of the distribution of powers and rules for its interpretation). As the recent turn in several African countries towards federal arrangements has been marked by a perception of federalism as an effective tool to manage ethno-cultural diversity, the paper places particular emphasis on experiences from countries that feature such diversity.

This panel aims to deal with the use of constitutional identity by some East–Central European Member States of the EU. The reference to national constitutional identity by governments and constitutional courts sometimes serves to legitimize deviations from the shared values of rule of law, democracy, and fundamental rights, the ‘basic structure’ of Europe. Especially the two main backsliding countries, Hungary and Poland justify their non-compliance by referring to national sovereignty and constitutional identity. The panellists try to answer the question whether there are indeed common characteristics of national constitutional identities in these new Member States, and how can the EU effectively protect the values in Article 2 TEU, while respecting the constitutional identity of the Member States. Due to the number of presentations, the country case studies and the comparative and European aspects will be discussed in two separate subpanels.

Participants

David Kosar and Ladislav Vyhnanek: The Czech Republic: Constitutional Identity of the Czech Republic: A Dormant Concept Thorn between Legal and Political Identity?

Despite its bicultural identity as shown in its Lisbon I Lisbon II and Holubec judgments the Czech Constitutional Court has not engaged with the concept of constitutional identity good and proper. While the founding principles of the Czech Constitution in particular the Eternity clause and the relevant case law of the Czech Constitutional Court provide a helpful starting point for reconceptualising the constitutional identity is a dormant concept in the Czech Republic. The lack of public debate and the limited involvement of other constitutional actors in the identity discourse pose another challenge to conceptualizing Czech constitutional identity. Even though the concept of constitutional identity is a normative one, the process of discovering and defining it cannot be limited to a textual reading of the constitution itself or even of the relevant case law of a constitutional court. Hence, it is important to bear in mind that the judicially created understanding of consti-
tutional identity does not necessarily have to find traction among the people. Put it more bluntly, “legal” concept of constitutional identity developed by the Czech Constitutional Court may significantly differ from the people’s “political” understanding of constitutional identity.

Katarina Šipulová: Slovakia: Democratic Backsliding and (Ab)use of Constitutional Identity: Slovakian Place in the Concept of Fundamental Constitutional Values of the European Union

This paper seeks to present the Slovak example of constitutional values development and its place in recent discussions. Slovakia undoubtedly represents a peculiar case among the ECE countries thanks to its episode of non-democratic regime established under the Prime Minister Mečiar at the beginning of 1990s. The paper therefore discusses the formation of constitutional values under different stages of democratization (post-communist transition, non-democratic regime itself, and democratic backsliding during the EU integration, and finally, the recent backsliding under the populist government of SMER). Apart from the law on the books, which is compared with constitutional provisions from neighboring countries, the paper also searches for a practical use of concepts of constitutional values, national identity and a common European heritage by individual political actors in order to foster or stay the fragile democratization process and its consolidation in later stages.

Tomasz Tadeusz Konczewicz: The Politics of Constitutional Identity. Between Constitutional Essentials and Unconstitutional Capture

The constitutional identity stands for distinctive- ness of a constitutional order. It takes on special importance when faced with multiple sources of constitutional authority each with its own constitutional essentials to look after, and vindicate. After 2004, Polish Constitutional Court has been careful in reconstructing Polish constitutional identity in harmony with the new legal reality of the EU Accession and new legal order rhetoric of the Court of Justice. It was searching for a middle ground between rational deference and constructive critique. This delicate status quo has been undermined by the unconstitu- tional capture that has swept across Poland after 2015 elections. Unconstitutional capture constitutional essentials are deprived of their exceptionality and shaped by the transient politics. Necessity and short-term perspective shapes the identity which is looked at as a trump card against the EU. Enter the sovereignty talk, constitutional identity becomes a catch-all phrase, used and abused by the political powers-that-be. All this begs a question of the Polish constitutional identity, its elements and, last but not least, viability of the concept moving forward in a context of a state captured by the populist and divisive politics.

Gabor Halmai: Hungary: Non-constitutionalist Nationalist Constitutional Identity

Before and right after the EU accession, the Hungarian Constitutional Court, a powerful and still independent institution developed a standing jurispru- dence regarding an almost uncontested primacy of EU law. But ever since the 2010 parliamentary elections Hungary has set off on the journey to become an “illiberal” member state of the EU, which does not comply with the shared values of rule of law and democracy, the “basic structure” of Europe. The new government of Viktor Orbán from the very beginning has justified the non-compliance by referring to national sovereignty, and lately – as an immediate reaction to the EU’s ef- forts to solve the migration crisis – to the country’s constitutional identity guaranteed in Article 4 (2) TEU. The paper tries to answer the question what’s wrong with this reference, and how can the EU effectively protect the values in Article 2 TEU, while respecting the constitutional identity of a member state.

Vlad Perju: Romania: The Politics of Constitu- tional Identity in Europe

In my paper I connect the turn to identity in Euro- pean constitutionalism with what I call the “de- radicalization” of the Europeanization of European constitutional identity. I argue that the identity jurisprudence is part of a project that became mainstream in European constitutional theory only in the post-Maastricht period in opposition to the advancement of European unification. Yet insofar as this project must pretend itself as a respectable legal/ constitutional theory, it distorts the doctrines of Euro- pean constitutional law and misinterprets its normative core. The greatest effort of identity constitutionalism has had its greatest effect at the municipal level, at both doctrinal and discursive levels, where it has been deployed strategically to create a potentially unbridgeable chasm between national and the European legal orders. I illustrate this point using the example of Ro- manian constitutionalism, as well as other national jurisdictions.

Paul Blokker: Discussant

### 45 CONSTITUTIONAL COURTS AND CONSTITUTIONAL ADJUDICATION IN EAST ASIA

In order to contribute to the theme of this confer- ence: ‘Courts, Power, Public Law’, this panel looks at the scene of constitutional courts and constitutional adjudication in contemporary East and Southeast Asia – a region of the world that has witnessed rapid and dramatic growth in both the establishment of constitu- tional courts and the judicialization of “megapolitics” in recent decades largely in the context of transitions of states from authoritarianism to democracy. The first paper provides a historical and comparative overview of the rise of constitutional courts in Tai- wan, South Korea, Mongolia, Thailand and Indonesia. The second paper engages in a case study of the constitutional court of Taiwan, which is the oldest con- stitutional court in East Asia. The third paper explores the peculiar constitutional complexities arising from the practice of “One Country Two Systems” in Hong Kong a former British colony and now a Special Ad- ministrative Region where constitutional adjudication flourishes in an English common law based system that contrasts sharply with the legal system of the People’s Republic of China.

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Albert H.Y. Chen: The Evolution of Constitutional Courts in East and Southeast Asia

This paper provides a historical review of the rise and development of constitutional courts in East and Southeast Asia, including those in Taiwan, South Ko- rea, Mongolia, Thailand, and Indonesia, according to the chronological order of their establish- ment. It provides a comparative perspective on the role and performance of constitutional courts in the political and legal systems of these Asian countries. It also attempts to develop a theoretical framework for the study of constitutional courts in Asia, building upon and refining Bjorn Dressel’s typology of judi- cial politics which consists of the fourfold catego- rizations of “judicial muteness”, “judicial restraint”, “judicial activism”, and “politicization of the judiciary”, and applying the typology to the five constitutional courts mentioned above. Finally, it will consider the implications or lessons of the experience of these Asian constitutional courts for other Asian countries that do not have constitutional courts.

Wen-Chen Chang: The Constitutional Court of Taiwan: An Evolving Strong Court against Con- textual Dynamics

Taiwan’s Constitutional Court also known as the Council of Grand Justices prior to 1993, stands as one of the oldest constitutional courts in the world. Established in 1948, the Constitutional Court has since been confronted with challenges in the decades-long authoritarian governance, followed by democratization and constitutional reforms during the 1990s, and par- tisan politics in the context of “divided government” in the 2000s. In the course of tackling these challenges, the Constitutional Court has not only sustained itself but also become a powerful judicial institution and an indispensable strategic player in the development of constitutional democracy in Taiwan. This paper is intended to illuminate how this court has traveled such a long journey and its contextual dynamics by highlighting dif- ferent roles that the Court played in each context and assessing the judicial strategies and jurisprudence it has developed as it moved from the sidelines to the power center of constitutional governance.

Cora Chan: Hong Kong courts and Chinese insti- tutions: pluralism autonomy power balance in Hong Kong’s constitutional adjudication

Beijing’s exercise of its power of interpreting the Basic Law – Hong Kong’s constitution – seems to suggest that it has final say over what the law is in Hong Kong. This paper argues that it is possible to conceptualize and develop a framework to understand the Hong Kong legal orders as a form of legal pluralism similar to that found in the European Union. It further argues that a possible way of maintaining the separation of these two highly divergent legal orders – such separation being promised in the Sino-British Declaration and the founding of Hong Kong’s autonomy vis-à-vis China – is for courts in Hong Kong to develop the relationship between the two legal orders in a pluralist direction, thereby assuaging the power imbalance between the two jurisdictions. Unfortunately, Hong Kong’s courts missed an important opportunity to do so in the latest oath-taking saga.

Po-Jen Yap: Discussant

This paper provides a historical review of the rise and development of constitutional courts in East and Southeast Asia, including those in Taiwan, South Ko- rea, Mongolia, Thailand, and Indonesia, according to the chronological order of their establish- ment. It provides a comparative perspective on the role and performance of constitutional courts in the political and legal systems of these Asian countries. It also attempts to develop a theoretical framework for the study of constitutional courts in Asia, building upon and refining Bjorn Dressel’s typology of judi- cial politics which consists of the fourfold catego- rizations of “judicial muteness”, “judicial restraint”, “judicial activism”, and “politicization of the judiciary”, and applying the typology to the five constitutional courts mentioned above. Finally, it will consider the implications or lessons of the experience of these Asian constitutional courts for other Asian countries that do not have constitutional courts.
Concurring panels

46 HIGH COURTS AND EXECUTIVE POWER IN LATIN AMERICA: AN AMBIVALENT RELATIONSHIP

The panel investigates the complex relationship between high courts and executive power in Latin America. Each contribution assesses a sensitive issue on which courts have interacted with the executives and shown attitudes spanning from self-restraint to strong interpretative authority. First, S. Ragone addresses the exceptional role of the Colombian Constitutional Court in relation to the presidential re-election, offering a comparative overview built on the Colombian case law. In order to better understand the evolution of the role of the Colombian Constitutional Court, G. Ramirez Cleves explains the "substitution doctrine" and focuses on disputable recent cases where the Court referred also to the (political) "convenience" of the amendments. Subsequently, S. Verdugo examines the ambivalent role played by the Chilean Constitutional Court during the authoritarian regime and J.M. Mecinas Montiel proves that the evolution of the Mexican Supreme Court depended on a new self-consciousness on its position in a democracy. Finally, J. Zaiden Benvindo discusses the role of the Brazilian Supreme Court in the impeachment of President Dilma Roussef and the contribution by D. Werneck Arguelhes and T. Pereira develops a framework to understand the separation of powers in light of this procedure.

Participants

Sarbrina Ragone  Gonzalo Ramirez Cleves  Sergio Verdugo  Juan Manuel Mecinas Montiel  Juliano Zaiden Benvindo  Diego Werneck Arguelhes and Thomaz Pereira

Moderator

Elizabeth Trujillo and David Landau

Room

8B.2 - 4.9

Sarbrina Ragone: Latin American Jurisprudence on the Presidential Re-election: A Comparative Analysis

Latin American constitutionalism has as one of its main features the presence of presidential systems, and the (constitutional) regulation of the re-election of the President can easily be considered as an element of the constitutional identity, in both directions: permitted, or not. In the latter case, has been said in the past that in some countries, the possibility or impossibility of a second/third mandate for the incumbent has been introduced through constitutional amendments and legal reforms being in some cases challenged before the domestic constitutional or supreme courts. This contribution will deal with significant cases that help clarify the way high courts have intervened in the case. In particular, I will use the jurisprudence of the Colombian Constitutional Court permitting a second mandate (judgments C-1040 to C-1057/2005) and not a third mandate (judgment C-141/2010) as the pivot of a comparative reconstruction of the Latin American recent case law on this topic, taking into account also the judgments issued in 2010 by the Supreme Court of Nicaragua and in 2014 by the Constitutional Court of Ecuador.

Gonzalo Ramirez Cleves: The Colombian Constitutional Court and the Substitution Doctrine: Dilemmas and the Use of Convenience as a Parameter

One of the most important decisions within the Colombian constitutional jurisprudence has been the substitution doctrine of the Constitution, which implies that a constitutional reform can be declared unconstitutional due to the fact that it substitutes principles and values of the Constitution of 1991. Despite the importance of the substitution doctrine several criticisms have been made for the indeterminacy of the principles and the wide degree of discretion that the judges have in the determination of the substantial principles. Very recent decisions, such as C-285, C-373 and C-699 2016, introduce arguments related with the convenience of the amendment that make it impossible to determine when a substitution of the Constitution is taking place. My thesis is that the substitution doctrine must be maintained because it protects the constitutional basic principles against potential contrary majorities in the Congress. However, this doctrine cannot be used for reasons of convenience or utility that do not have a constitutional basis and where the argumentation about the declaration of unconstitutionality is weak or unfounded.

Sergio Verdugo: The Role of the Chilean Constitutional Tribunal under the Pinochet Regime: A Critical Approach

During the authoritarian regime that ruled Chile between 1973 and 1989, the Chilean Constitutional Tribunal unexpectedly helped to defend conditions for a successful return to democracy. Some scholars, driven by Barros’ book, use the case of the Chilean Tribunal to show how an effective constitution limiting political power can exist under an authoritarian regime, while challenging the conventional explanation about the role of constitutions and courts under authoritarian regimes. The Chilean example shows that courts under authoritarian regimes could be more than mere pawns or window-dressing institutions. I claim that this is the case and I analyze this possibility by using the jurisprudence of the Chilean Tribunal by focusing on a particular type of judicial decisions. I show how the Tribunal satisfied some authoritarian goals intended by the dictatorship’s constitution-designers, and argue that precisely because of this the Tribunal was able to legitimize the demands of the regime’s soft-liners, who advocated for a consensual return to democracy. The Tribunal helped to legitimize the dictatorship at the same time that it was forcing the Pinochet regime to establish the electoral rules that allowed the opposition to win the plebiscite. This nuanced approach suggests that, under certain circumstances, authoritarian and non-authoritarian judicial functions can reinforce each other.

Juan Manuel Mecinas Montiel: The Mexican Supreme Court and the Executive Power (1995-2016): from Deference to Activism

Two decades ago, Mexico started a transition to democracy and the relation between the Mexican Supreme Court and the executive power has moved back and forth. Specially during the PAN terms in the executive power (2000-2012) some decisions challenged the independence of the judiciary, and others showed a high court as a real counterpart of the executive power. In any case, the Court seemed to be ready to participate in cases where its role was as political as legal. With the PRI comeback (2012) the relation changed because the Court decided to participate actively in particular cases with the case concerning the legal use of marijuana undertaking a singular political role. This study aims to show the intense disputes between the Mexican executive power and the Supreme Court in four cases (Florence Cassez liberation, abortion, legal use of marihuana and gay marriage). With these judgments -and with diverse results- the Court confronted the conservative and positivistic vision of the executive power in the last two decades, with self-restraint or political ambitions according to the case. In this period the competences of the executive branch remained almost untouched and the change was due to the acceptance by the Court of its role in a democratic system with checks and balances, leaving behind its previous function as part of the authoritarian executive power.

Juliano Zaiden Benvindo: Nudging the Impeachment: The Supreme Court during the Brazilian Political Crisis in 2016

The impeachment of an elected President strongly disturbs democratic regimes. Not rarely it raises doubts whether such extreme measure was legitimately carried out according to the constitutional rules or, rather, stemmed from a political crisis leading to a form of Coup d’état. In such circumstances, the Supreme Court may play a fundamental role in drawing the lines of this procedure and defining how it can take place without jeopardizing the constitutional regime. By doing so, however, the Supreme Court enters the political game, that matters of the political regime are in place itself both as the guardian of the constitution and as a central political player standing beside Congress. This contribution discusses the role of the Supreme Court amid the political crisis that led to the impeachment of President Dilma Rousseff in Brazil in 2016. It concludes that, as a Court that aimed at acting as merely the guardian of the constitution, it may have in the end nudged the impeachment itself.

Diego Werneck Arguelhes and Thomaz Pereira: Judicial Review of Impeachment Trials and the Limits of the Separation of Powers

Should supreme courts review impeachment trials conducted by the legislative? During the long impeachment proceedings of Brazilian President Dilma Rousseff between 2015 and 2016, constitutional scholars, courts, and legislators grappled with this question and its implications. The Supreme Court has yet to rule on the last batch of Rousseff’s challenges to the verdict; but it most likely will never rule on their merits. However, there is more at stake here than the fate of Dilma Rousseff. If the Court decides to review anything close to the merits of the case, this would mean the end of a certain notion on the meaning of separation of powers in Brazil. We use this debate to build a broader framework for understanding separation of powers in different systems. We argue that answering the question of judicial review of impeachment trials reveals where one stands between two different models of separation of powers. In the U.S.-style “separation of powers”, judges must acknowledge the existence of multiple sources of authority, some of which may be empowered by the Constitution to decide constitutional issues that are outside the scope of judicial review. In contrast, in the “European” model, the Constitution distributes decision-making power to different institutions, and the scope of constitutional review is unaffected. The important question is one of interpretation: what does the Constitution say? - not one of authority. In this period the Court had to interpret the constitution in this case? These questions can shed light on the origins and consequences of the two different approaches to separation of powers, involving self-conscious political decisions, specific legal cultures, or different conceptions of the legitimacy of judicial review; in any case, understanding them might provide a valuable framework for understanding different constitutional systems.
48 INTEGRATED RIGHTS IN THE PRACTICE OF REGIONAL HUMAN RIGHTS COURTS

The panel will introduce concrete proposals for a holistic (‘integrated’) approach to supranational human rights justice through a hands-on legal exercise: the rewriting of decisions of supranational human rights courts. The paper presenters have thus redrafted crucial passages of supranational human rights judgments. They will present their interventions in the cases as well as the methodology and/or theoretical framework that guided their approaches, and demonstrate how human rights monitoring bodies may adopt an integrated approach to human rights law. This panel is a spin-off of a book project, in which ‘Integrated human rights in practice. Rewriting human rights decisions’ will be published by Edward Elgar Publishers in August 2017 (http://www.e-elgar.com/shop/integrated-human-rights-in-practice). The panelists have rewritten judgments ‘as if human rights law were really one’ borrowing or taking inspiration from developments and interpretations throughout the whole multi-layered human rights protection system. In this perspective, indivisibility and intersectionality are some among many methods and tools that have been used or could be used by supranational human rights courts to work toward human rights integration. Finally, the presentation will introduce the idea of a ‘global human rights conversation’ as a central feature of smart human rights integration.

Participants

Eva Brems
Valeska David
Marijke De Pauw
Liesllet Verdonck

Moderator

Eva Brems
Room
BA-3-21

Eva Brems: Integrated human rights

The first presentation will introduce both the rewritten judgments and the overall idea of ‘human rights integration’. The presentation will discuss both the potential benefits of human rights integration, and its necessary limits, introducing the concept of ‘smart integration’. Without putting forward a singly model for human rights integration, it will give a broad overview of methods and tools that have been used or could be used by supranational human rights courts to work toward human rights integration. Finally, the presentation will introduce the idea of a ‘global human rights conversation’ as a central feature of smart human rights integration.

Valeska David: Caring rescuing or punishing? Rewriting R.M.S v Spain (European Court of Human Rights) from a human rights perspective on the rights of women and in poverty

The ‘rescuing’ of children from poor and otherwise ‘deviant’ families is a longstanding and yet unsettled conversation. The ‘rescuing’ of children from poor and otherwise ‘deviant’ families is a longstanding and yet unsettled conversation.

47 INSTITUTIONAL DIALOGUE: COURTS AND PARLIAMENTS

ConCurring panels

Constitutional courts resort to strategic decision-making to anticipate the reaction of actors such as the legislature and the public, and to ensure implementation. So far, a focus on judicial actions was focused on conversations with other courts rather than with Parliament. The question arises as to how Parliaments react to court decisions and whether deliberative behavior by courts might enhance the relations between these institutions. In line with ICON’S mission statement, the panel takes an interdisciplinary perspective, with legal scholars conducting empirical research and political scientists working on topics of judicial politics. In their presentations, the participants give evidence from Belgium and Canada to show that courts as implementer-dependent institutions do not dominate the political playing field and therefore rely on dialogue as a judicial strategy to ensure compliance. Also, the implications of the legislative strategy of non-compliance for dialogue theory are presented as a framework to understand judicial-parliamentary relationship.

Participants

Sarah Verstraelen
James Kelly
Josephine De Jaegere
Nicola Lupo
Sarah Lambrecht
Patricia Popelier

Moderator

Room
BA-3-17

Sarah Verstraelen: Constitutional Dialogue on legislative lacunae

In approximately 120 judgments, the Belgian Constitutional Court found legislative lacunae to violate the Constitution. These judgements incite a constitutional dialogue, first and foremost with Parliament, especially when the Court instructions courts resort to strategic decision-making to anticipate the reaction of actors such as the legislature and the public, and to ensure implementation. So far, a focus on judicial actions was focused on conversations with other courts rather than with Parliament. The question arises as to how Parliaments react to court decisions and whether deliberative behavior by courts might enhance the relations between these institutions. In line with ICON’S mission statement, the panel takes an interdisciplinary perspective, with legal scholars conducting empirical research and political scientists working on topics of judicial politics. In their presentations, the participants give evidence from Belgium and Canada to show that courts as implementer-dependent institutions do not dominate the political playing field and therefore rely on dialogue as a judicial strategy to ensure compliance. Also, the implications of the legislative strategy of non-compliance for dialogue theory are presented as a framework to understand judicial-parliamentary relationship.

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BA-3-17

Sarah Verstraelen: Constitutional Dialogue on legislative lacunae

In approximately 120 judgments, the Belgian Constitutional Court found legislative lacunae to violate the Constitution. These judgements incite a constitutional dialogue, first and foremost with Parliament, especially when the Court instructions courts resort to strategic decision-making to anticipate the reaction of actors such as the legislature and the public, and to ensure implementation. So far, a focus on judicial actions was focused on conversations with other courts rather than with Parliament. The question arises as to how Parliaments react to court decisions and whether deliberative behavior by courts might enhance the relations between these institutions. In line with ICON’S mission statement, the panel takes an interdisciplinary perspective, with legal scholars conducting empirical research and political scientists working on topics of judicial politics. In their presentations, the participants give evidence from Belgium and Canada to show that courts as implementer-dependent institutions do not dominate the political playing field and therefore rely on dialogue as a judicial strategy to ensure compliance. Also, the implications of the legislative strategy of non-compliance for dialogue theory are presented as a framework to understand judicial-parliamentary relationship.

Participants

Sarah Verstraelen
James Kelly
Josephine De Jaegere
Nicola Lupo
Sarah Lambrecht
Patricia Popelier

Moderator

Room
BA-3-17
concern in many countries. Members of the Council of Europe are no exception. The Council’s Parliamentary Assembly recently acknowledged that while children from ‘vulnerable groups’ are disproportionately represented in the care population of member states, no evidence suggests that parents who are poor, less educated or who belong to minorities are more likely to abuse or neglect their children. R.M.S v. Spain deals with this paradox. In 2005 Spanish social services removed a girl aged nearly 4 years old and placed her in an institution as a result of her immediate mother’s poverty. They saw each other for the last time a few months after their forced separation. In 2013 the European Court of Human Rights (ECHR) agreed with the single young mother on the violation of her right to family life, but dismissed her complaint on discrimination. Albeit the judgment is welcome and offers grounds for praise its reasoning is fragmentary. It does not take full account of both the rights holders and rights frameworks involved in the case. An integrated approach thus may be necessary to interpret the right of children to the ‘private’ realm of families and questions the way the ECHR addressed the proportionality of family separation on the ground of poverty. Secondly, attention is drawn to the compounded stereotypes underlying the decisions of the Spanish authorities and which the ECHR failed to uncover. The analysis thus presents a gendered account of R.M.S and challenges prejudices about the experience of poverty and dominant notions on valued families. Thirdly, the paper revisits the ECHR scrutiny of the domestic judicial and decision-making process over both the girl’s removal and placement.

Marijke De Pauw: Integrating disability rights into the ECHR: re-writing McDonald v. the United Kingdom

Over the last decades, there has been growing attention for the fundamental rights of persons with disabilities at both the international and European level. In several cases, the Strasbourg Court has recognized that the lack of State action may fall within the scope of Article 8 ECHR. It has, however, in very few cases found a violation of the Convention in the United Kingdom – concerning the reduction in right-time care for a disabled woman – is to certain extent a positive development as the Court recognized the possibility for such an interference to constitute a breach of the right to a private life. This paper, however, argues that McDonald also represents a missed opportunity as the judges could have gone much further in the affirmation of the rights of persons with disabilities, and therefore aim to re-write this judgment from an integrated perspective. A first issue to be addressed is the inadequate consideration and lack of clarity regarding the relevance of external sources. This re-writing exercise therefore entails the inclusion of a much more explicit discussion of external instruments as regards the positive obligations of Member States to provide care and to ensure the enjoyment of the right to independent living. In addition to the main international (CRPD) and regional (Revised European Social Charter) relevant binding instruments, soft norms are also used as interpretive tools. Secondly, it is argued that the Court in McDonald failed to adequately consider the proportionality of the contested measures, namely the reduction in care. This part of the judgment has thus been re-written in light of those relevant external norms and what is considered to be a newly emerged European consensus on the rights of persons with disabilities. In addition, the concept of dignity – which has thus far remained vague and ambiguous in the Court’s jurisprudence – is elaborated further and utilised in the proportionality test and the interpretation of positive rights. Finally, an equality perspective will be integrated in the interpretation of the right of persons with disabilities to care assistance and independent living.

Lieselot Verdonck: Moving Human Rights Jurisprudence to a Higher Gear: Rewriting the case of the Kichwa Indigenous People of Sarayaku v. Ecuador (Inter-American Court of Human Rights)

This paper rewrites the judgment by the Inter-American Court of Human Rights in the case of the Kichwa Indigenous People of Sarayaku v. Ecuador of 2012, concerning oil exploration activities in indigenous territories, and suggests that an approach to human rights is adopted in relation to seven themes, including innovative suggestions to move the human rights framework forward. To start, indigenous peoples’ right to self-determination should feature at the forefront of the Court’s analysis, instead of the right to property. Second, the Court should have further developed the norm of free, prior and informed consent, in line with (and beyond) earlier jurisprudence. Third, the analysis of some potential human rights violations was unjustifiably absorbed into the Court’s reasoning under Article 21 ACHR. Fourth, children’s rights could have been more explicitly mainstreamed. Fifth, the right to live in a healthy environment should have been explicitly considered at best as an independent right. Sixth, the McDonald judgment should be supplemented by a further discussion of non-state actors’ human rights obligations. Finally, it is suggested that the Court should move towards not only an integrative approach to human rights norms, but to one of human rights holders as well.

49 COURTS AND ADMINISTRATIVE POWER

This panel is concerned with judicial review of administrative action, seen from a comparative perspective. The discussion will be aimed at stressing the importance and limits of judicial control and at understanding the role of the Courts in shaping the balance between public power on the one hand, and individual and collective rights on the other hand. In particular, attention will be paid to the different scope and intensity of judicial review depending on – inter alia – the various types of public administrations involved, the powers exercised, the technical or scientific features at stake. Other aspects will be taken into consideration, such as the use of economic analysis by the Courts, the reference to general principles of law in judicial review, the ways to obtain a more substantial certainty and predictability in judgments. Finally, the panel will deal with the relationship between judicial review and extra-judicial control of administrative power.

Participants
Paul Craig
Giulio Napolitano
Eduardo Jordao
Alfredo Molteni
Guy Seidman

Moderator
Marco D’Alberti

Room
8A-3-45

Paul Craig: Courts and Administrative Power
Giulio Napolitano: Courts and Administrative Power
Eduardo Jordao: Courts and Administrative Power
Alfredo Molteni: Courts and Administrative Power
Guy Seidman: Courts and Administrative Power

50 BETWEEN POLICY-MAKERS AND BYSTANDERS: CONSTITUTIONAL COURTS OF THE FORMER YUGOSLAVIA AND DEMOCRATIC TRANSITION

It is widely assumed both in constitutional scholarship and in international decision-making circles that constitutional courts have a potential to act as crucial actors in states undergoing democratic transition and consolidation. By and large they are expected to play a role of a key democratic control and dispute-resolution mechanism in the face of considerable constitutional and political uncertainty characterizing transitional states. But have the courts managed to attain this assumed potential in accordance with high scholarly expectations and public demand for justice in such states? The paper addresses this complex question focusing on successor states of the former Yugoslavia. Treating these countries and their constitutional courts as a distinct object of study is justified for at least two reasons: unlike other former communist countries in Europe, Yugoslavia has had a long tradition of constitutional adjudication, dating back to 1963; secondly, transition to democracy in most states of the former Yugoslavia was a complex one, involving not only a transition from an authoritarian regime to democracy and fundamental economic transformation, but also, to a greater or lesser degree, transition from conflict to peace.

Sanja Baric: Constitutional Court of Croatia as a Facilitator of Democratic Transition: From the Ex-Yugoslavia to the EU

The paper analyses the position and role of the Croatian Constitutional Court in the country’s transition to democracy and complex socio-political circumstances of the country. The paper argues that the Court managed to protect core constitutional values and principles (even during the Homeland War), contributing to a significant extent to the process of Europeanization of the Croatian legal order. Nonetheless, recent events put its very existence in peril and its sociological legitimacy and legal authority significantly deteriorated. The paper sketches the Court’s trajectory from early years of democratization to the country’s integration into the European Union, identifying different factors contributing to the variations in impact and legitimacy.
Tatjana Papic: At the Margins of Transition: The Role and Impact of the Constitutional Court of Serbia

The paper addresses the role of the Constitutional Court of Serbia (SCC) in the legal and political life of the country. The SCC has been an important institution in the process of democratic consolidation in Serbia. It examines social and political context and other relevant factors such as history and institutional setting in particular – to frame the discussion pertaining to the legitimacy of the SCC in the minds of the public and societal terms. The paper argues that from all these standpoints, SCC’s legitimacy is weak. Accordingly, it is shown that the SCC has been having only marginal role in political and legal life in Serbian society and modest impact on the process of democratic consolidation. Even though the SCC has been more assertive in cases pertaining to parliamentary democracy and human rights, when one considers the public perception of the SCC and the effects of its decisions in general, it appears that even those rare decisions have had only a limited effect. This reveals poor output legitimacy of the SCC. Namely, the effect of its decisions with respect to the SCC is largely influenced by the external environment, the politically more challenging environments generally prevail. The different approaches on one hand suggested addressing the issue of compensations for undue procedural delays ought to be designed, rather than the Court explicitly enters the sphere of inherently political function where the consequences of the decision is reached based on the pre-existing legal and material evidences; or to forward looking political function where the consequences of the decision are the primary determinants of its adequacy. Ultimate decision on the procedural dilemma was made when a Court explicitly enters the sphere of inherently political decision making this paper examines how the Court and its advocates general argue in their capacity as political decision makers that seek to instrumentalise sensitive issues in line with the already existing underlying structures of EU law and which would likely improve the level of transparency and clarity of its judgments.

Juha Tuovinen: Balancing, the Margin of Appreciation and European Consensus: Why the European Court of Human Rights Does Not Rely on European Consensus in Article 8-11. Why It Should, and How To Fix the Situation

The Role of Post-Yugoslav Constitutional Courts in Democratic Transition and Their Balancing, the Margin of Appreciation and European Consensus

The paper addresses the role of the Constitutional Court of Serbia, and in particular, the role of the Constitutional Court in resolving cases of controversial issues such as human rights violations. It examines the effectiveness of the Constitutional Court in maintaining judicial independence and the impact of its decisions on the democratic process. The paper argues that while the Constitutional Court has been important in some cases, its decisions have not always been effective. The paper concludes by suggesting ways to improve the Constitutional Court’s effectiveness in resolving controversial issues.

Edin Hodzic: The Role of Post-Yugoslav Constitutional Courts in Democratic Transition and Their Balancing, the Margin of Appreciation and European Consensus

The paper examines the role of the Constitutional Court of Serbia in maintaining judicial independence and the impact of its decisions on the democratic process. It argues that while the Constitutional Court has been important in some cases, its decisions have not always been effective. The paper concludes by suggesting ways to improve the Constitutional Court’s effectiveness in resolving controversial issues.

Zane Rasnača: Do “controversial cases” make bad law?

While the majority of cases coming before the CJEU are rather mundane and do not draw any attention during the last two decades the CJEU has increasingly been requested to decide on “controversial” cases. Because today the CJEU is often seen as a forum that decides controversial cases it experiences anything but “benign neglect”. On the contrary it has become a bogeyman whose “rule over Britain” is to be feared and avoided at any cost, and its future decisions are seen as potentially fatal for such long-standing national systems as the German co-determination model. This paper will explore the Court’s approach to deciding such “controversial” cases and argue that so far the CJEU has failed to develop satisfactory techniques to solve them. The judgments in Dano, Alimanovic, Brey, and Commission v. United Kingdom, all illustrate a clash between the CJEU’s rights to legal argumentation and the financial interests of the member states in the light of politically charged accusations of “welfare tourism”. Furthermore, beyond dealing with these controversial issues, these cases also represent a conflict between a desire to build a new, supra-national, Bosnia and Herzegovina. The main argument of this paper is, however, cautiously counter-intuitive: despite their common tradition, similar origins, competences, institutional features, and similar social challenges, they have been facing, the respective roles activism and impact of the constitutional courts in post-Yugoslav constellation vary significantly with those operating in the politically more challenging environments generally scoring higher. In discussing the contributing factors, the paper shows that the equation of judicial influence in transition is complex and multi-layered. Acknowledging that the role of constitutional courts in such contexts is largely influenced by the external environment, such as the international involvement and the extent of political diffusion, the paper places particular attention to important internal factors, such as the institutional details, assertion of authority, expertise of the judges, and overall quality of their decisions.

The cases of Bosnia and Herzegovina as a point of departure, this paper takes a comparative look at the role and impact of constitutional review in the post-Yugoslav states and its contribution to the region’s development and institutional setting in countries of the former Yugoslavia. Given the dominant doctrinal presuppositions, one could expect that constitutional courts would be weaker and less influential in the more complex states and political contexts such as those of Bosnia and Herzegovina, Serbia, and Herzegovina. The main argument of this paper is, however, cautiously counter-intuitive: despite their common tradition, similar origins, competences, institutional features, and similar social challenges, they have been facing, the respective roles activism and impact of the constitutional courts in post-Yugoslav constellation vary significantly with those operating in the politically more challenging environments generally scoring higher. In discussing the contributing factors, the paper shows that the equation of judicial influence in transition is complex and multi-layered. Acknowledging that the role of constitutional courts in such contexts is largely influenced by the external environment, such as the international involvement and the extent of political diffusion, the paper places particular attention to important internal factors, such as the institutional details, assertion of authority, expertise of the judges, and overall quality of their decisions.
solidarity is a powerful instrument. It is the glue that holds together a community, a state or an entity of states, for instance, an IO. On the other hand, if solidarity is missing, such an entity might fall apart, and political actors are very much aware of this reality. For instance, in an EU setting solidarity is a legal concept with legal bases in a number of different treaty provisions, which allows the EU to presently challenge regarding the concept of solidarity, due to among others the migration crisis, the economic crisis, Brexit, and some wider aspects of legal disintegration. Whereas solidarity is often associated with civil society (bottom-up) or national/int’l legislation/treaty-makers (bottom-down), this panel will analyse the role which int’l courts play in relation to creating, sustaining and developing solidarity. How is solidarity defined, addressed, and even created at int’l courts? Can int’l courts promote solidarity when political actors are causing disintegration? More specifically, firstly, the general state of solidarity in Europe is examined, and then secondly examined at two int’l courts in Europe, namely the CJEU and the ECtHR.

Thirdly, finally, the perspective is broadened, so as to understand solidarity at int’l courts beyond Europe by focusing on the ICJ.

**Participants**
- Hans-Jörg Trenz
- Dagmar Schiek
- Helje Krunke
- Achille Skordas
- Hanne Petersen

**Room**
BB 5-3-19

**Hans-Jörg Trenz: European Solidarity in Times of Crisis: Towards Differentiated Integration**

The concept of European solidarity, which was originally conceived as one of the founding values of the European Union and as a motor for social cohesion is currently redefined. European solidarity has become one of the most contested claims in public debates turning it into a mobilization force for intellectual and political actors and citizens’ movements. By providing an analytical framework for the analysis of such solidarity contestation in times of crises, we argue that new political interpretations of solidarity in the EU can be distinguished, which is different from the old political identity of European identity. In line with and as a consequence of the intensified argumentation in favor of differentiated integration, differentiated solidarity entails a shift of emphasis from the promotion of European integration to European solidarities, which are in particular based on the recognition of different needs and necessities. More specifically, during the Eurocrisis years, the following three mutations in the concept of EU solidarity can be observed: a) the exceptionality of charity: solidarity as acts of benevolence towards thirds; b) the exclusivity of egaliitarian solidarity: national solidarity communities becoming more exclusive; 3) solidarity among non-equals: constant renegotiation of the costs and benefits of solidarity as a rescuing mechanism, which binds donating and receiving countries together in a situation of emergency.

**Dagmar Schiek: Solidarity in the EU and the European Court of Justice**

Achieving and maintaining solidarity in the EU seems to be an ever more challenging project. Political projects putting individual nation states first and excluding any form of solidarity beyond national borders are gaining in momentum, epitomised by the UK’s decision to leave the EU among others, but by no means limited to English voters who decided the EU referendum by their overwhelming majority for “LEAVE”. Can the EU survive as a project of a community based on law which promotes transnational solidarity between citizens of different Member States, and partly even with citizens of non-member states? The EU Treaties at least make it possible that solidarity is a value. In a Community of Law the value of this value would depend on its capacity as a legal principle. This paper explores whether and in how far the case law of the Court of Justice supports solidarity as an EU legal principle. The thesis that we suggest is that whether solidarity as a transactional category between citizens of different nationalities is supported. We distinguish between receptively and participatory solidarity as a central element of social citizenship in the EU. On the basis of a numerical analysis of ECJ case law using solidarity in its reasoning the paper exposes the notions of solidarity used by the Court. This enables us to decide whether jurisprudence on solidarity between Member States and solidarity of Member States with citizens on the move has the potential to establish a legal principle for the EU as a Community of Law. The paper will investigate the European Court of Human Rights’ use and application of solidarity from two different angles. One aspect of this research will view the ECtHR’s jurisprudence on the protection of social rights based on Article 1, which are not detailed in the EU’s treaties. The Court’s judgments are interpreted as a starting point for the development of the EU’s case law. Another aspect of this research will view the ECtHR’s jurisprudence on the protection of social rights based on Article 1, which are not detailed in the EU’s treaties. The Court’s judgments are interpreted as a starting point for the development of the EU’s case law. The second approach will take its outset in a search for case law from the Court, which uses the term ‘solidarity’ in order to determine how the Court uses the term ‘solidarity’ in its argumentation, and whether new fields of solidarity are appearing in the case law of the Court. Both approaches are based on empirical data gathering through data base searches. Together the results will together feed into an analysis of the European Court of Human Rights’ use and application of solidarity.

**Helle Krunke: Solidarity at the European Court of Human Rights**

Whereas solidarity is explicitly mentioned as a value in the EU treaties, the European Convention of Human Rights and its protocols do not specifically refer to solidarity as a value. This paper will investigate the European Court of Human Rights’ use and application of solidarity from two different angles. One aspect of this research will view the ECtHR’s jurisprudence on the protection of social rights based on Article 1, which are not detailed in the EU’s treaties. The Court’s judgments are interpreted as a starting point for the development of the EU’s case law. Another aspect of this research will view the ECtHR’s jurisprudence on the protection of social rights based on Article 1, which are not detailed in the EU’s treaties. The Court’s judgments are interpreted as a starting point for the development of the EU’s case law. The second approach will take its outset in a search for case law from the Court, which uses the term ‘solidarity’ in order to determine how the Court

**Participants**
- Salvatore Caserta
- Michi Wiebusch
- Maksim Karliuk
- Pola Cebulak
- Marcelo Torely

**Moderator**
- Pola Cebulak
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BB 5-3-33

**Salvatore Caserta: Regional Integration through Law and International Courts – The Central American Court of Justice (CACJ) and the Caribbean Court of Justice (CCJ)**

The article builds an innovative theoretical framework with the goal of unveiling the preconditions allowing ICs to become engines of supranationality in different institutional and socio-political contexts. In so doing, the article nuances the theoretical approaches on the relationship between supranationality and supranational adjudication. The article focuses on the Central American Court of Justice (CACJ) and the Caribbean Court of Justice (CCJ), and it compares them with the European Court of Justice (ECJ). Both the CACJ and the CCJ have been branded as institutional copies of the Luxembourg Court. The two Courts have also borrowed key jurisprudential principles from the CJEU with the goal of expanding the reach of Central American and Caribbean supranationalism. Despite this, both Courts have thus far failed to foster supranationality in their respective systems. This is because the conditions allowing ICs to become engines of-
ConCurring panels

Union declaration to withdraw from the International and legal arguments behind these recent trends, and accommodating ones, such as the Russian one, are this process might be expedited in light of the African Court. Second, in a recent decision, the African Court has voiced its differences in certain approaches. This could lead to innovative but perhaps more politicized practices. Especially since the entry into force of the Charter of Fundamental Rights of the EU, the Court of Justice of the EU (CJEU) has started adjudicating more on human rights issues and performing constitutional review at EU level (Digital Rights Ireland 2014). Thereby, it encroached upon the traditional role of highest courts as protectors of fundamental rights. Several highest courts in the EU have asked their first preliminary ruling questions to the CJEU about validity or interpretation of EU law in the recent years (Spain 2013, France 2013, Germany 2015) and several other preliminary ruling questions from highest courts concerned specifically human rights (Ireland 2014, Austria 2015). This increased dialogue appears, however, to be a result of increased tensions rather than increased convergence. Some preliminary ruling references included skepticism as to compatibility of the EU law measures with human rights protection guarantees at national level (Melloni (2013)), others amounted nearly to an ultimatum (Gauweiler (2015)). Finally, two constitutional courts went as far as to expressly decide not to apply a preliminary ruling judgment from the CJEU (Czech Republic (2012), Denmark (2016)).

Marcelo Torely: The Conventionality Review Doctrine and the Inter-American Court of Human Rights Constitutional Claim

This paper analyzes the constitutional claim of the Inter-American Human Rights Court (IACHHR) and its recent development into a judicial review doctrine. It focuses on the protagonist role the IACHHR has developed in the region and the expansionist nature of its legal regime. Comparatively, while the adoption by the European Court of Human Rights of the doctrine of national margin of appreciation has been criticized for not imposing supranational and international law more firmly, from the 2000’s onwards the Inter-American Court of Human Rights (IACHHR) has started developing a strict legal review doctrine and practice based on the American Convention. This emerging doctrine uses a domestic analogy to build up a constitutional claim that the American Convention is some sort of regional constitutional document and that the San José Court is likely to be its final interpreter, as same as a constitutional court in the domestic order. The article describes this emergence and questions whether the traditional hierarchical constitutional framework may constitute an adequate structure to the human rights regional regime.
A number of proposals for reform that were discussed and seemed particularly interesting are presented in the form of concluding remarks, based on a number of empirical observations and experiences that were brought to the fore.

The international judiciary has a notorious reputation for maintaining a hierarchy in which participation is marked by bias in terms of gender, ethnicity, educational background, legal culture, and other similar factors. The aim to improve diversity among judges in order to promote true universality in the interpretation of international law requires reflection upon the potential contribution and drawbacks of relying on particular theoretical approaches as the vehicle for change. This paper tries to provide a tool to color our understanding of the role of the female judge (as well as the male judge) and explains to what extent feminist theory may be considered to be emancipatory but also risks suffering setbacks in practice.

A number of proposals for reform that were discussed and seemed particularly interesting are presented in the form of concluding remarks, based on a number of empirical observations and experiences that were brought to the fore.

Stéphanie Hennette-Vauchez: “A deliberative idea of quality” – Gender balance in the judiciary: voices from the inside

In September 2014, we organized a closed workshop at the European University Institute in Florence that brought together an extraordinary group of female justices from around the world as well as from a diversity of judicial arenas. They had been invited to complete a questionnaire prior to the workshop, on the basis of which we as organizers framed the discussion in order to address a series of three sub-questions: (i) should looking at courts as institutions help us see why gender balance is a legitimate/desirable goal? (ii) should looking at courts as judicial law-making authorities? (iii) if at all, what would be the most valid normative grounds for reform in favour of gender balance in the judiciary? Subsequently to the workshop, we complemented the fascinating accounts that had been gathered by a series of in-depth interviews with other justices (mostly male) – on the basis of the original material that we gathered, we have identified a number of main topics or concept that help (i) frame the issue and (ii) illustrate the debate over possible normative grounds for gender-balance in the judiciary. A number of proposals for reform that were discussed and seemed particularly interesting are presented in the form of concluding remarks, based on a number of empirical observations and experiences that were brought to the fore.

Cecilia Bailliet: Power Dynamics, the Exclusion of Women on the International Judiciary and the Dilemmas of Pluralist Feminist Theory

The international judiciary has a notorious reputation for maintaining a hierarchy in which participation is marked by bias in terms of gender, ethnicity, educational background, legal culture, and other similar factors. The aim to improve diversity among judges in order to promote true universality in the interpretation of international law requires reflection upon the potential contribution and drawbacks of relying on particular theoretical approaches as the vehicle for change. This paper tries to provide a tool to color our understanding of the role of the female judge (as well as the male judge) and explains to what extent feminist theory may be considered to be emancipatory but also risks suffering setbacks in practice.

Neus Torbisco-Casals: Women and Minorities Underrepresentation in the Judiciary: An Argument for Diversity on the Bench

Ruth Rubio Marín: “A deliberative idea of quality” – Gender balance in the judiciary: voices from the inside

In September 2014 we organized a closed workshop at the European University Institute in Florence that brought together an extraordinary group of female justices from around the world as well as from a diversity of judicial arenas. They had been invited to complete a questionnaire prior to the workshop, on the basis of which we as organizers framed the discussion in order to address a series of three sub-questions: (i) should looking at courts as institutions help us see why gender balance is a legitimate/desirable goal? (ii) should looking at courts as judicial law-making authorities? (iii) if at all, what would be the most valid normative grounds for reform in favour of gender balance in the judiciary? Subsequently to the workshop, we complemented the fascinating accounts that had been gathered by a series of in-depth interviews with other justices (mostly male) – on the basis of the original material that we gathered, we have identified a number of main topics or concept that help (i) frame the issue and (ii) illustrate the debate over possible normative grounds for gender-balance in the judiciary. A number of proposals for reform that were discussed and seemed particularly interesting are presented in the form of concluding remarks, based on a number of empirical observations and experiences that were brought to the fore.

Federico Caporale: ICSID arbitrations and the notion of “service public”/public utility

Bilateral Investment Treaties are amongst the most relevant carriers of economic and legal integration. Currently, more than 2500 BITs are in force and ICSID is the main forum for their dispute resolution. Under BITs’ umbrella, ICSID has scrutinized public authority/puissance publique acts connected with the regulation of public utilities in connection to foreign companies, as the nullification of tariffs fixed by Compañía de Aguas del Aconcagua S.A. by the Ente Regulador de Agua de Tucumán (ERSACT); the tariffs, the fines and the concession cancellation established by the Organismo Regulador de Aguas Bonaerense; the measures taken by the Tanzanian Minister of Water against the Dar es Salaam Water and Sewerage Authority; the water supply concession renegotiation and cancellation imposed by the Ente Regulador de Servicios Sanitarios de la Fuerza de Españares (ERSS). The paper will be structured in five parts. Firstly, I will briefly show that both the traditional notions of public utilities and service public imply some authoritative powers (or at least some powers which waive common law/civil law principles). Secondly, the concession is not bound by a stare decisis rule and BITs apply only inter partes, the number and the consistency of ICSID arbitrations on these topics allow talking of a strengthened interpretative trend. Thirdly, I will stress that, at the same time, ICSID broadened and curb individual rights. It allows foreign legal companies which would not be protected by domestic courts to file an international lawsuit against national regulatory measures; however, it straddles a limited protection. Citizens who have only few rights of participation in international arbitrations. Then I will explore the solutions and the arguments given by ICSID arbitrators vis-à-vis public utilities/service public issues. I will show that ICSID is playing a kind of function (under BITs’ clauses) of national administrative measures. Through this via, ICSID clearly indirectly reads and affects national administrative laws; although it does not scrutinize if national administrative proceedings have complied with their application. In conclusion, I will emphasize how these arbitrations may affect domestic notions of public utilities/service public.

Andrea Averardi: Antitrust global governance and industrial policies strategies: the Airbus-Boeing dispute over civil aircraft

The dispute over subsidies between the European multinational Airbus Industries and the American Boeing Company which has been continuing for more than twenty years, is the biggest commercial disagreement case based on ICSID in the European Community of the recent global trade history. Since 2004, as the negotiations between the European Community and the United States failed, each part...
The first and most important profile is the questions of the interaction between industrial policies, state aid law and WTO law and emphasizes how uncertain and disadvantages of replacing ad-hoc arbitrators with court-like mechanisms are. Courts are more centralized than arbitrators, which gives them the ability to act in a coherent way and consider long-term consequences. However, explicit wording may imply a greater risk of capture by special interests and could lead to more radical legal developments than the stable system of diverse arbitration. Furthermore, compromise solutions that create numerous competing court-like mechanisms instead of a universal court may escalate the fragmentation of international law.

Güneş Ünür: Impossible ethics? A critical analysis of the rules on appointment of judges in the new EU FTAs

This paper critically analyzes the new rules on ethics and appointment of the members of the investment tribunals to be established under the investment protection provisions of recent and ongoing FTAs, such as the CETA and EU – Vietnam FTA. It examines the rationale behind these new rules, and why they were deemed necessary or desirable vis-à-vis rules that are in place in various IAs regarding conflict of interests of arbitrators. It will specifically scrutinize the new restrictions on the appointment of members of future investment tribunals, and how these rules would, or could, apply in practice. It will ask the question of whether they are feasible in the light of current practice relating to the appointment of arbitrators in ISDS, and the public backlash against the so-called “club” of a small group of private actors driving the adjudicatory practice. To that end, the research will additionally benefit from previous scholarly and empirical work on arbitrators in international investment law such as legal counsel arbitrators and expert witnesses; who they are, and how they conduct their practice.

Joanna Jemielniak and Shai Dothan: A Paradigm Shift? Arbitration and Court-Like Mechanisms in Investors’ Disputes

Recently, several court-like mechanisms have been considered as a substitute for investor-state arbitration. Suggestions for creating such mechanisms have been around for a long time, but new trade agreements may make court-like mechanisms for investors’ disputes a reality. This paper starts by asking whether the shift from arbitration to court-like mechanisms is likely to happen and how deep is the change to dispute resolution going to be. The advantages and disadvantages of replacing ad-hoc arbitrators with court-like mechanisms are examined. Courts are more centralized than arbitrators, which gives them the ability to act in a coherent way and consider long-term consequences. However, explicit wording may imply a greater risk of capture by special interests and could lead to more radical legal developments than the stable system of diverse arbitration.

Marsid Laze: The constitutional implications of the evolution of the relationship between judges and legislator

It is universally known that the separation of powers has been probably been the main foundation for the establishment of the modern state. It is also known as over the past few decades the relationship between the three traditional powers, especially between the legislative and the judiciary have significantly changed. As a result, the theme of the relationship between judges and legislators is subject to renewed and vigorous controversy in all the States of democratic sovereignty, under several respects. The first and most important profile is the question regarding the identification of the boundaries in the exercise of their respective functions. One of the most recurrent themes in the legislators / judges conflict is the substitution of judges to parliament in front of the inertia of the legislative power, which is sometimes expression of a conscious renunciation, for example, because some choices are likely to reduce electoral support. On the other side there have been cases of authentic interpretation laws aimed at overturning the predictable result of certain processes or even to revoke the res judicata. Creativity or the excess of judgments creativity is another reason of dispute, but also one of the aspects that deserves to be contextualized and articulated in a series of points with the necessary differentiation between constitutional jurisdiction and ordinary jurisdiction. On the international and supranational level the expansion of judicial power shows two aspects that should be considered separately: the internal expansion within the legal systems of the single States, and the one caused by the growing influences interactions and conflicts between national jurisdictions, by one side, and the international and supranational ones by the other. One possible solution has been represented by the rhetoric of the “dialogue between courts” that has divided the legal scholars between supporters and detractors of this theory. The foregoing considerations show that it has become increasingly difficult to distinguish between physiological and pathological elements of the relationship, significantly more conflictual than in the past, between legislators and judges. This conflict reflects the tension between the principles on which is based the constitutional State, respectively, the democratic legitimacy of the political power and the identification of its limits, consisting on the guarantee of fundamental rights. However, the analysis of the evolution of this conflictual relationship can help us to better identify the effects of the mentioned tension over the form of State and the form of government.

56 INVESTMENT COURT SYSTEM IN RECENT EU FREE TRADE AGREEMENTS: GOALS AND PROSPECTS

Doctrinal and political proposals for multilateralization of international investment dispute resolution have been formulated since the 1940s and 1950s. However, it is only the recent Investment Court System (ICS) project that may result in establishment of a functioning set of international institutions. This system, forwarded by the European Commission in several “new wave” EU Free Trade Agreements, has been widely publicized as a remedy to deficiencies of the prevalent investment arbitration regime. Replication of this model in subsequent treaties of the EU with different partners also officially aims at stimulating creeping multilateralization of investment dispute resolution through eventual consolidation of such parallel tribunals. The proposed panel seeks to present and discuss several pressing issues related to the ICS, which may be decisive for the success or failure of this project. It will explore inter alia such topics as hybrid character of the ICS jurisdictional controversy regarding compatibility of the system with the CJEU powers and representation of public interest.

Participants
Joanna Jemielniak and Shai Dothan
Güneş Ünür
Pawel Marcisz and Joanna Jemielniak
Ann Aseeva
Moderator
Shai Dothan and Joanna Jemielniak
Room
88-3-52

Joanna Jemielniak and Shai Dothan: A Paradigm Shift? Arbitration and Court-Like Mechanisms in Investors’ Disputes

Recent developments in investment protection have considered arbitration as a substitute for investor-state arbitration. Suggestions for creating such mechanisms have been around for a long time, but new trade agreements may make court-like mechanisms for investors’ disputes a reality. This paper starts by asking whether the shift from arbitration to court-like mechanisms is likely to happen and how deep is the change to dispute resolution going to be. The advantages and disadvantages of replacing ad-hoc arbitrators with court-like mechanisms are examined. Courts are more centralized than arbitrators, which gives them the ability to act in a coherent way and consider long-term consequences. However, explicit wording may imply a greater risk of capture by special interests and could lead to more radical legal developments than the stable system of diverse arbitration. Furthermore,
Article 8.31(2) CETA is consistent with this monopoly.

ConCurring panels

The paper focuses on the judicial adjudication of social rights in the context of the implemented auster-

Chapter Title

y measures in the Greek legal order. At first the paper examines how domestic lowest courts safeguard social rights by indirectly enforcing constitutional provisions in order to toxicify social rights and to interpret the positions in relation to the constitutional guarantee of human dignity. The paper then juxtaposes this practice to the opposite interpretation of auster-

yrity measures by the European and Supreme Greek Courts. The analysis further identifies and draws parallels between the Greek and the American federal system of judicial review and reflects on the multilevel structure of constitutionalism and human rights ar-

chitecture in Europe. The paper aims to highlight the undocumented clash in constitutional control which took place at a domestic level in Greece and brought forward questions of legitimacy and constitutionalism at a national and supranational level.

Tania Abbiate: An Overview of Social Rights Adjudication in Africa

The constitutional wave which has interested Af-

raid countries has seen a new impetus in the last years has produced advanced constitutional mechanisms which have at least on the paper improved the rule of law and constitutionalism. A specific feature has been the growing recognition of social rights and the steps towards achieving social justice. This paper will bring light on the jurisprudence of some African courts, bringing reference to specific social rights such as the rights to healthcare, food and adequate standard of living. The protection of these rights is often provided through civil and political rights, and the paper will consider the procedural peculiarities of social rights adjudication in some African constitutional systems. Moreover, it will be considered whether some regional trends can be recognised, and which ones are the most promising judicial developments and the most disappointing ones.

Andrea Bogataj: The procedural peculiarities of social rights litigation in comparative perspective

Social law is meant to protect citizens in times of need and in this regard domestic courts play a crucial role in enforcing social rights. Individual entitlement to protection under social law requires standards of procedural law that may differ from those in civil or administrative judicial procedures. There are inequalities between the parties in terms of resources, legal knowledge and experience. In my paper, I inquire into the existence of mechanisms which compensate the economic imbalances between the parties and enable easier access to the justice on the basis of social rights for the plaintiffs. From a comparative perspec-

ive, I explore the procedural peculiarities of social law cases in the European Union in terms of costs, formality of a lawsuit, the role of judges and issues around mandatory attorneys.

Alexandre de le Court: Social rights and the role of courts: the case of the application of the Eu-

orean Social Charter by domestic judges

While the European Social Charter has been gen-

erally considered as containing only obligations of an international character, partly reflecting the vision of social rights as non-justiciable rights, it has been applied in various forms by ordinary and constitutional domestic courts. The study of the jurisprudence on the justiciability of the European Social Charter in The Netherlands, Belgium, France, Spain and Germany re-

veals a framework of application of international social rights instruments which is more nuanced than those centered on the doctrine of self-execution, and, at the same time, allows the development of a critical view on some forms of use of that doctrine. Moreover, the combination of the previous observations with the analysis of the evolution of domestic jurisprudence in the studied cases adds new elements to the debate on the legitimacy of courts in the adjudication of so-

cial rights in general, and international social rights in particular.

Anastasia Poulou: Social rights adjudication and democracy: an insuperable tension?

Academics and international bodies have so far put emphasis on the procedural human rights of social rights, such as the minimum core obligations and the progressive realization doctrine. Equally important, though, is the procedural dimension of social rights, which guarantees the ability of individuals to effectively participate in the development of the law. Referring to cases from the South Africa and India, my contribution aims to show how courts can adjudi-

cate social rights in a way that is not antagonistic but rather facilitative to the democratic process. Special emphasis will be laid on the potential of procedural models of social rights adjudication to mitigate the tension between democratic decision-making over social welfare decisions and the exclusionary effects of litigation. In order for the pitfalls of the procedural approach to be overcome, a suggestion will be made to establish a link between the procedural and the substantive approach of social rights.

Kyrkiavi Pavlidou: Debating Social Rights in the European Austerity Crisis: The Greek Reply

...
Concurring panels

At the core of the current rule of law crisis is a problem of concentration of power, or conversely a lack of separation of powers. This shows the failure of classic trias politica: a constitution with a formal separation between three branches of government is not enough to safeguard the rule of law. The central question we seek to answer is whether new powers or a new balance between rule of law institutions can be identified in constitutional democracies. Starting point for these two panels is the core of the doctrine: there should not be concentration of the powers to regulate, to enforce and to review. Panel 1 will debate new ideas for a separation or balance of powers beyond the classic three branches of government. What does it mean conceptually to claim that international actors can also strengthen the rule of law at the national level? How can balance of powers across legal orders be theorized? Is it possible to reconceptualize the doctrine beyond public actors? For instance, can we see citizens themselves as a new ‘counterpower’, or are there other private actors that can take up such a role? In this panel the focus is on offering theoretical proposals to extend reshape or replace the traditional doctrine.

Participants
Christoph Möllers
Sanne Taekema
Dimitrios Kyritsis
Lukas van den Berge
Kim Lane Schepple
Moderator
Sanne Taekema and
Thomas Rietheus
Room
8A.4.35

Christoph Möllers: Is there a value of separated powers in the rise to populism?
The protection from tyranny is the oldest rationale for separated powers. But far from having achieved any consensus on what the reference to “separation of powers” really means we moderns also doubt if it is of any practical use. Maybe a sound political process is the condition for a functioning separation and not, vice versa, the separation an instrument to protect us from populist politics. The talk tries to give more concrete answers to that problem and will attempt to show that any meaningful protective use of the notion lies in its potential to protect a pluralization of decision-making procedures. This does not correspond to a classical reading of separated powers, but it might help us to reintroduce the concept in a timely manner.

Sanne Taekema: In search of counterpowers. Can non-state actors curb government power?
Traditional separation or balance of powers focuses on formal mandates of public actors and their interactions. Given the fact that in many states executive and legislative powers have become strongly intertwined a veritable trias politica is merely an ideal. In this paper, I will explore whether a model of balance of powers can be extended to include non-state actors. Is it possible to revise the theory to include counterpowers outside of the state? My primary focus will be on the possible role of civil society actors such as citizen groups, non-governmental organizations or the media. The paper will develop a theoretical notion of counterpower and explore a distinction between direct and indirect checks on government action.

Dimitrios Kyritsis: A Moral Map of Constitutional Polyphony
This paper offers a normative account of separation of powers. It argues that, like all constitutional law, separation of powers must be understood as a legitimacy enhancer: political regimes that conform to it make a stronger moral claim to the allegiance of their citizens. Separation of powers achieves this by structuring cooperation among state institutions in accordance with two imperatives: Division of labour and checks and balances. The first imperative dictates a) that government tasks be assigned to those bodies that can carry them out efficiently or in a way that instantiates relevant intrinsic values such as fairness and b) that other bodies respect each other’s contribution. The second imperative dictates that mechanisms be put in place for effectively monitoring government power and averting its misuse. The paper then considers two closely connected objections to this account. The first rejects its instrumentalism and the second dismisses it as undermining.

Lukas van den Berge: Judicial review of government actions in the neoliberal era
The present era of privatization, decentralization and individualization has seen an unprecedented fragmentation of the public sphere, a breakup of public imperium into separate pieces, not only left in the hands of supranational or subnational authorities but also entrusted to private actors. Public law has experienced an all-out shift from government to governance, replacing centralized bureaucratic rules with all kinds of ‘co-regulatory mechanisms’ and ‘multilevel partnerships’ as allegedly more efficient methods of regulation and policy-making. With the abandonment of previously undisputed notions of strict legal verticality and the undivided general interest, the separation of powers doctrine as applied in most continental systems of administrative law is in need of serious rethinking. As I will argue in my paper, the governance model leaves little room for the classical notion of a ‘freies Ermessen’ as a legal vacuum in which the enforcement of public power is only under democratic control. In fact, a truly democratic system requires strong judiciary counterweight against the neoliberal spirit of governmentalism that is more than ever intent on output and measures everything by quantitative standards of efficiency. Such counterweight could be sought in the substitution of the idea of a governmental ‘discretionary latitude of decision’ with principled and full constraint by norms of appropriateness, subsidiarity and proportionality.

Kim Lane Schepple: Discussant

The panel’s focus will analyse how far the much celebrated reforms introduced by the Lisbon Treaty and the requirements of the Charter of Fundamental Rights aimed at enhancing citizens’ participation in the EU decision-making process have been put in place by the EU political institutions. The panel will also outline how far the recent case law of the Court of Justice has contributed to the fulfilment of this important value, especially considering the plethora of crises the EU is facing and is constantly struggling with due to a democratic deficit. Seven years after the entry into force of the Lisbon Treaty, is the current EU a more democratic and transparent polity, closer to its citizens? A particular attention will be devoted to the access of documents relating to the EU legislative procedure, in particular “trilogues”, the informal meetings between the EP, the Council and the Commission used at every stage of the EU legislative procedure, that have become a much debated issue in recent times (see the new Inter-institutional agreement on Better Regulation, the EU Ombudsman’s public consultation launched in December 2015, the pending action in front of the ECJ challenging the European Parliament’s decision to refuse full access to documents relating to a legislative proposal).

Participants
Maria Elena Gennusa
Stefania Ninatti
Antonio Tarca
Emilio De Capitani
Giulia Tiberi
Paolo Zichittu
Moderator
Giulia Tiberi
Room
8A.4.47

Maria Elena Gennusa: “As openly and as closely as possible to the citizen”: the constitutional dimension of “openness” and “transparency” after the Lisbon Treaty
The paper discusses the constitutionalisation of the principle of openness as a cornerstone of the European democracy reflecting upon the link between transparency and democracy.

Stefania Ninatti: The fundamental right of access to documents in the European Union: reflecting on participatory democracy in the recent CJEU’s case law regarding Art. 42 of the EU Charter and Art. 15 TFEU
The paper investigates the new dimension acquired by accessing documents after the Lisbon Treaty (as expressly granted by art. 15 TFEU and Art. 42 of the
EU Charter of Fundamental Rights). It also looks into the pivotal role so far played by the Court of Justice to enforce such a right together with a critical analysis of the shortcomings of such a jurisprudence.

Antonio Tanca: “Trilogues” transparency: the Council’s perspective

One of the greatest achievements of the Lisbon Treaty was how the new Treaty would help EU law making become much more transparent. What has been done so far in the EU Council of Ministers to fulfil this promise?

Emilio De Capitani: The principle of “the widest possible access” to legislative preparatory documents and the European Parliament’s approach: arguments for an action before the Court of Justice

In this paper the issue of transparent law making after Lisbon will be discussed in the light of the pending action brought against the European Parliament’s decision to refuse full access to documents relating to a legislative proposal, which will be decided in the near future by the Court of Justice (Case before the General Court T-540/15, De Capitani v. European Parliament).

Giulia Tiberi: Transparency v. Privacy and Security

The paper will discuss the judicial interpretation of the exceptions to the right to accessing official documents especially in cases where it is at stake the balancing between transparency and the conflicting fundamental right to personal data protection and in the area of international relations.

Paolo Zichitella: The European Citizens’ Initiative: promise or reality?

The paper will critically assess the implementation of the European Citizens’ Initiative (ECI) after five years of the entry into application of Regulation (EU) No 2110/2011 (ECI Regulation), in order to verify if the ECI is truly a mechanism aimed at increasing direct democracy by enabling the EU citizens to participate in the development of EU policies. In this respect, the recent Court of Justice case law will be considered.

60 JUDGING SOCIAL RIGHTS: THE ROLE OF JUDICIAL REVIEW IN SHAPING AND PROTECTING SOCIAL RIGHTS – DOMESTIC COURT PRACTICE IN CONTEXT

Courts around the world play an increasingly central role in developing the protection of social rights. Thus, courts around the world are facing similar challenges in performing judicial review of the state’s obligation to protect, respect and fulfill social rights. These include, inter alia, arguments against the justiciable nature of social and economic rights, questions regarding the nature and character of the judicial review of the legislature and the substantive dilemma of creating a legal standard to the protection of social rights, where such standards are not specified by the legislature. This panel will explore different examples of the role of domestic courts in shaping the protection of social rights. Panelist will present works which integrate a theoretical discussion with an analysis of the jurisprudence regarding the right to health, the right to sanitation, the right to dignified minimum existence, and the right to access justice. Through these examples, the panel will provide a broad comparative perspective on the development of domestic and regional human rights courts and the protection of social rights by domestic judicial review.

Participants: Michal Kramer, Hana Le Phan, Bruce Teshome, Mishal Plagis

Moderator: Michal Kramer

Room: 8B–4–03

Michal Kramer: The right to a dignified minimum existence and its conception of human dignity – A review of the German adjudication

The legal, philosophical, and political debate on economic and social rights has changed dramatically in the last two decades. In legal and philosophical thinking, there is a growing recognition of social rights as human rights, as well as recognition of their justiciable nature. Although economic and social rights have grown increasingly common in national constitutions, the protection of economic and social rights via constitutional jurisprudence is not limited to a judicial interpretation of social rights provisions in written constitutions. The understanding that a constitution is more than its text together with a judicial culture of developed judicial or quasi-judicial review for civil and political rights provide the underlying conditions for the protection of social rights on the basis of other constitutional principles by ways of judicial interpretation and judicial decisions. Against this background, this paper will analyze the constitutional right to a dignified existence that was developed in the recent adjudication of the German Federal Constitutional Court and is based on the constitutional guarantee of human dignity. The paper seeks to conceptualize the social aspect of human dignity which is reflected in adjudication of the German federal courts and to put it in context of the theoretical discussion on the scope and content of human dignity.

Hà Lê Phan: The Right to Sanitation in Regional Human Rights Courts

In May 2013, the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ESC Rights) arguably marked a paradigm shift in the long-standing justiciability debate. The UN Committee on ESC Rights was vested with the mandate to examine individual and collective communications on a state party’s violation of socio-economic rights. However only two views towards Spain have been adopted to date while eight cases are still pending. As views adopted by UN treaty monitor bodies have no binding legal effect, the complaints procedure of the Optional Protocol has had a limited impact on the implementation of ESC rights. The role of domestic and regional human rights courts remains central for enforcing ESC rights. The paper assesses how the European, Inter-American, African, Arab and ASEAN human rights regimes have dealt with the rights related to sanitation. While the European Convention on Human Rights originally limited its scope to civil and political rights, the Strasbourg Court has made use of the “living instrument” doctrine to fit socio-economic concerns within the wording of the Convention. The Inter-American Convention of Human Rights encompass a number of relevant ESC rights. In African, Arab and ASEAN human rights documents, the right to sanitation is expressly recognized, but implementation mechanisms are often ineffective or non-existent. Do regional human rights regimes afford sufficient protection to the right to sanitation?


Domestic and regional courts are increasingly playing a crucial role in resolving policy issues and as platforms where economic and social rights could be enforced. Domestic courts are often as recipients of international and regional human rights law and assumed that they incorporate these standards in decisions involving economic and social rights. They are also expected to review the impact of public policy and executive action where it is deemed to be against the law or the constitution. In situations where the law is unclear or there is a plurality of conflict interpretations, courts also turn to policy arguments to fill lacuna in the law. The proposed paper will examine the dilemmas that exist for courts in incorporating internationally developed standards while at the same time resolving questions of law using arguments that are in line with the law of the land and the intent of policy makers. By analyzing selected cases from jurisdictions that typify different approaches to the judicialization of the right to health, the paper will explore the reciprocity of influences between courts and policy makers and the influence of policy arguments in judicial decisions. Trends in policy making with regards to the right to health at the international, regional, and national levels will also be discussed to analyze how this process of reciprocal influences between policy makers and courts impacts our understanding of the process of implementing the right to health.

Misha Plagis: Constructing Access to Justice as a Substantive Right, the Supreme Court of India

Access to justice is often used in law and development literature without much attention to its exact definition or connotation. Whether it be in the international sphere or the local scholars agree that access to justice is important; it ensures that the plethora of rights found in conventions and constitutions can be enforced, should they be violated. The ability to attain redress for a wrong is a basic foundation of the ‘rule of law’. What access to justice means in a certain context or jurisdiction, however, is often left to the wayside. As a result, legal scholars and policy makers often view the rights to access to justice in different ways and with different expectations of what should be performed by the state and legal institutions. This paper explores the development of the term access to justice by the Supreme Court of India. The development of the Supreme Court case law has evolved from the more traditional access to lawyers and non-discriminatory access to courts, to addressing the socio-economic needs of litigants. The importance of the right is further illustrated by the proposed constitutional amendment to add access to justice as a substantive right to the Constitution of India. As the gap in access to judicial institutions remains problematic in Indian society, how the Supreme Court conceptualizes and addresses the social and economic factors that impede such access, have major implications on the ability of marginalized communities to enforce their fundamental rights.

CONCURRING PANELS
Courts, both domestically and internationally, have become increasingly engaged in addressing challenges that fall within traditional spheres of deference to the executive. Courts, moreover, have pursued this expanded role not only where a state acts domestically, but also where it acts beyond its territorial jurisdiction and jurisdictional boundaries. This panel examines the growing power of courts to shape public law on matters implicating domestic and international security, including military operations, terrorist threats, and cross-border migration. The papers cut across various substantive areas, including constitutional criminal immigration and human rights law. The papers compare the different approaches of regional tribunals and national courts in addressing such issues as online incitement to terrorism, the risk of intervention in the conflict between public power and law. It focuses on the clash of security and legal rights, and its implications for noncitizens facing prolonged immigration detention; non-Domestic Courts and Military Operations Abroad, and increased restrictions on migration across borders. 

Participants

Jonathan Hafetz: Courts, Legal Rights, and the Politics of Exclusion: Denying Constitutional protection to noncitizens facing prolonged immigration detention and removal. In line with the conference theme, the paper examines the role of courts in mediating between public power and law. It focuses on the clash between security and legal rights, and its implications for courts in a pluralistic society. The paper examines two prominent immigration cases, both pending in the U.S. Supreme Court. One case, Jennings v. Rodriguez, challenges the denial of bond hearings to noncitizens facing prolonged immigration detention; the other, Castro v. Department of Homeland Security, involves the denial of judicial review to asylum seekers from Central America subject to expedited immigration removal proceedings. Both cases require courts to evaluate shifting conceptions of the border as a demarcation line for constitutional rights. In the name of enhanced security, the government seeks not only to deny rights to those outside the country, but also to redraw legal boundaries in the country to exclude individuals historically considered within the Constitution’s protections. The paper explains why courts play an important role in the face of efforts to restrict constitutional rights and as a buffer against a resurgence of politics of exclusion. The paper explores the ramifications not only for the United States, but for the region as well, and examines these developments against the background of decisions by regional and international tribunals. The paper situates the disciplinary approach that combines law, political theory, and sociological perspectives on membership.

Myriam Feinberg: The role of court in regulating online incitement to terrorism

Online incitement to terrorism raises a number of legal issues including in particular the conflict between the obligation of each state to protect the security of its population from the threat of terrorist attacks and their national and international obligations to protect other human rights of individuals including those of the terrorist suspects. Because online incitement to terrorism concerns the protection of human rights such as freedom of speech and privacy which are not unlimited rights their practical application will need to be decided by courts. In this context non-domestic courts in particular the European court of human rights will decide on the balance that states have to apply in their own jurisdiction. In matters of national and international security where courts have deferred to the executive branch the involvement of these regional courts is of critical nature. This is the case especially due to the transnational nature of cyberspace. The article examines the role of courts in the transnational regulation of online incitement to terrorism. It focuses on the specific example of Facebook and on content that can be described as online incitement to terrorism appearing on the social network. It compares the way France and Israel deal with this issue in order to contrast jurisdictions that are subject to European courts with those that are not but possess a strong judicial system.

Silvia Borelli: Litigating War? Domestic Courts and Military Operations Abroad

In recent years, the extra-territorial applicability of the European Convention on Human Rights (ECHR) has been recognized by the European Court such that the European Convention now undoubtedly applies to at least some action of States parties conducting military operations abroad. As a direct consequence, a series of new issues concerning the interaction of international humanitarian law and international human rights law have emerged and have been litigated before the courts of ECHR Contracting States including issues relating to the obligation to investigate killings, disappearances and allegations of torture during military operations, questions of the legal basis for preventive detention of individuals during situations of security emergency, and the rights of members of a State party’s own armed forces. To the extent that the relevant obligations involve constraints upon the freedom of a State to conduct military operations, questions of national security are thereby implicated. Further all of these issues involve the recognition by courts of questions of national security and the protection of individual rights. The paper will examine the approach taken by the English courts to these questions, and the manner in which they, on the one hand have sought to reconcile the potentially conflicting obligations under international human rights law and international humanitarian law, and on the other, the balance which has been struck between individual rights and issues of national security.

Dimitrios Kagiaros: The Role of the European Court of Human Rights in Shaping the Law of State Surveillance

In assessing whether a restriction to a qualified right amounts to a violation the European Court of Human Rights first examines whether the restriction was “prescribed by law.” What this entails is that contracting parties to the Convention must ensure that limitations on human rights are framed in a manner that guarantees they are compatible with Convention standards. In light of this the paper seeks to examine the influence of the Court in European law-making in the area of interference of communications and surveillance. The paper focuses on two issues. Firstly it aims to critically assess the Convention requirements in relation to surveillance laws. Dating back to the 1970s and 1980s the ECHR has identified state surveillance as a legitimate means to safeguard democratic institutional structures. Secondly with a series of further applications challenging mass surveillance pending before the Court in the aftermath of the Snowden disclosures and at a time when the big European players in the field of surveillance (the UK and Russia) are in conflict with the broader Convention system the paper aims to critically assess the challenges the Court faces in continuing to uphold these standards.
nowadays we are witnessing an ever-increasing density of international law both in terms of adjudicative fora and international legal instruments. This invites, in my view, a rethinking of the use of general principles in international law. If gaps are rarer and parallel, potentially conflicting norms and decisions are more frequent, general principles of law could assume an additional law of safeguarding system coherence. For these reasons, I will try to show through an examination of case law that general principles are more accurately described as a result of judicial reasoning responding to instances where there is either sparsity or density of international law norms. Thus, general principles are not so much a source of legal obligation of international law subjects but more of a yardstick to assess their actions in the context of adjudication. This means that their identification by the judges is what primarily confirms their existence if not creates them. This however calls into question both the positivist understanding of general principles of law and their functional reconceptualization.

Parvathi Menon: A Deduction of Incoherence: Widening the Minority Gaps in Judicial Reasoning

Induction and deduction, as methods of interpretation, are premised on the coherence/internal logical consistency of the system of enacted legal norms. Using such reasoning obliterates the hidden ideologies of the judges, creating a veneer of a "correct" interpretation. Relying on the vastly indeterminate field of minority rights, I would like to assess the (in)applicability of these methods of interpretation, keeping in mind the various indices the law provides. Identity, which forms the basis of the claim against the majority/dominant culture, alternates between essentializing what it is to have some particular trait that sets its possessors apart, in order to develop and legitimate claims, and trying to reconcile those claims when they conflict. In order to demonstrate the lacking coherence of the system, my study shall involve an examination of the diachronic and synchronic development of the logics surrounding the meaning of a "minority" by judges within different judicial systems; despite the evolution of what a "minority" entails this paper shall demonstrate how the appearance of objectivity in determining its meaning has perpetuated the abuse of inductive and deductive reasoning, and vice versa.

Gleider Ignacio Hernández: Judicial Institutions as Systemic Agents of International Law

Sources doctrine plays a huge role in construing international law as a system, too often taken as an unexplored tenet of faith within the international legal discipline. But nowhere is it so important than as a tool used by judicial institutions to affirm their authority as systemic agents within the international legal order. This paper will argue that judicial institutions and sources exist in a mutually constitutive relationship, and together are necessary conditions for the existence of the international legal system itself. Sources doctrine reinforces and buttresses international law’s claim to constitute a legal system; and the legal system demands and requires that legal sources exist within it - a form of normative closure which constitutes the legal system itself. Judicial institutions, as “legal officials” within that system, are essential for the application, interpretation and development of sources: without their intervention the legal system cannot exist. In this respect, the social practices of those judicial institutions, who are part of the institutional workings of the system, and especially those with a law-applying function, are of heightened relevance in conceiving of international law as a system. This recursive relationship privileges unity coherence and the existence of a unifying inner logic which transcends mere inter-State relations and constitutes a legal structure. Accepting a conception of system as rooted in such structural dynam- ics might help the international lawyer to reflect on her position as a professional actor within the system.

63 JUDICIALISATION OF HUMAN RIGHTS LAW AND POLICY: A VEHICLE FOR EFFECTIVE PROTECTION OF FUNDAMENTAL RIGHTS?

The panel introduces the Leiden Research Group ‘Effective Protection of Fundamental Rights in a Pluralist World’. Though judicialisation is in itself not a new phenomenon, in the context of today’s globalizing world and the increasing interaction between legal systems, judicialisation is taking on entirely new dimensions and is giving rise to new and complex issues. This is especially true in the field of fundamental rights. At first sight, this judicialisation in the area of human rights seems to be a positive development that furthers the effective protection of human rights and fundamental freedoms at the international regional and domestic level. However, judicialisation also raises a number of issues that need to be addressed, such as the democratic basis of law-making and separation of powers. Against this background, judicialisation as a means to further fundamental rights protection is very much in need of new and innovative research concerning its meaning workings and impact. Three elements merit particular attention during the panel: a. Conceptualization of judicialisation in the area of human rights; b. Judicialisation in relation to substantive areas of human rights; c. Potential and limitations of judicialisation for the effective protection of fundamental rights.

Participants

Ingrid Leijten
Titia Loenen
Jan-Peter Loof
Hans-Martien ten Napel
Jerfi Uzman

Moderator

Titia Loenen

Room

8B-4-33

64 JUDICIALISATION OF POLITICS IN (AN INCREASINGLY MULTI-POLAR) EUROPE: PAST, PRESENT, FUTURE

The Panel will examine the extent of modifications of the constitutional balances of power in the EU member states as result of the expansion of the role of courts (national and international) characteristic to the past two decades. Taking into consideration contested legal areas where particular tensions and antagonisms within European societies are manifest, the panel will investigate whether the European Courts (CJEU and ECtHR) have been capable to exert any meaningful and durable influence on the national law of the EU states, or on the alignment of this law with normative values promoted at the EU level. Because the recent developments within the EU, such as the rise of populist movements, “illiberal democracy” or the results of the British 2016 referendum appear to have the potential to undo the judicialization of politics and the continuous expansion of the courts’ power characteristic to the past two decades, the panel will further examine the implications of these developments and in particular of the “Brexit” for the judicialization of politics in the EU. Finally, the panel will examine The Jurisdiction of International Trade and investment and the implications of the recent political disputes for the future of the international dispute settlements.

Participants

Rafal Marko
Liviu Damas
Sara Razai
Kirk Ewan
Catalin Gabriel Stanescu

Moderator

Liviu Damas

Room

8B-4-43

Ingrid Leijten: Human rights and social policy: interpretation, integration, judicialization

Titia Loenen: Judicialization of social rights and the tensions between individual and collective aspects of social rights claims

Jan-Peter Loof: Rights interference by intelligence services: the (limited) ability of courts to serve as a procedural safeguard

Hans-Martien ten Napel: The European Court of Human Rights “constitutional morality” in the religious domain

Jerfi Uzman: Power to the people or institutional courtesy? Judicialization and counter-judicialization of rights in an era of populism

Rafal Marko: European Court of Justice and the political: a CEE perspective

The paper will explore, from the perspective of Central and Eastern Europe, the role of the European Court of Justice as an actor taking political decisions. The notion of the ‘political’ will be understood here especially along the lines of Chantal Mouffe as denoting existing agonisms within European societies, especially of an economic nature (e.g. consumers vs. traders, employers vs. employees, debtors vs. banks). First of all, the paper will focus on significant ECJ case-law in which the existing body of legal texts did not provide a clear answer (‘hard cases’), forcing the Court to take what was ultimately a political decision. Special focus will be given to cases of social agonisms mentioned above as a starting point, the paper will explore the role of CEE judiciaries in triggering such questions (in the preliminary reference procedure) as well as the impact of such decisions on national
courts. The paper will look no only on the aftermath of concrete preliminary reference procedures initiated by CEE judges but also on spontaneous references to ECJ case-law outside the content of the preliminary reference procedure, as for instance in the litigation situations between Polish and French banks over loan agreements denominated in Swiss francs. As a third step, the paper will try to give an overall assessment of the role of the ECJ case-law in determining the outcomes of agonisms (the realm of the political) in CEE Member States by assessing whether such impact can be considered as meaningful, durable and broad, or rather selective, erratic and occurring merely on a case-by-case basis in some specific sectors.

Liviu Damsa: Limited Power for National and International Courts in deeply fragmented polities? The strange case of Romanian post-communist restitution.

The judicialization of politics and the continuous expansion of the role of courts (both national and international) have been arguably some of the most significant developments in late-20th and early-21st century government. Reflecting the scholarly consensus related to the judicialization of politics and expansion of courts’ power, scholarship on Central Eastern Europe has been more or less in agreement that this double phenomenon characterised constitutional developments in CEE countries since 1989, at least until the advance of ‘liberalism’ in countries like Hungary or more recently in Poland. In my paper I examine whether the judicialization of politics and the expansion of the role of courts had any impact on matters that stirred high passions in post-communist societies such as the processes of restitution or the privatization of public goods. Taking the case of Romania, I argue that there was a lack of political consensus in respect of restitution policies that should have been followed after the fall of communism, I argue that the national courts’ decisions in restitution cases could not restrain the national administration or the government in pursuing policies which infringed the rule of law and ultimately rendered national courts powerless. When the issue of (Romanian) restitution moved to the ECtHR the Strasbourg court’s decisions could do little to prevent the Romanian authorities to cease their continuous infringement of the rule of law and of the European Convention on Human Rights. After a decade and a half of litigation, the only thing that the ECtHR could do was to endorse an uncertain Romanian restitution scheme that lacked much legitimacy. While the ECtHR record in Romanian restitution cases could still be considered impressive the reduced effectiveness of both national and international courts in altering the course adopted by the Romanian national administration in restitution matters should make us to reconsider the role that the courts could play in divided societies and devise additional mechanisms that further support the courts in healing political and social divisions.

Sara Razai: Judicialisation of Politics in the Arab World

Kirk Ewan: The role of the CJEU in the development of the concept of EU Citizenship

The concept of EU Citizenship was introduced by the Maastricht Treaty in 1992, but was founded upon much more established principles of free movement for citizens of Member States entrenched in the treaties. The codification of EU Citizenship in the treaties created ideas of a much more tangible European identity, and along with it, ideas of fundamental rights that this identity brings. However, the concept of EU Citizenship as it is expressed in the treaties is rather bland and matter-of-fact. It leaves many questions unanswered, and the answers have generally come from judgments of the CJEU. These judgments have helped to develop the concept of citizenship both before and after its official codification in the Maastricht Treaty. The purpose of this paper is to analyse the effect that the CJEU’s intervention has had, and to evaluate the direction that its judgments are taking EU Citizenship in. It will also evaluate the effect that this has had upon the UK, by examining the interplay between the CJEU and the UK courts over issues of free movement and citizenship, often discussed in cases concerning derogations from free movement and eligibility of EU citizens to financial assistance. Whether the future for EU Citizenship is away from its current status as subservient to national citizenship will also be considered along with whether the CJEU has an important role to play in this potential future development.

Catalin Gabriel Stanescu: Removing public interest by judicial dicta? The clash between the USSC’s stand on arbitration and the pro litigant stance of the Fiar Debt Collection Practices Act

65 LANGUAGE IN INTERNATIONAL COURTS

This panel explores the role of language in international courts, in its dual role as medium and as subject of adjudication. International courts are places in which actors from different states argue about the law bringing to the courtroom a variety of linguistic backgrounds. To enable communication and frame the conditions for decision-making, procedural rules contain provisions about languages and possible languages that parties can use before the court, as well as establishing a framework for translation/interpretation where necessary. Examining how these rules influence the operation of international courts, and thus the creation of international law, forms one interest of the panel. At the same time, language is not only the medium through which law is negotiated, but also a subject matter courts are called to decide about. Since questions of linguistic rights are regularly linked to minority question of the world, the answers have generally come international courts form an important forum for adjudication. The panel includes presentations on both aspects of language in international courts, and by bringing them together aims at discussing also the relationship between the two.

Participants: Jacqueline Mowbray
Mathilde Cohen

Moderator: Dana Schmalz

Room: 8B-4-49

Dana Schmalz: More than conveyance of information: The role of the mother tongue in the jurisprudence of the European Court of Human Rights

This paper examines which weight the European Court of Human Rights (ECtHR) has given to the him of language in adjudicating language rights cases. With regard to language as a prerequisite of democratic processes, a broad range of considerations exists about the complex interwoven languages and normative settings. Thinking about the “linguistic turn” conceived as not only a medium of interpretation and communication but more fundamentally as structuring all perception of the world. At the same time, adjudication of linguistic rights has treated language mostly with a fixation either on the national or the international medium of conveying information. Especially cases of communication rights of prisoners illustrate the latter tendency. I am interested in discussing how further aspects of language and particularly of a person’s mother tongue will also be considered in dealing with such cases. Moreover this allows questioning how language rights schemes have been oriented at established national minorities as opposed to newly forming immigrant populations.

Mathilde Cohen: The Linguistic Design of Multi-national Courts: The Case of French

This talk discusses the importance of language in the institutional design of European and international courts, a research area that I refer to as “linguistic design.” What is at stake in the choice a court’s official working language? Picking a language has far-reaching consequences on a court’s composition and internal organizational culture, possibly going as far as influencing the substantive law produced. This is the case because language choices impact the screening of the staff and the manufacture of judicial opinions. Using the example of French at the Court of Justice of the European Union, the European Court of Human Rights, and the International Court of Justice, I argue that granting French the status of official language has led French lawyers and French judicial culture to disproportionately influence the courts’ inner workings. This is what I call the “French capture.”
Comparative constitutional scholars in recent years have devoted increasing attention to the subject of constitutional transitions, i.e. the process of constitutional transition from conflict to peace, authoritarian to democratic rule, or colonial rule to self-government. Far less attention, however, has been given to what might be called ‘second’ constitutional transitions – or the transfer of power from the founding constitutional generation to the next set of institutional actors. In many countries, second transitions of this kind are also exactly the moment at which constitutional orders are at greatest risk: the average endurance of constitutions worldwide is now 19 years. Many constitutions thus simply do not survive the process of a second transition. This panel reflects on this problem and its implications for debates over constitutional design and decision-making, with particular attention to problems of institutional transition in the US Senate, in constitutional courts, and in divided societies.

Participants

Mark Graber
Hanna Lerner
Rosalind Dixon
Sam Issacharoff
Moderator
Vicki Jackson
Room
8B-4-52

Mark Graber: Charles Buckalew and the Origins of the Stupid Senate
February 26, 1866 is the day the Senate became stupid. From the framing until the end of the Civil War, the Senate of the United States served clear constitutio nal purposes. The Upper House of Congress protected small states from logrolls by the larger states and promoted bipartisan consensus on slavery policies. Republicans when redesigning constitutional institutions after the Civil War rejected every previous constitutional purpose that might have justified equal state representation in the Senate. Equal state representation remained the law of the land partly because of inertia but also because that method of staffing one House of Congress served the partisan purpose of the Republican Party. This essay highlights how decisions of interest and principle are inevitably interwoven both in the makings of constitutions and, when subsequent generations seek significant constitutional reform.

Hanna Lerner: Interpreting Constitutions in Divided Societies
High hopes have been placed in recent years in the ability of courts to promote the rule of law, strengthen the democratic order, and mitigate identity conflicts in divided societies. Such hopes have led drafters of new constitutions in democratizing countries to adopt systems of constitutional judicial review by establishing constitutional courts with exclusive jurisdiction over judicial review. However, at the same time, in many cases of divided societies, the same drafters left some foundational issues – that stood at the center of the constitutional debate – undecided, and intentionally adopted incrementalist arrangements within the formal constitution (e.g. ambiguous language, deferral of controversial issues, conflicting provisions or nonjudiciable sections). A good example for this dual trend is reflected in the new constitution of Tunisia (2014), which established a strong constitutional court yet left many ideational issues (for example concerning the role of religion or women’s rights) ambivalent. The paper addresses the puzzle of judicial review in divided societies from a comparative and political perspective. Drawing on the experience of countries such as India and Israel it argues that under conditions of deep division over the state’s basic norms and values courts face grave challenges and the risk of generating a harsh political backlash, which may weaken the court’s legitimacy as a political neutral defender of democratic procedures. When courts attempt to address foundational issues left unresolved by the constitutional drafters, their involvement may intensify rather than mitigate identity conflicts. Moreover, the paper argues that the empowerment of courts in divided societies is impacted less by institutional design during the constitution-drafting stage than by political developments outside the constitution and choices made by the court itself in the post-drafting stage.

Rosalind Dixon: Constitutional Court Transitions
Constitution-making is a process that takes place across many time-periods, and involves courts as well as legislatures. A key part of any successful process of constitution-making, therefore will be the creation of a constitutional court whose power and legitimacy endures over time. This paper explores the particular risk to courts in achieving this form of institutional endurance at moments of transition – i.e. in the transition from the 1st to 2nd generation of judges on a new constitutional court and – what if anything can be done at the level of institutional design or judicial doctrine to mitigate these risks. It notes, first, the importance to meaningful constitutional court endurance of norms of staggered judicial retirement and appointment. Second, it suggests that courts own doctrinal approach may be even more important to the achievement of a smooth or successful transition: if a court begins with a jurisprudence that is too active or robust, court may have nowhere to go in terms of incremental doctrinal development and thus inevitably engage in a confrontation with the political branches for which they are ill-prepared. Similarly if a court adopts an overly personalised approach to its jurisprudence, or gives priority to the authorial voice of certain judges, it may undermine its ongoing institutional standing after the retirement of a particular judge. The paper illustrates these dynamics by reference to case studies of both successful, and less successful, as usual Court transitions in South Africa, Hungary, Colombia, Indonesia, and Israel, and suggest tentative lessons for both constitutional drafters and judges from these experiences.

Sam Issacharoff: Constitutional Court Transitions (with Rosalind Dixon)
Concurrences Panel

Panel Session 3

Power and Its Consequences: Threats to the Authority and Independence of International Courts and Arbitral Tribunals

The increasing judicialization of international relations has enhanced international courts and tribunals’ ability to constrain public power. Less noticed, however, is states’ response to these expanded powers. This panel extends an emerging literature on “backlash” by examining new threats to judicial authority. To do so, panelists analyze recent efforts by states to constrain the powers of international courts and tribunals, and the strategies judges and arbitrators use to maintain autonomy and independence. The papers thus examine various controversies between states and courts and arbitrators over judicial role, authority and independence. Panel papers will explore (1) efforts to constrain the independence of international courts through appointment practices, and the complex interactions among judicial independence accountability, and transparency; (2) why states often choose arbitral fora rather than courts to hear controversial disputes -- and the resulting backlash against arbitral tribunals when they rule on such cases; and (3) state attempts to constrain the authority of international investment tribunals, in an effort to eliminate all margins of judicial law-making. The papers thus explore several recent and normatively troubling efforts at de-judicialization.

Participants: Jeffrey L. Dunoff and Mark A. Pollack, Filippo Fontanelli, Taylor St. John

Moderator: Jeffrey L. Dunoff

Room: 4B-2-22

Jeffrey L. Dunoff and Mark A. Pollack: Structural Constraints on Judicial and Arbitrator Independence: The inevitable tradeoffs among judicial independence accountability and transparency

This paper uses recent controversies over reappointments at international tribunals to argue that the states that design, and the judges that serve on international courts face an interlocking series of trade-offs among three core values: (i) judicial independence, the freedom of judges to decide cases on the facts and the law; (ii) judicial accountability, structural checks on judicial authority found most prominently in international courts in reappointment and reelection processes; and (iii) judicial transparency, mechanisms that permit the identification of individual judicial positions (such as through individual opinions and dissents). Drawing on interviews with current and former judges at leading international courts, we show that it is possible to maximize at most two of these three values. The paper unpacks the logic driving this Trilemma, and traces the varied ways in which this logic manifests itself in the design and operation of the ICJ, CJEU, ECtHR, and the WTO’s Appellate Body. The proposed framework enables us to conceptualize the limits of judicial independence, and to identify strategies to enhance this independence.

Filippo Fontanelli: How to unring a bell – States’ attempts to reset arbitral practice in investment law

Judging by States’ action in recent years, it seems that investment arbitration has irreversibly escaped their control. There is a widespread trend towards a ‘hard’ reset of the system of investment arbitration through drastic measures. These vary in intensity: withdrawal from ICSID or from investment treaties, re-negotiation of treaties, abandonment of arbitration, issuing of joint interpretation statements, establishment of appellate review and/or of a multilateral permanent court. The reasons of this general recoil are difficult to pinpoint, but a generic mistrust of tribunals emerges starkly, which is not attenuated by the level of detail reached by treaty provisions. Apparently, States simply stopped accepting to be subject to tribunals’ jurisdiction. Their actions betray a misunderstanding of what interpreting and applying international obligations entails.


Dr. St. John, a Postdoctoral Fellow at PluriCourts who focuses on the history of the international investment arbitration system and on issues of institutional design, will serve as discussant.

Jeffrey L. Dunoff and Mark A. Pollack: Structural Constraints on Judicial and Arbitrator Independence: The inevitable tradeoffs among judicial independence accountability and transparency

This paper uses recent controversies over reappointments at international tribunals to argue that the states that design, and the judges that serve on international courts face an interlocking series of trade-offs among three core values: (i) judicial independence, the freedom of judges to decide cases on the facts and the law; (ii) judicial accountability, structural checks on judicial authority found most prominently in international courts in reappointment and reelection processes; and (iii) judicial transparency, mechanisms that permit the identification of individual judicial positions (such as through individual opinions and dissents). Drawing on interviews with current and former judges at leading international courts, we show that it is possible to maximize at most two of these three values. The paper unpacks the logic driving this Trilemma, and traces the varied ways in which this logic manifests itself in the design and operation of the ICJ, CJEU, ECtHR, and the WTO’s Appellate Body. The proposed framework enables us to conceptualize the limits of judicial independence, and to identify strategies to enhance this independence.
Courts can exert power over cultural heritage in a number of ways: judges may decide a case that deals directly with cultural heritage, their judgments may indirectly influence culture heritage and the perception of it, or judges may deliberately reason in such a way as to avoid making any judgment that would at all affect cultural heritage. This interdisciplinary panel provides a specific example of the three scenarios. The panelists consider whether courts have the definition of cultural heritage, the roles of State non-state, and individual private actors active in the cultural heritage field. Indeed, whether judges and their courts are faced with a legal issue that involves cultural heritage, the judgments they render inevitably attempt to substitute the voice of the court for the voice of society at large, other governmental agencies, and private stakeholders whose actions are often conceived as the proper place for justice to be rendered, it may or may not be the proper place for a public discourse about cultural heritage: this interdisciplinary panel aims to fully consider the powerful mediating role that courts play in shaping and defining cultural heritage and the repercussions of that mediation.

**Participants**
- Daria Brasca
- Felicia Caponigrì
- Anna Pirrì
- Elena Pontelli
- Lorenzo Casini
- Sabino Cassese and Lorenzo Casini

**Moderator**
- 4B-2-34

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**Daria Brasca: The Denial of Holocaust Looted Art in the Italian courts: Just A Justice Matter?**

In Varsity v. Star Athletica, the U.S. Supreme Court considered whether certain fashion design is copyrightable subject matter under U.S. law. This paper explores whether the Court’s decision will support or undermine Fashion design’s current presentation and appreciation as cultural heritage in American museums; it contrasts the nuanced effect of U.S. copyright law on the definition of cultural heritage with the direct effect Italian cultural heritage law and the judgments of Italian administrative courts have on the definition of cultural heritage.

**Anna Pirrì: Artworks under ‘Indecent’**

This paper aims to deepen the relations existing between contemporary art and law through a close look at some selected court decisions that deal with artworks. These cases are an example of the possible dichotomy between what is considered art by courts and what is generally considered art by the art system and the art market. The paper aims to express the challenges represented by contemporary art for the legal regimes of customs law copyright and moral rights.

**Elena Pontelli: The Denial of Exportation Certificates in Italy and its Judicial Review: an ancient story**

Parliamentary discussions of the first republican Italian Parliament, upon the approval of the draft U171/“Modifiche dell’attuale disciplina delle mostre d’arte” (N. 561/1950), reveal common traits with the debate fueled in those years by art historians and archaeologists on the increasing numbers of exhibitions involving the movement abroad of parts of national artistic heritage. Over the decades, courts have become a meeting point for archaeology and law, reflecting the debate between these two worlds. This paper will analyze the legal reasoning given by courts in their judgments in cases where the denial of an exportation certificate was appealed in order to show the close relationship (whether in agreement or not) between the legal reasoning and the dominant cultural theories in archaeology and art history.

**Lorenzo Casini: The Future of Cultural Heritage Law**

Cultural heritage sway between international and national legal dimensions, and between universal and outstanding values: one property may be simultaneously outstanding and extremely relevant to a given single nation and its community – and universal – and significant to all mankind, assuming that culture cannot be restrained within one single country and/or community. International regulation of cultural heritage sheds light on the multifarious relationships between different legal systems of interests and importance for the Court to recognise complex and structural inequality under EU law. The Court’s reasoning appears in sharp contrast with a larger body of work on interculturalism, Tieuzo’s turn to redress intersectionality.

**69 THE CJEU AS A FUNDAMENTAL RIGHTS COURT: NEW PERSPECTIVES IN LIGHT OF RECENT CASE LAW**

This paper explores the transformative potential of the CJEU in enforcing fundamental rights guaranteed under EU law. The Court’s recent jurisprudence in at least three areas – discrimination, Charter rights and the right of asylum seekers and refugees – highlights the potentialities in defining the role of the Court as a fundamental rights court. The Panel surveys this trend and lays down the groundwork for fully exploiting this potential. Atyre examines the CJEU’s failed opportunity to address intersectionality in a case explicitly argued on two grounds of discrimination – Parris and TCD. Her critique hopes to revive the promise in the Court’s preliminary ruling mechanism for addressing complex and structural inequality through EU law. Rauchegger examines the role of the CJEU in enforcing Charter obligations in cases concerning asylum seekers and refugees. In light of the Common European Asylum System (CEAS), she studies the obligations imposed by EU law on collective agents such as the UNHCR.

**Participants**
- Shrey Atrey
- Lilian Tsourdi
- Clara Rauchegger

**Moderator**
- Bruno de Witte

**Room**
- 4B-2-58

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**Shrey Atrey: Facing the challenge: CJEU’s turn to redress intersectionality**

The Court of Justice of the European Union decides upon discrimination claims argued explicitly on two grounds – sexual orientation and age – on 24 November 2016. It found that no discrimination could exist on two grounds combined together where no discrimination existed on the grounds considered separately. With this, the Court rejected the first possibility of recognising discrimination based on two grounds and thus the relevance of the theory of intersectionality in EU discrimination law. The claim in Parris v Trinity College Dublin thus failed. The failure in Parris signifies the lost opportunity for the Court to address inequalities that matter; with the purpose of developing the Court’s preliminary ruling mechanism as a way of advancing substantive equality in Europe.

**Lilian Tsourdi: The role of collective actors in the enforcement of asylum seekers and refugees’ rights**

Lacking both an international judicial instance, and a global level monitoring mechanism with a possibility to deliver opinions in individual cases, international refugee law is particularly challenging to enforce. The creation of a Common European Asylum System (CEAS) was carried within it the potential for the CJEU to shape EU asylnum, and by extension international refugee law, as well as to enforce asylum seekers and refugees’ rights. Strict procedural rules on direct access somewhat relationship (the CJEU’s potential to be the ‘Court’). Nevertheless, provisions in the various legal instruments comprising the EU asylum acquires influence the conditions for asylum seekers and refugees to gain access to national courts. One of the main advancements of Clarke’s work is that CEAS’s legal regime is that it seeks to harmonise in a detailed manner rules around asylum procedures at national level, including provisions on the right to an effective remedy and related guarantees. In addition, refugee-assisting organisations, at national and EU level, as well as the Office of the High Commissioner for Refugees (UNHCR), are increasingly engaging in strategic litigation in the field of asylum. Set against this backdrop, the paper examines the role of collective activities in the broader context of international law, as well as the relationship with collective actors and for UNHCR within CEAS. It then critically assesses if, and how, these functions relate to their capacity to judicially enforce asylum seekers and
ConCurring panels

After having explored the first condition the distinction acquired binding force in 2009, was not meant to be respected and third the "supremacy unity and effectiveness" of EU law cannot be compromised. The paper sheds light on the hidden processes behind asylum litigation and the oft-ignored influence of auxiliary Charter case law of the CJEU of the past. The paper confronts the CJEU’s approach to the co-application of EU and national fundamental rights with that of domestic constitutional courts. The Italian Constitutional Court, for instance, has recently articulated its view on this matter in its preliminary reference in the Taricco case.

Claire Rauchegger: The CJEU and National Constitutional Rights

The EU Charter of Fundamental Rights, which acquired binding force in 2009, was not meant to replace, but to complement the fundamental rights of the Member States. In the seminal Melloni and Akkerberg Fransson cases of February 2013, the Court of Justice of the EU clarified that national fundamental rights can be applied in parallel with the EU Charter of Fundamental Rights if three conditions are fulfilled. First, the provision of EU law which triggers the applicability of the Charter has to leave a degree of implementing discretion to national authorities; second, the minimum level of protection of the Charter has to be respected and third the "supremacy unity and effectiveness" of EU law cannot be compromised. The proposed conference paper sheds light on the actual meaning of these three conditions. It examines the abundant Charter case law of the CJEU of the past four years in order to determine how much leeway the court actually leaves for the application of national fundamental rights within the scope of the Charter. After having explored the first condition the distinction drawn by the CJEU between complete and partial determination by EU law, the paper aims to understand to what extent the applicability of domestic constitutional rights is restricted by the second condition, the respect of the Charter as a minimum standard of protection. Three different standards of review employed by the CJEU under the Charter and therefore three degrees of deference to national fundamental rights are identified. In the first group of cases, the ECJ fully defers the fundamental rights review to the national court, in the second group, it opts for a light-touch review, and in the third, for full substantive review under the Charter. Regarding the third condition for the application of national fundamental rights in parallel to the Charter from the respect of the "supremacy unity and effectiveness" of EU law, the analysis of the case law shows that it has no practical significance. The final part of the paper confronts the CJEU’s approach to

70 JUDICIAL DESIGN IN FEDERAL SYSTEMS

As an organizing principle for government, federalism embraces regional autonomy, diversity, innovation and competition while also promoting shared commitment to common values including, for example, commitments to the rule of law and individual liberty. Judicial federalism – the way in which judicial systems are structured within a federation – raises pointed questions about how to reconcile these foundational principles of federalism. Where a system of sub-national courts is maintained within a federal judicial structure, a tension arises between national rule of law commitments to judicial integrity (including judicial independence and fair and consistent judicial processes) and sub-national diversity. To characterize and evaluate judicial federalism requires an understanding of how an individual system balances these (and other) sometimes competing values. This panel will review system-design in the United States, and Australia, Canada, Germany, Malaysia, and Brazil.

Participants
Gabrielle Appleby and Erin Delaney
Gerry Baier
Thomas John
HP Lee and Richard Foo
Angelo Oliveira
Catalina Smulovitz

Moderator
Vicki Jackson

Room
7C-2-24

Gabrielle Appleby and Erin Delaney: Integrity in Diversity: Comparing Rights and Structure in Judicial Federalism

The United States and Australia each initially designed its judicial federalism with an understanding that state courts would perform a role in the new federal system. But each constitutional text was silent as to how judicial integrity of state courts would be assured. In the United States, a partial solution was developed through the strengthening of concurrent jurisdiction in federal courts, thus providing litigants with an alternative forum in which to resolve federal claims. In Australia, the Australian High Court has drawn on the Constitution’s express inclusion of state courts in the federal judicial system to develop a structural solution to monitoring state judicial integrity. Extrapolation of the protections for judicial independence that apply to federal courts, the High Court has implied similar guarantees of judicial independence and integrity at the state level. In each system, albeit in different ways, the court has drawn constitutional implications to address the challenge of maintaining integrity within state judicial systems and processes.

Gerry Baier: Canadian Judicial Federalism: Quasi-Federalism Realized

Canada’s system of judicial federalism was consciously designed to impose national uniformity on the federation. Major areas of private law are distinct to individual provinces, with Quebec and its use of a civil code being the most distinct of the provinces. This is not a surprising trait for a federation. Moreover, a federalized judiciary oversees the enforcement and interpretation of those laws. There are distinct provincial and federal court systems with differing jurisdictions. However, the federal government appoints the most senior justices of the provincial systems as well as the Supreme Court of Canada, a court which has plenary jurisdiction over all provincial and federal laws. The appointment of a significant portion of the judiciary by the federal government demonstrated the distrust that Canada’s founders had for local particularisms as well as their desire for centralization of power and standards at the national level. Legal particularities among the former colonies were a sticking point of the Confederation project, so the ability to pull off this particular bit of uniformity was uncharacteristic of other compromises that are features of the legal landscape in Canada’s federation. That said, Canada’s judicial federalism is among the more unifying features of a very diverse country, though probably underappreciated as such. Setting Canada’s judicial federalism into comparative context will give a greater appreciation of the capacity for integration and particularity that is possible in a federal judicial system.

Thomas John: Assessing Germany’s Integrated Hierarchical Judicial System

The German judicial system was conceived in the late 1940s, with the abuses of judicial power as committed by the judiciary in the Weimar Reich clearly on the mind of the drafters of the German Grundgesetz. As a result, the Grundgesetz allocates the competencies of the Landes- and Bundes-courts to create one integrated, hierarchically structured, judicial system. This approach was thought to balance a number of competing interests. It aimed to strengthen the German Länder, and to delineate, and thus limit, the federal powers of the Bund. It also stood in contrast to established judicial systems that are, like the Australian or that of the United States, based on perhaps even competing, state and federal judicial systems, with a view to avoiding any or most Kompetenzverängerung among the Landes- and Bundes-courts. And it was thought that integration would ensure an efficient judicial system, and that competition would be a panacea for national–wide legal system that still maintains a level of regional autonomy and (thus) diversity. The paper will analyse the complex web of constitutional and legisla-
Judicial politics have engendered controversies over Angela oliveira: Judicial Federalism in Brazil: Constitutional Structure and the Supremacy of German judicial system, will also be considered.

Sarawak. In 1965 Singapore was ejected from the federation. Malaysia and the states. This paper will provide the Malaysian perspective on some aspects of the judicial system and the constitutional development states must allocate resources to enforce them. States need financial support to fund a judiciary with qualified staff, agencies throughout the territory, policing capabilities and support services such as shelters, hospitals, schools and prisons. To state that the protection of rights has economic costs is neither contradictory nor original assertion (Holmes and Sunstein, 2000). Nonetheless, empirical research about the protection of rights tends to overlock this dimension of the problem. To amend this deficiency, this paper analyzes how international courts engage in judicial reviews and the role of the international courts in the functioning of a parallel system of Syariah courts. Islam is the sole domain of the states. Judicial politics have engendered controversies over a number of fundamental issues which challenge the notion that the Syariah courts provide for a secular nation with Islam expressly declared to be the religion of the federation in terms of its role for ceremonial purposes. A constitutional amendment in 1988 has led to a number of fundamental issues relating to the centralization of powers and the jurisdictional boundaries between the civil courts and the Syariah courts. In one of the states there exists a sub-national tier of courts the Native Courts of Sarawak. This paper will provide the Malaysian perspective on some aspects of the judicial system and the controversies engendered in the Malaysian federation.

Angela Oliveira: Judicial Federalism in Brazil: Constitutional Structure and the Supremacy of German judicial system. The contemporary Malaysian federation first came into being in 1957 as the Federation of Malaya comprised nine states with hereditary rulers (or Sultans) and two Straits Settlements. It was subsequently enlarged in 1963 as Malaysia by the addition of the Crown colony of Singapore and Sabah (formerly North Borneo) and Sarawak. In 1965 Singapore was ejected from the federation. In crafting the constitution for an independent polity, the Constitution was on ethnic issues rather than a struggle for powers between the states and a new central polity. The judicial system which operated in the federation is highly centralized and is largely because of the historical colonial factor. Never- theless, the allocation of jurisdictional powers among the three tiers of the system is functioning of a parallel system of Syariah courts. Islam is the sole domain of the states. Judicial politics have engendered controversies over a number of fundamental issues which challenge the notion that the Syariah courts provide for a secular nation with Islam expressly declared to be the religion of the federation in terms of its role for ceremonial purposes. A constitutional amendment in 1988 has led to a number of fundamental issues relating to the centralization of powers and the jurisdictional boundaries between the civil courts and the Syariah courts. In one of the states there exists a sub-national tier of courts the Native Courts of Sarawak. This paper will provide the Malaysian perspective on some aspects of the judicial system and the controversies engendered in the Malaysian federation.

Catalina Smulovitz: Who pays for rights in the Argentine provinces? The case of domestic violence laws

Protection of rights is not free. To ensure their implementation states must allocate resources to finance a bureaucratic apparatus to enforce them. States need financial support to fund a judiciary with qualified staff, agencies throughout the territory, policing capabilities and support services such as shelters, hospitals, schools and prisons. To state that the protection of rights has economic costs is neither contradictory nor original assertion (Holmes and Sunstein, 2000). Nonetheless, empirical research about the protection of rights tends to overlock this dimension of the problem. To amend this deficiency, this paper analyzes how international courts engage in judicial reviews and the role of the international courts in the functioning of a parallel system of Syariah courts. Islam is the sole domain of the states. Judicial politics have engendered controversies over a number of fundamental issues which challenge the notion that the Syariah courts provide for a secular nation with Islam expressly declared to be the religion of the federation in terms of its role for ceremonial purposes. A constitutional amendment in 1988 has led to a number of fundamental issues relating to the centralization of powers and the jurisdictional boundaries between the civil courts and the Syariah courts. In one of the states there exists a sub-national tier of courts the Native Courts of Sarawak. This paper will provide the Malaysian perspective on some aspects of the judicial system and the controversies engendered in the Malaysian federation.

Or Bassok: The Supreme Court of the United Kingdom: How More Independence from Politicians may Entail Less Independence from Politics

The establishment of the Supreme Court of the United Kingdom under the Constitutional Reform Act 2005, that removed the Law Lords from the Westminster Parliament, has been commonly understood as a move towards creating a greater separation between law and politics. I argue that examining the change from the perspective of the Court’s source of legitimacy reveals that the end result may be opposite to the constitutional intentions. The new institutional design aims at the potential of shifting the focus of the Court’s source of legitimacy from expertise to public support. Thus, the divide between law and politics may erode due to the change. Recent developments in the Court’s jurisprudence indeed show that this erosion has already begun.

Dmitry Kusovos: Courts as facilitators of democratic deliberation

Deliberation is often considered one of the key features of democratic process. The underlying theory is that the informed public would be in the position to make a better judgment. Numerous studies have been conducted, regarding deliberation at both micro- and macro-level. Ultimately, though, elections form the key part of democratic process. In electoral context, deliberation can be approached in markedly different ways. While some would argue that ‘marketplace of ideas’ (even if money is considered ‘speech’) would ultimately lead to democratic deliberation, others contend that such a result can be achieved only if debate is freed from unwanted influences. In the current media environment, where facts are challenged by ‘alternative facts’, such a juncture becomes crucial. In my paper I argue that the role of the courts as facilitators of democratic deliberation in the light of new developments in the media. Principal among them are the concentration of traditional media in single hands,
The constitution faces from its very beginning a paradoxical relation between itself and that which constitutes it and there is no big news. Yet the difficulty to deal with it still remains for political and constitutional scholars. The idea of a radical constitutional takes this paradox as foundational. Another way of looking at this foundational paradox between constituent power sovereignty and the constitution is focusing on the relation between democracy and constitutionalism which poses the same difficulties in terms of not having a "secure" ground for their accommodation. Progressive constitutionalism and radical political theory, particularly radical democracy, are different, internally variegated but share some points of view, such as a critical attitude towards liberal democracy and, paradoxically, a commitment to certain elements of the liberal tradition. Radical democracy favors participative and enhanced opportunities for popular control over the limitations of parliamentary democracy. It is attentive to the inequalities that undermine people's capacities to access liberal rights yet it depends on liberal principles. The purpose of this panel is to discuss to what extent constitutionalism and radical democracy can join an agenda for political and judicial action.

Participants
Vera Karam de Chueiri
Melina Girardi Fachin
Maria Francisca Miranda Coutinho

Moderator
Vera Karam de Chueiri

Room
7C-2-12

Maria Francisca Miranda Coutinho: Political representation as a dialectical process and an ethical relation

Political representation as a dialectical process and an ethical relation. Nowadays, the legitimacy of political representation is in crisis in Brazil, especially on account of the fortification of the civil society's role as a key political actor (through increasing social media articulation, broadening of public political debate in private spheres and strengthening of the Constitution's role after the process of redemocratization post 1988) and the increasing discredit in the ability of rulers to act according to public interest and to consider the heterogeneity of perspectives involved. However, in a complex society like the Brazilian one, the complete overcoming of the category of representation can not be sustained. The present article intends to approach the problem of representation to be thought by the philosophical principle of the identity, like a closed totality and zero sum. It also maintains that legitimacy shouldn't be attached to the act of authorization. On the contrary, it is suggested that representation should be thought as an ethical relation marked by the insuperability of radical difference and as a dialectical process in permanent production and reconstruction delimited by the logic of the non-whole. Legitimacy, then, would be in the process itself. This reinforces the idea of progressive constitutionalism that a good practice of representation as a dialectical process of determining agendas, deliberation and decision-making, as well as to consider the importance and materialization of accountability and responsiveness. Finally, it highlights the political capacity and strength of that remains and resist not represented, as a negativity that pushes and enables the permanent resignification of the process of representation.

Participants
Francesco Natoli
Balthazar Durand
Nicolas Klaussner
Jean-Philippe Foegle
Jessie Blackburn

Moderator
Stéphanie Hennette-Vauchez

Room
7C-2-02

Francesco Natoli: The Constitutional priority question and the impact of judicial review during the state of emergency

From a legal standpoint, the concept of emergency refers to a situation characterized by an immediate risk of damage towards personal safety, environment or goods. Therefore, exceptional measures are implemented by providing public authorities with derogatory powers. The rise of executive prerogatives at the expense of ordinary procedures is justified in those cases by the necessity for institutions to quickly act on a public threat. However, even though the efficiency of such an intervention is closely related to the ability of government or local authorities to react in a promptly and effective way, the over-invocation of emergency can affect the balance of power by granting permanent and unjustified discretionary powers to the executive. As a consequence, the constitutionality of those measures represents an actual debate in modern democracies. In France, the constitutionality of the state of emergency law of the 3rd of April, 1955, which provides a legal basis for the state of emergency regime, has been found to be consistent with constitutional law by the Constitutional
The study of the legal commentaries made on decisions of the Constitutional council in its decision of the 25th of January, 1985. On that occasion, the Court stated that the competence of conciliating the safeguard of civil liberties with public order exclusively belongs to Parliament. After having implicitly declined its jurisdiction with regard to the constitutionality of this peculiar regime appeared to be a widely accepted fact. However, the introduction of a posterior constitutional control in 2007 and the recent modifications of state of emergency’s regime alter the territorial distribution of the techniques of digital surveillance creates a barrier to the effective control over intelligence activities. Finally, the paper will assess how the implementation of some best practices identified in international law (Cleared counsel, mandatory disclosure of classified information, protection of whistleblowers...) could improve the efficiency of democratic control over intelligence activities.

Jessie Blackbourn: States of Emergency, Anti-Terrorism Laws, and the Power of the Courts: The View from the United Kingdom

Drawing on the themes raised in the first four presentations in this panel, this paper provides a view from the United Kingdom. Parliament in the UK have a long history of legislating against terrorism, dating back to the partition of Ireland in 1921. Various counter-terrorism strategies were employed to counter the threat of terrorism in Northern Ireland, including the adoption of a state of public emergency and the enactment of laws that infringed upon the fair trial rights of terrorist suspects, as well as the use of environmental activists or demonstrators on the one hand and civil liberties’ restrictions implicated by Home office decisions on the other one. The unusual nature of this proportionality control is that the assessment of a public order threat is almost solely based on an objective examination of the abstract qualities of legislative process but rather to the complex dynamics and social relations that support them...
75 CONSTITUTIONALISM AND CONSTITUTIONAL CHANGE

This panel focuses on major themes central to constitutionalism and constitutional change. What is the relationship between a constitutional order and a state’s territory? Democratic choices of a polity are somehow bound by geographical space. A territory is central to the constitutional order. And of course, there is a strong link between the people territory. But can we criticize been this particular? This dilemma also appeals with regard to the Brexit, which presents a unique opportunity to reevaluate our conceptions on popular sovereignty. How do we imagine the role of the people in constitutional change, and how do we imagine the people’s identity vis-à-vis major constitutional changes? Finally, must we resort to formal constitutional amendments in order to change the constitution, or may we resort to subconstitutional quasi-constitutional amendments? The panel will elaborate on these vexing questions.

Moderator: Yaniv Roznai
Participants: Oran Doyle, Zoran Oklopcic, Richard Albert, Michaela Hailbronner
Room: 8A–2–27

Oran Doyle: Constitutional Amendment of a State’s Territory

Constitutions typically stipulate a process for their own amendment. These processes are generally seen as an important means to allow constitutions be updated or reformed. However, they also contain a number of precautionary measures to territory. The paper examines why the exclusion of these rights from justifiable is overwhelmingly harmful to their development. Firstly, it examines the reasons for legislative supremacy in this area being; competence, capability, and democratic legitimacy. It argues that excludes an end, furlongues of rights from the purview of the judiciary arguably breaches the separation of powers by creating a situation which it was designed to prevent. Further, this exclusion compounds the view that these rights are inferior to their civil and political counterparts. This leaves the presumption of priority and fundamental limits of legislative supremacy, and — perhaps shockingly to some — a model of discrimination as a model for reconciling judicial power with democratic will-formation.

Zoran Oklopcic: Brexit demos dixit?

Over the last two and a half centuries, these binary—yardstick/allergy and top-down global/bottom-up/local — shaped our understandings of popular sovereignty. They did so subtly, and indirectly: by shaping our understandings of what kinds of questions we can ask about it, and in which contexts. This essay is an attempt to explore other possibilities. Instead of asking What (are the normative criteria for the legitimate exercise of political power)? I will ask When and Where (in our imagination of popular sovereignty, are there criteria applicable)? Instead of asking Who is the people in a particular case, and whether a particular event may be understood as the manifestation of its will — I will ask How do those who answer that question imagine its identity and the scene in which that event occurs? In the context of the vote on the Brexit referendum in the United Kingdom, whereby the winning majority supported the exit of Britain from the European Union, Brexit is a unique opportunity to change the terms of the debate about popular sovereignty: not only because a number of different questions that have haunted that debates separately have now appeared together, but also because they occurred in the context dominated by different terms of debate. Unlike elsewhere, the British doctrine of parliamentary sovereignty does not provide answers to Who? and What? These questions with recourse to the standard disciplinary and theoretical bannisters made intelligible within the matrix organized by the two binaries.

Richard Albert: Quasi-Constitutional Amendments

The difficulty of formal amendment in constitutional democracies has given rise to an increasingly common phenomenon: quasi-constitutional amend-
Democracies around the world are facing new threats from within: populist parties are on the rise globally, and many have succeeded in passing major changes to existing constitutional arrangements. In other countries, dominant political parties and actors are finding new ways to entrench their hold on power. There is also an emerging subfield of comparative constitutional studies that addresses this phenomenon. This panel brings together leading contributors to this literature, to reflect on how courts and constitutional law can respond to this phenomenon of abusive constitutionalism or dominant party rule – or effectively engage in processes of ‘democratic hedging’.

Sujit Choudry: What can constitutional law learn from the past of democratic breakdown?

Tom Daly: Preventing ANC Capture of South African Democracy: A Missed Opportunity for Other “Constitutional Court”?

When we think of constitutional courts and South Africa, we inevitably (and understandably) think of one institution: the Constitutional Court in Johannesburg. As regards dominant party democracy, the constitutional framework reposes considerable faith in the Constitutional Court to act as a bulwark against capture of the democratic process by the African National Congress (ANC), and the Court has a mixed record in this regard. Entirely missing from the narrative is the potential role of other constitutional courts as a further firewall against capture; chiefly the African Court on Human and Peoples’ Rights. This paper will discuss why, and how South Africa’s post-apartheid constitutional system has made little space for the role of international courts as a ‘back-up’ constraint, and why this matters as we enter a new political context of declining ANC hegemony and the potential for heightened ‘capture tactics’ this may bring.

David Landau: Tiering Constitutional Amendment

The US Constitution is famous for its demanding requirements for formal constitutional amendment. Another equally important, if less noticed, feature of Article V of the Constitution is the heightened protection it gives to the ‘Equal Suffrage’ provisions in Article I. When the Constitution is read together with state constitutions, it is also clear that the US is home to another, parallel form of constitutional ‘tiering’: most provisions of state constitutions can be relatively easily amended, but those that implicate fundamental provisions in the federal Constitution cannot be amended other than by recourse to Article V. The tiering of constitutional amendment procedures, the article further argues, has clear advantages from a democratic perspective: it balances democratic commitments to constitutional flexibility and rigidity in ways that are superior to approaches based on the averaging of costs and benefits to amendment or a ‘moderately’ difficult formal amendment rule. This balance is also increasingly important in a world in which, in many countries, formal amendment processes not only serve as a means by which democratic majorities may update constitutional language or override court decisions, but as a vehicle for distinctly antidemocratic constitutional change. The precise content and details of a tiered approach to amendment will inevitably vary by country but may be guided by a range of general design principles, including a commitment to: a mix of specific, rule-like provisions, and broader, more standard-like democratic guarantees; a limited number of different tiers; the use of a range of different procedural mechanisms to protect higher tiers; sensitivity to the distribution of political power in a society; and the degree to which tiers are occurring ex ante or ex post. While the success of a tiered approach depends on a great deal of local legal and political conditions, the effectiveness of tiering can also be increased in many cases by careful attention to the relationship between formal constitutional entrenchment and language, and to the relationship between amendment tiers and comparative democratic practices. The article makes these arguments drawing on a range of case-studies from the US, Colombia, India, South Africa, Hungary, Ecuador, Venezuela, and Nicaragua.

Rosalind Dixon: Tiering Constitutional Amendment (with David Landau)

Arbitrations between private economic actors and public law bodies are on the rise, both under international investment treaties and public contracts. Yet, arbitral tribunals not only settle disputes, but also review the legality of government acts and incrementally develop the applicable law. The panel will discuss in the abstract how constitutional ideals may become important law-makers that generate the law governing private-public relations in a specific domestic legal system and their democratic practices. This raises questions of legitimacy and concerns for principles of constitutional law, such as democracy, the rule of law, and the protection of fundamental rights. Concerns of a constitutional nature are all the more significant as arbitration proceedings in private-public disputes do not conform to safeguards that are usually in place in public law adjudication in domestic courts. Setting private-public disputes through arbitration may endanger how states regulate in the public interest. The European Research Council-funded Lex Mercatoria Publica Project aims at developing a framework for addressing legitimacy concerns of private-public arbitration. The panel will present results from the first four years of research of this project.

Stephan Schill: The (Comparative) Constitutional Law of Private-Public Arbitration and its Legitimacy

This paper analyzes the legitimacy challenges of arbitrating public-private disputes for constitutional principles such as democracy, human rights and the rule of law and develops a framework for conceptualizing legitimacy in a multi-jurisdictional system with little regulation under international law and few stringent control mechanisms under domestic law. The paper introduces the idea that absent a centralized way to control private-public arbitrations, a framework for legitimacy can be developed through comparative legal analysis of what constitutional principles, like democracy, human rights, and the rule of law mean for ensuring that the public interest is not negatively affected by settling private-public disputes through arbitrations and not in domestic courts. Rather than discussing in the abstract how constitutional ideals may impact private-public arbitration, the paper argues that criteria to assess the legitimacy of private-public
ConCurring panels

Transnational Private-Public Arbitration

Law? An Empirical Study on National Law(s) in a broad conception of “public entity” which includes and public law bodies tackle domestic law. It adopts and domestic elements? Do they, instead, appropriate and/or reflects a certain consistency within a given analysis of concrete constitutional regimes. To this end, the paper will explore the legal basis and implications of constitutional law in several jurisdictions in respect of the involvement of public actors in settling disputes with private actors through arbitration, rather than in permanent courts. It assesses whether under which circumstances the resolution of international disputes, the second part will focus on the main legitimacy concerns that arise when private-public disputes are resolved institution-administered arbitration. Are arbitral institutions suitable for the resolution of disputes in the public interest? Are the arbitration rules available on the global market appropriate to deal with proceedings involving public interests? Are recent changes made to the procedural rules sufficient to address legitimacy concerns. Or do we need to rethink how arbitral institutions work to ensure private-public arbitration concerns are dealt with in an appropriate manner?

78 MARGIN OF APPRECIATION IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

With the signature of Protocol n.º 15 to the European Convention on Human Rights, the Contracting Parties have included in the text of the Convention the doctrine of the margin of appreciation, which has long been used by the Court in many of its decisions. This doctrine grants national authorities a margin of discretion in fulfilling their obligations under the Convention and, on this reason, it can be said to mark the boundary between the universality of human rights and the irredutable State sovereignty.


The paper explores how arbitral tribunals deciding on transnational disputes between private parties and public law bodies tackle domestic law. It adopts a very narrow margin of appreciation, imposing an overly important role in the field that comes along with considerable ‘hard’ authority, thus putting them at the center of the international system. To this end, the paper will explore the legal basis and implications of constitutional law in several jurisdictions in respect of the involvement of public actors in settling disputes with private actors through arbitration, rather than in permanent courts. It assesses whether under which circumstances the resolution of international disputes, the second part will focus on the main legitimacy concerns that arise when private-public disputes are resolved institution-administered arbitration. Are arbitral institutions suitable for the resolution of disputes in the public interest? Are the arbitration rules available on the global market appropriate to deal with proceedings involving public interests? Are recent changes made to the procedural rules sufficient to address legitimacy concerns. Or do we need to rethink how arbitral institutions work to ensure private-public arbitration concerns are dealt with in an appropriate manner?

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A. Sofia Pinto Oliveira: National security cases: a wide margin of appreciation justified?

The emphasis given to national security interests, as compelling reasons to restrict individual freedoms and rights, especially in migration cases, is a current important issue. Being this a vital interest, a wide margin of appreciation must be recognized to the States but the Court needs to identify which dangers to the national security are genuine and which are not.

Catarina Santos Botelho: The margin of appreciation doctrine between praise and criticism

The margin of appreciation doctrine can paradoxically be seen as a double-edged sword. On the one hand, the ECHR is criticized for halting international integration by the allowance of a too wide margin of appreciation. On the other hand, some argue that the ECHR promotes such integration by endorsing a very narrow margin of appreciation, imposing an overly liberal and individualistic view of human rights. The great difficulty in applying this doctrine is its indeterminate character, because the ECHR in addition to not having yet defined it, gave it a functional treatment by developing it on a case-by-case basis. We believe that the margin of appreciation doctrine has the enormous potential of offering a compromise solution between universalism and particularities of each State.

Benedita Mac Crorie: Margin of appreciation and bioethics

The development of biomedical sciences and the new challenges it implies have raised many new questions examined by the European Court of Human Rights and this is a field where the margin of appreciation doctrine is very often used. By analyzing the Court’s case law we will try to evaluate whether in these matters the recourse to this doctrine is positive, since it implies the recognition of different sensibilities of Contracting States, or whether it involves a lack of human rights protection by the Court against violations by States, particularly of the so called “right to bioethical self-determination”.

Anabela Costa Leão: Margin of appreciation and religious freedom

The European Court of Human Rights has been required to deal with several issues concerning the ad-
The panel aims to deal with the use of constitutional identity by some East-Central European Member States of the EU. The reference to national constitutional identity by governments and constitutional courts sometimes serves to legitimate deviations from the shared values of rule of law, democracy, and fundamental rights, the ‘basic structure’ of Europe. Especially the two main backsliding countries, Hungary and Poland justify their non-compliance by referring to national sovereignty and constitutional identity. The panelists try to answer the question whether there are indeed common characteristics of national constitutional identities in these new Member States, and how can the EU effectively protect the values in article 2 TEU, while respecting the constitutional identity of these Member States. Due to the number of presentations, the country case studies and the comparative and European aspects will be discussed in two separate subpanels.

Participants
Bojan Bugaric
Andras Sajo
Armin von Bogdandy
Kim Lane Scheppel
Signe Rehling Larsen
Matthias Wagner
Federico Fabbrini
Moderator
Oreste Pollicino
Room
8B-2-33

Bojan Bugaric: Disappearance of Mitteleuropa?
On the Resurgence of Nationalist Populism in Post-communist Europe

Former communist countries, after the collapse of the regimes in 1989, started following the Western path. They wanted to go “back to Europe”! Transformation had begun throughout the region towards market economy and pluralistic political democracy. In the 2010s however, a nationalist populism has challenged the dominance of liberal parliamentary in several CEE countries. Whether this new trend of illiberal populism in the region represents a clear break with the previous hegemony of liberal institutions and policies is too early to tell. Nevertheless it shows that the period of liberal hegemony is clearly over and illiberalism is being challenged by an alternative set of authoritarian and illiberal forms of constitutionalism. As various examples of democratic fatigue, regression, and backsliding into various forms of constitutional authoritarianism in Central Europe show, the “return to Europe” is far not yet complete. The ease with which democratic regression has occurred in these countries in many ways calls into question the supposed sharp divide between the Central European “success stories” and other, more problematic countries from the Balkans and further east. Although the post-Soviet East and the Balkans represent a more extreme form of corrupt, nationalist illiberalism than Central Europe, the similarities are striking. We are witnessing a gradual disappearance of “Central Europe” and the return to “two Europes” West and East.

Andras Sajo: National Identity and the European Court of Human Rights: Margin of Appreciation or Populism à la carte?

Constitutional identity, uncertain and controversial a concept as it may be, offered some interesting vistas for constitutional theory. As a normative concept it is a defensive tool used for sovereignist purposes. Its uses in the case law of the ECtHR both in terms of the Court’s own role definition and (closely related to it) as part of its localism promoting use in the definition of the scope of rights is a fundamental challenge to the defense of human rights, at least if one is of the view that these rights are universal, even if with full respect of localism. The rights restrictive use of national constitutional identity did not originate with “Eastern” Europe but it will have special consequences in that legal environment.

Armin von Bogdandy: The Dialectic Relationship between Arts. 2 and 4(2) TEU

Article 2 TEU sets out the basic common values of the European legal space. Article 4(2) TEU protects individual constitutional identities. The talk will explore the difficult relationship between these two core provisions and evaluate the EU instruments to defend those common values in that light. A specific focus will rest on the principle of the rule of law. Aggregating recent research on social trust, it will substantiate what the European rule of law must request throughout the European legal space and how that provides a theoretical angle for a common approach to the relevant legal instruments that mediate in the dialectic relationship between those two core articles.

Kim Lane Scheppel: The Constitutional Identity of Anti-Constitutional States in the EU

The EU was founded on the conflicting principles that a) member states had to be able to trust each other’s governmental structures in order for them to engage in this common project and b) the EU had limited and delegated powers in a world in which its member states retained control over key aspects of their national identity. Conflict between the two principles was inevitable. The most serious challenges to EU law are now coming from a new crop of autocrats who claim constitutional identity as a cover for illiberalism. This paper addresses the question of how the EU’s constitutional institutions operate the constitutional power in a constitutional system from which all checks on this power have been removed. EU institutions must now face claims that constitutional identity should ‘trump’ EU law at precisely the moment when acquiescing in such claims will make it justifiably harder for states to trust each other’s governmental structures. In this paper, I examine the idea of constitutional identity against the principle of mutual respect and consider whether the EU and national courts have struck the balance properly.


This paper approaches the contested idea of constitutional identity in the EU from the perspective of the constitutional theory of the federation. In the federation, constitutional identity plays a key but ambivalent role because of an internal tension: the federation is the political unity constituted in order to preserve the identity of its Member States. Whereas European unity demands constitutional transformation, national identities in these new Member States, and especially the two main backsliding countries, Hungary and Poland, justify their non-compliance by referring to their national sovereignty and constitutional identity. The special East-Central European identity offers an illuminating perspective on the materiality of these fault-lines, because of its particular promise of a ‘return to Europe’ and its distinct relation to economic and political liberalism. As integration now demands the transformation of fiscal authority through attachment to economic liberalism and the ideology of austerity, identity demands the reclaiming of territorial authority through attachment to political illiberalism and the ideology of nationalism. The paper concludes that, in the wake of the financial crisis and the refugee crisis however, the tension has revealed serious fault-lines. The special East-Central European identity offers an illuminating perspective on the materiality of these fault-lines, because of its particular promise of a ‘return to Europe’ and its distinct relation to economic and political liberalism.

Federico Fabbrini: Discussant

Discussant

Jiewuh Song: Equality, Democracy, and Judicial Legitimacy

Debates on judicial review center on the question of whether national judicial expertise could be considered democratic. The literature, however, is surprisingly thin on the justification of democracy itself. Perhaps this reflects an assumption that the justification of democracy is settled and obvious. But this assumption is not helpful. For our democratic theory of democratic quality of judicial review will depend on why, precisely, we think that democracy matters. Building on recent work in political theory, this paper makes explicit an egalitarian justification of democracy on which the point of democracy is to avoid particular kinds of illiberal interaction. It then employs this justification to evaluate different systems of judicial review, focusing on checks on executive power and examining cases from Asia and the United States. Throughout, the paper compares the egalitarian justification to justifications that prioritize self-legislation, and argues that the former has unique theoretical advantages.

Yoon Jin Shin: Impedancing the President: Democracy and the Constitutional Court in South Korea

Since late 2016, South Korea has been through another constitutional moment after its 1987 democratization. The now former president practically shared power with the courts. This new automations works to consolidate executive power not holding any public position who manipulated various sectors of the state for vast personal profit. The scandal caused grave damage to democracy and democracy and the role of constitutional courts in Asia

Participants
Jiewuh Song
Yoon Jin Shin
Annart Tangkiriphimun
Swati Jhaveri
Moderator
Jiewuh Song
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8B-2-43
the rule of law. Over the winter, millions of citizens protested around the nation in remarkably peaceful ways requesting the removal of the president and the re-building of a democratic and just nation. In March, the South Korean Constitutional Court issued a unani- mous decision to impeach the president. The Court emphasized the presidential impeachment is not a political but a constitutional procedure and reviewed each ground of the National Assembly’s filing. In the subsequent election, citizens chose the leader of the major opposing party as the next president, who was a human rights lawyer in the military dictatorship era. Ending the legacy of the authoritarian past is one of his administration’s top priorities. This latest development in South Korea provides a vivid example of bottom-up democratic constitutionalism contrasting with recent populist movements around the world with nationalist and authoritarian nature. The research examines the constructive role played by the constitutional court in this process and how the constitutional moment was achieved through citizens’ democratic movement answered and confirmed by the court.

Ammant Tangkiriphimarn: The Role of the Constitutional Court in the Thai Politics

The Constitutional Court has been one of the most active and effective participants in Thai politics since its establishment by the 1997 Constitution. It has de- cided several critical cases that significantly shaped Thailand’s political landscape, including the acquittal of Thaksin Shinawatra from his failure to declare ass- sets properly, the nullification of the general election, the dissolutions of de facto Shinawatra’s political par- ties, and the disapproval of a government’s plan to spend the national budget. As for its function to deter- mine the constitutionality of law, the Court dismissed the petition claiming that Article 112 of the Criminal Code (féé-majésté law) was unconstitutional. Due to these controversial judgments, numerous commentators have questioned the Court’s role in a democratic society. For some, the Court, as part of the coalition among the monarchy, the military, certain political parties, and the Yellow shirts, is essentially a potent political apparatus used by the conservative elites to maintain the status quo, a process that has been ongoing since the 2006 Coup d’etat. Thus rather than functioning as an impartial adjudicatory institution, the Court has been perceived as a major cause of the conflict. This research will examine several judgments of the Constitutional Court and their implications, and the Court’s relationship with other political institutions, and their roles in the current political turmoil. Addition- ally, it will project the Court’s role under the recently approved constitution.

Swati Jhaveri: Reconstitutinalising Political Reform in the Hong Kong SAR of China

The question of whether constitutional law can pro- tect consolidate and advance democracy has been considered extensively in multiple jurisdictions. The is- sue has not yet been considered in the context of one of the most problematic contemporary democratic transitions: Hong Kong’s from an externally governed colonial outpost to a self-governed suffrage-based special administrative region of the People’s Republic of China. The Basic Law of Hong Kong proposes the eventual election of the Legislative Council and Chief Executive of Hong Kong by some form of universal suffrage: these provisions are at the core of the ‘demo- cratic constitution’ of Hong Kong. Achieving this goal requires consensus between the executive in Hong Kong, members of the Legislative Council in Hong Kong and the legislative body in China. Although not a formal requirement, any democratization efforts will also require popular buying from Hong Kong residents in order to function effectively. However, it is increas- ingly clear that the views of all concerned do not con- verge on how and when these constitutional aspira- tions should be realised. In addition, all parties have started moving outside of the constitutional framework when deliberating issues of political reform. This paper looks at the problems in the constitutional design and setup of the Hong Kong special administrative region that have resulted in this political deadlock. The pa- per will look at one key solution that has been explored in the deadlock and design issues: litigating the democratic constitution in the courts. This paper evaluates the use of the courts thus far by Hong Kong residents to correct and advance political reform. This is with a view to exploring constitutional and design issues that may have failed and what can be done to better position the courts in political reform. The ultimate goal is to utilize the courts to reconstitute constitutional political debate on electoral issues.

81 MIXED CONSTITUTIONS

While it is customary to dichotomize between liberal and illiberal regimes and to associate constitution- alism with the former but not with the latter, this bi- nary view is over simplistic. Across the globe there exists a range of regimes, extending from the most liberal to the utmost illiberal and authoritarian, with many variations in between. At least some of these regimes could be classified as constitutional regimes, but constitutional scholars have yet to explore the different constitutional principles underlying these types of regimes in order to expand our understand- ing of global constitutionalism. The panel will discuss both theoretical aspects and constitutional design aspects of illiberal and semi liberal constitutional regimes.

Participants
Mark Tushnet
Ran Hirschi and Ayelet Shachar
Asli Båli and Hanna Lerner
Gila Stopler

Moderator
Moshe Cohen Elyia
Room 8B-2-49

Mark Tushnet: The Possibility of Illiberal Constitutionalism

View of illiberal constitutionalism would reject the inherent equality of all persons, reject the priority of the right over the good, or both, while maintaining some limits on government power. A sharply nationalist constitu- tionalism illustrates the former distinguishing between “full” citizens and others. Frankel’s dualism suggests the need to theorize this form of illiberal constitutionalism, and suggests that it is likely to be unstable. Theocratic con- stitutionalism might illustrate the second possibility. The difficulty for perfectionisms is that the existence of limits on government power to enforce perfectionist principles is unclear, though Raz has argued for a form of power-limited perfectionism.

Ran Hirschi and Ayelet Shachar: The Limits of Constitutionalism: The Challenge of Religion

In this essay (forthcoming in the Chicago Law Review) we elucidate the essence of religion’s chal- lenge to modern constitutionalism. We focus on the alternative belief system aspect of religion, with its own symbolic, moral, and interpretive logic, separate con- stitutional narratives, different jurisdictional concepts and conflict resolution norms, cross-border affiliations and solidarity, transnational mobilization capacity etc and how the confluence of these factors has played itself out in various settings, north and south, national and international, to pose a serious threat to the statist project and its constitutional domain.

Gila Stopler: Semi Liberal Constitutionalism

Can semi-liberal constitutionalism be coherent as a theoretical idea and in practical reality? We think of liberalism as guaranteeing a range of individual rights. Countries that respect these rights are liberal while those that do not are illiberal. However, some countries have intentionally set up a semi liberal constitutional system built on dual commitments to liberal rights and to non-liberal values that partially circumscribe some of these rights. I will show that the application of liberal principles by well-intentioned courts trying to protect liberal rights in semi-liberal settings may further dilute these rights. I will suggest ways to resolve that.
This panel will address these questions based on three peace agreements. Additionally, it has limited the kind of decisions people can make within the context of plebiscites. Those judgements dealt with important issues such as the Parliaments’ and governments’ political discretionality during transitional processes, the scope of judicial review and limits of people’s choices. Therefore, the main question this papers aims to answer is: what is the role of constitutional judges in the legitimization of political and democratic powers during transitional processes?

Elizabeth Salmon: The Case of Alberto Fujimori: A Memorable Experience of Dialogue Between International Law and Domestic Legal Systems in the Fight Against Impunity

Due to the various legal changes that occurred as a result of the Colombian peace process between the Government and the FARC, different constitutional amendments were needed. Those amendments were put under the scrutiny of the Constitutional Court, which motivated a series of judgments about the concept of peace in the Colombian Constitution. In my opinion the Constitutional Court overreached its main function as a guardian of the Constitution when it analyzed the armed conflict, which includes the duty to guarantee the right of access to justice. Finally, the case law of the Inter-American Court on Human Rights will be examined. This case is particularly interesting due to the well-known activism of the Colombian Constitutional Court, which should serve in this context two conflicting, contrary goals: the achievement of peace and, on the other hand, the full reparation of victims of the armed conflict, which includes the duty to guarantee the right of access to justice. Consequently, the Constitutional Court ended up becoming a crucial political actor within the Colombian peace building process. The rule of law and the Court: A Model Experience of Dialogue Between International Law and Domestic Legal Systems in the Fight Against Impunity

In the context of the Peruvian transition to democracy, the ruling of the Supreme Court against former president Alberto Fujimori constitutes a key stone. The Court found Fujimori guilty of crimes against humanity based on the application of several human rights, standards from the Inter-American System, the European Court of Human Rights and the ad hoc international criminal tribunals. The importance of this dialogue is underlined by the use of circumstantial evidence gathered in the desistions Barrios Altos and La Cantuta, handed down by the Inter-American Court, which were brought by the Supreme Court to judge Fujimori.

Alessandra Lang: The rule of law and the Court of Justice of the European Union

Under the present Treaty framework, a special mechanism has been set up to challenge serious breaches of the rule of law by Member States as a means of protecting the European Union’s fundamentals and its constitutional identity. This special mechanism is political in nature and the actual level of control exercised by the Court of Justice is rather limited. Against this background, and de lege lata, this paper will analyze the contribution that the Court of Justice can make towards a better understanding of the scope of the rule of law, as well as to encourage an effective means of enforcement in order to avoid serious breaches from occurring in the future. Indeed the Court of Justice can contribute to sharpening the focus upon the elements of the rule of law and to strengthening the respect of the Member States towards it simply by exercising its ordinary competences. This paper will discuss a number of instances in which the Court has used the principle of the rule of law, based upon preliminary references or infringement proceedings, especially when other provisions of EU law were at stake.

Angela Di Gregorio: Constitutional courts and rule of law in the member States of the European Union

This paper analyzes the use of the rule of law principle in the jurisprudence of Constitutional Courts in new Member States of the Union. The purpose is to discover any recent or past decisions that could clarify the use of the principle in these countries. An example of this is the legalistic concept of the rule of law as expressed by the Hungarian and Polish Constitutional Courts in the context of the constitutional control of the lustration laws. On the other hand, some Constitutional Courts have achieved a wider and more sophisticated application of the rule of law (e.g., the Czech Constitutional Court). These are issues, which may provoke a general discussion on concepts such as constitutional identity, sovereignty and the relationship between internal and European legal sources. This paper intends to widen the debate on the crisis of the rule of law in the new EU Member States underlining that some of them have jurisprudential positions that are perfectly in line with European values.
this positive step the enforcement of the rule of law in Georgia, Moldova, and Ukraine may be effectively played a major role in the dissemination of the rule of law principle.

The paper deals with the most recent cases (Decision no. 1/2014 and no. 35/2017) of the Italian Constitutional Court on the constitutionality of the electoral laws. Before the leading case decision no. 1/2014 the Italian Constitutional Court – different constitutional judges – has been resilient in entering in a highly political sensitive field as the electoral rules. But with decision no. 1/2014 it declared unconstitutional some profiles of law n. 270/2005 paving the way for the judicial intervention in electoral matters. Indeed with decision no. 35/2017, the ICC ruled on the constitutionality of the Italicum (law n. 52/2015) and it struck down two key features of such law (in particular the second ballot provision). This turn of the ICC has been sharply criticized by the political community, as it represents a significant reconsideration of the principles of the European electoral heritage and to assess the conditions necessary for their application. The paper deals with the role of the Venice Commission in fostering the spread of the European Electoral Heritage.

Pierre Garrone: The European Electoral Heritage – The contribution of the Venice Commission

Since its creation the Venice Commission has been active in electoral field in order to promote the principles of the European electoral heritage and to assess the conditions necessary for their application. The paper deals with the role of the Venice Commission in fostering the spread of the European Electoral Heritage.

Beke Zwingmann: The Bundesverfassungsgericht and the 5% threshold

In matters of electoral law, the approach of the German Federal Constitutional Court can be described as being no more or less ‘activist’ than in other areas of law. The German Constitutional Court does not prescribe the choice of a specific electoral system – it leaves the decision to the legislator subject to certain minimum criteria. According to Art. 298, elections have to be “general, direct, free, equal and secret”. As long as the system designed by the legislator adheres to those criteria, the court’s approach is to respect the discretion of the legislator and not to scrutinize its motives. Depending on the issue at hand, this could lead to judgements taking a fairly hands-off approach as well as to those conducting a very detailed analysis of highly technical elements of the existing system. The decisions of the Bundesverfassungsgericht on electoral law cover a wide range of issues, but have not dealt with a fundamental overhaul as was the case in Italy. The current system is a combination of proportional representation and a first-past-the-post system. The feature that is currently discussed rather controversially is the so-called “5% threshold” which provides that all parties which do not gain a share of 5% or more of the proportional vote are not considered for the eventual allocation of seats in parliament. The Bundesverfassungsgericht has consistently ruled that if as far as elections to the Federal Diet (Bundestag) are concerned, such a cap is constitutional even though it constitutes a severe limitation of the principle of equality of votes. However, recent events prompted demands for a fundamental review of that position: in the Bundestag elections in 2013, the votes which ended up not being considered for representation due to that cap came up to nearly 16% in total. Furthermore, the court issued two decisions in 2011 and 2014 which considered a similar threshold for elections to the European Parliament to be unconstitutional. My contribution to the panel discussion will explore the question as to whether the Bundesverfassungsgericht may have prioritised legal certainty and jurisprudential consistency over an opportunity to send a stronger signal to the political powers, in other words whether the court has not been ‘activist enough’ in this matter.

Eszer Bodnár: Lost between Budapest and Strasbourg: Equality of the right to vote of Hungarian citizens abroad

Equal suffrage is a basic principle of democratic elections which is included in most constitutions and international human rights documents. It applies to the Italian Constitutional Court – different constitutional judges – has been resilient in entering in a highly political sensitive field as the electoral rules. But with decision no. 1/2014 it declared unconstitutional some profiles of law n. 270/2005 paving the way for the judicial intervention in electoral matters. Indeed with decision no. 35/2017, the ICC ruled on the constitutionality of the Italicum (law n. 52/2015) and it struck down two key features of such law (in particular the second ballot provision). This turn of the ICC has been sharply criticized by the political community, as it represents a significant reconsideration of the principles of the European electoral heritage and to assess the conditions necessary for their application. The paper deals with the role of the Venice Commission in fostering the spread of the European Electoral Heritage.

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The panel will discuss interaction between parliaments and courts in the Nordic countries. Traditionally courts have played a peripheral role in Nordic constitutional orders. But the role of the courts might be changing. The panel sets out to understand what factors drive this change, how external factors play out within the courts, and what the impact might be on the relationship between the legislature and the courts. We are interested in the ex ante and ex post constitutional review mechanisms, methods of constitutional interpretation, changes in the dialogue between parliament and courts in the Nordic countries. Traditionally courts have played a peripheral role in Nordic constitutional orders. Significant changes in the dialogue between parliament and courts have played a role in the constitutional shift in the Nordic countries. The overall question this panel will try to answer is what external and internal factors impact on the relationship between courts and parliaments?

Helle Krunke: Winds of Change? The Danish Supreme Court and EU Integration from the Maastricht Judgment to the Ajos Judgment

The Danish Supreme Court traditionally shows restraint in relation to the political institutions. Only in one judgment has the Supreme Court found a piece of legislation unconstitutional. This restraint has also applied to the area of EU integration. However, a shift of thought seems to be on its way. This paper analyzes how the Supreme Court’s approach beginning with the Maastricht judgment, over the Lisbon judgment to the recent Ajos judgment – a year after the Norwegian constitutional codification in 2015, as a consequence of the ECHR decisions against Norway in the 1990s, and as a consequence of codification in 2015, as a consequence of the ECHR decisions against Norway in the 1990s, and as a consequence of parliamentary resolutions such as incorporation of the European Convention on Human Rights into Norwegian law in 1999 and the constitutional human rights reform in 2014. Anna Jonsson Cornell: Changing Methods of Constitutional Interpretation in Swedish Constitutional Law?

Swedish courts have traditionally been reluctant to engage in constitutional review, deferring to the legislature. However, recently there has been a shift of power from the legislature to the courts, due to for example external political and legal factors (EU- and Convention Law), and domestic legal factors such as legislative techniques leaving larger space for interpretation by the courts, an expansion of policy areas to be decided by the courts, for example, migration and environmental issues. This paper will analyze recent case law in the Swedish Supreme Court and the Swedish Supreme Administrative Court in order to trace and explain changes in methods of constitutional interpretation by the two courts. The overall question to be discussed is whether the Swedish Supreme Courts are reluctant constitutional actors forced into becoming more active? And if this is the case, to highlight the strategies adopted by the Swedish courts in order to put the result in a comparative Nordic context.

Tuomas Ojanen: Human Rights as a Source of Judicial Empowerment and Constitutional Dynamics in the Nordic Countries

All five Nordic countries – Denmark, Finland, Iceland, Norway, and Sweden – have a written constitution with catalogues on constitutional rights, in some countries even fairly broad ones (e.g. Finland), and their track record in human rights treaty ratification is excellent in international comparison. Yet, rights and their protective function concerning to constitutional roles on the Nordic scene of constitutionalism, particularly in Denmark, Finand and Sweden. Ragnhildur Helgadóttir: Icelandic Courts as Constitutional Actors

This paper will consider the recent case law of the two Finnish Supreme Courts as well as Constitutional Law Committee of Parliament in order to examine how
Although Kojève is well known for being inspired by Octaviano Padovese: Kafka and “Kairós”

Disregarding a strictly scientific overview on authority, no one has understood better than Kafka the implications of authority. Each of his writing was about authority, including a letter addressed to his father, accusing him of years of an abusive relationship. Further Kafka was able to pinpoint that authority occurs even in horizontal relations. Kafka’s cosmological writing is able to interrupt our uncrushable believing in the world’s order. Kafka has the incomparable skill to use his own personal experience and to translate it to a general feeling that things happen according to Kafka’s narrative. On the other hand, Kojève efforts to explain briefly the meaning of authority elucidate a sheer difficulty to define and to frame a structural semantic of authority. Although Kojève is well known for being inspired by Hegel, not his master analyst that Kojève reaches the conclusion that Hegel wrote a general (“Allgemeine”) theory of authority. For Kojève, it would be relevant to detail the differences between types of authority.

Briefly speaking, for Hegel the relation of authority summons in a collegial relation between a master, which overcame his animality condition of fearing death, while the slave flanks out his trial. As Kojève explains “Mastery arises from the Struggle to death of ‘recognition’ (Anerkennung).” So to speak Hegel’s idea of authority is a quite strong example of how a word which is performative, however, it is normally used to make statements, indeed has more allegorical im-

87 OUTSOURCING DISPUTE RESOLUTION? EXPECTATION VERSUS REALITY

We take as a starting point the notion of the ascendency of the court (the extension of its jurisdiction, its adjudicatory role and its control over the exercise of (public and private) power). We examine the legal and normative framework within which this “expectation” exists, and the general assumption derived from it, namely that the court is the only institution to provide “real” Justice. We then examine the nature of dispute resolution in diverse areas, including consumer protection and judicial cooperation in civil matters. In these specific areas a fragmentation of adjudicatory power is observable, which emerges at once through and as a result of the outsourcing of dispute resolution tasks to institutions other than courts. The participation of these additional players generates new realities which require that we call into question the generally widespread assumption that both the role and power of the court are increasing. Against this background we examine the extent to which these shifting expectations and realities adhere to the continuing importance of the court in ensuring the effective protection of rights paying particular attention to the possibility for the review by courts of these bodies’ decisions.

88 PROCEDURAL REVIEW: DEFINITION, FUNCTIONS AND LIMITATIONS

In deciding on cases about infringements of fundamental rights, it is generally expected that courts perform the substantive assessment of these rights through the qualitative or proportionality review. Scholars have argued, however, that it could be valuable for courts to take a ‘procedural turn’ in their argumentation. Instead of (only) reviewing the substantive reasonableness of an act with a substantive examination of its proportionality, courts might (also) expressly take account of the quality of the legislative, administrative or judicial process that has led up to the alleged violation.

In the case of civil matters, both the EU and ECtHR have been active in the area of procedural law. The two courts have noticed a ‘procedural turn’ in relation to the case-law of both the ECtHR and the European Court of Justice. While both courts have become increasingly aware of the importance of not only the substance, but also the process of a legal act, the courts have been active in individual measures. The latter is also the subject of the paper.

The Enforcement of EU Consumer Law: From Courts to ADR

Stephanie Law: The Enforcement of EU Consumer Law: From Courts to ADR

This paper will discuss one of the fundamental shifts in the way in which consumer rights (both with regard to claims brought by and against consumers) are enforced in the EU Member States. In particular, it will examine the shift from individual, private redress by consumers before courts to alternative (and especially online) dispute resolution. As neither the directives on mediation and consumer ADR nor the regulation on online dispute resolution have a harmonisation purpose, the legal and policy frameworks of ADR established across the EU are necessarily heterogeneous. Nevertheless, the ADR directive provides that it should be facilitated with expertise independence and impartiality, and in line with the principles of transparency, effectiveness, facilitating the use of mediation by providing for the amendment of contracts and the enforcement of arbitral awards. Instead, it is done in light of key CJEU and ECHR case law (including C-317/08 Alassin).

The Concept of Procedural-type Review Revisited: Definition and Modalities

The concept of procedural review appears to be increasingly applied in fundamental rights cases. Scholars have noticed a ‘procedural turn’ in relation to the case-law of the European Court of Human Rights, the European Court of Justice and constitutional courts; also in relation to the United Nations Treaty Bodies; a trend of ‘proceduralization’ is mentioned. The notion of ‘procedural-type review’ can generally be said to refer to a practical reasoning in which the decision-making procedure or process of a public authority has played a role. Furthermore, procedural-type review has a harmonisation purpose, the legal and policy frameworks of ADR established across the EU have been transformed acquiring the four key attributes: autonomy, neutrality, efficiency and accessibility. The paper assesses one of the key concerns with ensuring effective access to justice in line with these provisions, Art.47 CFR and Art.6 ECHR, namely the scope for the review by courts of decisions of ADR entities, facilitated via the ODR platform. This is done in light of key CJEU and ECHR case law (including C-317/08 Alassin).

The ‘Logics’ of Procedural-Type Review by the European Court of Human Rights

In the case law of the European Court of Human Rights, a ‘procedural turn’ can be noted. It seems that in its assessment of the compatibility of a public measure or situation with the European Convention on Human Rights, the Court increasingly includes an appreciation of the quality of the public decision-making process that lead to this measure or situation. Scholars have noted this procedural turn, and have started to analyse it, by mapping and assessing its various manifestations. Building on such mapping...
ConCurring panels

Janneke Gerards: Modalities of Procedural Review in the Case-Law of the European Court of Human Rights

In recent years the European Court of Human Rights has emphasised the importance of extensive national deliberations and sound decision-making procedures to help avoid human rights violations. It has also indicated its willingness to take account of such deliberations and procedures in its review of the reasonableness of limitations of Convention rights. For example in its contribution to the 2015 Brussels Conference on the long-term future of the Court it remarked that “the fact that the parliamentary record indicates that there was in-depth consideration of the human rights implications of an enactment can be of significance in certain types of case i.e. in which the margin of appreciation arises,” (para. 6). It also has mentioned in several judgments that “[w]here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law the Court would require strong reasons to substitute its view for that of the domestic courts,” (Van Hannover No. 2 [GC] para. 107).

Kasey McCall-Smith: Procedural Review and the Human Rights Treaty Bodies

International human rights treaties set out a minimum standard of treatment to which states agree in terms of human rights protection. This enables evolutive interpretation and presents a particular challenge in articulating the basis of a substantive breach that is universally applicable across States Parties to a particular treaty. Universality applicability however is a primary goal of the international human rights system and requires treaty bodies to balance the progressive realisation of rights against historic state sensitivities to interference in domestic affairs. This balancing exercise has put treaty bodies at odds with states. Despite this tension the ICJ has clarified that treaty bodies the Human Rights Committee in particular are the ultimate interpreters of their respective treaties thus it is crucial to understand the semantics of their decision-making. Review of treaty body jurisprudence suggests that migration toward a procedural approach to human rights violations may resonate more naturally with states due to the simplicity of establishing procedural infractions. It is argued that proceduralized decisions function as an aid in the establishment of a common human rights standards by slowly moving away from purely value-based determinations a practice that sits more easily with states. This migration is reflected in two identifiable practices. The first sees states in breach of obligations based on the failure to adhere to rules of procedure or procedural obligations under a treaty. The second bases a breach determination on the procedural dimension of a substantive right. This paper will examine how both contribute to the developing role of procedural review in international quasi-judicial mechanisms.

89 CRIMINAL LAW, CONSTITUTIONAL PRINCIPLES AND HUMAN RIGHTS

This panel is the first of two, linked proposed panels on criminal law, constitutional law and international law. (The second panel is entitled “criminal law, international law and human rights.”) Criminal law has been one of the most contentious areas of public law in recent decades. From disputes about sexual relations, drug use and physician assisted suicide to battles over sentencing and police powers, courts have invoked themselves in a major way in a wide range of polarizing and controversial issues in the criminal law. This is true in both international and domestic criminal law. Perhaps unsurprisingly in both domestic and international contexts, questions of legitimacy are now taking center stage. Rather than considering rights provisions in constitutional documents as simply the embodiment of first-order moral judgments, a number of criminal law scholars have instead begun to focus on the institutional and political dimensions of criminalization, both at home and in international contexts. The aim of the panels that we are proposing is to provide an opportunity for a group of scholars working on these issues to share their current work in this area.

Participants

Vincent Chiao
Hamish Stewart
Malcolm Thorburn
Javier Wilenmann
Leora Dahan Katz

Moderator

Vincent Chiao

Room

8B-3-39

Vincent Chiao: Formalism & Pragmatism in Criminal Procedure

What is “criminal” law? In many contexts, this might be thought of as a largely academic question, one for practical people to wonder about in their spare time. But in at least one type of context, it is a question with very significant practical repercussions. This is the context of criminal procedure. Many jurisdictions define a special procedural regime for people facing criminal charges. Of course, in many – probably most – cases, this question will not be controversial. However, there will be cases that are controversial, and then it will be important to have a principled way of deciding which procedural rights should apply. In this chapter I consider two methods for deciding when a legal matter qualifies as “criminal”. The first, formalist, approach is to define the criminal law by reference to the concept of punishment. If you are unsure whether you are involved in a criminal case you should ask whether the state by exercising its laws against you is trying to punish you. If so, chances are you are in a criminal case. If not, then probably not. The second pragmatist approach defines the criminal law by reference to the interests that are at stake for the non-moving party. Drawing upon the capabilities approach, I sketch a pragmatist model for rights allocation that is sensitive to effective access to a range of central capabilities, regardless of whether the action in question qualifies as “punishment”. I also have in mind the so-called “collateral consequences” of a conviction, and in part because constitutional norms of due process are more fundamental than the traditional, but largely inchoate, distinction between civil and criminal process.

Hamish Stewart: The Constitutional Right to Procedural Fairness

Malcolm Thorburn: Constitutional Regulation of Substantive Criminal Law in the Common Law World: An Overview

Javier Wilenmann: Criminalization Conflicts and Constitutional Norms

Legal literature tends to relate itself with criminalization assuming a substantive justice approach: a theory of criminalization should establish the conditions under which a legislative criminalization decision can be justified in principle. Although more ambiguous and less assertive, a similar approach can also be seen in constitutional literature: constitutional law would establish certain substantive definitions on what can be criminalized and constitutional courts may have review powers of legislative decisions that violate such definitions and therefore violate constitutional rights. The presentation “Criminalization conflicts and constitutional norms” in the panel on “criminal law constitutional principles and human right” aims at sketching an alternative approach for the constitutional analysis of criminalization decisions and seeks to sketch an alternative approach. Two are the main arguments that will be explored. On the one hand, the substantive justice (or constitutional values) approach does not take into account the conflicting nature of criminalization processes. Sociological and socio-legal studies show that criminalization decisions are often connected with activism from social movements or interest groups. As a general claim, conflicts are often connected in relationship with the criminal law (abortion, consensual intercourse between same sex adults, drug consumption, white-collar criminality) are generally related to larger political conflicts; they can be seen as (mostly but not only) symbolic instruments in the impeachment of moral or justice frameworks by conflicting groups. As such, most decisions related to the substantive justice of any possible decision will likely be presented as political
In this panel, Li Venter and Broekhuijse propose to discuss the protection of democracies and democratic rights (such as the freedom of speech and electoral rights). This will be mainly although exclusively be discussed from the perspective of the courts. Both the paper of Venter (focus on freedom of speech) and Broekhuijse (focus on regulation of political parties) will take a comparative approach. The paper of Li Qi provides a broader theoretical framework in which these discussions take place. The relevance of this panel is partly discussed in the submissions of the papers of Venter and Broekhuijse/Spoormans; it offers insights that are not yet commonly known, as well as a theoretical framework in which we should value the discussions.

Participants
Haibin Qi
Voxan Venter
Irene Broekhuijse
Huub Spoormans
Moderator
Irene Broekhuijse
Room
8B-349

90  PROTECTING DEMOCRACIES AND DEMOCRATIC RIGHTS: THROUGH COURTS AND OTHER MECHANISMS

Roxan Venter: The realisation of democracy and freedom of expression within the judicial authority: a comparative perspective

Freedom of expression forms an integral part of modern democracies. One of its primary functions is to support democracy by facilitating public participation in governmental activities, enforcing public and political discourse and ensuring open and transparent government. Freedom of expression therefore also has a significant role to play within the various branches of government. This role is clearly visible in the activities of national legislative institutions, such as parliaments, or even within the executive branch, both of which enjoy broad media coverage in most modern states. The role of freedom of expression in the activities of the judicial branch, however, is much less obvious. The purpose of this paper is therefore to explore the less obvious branch of government when it comes to the use of freedom of expression by discussing the different ways in which freedom of expression gives effect to democracy within the context of the judicial authority. In order to determine how freedom of expression gives effect to democracy within the judicial branch of government, different elements of democracy need to be identified and it needs to be shown how these elements are applied within judicial organs and which role freedom of expression would play with regard to each of these elements. Such a discussion may also assist young democracies in the organisation of their own branches of government in such a way as to create vibrant and sustainable democratic systems.

Irene Broekhuijse and Huub Spoormans: The regulation of political parties in the Netherlands

Alongside, like Katz and Mair, the political scientist Van Biezen has elaborated on the changing relationship between political parties and states. Based on empirical research she concluded that the relationship between the state and the parties (also in the Netherlands) has become considerably weaker, at least with regard to the financial dependence, of parties on the state and the increasing regulation of parties by the state. In particular, she has drawn attention to the remarkable judicialisation of political parties in post-war Europe. This judicialisation consists of the constitutive codification of political parties and the legal regulation of political parties. The Netherlands seems to deviate from the European pattern. Political parties are not even mentioned in the constitution, there exists no Party Law. Because of this particularity, this contribution aims provide insights in the Dutch legal framework. In this paper, we describe the development of political parties in the Netherlands and the Broekhuijse and Spoormans discuss the regulation of political parties.
The enforcement of human rights law entitles the individual with unprecedented freedoms. However, an increasingly pluralistic and religiously diverse society, conflicts between the State and individual rights as well as between competing individual rights intensify. The right to conscientious objection may act as an instrument to accommodate different sets of values characterizing today’s society. The panel questions the legal dimensions of this right, its dialogical development in international courts and its strategic mobilization by social actors. Fabienne Bretscher investigates and contrasts the development of the ECtHR and the UNHRC jurisprudence related to conscientious objection and military service based on the theoretical concept of ordered pluralism (pluralisme ordonné). Tania Pagotto considers cases of conscientious objection related to sexual orientation and medical treatment. Adopting a comparative legal view, she highlights the factors taken into account by the Courts in order to extend or not the legal boundaries of the objection. Lisa Harms examines the previous legal developments through a sociological lens and sheds light on how secular and faith-based advocacy groups negotiate the right to conscientious objection along new lines of contention.

The right to conscientious objection has been legally defined by national and supranational legislators mostly in relation to the military conscription. Also the European Court of Human Rights considered these circumstances in Bayatyan v. Armenia (2011) and incorporated the right to conscientious objection within the framework of Article 9 of the Convention (freedom of thought conscience and religion). The literature perceives the debate on military service well-defined by the European jurisprudence, even though in a few Countries it is still a sore point. By contrast, the legal reflection on conscientious objection linked to other themes is still very much open for the discussion. Individuals indeed require the Courts to accommodate their conscience claims and recognize, for example, the right to abstain from the solemnization of homosexual marriages performance of abortive practices and other ethical and biochemical issues. The paper therefore will take into account these recent developments and analyse them under a comparative legal perspective including the ECtHR jurisprudence. It will try to enucleate which conditions the Courts consider in their analysis in order to extend or not the legal protection to “new” cases of conscientious objections.

Fabiene Bretscher: The ECtHR’s and the UNHRC’s case law on conscientious objection: A process of integration?

International human rights bodies have been dealing with complaints of conscientious objectors to military and civil service for several decades. Yet, the European Court of Human Rights (ECtHR), respectively the European Commission of Human Rights (EComHR), and the United Nations Human Rights Committee (UNHRC) initially chose a very much different approach to the issue: While the EComHR and the ECtHR found a right to freedom of religion granted not to be applicable to conscientious objectors, the UNHRC, contradicting the ECtHR’s and the EComHR’s approach at that time, recognised a right to conscientious objection first in a General Comment and then in individual complaints. In the well-known Grand Chamber decision of Bayatyan v. Armenia, the ECtHR reversed its standing case law and recognised a right to conscientious objection. This paper inquires

the development of the two international human rights bodies’ case law concerning conscientious objection to civil and military service from divergence to coherence based on the theoretical framework of ordered pluralism (pluralisme ordonné) put forward by Mireille Delmas-Marty. Drawing on such analysis, potential prospects of the future relationship of the ECtHR and the UNHRC are addressed.

Tania Pagotto: New cases of conscientious objection: the legal factors considered for the judicial recognition

Lisa Harms: From Armenia to South Korea and from gay marriage to hunting: Faith-based advocacy groups litigating the right to freedom of conscience in transnational courts

Until recently, claims of conscientious objection have been rather unsuccessful at the European Court of Human Rights. After the failure of initial cases brought by religious actors in the early 1990s, the topic only emerged occasionally without triggering much debate. With the beginning of the current decade, however, judicial framings in terms of conscientious objection gained in prominence in particular for religiously motivated claims of exemption. How can we explain this? Or is the right to freedom of conscience established by the ECtHR of the rights and freedoms enshrined in the Convention? This paper suggests that ECtHR case-law and its outcome are not only the result of judicial and political mechanisms but rather reflect the influence of a complex social field of related, allied, and opposed actors, strategically litigating the right to freedom of religion and conscience. The discussion of the concept of conscientious objection thus appears strongly entangled with power-distribution and the strategic positioning of these actors. In this perspective, the right to conscientious objection negotiated in Strasbourg bears the imprint of transnationally organized faith-based and secular advocacy groups bridging national and transnational judicial realms and competing around newly emerging lines of contention which relate in particular to the question of religious pluralism and the place of Islam in Europe.

Stefan Schlegel: Discussant

Fritz Edward Siregar: Does Indonesian Constitutional Court have authority to issue conditional constitutional decision?

Since its establishment, the Indonesian Constitutional Court has had the capacity to issue three forms of conditionally constitutional decisions. One form occurs when the Court states that the law in question is constitutional but only if it is interpreted in the way the Court interprets it. The second form occurs when the Court issues a conditionally constitutional decision declaring the law unconstitutional and then provides a period during which the decision should be enforced, giving the President and the Parliament time to amend the existing law according to the Court’s interpretation (‘suspension of invalidity’). The main purpose of this paper is to investigate the practical operation of conditionally constitutional decisions so as to assess their impact on the separation of powers in Indonesia. Do these decisions in fact give the Court a role in policy-making beyond that which was originally envisaged by the constitutional amendment explaining this new tendency within the supervision operated by the ECtHR of the rights and freedoms enshrined in the Convention? This paper suggests that ECtHR case-law and its outcome are not only the result of judicial and political mechanisms but rather reflect the influence of a complex social field of related, allied, and opposed actors, strategically litigating the right to freedom of religion and conscience. The discussion of the concept of conscientious objection thus appears strongly entangled with power-distribution and the strategic positioning of these actors. In this perspective, the right to conscientious objection negotiated in Strasbourg bears the imprint of transnationally organized faith-based and secular advocacy groups bridging national and transnational judicial realms and competing around newly emerging lines of contention which relate in particular to the question of religious pluralism and the place of Islam in Europe.

Stefan Schlegel: Discussant
Those three cases are allegedly related to judicial review and election dispute authority. Constitu- 
tional court procedural law did not limit and provide nu- merous possibility for justices in providing the verdicts. Manipulating cases can be detected from submitting the applications Constitutional Court. This manipulation occurred because there is no com- mitment towards constitutional court procedural law. It takes too much time and phases on several cases that potentially can be used to manipulate the case. This paper explore three fact. First, how manipulation of a verdict and court procedure had been occurred. Second, which cases in Court’s docket that potentially manipulated. Third, the solution to hinder this practice.

Donal Fariz: The Puzzle of Constitutional Justice Selection Process

When Chief Justice Akil Mochtar was arrested by Corruption Eradication Commission in 2013, Indonesia Constitutional Court did not collapse and able regain its independency. However, almost three years later, Jus- tice Patrialis Akbar had been arrested for accepting a bribe. Those two Justices have their similarity, which is both of them were a former politician, Mochtar was Golkar Party’s members, and, on the other hand, Akbar was a National Mandate Party leader. Both of them had served as the member for Indonesian National Par- liament. The arrest of two constitutional justice that has similar background, lead public seen the Court as another institution that had been filled by people that have the corruptive figure, and new judiciary selection has been named and nominate to the various govern- ing officer, including constitutional justice. In this paper, I will provide the argument why political parties have interested to become constitutional justice. Through existing selection processes success to nominate “their agent” to become constitutional justice. As the consequences, it is damaging court reputation and court judicial legitimacy has been ques- tioned. The ongoing selection process did not protect the Court from the corruptive figure, and new judiciary selection needs to be identified. Iwan Satriawan: Strengthening the Supervision of the Constitutional Justices in Indonesia

Existing research argues that the declining of the constitutional justices’ integrity is rooted due to lack of supervision of the constitutional justices. It is believed that with a huge authority and at the same time the Constitutional Justices do not have strong supervision, this could undermine the constitutional justices has put at stake. The Court actually has an Ethics Board and the Honorary Council of Constitutional Justices which are an internal supervision of constitutional justices and the staffs. However, the internal supervision does not work selectively. This paper recommends two argu- ments. First, there is a need to reform internal regu- lations of the Court, particularly on the Ethics Board and the Honorary Council of Constitutional Justices. Both internal regulations should be more account- able and impartial by creating a more accountable mechanism of the trial. Second, there is also a need to assert clearly the authority of Judicial Commission to supervise the constitutional justices through amendment of the applicative Constitutional Constitution. Having better internal and external supervision of it is expected that the integrity of the constitutional justices would be more guaranteed.

Lutfi Widagdo Eddyono: Mixing Support of Po- litical Parties Towards Judicial Independence of Indonesia Constitutional Court

This paper will examine the dynamics of the in- dependence of Indonesian Constitutional Court. The amendments of the Indonesian Constitution did not only created the Constitutional Court and Judicial Commission. Most importantly, the amended provided and guaranteed the principle of checks and balances among state institutions. The role of the judiciary as an independent institution to manage the check and balance is a crucial factor to be supported by other in- stitutions. This paper attempt to answer two research questions. First, what are political factors that support and undermine the independence of the Court? Sec- ond, whether the political parties, or a specific party, is/are being impose by reviewing Court’s performance since 2003? The outcome of this paper will enrich discus- sions of the explanatory factors that shape the dynam- ics of the independence of the constitutional court and those of the judges. The paper is inspired by domestic legal theory and thinking. The research also concludes that there is a need to reform internal regulations and rules. First, there is a need to reform the internal internal regulations, particularly those related to the accountability of the judges. Second, there is also a need to assert clearly the authority of Judicial Commission to supervise the constitutional justices through amendment of the applicative Constitutional Constitution. Having better internal and external supervision of it is expected that the integrity of the constitutional justices would be more guaranteed.

93 INSTITUTIONS OF THE RULE OF LAW: NEW BALANCE OR NEW POWERS? PANEL II: TRANSNATIONAL BALANCE OF POWERS

At the core of the current rule of law crisis is a prob- lem of concentration of power, or conversely, a lack of separation of powers. This shows the failure of classic trias politica: a constitution with a formal separation between the three branches of government is not enough to safeguard the rule of law. The central question we seek to answer is whether new powers or a new balance between rule of law institutions can be identified in constitutional democracies. Starting point for these two panels is the core of the doctrine: there should not be concentration of the powers to regulate to enforce and to review. Panel 2 will discuss the promises and pitfalls of involving transnational actors in the balance of powers. All three government powers might be transferred to the international level: transnational regulation replaces legislation, UN bodies perform national administrative tasks such as the determination of refugee status, international courts, e.g. the European Court of Human Rights, review national legislation. Is it possible to outsource one power, yet keeping that power in check by do- mestic counterparts? The focus of the panel will be on the scope and mandate of such actors and on the relationship to the domestic branches of gov- ernment.

Participants

Ingo Venzke and Joana Mendes
Lando Kirchmar
Thomas Riesthuis
Cormac Mac Amhlaigh
Jan Klabbene
Thomas Riesthuis and
Sannie Taekema
Room
8A-4-35

Ingo Venzke and Joana Mendes: The Idea of Relative Authority in European and Interna- 
tional Law

The present contribution reacts to concerns about the legitimacy of supra- and international public au- thority by introducing the idea of relative authority. It argues that public authority is relative, first, in the sense that the exercise of authority by one actor al- ways stands in relation to others and second, that the division of authority should be informed by the legiti- macy assets that different actors can bring into the governance process. It develops an argument in favour of a sophisticated balance of power. Like other legal approaches to global governance it is inspired by domestic legal theory and thinking. It distinguishes itself through its focus on questions of institutional choice: Who should do what in European and international law? While ideas of the separation of power face an uphill battle in the variegated insti- tutional settings at the European and even more so international level, the core normative programme em- bedded in the idea of relative authority offers the idea of relative authority as a core part of an argumentative framework to critique and help justify the exercise of supra- and international public authority.

Lando Kirchmar: What is Transnational Balance Of Power And How To Achieve It?

This paper argues that an understanding of transnational balance of power is essential for deal- ing with outsourcing (elements of) balance of power from national legal orders. The paper holds true for analyzing the scope and mandate of transnational actors acting on behalf of a transnational balance of power. This need for a concept of transnational balance of power faces, however, the challenge that balance of power differs greatly in extent and content depending on the national legal order. This article, hence, aims at mapping the fundament of transnational balance of power. While this is already quite daring, it is – despite its title – not as bold as it sounds. What is the need to work criteria embracing the diversity of national legal orders and their diverging concepts. These criteria need to be abstract enough in order to comprise plurality and diversity of national legal orders. In this paper, it is argued that national courts do have a constitutional court despite of having a sophisticated balance of power. Nevertheless, such criteria must be concrete enough to deliver results: the transnational balance of power must not be a vague and abstract concept, but a support of deliv- ering meaningful results when tested in a particular case. Otherwise, we risk being arbitrary.

Thomas Riesthuis: International Courts as Ac- tors in a Transnational Balance of Powers

International courts are generally understood to function outside of the balance of powers of domestic constitutional legal systems. Although significantly influential in domestic legal systems, international courts are not considered actors in the balance of powers. In this paper, I unpack the theoretical assump- tions underlying the idea that international courts are to be considered external to domestic constitutional legal systems. It will challenge a common positivist conception of the balance of powers that includes transnational actors, such as, for example, interna- tional courts. Moreover, I will develop a non-positivist conception of the balance of powers that includes transnational judicial actors based on the work of Ronald Dworkin. The paper argues that the European Court of Justice and the European Court of Human Rights are best understood as judicial actors in a transnational balance of powers.
Cormac Mac Amhlaigh: Transnational Legitimacy in a Populist Age

Populism is not new. Neither is the tendency for populist parties to denigrate elites and elite institutions. Caught within this tendency to denigrate all things elite is, of course, the regular trashing of the structures and values of constitutional politics including abstract ideas such as the rule of law, separation of powers or the independence of the judiciary as well as specific attacks against institutions charged with up-holding these Ideas, usually Courts. (Möller 2016) When populism reigns constitutions, constitutional ideas and constitutional courts rarely come out of it well. The fragility of multilevel governance systems is thrown into sharp relief during periods of populist rule. They tend to share the abuse suffered by domestic elite institutions with the distinction that the abuse tends to be magnified manifold. As such not only are they elite institutions, upholding elitist values but, worse, they are the “other” – foreign courts, foreign elites with foreign values with no legitimate claim to rule over ‘us’.

Jan Klabbers: Discussant

94 NATIONAL CONSTITUTIONAL COURTS AND EUROPEAN INTEGRATION

National constitutional courts have always played an ambivalent role in the process of European integration. On the one hand, they have by and large engaged constructively with the European Court of Justice and recognized its doctrines on the status and operational qualities of Union law. On the other, their posture towards EU law has been occasionally critical, when Union law threatened to undermine its competence, limits and domestic constitutional identities. The panel discusses the value, role and place of national constitutional courts in the process of European integration on the basis of Jan Komarek’s article “National constitutional courts in the European constitutional democracy”. The discussion will focus on the following issues: 1) The causes and implications of the displacement of constitutional courts determined by the Simmenthal doctrine 2) the extent of displacement and the actual opportunities for constitutional courts to participate in supranational litigation 3) the possibility to reconcile public and private autonomy in the current European judicial architecture.

Participants
Marco Dani
Sabine Mair and Elias Deutscher
Jan Komarek
Moderator Christoph Möllers
Room 8A-4-47

Marco Dani: Coping with the displacement of national constitutional courts in supranational litigation

The paper argues that the relative value of national constitutional courts resulting from the Simmenthal doctrine is coherent with a pan-European institutional setting relying on the synergy between supranational law and national constitutional democracies. It suggests that concern for their displacement is more justified with a view to the expansion of EU competences and their inbuilt policy agenda than with the rise of fundamental rights adjudication. It concludes by observing that in an institutional framework where constitutional democracies are subject to the risk of intergovernmental and technocratic encroachment constitutional courts are still in the position to influence from the margins supranational litigation by voicing the normative claims associated with national constitutional democracies.

Sabine Mair and Elias Deutscher: À la recherche du temps perdu: Reinforcing national constitutional courts to save national and European constitutional democracies?

Our paper ‘A response to Jan Komarek’s “National Constitutional Courts in the European Constitutional Democracy” disagrees with Jan Komarek’s account of the current state of the ‘European Constitutional Democracy’ on three grounds. First, we question his hypothesis that the displacement of national constitutional courts was caused by the so-called ‘rights revolution’ in the aftermath of the Charter of Fundamental Rights of the EU (CFREU) becoming legally binding. Second, albeit agreeing with Jan Komarek’s finding that the institutional balance between the EU judi- cator and legislator differs substantially from that of national constitutional democracies, we find his con- tention that the communicative link between the CJEU and the political and public sphere at the EU level is ‘broken’ too stringent. Finally, we also harbour doubts about Jan Komarek’s claim that the CJEU is biased in favour of private autonomy and to the detriment of public autonomy. Not only do we take issue with his distinction between private and public autonomy from a conceptual point of view, but, we also argue that the alleged private autonomy bias of the Court of Justice cannot be unequivocally supported by empirical evidence, as the Court’s case law is often grounded in considerations of European public autonomy.

Jan Komárek: Reconsidering the place of constitutional courts in European integration

In the paper I will provide a response to two critical reactions to my original paper “National constitutional courts in the European constitutional democracy”. While I am happy to concede, to some extent, the point concerning the “Rights Revolution”, I will seek to explain why it is difficult for the ECJ to escape the constraints of the EU’s economic constitution and to develop a true equivalent to the liberal democracy existing at the national level. The question I would like to further raise concerns the very value of the latter in the light of the growing disabling of democracy at both levels.

95 RIGHTS, SECURITY AND THE POLICY PROCESS: THE CONSIDERATION OF RIGHTS IN THE DEVELOPMENT OF COUNTER-TERRORISM POLICY

This Panel explores the question of whether and how rights are considered in the process of policy making in the particular context of counter-terrorism. This question will be explored from a comparative perspective through two case studies (Germany and Israel) analyzing a recent process of developing a particular counter-terrorism policy. Relying on both open materials as well as interviews with various actors, the case studies attempt to describe who raised these considerations, at what stage and as part of which process, as well as the substantive aspect of the actual weighing of rights considerations. The goal of each case study is to locate the factors and processes that had a positive effect on the consideration of rights as opposed to those which had negative effects. The juxtaposition of the case studies provides the opportunity to draw broader conclusions regarding the question of the optimal consideration of rights in the policy process.

Participants
Andrei Lang
Fiona de Londras
Lila Margalit
Mattias Kumm
Rebecca Ananian-Whel
Moderator
Andrej Lang
Room 8B-4-03

Andrei Lang: Rights Considerations in the Legislative Process in Germany

My paper analyzes the consideration of rights in the development of terrorism policy in the legislative process in Germany based on two case studies: the Counter-Terrorism Database Act and the Data Retention Act, which were both subject to judicial review by the Federal Constitutional Court. The paper explores which institutional actors in the ministerial bureaucracy and in parliament were involved at which stage in the process and how rights considerations were framed therein. The analysis reveals the dominance of government over the legislative process, the substantial role of legal experts, the extensive judicialization of the political process and the inherent limits, but also prospects, of rights review by non-judicial institutions.

Fiona de Londras: Proportionality and the Making of the EU Counter-Terrorism Directive

Having had no counter-terrorism law on 11 September 2001, the EU now has hundreds of pieces of counter-terrorism law and policy, with implications across the 28 member states. In the wake of the Paris attacks in 2015, a comprehensive EU Counter-Terrorism Directive was proposed the final text of which has recently
Terror Law

ConCurring panels

Directive, the policy-making, and the finalization of the
they were raised and deliberated; and the impact they
the way in which rights and questions of proportionality
throughout the process; the dynamics through which
identifies significant constraints upon the effective
proval of the 2016 Israeli Combating Terror Law, a
comprehensive piece of legislation granting the gov-
considerations during the initiation shaping and ap-
ultimately had. Tracing the development of the law
from the internal government deliberations through the
public hearing and - most significantly, in a formal and
legal setting – the Israeli Parliament, the study identifies significant constraints upon the effective
consideration of rights in the process while at the
same time identifying factors which facilitated rights-
based changes in the law.

Mattias Kumm: Commentator
Rebecca Ananian-Welsh: Commentator

Lucia Busatta and Marta Tomasi: BioLaw and the ECtHR: between political discretion and ju-
dicial scrutiny

In the specific area of BioLaw, the analysis of the
case law of the European Court of Human Rights al-
loows to reflect on the difficult relationship between
the extension of the political discretion of the law-
maker and the intensity of the scrutiny the Court can
exercise on national decisions affecting human rights
and freedoms. Beyond the incidence of moral values, there is one more aspect that often
recurs in the Court’s case law. This is represented by
the scientific and technological factor, as one of
the possible instruments to measure national decisions. With regards to both of these elements, the ECtHR
across the years elaborated the doctrine of the mar-
gin of appreciation, which serves as a boundary line
to define the extension of states’ discretion in regulat-
matters relevant to the field of BioLaw, such as abortion, assisted reproductive techniques, end of life
issues, etc. The aim of this presentation is to give a
comprehensive view on the attitude and instruments that
the Court applies in this field of law (margin of
appreciation, consensus among contracting parties, entre-credentials of legal orders), in order to provide
the reader with a clear understanding of the
considerations of courts when dealing with
questions of BioLaw and the margin of appreciation.

Andrea Rovagnati: Experimentation on Humans: Who Decides What?

In my paper I will offer a brief reflection on the
threats posed to human reason and liberty by certain
ways in which European Courts have determined the
challenges related to moral status or human embryos. First,
I will provide a description of recent decisions on issues
related to experimentation on human embryos, deci-
sions made by two European super-national Courts,
namely the European Court of Human Rights and the
European Union Court of Justice. Second, I will brieﬂy
illustrate the erroneous response of those Courts
to the question about the biological nature of human
embryos, and its negative effect not only on human
embryos but also on all human beings. Then I will illustrate
how the legitimation of the use of human embryos
in research activities presents a danger to European
constitutionalism, because it undermines one of its
postulates, that is the idea that rights of equal justice
are due to each and all human beings. Finally, I will conclude by arguing for a path leading to go beyond laborespace and logics for grasp-
ing that ultimate dimension of human beings, which is
different from the biological one and it is actually the
one confronting them dignity and liberty.

Benedetta Vimercati: Science, patient autono-
my and end-of-life decisions across Courts and
Legislators: treading a ﬁne line

The scientific progress in medical care is strictly
intertwined with the delicate subject of the end of life
where medical/technical decisions deal with moral
ethical and legal aspects. Scientific advances inter-
ference with death, a purely natural process traditionally
excluded from the juridical – political space. However, and especially in Europe, the social and legal perspective: the capability to prolong or sustain human life through medical technologies has influ-
enced legal response in order to protect and improve
decision-making autonomy. Hence, given the impor-
tance placed upon the claim of the patients’ right to
to control their own treatments, judges and legislators are dealing with various dilemmas. Among them, we
can count the several alternative definitions for death;
the distinction between the different forms of reduced
morality and life-sustaining measures. These are
important subjects of debate in all parts of the
world, as well as recently in the EU. The European Union
system where the Italian Parliament has resumed debate
upon the end-of-life decisions’ bill. The present paper aims to provide some reflections on the relationship

96 SCIENCE AND LAW BEFORE THE COURTS. A COMPARATIVE OVERVIEW.

The Panel will provide a comparative survey of the ap-
proaches that national, international and supranational
courts are implementing when coming to assess le-
gitimacy of laws and acts regulating medical activi-
ties and scientific issues. Regulation of scientiﬁc and
technological innovation has become a particularly
challenging context in which the “traditional” tension
between legislative and judicial power achieves the
most sensitive and relevant level. By analysing dif-
ferent jurisdictions – at the national international and
European level – the Panel will aim to detect the exis-
tence of common lines of reasoning between them:
Is it possible to propose the existence of a common
frame of scrutiny in the ﬁeld of regulation of science?

Participants
Lucia Busatta and
Marta Tomasi
Simone Penasa and
Elisabetta Pulice
Giada Ragone
Andrea Rovagnati
Benedetta Vimercati
Lorenza Violini
Gia’d Ragone: Scientiﬁc assessments and lim-
its to the review by the Courts of the European
Union: the GMO case

It is settled case-law that where a EU institution is
called upon to make complex assessments, it enjoys
a wide measure of discretion, the exercise of which
is subject to a judicial review restricted to verifying
that measure in question is not vitiated by a manifest
error or a misuse of powers, and that the compe-
tent authority did not clearly exceed the bounds of
its discretion. According to the EU jurisprudence,
in order to ascertain if the measure is vitiated by a
manifest error, the Courts are tasked to do a review
of "plausibility", in which the evidence adduced by
the applicant must be sufﬁcient to make the factual
assessments used in the act implausible. Indeed, it
is not the Courts’ role to substitute their assessments
of complex facts for that made by the institutions
which adopted the decision. In recent years, several
cases have been brought before the Courts of the
European Union, challenging the authorizations to
cultivation or commercialization of GMO products.
As well known, the scientiﬁc assessments on this
kind of products are often controversial and based
on complex technical knowledge. The paper aims to
point out how the abovementioned limits to the
review by the Courts of the European Union operate
in cases challenging GMOs’ authorizations. Is judicial
entrance into substantive of legal orders, where the
issues are so serious that even a non-scientist can easily
detect and correctly identify them? Is a “plausibility”
review possible without giving rise to a review of the
The paper presents what interpretations the defini
tion of constitutional identity may have from a legal perspective. Compared to the theories of Jacobsohn and Rosenfeld, constitutional identity appears in the Eu-
ropean integration in a different relation, and it is looking to answer that the question: which are the elements of the constitutional identity of a Member State that the EU must respect in order to determine whether the Member State’s constitutional identity should be conceived as the identity of the constitution, as a legal notion that can be invoked in legal proceedings. The concept named as constitutional identity has three different but interconnected layers, which can be called national identity, the identity of the constitution that can be used against EU legislation, and the identity of the constitution which limits the formal constitution-amending power. Reference to and application of the identity of the constitution occurs in connection to the boundaries of EU law and the unconstitu-
tional constitutional amendments. However, while in the former case the reference is an explicit one, it is not in the case of formal constitutional amendments.

**Giacomo Delledonne: Article 2 TEU: European Values and Constitutional Identity of the EU. Overlaps and Distinctions**

This paper aims at building on the achievements of the debate about the founding values of the European Union from the perspective of constitutional identity. The CJEU has elaborated two different methods of constitutional identity focusing, firstly, on how European constitutional identity relates to the specific constitutional identities of European nation-
states and the implications for the division of authority between the European and national levels within the EU. Secondly, the panel offers the opportunity to discover to what extent the constitutional identity be-
came the explicit arena of disputes between Courts, and how its definition goes beyond their interpretation.

The paper presents what interpretations the defini-
tion of constitutional identity may have from a legal perspective. Compared to the theories of Jacobsohn and Rosenfeld, constitutional identity appears in the Eu-
ropean integration in a different relation, and it is looking to answer that the question: which are the elements of the constitutional identity of a Member State that the EU must respect in order to determine whether the Member State’s constitutional identity should be conceived as the identity of the constitution, as a legal notion that can be invoked in legal proceedings. The concept named as constitutional identity has three different but interconnected layers, which can be called national identity, the identity of the constitution that can be used against EU legislation, and the identity of the constitution which limits the formal constitution-amending power. Reference to and application of the identity of the constitution occurs in connection to the boundaries of EU law and the unconstitutional constitutional amendments. However, while in the former case the reference is an explicit one, it is not in the case of formal constitutional amendments.
ConCurring panels

98 SOLAR PANEL: NATIONAL ADJUDICATION AND TRANSNATIONAL SOFT LAW: JUDGES IN A NON-BINDING ENVIRONMENT

Soft law is present in nearly every EU policy. The term captures a multitude of instruments that are not legally binding but which produce legal effects. While it is generally acknowledged that soft law is an essential tool of EU policy-making, difficult questions concern its nature and effects. With most of the research focusing on the EU level, there is little analysis of EU soft law in Member States. This is problematic for many reasons. First, the uncertainty surrounding EU soft law in national settings can endanger the principles of legal certainty, transparency, and legality. Second, ambiguity negatively affects the implementation and enforcement of EU law, if national judges, who are the key actors interpreting soft law instruments, are unsure if and how to apply soft law. Third, soft law may also have positive effects, but its potential to contribute to legitimate governance remains unexplored. The proposed panel brings together scholars researching soft law in order to determine whether and how soft law is recognized and used by national courts. The empirical focus is on three policy fields: competition law, environmental law, and financial regulation. This panel is organized by the Commission funded Jean Monnet Network “European Network on Soft Law Research” (SoLaR).

Participants

Emilia Korkea-aho and Mariolina Eliantonio
Kathryn Wright
Napoleon Xanthoulis
Zlatina Georgieva

Moderator

Emilia Korkea-aho and Mariolina Eliantonio

Room

8B 4 33


Soft law has long constituted an important part of the EU legal order, complementing and augmenting the legislative framework. Its legitimacy and effectiveness to fulfill the expectations laid on it are often assessed, but many basic questions still remain unanswered. One remarkable gap concerns Member States, as much of soft law’s promise to fill gaps and unify practice is dependent on the national courts’ willingness to use soft law. Do national judges take EU soft law seriously? Do they use it? In deciding cases? How do national approaches towards soft law influence the use of soft law by national judges? Provided that soft law is non-binding guidance, its guiding ‘force’ rests on the extent to which it has social legitimacy that is accepted by those using it. Based on a survey conducted among the selected national judges in the autumn 2016, this paper presents the first empirical findings concerning the use of Water Framework Directive guidance documents in national courts. The results show that the status and legal effects of non-binding guidance for national courts are not clear, and there is a diversity of approaches to their binding value, creating much uncertainty amongst national courts and administrators. The paper ultimately disputes the idea of a uniform application of EU law into doubt. In light of the answers of the survey, the paper concludes by trying to provide a coherent framework for evaluating soft law in the national setting taking into account both normative and social legitimacy aspects.

Kathryn Wright: Shared Judicial Control for a Shared Administration? National Courts and European Regulatory Networks

This paper considers the role of courts in EU regulatory governance, focusing on networks of regulators and agencies in economic regulation. The creation of European agencies with legal personality in theory allows for greater judicial scrutiny at the EU level. However, legal accountability gaps remain, deriving from prominent features of European regulatory networks: shared administration and soft law rule-making. While the legal literature tends to concentrate on the EU context, this paper examines the role(s) for national courts in the context of these regulatory networks. National regulatory authorities have “soft” obligations towards the European agency, such as ‘comply or explain’ or the duty to take ‘utmost consideration’ of the agency’s recommendations. This raises the question of how national courts might deal with EU recommendations when reviewing national regulators, in addition to their own duty to take account of such sources. After noting indications from national courts’ practice, the paper makes suggestions for an enhanced role based on the traditional channel of the preliminary reference procedure together with more innovative horizontal coordination.

Napoleon Xanthoulis: Soft law instruments in the EMU and their impact on liability: Judicial dialogue in times of (euro) crisis

When the global financial and economic crisis hit Europe, the Eurozone lacked a robust regulatory framework to address the systemic risk. The paper examines the output of two dominant institutional players, namely the ESM and the Eurogroup. First, it discusses the legal relevance of the Eurogroup statements with reference to the recent ECB judgments on the bail-in that applied in the Cypriot banking sector (Joint Cases C-381/15 to C-10/15 Mallia et al v ECB and Commission). Second, it engages with the accountability of the MoUs that contain the macroeconomic conditionalities accompanying the ESM’s financial assistance to the respective member state in need. The significance of the MoU lies in that it is adopted within an institutional context governed by international law on the one hand, yet with the active involvement of Union institutions on the other. To this effect, the paper draws a comparative analysis between the approach endorsed by the Greek Council of State in respect of the Greek MoU and the conflicting views that identified in Ledra Advertising, a case pertaining to the Cypriot financial assistance programme (Joint Cases C-8/15 P to C-10/15 P Ledra Advertising et al v ECB and Commission). This paper concludes by discussing the impact of such soft law instruments on the accountability of the various actors involved. It suggests that, as a result, the liability in this context becomes blurred both vertically, between the national and supranational actors as well as horizontally, between EU law and international law entities respectively.

CONCURRENCE PANELS
This paper is based on an empirical dataset of 112 national competition cases from four EU Member States, which contain judicial reasoning on supranational competition soft law. This fact poses a problem for the maintenance of the horizontal principles of consistency and legal certainty that the CJEU (the ECJ and GC) show their position with regard to others (the 102 Guidance Paper and the 2009). One of the benefits of creating specialist courts is their capability to improve decision making due to the expert judges' ability to decide on such complex matters. Chile is a case in point. The Chilean Patent Office (INAPI) created a specialist court in accordance with the Chilean Intellectual Property Law. Nevertheless, intellectual property rights infringement cases are heard and solved by generalists in either civil or criminal courts, depending on the IP right infringed, with expectation of applications to extend the term of patent protection due to unreasonable curtailments of technology. To meet the demand of innovators to obtain early approval to commercialize a pharmaceutical or agrochemical product, the present contribution intends to shed light on the role of the Intellectual Property Court of Appeals in influencing generalist decision-making process in criminal courts when solving disputes arising from patent infringements in Chile. To achieve this, an analysis of the relevant patent and patent enforcement provisions within the Chilean IP enforcement policy for its members in Europe. Yet the EPO is an autonomous intergovernmental organization whose specialist jurisdiction and operation is completely detached and insulated from review in the legal system of the European Union, the Council of Europe's human rights system, and the national legal systems of its members. This paper will analyse how the legal insulaion of the EPO together with its pivotal quasi-judicial role in the grant of patents has facilitated the increasing dominance of EPO standards applied in patent litigation, which has led the CJEU to develop a judicial path ahead with the UPC. More particularly, the paper will reflect on the interplay of the CJEU's harmonization of norms and specialist patent offices and courts in Europe and consider how to address over-representation of the EPO in the UPC's jurisdiction and thus address the public interest in the grant of exclusive property rights.

Tuomas Mylly: Does the insulation of the Unified Patent Court from EU law and outside influence result in patent values?

The purpose of the contribution is to address the ways in which the jurisdictional domain of the Unified Patent Court (UPC), the "unitary patent package", is shielded against external judicial review: systematically and substantively. The norms providing the unitary patent its substantive contents, the Agreement on a Unified Patent Court and the European Patent Convention (EPC), are shielded against judicial review. The UPC is detached from any background legal regime. By contrast, the EPO is held in constitutional law and general doctrines of law. It will be one of the most specialist courts in the world, thus being shielded from external legal influences. Whereas the UPC and EPC systems will likely converge based on the Unified Patent Court, the EPO remains at the same time subjected to fragmentation. Its core principles concerning legality and judicial review are being undermined in the process. In the cases challenging the legality of the patent package, the Court of Justice of the European Union (ECJ) appears to permit the related disintegration of Union law, its legal instruments and the EPC's powers for the sake of a specialist autonomous hybrid regime functioning on the borderline of Union and international law. Despite the ECJ's capacity to reverse the Federal Circuit's approval of gene patents, it reversed the Federal Circuit's approval of gene patents and thus affect the adjudicative practices of the UPC.

Dhanay Cadillo Chandler: The influence of "specialist courts" on generalist courts in Chile

The expression "specialist courts" is traditionally understood to refer to courts or tribunals with limited or exclusive jurisdiction in a determined field of law (Zimmer 2009). One of the benefits of creating specialist courts is their capability to improve decision making due to the expert judges' ability to decide on such complex matters. Chile is a case in point. The Chilean Patent Office (INAPI) created a specialist court in accordance with the Chilean Intellectual Property Law. Nevertheless, intellectual property rights infringement cases are heard and solved by generalists in either civil or criminal courts, depending on the IP right infringed, with expectation of applications to extend the term of patent protection due to unreasonable curtailments of technology. To meet the demand of innovators to obtain early approval to commercialize a pharmaceutical or agrochemical product, the present contribution intends to shed light on the role of the Intellectual Property Court of Appeals in influencing generalist decision-making process in criminal courts when solving disputes arising from patent infringements in Chile. To achieve this, an analysis of the relevant patent and patent enforcement provisions within the Chilean IP

Aurora Plomer: The European Patent Office as the legal engine for patent policy in Europe

The presence of technically qualified judges or, more specifically, "technical judges" in specialist patent courts in Chile is one of the key characteristics of the new 'common' European law on patents set out in the European Patent Convention (1973) against the diversity of national patent laws in Europe. In reality, the existence of opposition and appeal procedures within the EPO system means that EPO boards have developed a quasi-judicial function reflected in the description of their jurisprudence as 'case-law'. As the institution fronting the grant of European patents, the EPO thus has a critical role in setting legal patent policy for its members in Europe. Yet the EPO is an autonomous intergovernmental organization whose specialist jurisdiction and operation is completely detached and insulated from review in the legal system of the European Union, the Council of Europe's
trust: which role does the CJEU ascribe to trust?

Trust is often invoked in the European Union. Calls for better regulation or transparency rely on trust, but trust is seldom used in any stringent way. The understanding of trust by the Court of Justice of the European Union (CJEU) as an authoritative voice on EU law informs and shapes the role trust has and should have in the EU legal system. But how does the CJEU itself understand trust? Is trust marginal or relevant in European case law? This article aims to answer these questions that have been ignored in academic debate about judicial power of international courts. It compares the European judicial approach to trust with the administrative cases handled by the European Ombudsman (EO). This article also provides new insights into the factors shaping levels of (dis-)trust in the main ‘engines’ of European integration. In doing so, this article shifts the focus from existing research on trust in judicial institutions to evaluations of Registrars’ trustworthiness, as one element that impacts the degree of trust in two European courts: the General Court of the CJEU and the ECtHR. We draw from surveys of individuals, companies, NGOs, and their respective lawyers that have initiated claims in order to identify Registry actions or practices upon which these constituents rely when forming evaluations of the Courts’ level of trustworthiness. In doing so, this article sheds light on the critical role of bureaucrats within the European courts and provides new insights into the factors shaping levels of (dis-)trust in the main ’engines’ of European integration.

Concurred panels

Law will be carried out. Decisions concerning patentability requirements from the Intellectual Property Court of Appeal will be analysed to understand the Patent Office’s role in delineating the scope of patent protection for pharmaceutical and agrochemical products and compare the role of criminal courts in patent infringement rulings.

Monica Claes: The CJEU and National Courts: Building Mutual Trust

The CJEU and National Courts: Building Mutual Trust

The European Union lacks a full-fledged EU federal court system, and hence, is dependent on national courts to enforce EU law and protect the EU rights of individuals. Over the years, the CJEU has, in its case law, developed a European mandate for national courts: a set of duties and obligations for national courts in the enforcement of EU law (built on doctrines and principles such as direct effect, primacy, conform interpretation, effet utile, mutual recognition and mutual trust). More recently, the EU legislature has developed additional duties for national courts, as is the case in the areas of criminal law (European Arrest Warrant) and asylum law. The CJEU is the supreme court of this decentralized European and transnational judicial system. Mutual trust between the CJEU and national courts is the most trusted European institution, with net trust scores relatively stable over the past decade. Similarly, al et al (2011) find that domestic actors display remarkably high levels of trust in the European Court of Human Rights (ECtHR) system as a whole. Existing research on trust in European and international courts more generally focuses predominantly on the role of judges and their rulings in engendering or undermining trust, largely overlooking the role of Registrars and Legal Secretariats. While understandable given the visibility of a court’s judges, this narrow focus remains surprising as a court’s registry is responsible for the day-to-day work of the institution represents the primary point of contact for parties to a case, and plays a critical role in conducting legal research and drafting judgments and decisions. This article shifts the focus of existing research on trust in judicial institutions to evaluations of Registrars’ trustworthiness, as one element that impacts the degree of trust in two European courts: the General Court of the CJEU and the ECtHR.

Zuzanna Godzimirska: Builders of (dis)trust: The Role of Registrars in the European Courts

As the European legal order’s impact on the daily lives of its citizens has grown, so too has attention to the public’s trust in European institutions and courts. Early on, Gibson and Caldeira (1995, 1998) suggested that the Court of Justice of the European Union (CJEU) did not enjoy high levels of diffuse public support, but more recently Kelemen (2013) found that the CJEU is the most trusted European institution, with net trust scores relatively stable over the past decade. Similarly, al et al (2011) find that domestic actors display remarkably high levels of trust in the European Court of Human Rights (ECtHR) system as a whole. Existing research on trust in European and international courts more generally focuses predominantly on the role of judges and their rulings in engendering or undermining trust, largely overlooking the role of Registrars and Legal Secretariats. While understandable given the visibility of a court’s judges, this narrow focus remains surprising as a court’s registry is responsible for the day-to-day work of the institution represents the primary point of contact for parties to a case, and plays a critical role in conducting legal research and drafting judgments and decisions. This article shifts the focus of existing research on trust in judicial institutions to evaluations of Registrars’ trustworthiness, as one element that impacts the degree of trust in two European courts: the General Court of the CJEU and the ECtHR. We draw from surveys of individuals, companies, NGOs, and their respective lawyers that have initiated claims in order to identify Registry actions or practices upon which these constituents rely when forming evaluations of the Courts’ level of trustworthiness. In doing so, this article sheds light on the critical role of bureaucrats within the European courts and provides new insights into the factors shaping levels of (dis-)trust in the main ‘engines’ of European integration.

Juan A. Mayoral: On EU law supremacy: The impact of judicial trust for strengthening supranational legal system

The literature, in the last couple of decades, has developed diverse justifications for explaining why national courts accept and enforce EU law supremacy and its importance for legal integration. However, new scholarship on the role of individual attitudes and judges’ profile marked the relevance of judicial trust for the acceptance and compliance by national judges with their duties imposed by the CJEU as EU decentralized courts. This study takes this novel approach for the judicial construction of Europe and proposes that the judges’ grasp of supremacy is generally influenced by their individual attitudes towards the CJEU which
The paper argues that the “autonomous interpretation” is still a vivid concept which allows the CJEU to effectively guarantee individual rights within the areas covered by the EU law than the disabled constitutional courts. Therefore, the disabling of the constitutional courts might lead to unexpected integration tendencies.

The concept of normative parallelism has traditionally been linked with the phenomenon of normative fragmentaion of international public law norms, but currently relates to the interaction of the norms derived from a given national legal order of a Member State and the CJEU or the Constitutional Court of a Member State that have more interpretative power to interpretative instrument challenges the renaissance tendencies within the EU.

The concept of normative parallelism has tradition-
102 WHERE OUR PROTECTION LIES: CONSTITUTIONAL REVIEW AND SEPARATION OF POWERS – BOOK DISCUSSION

The global ascendancy of constitutional review in recent years has not diminished its contentiousness. In his forthcoming book, Where Our Protection Lies: Constitutional Review and Separation of Powers (OUP 2017) Dimitrios Kyritsis offers a novel philosophical account of the limits and justification of constitutional review. He argues that we do well to view constitutional review through the lens of the idea of institutional cooperation as regulated by the principle of separation of powers. He contends that, while legislatures ought to have the initiative in shaping government policy and giving meaning to our constitutional rights, courts are well-suited to perform a checks-and-balances role. Crucially, this role is subsidiary. The book then develops a sophisticated theory of judicial deference that operationalises courts’ subsidiarity in fundamental rights adjudication. This panel will be devoted to critically examining the key claims of the book. Discussants (Mattias Kumm, Stephen Gardbaum, Kai Möller) will comment freely on any of its aspects. The panel will consist in a) outline of the overall argument by the author, b) the discussants’ comments, c) author’s reply, d) q&a session.

Participants
- Dimitrios Kyritsis
- Mattias Kumm
- Stephen Gardbaum
- Kai Möller

Moderator
- Dimitrios Kyritsis
Room
- 4B-2-22

Dimitrios Kyritsis: Where Our Protection Lies

Mattias Kumm: Discussant

Stephen Gardbaum: Discussant

Kai Möller: Discussant

103 THE FUTURE OF INTERNATIONAL LAW AND INTERNATIONAL ORGANIZATIONS

Participants
- Michael B. Krakat
- Rishi Gulati
- Eyal Benvenisti and Agon Sivan Shlomo
- Anne van Aaken
- Oleksandr Vodiannikov

Moderator
- Anne van Aaken
Room
- 4B-2-34

Michael B. Krakat: Is an “International Law of Citizenship” a misnomer? Courts as mediators between mercantile- and global citizens

This paper discusses domestic and international courts in regards to the globalization of citizenship laws. It refers to municipal direct sale of citizenship ‘by investment’ (CBI), direct naturalization without periods of required residence, creating global market citizens. Likewise supra-national law pierces the national veil, rendering futile the ICJ’s judgment in Nottebohm that required a ‘genuine connection’ for national membership. The European Convention on Nationality shows that naturalization has become more of a duty-less right than a favour requiring proceedings within a reasonable time and with reasonable fees. Human Rights may further constrain the denial of any form of citizenship, with restrictive policies seen as discriminatory. The supranational nature of Human Rights Law is expressed in developing binding force even against the will of the signatories. ‘Supranational citizenship’ was evaluated in Rottmann, rooted in an initially commercial union with political aspirations and cosmopolitan outlook. Domestic courts function in a national as well as the development of an international order, overcoming supranational-level institutional deficiencies. Conversely, the ICJ has interpreted and applied domestic law. Can we distil principles common to above systems, inspiring a rule for global citizenship for the international community, a cosmopolitan outlook on CBI laws? Is an ‘international law of citizenship’ emerging turning ‘international’ law into ‘law’?

Rishi Gulati: Justiciability of disputes involving international organisations

International organisations affect the lives and rights of individuals more than ever before, as exemplified by the outbreak of cholera in Haiti due to UN conduct or the occurrence of the genocide in Srebrenica. It is trite to say that victims of international organisational conduct more often than not are denied a remedy. To secure the delivery of justice to persons harmed by international organisations, access to judicial mechanisms is paramount, for such access is the ultimate guarantee to a check on the unrestraint
ConCurring panels

Through careful analysis of WTO jurisprudence, it
and domestic mechanisms should be considered as
occupying critical positions in the international legal
order. Instead of isolating the national from the inter-
national it is important to understand the links be-
tween those two legal orders and their intertwining,
when it comes to understanding questions of access
to justice vis-à-vis individuals affected by the actions
of international organisations. In this paper, I discuss
the concept of ‘justiceability’ at the national and the
international level.

Eyal Benvenisti and Agon Sivan Shlomo: The
WTO Law of Strangers: Other-Regardingness in
Benvenisti Eyal WTO Jurisprudence
The article explores the phenomenon of other-
regardingness in international adjudication while fo-
cusing on the WTO dispute settlement system (DSS).
Through careful analysis of WTO jurisprudence, it
uncovers the role played by other-regarding consid-
erations in the DSS operation as manifested along
the interrelated threads. The first concerns a series
of obligations imposed by the DSS on WTO Members
in respect of third states and foreign nationals, se-
curing such strangers a voice in domestic regulatory
processes that affect them. The second concerns
other-regarding elements introduced by the DSS to
its own operation, accounting for stakeholders other
than the disputants appearing before it. The two other-
regarding threads unveil in turn critical aspects of WTO
adjudication. They expose other-regardingness as a
multifaceted judicial philosophy that emerged in the
shadow of textualism in WTO jurisprudence, embed-
ding the interests of various strangers within the duties
of Members under the WTO and within the bilateral
structure of WTO disputes. The two threads further
recount a story of institutional change, illuminating the
DSS transformation from a purely bilateral dis-
putes settlement mechanism to an adjudicating system
that delivers justice, as the case may be. Both international
and domestic legal theories against realistic behavioral assumptions.

Oleksandr Vodianikov: Reclaiming Legitimacy
through International Law: Friendly Treatment
of International Law Jurisprudence of the Con-
stitutional Court of Ukraine in Turbulent Times
for International Law
General distrust of international law and institu-
tions has lurked into courtrooms of many states. Ju-
dicial dialogue between the national courts and inter-
national tribunals is tainted with growing distrust and
frustration. Against this background Ukraine’s
good games are concerned with the question under
what conditions social cooperation arises. They in-
clude behavioral insights deviating from the rational
choice assumption. This paper asks what those in-
sights can contribute to our understanding of interna-
tional law. Whereas HLA Hart deemed his “Concept of Law”
an essay in descriptive sociology, this paper is
an exploration of an essay in descriptive psychology. It allows also us to test (international) legal theories
against realistic behavioral assumptions.

Anne van Aaken: Can Behavioral Economics In-
form International Legal Theory?
“What is law” and what distinguishes law from other
social practices? “Is international law law”? Those old
questions may seem obsolete but they pop up again
and again. Theories about international law often con-
tain implicit assumptions about how people and/or
states behave and why. But they are disconnected
from social science and behavioral insights. Public
rooms.

104 BOOK ROUNDTABLE: A DISCUSSION ON “UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS”

Can a constitutional amendment be unconstitutional?
This paradox is now one of the most important ques-
tions in all of public law. It is this question that forms the
core of Yaniv Roznai’s inquiry in his new book entitled
“Unconstitutional Constitutional Amendments” (OUP
2017). In this panel four scholars will comment on Roz-
na’s book, and Roznai will respond, after which we will
engage in a broader conversation with the audience on
this intriguing question.

Participants
Richard Albert
Joel Colon-Rios
Rosalind Dixon
Gary Jacobsbohn
Yaniv Roznai
Kim Lane Schepple
Moderator
Richard Albert
Room
4B-2-58

Richard Albert: Discussant
Joel Colon-Rios: Comment on Roznai’s “Uncon-
stitutional Constitutional Amendments”
Rosalind Dixon: Comment on Roznai’s “Uncon-
stitutional Constitutional Amendments”
Gary Jacobsbohn: Comment on Roznai’s “Un-
constitutional Constitutional Amendments”
Yaniv Roznai: Response to comments on Roz-
na’s “Unconstitutional Constitutional Amend-
ments”
Kim Lane Schepple: Comment on Roznai’s “Uncon-
stitutional Constitutional Amendments”

105 JUDICIALIZATION OF POLITICS IN ILLIBERAL DEMOCRACIES: EFFECTS AND CHALLENGES

The panel explores how the rise of illiberalism affects
the rule of law and increases the political importance
of courts. It draws mostly on Central and South-East
European examples, but also advances hypotheses
and develops arguments that could be applicable well
beyond this region. In Central and South-East Europe,
constitutional values of liberal parliamentary democra-
ties have not only become less appreciated and much
less understood but also the main targets of new, right
wing populist forces. The paper presentations focus
both on theoretical issues – such as illiberalism as an
ideology in complex and tense relationship with consti-
tutionalism and imperial case studies from Bul-
garia, Hungary and Serbia. An important dimension of
the analyses is to investigate the emerging politiciza-
tion of jurisprudence at international courts, especially
the European Court of Human Rights, that is caused
by political parties in power that define themselves as
illiberal. A more general issue the panel addresses is
to what extent courts could be instrumental for
the curbing of some of the excesses of populist politics.

Participants
Denis Galligan
Daniel Smilov
Judit Sandor
Violeta Bulević
Moderator
Andras Sajo
Room
7C-2-24

Denis Galligan: Judicialization of Politics in Illob-
eral Democracies
Daniel Smilov: Illiberalism and the counter-
majoritarian difficulty
Alexander Bickel’s counter-majoritarian difficulty
acquires another meaning in Eastern Europe today.
The problem is not why courts stand against the will
of democratically elected bodies, but why they fail to
do so effectively even if these bodies violate constitu-
tional principles and rights. This is a pertinent question
since Eastern Europe has been generally regarded as
a success story in terms of institutional transplantation
of judicial review. Why the institutional transplants fail
to perform as expected will be referred to as “coun-
ter-majoritarian difficulty”. The paper explores this
question on the basis of evidence from Central East-
ern Europe with a specific focus on developments in
Bulgaria. The main argument is that constitutionalism
is a complex mixture of formal rules and informal con-
ventions, institutional transplants from the 1990s were
successful in creating rather robust formal frameworks.
However, the creation of necessary informal conven-
tions was lagging behind and was even non-existent in

Anne van Aaken: Behavorial Economics In-
form International Legal Theory?
“What is law” and what distinguishes law from other
social practices? “Is international law law”? Those old
questions may seem obsolete but they pop up again
and again. Theories about international law often con-
tain implicit assumptions about how people and/or
states behave and why. But they are disconnected
from social science and behavioral insights. Public

The rise of political populism has helped to open up a new front in the struggle to preserve the liberal order. In the field of constitutional theory, normative questions such as the appropriate role of courts, the nature of constitutional adjudication and the appropriate approaches to interpretation are often discussed without any explicit reference to a specific institutional setting in which these normative answers are expected to obtain. The current situation suggests that constitutional design can be linked to different answers in these questions: they can be shaped by different understandings in that community of the role of courts and of public law; moreover, differences in institutional design can also help shape these understandings and normative expectations themselves. In this paper, we argue that the counter-majoritarian difficulty that judges are unelected and their change. Moreover, internationalized (Garoupa) – which, in turn, transforms the role of the judiciary in shaping political issues.

Violeta Beširević: Making sense of political question doctrine: The case of Kosovo

It was only a matter of time when the long-lasting Serbian/Kosovo dispute would be, to paraphrase Tocqueville, resolved into judicial question. First, following Kosovo’s unilateral declaration of independence, Serbia’s counter-secessionist strategy included involvement of the International Court of Justice, which was asked to deliver an advisory opinion on Kosovo’s declaration of independence. Soon after, the Constitutional Court of Serbia and the Constitutional Court of Kosovo faced the requests to decide on the constitutionality of the Brussels Agreement, reached in 2008 and empirical evidence that in the current political climate, the case law of the constitutional courts of European states does not prioritize the rule of law; moreover, differences in institutional design can also help shape these understandings and normative expectations themselves. In this paper, we analyze how courts should decide, and under what conditions the institution of judicial review could be reconciled with democratic commitments. Such debates have been largely based on the assumption that the both constitutional courts, one of legitimacy rooted in legality.
In recent years, there is no lack of constitutional courts’ judgments that more or less openly challenge the primacy of EU law and the ECJ’s authority. The Czech constitutional court’s famous judgment of 2012 for the first time found an ECJ’s decision to be ultra vires. The German constitutional court reiterated and developed its doctrine on the constitutional limits to compliance with EU law in a handful of recent judgments. In December 2016 in a judgment on the immigrants’ quota system, the Hungarian constitutional court endorsed in the国内 possibility to refuse compliance with EU law in the name of a Member State’s constitutional identity. A preliminary reference by the Italian constitutional court is currently pending before the ECJ: While showing a rather dialogical approach, it embraces the possibility to declare a Treaty provision inconsistent with the supreme principles of the Italian Constitution. This phenomenon deserves close scrutiny. It can be considered either as a reasonable counterbalance to the ECJ’s power or as a serious encroachment into the two courts’ understanding of the CCC’s position and that the ultra vires judgment was a negligible episode with peculiar domestic roots. It firstly analyses the concept of the Eternity Clause of the Czech Constitution, which constitutes the only foreseeable normative obstacle to the supremacy of EU law within the Czech legal order. This ‘constitutional core’ does not draw on some specific Czech constitutional identity but rather on shared values concerning the constitutional order and the unity of Europe. Afterwards, the paper shows that the CCC adheres to euro-friendly interpretation of the Czech constitutional order and it has even interpreted the Eternity Clause itself – especially concepts like democracy or sovereignty – with respect to the logic and nature of European integration. The CCC’s euro-friendliness is further complemented by the respect that EU law pays to national – especially constitutional – identity of the Member States.

David Paris: Constitutional limits to EU law primacy: A comparative overview

Several constitutional courts refuse to accept the absolute primacy of EU law over domestic constitutional law. They have thus developed specific review mechanisms to deny in exceptional cases the applicability of EU law within the domestic legal order. Although similar in their goal, these reservations significantly differ from each other. Taking into account the jurisprudence of eight Member States’ constitutional courts, this paper highlights similarities and differences in the limits constitutional courts set to the primacy of EU law. In particular, it offers a comparative overview on the constitutional foundations of these reservations, on the values that can be invoked to refuse compliance with EU law, on the institutions that can exercise these review mechanisms and on the procedural rules governing them. The comparative analysis helps to identify common trends in constitutional courts’ reservations to EU law and to define the procedural and substantial limits of a ‘sustainable’ dissent by constitutional courts.

Ladislav Vhynánek: Barking dog never bites: On the Euro-friendliness of the Czech Constitutional Court

The Czech Constitutional Court (‘CCC’) famously declared an ECJ’s judgment ultra vires. Does this mean that the CCC intends to be a guardian of the Czech sovereignty and constitutional order against foreign intrusions? This paper argues that this would be a misunderstanding of the CCC’s position and that the ultra vires judgment was a negligible episode with peculiar domestic roots. It firstly analyses the concept of the Eternity Clause of the Czech Constitution, which constitutes the only foreseeable normative obstacle to the supremacy of EU law within the Czech legal order. This ‘constitutional core’ does not draw on some specific Czech constitutional identity but rather on shared values concerning the constitutional order and the unity of Europe. Afterwards, the paper shows that the CCC adheres to euro-friendly interpretation of the Czech constitutional order and it has even interpreted the Eternity Clause itself – especially concepts like democracy or sovereignty – with respect to the logic and nature of European integration.

The German Federal Constitutional Court (‘BVerfG’) has developed three types of review that challenge the primacy of EU law. While the first cases dealt with fundamental rights review, in the recent past the BVerfG has frequently referred to ultra vires and identity review. This constitutionally grounded review potentially threatens the uniform application of EU law and conflicts with the ECJ’s jurisdiction. The case law of the BVerfG thus reveals a balancing act between self-confident demarcation towards EU law on the one hand, and willingness for a dialogue with the ECJ in the multilevel cooperation of courts on the other hand. The BVerfG’s judgments concerning the OMT decision of the European Central Bank of September 2012 can be cited as an example. It was the BVerfG’s first request for a preliminary ruling of the ECJ. Although the BVerfG in its final judgment of 21 June 2016 followed the ECJ’s ruling on the merits, it also expressed explicit criticism on the ECJ’s methodological approach. This story is to be continued for sure.

Gábor Halmay: The Misuse of Constitutional Identity: The Case of Hungary

After a failed referendum and constitutional amendment, the packed Hungarian Constitutional Court in an abstract constitutional interpretation rubberstamped the government’s constitutional identity defense of its policies on migration, and everywhere it may disagree with the EU. When the Hungarian Constitutional Court on behalf of the government protects Hungary’s current constitutional identity, which is inconsistent with many of the joint values of Article 2 TEU, it promotes an unconstitutional national constitutional identity. If the EU will still be unable to protect its joint values towards Member States, such as Hungary (and lately also Poland), which do not want to comply with them, the case of Hungary (and Poland) will have a negative impact both on countries with genuine and legitimate national constitutional identity claims and on the constitutional pluralism in the EU abandoning the common European constitutional whole and emphasizing only the unconstitutional nationalists constitutional identity.

Diletta Tega: Narrowing the dialogue: The Italian Constitutional Court and the Court of Justice on the Taricco case

In its 2015 Taricco judgment, the Grand Chamber of the ECJ held that the Italian legislation concerning the limitation period for VAT frauds is too lenient to ensure the protection of EU financial interests, as required by Art. 325 TFEU, and has to be abolished. In its order no. 27 of 2017, the Italian Constitutional Court (‘ICC’) reacted poignantly. It found that this disapplicability would infringe one of the supreme principles of the Italian Constitution, i.e. strict legality in criminal matters. Consequently, in an urgent preliminary reference, the ICC asked the ECJ to reconsider its conclusions and to take into greater account national constitutional concerns, arguing that they have some relevance also under EU law. In this instance, the dialogue between the two courts is indeed strained. Nevertheless, both courts would probably not try to assert their own ultimate authority and instead to use it most sparingly and prudently. Narrowing the scope of the controversy might be the best path to find a common ground and to distinguish this case from other more serious and far-reaching challenges to EU law that come from other national jurisdictions.
This panel seeks to explore the role of colonialism in court systems past and present. If this year’s ICON conference asserts that understanding role of courts is arguably one of the most significant developments in the late-20th and early-21st century, it could be due in part to the forces of empire and post-colonialism. This panel represents a group of scholars working in different forms and historical settings, who will provide case studies or raise overarching questions on the role of (post-)colonialism in creating and transforming courts and judiciaries.

Participants
Binyamin Blum
Mathilde Cohen
Tanya Hernandez
Moderator
David Law
Room
7C-2-02

Binyamin Blum: The Post-Colonial Jury: The Rejection of Trial by Peers in Britain’s Former Dependencies

Though central to the English common law trial by jury of one’s peers was an idea firmly rejected in most British colonial settings. With the exception of some settler colonies, most British dependencies did not allow trial by jury. With its persuasive potential, the jury bestowed far too much power in the hands of the colonized and thus posed a significant threat to colonial rule. Though sometimes willing to employ hand-picked assessors or local magistrates to bestow legitimacy upon an imposed legal order, juries for non-Europeans were rarely introduced. Yet considering the place of the right of trial by jury in American Constitutional history, it represented a significant threat to colonial rule. Though central to the English common law trial by jury of one’s peers was an idea firmly rejected in most British colonial settings. With the exception of some settler colonies, most British dependencies did not allow trial by jury. With its persuasive potential, the jury bestowed far too much power in the hands of the colonized and thus posed a significant threat to colonial rule. Though sometimes willing to employ hand-picked assessors or local magistrates to bestow legitimacy upon an imposed legal order, juries for non-Europeans were rarely introduced. Yet considering the place of the right of trial by jury in American Constitutional history, it represented a significant threat to colonial rule. Though central to the English common law trial by jury of one’s peers was an idea firmly rejected in most British colonial settings. With the exception of some settler colonies, most British dependencies did not allow trial by jury. With its persuasive potential, the jury bestowed far too much power in the hands of the colonized and thus posed a significant threat to colonial rule. Though sometimes willing to employ hand-picked assessors or local magistrates to bestow legitimacy upon an imposed legal order, juries for non-Europeans were rarely introduced. Yet considering the place of the right of trial by jury in American Constitutional history, it represented a significant threat to colonial rule.

Mathilde Cohen: Courts in Overseas French Territories: (Post-)Colonial?

Contemporary France maintains a court system outside of the European continent in eight “overseas” regions such as Martinique, Réunion, French Guiana, and New Caledonia. Held as colonies until the 1940s, these territories became part of the French state with varying statuses and degrees of autonomy. Based on qualitative research, I show that the French overseas courts remain subject to colonial mechanisms of control, attesting that the French state remains a (post?) colonial one. Moreover, I argue that present-day courts may be even less autonomous than during colonial times when the colonial power actively sought to recruit judges and prosecutors among native peoples to secure the buy in of local populations. By contrast, the current “decolonized” state endeavors to keep native peoples off the bench (or at least off the courts located in their native lands).

Tanya Hernandez: Racially-Mixed Personal Identity Equality

A growing number of commentators view discrimination against multiracial (racially-mixed) people as a distinctive challenge to racial equality. This perspective is based on the belief that multiracial-identified persons experience racial discrimination in a manner that judges steeped in binary “colonial” construct of race cannot comprehend. I dispute that premise and deconstruct its Personal Identity Equality approach to anti-discrimination law and demonstrates its ill effects reflected in Supreme Court affirmative action litigation.

Mark Tushnet: Canada judicial appointment process

The “modern” (that is post-1960s) judicial appointment process in the United States has become perhaps the most transparent in the world. Yet, not only are nominees subjected to extensive public questioning, but preliminary lists of those being considered for nomination are widely publicized. The typical nomination process since at least 1966 has allowed for public comment. The typical nomination process since at least 1966 has allowed for public comment. The typical nomination process since at least 1966 has allowed for public comment. The typical nomination process since at least 1966 has allowed for public comment. The typical nomination process since at least 1966 has allowed for public comment. The typical nomination process since at least 1966 has allowed for public comment. The typical nomination process since at least 1966 has allowed for public comment. The typical nomination process since at least 1966 has allowed for public comment.

Micaela Alterio and Roberto Niembro: Bolivia judicial elections

The Bolivian procedure for appointing judges of the Constitutional Court changed with the 2009 Constitution. Before the constitutional reform, the Bolivian procedure for electing judges of the Plurinational Constitutional Court. Finally, Camilo Saavedra discusses the Mexican Supreme Court appointment procedure.

Participants
Mark Tushnet
Micaela Alterio and Roberto Niembro
Camilo Saavedra
Moderator
Rafael Rubio
Room
8A-2-17

Camilo Saavedra: Mexico judicial appointment process

On December 5th, 1994, just four days after taking office, Ernesto Zedillo, the last president emerging from the once hegemonic National Revolutionary Party (PRI, for its Spanish abbreviation) before its fall, promoted a constitutional amendment of the institutional design of the Mexican Supreme Court of Justice. The so-called 1994 judicial reform substantially expanded the Court’s constitutional review powers, reduced size of the Court, increased the number of stages in the appointment process, and set a new appointment method combining elements: three-member shortlists, presidential nomination and senatorial confirmation. In the period 1917-1994, the rotation in the Court’s membership resulted in an average of 2.8 appointments per year. Conversely, since the enactment of the 1994 judicial reform, 23 justices have come to the bench, including the 11 appointed in 1995. Certainly, for the first time in the Mexican history, the membership of the Supreme Court (that judges are alternated) has remained more or less the same, with the exception of the last two decades all the vacancies have resulted from the death of a sitting justice. What factors could explain this unprecedented stability? The sociological literature on Mexican judicial politics has flourished along the last two decades. Judicial selection, however, has remained a topic dominated by legal academia. This scholarship has arrived at insightful conclusions that stress the importance of the current rules that allow the president to have a major control over appointment processes. Nonetheless, it has not provided persuasive explanations of why, for instance, the Senate has rejected the first presidential shortlist in four out of the last twelve process. The purpose of this paper is, instead of analyzing the effects of judicial stability or focusing on the appointment legal framework, to explore what the factors that have promoted judicial independence in the Mexican Supreme Court
of privately-owned land are also included. The City of Johannesburg embarked on a project to develop ‘Corridors of Freedom’ by means of which it is making a decisive turn towards a low-carbon future with eco-efficient infrastructure that underpins a sustainable economy. The city also devotes a significant portion of its budget to cultural projects and initiatives, a trend that is in line with Jogbun 2040 the Growth Development Strategy based on transport-orientated development. The shape of the future Johannesburg will consist of well-planned transport arteries – the Corridors of Freedom – linked to interchanges where the focus will be on mixed-use development. The eThekwini development has been contested in court on the basis of the alleged limited environmental author- ity of city governments. The City of Johannesburg’s understanding has not been the subject of specific litiga- tion but the development may be seen as a posi- tive response to the strong message of the courts in earlier judgments against the City related to forced evictions, access to housing and access to sufficient water. With reference to real and promising examples from the cities of Johannesburg and Durban in South Africa, this contribution critically analyses the im- portant role of domestic courts in the interpretation and protection of the power of city governments to plan and to develop over spatial planning as part of the pursuit of SDG 11.

Michèle Finck: The Urbanization of European Union Law

This essay explores the relationship between European and urban citizenship by focusing on the European Citizens’ Initiative. The first supranational instrument of direct democracy, inaugurated by the Treaty of Lisbon in order to directly involve European citizens in the EU legislative process, allows at least one million citizens from at least one quarter of all Member States to suggest legislative change to the European Commission in its role as the initiator of supranational legislation. While the ECI is still in its infancy, it could have potentially far-reaching consequences for the nature of the EU and its legis- lative procedure, the relation between citizens to the Union and to another, and the nature of European citizenship. This short essay makes the point that the emergence of the European Citizens’ Initiative could however also come to influence the relationship be- tween local communities and the European Union. The argument that will be made is that there are numerous incentives for local communities and their representa- tives to become involved in the ECI mechanism and such involvement could transform the nature of the ECI but also the nature of the interaction between the local and the supranational. This argument will be structured as follows. Our analysis will open with an argument that the constitutional arrangements of their respective Member State. This paper considers to what extent EU citizens are able to rely on their citizenship rights at the local level with respect to these two roles, and what the legal sources for divergence might between local authorities in the Global South to engage in individual experimentation in coping with challenges of urban transformation: these should recognise the singulari- ties of their urban areas and seek to develop their own, possibly unique, governance arrangements.

Josephine van Zeben: Local Citizenship in the European Union

Local governments in the European Union act as democratic conduits and service providers for resi- dents – national citizens, EU citizens and third country nationals alike. The ability of local governments to fulfil both these roles depends primarily on their legal form and status, which in turn is determined by the constitutional arrangements of their respective Member State. This paper considers to what extent EU citizens are able to rely on their citizenship rights at the local level with respect to these two roles, and what the legal sources for divergence might between local authorities in the Global South to engage in individual experimentation in coping with challenges of urban transformation: these should recognise the singulari- ties of their urban areas and seek to develop their own, possibly unique, governance arrangements.

Malcolm MacLaren: Been there done that? on best practices in urban policy-making

Urban areas in the Global South have been the subject of extensive research, inter alia as settings for group conflict and as sites for related governance failures. Exploitation and conflict, peace-building, and state-building in this context as well as the conflict management strate- gies of authorities in particular areas. On the basis of these respective studies, policy initiatives have been proposed to meet challenges of urbanization and urbanism in developing countries. It is argued that government according to fundamental principles of subsidiarity and democracy is the most effective in mitigating tensions, and calls are commonly made to follow ‘best practices’ of political decentralization and popular participation amid urban transformation. My paper will question the value of this research when (re-) forming urban governance. How insightful and use- ful are such recommendations in fact? (Basic doubts arise: e.g. can different urban areas be meaningfully compared; can independent variables in the success (or failure) of different strategies of conflict manage- ment be reliably identified; can one area’s success be legally engineered in a different area?) I will conduct a case study of Habitat III’s New Urban Agenda and this concerns recommendations about urban government. My thesis is that the extent to which urban areas are able to – and should actually – ‘learn from each other’ in their policy-making is significantly less than experts presume. What seems a more promising strategy for authorities in the Global South to engage in individual experimentation in coping with challenges of urban transformation: these should recognise the singulari- ties of their urban areas and seek to develop their own, possibly unique, governance arrangements.
The traditional doctrinal approach to the study of courts is no longer dominant. The new paradigm is interdisciplinary. But as the field has ventured into the uncharted territories of interdisciplinarity, it has become more and more limited to a specific method. Interdisciplinary approaches have themselves become instead of a tool箱, it is a case of understanding the law in a more holistic way. This panel seeks to examine the frontiers of the interdisciplinary study of courts. It aims to bring into conversation three different approaches to the research of courts and adjudication – which combine legal research with insights from social sciences political theory and metaphysics – and seeks to discover possible venues for a more comprehensive understanding of courts, one that would transcend the new interdisciplinary fault lines. The purpose is two-fold: first to present three different approaches to the study of courts, and second to initiate a discussion about possible ways of engaging in a dialogue across interdisciplinarity lines.

**Participants**

Bosko Tripkovic  
Sabine Mair  
Jan Zglinski  
Moderator  
Urška Šadl  
Room  
BB 2-03

**Bosko Tripkovic: Should Judges Know Metaethics?**

The paper explains the relevance of metaethics for constitutional adjudication. First, it rejects the notion that metaethics is irrelevant for judicial decision-making. In contrast to some of the existing approaches, the paper maintains that metaethics is not reducible to normative ethics and that disagreement does not make metaethical questions immaterial. Second, the paper argues that metaethical questions are unavoidable and allow for a more complete explanation of constitutional adjudication. It contends that metaethics is empirically and analytically implicated in the way constitutional courts use value-based arguments and that incorporating metaethics into the understanding of constitutional adjudication enables us to better account for the entirety of our ethical experience in this domain. Third, the paper argues that thinking about constitutional adjudication from the perspective of metaethics is fruitful. Metaethical explanation of constitutional adjudication sheds new light on some of the pressing constitutional questions and points to new ways of resolving them.

**Sabine Mair: Can Political Theory After Judicial Review be Valuable for Courts?**

The paper explains how political theory can be valuable for courts, in specific the Court of Justice of the European Union, when adjudicating on individual rights. It is assumed that perfectionist political theory, which focuses on the collective good individual rights are grounded in, can serve as metha-judicial tool in three ways. First it is argued that the recourse to considerations of political theory can in some but very rare instances, change the outcome of a case. Second, and grounded in the assumption that courts do not only exert influence on society by the outcome of a case but by the reasoning underlying the outcome, it will be shown that political theory can provide normative guidelines for the choice of a court’s rationale. Third, it is argued that political theory can assist courts when having to decide whether a case should be resolved in favor of individual or public autonomy. In this sense, criteria will be developed which allows the Court to decide when to be the guardian of individual autonomy and when to respect the diverse cultures traditions, and values predominant in European Member States.

**Jan Zglinski: Measuring Judicial Activism: An Empirical Analysis of CJEU Jurisprudence**

It has become a commonplace to say that the Court of Justice of the European Union has constantly seized the opportunities presented to it to enlarge its jurisdictional authority and power. This is the narrative approach to the activism tale, the CJEU’s jurisprudence is ever-increasing, it is exposing the shortcomings of national courts. But when we look at the case law of the Luxembourg Court since the 1970s. Contrary to the activism tale, the CJEU’s jurisprudence is ever-shrinking, the case law of the Luxembourg Court is a comparative analysis of the national constitutional courts’ case law on social rights protection during the Eurozone crisis. The paper will focus on the CJEU’s approach to social rights violation in time of economic crisis. The paper aims at addressing such a claim through a comparative analysis of the national constitutional courts’ case law on social rights protection during the Eurozone crisis. The paper will compare the case law of Supreme Courts of bail-out states (Portugal, Romania, Latvia, Greece) with the case law of the constitutional Courts of no bail-out states (Italy), in order to assess the role played by external influences (i.e. conditional- ity, funding, balance of power and lobbying) on the Courts balancing between the needs of the public interest and fundamental constitutional rights. The paper will address the Courts’ attitude in the light of the peculiar political and institutional context of the Eurozone-crisis where the protection of social rights is often guaranteed by national constitutions – is challenged by the economic conditions negotiated by national executives and international financial institutions.

**Antonia Baraggia: Judicial “Activism” in Time of Economic Crisis: a Comparative Overview**

“Jurisprudence charges cannot be the same in times of EU sovereign debt”: starting from this assumption (Kilpatrick 2015), this paper deals with the Courts’ approach to social rights violation in time of economic crisis. The paper aims at addressing such a claim through a comparative analysis of the national constitutional courts’ case law on social rights protection during the Eurozone crisis. The paper will compare the case law of Supreme Courts of bail-out states (Portugal, Romania, Latvia, Greece) with the case law of the constitutional Courts of no bail-out states (Italy), in order to assess the role played by external influences (i.e. conditional- ity, funding, balance of power and lobbying) on the Courts balancing between the needs of the public interest and fundamental constitutional rights. The paper will address the Courts’ attitude in the light of the peculiar political and institutional context of the Eurozone-crisis where the protection of social rights is often guaranteed by national constitutions – is challenged by the economic conditions negotiated by national executives and international financial institutions.

**Anastasia Poulou: The Judicial protection of social rights in times of crisis. The Portuguese and Greek example**

The public debt crisis in Greece and Portugal resulted in severe cuts on social expenditure and successive restrictions on social rights. The Portuguese Constitutional Court and the Greek Council of State have been repeatedly confronted with the legal assessment of the austerity measures and their compatibility with social rights and principles. Even though in many cases the challenged cuts were of similar nature, the courts’ reasoning and verdict varied significantly. My paper aims, first, to present the case-law of the Portuguese and Greek courts related to austerity measures, especially understood in the years of the Eurozone crisis. Second, the paper will critically analyse the legal grounds and arguments on the basis of which restrictions on social rights were assessed. Lastly, the question will be tackled whether in times of crisis the judicial protection of social rights is endangered or not, whether there are social rights or of civil rights and general principles of law.

**Colm O’Cinneide: The Limits and Potential of European Social Constitutionalism**

Many European constitutions expressly affirm that they are ‘social states’ (Sozialstaat in the German constitutional terminology) and/or contain lists of fundamental social rights or directive principles setting out social goals to which state policy should strive to give effect. The EU constitutional framework also recognises the fundamental nature of social rights. However, the constitutional protection of social rights in Europe remains limited and uncertain in scope – as exposed by the ongoing austerity crisis, which has exposed the limits of judicial activism and the limits and the potential of European Social Constitutionalism at both the national and supranational level. This is not to dismiss the value of the limited degree of social rights protection that exists in European constitutional systems. It gives symbolic affirmation to the role of the state in securing social citizenship and sensitises legal systems to the existence of this necessary social dimension. It also opens up room for courts to interpret concepts such as dignity and equality with reference to the ideal of ‘social citizenship’, to read legislation in a socially protective manner, and to develop the type of ‘baseline standards’ jurisprudence that is exemplified by the Hartz IV judgment of the German Constitutional Court. However, beyond that European social constitutionalism lacks substance. The task is thus for judges and legislators, and legal scholars, to flesh out the bones of European social constitutionalism to roll their sleeves up and start defining what exactly constitutes the substantive content of social rights in the European context. In so doing, there is a need to be aware of both the potential and limits of the social constitutionalist project at large.

**Zane Rasnača: “Finding CJEU” – Tracing the Judicial Influence on the European Pillar of Social Rights**

What does the European Pillar of Social Rights (Pillar) have to do with courts? Apparently, almost nothing. At least according to the European Commission’s outline for this brand new project published in spring 2016, which states that “The specific aims of this project are to develop an understanding of exactly this “European Pillar of Social Rights” will be (“an expression of [...] principles”, “a framework of principles”, “a reference framework to screen [...] perfor...
The changing nature of the public administration: what role for judicial review?

Nowadays, a complex and challenging transformation is putting into question the essence of administrative law. In its main facets, it shows that the public tasks are shared between public and private actors, that the divide line between administration market and society is no longer clear, and that the general principles of administrative law are public accountability, proportionality, legitimacy expectations and the likes – are, at best, challenged. In light of this transformation, two questions become central: 1) are the current paradigms of administrative law still suitable for encompassing instances where private parties (co-)exercise public functions?; 2) how and to what extent do classic mechanisms of judicial review secure the accountability of these new types of administrative action, while preserving the effective exercise of public tasks? The proposed panel aims at tackling these topical questions. It does so by critically analyzing case studies at international European national and subnational levels. This exploration is urgently required to define the applicability of general principles of administrative law to hybrid institutions as well as the scope and standards of judicial review applicable to such innovative administrative actions.

Participants

Cedric Jenart
Sara G. M. Van Hemelryck
Steven Van Garsse and Yseult Marique
Mariliona Elantiono
Javier Barnes and Amelie Icart
Wil Sawadera-Bazaga
Carlo Colombo
Moderator
Carlo Colombo and Mariliona Elantiono
Room
BB 2-19

Michael Ioannidis: Judicial review of economic policies: the CJEU as adjudicator of EU economic governance

During the Eurozone crisis, the Court of Justice of the European Union had to review some of the complex economic arrangements that the Member States and the EU institutions devised to save the euro. Several cases landed to the Court either via preliminary reference from national courts or via direct action against EU institutions. From Pringle and Gauweiler to the recent judgement in Ledra, the Court had to review some of the basics of the new Eurozone architecture. The Court, however, is showing an increasing willingness to deal with the Stability and Growth Pact, these cases now offer a significant corpus of case-law regarding the stance of the Court towards economic decisions taken at the EU level. This paper asks whether there is an emerg- ing doctrine of judicial review of economic policies exercised by the CJEU. Has the Court devised a standard of review calibrated to the nascent European economic governance?

113 THE CHANGING NATURE OF THE PUBLIC ADMINISTRATION: WHAT ROLE FOR JUDICIAL REVIEW?

Cedric Jenart: The Legal Status of the World Anti-Doping Agency and the Implementation of Its Norms in Flemish Law

Sports have been famously described as ‘the world’s most significant insignificance’. However doping compromises the functions of sports because it threatens fair play, the spirit of the sport as well as the athlete’s health. Anti-doping legislation has been receiving increasing worldwide consensus in the wake of the Lance Armstrong affair. While the WADA was established in 1999, it relies on the premises of the Olympic movement to foster a level playing field, on the principles of anti-doping in sport, and on the mission of protecting the integrity of sport. Taking into account the recent dramatic rise of performance-enhancing drugs, these principles are challenging the legal order. The WADA is put forward as a valuable asset in improving the anti-doping system in sport, which is why it is relevant for public law.

The International Council for Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use (ICH) has established itself as the prime source of global standards in the field of pharmaceuticals regulation. The ICH is established as a Swiss association but essentially forms a hybrid public-private partnership consisting of regulators and private interest representatives in the fields of public health, and is put forward as valuable asset in improving global standards for the pharmaceutical industry. Taking into account the recent dramatic rise of pharmaceuticals, these standards are relevant for public law.
political concerns call for reimagining administrative law, so as to find new strategies to articulate public procurement requirements with public participation requirements, to the benefit of the common good.

Mariolina Eliantoni: How much “public law” is there in the European standardization? The legal nature of standards the applicability of the principles of administrative law and the possibilities of judicial review

This paper analyzes one specific case of co-regulation, namely that of European standardization. Born out of the need to ensure the completion of the internal market, European standardization is still a very common regulatory mechanism and its use has been reinforced by the 2003 Interinstitutional Agreement on Better Law-Making and the latest Better Regulation Agenda. While the involvement of private parties in EU administrative governance has the clear advantage of delivering policies which are based on the involvement of private parties themselves, private-party rule-making raises significant concerns in terms of its legitimacy. In particular, not only can the involvement of private parties in EU decision-making be questioned from the perspective of compliance with the Meroni doctrine, but also from that of the existence of an adequate set of control mechanisms to review the legality of the actions taken by private parties as administrative rule-makers. This contribution will address the question of whether these standards have the characteristics of “public law” both on the European and on the national level.

Carlo Colombo: The advent of the collaborative state: towards a new paradigm for the law in administrative procedures at subnational level

In many policy areas at urban and regional level, new ways of taking decisions are developing. Due to current developments, such as privatization of public tasks, globalization of national markets, and the increased complexity of societal problems, collaboration between public administrations and private actors is increasingly needed. This is especially true for the existence of an administrative law based on the presence of an adequate set of control mechanisms to review the legality of the actions taken by private parties as administrative rule-makers. This contribution will address the question of whether these standards have the characteristics of public law at both the European and national level.

Javier Barnes and Alicia Israel Saavedra-Baza: New Frontiers of Administrative Law

This paper is focused on those private bodies without position of formal executive power that are being and must be increasingly subjected to higher duties and prohibitions that affect members of the public to a significant degree; private bodies which in addition work closely with administration, that is, in a collaborative and networked environment. Regarding the private and public law relationship, I argue the need for institutionalization, and more specifically, for the internalization of public values and norms into private law, when “administrative” action is performed. It is about to “infuse” the private law with public law values rather than to replace the private law with rival legal norms. Part I briefly explores these emerging new domains, and Part II specifically focuses on those areas that are dominated by non-governmental actors (the “public life” of private actors), or by administrations acting under private law (the “private public law” of public authorities). Finally, Part III summarizes some preliminary features of new administrative law dealing with these new scenarios. When I refer to private bodies or to private-public actors this chapter, I mean certain specific types of non-regulatory entities, such as professional associations with self-regulatory regimes, standard-setting bodies, credit rating agencies, unions, or companies in regulated sectors that provide services of general interest.

114 THE ROLE OF “EXTERNAL” NORMATIVE SOURCES AND PERSPECTIVES IN SAFEGUARDING CONSTITUTIONAL ORDERS

The proposed panel will bring together scholars with specializations in Public Law, EU Law, Public International Law and International Human Rights Law to deliver papers which will evaluate the themes of representative democracy, constitutional equality, accountability for State-sponsored wrongdoing in extra-territorial settings, and the adjudication of extra-territorial human rights violations. For this purpose, the proposed papers will discuss how the legal systems of the EU and Canada, the UK, and the US have responded to the chal- lenges of new scenarios. When I refer to private bodies or to private-public actors this chapter, I mean certain specific types of non-regulatory entities, such as professional associations with self-regulatory regimes, standard-setting bodies, credit rating agencies, unions, or companies in regulated sectors that provide services of general interest.

Paul Gragl: Concealed Monism in the Supreme Court’s Judgment in Miller: Externalizing Representational Democracy

The constitutional law implications of the Supreme Court’s judgment in Miller in the UK case on the United Kingdom’s planned withdrawal from the European Union are conspicuous and thus already under close scrutiny by constitutional lawyers. In contrast to these questions, this paper intends to look beyond the domestic legal ramifications of the judgment and to focus on its more ‘exotic’ aspects, namely the external or international law perspective of Miller and its impact on representational democracy. In accordance with the overall theme of this conference this paper will therefore examine the Supreme Court’s possible re-considering the relationship between domestic and international/EU law, and how this (re-)consideration safeguarded Parliament as an institution of representative democracy. To begin with, the relationship of the UK’s domestic legal system with both international law and EU law in particular is of special interest. Traditionally, the UK system is seen as deeply dualist, which – at least prima facie – also appears to be confirmed by the Supreme Court in Miller. The main argument of this paper is, however, that even though the judges emphasize the UK’s dualist legal nature throughout the judgment, their language belies this very nature, as it is covertly monist. While the European Communities Act 1972 (ECA) gives effect to EU legislation through the exercise of the “princeps legis” or “sovereign legislative authority”, and to Miller, EU law is ‘an independent and overriding source of domestic law’ [para. 65]. Therewith, the Supreme Court seems to confirm its acceptance of the supremacy and direct effect of EU law. It is of course true that the UK had been “closer to the Community in its checks and balances”, but it makes one crucial point even clearer: repealing the ECA without concurrently withdrawing from the EU entails the UK’s breach of obligations under EU law for which it can be held responsible (e.g. through infringement proceedings under Article 258 TFEU). This means, alternatively put, that it is EU legal order which has the last say in the case of normative conflict, and that as long as the UK remains a member of the Union, it is part of a monist system with the EU on top in terms of normative hierarchy. On the other hand, withdrawing from the EU while retaining the ECA does not perpetuate or safeguard the currently existing rights under EU law for UK residents if there is no relevant agreement with the EU clarifying this situation. Consequently, in this respect, the concealed monism is that a loss of this source of law would also remove some existing domestic rights of UK residents stemming from EU law, which makes it impermissible for the executive to withdraw from the EU without subsequently enacting a corresponding law. It is the point where the real power of the Supreme Court comes to the fore, namely in its strengthening of representative democracy and by externalizing it: the executive’s treaty-making power certainly remains unaffected and embedded in the Act of State doctrine, but if an international treaty bestows rights to individuals through the conduit of domestic law, the treaty-unmaking powers of the executive under the Royal Prerogative are severely restricted and consequently require an interpretation of the UK’s international law obligations as regarded as subjects of international law and the fact that domestic implementation is required for giving effect to a certain treaty is only a technicality of UK constitutional law. What is more important is that representative democracy has been externalized to the international level and that only Parliament can take away rights which have been granted by international treaties. Accordingly, the same conditions will apply if the Government plans to withdraw from the limits of EU law and international law, as then the Human Rights Act of 1998 – similarly giving rights to individuals – will have to be repealed.

Thomas Poole: Act of State in Common Law Courts: The Limits to Challenges to the legality or validity of certain sovereign acts. It can serve to shield serious improprieties. It performs something of a gatekeeper role. Janus-like Act of State is sourced...
in domestic constitutional principle but looks outwards to international law private and public. Act of State cases raise questions of considerable constitutional significance. Requiring courts to draw the ambit of legality in respect of non-domestic acts, it raises with unusual regularity fundamental moral and legal questions – ‘legal black holes’, ‘anomalous zones’, and the problem of ‘geographic morality’. The answers to such questions tell us a great deal about the moral health of a political community and often glimpse into the strengths and weaknesses of international legal order. The heightened international cooperation, especially in security matters, has made this area of law both more important and more complex. This paper focuses on a trio of 2017 UK Supreme Court cases – Bellohia Rahmatallah and Al-Wahied – all of which relate to post 2001 overseas security operations. The cases raised allegations of rendition torture and arbitrary detention either against the UK either for assisting another state in so doing. To enable us to unpick remarkably intricate judgments, and to generalize from them, the paper casts a comparative eye at Act of State and sovereign immunity cases in partner jurisdictions, notably Khadr in Canada and the Australian case Habib and Moti.

Stephen David Allen: Adjudicating External Human Rights Violations: The Decisions of the EU Courts in the Western Sahara Cases

The case of Bellohia Rahmatallah and Al-Wahied concerned a challenge to a Council Decision which approved the 2010 EU/Morocco Liberalization Agreement regarding agricultural and fisheries products (which had amended aspects of the 2000 EU/Morocco Association Agreement). According to the Moroccan Agreement, the provisions were applicable in respect of ‘Moroccan territory’. The Polisario argued that the tariff privileges established as a result had been applied to products originated from the occupied territory of Western Sahara in contravention of the Liberalization Agreement. In the General Court of the EU decided that the Council had to ensure that products from this Non-Self-Governing Territory were not treated in ways that were detrimental to the fundamental rights of the Sahrawi people. It was concerned that the EU was contributing to the human rights violations being perpetrated by Morocco by ‘encouraging and profiting’ from the exploitation of Western Sahara. On appeal the CJEU saw things very differently. It appended profiting’ from the exploitation of Western Sahara. On appeal the CJEU saw things very differently. It appended

115 THE ROLE OF COURTS AND (IL)LIBERAL DEMOCRACY

Looking into various regional settings, the panel aims at expounding on the constitutional framework for a democratic rule. While it is not limited to the legal perspective only. The liberal or illiberal shape of democracy is mostly a political choice. Moreover it calls for an inquiry into the social sciences or even social psycholoty. The comparative analysis will cover national and supranational Hungarian and Polish (CEE) and Kenyan, Tanzanian and Uganda’s (East African) experiences, where the liberal democratic principles are making progress and experiencing setbacks at the same time. This is a reason why the court decisions at any level: national (supreme courts of Kenya, Tanzania, and Uganda, Hungarian and Polish constitutional courts) regional (East African CJ supranational (CJEU) and international (ECHHR) are worth examining. Taking a comparative and multidimensional approach will ensue the non-Self-Governing Territory will provide for insights not only into the constitutional reality, but also into its legal, political and social underpinnings. Scholars will address the fundamental questions (liberal/illiberal democracy, rule of law, and human rights) as well as some specific issues, notably referendum and emergeny powers.

Participants

Tímea Drinócz Tímea Drinócz
Anieszka Bień-Kacala
Tomasz Mili
Maciej Serowaniec
Fabio Ratto Trabucco
Moderator
Tímea Drinócz
Room
8B-2-43

Tímea Drinócz: Recent systemic developments in Poland and Hungary

In the paper, using the example of Poland and Hungary, the ConCurring panelists will instruct how constitutional mechanisms are ‘captured’ and ‘used’ by political decision-makers to fulfill their political agenda. These states have been turned from a constitutional democracy to something else, which is described by many scholars as authoritarian, semi-authoritarian regimes, lands in-between, democracies in crisis. Publicists and academics have already explained, but only partially from the constitutional law perspective, what factors and in what way have led to this crisis. Against this background, the ConCurring panelists conceptualize how constitutional mechanisms were abused in a different way by Poland and Hungary and yet, how they could have the same effect, i.e. shaping an illiberal constitutionalism. In our view, both the Polish and the Hungarian constitutional and constitutionalism are captured by the leadership parties. The illiberal constitutionalism is thus formed by capturing the constitution and constitutionalism in a legal way by the populist political majorities, which lacks self-restraint, with formal and informal constitutional change and packing the constitutional court. We also perceive in which the illiberal constitutionalism is theorized by a misunderstood political constitutionalism and constitutional identity. These steps are consecutive, thus not the interchangeable result of a slow development.

Co-author: Anieszka Bień-Kacala

Tomasz Milej: Liberal principles for East Africa – the judiciary’s perspective

Located individually in Kenya, Tanzania, and Uganda embrace the idea of liberal democracy, the liberal principles are by no means on a steady upwards trajectory. Just to give a few examples: The ethnic affiliation is still one of the main factors determining Kenyan politics President’s Magufuli administration, in Tanzania takes a harsh stance against the media, and it was not long time ago that the Ugandan legislator tried to dramatically increase the penal sanctions for homosexual contacts between consenting adults. However, who is to understand? The normative liberal/illiberal constitutional framework in all three states creates for the judiciary a conducive environment to stand for the liberal democracy. All three constitutions contain a comprehensive Bill of Rights. There are also different forms of formal constitutional change, including the East African Court of Justice – a regional court of the East African Community – embraced the idea of Public Interest Litigation. However, the image of the judiciary
The role of international and national judges in developing inter-systemic linkages

Judges have a central role in defining and developing the relations among legal systems. Not only do they hold the keys of their system’s gates, but they also decide when to observe the outer world from its windows. In short, they can forge the relationship between legal systems in many different ways. The panel we propose aims at studying inter-systemic interactions from the perspective of the judges involved. A first section will specifically address the ‘horizontal interactions’ between international jurisdictions (i). A second section will discuss the ‘vertical interactions’ among international courts and tribunals on the one hand and national courts on the other (ii). The two sections are closely connected and carefully interfaced: while the horizontal one will analyse different judicial methods and techniques inspired to the practice of national courts, the second will focus on the relationships between national courts and the numerous jurisdictions populating today’s fragmented international law.

Participants
Pasquale De Sena
Luca Pasquet
Edoardo Stopponi
Lorenzo Gradoni
Laurence Burgorgue Larsen
Remy Jonitsma
Andrea Delgado Casteleto

Room
8B 2–49

Pasquale De Sena: Balancing Test: An inter-systemic weight formula?

The first presentation discusses how international courts and tribunals apply the balancing test to deal with competing and potentially contradictory international legal norms. More specifically, it regards those cases in which the principles and values of the court’s own regime are weighed against those of other regimes. The balancing test is traditionally applied by national constitutional courts in order to deal with competing constitutional principles. As advocated by some observers, the same technique should be generally applied in international law to strike a balance among competing international norms having the same hierarchical status. However, in a legal space fragmented along functional lines, this would necessarily imply that judges must attribute a “weight” to external legal principles belonging to other legal regimes. While some international courts, such as the European Court of Human Rights (ECtHR), have normally resort to this technique, others, such as the International Court of Justice (ICJ), have so far avoided applying it. Analysing this technique may shed light on the way in which international courts reconstruct external values and principles in their own regime and attribute a weight to them.

Luca Pasquet: Horizontal Solange - An inter-systemic legality review?

The second presentation discusses how international courts and tribunals directly or indirectly review the legality of acts belonging to other legal regimes following a modus operandi reminiscent of the Solange method employed by constitutional courts. Examples can be found in the ‘equivalent protection’ doctrine developed by the ECtHR, and in the Kadi jurisprudence of the Court of Justice of the European Union (CJEU).

By trying to come to light the way in which international courts reconstruct external values and principles in their own regime, this paper aims at studying inter-systemic interactions from the perspective of the judges involved. A first section will specifically address the horizontal interactions between international jurisdictions (i). A second section will discuss the vertical interactions among international courts and tribunals on the one hand and national courts on the other (ii). The two sections are closely connected and carefully interfaced: while the horizontal one will analyse different judicial methods and techniques inspired to the practice of national courts, the second will focus on the relationships between national courts and the numerous jurisdictions populating today’s fragmented international law.

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I. The role of international and national judges in developing inter-systemic linkages

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This paper explores the evolution of the participatory principle in the Hungarian constitutional texts concerning the use of a referendum. What is the importance of this particular Hungarian referendum? Why it merits discussion in a comparative or broader context? After independence was it a check on the unfettered advantage of it for their ongoing purposes. Different examples of the East African judges’ awareness. On the basis of the respective case-law it tries to at least partly unveil the judiciary’s take on the liberal principles.

Maciej Serowaniec: The role of “controlled” referendums in Polish democracy

Due to the introduction of the principle of nation sovereignty in the Constitution of the Republic of Poland, it seemed that a nationwide referendum was bound to become an important instrument allowing the expression of opinions and formulation of decisions by the sovereign. In fact, as a form of participation of those governing in determining public matters, it serves the immediate expression of the political will allocated to the citizen. The nation is a source of power and may assume the role of an arbiter in conflict situations between constitutional state organs but also in disputes between the subjects of the political scene, which is reflected in the targeting of the activities of public authorities according to the will expressed via a referendum. The conclusions that can be drawn from the use of referendum in Poland are much less optimistic. From the very beginning of its implementation, it was accompanied by political horse-trading. A referendum has been and still is commonly treated by the Polish political classes as an element of political struggle between particular parliamentary and extra-parliamentary groups that take advantage of it for their ongoing purposes. Different political hubs attach different expectations to referenda. Some politicians treat them solely as a test of the popularity of their group. Referenda have become toys in the hands of politicians who use them as tools in electoral competition and an element of the power game. Co-author: Zbigniew Witkowski zbywit@umk.pl

Fábio Ratto Trabucco: The migrant quota referendum experience in Hungary

This paper explores the evolution of the participatory principle in the Hungarian constitutional texts concerning the use of a referendum. What is the importance of this particular Hungarian referendum? Why it merits discussion in a comparative or broader European perspective? These are things that may to some degree be self-evident but is important to be clear what the point of view and why it also matters outside Hungary. It was a questionable, distorted and ideological test of direct democracy (also called “Pótemkin referendum”), endorsed arguably by Constitution Court. The are also some doubts about the State funds that were used to pay for referendum adverts in government-friendly media outlets or on hoardings owned by government allies. Hungarian quota referendum appears as a democratic negotiate with other EU Countries on migrant affairs: the direct democracy may be vulnerable if the political players ask the people incomprehensible or otherwise rigged questions. Just remember that in the last years there are some examples of manipulative referenda in Europe and USA on different topics (e.g. 2014’s Crimea and 2015’s Greece; 2016’s Austin and Jacksonville).

A third intervention will discuss general principles of law as inter-systemic linkers. The discourse on general principles has evolved through history. Since the Committee of jurists reflected on principles recognized in foro domestico to avoid non liquet situations this judicial instrument acquired polymorph functions in the burgeoning activity of international courts and tribunals. Alongside with general principles of law mentioned by article 38 of the ICJ Statute, international courts have elaborated diverse general principles of international law by the system-specific or inherent to the international legal order. This paper shall focus on the use of general principles by international jurisdictions as key elements of the legal reasoning lying at the intersection of different legal orders. Studying the way the jurisdictional discourse tend to incorporate or reject them, between hegemonic and pluralist attitudes, will aim at clarifying the forms of this flourishing source of international law.

Lorenzo Gradoni: Customary international law and fragmentation from the standpoint of national judges

The presentation discusses the way in which national judges relate to international courts and tribunals when interpreting or applying international norms in their own legal systems. With the jurisdictionalization of the international legal order, national courts are now sided by supranational jurisdictions in identifying the con-
tent of an international rule. When having to address a norm of customary international law, for instance, national courts often refer, not so much to State prac-
tice, but to international judicial practice(s). Studying the way in which these vertical links are established or rescinded may shed light on how national courts internally reconstruct the fragmented international law, i.e. on how they establish external points of reference in a polycentric legal space and arbitrate between conflicting normative claims coming from different international legal regimes.

Laurence Burgorgue Larsen: How international courts frame the role of national judges

The presentation deals with the increasing attempt of international courts to frame the role of national judges under international law. This recent evolution is particularly evident in regional human rights protection systems. On the one hand, the Inter-American Court has crafted different obligations in order to frame the power of the national judge: the obligation of a ‘con-
ventionality control’, imposing to the judge not to apply a norm that is deemed contrary to the Convention in the light of the case law of the San José Court (Almo-
racid Arellano v. Chili 26 September 2006) and the obligation of proprio motu invocation of the pertinent provisions of the Convention (Rosendo Radilla Pache-
co v. Mexico 23 November 2009). On the other hand, the case law of the ECtHR, while refusing to define in abstracto the effects of the Convention in national law, has evolved towards the indication of necessary structural reforms through pilot judgments (Broniowski v. Poland 22 June 2004) or condemning the absence of ex officio use of the Convention when national law recognises its direct effect (Botten v. Norway 19 Febru-
ary 1996). This evolution of the jurisdictional systemic interactions can shed light on the evolving role of national courts in multilevel systems of adjudication.

Remy Joritsma: When national judges mount resistance against international norms

The presentation deals with the resistance op-
posed by national judges to the penetration of inter-
national norms into their own legal systems, which may result in clear acts of defiance towards international jurisdictions. Recent practice offers interesting exam-
plars, such as the decision of the Italian Constitutional Court n. 238/2014. On the one hand, the Court de-
clared the primacy of the fundamental constitutional right to jurisdictional protection over the international customary norms on State immunity. By doing so, the Constitutional Court openly defied the ICJ which, in Germany v. Italy, had defined the scope of sovereign immunity. Other clear examples include the Russian Constitutional Court debarring the execution of the decisions of the ECtHR, in case of incompatibility of the latter with the Russian constitution.

117 COURTS ADMINISTRATIVE DISCRETION AND REGULATORY AGENCIES

How much control should courts exercise over the executive branch? What is the scope and purpose of judicial control of administrative discretion? Should courts treat independent regulators differently? This panel will analyze these questions from a comparative perspective surveying different legal systems and their treatment of these matters. In addition to contrasting distinct legal arrangements, this panel also aims at comparing the distinct conceptual frameworks that may inform such arrangements, such as the role of courts and the role of administrators.

Participants
Mariana Mota Prado
Joana Mendes
Giulio Napolitano

Moderator
Mariana Mota Prado
Room 8A-3-17

118 THE QUEST FOR FREEDOM(S)

Several high-profile judges have gotten political recently. Be it Hungarian judge Baka, who criticized plans to reorganize Hungarian judiciary, Or Ruth Bader Ginsburg in the U.S., who admitted that Donald Trump would not be her choice in the presidential election, likening his prospective win to a catastrophe. There were several cases raising the million-dollar question – “Was it ok for the judge to express this opinion?” – even in our country. When are judges allowed to step into the political arena? Are there occasions where they are even required to speak up? Should they respond to the critique of their decision-making by members of the executive or legislative branches of government? Or should they turn a blind eye to their judgments? These are generally the questions I would like to norm-
atively answer in my paper. Certain principles may be abstracted from the comparative case-law. I would like to test these principles on several case-studies of real world work only with the law. The questions raised are also a matter of legal ethics. In current constitutional crises it often be up to judges to be an effective component of militant democracy (Shiellvare democratie) protecting demo-
ocratic spaces from self-destruction. But how do they know when to trigger this concept? If they speak up too early the danger is that they might overstep the ethical and legal boundaries of their role. But is it possible to draw the line?

Jack Tsen-Ta Lee: Patriotism and Belief: Judicial Approaches to Freedom of Thought Con-
science and Religion in Japan and Singapore

The courts in both Japan and Singapore have grappled with, and ultimately dismissed, assertions by claimants working in educational institutions that require them to participate in patriotic ceremonies in-
volving a national anthem, flag or pledge infringes their constitutional rights. The cases share the characteris-
tic of the courts asking the applicants’ views of what their personal systems of belief called for. Rather, the courts essentially took the position that they were entitled to determine the matters for themselves. This paper submits that the courts should not turn to the Constitution, as judges are bound by their duties. The paper purports to declare what practices should be regarded as not part of or not required by an individual’s belief system, particularly if it is a religious one. It examines
whether, and if so how, judges have balanced the relevant rights – the freedom of thought and conscience guaranteed by Article 19 of the Japanese Constitution; and the right to profess and propagate one’s religion protected by Article 15(f) of the Singapore Constitution – against other public interests said to be promoted by the government policies in question.

Elska Pirkova: Freedom of Expression and Internet Service providers: What future holds after Delfi?

This research paper discusses the issue of third party Internet liability for dissemination of ‘hate speech’ comments and opinions, while strictly focusing on non-commercialized speech that lies outside the scope of copyright law. It provides an analysis of the ECtHR pioneer judgment Delfi v. Estonia, where for essentially the first time the Strasbourg Court had to rule on the liability of Internet platforms that allow for dissemination of offensive and often threatening comments to a wide range of audience. It then continues with examining the most recent ECtHR judgment concerning the same issue, MTE v. Hungary. It draws parallels between the current and previous approach of ECtHR to hate speech. Simultaneously, it critically assesses the patters in the Court’s rulings and its possible future implications. The following part of the paper comprises the Strasbourg rulings to the approach adopted by the Court of Justice of the European Union (CJEU) to the Internet Service Providers’ liability for third party content (ISP’s). Further, it also sheds light on the newly developed human rights scrutiny test applied by the CJEU in cases such as Digital Rights Ireland or Maximilian Schrems v Data Protection Commissioner. Finally, the goal of this paper is to clarify ISP’s liability and to pin down the main obstacles imposed on the freedom of expression in digital age.

Oleg Soldatov: “Bloggers Law” and Online Freedom of Expression in Russia

In May 2014, the Russian Parliament enacted the Federal Law No. 97-FZ (the so-called “Bloggers Law”). This piece of legislation, which was passed with the justification of curbing the terrorist threat, requires compulsory registration of all bloggers with more than 3,000 visits a day with the country’s Internet watchdog, Roskomnadzor, leading to disclosure of their real identities to the State authorities. Moreover, according to this law the bloggers have to abide by the same rules as journalists, including, among other things, an obligation to verify information before publishing it. The Bloggers Law faced numerous criticisms: while the discussion as to whether there is indeed a legal right to online anonymity is still far from being concluded, the law makes anonymous blogging an impossible undertaking in Russia. In the paper the author attempts to: (a) analyse the reasoning behind the Federal Law No. 97-FZ; (b) disentangle and contextualise the most controversial provisions of the Bloggers Law point by point; (c) assess its effectiveness drawing conclusions from the events that happened in the Russian blogosphere in 2014-2016; (d) speculate whether other countries might choose to follow Russia’s example.

119  BUILDING THE PEACE

Participants Britta Sjoestedt
Jenna Sapiano
Cindy Wittke
Huub Spoormans and Irene Broekhuysie

Moderator Jenna Sapiano
Room 8A-3-45

Britta Sjoestedt: International actors in environmental peacebuilding: the local and the international in fragile states

In this paper, I explore the practice of implementing international environmental law in institutionally weak states transitioning from peace to conflict to further analyse how foreign and international actors’ practice fills an institutional and legal gap in post-conflict situations. This is of interest for two main reasons. First, it embodies the implementation of environmental treaties and international environmental norms such as ‘international cooperation’, ‘sustainable development’, ‘common but differentiated responsibility’ and ‘rights of future generations’. Second, it also transfers the governance of the environment in these post-conflict states from a domestic to an international level. In post-conflict states actors of the international community are supposed to help rebuild the society to make it robust state to be able to prevent the recrudescence of hostilities. I suggest that these actors representing often bypass the national government to directly address the local communities, investigate the interaction with the local communities and whether the suggested capacity-building to these states is in fact capacity-demolishing by maintaining a system of dependence on foreign aid? In this paper, I want to shed some light on what the environmental norms or constitutional in fragile states may do to post-conflict states under the dictates of international actors.

Jenna Sapiano: Constitutional Language and Peace Constitutions

The language used to describe constitutions (often articulated by courts), such as the ‘living tree’ metaphor, does not precisely describe peace agreement constitutions. The belief that a constitution is permanent is built into the very concept of constitutionalism, but locating stability and endurance in a document that, in its moment of founding and design, is compromised by a greater need to create peace, has the possibility to entrench the divisions of the conflict. A compromised constitution cannot be understood as an end-point if it to function in a deeply divided state emerging from high-level conflict. To understand the constitution as an activity breaks with the more accepted understanding of the constitution as an entrenched and lasting document. It is not the well-worn metaphor of the living tree, which grows yet is always rooted to its foundations, that best captures the meaning of the peace agreement constitution. A better symbol would be that of a cloud, existing in a bounded ecosystem, which finds its originating and sustaining source of existence (or authority) from the water below. In this meteorological image the constitution can only continue to exist if it can do so by which sustains it, or by those over whom the constitution exists. The constitution continues to exist so long as it is believed to have the authority to do so, upholding the legitimate political and legal order. The constitution is at once connected and part of those over whom it holds authority, but separate and distinct from that authority.

Cindy Wittke: Building and Keeping Peace in the City

21st century cities are objects, subjects, laboratories, and agents of emerging formal and informal modes of global, local, and transnational governance. Cities use the languages of inter-state relations and international law and mimic states’ practised forms of institutionalised and legalised interaction. Internally, cities are prone to ‘inside-city’ conflicts, which lead to theoretical and empirical challenges of exploring patterns, forms and distinctions of regular and irregular (violent) conflicts in 21st century cities. Consequently, the quest for peace, originally a state-centred concept, is understood to be on the new horizon of building and keeping “peace in the city”. The paper will explore the status as well as spatial dimensions of cities (and (re)conceptualise negative as well as positive approaches to peace relating to cities. These exploitations have hitherto the necessity of critical reflections on security concepts and securitisation in relation to formal and informal modes of governance that may be deployed in the city as well as on how to approach the every-day perceived safety and peace by people living in cities, by whom, and according to which norms.

Huub Spoormans and Irene Broekhuysie: The regulation of political parties in the Netherlands

Among others, like Katz and Mair, the Dutch political scientist Van Biezen has elaborated on the changing relationship between political parties and states. Based on empirical research she concluded that the relationship between the state and the parties (also in the Netherlands) has become stronger over time, at least with regard to the financial dependence, of

CONCLUDING PANELS
Ori Aronson: The Constitution in Trial Courts: An Empirical Study

The study is an extensive empirical survey of Israel's trial court decisions that have cited the Basic Laws – Israel's constitutional texts – in the past twenty years, since the introduction of judicial review to the Israeli constitutional system. While the full results of the study are still being analyzed, initial results are available, aimed at identifying unique characteristics of trial court constitutional adjudication. Notable findings are the nearly complete lack of judicial review litigation in trial courts (i.e. litigation that concerns the validity of primary legislation) despite the availability of constitutional jurisdiction with these courts; and the parallel trends of constitutional citation that appear in both Supreme Court and trial court decision-making over the two decades. The results hint at the significant force institutional hierarchies hold over trial court discretion in the constitutional field; they imply that if trial courts are to be tapped as useful sources of a pluralist and participatory form of constitutionalism, then institutional adjustments, which would relieve some of the power apex courts exert on the constitutional system, ought to be considered.

Paul Blokker: The Imaginary Constitution of Constitutions

The modern constitution is predominantly understood as an institutional and limiting power and is expected to contribute to (societal) stability certainty and order. Constitutions are hence of clear sociological interest but until recently they have received little sociological attention. The constitutional sociology developed here is phenomenologically inspired and stresses the importance of understandings of the modern constitution as ‘embedded’ in constitutional imaginaries. Rather than as a visible and rationally designed construct constitutional sociology understands constitutions as ultimately a ‘field of knowledges’. The suggestion is that this field of knowledge or ‘modern constitutional horizon’ is characterized by a tension between two ultimate markers in terms of what Castoriadis has identified as the social imaginary: signs of mastery and autonomy. Mastery and autonomy form the dominant constitutional orientations historically taken from solidified institutional meanings identified here as the modernist and the democratic imaginaries. The two institutional imaginary imaginaries will be ‘unpacked’ in specific components. In conclusion I suggest that constitutional sociology might significantly help elucidating the potential losses and heteronomous tendencies that may result from the contemporary uncertainty and possible metamorphosis that affects the modern constitution.

Eoin Carolan: Examining the social political and institutional dynamics of constitutional change

This paper examines the social, political, and institutional factors that shape processes of constitutional change. What are the conditions that determine when, how, and in what form demands for reform are made? This paper will consider these questions in light of the campaigns for marriage equality in California Ireland and Slovenia. While the campaign in each jurisdiction drew on the language of rights, the tactics and strategies of activities were clearly influenced by political and institutional considerations relating to the constitutional order. In California, a referendum reversing a judicial decision in favour of marriage equality was regarded by activists as an example of the so-called ‘backlash thesis’; the idea that judicial activism on rights issues may trigger a damaging popular backlash. This led to a divergence between strategists who wished to focus on political campaigns, and the community who wished to pursue legal action at federal level. In Ireland, by contrast, the referendum was seen as a means of circumventing a reluctant parliament and a cautious judiciary. In Slovenia, meanwhile, the focus was on legislative reform with little consideration given to the possibility of litigation. Drawing on interviews with activists and lawyers in each state, this paper examines what these differences of approach to a ‘rights’ issue suggest about the backlash thesis; and about the conditions in which judicially-mandated change may (or may not) be sustainable.

Friederike Eggert: Constitutionalized constitutional-making from a German constitutional lawyer’s perspective

The fear of unlimited constituent power is not new, but has chased governing institutions throughout history. In view of various apparently failed constitutional-making processes the call for limitations to constituent power has recently been renewed and in particular been voiced by David Landau and William Partlett. Furthermore, constitutional courts may be observed as more and more active players in constitutional-making processes. The idea of ‘constitutionalized constitutional-making’ has been brought about before by Andrew Arato and German scholars Christian Starck and Christian Winterhoff. Based on the empirical study of modern constitutional-making processes, a new type of constitutional-making can be observed. The traditional model of constitutional-making is preceded by a ‘third step’ the previous adoption of an interim constitution that lays out the constitutional-making process, or even content-related “principles” as in the South African Interim Constitution of 1994. In my paper I will try to grasp the idea of “constitutionalized constitutional-making” from a German constitutional law perspective. Drawing on the theory of constituent power as opposed to constituted powers and using the existing vocabulary of the dichotomy of constitution-making and constitutional amendment and I develop the concept of “constitutional replacement” as a tertium quid that will not only explain the additional stage in the adoption process, but also the involvement of constitutional courts.

Gert Jan Geertjes: The Objectives of Constitutional Conventions: Reflections on the Political Culture of the Common Law and Continental Constitutions

In almost every western democracy, the conduct of political state institutions such as the King, the Government and Parliament is, in addition to constitutional law, regulated by rules of a non-legal character. These rules are commonly referred to as constitutional conventions. In many common law systems conventions have traditionally been seen as instruments which are employed to ‘correct’ the potential negative effects of constitutionalism. The existence of non-elected institutions of the constitution. It could therefore be argued that conventions in the UK constitution are embedded in a political culture of majoritarianism. In current literature, this seems to be the dominant objective of conventions. It is however often overlooked that conventions of other (continental) constitutions may also be animated by other values. In the Netherlands, for instance, various conventions aim to respect the representation of political minorities in Parliament. It could therefore be said that in the Netherlands conventions operate against the background of a culture of proportionality. The gist of this paper is that the role of conventions in the constitution can only be properly understood in relation to the political culture in which they are embedded. Using existing literature on political and constitutional conventions as a model, this paper investigates the role that conventions may play in both common law and continental constitutional systems.
ConCurring panels

Participants
Pratyush Kumar
Andreas Hofmann
David Moya
Satvinder Juss
Moderator
David Abraham
Room
8B 3–09

Pratyush Kumar: The land question from colonial to post-colonial times: Reading and re-reading the Apex Court today

Land as a question of colonial and post-colonial India has affected its polity and public law ever since the ‘permanent settlement’ of 1793. The organized peasant movement starting in the 1920s gave a shot in the arm of India’s struggle for independence on the one hand and abolition of zamindari (landlordism) unsettling the colonial ‘permanent settlement’ on the other. In this backdrop, the Supreme Court of India remained essentially a colonial creation and went against the tide of time in deciding in favour of the biggest landlord in the country in Sir Kameshwar Singh v. State of Bihar leading to the abolition of right to property as a fundamental right and taking away all the land reform legislations from the purview of the court by putting them in the Ninth Schedule of the Constitution. With the turn of the century in 2013 the central government came up with a proposed land acquisition act which was then taken up with changes by the land acquisition ordinance of 2015 to develop on the idea of ‘development’ where land was to be taken away from farmers and effectively passed on to private players exercising its right of eminent domain. This puts a question mark on what is our land policy today; what is the nature of our public interest before shaping our public law and such acts of law see the light of day how will our courts, including our apex court, clinch the matter in twenty-first century.

Andreas Hofmann: Are Courts the Solution or Part of the Problem? Procedural Legitimacy in Land Use Conflicts

Is deliberative democracy meaningless if its outcome can be challenged in court? Deliberation and participatory decision-making have frequently been advocated as a means to increase the legitimacy of decisions that create distinct losers such as land use and siting issues. Discussions about the merits of deliberation and participatory decision-making as a mechanism to produce better public policy however, have seldom focused on deliberations of how this method of problem solving fits in with the ongoing expansion of the role of courts and judicial review. Courts pose a challenge since they can replace a solution reached through deliberation with a solution based on other procedural and substantive standards. The possibility for the “losing” party in a participatory setting to “exit” this decision-making procedure and choose a court case as an alternative raises the question to what purpose time and effort is spent on deliberation in the first place. In addition exit options add an extra layer of conflict by making not only the outcome but also the procedure an issue of contention. Based on the example of a conflict over nature conservation in Sweden this paper explores the respective merits of deliberative fora vs. court rooms and discusses the prospects of solving deep seated conflicts when more than one procedure is available.

David Moya: Strategic litigation. Using multilevel protection of immigrant and refugees’ rights to shape legislation and administrative practice by NGOs

The proposed paper is the result of a funded research on the role of NGOs in the judicial arena when advocating for immigrant and refugees’ rights. The paper explores the Spanish case-law in light of the EUCJ and ECHR jurisprudence, and in particular the structure of opportunities that creates different judicial possibilities. In this paper, the author will explore the respective merits of multilevel judicial strategy and the influence of NGOs as interest groups act in the political arena advocating for immigrants rights, but it is less known their litigation strategies and the limits they encounter to defend those rights. The paper explores the interaction between NGOs and the Judiciary in the role of NGOs coalition to ensure favourable judicial outcomes and some procedural limitations that diminish the impact of strategic litigation in this area.

Satvinder Juss: The Royal Prerogative in Colonial Constitutional Law

The Chagos Islanders Case will be remembered for its abandonment of the common law’s affirmation of a Subject’s right to be free from exile, when more than a decade ago the British Government in the exercise of its imperial powers decided upon the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being. Paradoxically, freedom from exile is a right guaranteed in the folklore of the UK, as demonstrated only too vividly in the celebrations of the 800th Anniversary of Magna Carta in 2015. A judgment given by Laws LJ in the Divisional Court in 2000 when the matter first arose in challenge brought by Louis Olivier Bancoult, a Chagossian advocate against the actions of the British Government, and subsequently affirmed most resoundingly by Sedley LJ in the Court of Appeal in 2007, had upheld this historic right. They had held that government objectives could not lawfully be accomplished by the use of ‘proportionate’ power. The British Government has not exercised governance over the Colonies as a Crown function. The interests of these territories are not co-terminous with interests of the UK state and its allies.

The governance of each colonial territory is in constitutional principle a discrete function of the Crown. However, in 2008 the House of Lords (as it then was) overturned these decisions, only to revisit the question again in judgment delivered in 2016, thus demonstrating the particularly protracted and vexatious nature of the issues which the Government had sought to determine through the ill-judged mechanism of the Royal Prerogative. The Bancoult saga is the longest Supreme Court case ever heard. The 2008 decision was not its last. In 2016 the Supreme Court gave a split decision, but which nonetheless still fully acknowledged that its earlier 2008 decision had moved the law forward and that, in the words of Lord Mance giving the majority decision (and who had also given judgment in 2008), the exercise of prerogative powers were “susceptible to judicial review on ordinary principles of legality, rationality and procedural propriety.” Yet, the plight of the Chagos Islanders remained unchanged in 2008 as it did in 2016 – such that further legal challenges remain relevant. The story is not yet over and this analysis is an attempt to locate the Bancoult litigation in its proper political context and to suggest that the House of Lords in 2008 could – and indeed should – have taken a different decision for reasons connected entirely to the fact that the Government was using prerogative powers in the context of colonial governance. This has serious implications both for the future use of the Prerogative and for Public Law in general.

Mario Savino: The role of courts and the speciality of migration law

Immigration law regulates public powers that, by definition, target non-citizens. This does not make those public powers special, as they still need to abide by the rule of law. What makes immigration law special is its legality. Due to the exclusive nature of political rights, who decide (insiders) are different from those who are affected (outsiders). The former decide whether and to what extent the liberties of the latter are protected and what are the corresponding (predominantly) public costs. This helps to explain why the fundamental rights of non-citizens (e.g. personal freedom) are often more severely constrained than the corresponding citizens’ rights; or why due process guarantees are notoriously weaker in immigration law. Moving from this assumption, the paper aims to deal with the following general questions: What are the implication of this “specialty” for the role of courts in immigration law? How do courts (should) deal with the liberal-communitarian dilemma, which stems from the antagonism between the competing collec- tive self-determination as a national community and “their” individual self-determination as human beings? How do domestic constitutional/supreme courts and supranational/international courts understand their respective role of non-majoritarian judiciary? The story is not over: do they manage the conflictual relations between the rule of law and the rule by law that is inherent in this politically asymmetric battlefield?
Concurring panels

122  crIMINAL LAW AND INTERNATIONAL COURTS

Participants

Narissa Ramsundar
Rosario Aitala
Tamar Hostovsky Brandes and Dana Pugach
Hendrik Lubbe
Enyebire Oguzh
Satwant Kaur
Moderator
Dana Pugach and Tamar Hostovsky Brandes
Room
BB – 3 – 19

Narissa Ramsundar: Conquering the new frontiers of international criminality: responsibility for international crimes committed by transnational armed groups through transnational judicial and quasi legal cooperation

Unlike the atrocities committed during the Second World War, which were largely committed by organs of the State, international crimes committed in the latter half of the twentieth century, for the most part, have been perpetrated by members of non-State armed groups who do not form part of the regular armed forces of a State. Moreover, as in some cases, such as with the Janjaweed and the Islamic State, these groups are transnational in their operation and remain outside the pale of international criminal justice machinery. This paper explores new ideas towards addressing the criminality of these individuals who so far have been able to escape prosecution with impunity, through transnational judicial cooperation with international peace and security mechanisms afforded under the Charter of the United Nations. This paper examines the undeniable role that non legal and quasi legal protections under international peace and security mechanisms can play in supporting international criminal justice. The paper will critically analyse the judgments and the extent to which the Office of the Prosecutor has adhered to the Charter of the United Nations. The recent prospections of the International Criminal Court (ICC) and the role of the Office of the Prosecutor.

Tamar Hostovsky Brandes and Dana Pugach: Victim's Rights in Prosecutions for International Crimes in International and Domestic Courts: Should a Universal Law Apply?

The Rome Statute accords victims the right to take part in the proceedings, the right to be heard, and the right to claim reparations from perpetrators. The ICC prosecutor enjoys wide discretion with regard to the conduct of investigations and with regard to prosecutions. While the Statute does not explicitly require the prosecutor to take into account the specific interests of victims, the “interests of the victims” are listed in the Statute as one of the factors to be considered by the Prosecutor when deciding that either launching an investigation or filing a prosecution would not serve the interest of justice. This article argues that the “interests of victims” should include the victims’ rights recognized by the ICC regime. The article then argues that when the prosecutor determines that victims’ rights in a particular case indeed warrant such case to be prosecuted, this recognition should affect the application of the principle of complementarity in that particular case, implying that, should a state wish to prosecute the same case domestically, it would be required to recognize victims’ rights parallel to those recognized by the Prosecutor. The article argues that reading victims’ rights into the principle of complementarity should lead to gradual domestic implementation of the ICC’s victims’ rights regime when crimes encompassed the Statue are prosecuted domestically.

Hendrik Lubbe: Regional and domestic responses to the ICC arrest warrants for President Al-Bashir: The ICC’s future in (South) Africa

This paper will critically analyse the judgments of the South African High Court and Appeal Court in which it was found that the government had breached its obligations under the Rome Statute and the Implementation Act by failing to arrest and detain for surrender to the ICC Sudanese President Al-Bashir. The primary issues that will be addressed relate to the existence of provisions and removal of the immunity that Al-Bashir was said to enjoy while attending the AU Summit in Johannesburg in June 2015. It will be demonstrated that the court battle was a meaningful exercise of judicial control over public power in that courts hold government to its domestic and international obligations as reinforced by the provisions of the Constitution. The executive’s announcement of South Africa’s withdrawal from the ICC, which is in line with the AU’s recent decision on a collective withdrawal strategy at the Rome Statute during its 28th Summit, will also be scrutinised. The AU’s previous decisions on Africa’s relationship with the ICC in 2013 and the adoption of the Malabo Protocol in 2014 will be highlighted for context. In anticipation of another opportunity for the court to interpret and enforce constitutional provisions re the relationship between different organs of state and the executive’s powers the executive’s legally and procedurally questionable claim that it has the prerogative to effect the withdrawal without going through parliament will be evaluated.

Enyebire Oguzh: ‘Can regionalisation solve the ICC’s legitimacy crisis?’

The paper will scrutinise the Rome Statute to try to explain some of the current crisis around the ICC’s legitimacy. The paper will explore the South African High Court’s decisions and the extent to which the Office of the Prosecutor has adhered to the Charter of the United Nations. The recent prospections of the International Criminal Court (ICC) and the role of the Office of the Prosecutor.

Concurring panels

Satwall Kaur: The Role of the International Criminal Court in Ending Impunity

This paper explores what ending impunity means within the context of the International Criminal Court and the extent to which the Office of the Prosecutor has succeeded in achieving this aim. The paper will also be scrutinised. The paper outlines that the most serious crimes of concern to the international community must not go unpunished and emphasises the determination to put an end to impunity for the perpetrators and thus contribute towards the prevention of such crimes. The paper was developed as “an organ of global jurisdictional reach and thus potentially able to respond to violations occurring anywhere.” However, the paper includes many caveats that shape the definition of this aim, including issues of jurisdiction, complementarity and admissibility and as the principal actor within the Court, it falls within the remit of the Prosecutor to determine which situations, cases and alleged perpetrators are pursued. This paper argues the OTP has undergone a period of rapid growth in order to meet the various challenges it has faced during its existence and structure and function over time as it has understood its role and purpose within the Court and within international criminal justice, however while the foundation has been laid for effective implementation of the Court’s aim, the practice of the Prosecutor has been limited. This paper contributes to debates on the International Criminal Court and the role of the Office of the Prosecutor.
ConCurring panels

123 THE LIMITS OF JUDGING?

Participants
Ranieri Lima-Resende
Mary Rogan
Soфиya Kartalova
Antoine Duval
Mu Li
Yu-Yin Tu
Moderator
Mary Rogan
Room 8B-3-33


Through the analysis of the four main precedents of the Inter-American Court of Human Rights about the legal invalidity of the Aymara Laws, it is possible to identify the permanent lack of implementation of serious international obligations by the condemned States even after significant period of time. It is mandatory to say that the decisions adopted in the cases Barrios Altos (2001), Almonacid Arelı́año (2006), Gomes Lund (2010), and Geimlan (2011) take a special position for evidencing the serious absence of full effectiveness according to the last Court’s resolutions regarding their compliance monitoring. This permanent state of non-compliance generates the necessity for searching for solutions inside the Inter-American System of Protection, including through important dialogues between international and national institutions. In this sense, the Inter-American System’s Project of Reform (1999/2002) has shown interesting proposals focused on the creation of an international mechanism of monitoring by external bodies and complaints and prompt improved protection of rights in prison.

Soфиya Kartalova: The Strategic Value of Ambiguity for the Authority of EU Law in the Dialogue between the European Court of Justice and the National Courts

The implementation of the authority of EU law through the dialogue between the ECJ and the national courts is conducted under enhanced indeterminacy due to multilingualism and constitutional pluralism. This study offers an unconventional interpretation of ambiguity in the EU legal order as a complement to legal and judicial reasoning (Plantadosi et al. 2012), coherence, and acceptability (Paunić; 2013; Leczyckiwicz 2008). The research focus falls on the preliminary ruling procedure and constitutional conflict as integral parts of a cyclical mechanism of ambiguity production, perception and resolution through judicial interpretation, which may be similar to Pickering and Garrod’s interactive alignment model of dialogue (2004). The main research question is “What is the strategic value of ambiguity for the authoring the EU law in the dialogue between the ECJ and the national courts?” There are two contrasting perspectives on this issue, depending on whether the interaction between the courts is of adversarial or co-operative nature. The researcher may use Derlen and Lindholm’s empirical study on ECJ precedent to find the case-law with the highest precedent and persuasive power (2015). Then, a semantically linked multilingual corpus may be constructed (Zhang Sun and Jara: 2018) out of the official translations of these judgments (Bengøeexx 2011) to reveal relevant instances of ambiguity.

Antoine Duval: Democratizing the Supreme Court of World Sport: The Court of Arbitration for Sport after Pechstein

The Court of Arbitration for Sport (CAS), created in 1984, reigns supreme over international sporting disputes. Formally it is an arbitral tribunal seated in Lau- sanne and subjected to Swiss private international law. Yet, if one goes beyond the formal consensual foundations of the CAS, in social practice its jurisdiction is imposed on athletes or clubs by the Sports Governing Bodies (SGBs) as a pre-condition to participate in their activities. Since the CAS is mostly active as a review instance for decisions taken by the SGBs, its function is in practice similar to a national or international court’s role in reviewing the exercise of public power by national or international authorities. This hybrid public/private nature of the CAS raises questions related to its independence from the SGBs. The recent Pechstein case, which played out in front of the German courts, highlighted these ‘constitutional’ issues connected with the idea of separation of powers. The CAS is the only external body to exercise a systematic judicial check on the SGBs. In light of the lack of democratic basis for the decisions of the SGBs, the need for a strong judicial counter-power is even more pressing. This paper proposes to investigate the capacity of the CAS to embody the counter-power to the SGBs. In particular, it will critically assess the CAS’ independence, its judicial practice in reviewing decisions of the SGBs and the publicity of its functioning.

Mu Li: Re-examine the scope of security exceptions: The evolving judicial review competence of international adjudicative bodies over security-related national trade-restrictive measures

For decades security exception provisions in international treaties or agreements have enjoyed greater flexibility (Plantadosi et al. 2012), coherence, and acceptability (Paunić; 2013; Leczyckiwicz 2008). The research focus falls on the preliminary ruling procedure and constitutional conflict as integral parts of a cyclical mechanism of ambiguity production, perception and resolution through judicial interpretation, which may be similar to Pickering and Garrod’s interactive alignment model of dialogue (2004). The main research question is “What is the strategic value of ambiguity for the authoring the EU law in the dialogue between the ECJ and the national courts?” There are two contrasting perspectives on this issue, depending on whether the interaction between the courts is of adversarial or co-operative nature. The researcher may use Derlen and Lindholm’s empirical study on ECJ precedent to find the case-law with the highest precedent and persuasive power (2015). Then, a semantically linked multilingual corpus may be constructed (Zhang Sun and Jara: 2018) out of the official translations of these judgments (Bengøeexx 2011) to reveal relevant instances of ambiguity.

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The Court of Arbitration for Sport (CAS), created in 1984, reigns supreme over international sporting disputes. Formally it is an arbitral tribunal seated in Lau-
This panel is the second of two linked proposed panels on criminal law, constitutional law and international law. (The first panel was entitled “Criminal law: constitutional principles and human rights.”) Criminal law has been one of the most contentious areas of public law in recent decades. From disputes about sexual relations, drug use and physician assisted suicide to battles over sentencing and police powers, courts have inserted themselves in a major way in a wide range of polarizing and controversial issues in the criminal law. This is true in both international and domestic criminal law. Perhaps unsurprisingly, in both domestic and international contexts, questions of legitimacy are running center stage. Rather than considering rights provisions in constitutional documents as simply the embodiment of first-order moral judgments, a number of criminal law scholars have instead begun to focus on the institutional and political dimensions involved – in both at home and in international contexts. The aim of the panels that we are proposing is to provide an opportunity for a group of scholars working on these issues to share their current work in this area.

Participants
Jakob Holtermann
Ryan Liss
Francesco Vigano
Alain Zysset

Moderator
Vincent DeBacco
Room 8B 3-39

Jakob Holtermann: Mapping the Modes of ICT-Scepticism: A Taxonomy of the Epistemic Critiques of International Criminal Tribunals

In this paper I examine the widespread epistemic critique of international criminal tribunals (ICTs) as a legitimacy challenge. This with a view to framing the epistemic critique in the broader context of a general comprehensive taxonomy of legitimacy challenges that can plausibly be raised against ICTs. As a first step in this analysis I distinguish between two distinct but often confused legitimacy questions: First – the axiological question – having to do with whether truth-finding capacity is in fact a reasonable desideratum for an ICT. Is it at all reasonable to expect that ICTs can deliver truth about past atrocious events or should we simply stick to the traditional desiderata discussed in legitimacy debates about deterrence, reconciliation, retribution, peace, etc.? Secondly, there is the epistemological question proper. How good are ICTs in fact at finding the truth producing reliable knowledge about past events such as genocide, crimes against humanity and war crimes? The first question constitutes a precondition for the meaningful investigation of the second since it is irrelevant to study how virtuous ICTs are as epistemic agents if everyone agrees that truth-finding is not a desideratum for ICTs (no one expects ICTs to find a cure for cancer; it is not a reasonable desideratum, and it is for that reason alone irrelevant to examine further whether they are good at it). In this paper by way of introduction I therefore recap what has been shown in greater detail elsewhere about the degree to which ICTs have failed to meet the necessary conditions that in spite of widespread claims to the contrary, it is reasonable to expect that ICTs produce roughly accurate historical truths about atrocities. Truth in law is not merely a technical legal notion defined in strictly procedural terms. I therefore undertake a thorough examination and mapping of the various arguments that have gained currency in the attempts to challenge the epistemic competence of ICTs. I approach these different arguments through a loose analogy with Ancient Pyrrhonian Skepticism as a panoply of skeptical modes, i.e. of argumentative techniques, forms of argument by which skeptics put appearances and thoughts into opposition in order to suspend judgment; to avoid affirming anything. Through a philosophical analysis I examine this panoply of “skeptical modes” focusing on the underlying concepts of truth, knowledge, proof, history, doubt, even of reasonable doubt applied in the epistemic critique. Is it one critique or are there many? If many, are they consistent or do they contradict one another? The aim of this examination is to get a better understanding of and hence, ultimately, a better ability to critically assess the kind of legitimacy challenge that is constituted by the epistemic critique.

Ryan Liss: Crime at the Limits of Sovereignty

The jurisdictional framework governing the prosecution of international crimes is unique. While the prosecution of domestic crimes is ordinarily limited to the co-territory of a state with a connection to the offence or offender, such connections are not required in the context of international criminal prosecutions. Those accused of international crimes are often tried before the courts of foreign states unconnected to the offence and before international tribunals. This raises the question of whether such a framework is legitimate. I identify three leading justifications in the current literature for this unique jurisdiction to punish international crimes: (1) the “humanity” theory; (2) the “gravity” theory; and (3) the “state failure” theory. I argue, however, that these three theories fall short, leaving a persisting legitimacy problem for international criminal law. In response, I offer an alternative answer to the question of what makes international crimes unique.

Francesco Vigano: The Ambivalent Role of Human Rights in Criminal Law Discourse

Human rights recognized by international law, as well as or constitutional rights within the domestic legal order, have been traditionally considered by criminal law scholars as limits to the State’s punitive power, aiming at the protection of suspects, defendants or convicts in respect of law enforcement measures, investigations, trials and sentences. In the last decades, however, human rights have increasingly been invoked in the international criminal law discourse as well as in the jurisprudence of both the ECtHR and the ICHR – as reasons to expand the use of criminal law for the sake of the victims of the crime. The core argument is that the effective protection of the victim’s human rights be criminalized in abstracto, but the punitive powers shall also be exercised in concreto – the investigation, the arrest of the suspect and his trial, as well as the conviction and sentence of the person eventually held liable for the crime becoming thereby the very object of a “positive” obligation to protect the victim’s human rights. This paper aims to critically discuss these developments, which are often accused of perverting the historic logic of human rights, originally thought as tools to protect the individual against the abuse of power by the State.

Alain Zysset: Right Crime and Courts: First Steps toward a Unitary Account of International Law

It is widely acknowledged that human rights law (HRL) and international criminal law (ICL) share core conceptual and normative features. Yet, the literature has not yet reconstructed this underlying basis in a systematic way. In this contribution, I lay down the basis of such an account. Starting with theory, I first deal with the “state failure” thesis and a “political” approach to articulate the foundations of HRL and ICL and explain where those approaches exactly clash. With a view to bring the debate forward, I then turn to the practices of HRL and ICL and examine which of those approaches best illuminates some salient aspects of the practice of international courts. I then argue that the political approach best unifies HRL and ICL. While preserving a distinct role both either consolidate the basic conditions for the primary subject of international law, namely the state, to legitimately govern its own subjects constructed as free and equal moral agents.
The past decade has seen a dramatic shift in the enforcement of tax and securities laws, from an almost exclusive reliance on designated agents for the detection of violations of these laws to a great reliance on whistleblowers, driven by the desire to obtain a reward. This shift has led to the payment of hundreds of millions of dollars in whistleblower rewards by the IRS and the SEC in recent years. Although legal scholars have devoted much attention to this shift in law enforcement, this literature has failed to explore one central question relating to the use of whistleblower rewards: How much should the IRS and the SEC pay whistleblowers? This Article fills this gap in the literature by developing a model to capture the deterrence effect of whistleblower rewards. Using this model, this Article highlights three major determinants of the minimal deterring whistleblower reward: the gain to the violator from violating the law, the personal cost to the whistleblower of violating the law, and the likelihood that the whistleblower will report. Three counter-intuitive findings emerge from this analysis: first, reports of less severe violations of the law may deserve a greater whistleblower reward; second, different whistleblowers may receive different rewards for providing the same type of information; and third, a greater likelihood of a successful false report may require a greater whistleblower reward. Recently adopted regulations ignore the three above-mentioned factors and should be amended.

**Jose Gustavo Prieto Munoz:** *When Constitutional Courts Meet Investment Arbitrators: Construction of Legitimacy in the International Legal Arena*

Investment arbitrators no longer solve disputes, but instead exercise a unique type of public authority in the global legal space. It is true that disputes arising from foreign investments are not new in international law; however, a new type of public authority has emerged into force of CETA may be years away in light of the legal challenges that have already been or may be filed in the near future and this presentation seeks to address the concerns that have been expressed against the Investment Court System foreshadowed in the Agreement.

**Andres Delgado Casteleiro:** *The Investment Court System in the Comprehensive Economic and Trade Agreement (CETA) on Trial: German, Canadian, and European Judicial Hurdles*

Last October, Canada and the European Union (EU) signed the Comprehensive Economic and Trade Agreement (CETA). However, the agreement has generated legal challenges in Canada Germany, and may end up in the Court of Justice of the European Union (CJEU). The Federal German Constitutional Court has expressed in an injunction proceeding, serious doubts as to “whether the EU can lawfully transfer “sovereign rights in relation to the Court System as a public law adjudicator: An Essay on the Functioning of the European Union by Belgium, if it requests that the CJUE render an Opinion as to the compatibility with investment arbitrators, by developing four different categories of remedies at international level wherein its remedial powers are unlimited in scope both in terms of which remedies are available and their enforcement at domestic level.

**Yehonatan Givati:** *Of Snitched and Riches: IRS and SEC Whistleblower Rewards*

The Investment Court System (ICS) envisaged under EU law has direct effect or be used to assess the validity of legislation requirements in IIAs; later this requirement was introduced in detail the different cases and scenarios in specific constitutional courts. The roadmap of the argument is the following. The first section will provide a conceptual insight into the methodological use of the concept of authority outside of the nation-state and international investment law. The second part will study in detail the different cases and scenarios in the relation of constitutional courts with investment arbitrators, by developing four different categories of interaction: cooperation, coordination, toleration, and resistance. Finally, the third section will develop a specific strategy of legitimation for investment arbitration for further cases.

**Maksim Usynin:** *Investor-state arbitration and the evolutionary development of the treatment of investor misconduct*

Critics of investment law allege that its nature and structure are fundamentally biased towards investors and do not provide states and tribunals with effective means to address investors’ misconduct. However, arbitral practice shows a line of evolutionary development, moving towards more balanced and proportionate application of the clean hands doctrine, in cases where both parties were observed behaving badly. Different approaches have emerged for the treatment of misconduct. Initially, tribunals concentrated on the legality requirements in IIAs; later this requirement was adopted as implied, in the absence of any treaty guidance. In certain cases introduced the limitations on damages due to investors’ contributory fault and allowed operational tribunals allowed states exercising bona fide regulatory powers in relation to their encroachment on the State powers in relation to their encroachment on the State (and the EU’s) regulatory powers, but also safeguard the autonomy of the EU legal order. The paper shows that ICS decisions will not be among the rules that can have direct effect or be used to assess the validity of EU law. The ICS creates a complete body of rules and remedies at international level yet therein its remedial powers are unlimited in scope both in terms of which remedies are available and their enforcement at domestic level.

**Moderator Mario Barata**

**Participants**

Mario Barata  
Andres Delgado Casteleiro  
Yehonatan Givati  
Jose Gustavo Prieto Munoz  
Maksim Usynin  

**Room**

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**Moderator**

Mario Barata
states in order to comply with the anti-terrorism reso-
lations, with the focus on enhancing national security, have implications (primarily) on separation of power and protection of human rights.

Jubran Manal Totry: Spatial Rights Discourse
Throughout the last two decades, there has been a significant proliferation of Non-Governmental Organiza-
tions (hereafter: NGOs) whose central focus is to ad-
ress spatial inequality and promote a “Spatial Rights Discourse”. This discourse is derived from general human rights norms and seeks to insert values such as equality, democracy, community participation, and social and distributive justice into the fiscal planning procedure as well as other legal arenas. I concen-
trate on the rhetoric and biases in their approach to minority claims and to the case law of Portuguese higher courts as its case

Octaviano Padovese: Paul de Man and Constitu-
tionality and Pluralism
In a groundbreaking article, The Rise of World Consti-
itutionalism, Bruce Ackerman spares no effort to describe a new global constitutional’s era.

This paper discusses the growing privatization of public law enforcement in the context of social welfare fraud prevention in the United States, Australia, United Kingdom, and the Netherlands. These practices are problematic in both civil and common law jurisdic-
tions for a number of reasons. First, the contractual and administrative relationship between public bodies and these “social welfare spies” are ill-defined. This has raised concerns regarding their accountability and the degree of supervision by public bodies. Second, these privatization practices have further eroded traditional public tasks and the pursuit
of the public interest. Third, the outsourcing of anti-
fraud enforcement tasks has been detrimental for due process in the pursuit of justice, as it increases the risk of procedural errors and illegal evidence gathering. We argue in this paper that social welfare spies are susceptible of endangering the transparency and openness of administrative procedures, the right to a due process, and the privatization of the public good. This paper draws on recent Dutch case-law and dis-
susses the role of courts in the outsourcing of public law enforcement. Dutch courts have recently shed light on the legal nature of public tasks, the admissibil-
ity of anonymous reports, and the contractual relation-
ship between public bodies and private actors (e.g., “no cure, no pay” contracts).

Marco Bocchi and Tommaso Soave: Judicial Balancing as a Situated Exercise. The Case of “Necessity” in WTO and ECCHR Jurisprudence
Through the proposed paper, we aim to problematize the argument whereby the balancing of competing principles by international courts and tribunals is a sign of the progressive constitutionalization of the international legal order. Instead of engaging in a purely theoretical discussion, we seek to illustrate our point by analyzing the necessity test as performed by the European Court of Human Rights (ECtHR) and the Appellate Body of the World Trade Organization (WTO AB). In particular, the ECtHR routinely adjudicates on special laws, which are often founded on the rhetoric of fraud prevention in the United States, Australia, United

Patricia Jeronimo: Courts, Cultural Diversity and Legal Pluralism in Europe
In the post-1992 context, European courts are increas-
ingly asked to arbitrate legal and cultural conflicts between the law of the state and the norms and practices of mi-
nority groups in a growing context of legal pluralism. It is believed that the judiciary is often better suited than the legislator to find reasonable accommoda-
tions between the needs of minority groups and other competing interests, on a case-by-case basis. On the other hand, it is acknowledged that there is a need to raise the judges’ awareness of potential cultural biases in their approach to minority claims and to improve their sensitivity to diversity through training. This presentation will address some of the many chal-
lenges faced by domestic court judges when dealing with cultural diversity and legal pluralism. It will take the case of those higher courts as its case study and compare it with trends from other domestic jurisdictions in Europe.
Legal pluralism is hardly a new phenomenon. Before the paradigm case of law emerged in the state in the early modern period, the world, we are conventionally told, was awash with legal pluralism. Even the centralisation of law and politics in the state failed to stamp out legal pluralism and two ‘waves’ of legal pluralism prevail in the era of the state; one spear-headed by legal anthropologists and sociologists, looking primarily at non-European, often post-colonial states and conceptualised a pluralist universe of official and unofficial legal orders and the other dominated by legal theorists, systems theorists, private and public international lawyers and comparative lawyers and usually focuses on official legal systems. This paper will focus on one issue in this explosion of interest in legal pluralism: the ability of conventional legal theoretical accounts of law to account for legal pluralism. Legal pluralists generally assume that the classic accounts of law and legal systems such as those of Kelsen Hart and their acolytes fail to account for normative orders which do not conform to their models. As such, they argue, standard theoretical accounts of law are not fit for purpose in a legally pluralist world. The paper will challenge this assumption. Arguing that the issue is necessarily one of degree, it will show that conventional legal theory has more resources for legal pluralism than its critics allow.

Michael Pal: The Comparative Constitutional Politics of Voter Suppression

I argue that voter suppression should be understood as a comparative phenomenon and trace the constitutional politics of the practice. Voter suppression involves deliberate attempts to craft electoral laws and practices to dissuade or prevent citizens from casting ballots in elections. Voter suppression stands as a staple of political and legal contestation in the United States centering particularly in recent years around restrictive voter identification rules and the Voting Rights Act. Election law scholar Richard Hasen has labeled these disputes over the ground rules of electoral politics the “Voting Wars”. Despite attempts at voter suppression by governments in other democracies, the practice has received little scholarly attention outside of the United States. Examples of the “Voting Wars” can be found in Canada, Australia, the United Kingdom, South Africa, and India, among others. I argue that voter suppression must be understood as a problem plaguing democracies generally and consider the implications for democratic practice constitutional design, and judicial review of election laws. Constitutional design must anticipate voter suppression and take steps to ensure fair election administration is protected by the constitution. Courts have struggled to respond to voter suppression, and judicial review of democracy must also be recast to account for partisan-minded interference with electoral integrity.

Fritz Edward Siregar: Elections Supervisory Board vs Election Court: Finding the Right Adjudication System

The duty of care and enhance the quality of an election shall not be bound by one parties. Political parties, government, civic society and public shall be participate in the process of ensuring direct judicial enforcement as make sure quality of democracy that we intend to achieve. In order to create a better election, many actors has been established in Indonesia. Election Commission had been created to organise the election. Election Supervisory Board will supervise the election process. According to the election criminal law in which Election Ethics Council will adjudicate ethical violation of election organiser. Indonesia Constitutional Court has the authority to settle election result dispute and Administration court will adjudicate administration law dispute among the political parties and election organiser. This paper is argue that there is great possibility to simplify the system. Regardless the context and the size of Indonesia as archipelago country, but it will merit to centralise election criminal violation and the idea to create an Election Court is a possibility.

Maureen Duffy: Courts as the “Bedrock of Our Democracy”

Courts traditionally check unstrained government power, operating independently from political branches of government. An alarming shift is occurring in some places, suggesting an unexpected vulnerability of national courts to attack by extremist governments. In Poland, a crisis has left the Constitutional Tribunal seriously wounded in its constitutional functioning. Poland’s elected Government has systematically obstructed the Tribunal in its mandate to review laws for constitutional compliance, changing the membership of the Tribunal, charging the fundamental way that cases are decided, and enacting laws otherwise undermining the Tribunal’s ability to issue constitutional rulings. These measures have made it impossible for the Tribunal to maintain its independence, obligations and allow the Government to violate the Constitution with impunity. In the U.S., Trump began his presidency with multiple orders affecting human rights. One such order was the “Muslim Ban” under which Trump’s lawyers attempt to keep Muslim countries from entering the U.S., including those legally allowed to enter. Court orders were issued within hours of his order, which set people free from detention and otherwise helped them to enter the U.S. This is just one example of the important role that courts play to protect the rule of law from unconstitutional political whims. This paper argues that the attack on the Tribunal in Poland represents a threat that echoes beyond Poland’s borders.

Michael Mohallem: Constitutional design or apex courts? The gatekeepers of international human rights law in South American states

International lawyers commonly claim that the most effective way of implementing international law is by internalising treaties and allowing domestic courts to enforce them. In line with this view, recent constitutional developments in South America produced remarkable permeability to international human rights law and judicial independence also giving preeminence to international over domestic law. The practices of courts, however, reveal differing methods of dealing with domestic judicial claims of international human rights law (IHR) violations. Some cases use concrete cases ultimately give distinct meanings to equivalent constitutional norms in different countries. Thus, the purpose of this paper is to analyse how ten South American apex courts consider IHR claims in the light of each respective constitution. I argue that constitutional design influences on the frequency of human rights claims in judicial cases but is not the single determinant as to the extent to which courts apply IHR domestically. This research shows judicial claims to IHR may be divided in (a) decisions applying IHR, (b) decisions considering IHR claims and finding no violation, and (c) decisions dismissing or rejecting the application of IHR. I propose to classify states as showing “moderate resistance to IHR”, “full resistance to IHR”, and “advanced integration of IHR into domestic law”.

Deyana Marcheva and Ekaterina Mihaylova: The Lack of Public Law Concept of Authority in Bulgaria (Why Does Bulgarian Judicial System Reform Continues To Fail)
partners violated the general principle of equality before the law (Art. 3 sec. 1 GG). Some have argued, that in the field of “Lebenspartnerschaft” the Court has already replaced the legislator: This socio-legal research project aims to analyse the German Federal Constitutional Court’s decisions on Lebenspartnerschaft to explore the interdependence between law, jurisprudence and social transformation. What is the role of the Court within the transformation of social realities? Does it accelerate social change or does it only legitimize already existing social postulates, or both? In what way is the Court configured in the legal discourse and how does it (re)act in each specific actor field? What is the influence of transnational interactions between courts of different levels? To answer these research questions qualitative social research methods, such as discourse analysis, will be used.

Helga Hafldadottir: Climate Change and Judicial Enforcement

With 2016 having been the hottest year on record the actuality of Climate Change intensifies the need for global action. Simultaneously, the issue of Climate Change highlights the potentials and limitation of international law. This paper is concerned with the power of international law to mitigate climate change. It examines the impact that international judicial enforcement can have on state compliance with environmental obligations. In doing so, the study focuses on the ICJ and its role on standing. In particular, it analyses the potential for individual states to bring a violation of environmental obligations before the court. The paper will demonstrate that in line with developments in international law environmental obligations can be classified as erga omnes obligations, which provides all States with the right to instigate proceedings before the ICJ. Furthermore based on State compliance with the ICJ judgements the paper suggests that the Court has considerable power to induce compliance with international obligations. However, the court’s decisions (this being especially true of provisional measures and other interim orders) have not necessarily induced compliance with international obligations in the past. The paper argues that characterizing environmental obligations as erga omnes obligations, however, enhances the likelihood of compliance with judicial enforcement.


In international and European law, water has been framed in a multiplicity of ways: economic good, common good, environmental resource and human right. However, the most common approach towards this essential resource providing life itself is a contested one. The majority of supranational and domestic legal sources consider water as both an economic good and an environmental resource, as well as to some extent a right to be guaranteed to everyone in conditions of equality and non-discrimination. While a human right to water appears to be progressively emerging as a norm of customary international law, environmental and economic consideration are also being seen as an essential part of the preservation of water supplies. In the context of the European Union, one of the main pieces of secondary legislation on this matter – the so-called Water Framework Directive (WFD) – adopts an equally mixed notion of water. The WFD states in its preamble that “water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such”. To fulfil the environmental objective of protecting and restoring all bodies of surface water and groundwater, Art. 9 of the WFD requires Member States to take into account the principle of recovery of costs of water services in accordance with the polluter pays principle. National water-pricing policies should then ensure a complete recovery of the costs associated with the extraction and provision of water.

Rowie Stolik: Global Climate litigation as 21st century public law litigation

In 2015 a group of Dutch citizens, united in the platform Urgenda, became the first in the world to win a lawsuit, arguing that the climate policy of the Dutch government failed to protect its citizens. The case of Urgenda paved the way for similar legal strategies throughout the world. This form of public law litigation, as Abram Chayes called it in a seminal article in the 1970’s, poses considerable challenges to several legal systems that traditionally feature a clear constitutional preference for individual dispute settlement, typified by the absence of a constitutional court, limited judicial review and a general hostility to public interest litigation. Climate litigation tends to be at odds with this paradigm because its focus is not on the individual application of norms, but rather on the enforcement of constitutional or transnational environmental values. In this paper, I discuss the inherent tension between individual and collective justice. I also question the legitimacy of climate litigation by interest groups or individuals and its implications for the role of the courts seen from the perspective of both the separation of powers and effective legal protection.

Patricia Galvo Ferreira: Judicial Review of Executive Climate Action: Can International Environmental Law Play a Role?

“A wait-and-see policy may mean waiting until it is too late.” (Climate Research Board Carbon Dioxide and Climate: A Scientific Assessment 1979). This paper analyzes the role of international environmental law in overcoming some of the obstacles for American courts. While judicial review of executive and legislative decision to promote or to refrain from promoting climate policies. Part I describes the shortcomings of the voluntary nature of state commitments under the 2015 Paris Climate Agreement, which resulted from the absence of clear definition of the scope of executive and legislative content of the right to healthy environment. This means that individuals do not know, when to complain about the violation of this right, and when they do the courts have difficulties to assess, whether the violation has really occurred. Therefore, the possibility of legal protection is based on procedural environmental rights or right to environmental information, but not on the substantive part. The goal of this paper is to present the structure and for Congress has evidenced the shortcomings of the Paris Agreement model when there is no political will at the executive and legislative levels. Part III considers the role American courts may play in promoting legislative and executive action in this context. It will be argued that the American courts may be the only way to protect the environment. Parallel to this, Part IV addresses the role of the courts seen from the perspective of both the separation of powers and effective legal protection.
to ultimately protect the core of national constitutions, such as fundamental rights, national competences, which not transferable to the EU, or national constitutional identity. This competence to review EU I

Agnieszka Frąckowiak-Adamska: National Courts as Guardians of the Charter in the EU Area of Freedom Security and Justice? The Obligation to Assess whether other Member States Protect Fundamental Rights

Recent case law of the Court of Justice of the EU – N.S. opinion 2/13 on the accession of the EU to the ECHR and Căldăraru - shows that the principle of mutual trust, even if of utmost importance for creating the APSJ, is not an absolute one. Courts of Member States are empowered and at the same time obliged to not transfer a person if there is an evidence that the other Member State does not ensure an adequate protection of fundamental rights, especially those protected by the Charter of Fundamental Rights of the EU. The paper will try to answer the question whether the courts are ready to bear this burden – do they have the means of assessment and of collecting the evidence, on whom the burden of proof should be placed. It will also analyze this new obligation as a shift of the power from the executive authorities (before in the extradition procedure done by the Ministries) to the judiciary.

Monika Polzin: The Legitimacy of International Judicial Review in a State of Emergency

The European mandate given to them by the Court of Justice improving the quality of legislation. The paper answers through the example to this question, the Courts’ judicial review is effect and improving the quality.

ConCurring panels

Participants

Hannele Isola-Miettinen
Leopoldo Gama
Darinka Piqani
Agneszka Frąckowiak-Adamska
Monika Polzin

Moderator

Room

8B - 4 - 03

CONCURRING PANELS

130 CONSTITUTIONAL REVIEW I

Hannele Isola-Miettinen: Judicial Review of Legislation

The paper concerns the judicial review of legislation in European Union, the methodology to study legislation and the Courts’ reasoning where the factual aspects play a role. The paper asks, is the Court of Justice improving the quality of legislation. The paper answers through the example to this question, the Courts’ judicial review is effect and improving the quality.

Leopoldo Gama: Judicial activism and the Rule of Law

The paper concerns the judicial review of legislation in European Union, the methodology to study legislation and the Courts’ reasoning where the factual aspects play a role. The paper asks, is the Court of Justice improving the quality of legislation. The paper answers through the example to this question, the Courts’ judicial review is effect and improving the quality.


National courts play an important role in the process of European integration and more specifically in the application of European Union law in the EU Member States. Ordinary courts have fully embraced the European mandate given to them by the Court of Justice of the EU (CJEU) (Claes 2006) on the basis of which they are empowered and obliged to set aside national law that is in conflict with EU law. At the same time, national constitutional court as protectors of national constitutional frameworks have been challenged by the various doctrines of the CJEU, primacy of EU law being the major contributor to such challenges. According to CJEU’s vision on primacy of EU law, EU law takes precedence over any provision of national law including national constitutions (Case 17/70 International Handels- und Börsehandelsverwaltungsgericht Hannover v. Dr. Lobb) constitutional courts have claimed competence to set aside EU law on constitutional grounds in reaction (Kumm 2005). The reason is their view on the locus of primacy of EU law: for some constitutional courts the basis for primacy of EU law is the national constitutional itself and, as a result, primacy is or can be limited by the national constitutional itself (Claes 2016). Many constitutional courts have eventually claimed a competence to review EU law in order
This paper aims to analyze the constitutional position of Alina Cherviatsova: (Un)Constitutional Justice: Case-Study from Ukraine

Political Power: Case Study of The Republic Of Macedonia in the past two years emphasized political power. Some compositions of the Constitutional Court in the Republic of Macedonia led to the efforts for “politicization of the Court”. This article will analyze the relations between the political power and the Constitutional Courts with special emphasis on the situation in Macedonia. The article will argue that the political system sustainable in a democratic representative system. The Constitution review on the impeachment can tame the uncontrollable revolutionary energy of the people into a constitutional framework by providing a last and independent resort. In addition, this argument will allow the people to have the benefit of a reasoned deliberation exactly in accordance with the constitutional value by filtering demagogical politics. The constitutional proceedings in the court inspired reasoned constitutional debates in the public sphere outside of the courtroom. This constitutional deliberation made the consequence of the impeachment acceptable to both polarised groups. Thus, the Constitutional court in the impeachment cases plays a cardinal role in restoring the underlined legitimacy of the representative democracy.

Younisk Kim: The Role of the Constitutional Court on the Frontline between Law and Politics: Lessons from Two Impeachment Cases in Korea

This paper will articulate how the constitutional courts in Korean impeachment cases handled a crisis that occurred on the frontline between the law and politics. In contrast to many countries the Korean Constitution requires the constitutional court to conduct a constitutional review of the constitutionality of the impeachment bill passed by the legislature. The Constitutional Court of Korea played a pivotal role in managing the political crisis caused by two presidential impeachment cases. In both cases, this additional constitutional judicial review was and will avail in the future in the Republic of Korea and in Macedonia in the past two years emphasized politicized behavior of the Constitutional Court. The paper will analyze the cases in which the Constitutional Court refused to restrict political power through analysis of the argumentation in the Court’s decisions, as well as the political circumstances in the time in which these decisions were issued. Also, the paper will analyze the factors that determine the success or failure of the Macedonian Constitutional court in performing its duties.

Aлина Червятсоўская: (Un)Constitutional Justice: Case-Study from Ukraine

Constitutional review can strengthen and protect democracies but, at the same time, it presents some democratic risks. These risks are not connected with a danger of ‘wrong decisions’ (any political institute may be wrong); but rather, with the lack of independence and democratic control. This is the case when constitutional courts are so closely linked to the executive branch that they are unwilling or unable invalidate unconstitutional acts. Ukraine, which does not have a stable democratic tradition, seems to be an example of state with an ineffective constitution and constitutional review threatening democracy. In this context, the paper will analyze the roots and effects of the lack of independence of the Constitutional Court of Ukraine during its short history (from 1996), in order to advance this study the paper will consider two cases: the first one will give a comprehensive analysis of some contentious decisions of the Constitutional Court of Ukraine, which were based on changeable political interests instead of constitutional principles; the second one will consider relations between the Constitutional Court and executive power focusing on the situations where executive power directly interfered in the sphere of constitutional justice; the last part will address the question of public power in Ukraine by answering the question of how and under what conditions the Constitutional Court of Ukraine could enjoy legitimacy and independence?

132 FAMILY AND DISABILITY RIGHTS

Participants
Sanjay Jain
Sara Benvenuti
Sanjay Jain
Delia Ferri
Janine Silga

Sara Benvenuti: Solidarity and disability at the times of crisis. What Courts Do. The case of the Italian Constitutional Court

The 2008 economic crisis forced several EU Governments to implement retrenchment policies which seriously impacted their welfare systems. The more fragile segments of societies, as it is the case of people with disability, were the most severely hit. These crisis-driven legislation and policies generated high levels of political instability. A large number of austerity measures have been challenged in the courts invoking the respect of fundamental rights, equality and solidarity, especially in jurisdictions where solidarity is explicitly mentioned in the constitution. The paper inquires into the role of the courts in mitigating or upholding crisis-driven legislation invoking the principle of solidarity with the purpose of unveiling on the one hand the values underpinning the courts’ decisions and, on the other, their profound meaning and concretizations of solidarity. This paper will analyze the cases in which the Constitutional Court of Ukraine could enjoy legitimacy and independence?

Younsik Kim: The Role of the Constitutional Court on the Frontline between Law and Politics: Lessons from Two Impeachment Cases in Korea

This paper will articulate how the constitutional courts in Korean impeachment cases handled a crisis that occurred on the frontline between the law and politics. In contrast to many countries the Korean Constitution requires the constitutional court to conduct a constitutional review of the constitutionality of the impeachment bill passed by the legislature. The Constitutional Court of Korea played a pivotal role in managing the political crisis caused by two presidential impeachment cases. In both cases, this additional constitutional judicial review was and will avail in the future in the Republic of Korea and in Macedonia in the past two years emphasized politicized behavior of the Constitutional Court. The paper will analyze the cases in which the Constitutional Court refused to restrict political power through analysis of the argumentation in the Court’s decisions, as well as the political circumstances in the time in which these decisions were issued. Also, the paper will analyze the factors that determine the success or failure of the Macedonian Constitutional court in performing its duties.

Aлина Червятсоўская: (Un)Constitutional Justice: Case-Study from Ukraine

Constitutional review can strengthen and protect democracies but, at the same time, it presents some democratic risks. These risks are not connected with a danger of ‘wrong decisions’ (any political institute may be wrong); but rather, with the lack of independence and democratic control. This is the case when constitutional courts are so closely linked to the executive branch that they are unwilling or unable invalidate unconstitutional acts. Ukraine, which does not have a stable democratic tradition, seems to be an example of state with an ineffective constitution and constitutional review threatening democracy. In this context, the paper will analyze the roots and effects of the lack of independence of the Constitutional Court of Ukraine during its short history (from 1996), in order to advance this study the paper will consider two cases: the first one will give a comprehensive analysis of some contentious decisions of the Constitutional Court of Ukraine, which were based on changeable political interests instead of constitutional principles; the second one will consider relations between the Constitutional Court and executive power focusing on the situations where executive power directly interfered in the sphere of constitutional justice; the last part will address the question of public power in Ukraine by answering the question of how and under what conditions the Constitutional Court of Ukraine could enjoy legitimacy and independence?

Sanjay Jain: Appointing Persons with disability as Judges: critique of Abelist Judicial approach in India

Although India has signed and ratified UNCRPD as soon as it is adopted by United Nations, courts have not made any considerable progress in recognizing and enforcing right to access to justice of Persons with disability (PWDs). This right is multidimensional, however, in this paper, Author would critique judicial approaches in respect of appointment of PWDs as judges from the lens of Abelism. He would demonstrate that Court is not open to diversified judiciary and instead of emphasizing on enabling environment to the PWDs to work efficiently as ‘judges’, it has constantly focused on the limitations of impairment in judging. Author would conclude that such an approach apart from being Anti-UNCRPD is overly influenced by Medical model of Disability thereby seriously deviating from International human rights standards of right to access to justice of PWDs.

Delia Ferri: The Italian Constitutional Court and the UN Convention on the Rights of Persons with Disabilities: Approach with Caution

Italy was among the first countries to sign the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2006. So far, the Convention has displayed significant influence on the UNCRPD. This paper focuses on how and to what extent the Italian Constitutional Court (ICC) has “used” the Convention to advance the protection of the rights of persons with disabilities. It identifies two main (somewhat contradictory) patterns within the ICC decisions. On the one hand, the ICC has appeared quite reluctant in granting the CRPD a groundbreaking value. It has affirmed that the CRPD is programmatically neutral in nature and indicates goals to be achieved by State parties, while leaving to them the task to identify concrete ways to implement these objectives. On the other hand, the ICC has used the CRPD to substantially advance the protection of rights of people with disabilities in the Republic of Korea. In the Republic of Korea, the CRPD has been cited aort it support the view that a formal recognition of a right is not sufficient, if the right is not guaranteed in practice. The ICC has also clearly affirmed that the lack of financial resources cannot justify the “paralysis” of the implementation of rights of disabled people. All in all, the paper argues that the approach of the ICC has been progressive in terms of promoting the rights of persons with disabilities, but cautious with regards to the value of the CRPD in the Italian legal system.

Janine Silga: Emerging Similarities in the Recent Cases of the European Court of Justice and the European Court of Human Rights on the Right to Family Life: Reunification: Convergence or Coincidence?

In the EU, the right to family reunification stems from the right to family life as set out in article 7 of the Charter of Fundamental Rights, which itself restates Article 8 of the ECHR. Besides this overarching human rights framework, the actual access to family reunification for third-country nationals falls under different legal regimes depending on their level of “proximity” with EU law. While the common regime is provided for by Directive 2004/38, there are important exceptions exist. The most notable regard family members of EU citizens and the preferential treatment stemming from international agreements. Beyond the EU legal order stricto sensu, the European Court of Human Rights ultimately decides cases on Article 8 of the ECHR. The coexistence of these different legal regimes reveals a fragmentation of the right to family reunification in the EU. However, the recent caselaw...
The panel takes as its starting point the increasingly apparent limitations of international organizations (IOs) law, particularly in dealing with questions concerning the legal responsibility of IOs. The panel seeks to explore this theme through a re-examination of the intellectual origins of IOs law, through a series of papers focussed on particular scholars who worked to construct the field. Among other things, the panel aims to examine the central place of functionalist approaches in IOs law, and whether it may be possible to recover heterodox threads in the early scholarship that could be used to rethink IOs law today. Moreover, the panel will explore the effort to apply broad public law concepts of accountability and responsibility to this nascent field in public international law.

### Participants

- Jan Klabbers
- Jochen von Bernstorff
- Guy Fiti Sinclair
- Emilia Korkea-Aho

### Moderator

Nehal Bhuta

### Room

8B-4-33

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**Jan Klabbers: The World According to Schermers**

H.G. Schermers is, without a doubt, the central figure in the post-war development of functionalist thought about international organizations. And yet, much of his functionalism has remained implicit, unspoken, to be picked up between the lines. The purpose of this paper is threefold. It is first, to distill Schermers’ functionalism; second, to flesh out how it developed the earlier functionalist thought of pioneers such as Paul Reinsch and Frank Sayre; and third, to investigate whether Schermers’ functionalism is capable of being further developed to accommodate concerns that have more recently surfaced such as concerns about accountability.

**Jochen von Bernstorff: A Viennese Concept of International Organizations: Hans Kelsen and the German Debate on the Juridical Nature of International Institutions**

Hans Kelsen and Josef L. Kunz developed a sophisticated theory of international organizations in the interwar period. They attempted to construct international institutions as particular legal orders which could be used for any given purpose irrespective of what they conceived of as ideological notions of sovereignty and domaine réservé. This integration-friendly theory collided with critical approaches to the idea of a world organization and international institutions in general, such as the one developed by Carl Schmitt.

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**Guy Fiti Sinclair: C. Wilfred Jenks and the Development of ‘Functional’ International Organizations**

As an international lawyer working in the International Labour Organization (ILO) for over four decades, Wilfred Jenks had an intimate knowledge of the development of the law of international organizations. This paper will argue that Jenks was a pivotal figure in the systematization of that law, and that his experiences in the ILO gave him a particular perspective on the meaning of ‘functionalism’ which may be worth recovering for international organizations law today.

**Emilia Korkea-Aho: Discussant**

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**134 Theories of Discrimination**

This panel looks at four forms of discrimination recognized by courts – disrespect for persons, indirect discrimination, pregnancy discrimination, and affirmative action – to engage the philosophical accounts of the conceptual features of discrimination and what makes discrimination wrong. Papers will also reflect on how theories of discrimination have been shaped transformed by courts’ attempts to design enforcement frameworks compatible with the evolving demands of equality in a democratic polity.

### Participants

- Kasper Lippert-Rasmussen
- Tarunabh Khaitan
- Julie Suk
- Reva Siegel

### Moderator

Ruth Rubio Marin

### Room

8B-4-43

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**Kasper Lippert-Rasmussen: Discrimination and Respect**

Some claim that discrimination is wrongful, when it is because of the disrespect it involves. This claim is plausible in part because, say, racist and sexist discrimination appear wrong even if by sheer coincidence they harm no one. I discuss two different disrespect-based accounts of the wrongfulness of discrimination: one offered by Larry Alexander in a seminal 1992 article which focuses on beliefs about moral worth, and one by Benjamin Eidelson, which focuses on giving appropriate weight to the equal moral worth and autonomy of discriminatees in the discriminating agent’s deliberations. At the end of the day, both are vulnerable to the same sort of counterexamples. Moreover, Eidelson’s account oscillates between a fact- and an evidence-relative account of disrespect in a way that is problematic. In accordance with Alexander’s more recent views I conclude that we are yet to see a satisfactory disrespect-based account of the wrongness of discrimination.

**Tarunabh Khaitan: Wrongs Group Disadvantage and the Legitimacy of Indirect Discrimination Law**

Is indirect discrimination liability more like an affirmative action programme or like the tort of negligence? Is it a redistributive measure or a corrective one? Is it best characterized as ‘public law’ or law ‘private law’? Does it seek to protect groups or individuals? In this paper, we will argue that liability for indirect discrimination occupies a middle ground between these supposedly settled legal categories combining features of both items in each dichotomy. It is this seemingly unstable and somewhat unfamiliar middle position that partially explains the persisting doubts expressed regarding the legitimacy of indirect discrimination liability. In section I, we will identify the two distinct duties – one general and the other
ConCurring panels

Julie Suk: Affirmative Action and Discrimination

On another view, affirmative action is in the DNA of United Parcel Service. In this paper I discuss disparate treatment and disparate impact claims of pregnancy discrimination under Young v. United Parcel Service. In this paper I discuss disparate treatment and disparate impact claims of pregnancy discrimination under Young v. United Parcel Service. We cover Hong Kong, Japan, and Taiwan. These papers offer general introductions to the constitutional status of the idea of human dignity and how it functions in constitutional jurisprudence of these jurisdictions. Specifically, we ask the following questions: 1) What is the legal and constitutional status of human dignity? Is it found in the constitutional text? If it is a legal concept transplanted from other jurisdictions, where is it transplanted from? 2) Is it used as a constitutional right, or only as a constitutional value that ground other rights? 3) If it is a right, is it absolutely protected, as in German Basic Law, or is it relative and subject to balancing? 4) What are its relations with other constitutional rights? 5) What are the important judicial decisions that features human dignity? What issues do they involve? The conference theme is “Courts, Power & Public Law.” Understanding the workings of human dignity is an indispensable part of understanding judicial power. By investigating the constitutional roles and functions of human dignity in this region, this panel helps to understanding how judicial power function in East Asia.

Participants
Kelley Loper
Keigo Obayashi
Jimmy Chyi-Shin Hsu
Moderator: Albert H.Y. Chen
Room: 8B-4-49

Kelley Loper: The Concept of Dignity as a Constitutional Value in Hong Kong

This paper considers the development of “dignity” as a constitutional value in Hong Kong, a special administrative region of the People’s Republic of China that maintains an independent legal system since its reversion to Chinese sovereignty in 1997. Although the term “dignity” does not appear anywhere in Hong Kong’s constitutional document, the Basic Law, the courts have referred to and highlighted the concept’s significance when interpreting a number of constitutional rights. Article 39 of the Basic Law guarantees the continued application and implementation of core international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Hong Kong Bill of Rights Ordinance – domestic legislation duplicating most of the text of the ICCPR – has achieved constitutional status. Although Hong Kong is a dualist, common law system, these provisions have established a direct link between domestic law and international human rights law. This has allowed the courts to deliver the applicable of dignity as an international human rights principle when interpreting constitutional rights in the Hong Kong context. While dignity is not a constitutional “right” on its own, a review of relevant judicial decisions suggests the concept has been recognized as a constitutional value that grounds other explicit articulated rights. This paper will examine how the courts have understood the meaning of dignity in cases involving the right to equality and non-discrimination (especially on the grounds of sexual orientation, gender identity and disability), the right to freedom from torture, the rights of prisoners, and the rights of people who fear torture or other forms of serious human rights violations if returned to their countries of origin. Examining the development of the notion of dignity in Hong Kong constitutional jurisprudence provides a helpful comparative study. It sheds light on the potential impact of international human rights law – and the principle of dignity in particular – on the interpretation of constitutional rights.

Keigo Obayashi: Human Dignity in Japanese Constitutional Cases: The Hybrid Approach as “Individual Dignity”

This paper concerns human dignity in Japan. Particularly it examines how does judiciary consider human dignity in constitutional cases. Although the Constitution of Japan doesn’t mention “human dignity,” the courts sometimes refer to “individual dignity” which resembles to “human dignity.” I think it as hybrid approach to protect individual autonomy and intrinsic humanity. I will explore the meaning of the approach through outlining the constitutional case. There are two provisions which relate to human dignity in Japanese Constitution. The one is article 13 that protects individual life, liberty and the pursuit of happiness. Article 13 provides “All of the people shall be respected as individuals.” The other is article 24 that protects right to marriage. Article 24 provides (marriage) “laws shall be enacted from the standpoint of individual and personal equality of the sexes.” These provisions command government to respect both individual and dignity. The courts have referred to “individual dignity” with relation to these provisions in constitutional cases. There are some areas of individual dignity which the court refers to it. Recently, the Supreme Court refers to individual dignity in equal protection and right to marriage case. The one of them is illegitimate child case (Hichaku case). In 2015, the Supreme Court struck down article 115 of the law which provided discrimination against illegitimate child out of wedlock. The law provided inheritance of child out of wedlock shall be one half of the share in inheritance of a child in wedlock. The Court decided that whether the law is reasonable or not must be judged in accordance with Constitutional Court provided individual dignity and equal protection. Therefore, the Court held that the provision was unconstitutional because it didn’t respect illegitimate
child as individual with considering recent various situations. In this case the Court considers that the child can’t choose the position of legitimate or illegitimate. It is important that the decision weighs both child’s autonomy and human intrinsic of child. The other case is about married couple with the same family name (Fufubessei case). The article 7/5 of civil law provides “A husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage”. Some women think it as unconstitutional because it compels many married couples to choose husband’s family name. In fact, married couples of about 90% choose husband’s family name. The plaintiffs sued the government as it against constitutional right not to compel the family name, right to marriage and equal protection. In 2015 the Supreme Court held that it was constitutional because it didn’t violate personal right under article 13 and equal protection under article 14. However, when the Court judged the constitutionality about marriage system, it considered reasonableness in accordance with individual dignity and the essential equality of the sexes under article 24. The Court held that the system was reasonable because it didn’t compel women to use husband’s family name, while it might inflict slight disadvantage. This case was considered individual dignity because it examined individual choice about family name and discrimination based on the position of woman. There are other inferior court cases about individual dignity. For example, the first privacy case referred to individual dignity (Utagenoato case). In 1964 Tokyo district court approved right to privacy deduced from individual dignity which needed to respect each personal right and protect from improper invasion. The compensation case for the vaccine also referred to individual dignity (Vaccine case). In 1984, Tokyo district court held that the governmental decision not to compensate for the victims who were inflicted damage caused by vaccine was against constitutional principle which derived from individual dignity. There are some cases with relation to individual dignity without referring to “individual dignity” directly. For example, the euthanasia case in 1995 – physician assisted suicide case – concerns like human dignity (Tokai University Hospital case). When the Yokohama district court approved the euthanasia under certain conditions, the court indicated that it derived from self determination to stop medical treatment and to receive natural death with keeping human dignity. There are two approach about human dignity in the world. They are individual autonomy and intrinsic humanity. The former relates to self determination and the latter relates to moral right (duty). Although the Supreme Court of the United States tend to refer to the former, western countries courts toward to use the latter. The Japanese courts takes the third approach; hybrid approach. It weighs individual determination and moral right. Although the courts usually think individual dignity as the context of individual autonomy, it has potential to consider moral duty as the public interest. I survey individual dignity in constitutional cases in Japan and the meaning of hybrid approach. First, I confirm the constitutional text about individual dignity and examine the meaning. Second, I survey the constitutional cases which referred to human dignity. Then I consider the meaning of hybrid approach.

**Jimmy Chai-Shin Hsu: Human Dignity in Taiwan’s Constitutional Jurisprudence**

The important role played by the Constitutional Court in Taiwan’s democratization is widely acknowledged. Less documented is the rise to prominence of the idea of human dignity in Taiwan’s constitutional jurisprudence. The concept of human dignity is not contained in the constitutional text. Still under the influence of German constitutional law and international human rights discourse, this concept made its first entry into Taiwan Constitutional Court decision in the mid-90s. In the following decade its presence quickly proliferated in the Court’s decisions. It has been recognized as a central constitutional value. There are mainly two functions of the Court’s use of this concept. The first is to buttress the enumerated rights by adding weight to the infringed right in proportionality analysis. The Court has used it to strengthen protection of freedom of expression right to subsistence right to property and right of equality. The second is to use it as a foundation for un-enumerated rights such as right to privacy right to reputation and right of personality. These rights are deemed “closely related” to human dignity and hence enjoy the status of fundamental rights. Still another less-developed function is to treat human dignity as a constitutional inviolable right subject to no balancing. In an interpretation involving freedom of thoughts the Court declared unconstitutional a statutory remnant from the authoritarian era which prescribed forced labor and “thought reeducation” of “communist spy”. This paper analyzes how the Court understands the concept of human dignity and how the Court uses it to establish an increasingly intricate right analysis structure.
Constitutional scholars around the world now analyse systems of judicial review as more or less ‘strong’ or ‘weak’ in nature. The distinction, however, is clearly one of degree, and the actual strength of judicial review in various contexts depends on a range of contextual factors including the approach of constitutional courts. This panel will examine these questions about the classification of judicial review, as more or less strong or weak in nature, as well as the role of different judicial remedies – including the ‘strike down’ power, and delayed or suspended declarations of invalidity – in creating stronger versus weaker forms of review.

Participants
- Stephen Gardbaum
- Aileen Kavanagh
- Rosalind Dixon
- Michele Massa

Room
4B-2-22

Stephen Gardbaum: What makes for stronger and weaker constitutional courts?

The distinction between “weak-form” and “strong-form” judicial review turns on whether or not legislatures are empowered to respond to particular constitutional court decisions by ordinary majority. This single-factor constitutional design issue does not purport to take into account the many other ways in which courts might more generally be thought of as strong or weak in an all-things-considered or Gestalt sense. This different and broader topic is the basis for a conception of judicial supremacy commonly employed by political scientists, albeit often to reject such a claim: courts are the most powerful branch of government on constitutional issues and are able to impose their will on other recalcitrant political actors and institutions. In attempting to address this broader question, this paper argues that the relative political power or overall “strength” or “weakness” of a given constitutional court is a function or mix of (1) legal powers, (2) institutional practices and culture, and (3) political context and contingency. In addition to raising and discussing these various factors, the paper illustrates their impact through a comparison of the Indian and Japanese supreme courts, among others.

Aileen Kavanagh: Situating the Strike-Down Power

The idea that constitutional judicial review is epitomised by the judicial power to strike down legislation is a common assumption underpinning both the theoretical and comparative law scholarship on rights review. Thus, leading theorists pose the question about the legitimacy of judicial review in terms of whether it is justified for unelected courts to strike down democratically enacted legislation. By the same token, influential comparative law taxonomies classify constitutional systems as ‘strong-form’ or ‘weak-form’, largely on the basis of whether courts have ‘normative finality’ on questions of rights and, in particular, whether they have the coercive power to invalidate or strike-down legislation. This paper argues that in order to capture accurately the nature and dynamics of constitutional review, we need to situate the strike-down power in the broader landscape of constitutional practice under Bills of Rights. So situated it can be seen that far from being the favoured tool that does all the work, judges often hold back from striking down, treating it as a measure of last resort. Even when judges decide to wield the guillotine of judicial nullification, they find myriad ways of narrowing its effects and softening its blow. Indeed, although the strike-down is often portrayed as nihilating the will of the legislature, in fact the legislature often has considerable leeway on how to remedy rights-violations in future legislation. This contextual study of the strike-down has two significant implications. The first is that it complicates and challenges the tendency within the theoretical and comparative law scholarship to rivet on the strike-down as a key marker of ‘strong-form review’. Second, it suggests that many accounts of constitutional review overstate the significance of the strike-down, whilst overlooking other crucial facets of the judicial power to review legislation for compliance with rights.

Rosalind Dixon: Responsive Judicial Remedies

A major focus of comparative constitutional scholars in recent years has been the development of a distinctly ‘weakened’ model of judicial review, according to which legislatures enjoy formal authority to override court decisions simply by way of ordinary majority vote. The aim of this model is also to address longstanding concerns about the relationship between stronger forms of judicial review and democracy. In a world of reasonable disagreement about the scope and meaning of constitutional provisions, particularly rights-based provisions, there are obvious democratic difficulties with giving non-elected the final say over the scope and meaning of such provisions; whereas even the most committed political constitutionalists acknowledge that there is generally little difficulty with giving courts a penultimate or non-final role in deciding such questions. In responding to concerns about the democratic legitimacy of judicial review however, proponents of weakened judicial review have often downplayed the dangers this model poses to the effectiveness of judicial review. A key function of weak judicial review is the ability of courts to overcome blindspots and burdens of inertia in the legislative process: such a role does not depend on court decisions having any truly final status, and it yet responds to widespread blockages in modern legislative processes. For courts to play this role effectively, however, they will often need to have quite broad and strong powers ex ante – ie powers that allow them to overcome legislative inertia by disrupting an existing legal equilibrium. This paper explores this issue through a focus on judicial remedies. It considers both formally weak declaratory remedies, such as those in the HK, and de facto weakened remedies, such as delayed or suspended declarations of invalidity, and their track-record in countering various political blockages. It also suggests ways in which courts could adopt a more intermediate – or weak-strong – approach to constitutional remedies, which splits the difference between concerns about judicial legitimacy and effectiveness. The article makes these arguments by reference to case studies of LGBT rights in Colombia, Hong Kong, India, South Africa, the UK, New Zealand, and Australia.

Michele Massa: Juridical Controversies on Constitutional Referenda: The Italian case of 2016

See general description

Justin Orlando Frosini: Parliamentary Sovereignty and Referendums: An Indigestible Cocktail? The Case of United Kingdom and Brexit

See general description

Kriszta Kovács: International Standards for National Referendums: The Hungarian case

Both democratic elections and referendums are expressions of the sovereignty of the people. Election principles are enshrined in international human rights documents and international election observations are regularly conducted to ensure that the basic principles are fulfilled. Although the effects of a referendum may be as strong as the effects of a general election, there are no internationally recognised legal standards and mechanisms concerning national referendums. Recently, the use of referendums has
This panel tackles the different ways in which the Court of Justice of the European Union (CJEU) contributes to ensuring the participatory justice in the EU. These range from the definition of what justice is, to the way these ideals of justice are applied (be it through private law public policies or the creation of new collective remedies at the national level). In addition, the panel looks into the national question of whether it should be the CJEU’s responsibility to constitute justice within the EU. The panel is particularly relevant in times of economic struggles, rising equalities, and increasing concerns about the EU deciding on the redistribution of wealth and welfare.

**Participants**

Leticia Díez Sánchez
Betül Kas
Martijn van den Brink
Inira Domurath
Moderator: Hans Micklitz
Room: 4B-2-58

Leticia Díez Sánchez: The Court of Justice of the European Union as a Distributive Actor

This paper analyses the way in which the Court of Justice of the European Union (CJEU) resolves conflicts that entail redistribution of wealth and income between different groups of society. It argues that (a) the case law of the Court can be seen as a manifestation of the social conflicts at the core of EU law, and that (b) the manner in which the Court resolves such conflicts can be seen as an expression of different theories of distributive justice. The social conflicts generated by EU law – First, this paper unveils the redistributive nature of EU law from the very origins of the European project. Policies with a specifically redistributive aim (CAP Cohesion Policy) as well as international provisions generate clear winners and losers. The resulting cleavages are much richer than often assumed confronting not only Member States but also collectives like consumers taxpayers farmers or regions. The Court as a forum to challenge distributive schemes – Litigation is an instrument for policy change. The case law of the Court is not only a place where abstract legal concepts are elucidated, but also one where social groups fight for that they consider their due. These struggles, the ‘demand side’ of judicial decisions, help us better understand the political decision-making and argue which political institutions and, implicitly or explicitly, favour or ignore the elephant in the room.

The Social Function of Contract Law Before the CJEU

The article analyses the role of contract law and adjudication embedded in a larger regulatory environment. Specifically it elicits the social function of contract law to provide welfare to individuals in the political economy of the credit-welfare trade-off. The field under study is mortgage law. First, it is described how contract law is taking on a social function, in the retreat of the welfare state and the expansion of the marketization of public policies, such as access to housing. In order to enable consumers to participate in this ‘market for personal welfare’ in the field of housing access to mortgage credit is no longer possible. These studies are valuable and introduce an approach in EU legal scholarship that was long overdue. Yet, they all ignore or try to circumvent at least one essential question: by which institutions and processes of decision-making do we want to constitute justice among Member States and its citizens? This paper addresses this question drawing on the work of Waldron, Christianso, and Bellamy. The paper focuses on the interplay between legal institutions and the political economy of the credit-welfare trade-off. Second, the article sheds light on the role of the CJEU in the adjudication of cases in which consumers were not able to
service their debt burdens any longer. It is shown how the CJEU uses the control of unfair contractual provisions to give guidance to the national courts and to formulate own rules for balanced contractual provisions. It highlights the role of the CJEU to act as the final arbitrator to remedy social inefficiencies of the national and European legal order, which are brought about by the opening up of markets for low-income consumers without establishing safeguards against the risks. At the same time, doubts are expressed as to the competence basis for and the ability of judicial activism to solve social problems, which also endows private law conflicts with a constitutional dimension. In the end, it is concluded that the embeddedness of consumer debt contracts in the political economy of the credit-welfare trade-off reflects the need for further protective mechanisms beyond the ones that can be included in the contractual agreements and their judicial control.

During the last two decades, the ECtHR’s tradition- ally restrictive attitude to remedies has undergone important changes, and notably a shift toward a more prescriptive approach. Initially, the Strasbourg Court started specifying, in a limited number of cases, the individual measures to be taken by respondent State. In 2004, the ECtHR introduced the pilot judgment procedure, which sought to direct States in rectifying structural sources of human rights violations. Since then, the ECtHR has issued dozens of pilot judgments, and also started indicating general measures to be taken by States in the ordinary (non-pilot) cases. Although these shifts in the ECtHR’s remedial practice have been analysed in the existing scholarship, their broader consequences, inter alia in terms of effectiveness and legitimacy of the ECtHR, still remain under-researched. In order to shed more light on these issues, this panel takes a closer look at the consequences of the ECtHR’s changing remedial practice for the effectiveness and legitimacy of the ECtHR and of the remedial practice more generally—on the basis of an interdisciplinary dialogue and methodological diversity as it encompasses both theoretical and empirical papers authored by lawyers and political scientists.

The ECtHR’s Remedial Practice – Implications for Legitimacy and Effectiveness

Jan Petrov: International Input to Domestic Implementation Mechanisms in the ECHR System

The existing scholarship on the implementation of the ECtHR’s case law stresses the role of the domestic level of the ECHR system and of the domestic politics. This paper concedes that the domestic political processes are crucial for compliance with the ECtHR judgments, however argues that they cannot be analysed in isolation from their international input, i.e. from the ECHR’s ruling. I concentrate on particular features of the Strasbourg Court judgments and conceptualize how they affect the strength and outcome of domestic implementation mechanism. More specifically I discuss the clarity, persuasiveness and the level of minimalism/maximality of the ECtHR’s reasoning, and the remedial strategy employed in a given case by the Strasbourg Court. A combination of these features implies the level of constraints imposed on the State party by the Strasbourg Court and sets the starting point for the domestic implementation mechanisms.

The paper thus provides for an analytical framework that can be used for analysing the significance of the international input to domestic implementation mechanisms.

Gyøvnd Stiansen: Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments

International and domestic courts that rule against state authorities face implementation problems. An important question is whether courts can design rulings in ways that facilitate timely compliance. This paper analyzes recent attempts by the European Court of Human Rights (ECtHR) to influence implementation by engaging more directly with expectations about implementation in its judgments. On the one hand, this strategy has the benefit of increasing the transparency of the implementation process and in this way increase the reputational costs of prolonged non-compliance. On the other hand, judicialization of the implementation process reduces the flexibility of the responding state in identifying efficient remedies that are acceptable to domestic veto-players. To assess empirically how the ECtHR’s remedial approach influences compliance with its rulings, I use matching to adjust for differences on observable country- and judgment- level indicators of the compliance environment. Cox regression models estimated on the matched data suggest that indications of measures aimed towards remedying the situation of individual applicants have considerably changed over time: the judgments where they have been offered. However, indications of broader policy changes have not been consequential for implementation.

Jannika Jahn: Playing the Two-Level Game Effectively: Enforcing Domestic Execution of European Court of Human Rights Judgments with Specific Individual Measures

The ECtHR has developed new remedial powers that considerably change the architecture of the European Convention on Human Rights (ECHR) system regarding the implementation of the Court’s judgments. While attention focused on the introduction of general measures since Broniowski v. Poland, it has nearly gone unnoticed that the Court developed further remedial powers: specific individual measures. In Volkov v. Ukraine (2013), the ECtHR for the first time ordered the respondent state to reinstate a dismissed Supreme Court judge at the earliest possible date in order to correct the part of its judgment, because the Ukrainian judicial disciplinary system suffered from such systemic deficiencies that the Court saw no other means to redeem the violation in fair trial terms. This case is the result of an incremental change in the Court’s interpretation of Art. 46 ECHR since 2004, by which it has substantially reduced the Convention states’ executorial discretion. This development will be analyzed with reference to the Court’s case law.

Despite current setbacks by certain Convention states’ unwillingness to follow the Court’s individual measures (cf. Volkov and Salov), I suggest that the Court has embarked on the right path and managed to tread a fine line between judicial activism and restraint, whereby it also manages to robust concerns of democratic legit-
The aim of the panel is to explore the increasingly central role that courts play in the promotion of EU policies set by the European Union and, at the same time, to discuss the shortcomings and weaknesses that judicial intervention has nonetheless shown in some instances. European courts have proved to be crucial in ensuring not only the implementation of EU policies but also in expanding the scope of such policies and promote them even beyond the original objectives. This pivotal role has entailed the recognition of individual and collective rights, as well as of corresponding duties on national public administrations and private businesses. In several cases, however, this policy-promoting role of European courts is jeopardized when it comes to the implementation of EU legislation by national courts and administrations or when the implementation finds procedural obstacles at the national level. In order to explore the policy-promoting role of courts and the connected shortcomings, the panel chooses a multi-sectoral approach which mirrors the diversity of EU policies and the rules of human rights promotion, environmental protection, banking supervision. It also provides a view of the powers of EU institutions to pursue these policies.

**Participants**

Valentina Volpe
Kostantin Peci
Elisabetta Morlino
Giulia Bertazzoli
Maurizio De Bellis
Moderator
Elisabetta Morlino

**Room**

7C-2-14

**Valentina Volpe: Judging Democracy The Role of European Courts in Protecting the Independence of the Hungarian Judiciary**

Is it possible for European Courts to play a role in case of systemic violations of the rule of law at the state level? How and by what means may the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) intervene in the event of domestic democratic backlashes? What is the impact of international adjudication on national liberal developments? Over the past decade, the ECJ and the ECHR have decided on cases related to the independence of the judiciary in Hungary. The paper investigates the transformative potential and the limits of “judging democracy” in the Hungarian experience. In the first part, the paper analyses the ECJ case C-299/12. The judgment had at its core the reform of the mandatory retirement age for judges and prosecutors promoted by the Országh government in 2011. The measure entailed the forced retirement of over 270 judges, one tenth of the total including many Presidents of Courts of Appeal and Supreme Court judges. The ECJ considered the measure as an unjustified age discrimination and a violation of the EU equal treatment directive 2000/78/EC. The paper then goes on to discuss the ECtHR case Baka v. Hungary of June 2016. In this case the Court decided on constitutional amendments and legal measures that determined the emasculation of the right of protest of the Hungarian Supreme Court Andrés Baka. Through such reforms the country violated both the right of access to a court (Art. 6 ECHR) and the freedom of expression (Art. 10 ECHR) of the applicant, who vocally criticized the government when he held the highest position in the judiciary. In investigating individual human rights violations, the ECtHR strengthens its judicial role and the process of “constitutionalization” of the European Convention on Human Rights. Juing the supervisory function of individual rights to the defence of the rule of law at the state level. In the conclusions, comparing the content and impact of the rulings, the paper elaborates on the role that European Courts can play in cases of systematic violations of the rule of law at the state level. It suggests that, at the cross-section level Pan-European system of dialogue and reaction, although imperfect and yet unformalized, is emerging on the continent. Multiple actors (domestic and European courts, regional organizations, civil society) are observing and increasingly taking part in the defence of constitutional shared values and in “judging” national democracies.

**Kostantin Peci: Judicial Protection and Corporate Accountability for Violation of Human Rights**

The paper will focus on the role of the judiciary power on granting effective protection against the violations of human rights by corporations. Accountably, it is not always the case that violations of human rights prompt questions the paradigm of judicial protection should be given to individuals only against violations of those rights by the State. The rationale behind this paradigm is a double-sided: the State is the only accountable entity for use of force and (hence) the State has, also, the obligation to protect its citizens against the use of force by other entities. However, there is a constantly growing awareness that corporations rank among those entities that, at least, influence, if not violate, the human rights. The question of corporate accountability has already been a point of contest in the body of case-law. The paper will explore the corporate action that has violated human rights could be faced. From a decisional perspective, the violation of human rights could be caused by the decision of the corporation, or the corporate action that has violated human rights could have been imposed or influenced by the State. From a behaviour perspective, the violation could be caused either directly by the corporations or, by the State, with the cooperation of corporations or, in more extreme cases, because corporations impose the violations to the State. The paper will, first, analyse the role of courts in shaping accountability of corporations for violations human rights. It will also discuss the options available to the courts in the United States and South America. Eventual obstacles, even of a procedural nature, on finding corporations accountable for violations of human rights will be identified. The analysis will, then, focus on Europe and, in particular, in the role of the ECJ and the ECtHR in granting protection of human rights. The final part of the paper will explore how judicial doctrines, developed in other branches of law, such as for example antitrust law and administrative law, could be used to find corporations liable for violations of human rights. An example in this direction could be the as if which approach which is at the basis of the in house providing doctrine or of the Italian judicial doctrine, mainly developed by the Italian Court of Auditors, of service relationship between corporations and public administration. In both examples these aims of the doctrine is establishing criteria in light of which the behaviour of the corporation could be considered as if it was part of the public administration and hence of the State. A last and more extreme example could be the case of a commercial corporation that, in certain situations does not justify anymore the distinction between the State and the corporation. In this last and extreme, case a reverse reasoning to what is the State Action Defence doctrine in antitrust law could be used for the violation of human rights, for violation of human rights, even by means of State action.

**Elisabetta Morlino: Environmental Protection under Judicial Scrutiny: The difficult intersection between administrative procedures and criminal law enforcement**

The paper explores the issue of effectiveness of environmental protection with a special focus on the interaction between the administrative procedures set by European and national environmental rules and judicial review of environmental cases at the national level. The last forty years have witnessed the growth of the environmental protection through a variety of means: the rise of global and national rules on environmental protection; the development of appropriate administrative authorities with the mandate of implementing the rules; the multiplication of administrative procedures to compose and combine the various interests at stake; the emergence of complex civil, administrative, and criminal litigation. The paper will thus focus on the extent that the application of the environmental law involve around a core conflict: that between environmental protection and economic development and between those who bear the respective interests, being local communities and businesses, developed and developing countries, future and present generations. European environmental rules as well as their interpretation by the CJEU set ex ante the point of equilibrium between these interests. Yet national ad-
ConCurring panels

Administrative procedures, thus, are necessary to yet have to face criminal liability and, eventually, are however the administrative ability to effectively com-
pose such interests and generate stable administra-
tive decisions is questioned. National courts, namely criminal courts, often intervene ex post to dismantle the rationale of administrative decis-
ions. European rules and rulings on environmental protection aim primarily at preventing environmental damage (eg.: precautionary principle). Risk factors are identified, and based on these rules prescribe admin-
istrative procedures and decisions to be taken to avoid environmental damage. Public administrations are the guardians of this system. In this context, ex post crimi-
nal sanctions, which are imposed once the damage occurs should have a marginal role. In practice, more and more national courts define the contours of environmental protection: the very cumbersome, and layered character of environmental legislation, combined with the inefficiency and the malfunctions of public administrations, moves the focus of envi-
ronmental protection from preventing environmental deterioration by the damage occurred. The final outcome is a no-
win situation: on one hand companies are found to follow cumbersome administrative procedures and yet have to face criminal liability and, eventually, are compelled to suspend or shut down their industrial activity; on the other hand, the community as a whole suffers environmental damage, which is sometimes irreversible. In order to explore the problem, the paper will be divided into three parts: the first will outline the European legal framework setting the principles and regulating the main administrative procedures instrumental to environmental protection; the second will provide an empirical analysis, compar-
ing three environmental cases in which administrative procedures and decisions have clashed with criminal courts rulings; the third will identify the main problems emerging from the interaction between administrative decisions and criminal courts’ rulings and will assess their impact on the effectiveness of environmental protection.

Giulia Bertezzolo: Access to information and au-
diting powers of the European Court of Auditors on banking issues

The general powers of the European Court of Auditors are laid down in Article 287 of the Treaty on the Functioning of the European Union (TFEU). The article sets out an obligation for the European Court of Auditors to examine all revenue and expenditure of the Union and of other institutions and agencies set up by the Union. The article however does not specifically refer to the European Central Bank (ECB) or the Single Supervisory Mechanism (SSM). This is the case also for the information and data that entities under scrutiny should make available and on the basis of which the European Court of Auditors perform its assessment. Article 287 of the TFEU only prescribes that bodies and institutions shall forward to the European Court of Auditors any document or information relevant for discharging the tasks entrusted to the Court, without providing any additional clarification. The type and granularity of information to which the Court may or may not have access determines of course the deep-
ness of the scrutiny that the European Court of Audit-
tors can undertake and is intertwined with the scope of its auditing powers in relation to a certain body. With regards to the ECB or the SSM, the Statute of the European System of Central Banks provides that the European Court of Auditors shall only assess the operational efficiency of the management of the ECB. The Statute is however silent on the supervisory tasks conferred on the ECB via the SSM Founding Regula-
tion. There can be thus different interpretations con-
cerning the powers of the European Court of Auditors and the obligation of the SSM to provide information in relation to such supervisory tasks. These interpreta-
tions have to take into account the independent role of the SSM in performing the supervision of banks as well as the scrutiny that the SSM applies to the reactions to the publication of information concerning financial institutions or their supervision may affect financial stability. The issue has emerged recently in the framework of an own initiative special report of the European Court of Auditors on the Single Supervisory Mechanism and gave rise to a debate that involved other European Institutions. The paper starts from this case to discuss on the right balance between the legitimate need for the SSM to be accountable and the need to be independent, as well as its ability to manage sensitive and confidential infor-
mation provided by the supervised banks in order to perform its supervisory tasks. The paper also reflects, more generally, on the impact that a more or less in-
trusive scrutiny of the European Court of Auditors may have on the banking sector and on financial stability.

Maurizia De Bellis: Administrative Inspections in EU Law and Judicial Control

An increasing number of EU institutions and agencies conduct administrative inspections. This is not only the case of the Commission in antitrust pro-
ceeding, but also of the European Anti-Fraud Office (OLAF), investigating fraud against the EU budget, of the European Central Bank (ECB), inspecting credit institutions, and the European Securities and Markets Authority (ESMA), inspecting the premises of credit rating agencies. The fact that EU administrations do not simply requests national authorities to conduct investigations in a given field, but have the power to carry out inspections within the territory of the member States, breaks with the paradigm, dating back to Max Weber, according to which States retain the monopoly on the legitimate use of force. Do private parties enjoy the same level of protection of fundamental rights, vis á vis EU authorities, that are guaranteed in the con-
text of national proceedings? What is the role of the judiciary, and in particular, does the current division of labour between national Courts and the Court of Jus-
tice provide for adequate protection of private parties, given the growing spread of this model of enforce-
ment of EU law? And are these legal safeguards, and in particular the limits of judicial control, compatible with standards set by the European Court of Human Rights for the protection of fundamental rights such as the inviolability of home? The paper conducts a cross sector analysis. It moves from practices in the area of competition, where inspection powers have been used for a long time, and lead to a rich case law of the Court of Justice, defining the limits of the powers of national Courts when authorizing inspections. The paper then analyses the scope and depth of the investigatory powers given to the Olaf, the ECB, and the ESMA, and the model at first elaborated in competition law has been adapted. Through the exam of recent cases that already emerged in the area of financial inspections, the paper challenges the existing model of judicial review in providing adequate legal safeguards against their exercise by EU administrations, and questions its compatibility with the standards set by the European Court of Hu-
man Rights.

141 WORKING PARENTS AND FREE MOVEMENT: THE EUROPEAN TRANSFORMATION OF THE FAMILY

Through the logic of free movement of services and labor, the European Union is transforming the fam-
ily. From abortion to assisted reproduction, the free

circulation of services is disrupting national efforts to regulate surrogate motherhood, post mortem in-
semination, and same-sex parenting. The CJEU has developed an unbalanced body of case law that attempts to reconcile the well-established EU law on free movement anchored in the EU’s competence over the economic enlargement of the market. This body of EU law has changed the way national legal orders can approach gender roles in the workplace which inevitably puts transformative pressure on gender roles within the family. What are the tensions and convergences with the evolution of national constitutional traditions with regard to working mothers? This panel explores how the logic of free movement is disrupting the traditional family in Europe. The backlash against such disruption will also be discussed.

Julie Suk: The Twenty-First Century Working Mother in European Constitutions

This paper engages the working mother as a subject engaged by the national constitutions in Eu-

trope that emerged after World War II. Drawing on the Weimar Constitutional Constitution of 1919 postwar constitutionalism it endeavored to guarantee equality between men and women by extending special protections to mothers. The family was also given special constitutional status, and children born out of marriage were also protected. This paper aims to demonstrate how the EU and the jurisdiction of the Constitutional courts are adapting these provisions for twenty-first century working parents. The relation-

ship of this evolution to EU interventions on pregnancy, maternity, and gender equality will also be explored.

Stéphanie Hennette-Vaucher: Gender Reproduc-
tion and Freedom of Circulation

This paper illustrates the ways in which biomedical law and related to ARTs in particular) increas-
ingly appears to be circumvented and thus potentially challenged by the impact of EU-grounded freedoms of circulation. National legislative prohibitions (such as bans on surrogacy or on post mortem in-
semination in France) have been gradually undermined through the exercise of the free of move-
ment of persons, even though explicit references to EU law-grounded fundamental economic freedoms re-

Participants

Julie Suk
Stéphanie Hennette-Vaucher

Moderator

Matthide Cohen

Room

7C–2–12
main very rare, as if inappropriate or taboo. The paper then seeks to draw attention to forms of backlash that this increased practice of circumvention through circum- 
triggers. In particular, it looks at the increasingly naturalist and principled approach of legal regulations of 
biomedicine that takes place in reaction to what is 
framed as excessive and uncontrolled commodifica-

of human material. Legal evolutions might ensue, 
as some recent cases (involving surrogacy and post 
mortem insemination but also same sex parenting) 
have led to legislative proposals that aim at creating 
legal sanctions for French citizens who travel abroad 
in order to access forms of reproductive care that are 
prohibited in France.

Ivana Isailovic: European economic governance 
family law and gender

Debates about European Union economic govern-
ance often remain silent on the role family and family 
laws and policies are playing in the EU context. This 
paper considers the interplay between EU economic 
project – including its ‘social’ dimensions – and family 
laws and policies. It argues that EU legislation de-

signed to bolster the common market and increase 
economic growth, has in fact also shaped the interac-
tions within the family, have influenced family law and 
policies and social norms. In order to substantiate this 
claim, the paper looks at the EU legislation concern-
ing family law and gender equality in four country contexts by lawyers, political scientists, 
anthropologists and sociologists, under the auspices 
of the European Research Council-funded research 
project on the impact of the ECtHR religion-related 
case law at the grassroots level (Grassrootsmobilise).

Margarita Markoviti: Religious pluralism and 
Grassroots Mobilizations in Greece: The dif-

erent uses of European Court of Human Right 
religion-related jurisprudence in national and 
local courts

This paper examines the different ways in which 
European Court of Human Rights (ECHR) decisions 
among religious provide the “political opportunity struc-
tures” and the discursive frameworks within which citi-
zens in Greece mobilize. It focuses on two cases – one 
adjudicated at the Council of State and another at a 
local administrative court in Chania – that touch upon 
core recurrent questions around the governance of 
religious pluralism and the prevalence of the Chris-
tian Orthodox Church in the country: the presence of 
religious icons on courtroom walls on the one hand 
and the rules governing exemption from religious 
education in public high schools on the other. Draw-
ing on extensive fieldwork conducted with a range of 
actors involved in these cases (claimants, defendants, 
lawyers and human-rights activists) the paper traces 
the relevance of ECtHR case law in triggering such 
mobilizations in the actual process of litigation and 
finally in shaping the actors’ arguments. The paper 
thus demonstrates the different usages and impacts of 
ECHR case law in national courts, exposing at the same time the ways in which developments in 
Strasbourg directly influence national actors’ motiva-
tion to mobilize and even shape the very outcome of 
religion-related cases in national courts in Greece.

Pasquale Annicchino and Alberto Giorgi: A two 
speeds impact? Italy religiously motivated 
claims and the European Court of Human Rights

Italy, as other countries, has recently developed a 
complicated relationship with the European Court of 
Human Rights. This is part the result of recent decision 
by the Italian Constitutional Court but also the out-

come of a complex system of enforcement according to 
which even claims that win cases in Strasbourg 
have to resort to the Constitutional Court to have a 
declaration of unconstitutionality of the law found to 
be in breach of the Convention. Besides these tech-
nical aspects, the decisions of the Strasbourg Court 
provide also an environment for discourse, activism 
and political opportunity structures. This is particularly 
true in the cases involving clashes between secular 
and religious worldviews. In this paper, through an 
analysis of national case studies and key-witnesses 
testimonies, we assess how and to which extent claims 
are key to understanding the ‘indirect effects’ of the 
ECHR in present-day Romania, both within and out-
side the courts of law.

Ceren Ozgul: “Genuine Belief” in the Inter-
national and National Courts: The ECtHR and 
Grassroots Mobilization around Conscientious 
Objection to Military Service in Turkey

One challenging question the European Court of 
Human Rights is facing regarding the Article 9 of the 
European Convention of Human Rights is its defini-
tion of belief in the area of conscientious objection 
to military service. The Court’s Grand Chamber decision of 
Bayatyan v. Armenien (2011) recognized the right to 
conscientious objection to military service under 
Article 9 when based on a “person’s conscience or his 
deeply and genuinely held religious or other beliefs”, 
whilst in Ercep v. Turkey, only months later, the ECHR 
extended the right only on grounds of religious belief. 
The definition(s) of the right by the ECHR both contrib-
uted to and restricted the struggle against compulsory 
military service among religious and non-religious ac-
tors in the field. This paper examines the relevance 
and mobilizing potential of the ECtHR’s case law on 
conscientious objection to military service as well as 
the obstacles in place for grassroots actors in Tur-
key. Specifically focusing on Court’s decision Ercep v. 
Turkey in relation to Bayatyan, this paper follows legal 
mobilization on conscientious objection to compulsory 
military service in Turkish national courts on two tracks: 
pacifist and militarist action and religiously based con-
scientious objection.

Mihail Popa: Who cares about Strasbourg? The 
role of activists in foregrounding the case-law 
of the European Court of Human Rights in reli-
gion-related litigations in Romania

The European Court of Human Rights (‘ECHR’ or 
‘the Court’) has recently become arguably the most 
visible international court in Romania, its legitimacy 
hard to contest. The use of ECHR jurisprudence as a 
professional evaluation criterion for Romanian 
 magistrates has surely played a role in increasing 
the frequency of references to the Strasbourg Court in 
domestic proceedings. But in religion-related cases, 
additional dynamics must be taken into account for 
understanding the ECHR’s visibility. This paper inves-
tigates in-depth two of the most prominent domestic 
litigations on matters related to religion in Romania 
in the last decade: the display of religious symbols in 
public schools and the legal recognition of same-sex 
couples. Based on the analysis of court files (judg-
ments written submissions) and on interviews with the 
main actors involved in these litigations, the analysis 
underlines the role played by activist jurists and law-
yers in ‘importing’ ECHR case-law in court proceed-

ings. The paper highlights the increasing attention 
paid to the Court by activists from the religious sector 
of civil society and points out that social mobilizations 
are key to understanding the ‘indirect effects’ of the 
ECHR in present-day Romania, both within and out-
side the courts of law.
The panel aims at sharing the interim findings of an ongoing research project on the Turkish Constitutional Court which is fully funded by the Turkish National Science Foundation (TÜBİTAK). The Project focuses on the impacts of Individual complaint mechanism before the Constitutional Court as adopted by September 2012. Following issues fall within scope of the Project:

- Constitutionality of Turkey’s human rights protection, judicial dialogue between the Constitutional Court and other apex courts, implementation of international human rights treaties as reference norms other than ECHR, and the possible empowerment of both the individuals and the Court. In the proposed panel, an overview of the project and interim outputs will be introduced by Bertil Emrah Oder, the principal investigator of the Project, who serves as the panel chair. The Project researchers will deliver their papers on specific topics representing fragilities of judicial protection of human rights in Turkey such as freedom of press (Betül Durmuş), criminal law issues (Levent Emre Özgüç), and human rights treaties as reference norms other than the EU (Utku Öztürk) criminal law issues (Levent Emre Özgüç), and impact of rights-based approach of the Constitutional Court on Court of Cassation (Sümeyye Elif Biber).

**Participants**
- Betül Durmuş: Does the Turkish Constitutional Court Guard Freedom of the Press? An Assessment of the Individual Complaint Case Law
- Utku Öztürk: Critical Issues from the Individual Complaint Case Law of Turkish Constitutional Court Regarding Political Sphere
- Levent Emre Özgüç: The Turkish Constitutional Court’s Individual Complaint Mechanism as a Pathway to the Right to Liberty in Cases of Detention and Arrest
- Sümeeye Elif Biber: The Impact of the Individual Complaint Case Law of the Constitutional Court on the Judgments of the Court of Cassation: Learning Experiences

**Moderator**
- Bertil Emrah Oder
- Room 8A-2-17

**Christophr Kuner:** Third-country legal regimes and the CJEU

Recent case law has given the CJEU an unprecedented role in ruling on the adequacy of data protection standards in third countries. The CJEU is the ultimate court for deciding questions concerning the interpretation and validity of EU law, and traditionally it has not passed judgment on the law of third countries, but this situation is changing. This paper suggests that the Schrems judgment, which allowed the CJEU to determine whether the level of data protection offered in a third country is ‘essentially equivalent’ to that in the EU, is at odds with the Court’s traditional judicial restraint in this area. It analyses the consequences of this judgment for future cases and examines the broader implications of this changed – and more active – role of the CJEU in determinations of ‘adequacy’.

**David Fennelly:** The CJEU and the Political Organs in Data Protection Governance: Striking the Right Balance?

With the shift of data protection from legislative creature to fundamental right in EU law, the landscape of data protection governance has radically altered. Through its jurisprudence under the Charter, constitutionalizing core principles of data protection law, the CJEU has played a central role in shaping the new landscape. This paper explores the relationship between the CJEU and the political organs as it emerges from this jurisprudence. In particular, it asks whether the Court has adopted an appropriate standard of review in its assessment of measures in this field.

**Orla Lynskey:** The role of collective actors in data protection governance

Article 8 of the EU Charter of Fundamental Rights specifies that compliance with data protection rules shall be subject to control by an independent authority. While these authorities have played a positive role in the adoption of advisory guidance on the data protection rules, their track record for litigating to enforce the data protection rules is less enviable. Many of the key protections offered by data protection law, for instance the prohibition on purely automated decision-making, have therefore not yet been applied by Courts. In contrast, the private enforcement of data protection law by collective actors has been instrumental in shaping this body of law. This is likely to increase given the new General Data Protection Regulation permitting representative (or group) actions. This paper examines the role of collective actors in data protection governance and considers its implications for the future development of data protection law.
The reservations that traditional legal perspectives have harboured about politics in the courtroom have also curbed the more general discussions about the functions of the judiciary in democracies. The judiciary’s deferent submission to the elected branches is all too often seen as the only criterion considered. This may seem particularly relevant in civil law jurisdictions, but as recent confrontations between the executive branch and the judiciary in the US indicate, it has a broader appeal as a research question as well. The panel addresses these questions finding the traditional limited view both objectively untenable and theoretically weak. Not only do courts factually play a more proactive role in democracies than traditional accounts would suggest, but this role can also be theoretically defended. Drawing on these presuppositions, the panel will explore the democratic dimensions of the judiciary with special reference to insights provided by contemporary political theory which we claim, remains an understated resource in research on the courts. The scope of analysis is not limited to traditional jurisdictions, but also includes the interaction between the judiciary and other institutions, as well as between different courts beyond state borders.

In this paper, focus is shifted from the prevalent question of the legitimacy of the judiciary to the no less important question of which courts are at all considered to have such a legitimizing function? The panel will explore the democratic dimensions of the judiciary with special reference to insights provided by contemporary political theory which we claim, remains an understated resource in research on the courts. The scope of analysis is not limited to traditional jurisdictions, but also includes the interaction between the judiciary and other institutions, as well as between different courts beyond state borders.

Seren Stig Andersen: The Legitimizing Role of the Courts

In this paper, focus is shifted from the prevalent question of the legitimacy of the judiciary to the no less important question of which courts are at all considered to have such a legitimizing function? The panel will explore the democratic dimensions of the judiciary with special reference to insights provided by contemporary political theory which we claim, remains an understated resource in research on the courts. The scope of analysis is not limited to traditional jurisdictions, but also includes the interaction between the judiciary and other institutions, as well as between different courts beyond state borders.
Limitations on constitutional amendment powers have become a growing trend in global constitutionalism and with judicial control of constitutional amendments. This panel will focus on some of the most burning dilemmas of limits of constitutional change. Can a constitutional change through courts be considered ‘constitutional’? And in which manner should we regulate constitutional changes during emergencies? These issues will be examined from both theoretical and comparative perspectives.

Participants

Tarik Olcay: The ‘Constitutional’ Constitution: Towards a Normative Justification for Constitutional Unamendability

The debates as to the relationship between the constitutional power and the constituted powers and to what extent the former contains the latter have been reigned by the proliferation of the constitutional amendment power that are aimed at limiting arbitrary exercise of governmental power. Offering a value test for the substance of unamendability, as long as it forms the democratic decision that founded the constitutional order. This paper seeks to explore whether a normative justification can be offered to justify some types of limitations on constitutional amendments. Taking issue with the organic justification which serves to justify fundamental features of jurisdiction-specific constitutional cores which may consist of some particular values that amount to a tool of exclusion of certain parts of society that did not have a chance to be part of ‘we the people’. There is no value test for constitutional derivation, this paper explains how the organic justification rests on the understanding of ‘democratic decisionism’ as an organic justification over the past few decades. This tension between the constitutional and constitutive has manifested itself as crises of constitutional amendment before courts across several jurisdictions. Courts have managed to strike down constitutional amendments they regarded to have violated the fundamentals of the constitution. Yet, while there are numerous countries in which this doctrine of unconstitutional constitutional amendment is now established it remains a controversial subject for constitutional theorists: how can courts be justified to have the final say in a question apparently for the constituent power? The most common justification offered both in constitutional theory and judicial practice for the judicial oversight of constitutional amendments is the organic justification. The organic justification asserts that every constitution has an unamendable core, through which it protects its spirit and identity regardless of whether it contains explicit limitations on constitutional amendments. These methods of examination have no such generalized and clarified structure as the principle of proportionality; however, the functions of these seem to be rather similar. Regardless of the common temporal limitation on constitutional amendment powers. At first look, one would expect that constitutional amendments could be a useful tool for overcoming various crises. On the other hand, there is a fear that during emergency times, constitutional amendment powers would be used for suspending constitutional rights and freedoms or in other ways which might lead to desolation of the entire democratic regime. Indeed, the amalgamation of the two extraordinary powers (amendment and emergency) has proved to be a frictional protection which would be in conflict with the constitutional identity.

Mikolaj Barczentewicz: Constitutional change through courts: when is it really unconstitutional?

From the perspective of social science, there is nothing surprising in a statement that courts are among the major agents of constitutional change and that, in some circumstances, they are the main agent. However, this conflicts with widely held intuitions among lawyers of many jurisdictions that their courts either lack legal power to make law or, at least, that they lack legal power to make law of such great significance as constitutional law. And when some courts clearly take part in constitutional change, those intuitions held by lawyers give rise to claims of ‘unlawfulness’ or ‘unconstitutionality of the courts’ actions. There is considerable conceptual confusion over when constitutional change through courts is unconstitutional (or unlawful) and when it is not. Fortunately, this confusion can be dispelled by extending the juridical framework of H.L.A. Hart, aided by modern social scientific approach to the study of normative change. I argue that social practices that are at the foundation of every legal system may make the courts a constitutional (lawful) agent of constitutional change even when no deliberately designed constitutional rule grants the courts such legal power.

Zoltán Pozsár-Szentmiklósy: Contextual elements in the judicial review of constitutional amendments

The possibility of reviewing constitutional amendments by judicial organs has a considerable practice worldwide and is also well theorized. These methods of examination have no such generalized and clarified structure as the principle of proportionality; however, the functions of these seem to be rather similar. Regardless of the common temporal limitation on constitutional amendment powers. At first look, one would expect that constitutional amendments could be a useful tool for overcoming various crises. On the other hand, there is a fear that during emergency times, constitutional amendment powers would be used for suspending constitutional rights and freedoms or in other ways which might lead to desolation of the entire democratic regime. Indeed, the amalgamation of the two extraordinary powers (amendment and emergency) has proved to be a frictional protection which would be in conflict with the constitutional identity. Therefore, this temporal unamendability concerns the delicate balance between constitutional preservation and constitutional adaptation, tilling it towards the former. This limitation raises fascinating theoretical, practical and institutional questions, which are conspicuously absent from the literature. In particular, this limitation might be considered dangerous as it may lead to the use of extra-constitutional means. This research would review the historical origins of this prohibition, its philosophical-theoretical foundations and practical challenges, in order to propose a more suitable constitutional design for constitutional amendments in emergencies.

Rehan Abyeatne: Discussant
Transitional decisions were typically seen as processes governed by domestic law and politics. Although in the last two decades, international law embraced transitional justice (TJ) topics with international HR courts deciding on questions of accountability, many, and new institutional setting and methodology, often overruled the choices of domestic decision makers, we still lack a deeper empirical understanding of the interaction between domestic and international actors. This panel therefore aims to address the impact of international human rights bodies on democratization and transitional justice processes. First, we look at general trends in the ECtHR and IAmCHR case law. Papers presented in the panel address both normative issues and empirical evidence of their impact, discuss cycles of decision-making, and aims pursued within the TJ framework. Then we move the attention to other international actors, such as the EU and the role of TJ in the accession process and accession conditions. Panelists address also the current problem of transitional justice in the context of democratic backsliding of unconsolidated young democracies, the reactions of different international actors and their ability to stay these processes. We ask what framework these actors use and what options they have to stay the democratic backsliding.

Participants
David Kosar
Ximena Soley
Katarína Šipulová
Antoine Buyse
Martin Kyrijev
Moderator
David Kosar
Room 8B-2-33

David Kosar: Transitional Justice in Regional Human Rights Courts and the Paradoxes of International Justice

This paper explores the ways in which transitional justice (TJ) has been articulated and adjudicated by two regional human rights courts: the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). Both courts have extensive case law dealing with the matter, but seem to approach the goals of TJ justice quite differently. On the one hand, the TJ cases are the very core of IACtHR’s jurisprudence. The IACtHR seems to be very much focused on transitional justice as a triad: investigate-prosecute-punish. This push for more accountability and for TJ as a tool against criminalization, is part of what Karen Engle calls “the turn to criminal law in international human rights”. This approach has successfully led to a reduction of impunity across Latin America, but an unintended consequence of this focus is to preclude other approaches to TJ that may highlight harmony over retribution. On the other hand, the ECtHR has focused on a much broader set of measures, including for instance lustrations, memorials, and property rights. As a result, it has seen TJ as a much more nuanced spectrum, of which prosecutions are just one fairly small part. An unintended consequence of this approach is to look at TJ as disruptive of the achievements of democracy and rule of law rather than conducive to them. Therefore, across the Atlantic, different understandings of TJ inform different visions of “international justice” as part of the mandate of these courts. It oscillates between international justice as a stabilizing force (ECtHR), to international justice as transformative (IACtHR). TJ can thus be perceived either as a proxy for the rule of law, or an obstacle to it, depending on which court one relies upon. This paper attempts to reconcile these two conceptions by exploring the cases of the two courts, and comparing them with broader issues of engagement of these two courts with the rule of law, and narratives of international justice.

Ximena Soley: Democratization and Transitional Justice as Identity-Forging Moment in the Inter-American System

This paper offers an alternative narrative of the Inter-American Court of Human Rights (IACtHR) and transitional justice. Instead of describing how the IACtHR shaped domestic transitional processes the focus shall be on the influence of transitions in the workings of the Inter-American human rights system. First this paper will show why the return to democracy set off a virtuous cycle that is key to understand the dynamics between the IACtHR State organs and civil society. In this virtuous cycle States made human rights and their protection by the IACtHR an important pillar of the transition substantially changing the relationship between domestic and international human rights law. Often these changes were cemented in the constitution. For their part civil society organizations made extensive use of the regional mechanisms of human rights protection. These organizations kept the human rights agenda front and center and made international human rights law become more tightly enmeshed with the domestic order. In a second step this paper will shed light on the factors that converged for this ‘constitutional moment’ to take place. The accepted wisdom is that consensus forged between the Left and the Right regarding the centrality of human rights set in the broader context of the global human rights revolution and the rise of civil society. Finally the significance of transitions for the institutional self-understanding of this regional human rights tribunal will be explored.


This paper aims to show what factors were involved in the varying dynamics of transitional justice processes in the post-communist countries, particularly the Czech Republic, Poland, and Slovakia, with a special emphasis being put on “externalities” influencing the transitional justice decisions: i.e. factors externally constraining domestic political elites and limiting the scope of potential decisions they could take to implement particular models of transitional justice. In my understanding, such externalities are especially (1) the influence of the European Union and its pressure to comply with international human rights commitments, and (2) the constitutional courts acting as a proxy for international organisations and human rights bodies. This paper therefore sets out to address two core aims: first, it offers a comprehensive analysis of the EU’s position on transitional justice, and compares it with the new 2015 Transitional Justice Framework. Second, it shows how significantly transitional justice differed in relatively similar states with identical minimally sufficient conditions. The case study compares transitional justice decisions made in the Czech Republic, Slovakia, and Poland, suggesting possible fundamental causes of these differences. Special emphasis was put on the “externalization” of transitional justice through international actors such as the European Union and the Council of Europe, acting through accession conditionality and other political criteria and forms of pressure.

Antoine Buyse: Reverse Transitions and European Human Rights Law

This paper delves into the current trend of ‘reverse transitions’. Transitions are usually assumed to occur from authoritarian rule to democracy, safeguarded and secured by integration into international human rights regimes. The weakening of democratic rule of law and human rights in a number of European countries puts the assumption of these regimes as anchors against backsliding into authoritarian rule to the test. Reverse transitions (or the threat thereof) affect the middle ground between the state and citizens. The paper will focus on this shrinking civic space by looking at how state authorities regulate and sometimes truly endanger the position of the media of civil society organisations (e.g. through anti-NGO laws) and the freedom of public assembly and protest. This shift is not just to what substantive (European) human rights are affected by this, but also how the European Convention of Human Rights system, with its Court can and should cope with these trends. Amongst others, it will investigate whether the tools developed in dealing with the aftermath of traditional transitions – from dictatorship to democracy and from armed conflict to peace – such as the pilot judgment procedure and the addressing of structural issues in other ways, are useful and salient in this context. Can human rights watchdogs play any role in turning the tide of reverse transitions?

Martin Kyrijev: Transitional Justice International Law and Reverse Transitions

The last discussion paper addresses previous participants’ presentations and sums up current challenges posed by the international law for the conceptualization of transitional justice and transitional rule of law. Discussant challenges the actual problem of reverse transitions and institutional problems of young democracies (both in democracies transitioned from communist regimes and Latin America non-democratic regimes) in the light of transitional rule of law and asks what role international law and selected forms of transitional justice play in emerging reverse transitions. The discussion paper concludes with a question how to re-design a new framework of transitional justice in order to prevent the emergence of current crises.
Magdalena Jozwiak: Balancing according to Google: on the rise of private actors as adjudicators in conflicts between the speech and privacy in the EU

The aim of this paper is to discuss how the technology development brings to the fore the role of private actors in shaping and adjudicating on the appropriate privacy-speech balance. The example on which the paper is drawing derives from the CJEU case law and the forthcoming reform of the EU data protection law. The EU’s data privacy system has been undergoing some technological and, on the one hand, the proposed reform aims at strengthening the internet users’ control of their data by providing for so called right to be forgotten and the very broad scope of the right to data protection in general. On the other hand, the power to make decisions on how the right to data protection is to be interpreted and executed is attributed to private actors, most notably search engines. Although such developments seem purely functional in their effort to enhance the efficacy of the data protection system, their impact is much more pronounced as it marks the shift from the judicial decision making on the scope of the privacy right to the decision making by private actors. Thus it is the latter that becomes a norm entrepreneur and enters the normative loop of governance norms. This assignment is necessary for many legal developments and fundamental rights before the Court of Justice of the European Union (CJEU) on trans individuals. Firstly, it singles out the narrative of the “gendered subject”, designed to fit within the legal and philosophical – feminist and Foucauldian – implications. Secondly, it focuses on the new subject of governance. The paper explores the implications of these changes in the mode of constitutional adjudication as involving either abstract or concrete review. However, the rise of social science evidence in constitutional adjudication has resulted in a large number of cases that are best characterized as falling somewhere in between. Constitutional litigation increasingly requires courts to make decisions about notional constitutional plaintiffs who may or may not be before the courts, or who are there in different capacities – as interveners as opposed to as named parties, for example. What are the implications of these of the mode of constitutional adjudication? Can courts successfully navigate the complex dynamics of constitutional cases that involve differently situated notional plaintiffs or do these modes of analysis result in errors and inconsistencies requiring courts to make decisions about notional constitutional plaintiffs who may or may not be before the courts, or who are there in different capacities – as interveners as opposed to as named parties, for example. What are the implications of these?
"post-truth" and Americans are now familiar with the phrase "fake news" and "alternative facts." Some refer to this factual narrative. This working paper explores why the US judiciary has become so dependent on facts in its constitutional decisions, and then warns about the consequences of such a "fact-y" turn in an environment where information is so easy to manipulate.

Francisca Pou Giménez: Fact-Finding and Proportionality Adjudication in Mexico
This paper will focus on proportionality adjudication in Mexican Supreme Court. Mexico superimposes three systems of judicial review – centralized, semi-centralized and decentralized – being amparo – the semi-centralized channel – the most important for the protection of rights. I will track the Supreme Court approach to the acquisition and use of empirical/social/personal in nature and therefore are not typically matters of witness credibility and are not likely to be within the special knowledge of the parties. They also need not be scientific or technical the usual subject of expert witness testimony. The usual assumptions the U.S. Supreme Court makes about facts – that they are best developed through party presentation; that narrow standing or conservative intervention rules support rather than detract from their effective adjudication; that appellate courts should not review them de novo or should hear legal arguments rather than evidence -- do not hold with respect to social or legislative facts. And yet assessments of such facts regularly form the basis for constitutional rulings in the United States and elsewhere. Driven on comparative experience, this paper discusses the options available to constitutional and apex courts facing the need to develop and adjudicate social or legislative facts.

Allison Orr Larsen: Constitutional Law in a World of Alternative Facts
Oxford Dictionary's 2016 word of the year was "post-truth" and Americans are now familiar with the phrases "fake news" and "alternative facts." Some combination of technological speed infinite access to information, and a diluted notion of expertise has led to a very central role in our political discourse for factual claims about the way the world works. But – as we are learning – facts are not always what they appear to be. And we are naive to think this will not affect the judiciary. Modern constitutional cases in the United States often turn on questions of fact: Do violent video games harm child brain development? Does money corrupt politics? Is voter fraud a common occurrence? The factual narrative that accompanies constitutional law is not costless. Legal systems outside the United States often answer tough questions about human rights and governmental power without citing secondary sources or supporting an authority on complex questions of fact. There are virtues, certainly, to anchoring legal rules in concrete observations about the way the world works. Less obviously, however, there is also a price to be paid for underestimating the importance of facts and factual narratives in constitutional adjudication.
The European examples are coupled with the analysis of European Union judgement by the UK Supreme Court 2002. In extreme cases, she even acts herself – think of substitu- tion orders (Trencon 2015). In between, there is a grey area. A court may order the executive to act, leaving discretion about what exactly has to happen or how – think of housing rights (Grootboom 2001). In other cases, an order may look like an obligation to obtain a result, but in reality be more of an obligation to make an effort. In SAPS v SALC (2015), the Constitutional Court forced the police to investigate alleged human rights abuses in Zimbabwe. How should future courts enforce such an order? How detailed should such an order be for it to be enforceable at all? Does separa- tion of powers doctrine impose limits? And how do enforceability issues impact court authority? Paolo Bonini: A case about the connection between the legislative by omission and the judicial decision in Italy

The paper will observe what happens when the Parliament choose intentionally to not establish some- thing about an issue, because of a huge political de- bate, and then the Court has the opportunity to decide a case about the same matter. Observing how the judge decides the case on the subject and about the method, it could be recognized an institutional (and political) dynamic in advantage of the Judges. In Italy, as a civil-law system, the law making process is split in two separated periods. The first, needed and sufficient to set the political will of the People: the legislative one. The other, eventual and however residual: the judiciary one. Within the statute about the “civil unions”, the Parliament chose to delete the disposition that gave the right to the stepchild adoption, after a huge debate. Four days after, the Court of Cassation decide in a case about a politically and constitutionally crucial cases, she even acts herself – think of substitu- tion orders (Trencon 2015). In between, there is a grey area. A court may order the executive to act, leaving discretion about what exactly has to happen or how – think of housing rights (Grootboom 2001). In other cases, an order may look like an obligation to obtain a result, but in reality be more of an obligation to make an effort. In SAPS v SALC (2015), the Constitutional Court forced the police to investigate alleged human rights abuses in Zimbabwe. How should future courts enforce such an order? How detailed should such an order be for it to be enforceable at all? Does separation of powers doctrine impose limits? And how do enforceability issues impact court authority? Paolo Bonini: A case about the connection between the legislation by omission and the judicial decision in Italy

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The paper explores the development of the interdisciplinary communities of knowledge devoted to the study of International Courts. For that purpose, and following previous contributions in other social sciences, this paper presents a detailed, and systematic, exploration of the relationships of the scholarship in International Courts. The paper aims to offer a general overview of the application of international law in the Occupied Territories in the past decade. The article argues that while the recognition of the right to self-determination of the Palestinians, the international legal community and, in particular, the International Court of Justice, perceived itself as part of the “Global Community of Courts” and thus sought legitimacy among the international community and, in particular, the international legal community. The current Court, on the other hand, perceives itself first and foremost as a domestic institution, serving and addressing the Israeli public, and is concerned much less about how its decisions are accepted abroad. This difference translates, among other things, to weaker reliance on international law both in practice and rhetoric.

Adam Shinar: Israel’s External Constitution: Friends Enemies and the Administrative Law Distinction

I examine the Israeli Supreme Court’s jurisprudence regarding the application of constitutional law to the Occupied Palestinian Territories. The central puzzle the paper seeks to solve is what accounts for the Court’s willingness to apply Israeli administrative law to the Territories, whereas it remains ambivalent about the application of constitutional law. The answer, I argue, does not lie with legal doctrine, but with unarticulated sentiments about the nature of constitutional law. Constitutional law demarcates the political community. Those within its scope are a part of the polity. Those outside it are viewed as potential threats. Thus the Court’s restrictive application when it comes to Israeli extra-territorial constitutional application is the Schmittian “friend/enemy” distinction, which is the only distinction relevant to establishing political authority. I extend his theoretical framework to explain the doctrinal reality of Israeli constitutional law outside the borders of Israel, which views the Palestinian collective as threatening Israel’s Jewish nature. This also explains the constitutional/administrative law divergence. Constitutional law sends a message of inclusivity to bearers of constitutional rights. Administrative law lacks the constitutional nature of constitutional law. Wherever there is bureaucracy there is administrative law, which takes care that things administer themselves and is concerned with the machinery of the state than with individual rights.

Masri Mazen: The Effectiveness of Litigating Scandals – The case of the Palestinians in Israel

The role of the judiciary arises constantly in debates on the nature of the Israeli state and its policies towards the Palestinians both in Israel, and the West Bank and Gaza Strip. Some authors hold that litigating scandals is the most effective strategy, while others argue that it is of little use. This paper seeks to understand the different uses of this concept, asking whether this is a fruitful category or – on the contrary – it may entail counterproductive effects in terms of ensuring equality and legal certainty in the protection of human rights.

CONCURRING PANELS

154 INTERNATIONAL LAW AND INTERNATIONAL COURTS

Participants
Juan A. Mayoral
Natalia Caicedo and Andrea Romano
Cecilia Bailliet
Marlene Wind
Moderator
Marlene Wind
Room
8B–3–01

Juan A. Mayoral: Mapping the scholarship in International Courts: An exploration of networks created in journals

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Cecilia Bailliet: Rejection of Requests for an Advisory Opinion as an Example of Strategic Prudence by the Inter-American Court of Human Rights

Advisory opinions may be considered to challenge sovereignty because they often address political issues which may be contentious at the national level. Nonetheless, within the Inter-American Human Rights System, the Court has actively utilized advisory opinions to develop human rights law and nurture democracy, in particular addressing the rights of migrants children, Indigenous people, and detainees. Thanks to pragmatic advocacy, which is closely tied to civil society groups, organizations, and institutions, such as the Inter-American Commission of Human Rights, which pursues litigious strategies to strengthen recognition of new rights by regional courts. This paper argues that the Inter-American Court of Human Rights is currently under pressure to uphold its legitimacy and examines whether the Court practices strategic prudence by rejecting certain requests for advisory opinions. In particular, it discusses four cases involving political issues: alleged incompatibility of national legislation with the American Convention, the prohibition of corporal punishment of children, the availability of judicial remedies for persons sentenced to death penalty, and due process rights relating to the impeachment of the president of Brazil. The paper argues that the examples of restraint reveal a complex balance between the Court’s role in applying and interpreting human rights in relation to nurturing democracy while respecting sovereignty. This signals a possible tension between the contrary.

Marlene Wind: Who cares about international law?

Although Scandinavians are often celebrated as the vanguards of human rights and international law, we make about what they consider human rights, and how Scandinavians have embraced these international courts and conventions that they themselves helped establish after the Second World War. This article presents original and comprehensive data on three Scandinavian courts’ citation practice. It demonstrates that not only do Scandinavian Supreme Courts engage surprisingly little with international law, but also that there is great variation in the degree to which they have domesticated international law and courts by citing their case law. Building on this author’s previous research, it is argued that Norway sticks out as much more engaged internationally due to a solid judicial review tradition at the national level. It is also argued that Scandinavian legal positivism has influenced a conciliatory approach to international case law than would normally be expected from this region in the world.
what extent legal challenges in Israeli courts could be effective in resisting discriminatory laws and policies against the Palestinians in Israel. The paper will focus on cases brought within the last 15 years in three areas: citizenship and immigration, especially family reunification, land rights and restitution, and disqualification from participation in the elections for parliament. The paper will examine to what extent these cases were successful, and the different factors that explain success and failure. These factors include local questions related to the nature of the constitutional regime and its legitimacy, and more global trends related to the role of the judiciary.

156 FRAMING PROPORTIONALITY

This paper builds on an analysis of the German Federal Constitutional Court case-law made by Niels Petersen. He challenges the critique of proportionality as an instrument of judicial self-empowerment. In his view, proportionality does not create judicial power. On the contrary, proportionality presupposes its existence. This paper tests this hypothesis using empirical analysis. It maps the rise of proportionality in the case-law of the Czech Constitutional Court (hereinafter “the Court”). As preliminary data shows, the Court first introduced its variation of proportionality in proceedings on constitutional review of legislation. It was meant to be a universal method to review constitutional rights infringements. In the first decade of its existence, the Court was nonetheless, very reluctant to base its decisions on proportionality in proceedings on constitutional complaints. Later on, the Court also introduced a modified version of proportionality in this type of proceedings. But it took another decade for the Court to unite its constitutional review standards in both types of proceedings. In conclusion, the paper reveals the reasons for the reluctance of the Court to apply proportionality in proceedings on constitutional complaints. And it compares them to the developments of the proportionality in Germany, which seems to be reverse.

Caroline Henckels: An exotic jurisprudential pest? Building a path to proportionality review in Australian constitutional law

The Australian High Court’s tentative moves toward adopting a European-style proportionality test as a method of constitutional review have been hampered by concerns the strict separation of judicial power under the Australian Constitution may prevent judges from engaging in the evaluative tasks that proportionality requires. The prospect of judges substituting their views for those of legislators in order to both questions of fact and evaluative judgments raise anxieties about the proper boundary of the judicial role. This paper argues that the manner in which a court undertakes proportionality analysis is crucial to the question whether it is exercising judicial or non-judicial power. In this respect, the concept of judicial deference plays a vital but thus far undertheorised role in Australian constitutional law. Deference refers not to judicial submission or surrender to the legislature, but to giving weight to the judgment or opinion of government in circumstances of normative or empirical uncertainty. Many other jurisdictions take such an approach, whether for separation of powers reasons or for reasons of subsidiarity or the right to regulate at international law. An increased understanding of the rationales underpinning deference in the context of constitutional review would diminish concerns about the Court straying outside the domain of judicial power; thereby supporting the continuing development of proportionality analysis as a method of constitutional review.

Jimmy Chai-Shin Hsu: Dignity Proportionality and Capital Punishment: An Analysis of Comparative Constitutional Jurisprudence

The abolition of capital punishment has gathered steam globally over the past three decades. However, the controversy remains active in many countries. Where effective judicial review is available, the death penalty has often been one of the major constitutional issues faced by the judiciary. The fundamental issue in these cases is whether capital punishment violates human dignity and right to life. In this paper, I cast spotlight on the relatively neglected engagement dialogue, or debate in this body of comparative constitutional jurisprudence. I will focus on the approaches of rights analysis with which the courts review the constitutionality of capital punishment in general. I will identify major approaches or patterns of rights analysis on this issue in prominent comparative judicial decisions, among which proportionality review features prominently in recent decisions. Jurisdictions featured most prominently will be Japan, the US, Hungary, South Africa, and South Korea. The dialogue to be presented in this paper is not always self-consciously conducted by the courts. I critically re-construct the dialogue by identifying the parts of legal reasoning that constitute meaningful debates. I adopt this method with an aim to address the following questions: If any court is to engage in these transnational judicial decisions, what lessons can be drawn from them? Are certain approaches more tenable than others?

Anne van Aaken: Framing Proportionality: Rationality and Cognitive Biases

Proportionality analysis (PA) is ever more widely used by national and international courts to balance public goals and private rights or rights against rights. Proportionality itself is a frame within which we often think about these issues. Hitherto, it mostly seen as a rational process of decision-making. But is it? How far does the frame of the PA itself frame the decision-making of (judicial) actors? Do biases and heuristics influence the decision qua the way PA is set up? The paper aims to shed light on certain features of PA which depend on how the analysis is conducted, influence the outcome of the decision due to biases and heuristics of the relevant decision-makers.
ConCurring panels

During the last decades it has become more common and important for national courts to interact with foreign and international courts. These developments imply challenges for the domestic legal systems. In many States, the structure of the court system, the sources of law that a court may or shall take into account when making decisions, the status of court decisions, and the rules of procedure are deeply rooted in the State’s constitutional traditions. International interaction between courts may often disturb this traditional order in different ways. In this panel, certain aspects of this new landscape of international interaction between courts will be discussed. The contributions in the panel have a Swedish perspective, but the problems discussed are to a large extent of a more general character.

Participants
Henrik Wenander
Tormod Otter Johansen
Vilhelm Persson
Joachim Åhman
Moderator
Joachim Åhman
Room
8B–3–49


In distinction to certain other European countries, the European Court for Human Rights (ECtHR) is rarely discussed in critical terms in Swedish media or in contemporary legal and political debate in Sweden. The presentation identifies examples of sporadic critical appraisals of the ECtHR in case-law and in legal debate. Interestingly, no political parties represented in the Riksdag have expressed scepticism to the ECHR. However, in 2016 the ECtHR held that Tele2’s right to a fair trial had been violated. This case illustrates the potential conflict between the freedom of the press and the right to a fair trial. In Sweden, this conflict has for the most part been resolved to the satisfaction of the press, in accordance with constitutional traditions with roots in the 1766 Freedom of the Press Act. The legacy of this act is even considered one of the basic principles by which Sweden is governed. Thus, the Arlewin case also illustrates a clash between the European Convention and the Swedish protection of fundamental rights, potentially touching upon core values of the constitution. This is also a clash between different approaches to the protection of the freedom of the press. The European Court often considers proportionality and reasonableness of the end result. In Sweden, the printed press and some other selected media types enjoy a special constitutional protection, determined solely by technical criteria, not by the content of an expression or by the result.

Joachim Åhman: A New Chapter in the Swedish Data Retention Saga

In its judgement of April 8, 2014 (Joined Cases C-293/12 and C-594/12), the Court of Justice (the Court) invalidated the Data Retention Directive 2006/24/EC. According to the Court, the obligations in the directive violated the Charter of Fundamental Rights of the European Union. In spite of this, the Swedish law implementing the directive has remained in force. In 2016 the ECtHR held that a man that considered himself a victim of defamation was not protected under Article 6 ECHR or the preliminary rulings procedure by the CJEU, it still raises questions about the limits of diverging definitions, views and concepts between European legal orders. The Swedish example indicates that even on basic issues, important for any legal order and the rule of law in general, large discrepancies can prevail. The paper will attempt to frame the questions for the purposes of future comparative studies implicated by this.


Swedish law has a unique constitutional protection of the freedom of the press. One part of this is significant restrictions on liability for expressions in certain media types. A consequence of this is the situation of the European Court of Human Rights (ECtHR) case Arlewin v. Sweden (Application no. 22302/10). There, a man that considered himself a victim of defamation because of allegations in a TV show, could not press charges in Sweden. In 2016 the ECtHR held that his right to a fair trial had been violated. This case illustrates the potential conflict between the freedom of the press and the right to a fair trial. In Sweden, this conflict has for the most part been resolved to the satisfaction of the press, in accordance with constitutional traditions with roots in the 1766 Freedom of the Press Act. The legacy of this act is even considered one of the basic principles by which Sweden is governed. Thus, the Arlewin case also illustrates a clash between the European Convention and the Swedish protection of fundamental rights, potentially touching upon core values of the constitution. This is also a clash between different approaches to the protection of the freedom of the press. The European Court often considers proportionality and reasonableness of the end result. In Sweden, the printed press and some other selected media types enjoy a special constitutional protection, determined solely by technical criteria, not by the content of an expression or by the result.

Moderator
Christina Lienen
Room
8A–4–17

Emilia Justyna Powell: Constitutions, Legal Practice, and the Measurement of Sharia-Based Institutions in the Islamic World

The Islamic legal tradition is more diverse than other legal traditions because the balance between religious and secular laws within domestic jurisdictions is frequently renegotiated. However, many scholarly analyses of legal systems in the Muslim world rely on constitutional instruments to detect sharia-based institutions. Constitutions are, at best, first steps in creating a legal apparatus, and the legal system as a whole – beyond constitutions – determines the size of the gaps between constitutional aspirations and actual practice. An empirical shift towards Islamic legal practice, defined as the sharia-based regulations and procedures that routinely affect actors within a legal system, can reasonably extend scholarship’s limitations by assessing the degree to which actors within a state are actually governed by distinctively Islamic institutions. Using factor analysis techniques on new data covering Muslim-majority countries’ constitutions and legal practices, we demonstrate that constitutional and practical variables fall along two distinct measurement dimensions that often produce different conclusions regarding the implementation of sharia-based norms within a country. The main insight of this paper is that only measures that couple constitutional language with measures of subconstitutional legal practice are likely to yield accurate conclusions regarding levels of sharia implementation throughout the Muslim world.

Christina Lienen: Two Waves: The Contemporary Development of Common Law Constitutional Rights

This paper focuses on the contemporary development of common law constitutional rights, with a particular emphasis on three main phases. The first wave, which peaked in the 1990s, occurred in the context of the run-up to the Human Rights Act 1998 and against the backdrop of the liberalisation of judicial review in the 1960s. The succeeding ‘trough’ is roughly represented by the first ten or so years the Human Rights Act 1998 was in force. During that time human rights protection at English common law developed
in the shadow of the Convention. The second wave, the current resurgence of common law constitutional rights, commenced roughly around the same time UK Supreme Court was created, and its aftermath still produces powerful judgments today. I identify the contributing factors, and discuss their respective constitutional implications.

Stefan Schlegel: *The fluidity of constitutions as a function for the rank that courts appoint to international law: a comparison of Germany, Austria, and Switzerland*

This paper looks at the interrelation between courts, the fluidity or reformability of constitutions and the rank of international law relative to constitutional law. It states the hypothesis that courts have to assign a higher rank to international law the more often a constitution is amended, the more details it contains, and the more their own possibilities of constitutional review are restricted. This is substantiated by a comparison of the constitutional jurisdiction of the highest courts of Germany, Austria, and Switzerland. It demonstrates how the Constitutional Court of Germany due to the comparatively erratic character of the Grundgesetz (and due to its own strong role) is able to maintain that there is a lesser degree of international treaties, higher even than the ECHR. Its own jurisprudence mitigates conflicts between the two sets of rules in all but theoretical cases. The Swiss Federal Court in contrast, not authorized to assess the constitutionality of treaties and dealing with a constitution that is amended almost on a yearly basis, had no other choice than to state that (some) treaties rank higher than even younger constitutional law. Austria, where, after a long struggle, the ECHR was granted constitutional rank, is in a middle position between the other two countries, that is, the reformability of the constitution and the role of constitutional review rather than a specific legal tradition that shapes the relation of a constitution and international law.

Michelle Miao: *The empowerment of courts in an authoritarian context: A decade of death penalty review in China as a case study*

The power of courts is central to the understanding of political and legal life in democratic as well as non-democratic settings. This article explains that, contrary to the conventional wisdom that authoritarian regimes normally curtail or even eradicate judicial power to strengthen their exclusive control over the social and political system, the Chinese legal and political system could be permitted or encouraged in non-democratic jurisdictions. Bureaucratic reconfiguration may permit courts to acquire more autonomy and authority. A salient example is the recentralization of review power over death sentences in China, controlled by the Constitution and the Criminal Procedure Law. The supreme court is now in charge and any case passing the Supreme People’s Court will be reviewed. The Chinese Supreme People’s Court (the SPC) has been able to expand its power and strengthen its authority by 1) consolidating previously dispersed and fragmented judicial power. 2) through this process of enhancing due process and consistency, unshackling local courts from the chain of corruption and political interests. 3) placing meaningful checks on the exercise of power by the central and local courts through its supervision on lower courts’ performance. Thus Chinese courts seized an opportunity of judicial empowerment without contravening the core interests of the authoritarian Party-state. The arguments in this article, admittedly, is qualified by the fact that they need to be understood against the central tension at the heart of the authoritarian governance – the need to maintain tight control of the society and the sought of legitimacy.

Fulvio Costantino: *Venom, crisis and legal traditions. Lessons from Italian court cases*

A growing concern about the economic situation is having a huge impact on the behaviour of institutions, including national courts. Traditional principles such as the act of recent or recent ones such as the protection of legitimate expectations, seem to face difficulties in being protected. The examination of some cases can be useful to verify if, with the crisis, there are real risks of undermining the foundation of the rule of law.


When it comes to decision-making on national security issues, the courts have to read the mind of foreign public law as the extent to which judges should be involved. Nevertheless, in recent years UK judges have been increasingly ruling on such issues. It is therefore pressing for law to analyse closely how UK judges have failed to uphold part or all of the UK Government’s decisions on a national security issue, due to disagreement about the level of existing threat to security, or the best way to deal with it. The analysis consists in identifying key themes as to the reasoning judges provide when disagreeing with the executive and what implications such reasoning may have for the broader debate on the role of judges with respect to national security. This analysis is of relevance for the ILO conference as it holds significant influence. If the UK’s role in the international committees of cooperation is a matter of contribution, if any, courts can make to decision-making in an area which has not only long stood as a thorny issue for public lawyers, but is increasingly urgent to engage with as more and more controversial issues are passed globally in the name of security, the recent US travel ban being just one example of many.
ConCurring panels

Norwegian Supreme Court when negotiating Nordic Exceptionalism: The Function of the Constitution and guarantees of fundamental rights. Yet there is a lack of research on its decision making since the accession of Slovakia to the European Union, and the differences between the ‘three CCs’ divided based on its three presidents so far. This paper uses the analytical framework of the ‘negative’ and ‘positive’ legislator to answer whether and why the SCC acted as a legislator during the three court terms. For this purpose, it uses a new dataset generated within the JUDICON project, which allows us to identify how the SCC has positioned itself vis-à-vis changing legislative majorities between 1993-2015 and whether there has been a period in which it used its legislating capacities beyond the average standard. The analysis offers new findings about each of the ‘three CCs’. During the latter, the SCC’s decisions gradually shifted towards ones favorable to the parliamentary majority (2006-2010) and the head of state, with a few exceptions. Moreover, the recent emptying out of the bench due to the conflict on the president’s competences in the appointment procedures further exacerbated the resignation of the majority on the legislating function of the SCC, and gave rise to some arguably unconstitutional decision-making practices.

Inger-Johanne Sand: Constitutionalism and Nordic Exceptionalism: The Function of the Norwegian Supreme Court when negotiating public policies and constitutional rights

Constitutions in an international context: The Functi...
Bentham American judicial review is not a case of LLSL but only an example of conjunctive sovereignty. Second, I agree with Hart that Bentham's command theory cannot adequately explain the phenomenon of LLSL, but I disagree with Hart's concrete analysis and arguments. I will demonstrate that Bentham's command theory can sufficiently and even better explain the power-conferring constitutional provisions, and that Bentham's idea that legality determines validity, on principle, is correct. Third, I will argue that Bentham fully realizes that his command the art cannot explain LLSL. Bentham then developed a theory of leges in principem, and argue that this theory is a better explanation of LLSL than Hart's theory of authoritative reason.

Tania Atiana: The notion of Sovereignty in Mexico co after Donald Trump's election

The 'public reason' related defenses of judicial review claim that the democratic ideas of reason-giving reciprocity and consensus flourish in court settings, and that judicial review is therefore legitimate. This scholarship has come up against various legitimacy or democracy-based objections, but the ones that have really gained traction are those centering on the fact of disagreement among judges, and indeed generally on the meaning and application of rights. In this paper, I probe further than Pettit (and indeed disagree with him) as far as he considers it in applying this thinking to judicial review specifically. I argue that the idea suggests these disagreement-on-rights based judicial review sceptics have good grounds (based on republican theory) for their scepticism. But I also argue that, in ruling against judicial power and lauding legislative supremacy, they generally take their opposition too far: that they miss the democratic values of judicial review, when it is understood in light of this republican idea. The paper considers the theoretical question in light of the Charter of Fundamental Rights, specifically.

Guilherme Pena de Moraes: Trends of Contemporary Judicial Review of Legislation

This study aims to address the trends of judicial review of legislation, in view of contemporary issues of Constitutional Law. The scientific investigation is geared to detect the extent and the constitututional courts, meanwhile it establishes the points of divergence between those courts. In fact, the work focuses on the area of concentration of the judicial review in democratic legal systems and, more particularly, in the line of research on the globalization of the constitutional decision-making process. The research is organized into five chapters, each of them discussing the mentioned trends, such as the rational justification for the internationalization of the decision fundamentals. The most important results will undoubtedly be related to the role of contemporary judicial review of legislation in safeguarding democracy protecting and promoting civil rights.

Eduardo Moreira: Unconstitutional State of Affairs

The so-called Unconstitutional State of Affairs is a new model of judicial review with an increasing importance in South America, which can be transplanted to different constitutional issues. The rights will highlight the main aspects of judicial power to recognize unconstitutional situational facts and affairs not fixed by the executive and legislative branches. The omission in this matter is long and continuously in violation of fundamental rights. Colombian reform construction in affected areas by the Farcs (forced displacement of people landmark case) and brazilian prisional system (daily tragedy of prisions main debate) are two good examples of unconstitutional state of affairs. The requirements, objective goals and overall judicial dialogue with the others state fields in a long conversation between constitutional branches and federal structure will be discussed in details. The developments of all phases of judicial dialogue and it's consequences to put an end to state omission will be explained as such hard cases that demonstrate the difficult and necessity to reach this new step in the judicial review powers.

Fred Felix Zaussell: The Authority of Legality

What role, if any, does the authority of legality play in the contemporary state administration? What has made between free and equals who reasonably disagree about what is good, just or right? Kant famously argued that individuals who are free and rational have a duty to enter a rightful condition by subjecting themselves to the defense of national sovereignty and national interest. After signing the NAFTA and after Mexican foreign policy pursued to leave aside it’s “no intervention” principle reclaiming national sovereignty seemed to be outdated. Nevertheless traditional notions of sovereignty persisted in other constitutional and political realms. For example defending “national sovereignty” was the core argument in the Senate against the International Criminal Court (ICC) jurisdiction by arguing that the ICC was a threat to sovereignty. Therefore appeals to national sovereignty are not a new phenomenon. But might indeed jeer upon the efforts of absolute recognition of the ICC’s jurisdiction as well as the demands of civil society of excluding the military from combating organized crime. Appeals to Sovereignty might also lead to military control of the Mexican borders not only in a symbolical sense against Trump, but foremost against the migration influx from Central America. The term sovereignty is therefore in constant reinterpretation and contrary to assumptions made in the early 90s about the disappearance of Sovereign Statehood Trump’s policies might transform the notion of Mexican sovereignty into a much more rigid and nationalistic approach in the political and legal sense.

Unconstitutional State of Affairs

Constitutional Jurisdiction is seen as a counter-majoritarian mechanism for taking decisions on matters in which citizens consider it to be of utmost importance and in which the democratic process seems unable to offer a decision. The practice of delegating certain issues to the Constitutional Courts to make the final decision (at least at procedural level) reflects a mistrust in democratic decision-making in the political arena. But this mistrust that we have seen things, is in the people and not in the authorities of the executive branch have appealed to the defense of national sovereignty and national interest. After signing the NAFTA and after Mexican foreign policy pursued to leave aside it’s “no intervention” principle reclaiming national sovereignty seemed to be outdated. Nevertheless traditional notions of sovereignty persisted in other constitutional and political realms. For example defending “national sovereignty” was the core argument in the Senate against the International Criminal Court (ICC) jurisdiction by arguing that the ICC was a threat to sovereignty. Therefore appeals to national sovereignty are not a new phenomenon. But might indeed jeer upon the efforts of absolute recognition of the ICC’s jurisdiction as well as the demands of civil society of excluding the military from combating organized crime. Appeals to Sovereignty might also lead to military control of the Mexican borders not only in a symbolical sense against Trump, but foremost against the migration influx from Central America. The term sovereignty is therefore in constant reinterpretation and contrary to assumptions made in the early 90s about the disappearance of Sovereign Statehood Trump’s policies might transform the notion of Mexican sovereignty into a much more rigid and nationalistic approach in the political and legal sense.

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The article presents an argument for gender diversity in constitutional courts. In order to recommend distinctive institutional designs or greater political notice to the disproportionate distribution between men and women in higher positions of the judicial branch, it is necessary to articulate theoretically the case for women in courts. I argue that the current scholarship is too narrowly focusing on emphasizing either a symbolic argument in that calls attention to the importance of women in socially valued positions as part of an empowerment process, or a material argument that seeks to establish an empirical correlation between the presence of women and a positive decision-making agenda. I aim to present a third hypothesis, based on a deliberative or procedural argument. I bring forward the case for women in constitutional courts as a tool for the improvement of the deliberative quality of these institutions, the conceptualization of social perspectives, coined by Iris Young in the debate about electoral representation. One of the merits of the account is to dislocate the focus from the presence of different interests to the idea of increasing the starting points in the deliberative process. Gender diversity promises to enrich the decision-making process itself, instead of the results of the court's deliberations per se.

When adjudicating cases concerning the separation of powers and the law of democracy, a constitutional court is bound to assume the role of a constitutional engineer. As intensified by the judicial constitutionalization of democratic politics, this function of judicial review has generated great uneasiness among politicians for a long time. It is widely held that judicial review is not an ideal forum to dislocate the focus from the presence of different interests to the idea of increasing the starting points in the deliberative process. Gender diversity promises to enrich the decision-making process itself, instead of the results of the court's deliberations per se. This paradigm conceptualizes – relying on the legal rhetoric and the gaze of the media – to name a few. This paper will present a structure within which judges must be even firmer than before. By countercalibrating politics, they must be politically incorrect.

Modern legal instruments are undergoing constant change, this objective need to maintain the balance in the law, which provide effective protection of the legitimate interests of human and civil, and as a field of public and private law at the same time. As one of the methods to solve the problem of ensuring and protecting the rights, relations and functions of public and private interests is considered “euro-interpretation” of the ECHR. This interpretation is a manifestation of “judicial activism” which “deconstructs” the norms established earlier giving them a new life. The article also analyzes the use of evolutionary interpretation in the field of private law public law, as well as in the activities of the specialized international organizations (for example International Organization of Supreme Audit Institutions). In the study, the author demonstrates the need to take into account unusual for individual public sovereignty of the state, which is a must in the national legislation. This quality allows us to identify the boundaries of the “evolutive interpretation”, as well as to formulate its principles on the existence of different interpretations of the Constitutional Court of the Russian Federation. The practical significance of the issues addressed is to define the balance between conventional and national legislation, search options for harmonization in order to flawless execution of the ECHR judgments, as a guarantee of its credibility.

Eszter Bodnar

As of the rise of legal realism in the US and the Free Law movement in the Continent, analysis of judicial performance has been sensitive not only to the internal coherency of doctrine but also to the relationship between law and neighboring social domains. These include the dialectic interaction between doctrinal and political power, between professional knowledge and legal knowledge, between the economy and legal ideology, between religion and legal culture and between law and neighboring social domains. These include the dialectic interaction between doctrinal and political power, between professional knowledge and legal knowledge, between the economy and legal ideology, between religion and legal culture and between law and neighboring social domains. These include the dialectic interaction between doctrinal and political power, between professional knowledge and legal knowledge, between the economy and legal ideology, between religion and legal culture and between law and neighboring social domains.
The paper aims to answer these questions by focusing on the constitutional law perspective of how 'good' administration of justice is measured in international law. The constitutional courts in their adjudication receive the doctrines of international law and are continuously confronted with other constitutional or international courts and what are limits of comparative arguments in constitutional issues. The paper offers some theoretical and practical reasons regarding the Basque and Catalan peoples.

**THE CEE COURTS’ SHAPING OF INTERNATIONAL LAW – THE MISSED AND LOST OPPORTUNITIES OF THE TRANSNATIONAL JUDICIAL DIALOGUE**

The aim of the panel is to consider the impact of the Central and Eastern European courts on international law and on strengthening of the rule of law through engagement in an exchange with other national and international courts as well as missed opportunities for such occurrences. In the analysis we take the regional perspective considering the EU Member States (Poland, Czech Republic, Lithuania, and Hungary) alongside the third countries (Russia and Ukraine) in order to demonstrate how the common legal heritage and varied levels of engagement in the regional integration affected the behaviour of the courts vis-à-vis international legal problems. The jurisdiction of the place, which is accorded to international law in domestic legal systems of these Central and Eastern European States and seek to understand which are the factors that facilitate and incentivise or deter the participation of the CEE courts in the global international law shaping enterprise.

**Participants**
- Anna Wyrozumska
- Izabela Skomerska-Muchowska
- Anna Wyrozumska
- Magda Matusiak-Frączak
- Karolina Podstawa

**Moderator**
- Anna Wyrozumska and Timea Drinoczi

**Room** 8B-4-33

**Anna Wyrozumska: The CEE Courts’ shaping of international law - the missed and lost opportunities of the transnational judicial dialogue**

Traditionally one thinks of international law as a product of international tribunals detached from the daily realities of ordinary citizens. Yet, the application of international law by such international tribunals constitutes only a percentage of the use and development of international law. Internal and external factors are the most important developments occur, where the courts in their adjudication receive the doctrines of international law and respond to such dictates grounding the argumentation in specific national legal traditions and needs of the society. This is where the role of CEE courts comes to the forefront. The presented contribution focuses on the areas of international law that have been thoroughly addressed by the practice of the CEE courts evoking examples from Polish, Russian and other examined jurisdictions (for instance the Nationiewski case). The positive bias of the contribution will be balanced by evoking the cases where the CEE courts (for political, legal or even technical reasons) have not showed understanding or capacity to deal with those cases and some experiences where the political branches have been capable of reaching sound and pragmatic solutions regarding secession and self-determination claims.

**IZABELA SKOMERSKA-MUCHOWSKA AND ANNA CZAPLINSKA: The exchanges of CEE Constitutional Courts with the CJEU in the Era of Constitutional Pluralism**

The Constitutional courts on the one hand play a special role as guardians of national constitutions (based in all these countries on principles of democracy and the rule of law). On the other hand they are continuously confronted with other constitutional orders, and in particular that of the EU. The Constitutional Courts often draw inspirations from the case law of foreign constitutional or other highest courts, especially while adjudicating on human rights or EU law. The practice of the Constitutional Courts will be analysed in the light of the concept of constitutional pluralism to explore how the Courts perceive themselves in the global community of judges, whether they exchange legal arguments with other international courts and what are limits of comparative arguments in constitutional issues. The particular position of the CEE constitutional court will be specifically examined pointing to the areas of EU law under scrutiny and the reactions of the courts mirroring their relatively recent engagement in the European Union legal order. In particular, we shall examine their capacity and willingness to take the CJEU’s indications and put them into question and under examination.

**Magda Matusiak-Frączak: The Dialogue between Selected CEE Courts and the ECtHR**

The protection of human rights and the interactions with the ECtHR is the most important area of judicial dialogue. In the previous years the broad concept of dialogue is adopted underlying its different functions, especially conflict resolution and classifies dialogue in respect to the accuracy of the referring court’s reasoning seeking or failing to involve references to other courts’ case law. The author recalls normative framework for dialogue with the ECtHR (with special emphasis on Poland) and carefully studies the practice of CEE courts within which he distinguishes proper, decorative (fake), failed or veiled dialogue. However, some cases he finds not to be the possible. The author presents a general assessment of the practice, explains reasons of occasional failures and suggests the instruments for improvement.

**Karolina Podstawa: The legislative procedural frameworks shaping transnational judicial dialogue on international law**

The final contribution to the panel focuses on the adjudication legislative, procedural and executive setting, which is conducive or destructive for the judicial engagement in the shaping of international order. The examples will be drawn from the jurisdictions examined in the course of the project: Polish, Czech, Lithuanian, Ukrainian, and Russian. The contribution will present the comparative legislative setting, organisation of the courts and the court systems (including the best and worst practices identified), as well as the role of the executive in the implementation of the international courts’ or national courts’ judgments on international legal issues. The comparative findings will be set against the theoretical background of the international law implementation measures, which differ across the traditional division of powers and frequently are defined as worlds apart.
This judicial saga had a significant impact at least in two respects: on one hand it broadened the distance between the EU and the U.S. requiring to take steps in order to reconcile the views encapsulated by the European and the U.S. models of protection. Since this wave of judicial activism is likely to make European an isolated “fortress of privacy”, some questions need to be addressed. Is up to the Court of Justice to define the scope of the right to privacy? Can the whole process be effective by neglecting the differences in the European and the U.S. constitutional views of these rights? And finally, since after the Schrems case it is likely that the legal framework in force will regularly be challenged before the Court of Justice, is it reasonable to expect that this judicial saga is a never ending process and ultimately beneficial from a global perspective?

The so-called right to be forgotten was first defined by a ruling of the European Court of Justice in 2014 in the landmark case “Google Spain v. Agencia Española de Protección de Datos and Mario Costejo”. This right was established not as a new and previously unproven right, but by international, European or national standards, yet it has been included in the provisions of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data as the “right to erasure”. This notion has been at the centre of several controversies among legal scholars, practitioners, activists and digital intermediaries. Most of the debates were triggered by the vague references made by the European Court of Justice to the right to information as a legal element to be taken into account in the context of the application of the right to be forgotten, which seem not to properly consider, at least in an explicit way, the vast implications of the former within a democratic society. Moreover the decision imposes search engines, usually global private corporations – the duty to abandon their purported content-neutral role to monitor content and make assessments with very serious implications for freedom of information and freedom of the media. This being said, the ruling also raised important territorial issues. Right after the ruling the EU Article 29 Data Protection Working Party – an independent European advisory body on data protection and privacy set up under Article 29 of Directive 95/46/EC – issued a series of guidelines on the implementation of the ruling by the data protection authorities within the EU. Among others one interesting element in this document – and probably the most controversial one – advises that for EU law not to be circumvented, delisting should be applicable not only to EU domains but also to .com domains accessible from the European territory. A further analyses recent developments such as the invalidation of the Safe Harbor Agreement and the adoption of a Privacy Shield. I argue that instead of a one-way street, usually conceptualized as the EU ratcheting up standards in the US, the influences between the two blocs are mutual. Such influences are conditioned by the receptivity and ability of domestic actors in both the US and the EU to translate, and often, adapt the “foreign” to their respective contexts. Instead of converging toward a uniform standard, the different points of entry in the two federated systems contribute to the continuous development of two models of regulating commercial privacy that, thus far, remain distinct.

The paper will draw some conclusions on the points discussed above. Particularly, it will be explored whether there is room for courts (most notably for the Court of Justice) to reduce the gap between Europe and the United States and to facilitate a dialogue between the two sides of the Atlantic Ocean.
The system of constitutional democracy (in which the Constitution is the supreme law and the Tribunal is its guardian) is turning into parliamentary democracy (the decisive vote belongs to the parliamentary majority).

**Jakob Hohnerlein: Preserving democracy as a standard for judicial review of legislation**

A crucial point about the legitimacy of constitutional and international courts reviewing legislation is that it depends on substantive standards, i.e. whether there are good reasons to restrict majorities. This may be true for individual rights as values conflicting with democracy. Another question is whether democracy itself justifies certain restraints. Majority decisions are the best way to realize equal chances of citizens in a given time and place to influence politics. However, they restrict the options of future citizens to realize their political preferences. Many policies have factually irreversible consequences. And present majorities can make change more difficult by unfair election laws, restrictions of political speech or legal entrenchment of policies (i.e. constitutionalizing them or requiring super-laws to be reversed only by supermajorities).

Moreover, democratic decisions in one polity affect those in others. Though not legally binding abroad, they may disable policy options there (e.g. tax havens). Now influence of democratic decisions over others is ubiquitous and often inevitable. So should normative theory be more modest, accepting that democracy is just about equal chances to influence politics under the given conditions? However, the power-questioning promise of political freedom should not be given up too quickly. This said, the issue is about identifying constraints on majorities that prevent illegitimate domination over future and foreign people.

**Roxan Venter: The realisation of democracy and freedom of expression within the judicial authority: a comparative perspective**

Freedom of expression forms an integral part of modern democracies. One of its primary functions is to support democracy by facilitating public participation in governmental activities, enforcing public and political discourse and ensuring open and transparent government. Freedom of expression therefore also has a significant role to play within the various branches of government. This role is clearly visible in the activities of national legislative institutions, such as parliaments, or even within the executive branch both of which enjoy broad media coverage in most modern states. The role of freedom of expression within the activities of the judicial branch, however, is much less obvious. The purpose of this paper is therefore to explore the less obvious branch of government when it comes to the use of freedom of expression, by discussing the different ways in which freedom of expression gives effect to democracy within the context of the judicial authority. In order to determine how freedom of expression gives effect to democracy within the judicial branch of government, different elements of democracy will have to be identified and it will be shown how these elements are applied within judicial organs and which role freedom of expression would play with regard to each of these elements. This discussion will be comparative in nature. Such a discussion may also assist young democracies in the organisation of their branches of government into vibrant democratic systems.
168  STRUCTURE OF DYNAMICS OF CONSTITUTIONAL COURTS

Participants
Niels Petersen
Max Steuer
Maxim Tomoszek
Ángel Aday Jiménez Aleman
Dana Burchardt
Chien-Chih Lin

Moderator
Niels Petersen

Room
4B-2-22

Niels Petersen: Equal Protection Guarantees and Judicial Self-Restraint

The principle of equality before the law seems to be one of the fundamental demands of justice. Consequently, most human and fundamental rights catalogues contain some sort of equal protection guarantee. However, spelling out what equality means in concrete cases is not straightforward. Laws distinguish necessarily. For this reason, courts usually adopt a two-step test when they operationalize equal protection guarantees. In a first step, they ask whether there has been a distinction between two social groups. In a second step, they look for a justification for this distinction. When implementing this test, courts can exercise more or less self-restraint. Most courts try to make a difference between more and less problematical distinctions. The proposed contribution aims to compare the equal protection jurisprudence of three different courts in this respect: the US Supreme Court, the European Court of Human Rights and the German Federal Constitutional Court. In a first step, it has a rather descriptive aim. It analyses which social groups are particularly protected the jurisprudence of the respective courts. Can we find patterns, i.e. situations in which equal protection guarantees are typically applied and in which they are not applied? In a second step, it tries to explain differences in the jurisprudence of the three different courts. Are such differences due to a difference in the applied, or are there other factors that contribute to the observed case law?

Max Steuer: Determinants of the Guardians’ Success or Failure: Identifying Influences of Constitutional Courts on Democracy

Are constitutional courts conducive to democratic regimes? Answers to this puzzle mostly work with concepts such as non-majoritarian institutions or counter-majoritarian difficulty as well as jurisprudential (Hirschl 2004) or judicial activism (e.g. Alexander 2015). However, with rare exceptions (Kneip 2011) there have been no efforts to conceptualize how constitutional courts influence democratic regimes. Approaching the question both through focusing on the outcomes of the court’s decision making and the decisions made by its individual judges that may or may not side either the overall direction of the court’s decision making or its concrete outcomes, this paper offers an approach how through looking at the trajectories of decisions in individual cases the overall contribution of constitutional courts to democracy can be determined. Applying process tracing methodology on the under-researched case of the Slovak Constitutional Court, the paper shows how its certain cases have been taken up by other political actors and the media and used to produce justifications for certain political practices, some of which helped strengthen various elements of democracy while others have been prone to undermine it. While these justifications alone do not equal political decisions, they are the starting point for a more nuanced determination of a constitutional “guardian” impact on democracy.

Maxim Tomoszek: The Devil is in the Detail: What Enabled or Prevented Disempowerment of Constitutional Courts in Visegrad Countries?

The Visegrad Group, consisting of the Czech Republic, Hungary, Poland, and Slovakia, is an excellent choice for comparative inquiry – the four countries have similar history, similar legal (and constitutional) traditions, but they also have a lot in common in the area of political system, society and culture. Taking into account these similarities, it is remarkable, how different was the latest constitutional development in these countries. Recently, we have observed a phenomenon described as democratic backslide in great extent in Hungary and later also Poland while the situation in the Czech Republic and Slovakia was much more stable. Both in Poland and in Hungary, the central conflict involved appointment of judges of constitutional courts. Most recently, there are signs of problems in this area in Slovakia as well making the Czech Republic look almost surprisingly good in this respect. This significant difference of outcomes in otherwise similar environments asks for deeper analysis of the factors leading to different outcomes. The goal of the proposed paper is to compare the mechanism of appointment of judges of constitutional courts in these countries their functioning in reality and their connection to democratic backslide. Based on this, the paper will identify factors protecting the independence of constitutional courts and strengthening their legitimacy and authority, and factors which go in opposite direction.

Ángel Aday Jiménez Aleman: From Neutral Powers to Active Ones? Constitutional Courts and their enforcement powers

The strengthening of the Spanish Constitutional Court’s enforcement powers at the convoluted context of the so-called Catalonian issue, has been contested in multiple fora, even at the Constitutional Court. Along with the recognition of the Court’s decisions as executive titles, the Court is now able to directly suspend authorities that are reluctant to enforce its resolutions. What is more, the Court can authorize
Although this function has been taken up by interna-
tional and supranational courts as well the bulk of the
courts also fulfils the function of counterbalancing each
corriders of their limits? The challenges to the courts’ role as
mediators between the international and the national
During the past decades, courts have been per-
cieved of as mediators between different legal spaces.
while this has been taken up by interna-
tional and supranational courts as well the bulk of the
mediated activity of judicial power at the expense of the political branch-
nationalism better explains the nuanced differences of the
judicial expansion in the four jurisdictions. To specify,
the judicialization of politics is most intrusive in South
Korea, followed by Taiwan and Hong Kong, and Singa-
more powerful the position of courts, the more
The rise to prominence of the referendum
liberal democracies around the world struggle
characterisation is that newly implemented constitutions
in many places for most issues of constitutional and
dissenting members of the Court
Jeri Uzman: Sense & Sensitivity: Courts and
Constitutional Referendums
Liberal democracies around the world struggle
with the perceived gap between political elites and the
general public. With both the turbulent rise of popu-
ism and the increased concern for political legitimacy,
many legal systems witness the revival of civic par-
ticipation initiatives. Prominent among those initia-
tives is the use of referendums, particularly as a tool
of constitutional innovation. Referendums are thought
to contribute to the quality of democratic government
because they involve large numbers of citizens in po-
licit decision making. There is, at least, a general
feeling that referendums have a huge impact in terms
of legitimacy. However, referendums may raise many
legal questions, either of a procedural or of a substanti-
ative nature. The rise to prominence of the referendums
as a political instrument is thus accompanied by in-
creased litigation before the courts. The (in)famous rul-
ing of the UK Supreme Court on the Brexit-referendum
servus as an example. How should courts evaluate the
sensitivities surrounding high profile litigation involving
constitutional referendums? Should popular majorities
expressing themselves through a referendum be en-
titled to some kind of special deference? And to what extent
should courts be considered to enter the politi-
cal realm when deciding cases involving referendums?
In my paper, I use a comparative approach to build
a tentative model of legitimacy for judicial review of both
the outcome and the procedure of referendums.

David Kenny: Routes to expand rights: Courts,
Referendums and Same Sex Marriage in Ireland
and America
In this paper, I examine the legalisation of same-
sex marriage as a form of constitutional change, exam-
ing whether this outcome should be brought about by
courts or by democratic means. It examines the power
of courts and the people and when each should prevail.
When the US Supreme Court invalidated State bans
on same-sex marriage, some criticised this court-led
change, driven by a judicial elite, as anti-democratic
and potentially creating negative backlash. However,
democratic referendums are under fire in the after-
math of Brexit and the rise of a new populism: the
people, perhaps, cannot be trusted when the rights of
minorities are at stake. To assess these approaches, I
contrast court-led change in the US with the success-
ful 2015 referendum to change the Irish Constitution
to legalise same-sex marriage. Is there evidence from
Ireland that this process is inherently less judicial innovation? Does Ireland show that fear and
distrust of referendums is misguided? I will suggest
that each approach has drawbacks, and the fears that
they are real but often exaggerated. I argue that there is no right course, what is needed is a prag-
matic approach to constitutional change and expan-
sion of rights, acknowledging that the right approach
will vary in different contexts. While court intervention
will sometimes be needed, the additional perceived
legitimacy of democratic means makes it preferable
in many places for most issues of constitutional and
social change.

Catherine Warin: Citizen participation in the
post-Lisbon EU democracy: striking the bal-
ance between individual rights and political
discretion
In a context of growing concern for ensuring demo-
cratic participation at the EU level, the role of the CJEU
is crucial in clarifying the relationship between the EU,
citizens and their institutions. The Court has dealt with
three main types of political participation rights: the
right to vote at the elections for the European Parlia-
ment; the right to petition; and the right to submit
European Citizens’ Initiatives. This contribution analyses
how these rights have fared in the case law in these three areas and asks the fol-
lowing question: how far does the contribution of EU
citizens to the exercise of public power reach? Or, how
is the balance struck between the political participation
rights of individual citizens and the discretion tradition-
ally granted to institutional political actors? Three main
conclusions emerge from the analysis. Firstly, although
depolycentric participation rights are enshrined in the Char-
ter, the Court does not review them according to the
right to participate dimension. Interestingly, instead,
political participation rights are indeed individual rights in the classic sense, i.e.
corequisites of the obligations of public authorities.
Thirdly, in performing these obligations the EU institu-
tions have discretion only with regard to the substantial
outcome of the participation process. This means that
as the case law currently stands, political participation
rights do not reach as far as a right to a certain outcome
of the decision-making process, but they are very real
procedural individual rights.

Brian Christopher Jones: Constitutions and Bills
of Rights: Invigorating or Placating Democracy?
Champions of constitutions and bills of rights
regularly portray them as possessing significant,
some say transformative, democratic potential. This
characterisation is that newly implemented constitutions
may invigorate a democracy, particularly at the ballot
box. This paper challenges that notion. In particular,
ConCurring panels

Ana Cannilla: The Constitutional Paradox in the Populist Crisis: An Answer from Popular Constitutionalism

In the judicial review of legislation arena, Popular Constitutionalism has strongly criticized judicial supremacy and has defended instead the idea of recovering the place of “the people themselves” in constitutional decision-making processes. Although Popular Constitutionalism has been widely debated, the question of what model of democracy better fits its principles has not been addressed. In this paper I place Popular Constitutionalism within democratic theory, with special attention to agonistic models of democracy that – in contrast to deliberative models of democracy – reject the ideal of achieving rational and universal consensus over our basic values and principles. I will draw on the work of Mouffe to explain the problems derived from the depoliticization of Constitutional law, the demonization of popular majorities and the sacralisation of counter-majoritarian institutions. I will argue that Popular Constitutionalism is not a danger to democracy but that it actually reinforces democracy from an agonistic approach, which becomes particularly important once technocratic and moral readings of the Constitutional order have proven unsuccessful for the safeguarding of rights and social cohesion. At times when popular sovereignty seems to be defended mainly by reactionaries it is vital that critical scholars offer alternative progressive options for the resolution of constitutional conflicts based on the goods of popular sovereignty and popular participation for democracy.

Uri Zibbersheid: Who represents the people: the parliament or the supreme courts?

Most of the democratic state constitutions declare that the people are the sovereign of the state. In representative democracy both the parliament and the supreme court s may be seen, if not declared, as democratic institutions representing the popular sovereignty. As the parliament and the supreme court often collide, is there a possibility to develop an objective criterion that will enable us to judge which of both institutions represents the people in a certain collision? It should be said that both institutions often violate the rights and well-being of the sovereign, the people. Thus, in all the parliaments of the democratic countries, the elected members the representatives or deputies, enjoy, often by a determination in the constitution, a free mandate in their parliamentary activity. That is, they are entitled to act according to their “best judgement”, or “conscience” in enacting laws and furthering certain policies – all in the name of public good. The supreme courts practically enjoy the same free mandate. I would suggest that furthering even fortifying the welfare state should be the criterion in representative democracy, the dominant form of modern democracy, according to which we should judge who really represents the people, the sovereign, in all social and economic matters, the parliament or the courts that should become much more active in the field of the general socioeconomic policy.

170 INTERNATIONAL LAW AND CONFLICT

Participants: Matthias Goldmann, Hent Kalm, Amarilla Kiss, Ayeal Gross, Marina Aksenova

Moderator: Matthias Goldmann

Room: 4B-2-58

Matthias Goldmann: Taking Hermeneutics Seriously: Strategic and Non-Strategic Uses of International Soft Law by Domestic Courts

This paper analyzes the use of international soft law by domestic courts. Based on an analysis of 70 cases from 25 jurisdictions it argues that domestic courts follow certain patterns in their approach to soft law. In contrast to much of the prevailing literature about the behavior of courts, we find that these patterns cannot be conclusively explained by the power interests of courts, or power struggles within courts. Rather, factors influencing this pattern include the resilience of domestic democracy, the particular position of the court within the separation of powers, as well as the subject matter of the decision and the communicative practices of the field. These factors lead to strategic and non-strategic uses of soft law. We therefore claim that hermeneutics might matter more than much of the empirical research about courts recognizes. Legal reasoning seems to have an independent influence on the outcome of a case.

Hent Kalm: Comparative International Law: From Reception to Strategy

Scholars have become increasingly aware that ‘international law is different in different places’. The idea of reception has suggested the prevalent mode of thinking about this phenomenon. The key notion underlying the various reception studies, expressed in broad terms, is that the meaning of any text is not constant, but rather varies with the different expectations brought to it. International law domestic lens – this expression perhaps best conveys the tenor of the present comparative research agenda. I will argue that the idea of reception mistakenly suggests that lawyers in different countries approach international law differently because they understand, read or decode it differently. By inducing us to overemphasize the cognitive side of the process of engaging with international law, the concept of reception obscures the strategic nature of statements about law. The main thesis of this paper is that arguments about the content of international law are less structural and more concerned with the categorical composition of a just world order than a concern to justify actions in a way that could be seen as universalist. We should thus not assume a close correlation between power and normative vision of world order. Even if a state has the means to rearrange the international order by creating new and proposing transformative interpretations of existing rules, it may well conclude that its values are not best carried into practice by loosening constraints on other actors.

Amarilla Kiss: International courts and tribunals in post-conflict situations: new trend in international law?

In public international law there are different fields when it comes to international courts and tribunals: traditionally, the ICJ is in charge of the settlement of international disputes, there are forums of international criminal law, regional and specific courts, cases for arbitration and administrative courts. The question of individual responsibility is not new in international law, still, it is a relatively young area where we just start to collect experiences from the operation of the different courts and tribunals. This area is shaping dynamically concerning the number and the expanding role of these forums. ‘Judicialization’ became a trend in international law. This poses questions, if it leads to a certain fragmentation in international law, as this area is forming faster than how fast we get the results and could control this process. Though they are important in rebuilding the state, in the accountability of individuals, and generally, in processing the past and strengthening the trust in justice institutions. However, they are criticized upon ignoring cultural diversity, the concept of legitimacy crisis. The attitude of states towards these forums is mixed as the national implementation of the decisions reveal. The paper attempts to discover how international courts and tribunals contribute to peace in a post-conflict situation and it also tries to reveal how the phenomenon of ‘judicialization’ affects public international law in general.

Ayeal Gross: The Writing on the Wall: The Courts of Occupation

This paper discusses the role of the judiciary in occupation, looking at the growing engagement of courts with occupation (International Court of Justice, European Court of Human Rights, and national courts especially the Israeli ones). It suggests that by looking at specific violations of the law of occupation, courts take a “merely factual” approach to occupation, one that regards the fact of occupation as given, and suggests a shift to a normative approach. The normative approach would consider that violates the basic principles of the law of occupation, is illegal. The functional approach which complements it comes as an alternative to the binary debates on whether occupation exists or not: e.g. is Gaza still occupied, when does cultural, etc. This paper will focus drawing on my new book (The Writing on the Wall: Rethinking the International Law of Occupation, CUP, 2017) on how the normative and the functional
ConCurring panels

ConCurring panels

UN founding documents or whether we are observing a re-invention of international law by certain groups and interpretations. If we assess whether new approaches to international law is as a whole and thus continued domination even if it fails to meet the standards of the basic principles of the law of occupation. The paper will look at the pitfalls in current judicial engagement with occupation, be it the Israeli one in the Occupied Palestinian Territory the UN founding documents or whether we are observing a re-invention of international law by certain groups and interpretations. If we assess whether new approaches to international law is as a whole and thus continued domination even if it fails to meet the standards of the basic principles of the law of occupation. The paper will look at the pitfalls in current judicial engagement with occupation, be it the Israeli one in the Occupied Palestinian Territory the

Marina Aksenova: Reinventing or Rediscovering?

Alternative Approaches to International Law

On 25 June 2016 Russia and China issued a joint declaration reiterating their commitment to the principles of international law as they reflected in the UN Charter and 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. The two states underlined the principles of sovereign equality, non-intervention and peaceful resolution of disputes as a ‘cornerstone for just and equitable international relations’ (cit). The paper scrutinizes the recent trends in an attempt to assess whether new approaches to international law is a mere restatement of the principles enshrined in the UN founding documents or whether we are absent a re-invention of international law by certain groups states. The latter supposition would support the idea of fragmentation of international law not only from a strictly legal perspective – as a plethora of conflicting rules of law – but also from a socio-legal perspective as a discipline harbouring conflicting narratives and interpretations.

171 ANALYZING AMENDMENTS: CONSTITUTIONAL CHANGE, POWER, AND LEGITIMACY

Constitutional change occurs in a variety of ways. Amending the written constitution is a formal way of producing change. The impact of amendments however vary. While some amendments are declaratory, others are minor refinements of existing constitutional arrangements, and still others are transformative. In some instances, the amendments may be so repudiatory of the foundational character of a constitution that they should not be considered amendments but as a form of diememberment or a revolution. This panel examines the processes, meanings, legality, and legitimacy of amending the constitutional text. It identifies factors that influence changes to the constitution and locate them within the broader political contexts. For instance, a particular amendment may have different outcomes depending on whether it is produced as part of a liberal democratic regime, an authoritarian regime, or a transitional one. In this regard, the papers will also reflect upon the institutional interactions between the courts and legislature in determining the meaning and impact of constitutional amendments.

Participants

Richard Albert
Yaniv Roznai and
Gary Jacobsohn
Jaclyn L. Neo
Tom Ginsburg
Marco Goldoni and
Michael A. Wilkinson
Moderator
Jaclyn L. Neo
Room
7C-2-2-4

Richard Albert: Constitutional Dismemberment

Some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate constitutional practice and understanding and, thereby, to destroy its foundations. And yet we commonly identify transformative changes like these as constitutional amendments different from others. A radically transformative change of this sort is not a constitutional amendment. It is a constitutional dismemberment. A constitutional dismemberment is a deliberate effort to disassemble one or more of the constitution’s constituent parts, whether codified or uncodified, without breaking the legal continuity that is necessary if not useful for maintaining a stable polity. Dismemberment seeks to transform the identity, the fundamental values or the architecture of the constitution. Importantly, a dismemberment need not necessarily weaken the democratic foundations of liberal constitutionalism; it can also strengthen a them. In this paper, I introduce and theorize the phenomenon and concept of constitutional dismemberment with reference to jurisdictions around the world including Brazil, Canada, Colombia, Honduras, India, Ireland, Jamaica, Japan, New Zealand, Saint Lucia, Taiwan, Turkey, the United Kingdom, the United States, the Caribbean, and the European Union.

Yaniv Roznai and Gary Jacobsohn: Constitutional Revolution

This paper will introduce an argument which is forthcoming as a book with Gary Jacobsohn, focusing on Constitutional Revolutions. The purpose of the book is to provide and invite theoretical and comparative reflection on the concept of the constitutional revolution, an idea for which no canonical meaning exists. Are the characteristics of a constitutional revolution distinguished from the features commonly as associated with the revolutions? Supposing a constitutional revolution was amended in some paradigm shifting way, either formally or informally through far-reaching judicial interpretation or political behavior. Can the concept of the constitutional revolution be made to accommodate the incremental and the revolutionary and the non-revolutionary developments? This, of course, would be contrary to Hans Kelsen’s famous formulation that a revolution occurs – whenever the legal order of a community is nullified and replaced by a new order in an immediate way – not prescribed by the first legal order. (Hans Kelsen General Theory of Law and State.) We claim that a constitutional revolution is defined as ‘a paradigmatic displacement in the conceptual prism through which constitutionalism is experienced in a given period of time’ (cit). This constitutional revolution is accompanied by critical changes in constitutional identity (although not every mutation in identity will entail a shift of sufficient magnitude to be considered revolutionary). Additionally, the distinction between legal and illegal transformations is not determinative in establishing the existence of a constitutional revolution. Finally, a ‘constitutional moment’ may or may not accompany the onset of a constitutional revolution. Those instances in which a polity experiences a substantial reorientation in constitutional theory and understanding are part of the constitutional moment are no less revolutionary for the incremental aspect that marks their arrival. The paper will focus on two case studies to contextualize the argument: Hungary and Israel. The Israeli example demonstrates how even without a ‘constitutional moment’ or an extra-constitutional invocation of constituent power, a constitutional revolution may occur (mainly through the judiciary). The Hungarian example demonstrates how formal constitutional amendments may be used in order to fundamentally transform the constitutional order.

Jaclyn L. Neo: Judiciary-Led Transformative Amendments

Some amendments are clearly transformative, but not all of them. Some amendments may have been intended to be declaratory, in that they merely seek to clarify or entrench an existing understanding of the constitution. However, through judicial interpretation, the amendments attain a transformative character that has an impact on institutional structures as well as the nature and scope of fundamental rights. This paper addresses the legitimacy of such judiciary-led transformations and argue that such transformations often respond to legislative dysfunction. In this article, I will discuss two scenarios that I argue represent legislative dysfunction: first, when the legislature is unable to agree on crucial matters involving moral (or religious) judgment and implicitly defer to the courts; and secondly, when the legislature is unable to respond negatively to judicial transformations due to extant social and political conditions. I examine the extent to which such judiciary-led transformations are problematic within the constraints of democratic constitutionalism.

Tom Ginsburg: Measuring Constitutional Amendment

While there is great need for scholars and constitutional drafters to get a handle on the comparative difficulty of constitutional amendment, there is little correlation among existing measures. In fact, measuring constitutional change presents significant conceptual challenges that have often been overlooked. After reviewing the existing measures of constitutional amendment, this paper elaborates on how regime type (democracy or authoritarian) interacts with the measures of difficulty, and affects the observed pattern of constitutional amendment in a given system.

Marco Goldoni and Michael A. Wilkinson: Constitucional Change through the Material Looking Glass

This paper introduces a new perspective on the understanding of constitutional change and amendments. We intend to tackle this question through the looking glass offered by the concept of the ‘material constitution’. The basic intuition offered by the material constitution is that constitutional change cannot be isolated from the socio-political and cultural context in which it occurs. In the first section of the paper, we sketch out the basic tenets of the idea of the material constitution by contrasting this approach with other informal takes on constitutional transformation; then, in the second section, we draw a distinction between the types of conflict which might have an impact on its core ordering factors. This allows us to introduce a criterion to detect cases where constitutional power is not exercised and cases where the material constitution itself is strengthened by constitutional change. Finally, in the third section we capitalise on these insights by offering a view of the material reading of constitutional changes as part and parcel of ‘juristic knowledge’. Given its relevance for understanding the issues around constitutional transformation, we conclude that such a material reading ought to be adopted by constitutional lawyers and practitioners as well.

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The fragmentation of international law long gave rise to discussions about norm hierarchy and conflict rules. Increasingly, however, it is realised that solving conflicts with such devices comes at a cost and, what is more, that the legal landscape is undergoing simultaneous change. Normative conflicts tend to have ramifications for our understandings of key concepts such as ‘jurisdiction’ or ‘responsibility’. Inter-legality is a book project (editors Klabbers and Palombella) aiming to take stock of such changes and think about possible ways to help overcome some of the resulting normative stalemates; this panel focuses on the latter part.

**Participants**
- Mikael Rask Madsen
- Jan Klabbers
- Gianluigi Palombella

**Moderator**
- Sanne Taekema

**Room**
7C-2-14

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**Jan Klabbers: Inter-legality: beyond conflicting legal orders**

The recent resurgence of right wing populism in Europe and the United States makes an old puzzle – that of judicial legitimacy – come to the fore. Whereas the offensive on courts in the U.S. poses the question of defending rights against democracy as a real exigency, courts also face the dilemma of having to protect democracy itself against what could be perceived as abuse of rights. Further, often based on history and context, the judiciary gets to calibrate the centrality of universal principles such as dignity, free speech and privacy across different constitutional orders. Ultimately, when delivering important but controversial decisions across that spectrum, the judges have to think of protecting the authority of their courts. Common criticisms of ‘judicial activism’ stretch from the somewhat out-dated but nonetheless repeatedly re-emerging argument of (quasi-)constitutional courts’ ‘counter-majoritarian difficulty’ to the prevalence of disagreement in plural societies concerning the substance and scope of human rights. However, beyond conceptual attacks on (quasi-)constitutional adjudication, it is increasingly common to find politicians across the world that attack courts for decisions with which they simply disagree.

**Participants**
- Michaela Hallbrunner
- Christoph Bezemek
- Boryna Petkova
- Scott Stephenson

**Moderator**
- Stephen Gardbaum

**Room**
7C-2-12

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**Michaela Hallbrunner: Courts and Institutional Failure**

It is a recurring argument in judicial decisions and academic writing in the Global South that when other avenues for addressing a problem are blocked, courts may be allowed to do more or other things than usually. Yet this evolving understanding has so far never been analyzed more broadly and in any depth, even though it stands in sharp contrast to traditional ideas of separation of powers and the judicial role. This is problematic because, properly applied and understood, institutional failure might serve as a useful judicial concept, not just in the Global South. However, without further analysis and qualifications, it also risks justifying judicial ‘activism’ in situations where it may at best be useless, and at worst contribute to causing additional harm. Whether institutional failure is indeed a legitimate basis for extraordinary judicial actions depends on many factors, but first and foremost on what qualifies as institutional failure in the sense relevant to courts. As a tentative definition, I suggest that institutional failure requires 1. a legitimate expectation of specific institutional behaviour that is not fulfilled in spite of 2. that behaviour being part of a key function of the institution charged with its fulfilment. Yet this rough definition leaves many questions open. Work on institutional economics and sociology provides an important backdrop to understanding institutional failure and what courts might or might not be able to contribute when it happens. How best to measure institutional dysfunction or indeed even to provide an appropriate conceptual definition of that term is a subject of some methodological debate in these disciplines. Suggestions range from measuring institutional performance in terms of the state’s overall goal of helping citizens to lead good lives (Sunstein 2015) to more institution-specific standards (Lewallen & Jones 2015). Social science work can also be valuable in identifying categories of institutional failure such as design failures, institutional mismatch and obsolescence, adaptation failures or capture (Prakash & Pototski 2015), that can inform a legal conceptualization of that concept.

**Christoph Bezemek: The Best Joke About Democracy: Abuse of Human Rights**

When a collection of essays by Joseph Goebbels was published in the mid 1930s, the introduction to the chapter on democracy famously stated that: “[f] or ever it will be among the best jokes about democracy that it provided the means to its own destruction to its mortal enemies.” Against the backdrop of modern human rights law seemed unwilling to accept the joke any longer. Based on conceptions of “militant democracy” developed by Karl Loewenstein and highlighted by Karl Popper “Abuse-Clauses” like Art 5 ICCPR and Art 17 ECHR ensure that “nothing in [a human rights] Covenant may be interpreted as implying for any group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the ECHR. In particular, has generated a comprehensive (even if diverse) body of case law denning protection to those who want to overcome the reinforcements of democracy by abusing liberty as a Trojan Horse. Sometimes, however, as critics argue, the Court may push beyond “the general purpose of Article 17 to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention”; refusing from the outset to grant human rights protection to phenonena because they are to be considered disturbing foolish or simply wrong than abusive. This paper intends to take a closer look at the slippery slope of how much liberty is to be granted to the enemies of liberty by analyzing the most important abuse clauses, examining their application and assessing the danger attached to their frequent invocation.

**Bilyana Petkova: Who is afraid of the right to freedom?**

The centrality of universal principles can vary across different constitutional orders: the examples of dignity in Germany or the First Amendment in the United States naturally come to the fore. Yet this evolving understanding has so far never been systematically studied. It may have recently become one of the most prominent institutional actors in promoting the rights to privacy and data protection in the European Union. Landmark judgments like Digital Rights Ireland, Google Spain, and Schrems have had a reinforcing effect on one another. These rulings have also generated havoc, most notably in the U.S., which differs substantially in its understanding of privacy as being balanced against other rights and values. Yet European constitutionalism itself is still grappling with the different values and purposes that data privacy rights serve across multiple contexts of EU law. Without clear distinction, under the rubric of privacy, European judges are bundling together dignity, self-realisation, autonomy, protections from the “chilling effect” on the exercise of other freedoms, and data protection has also been successfully evoked before the Court of Justice of the European Union (CJEU) to justify executive power secrecy. Further, the strong stance taken by the CJEU in this field contrasts with its recent restraint in areas like EU anti-corruption law and citizenship where in past years the judges had traditionally taken the lead. The paper will analyse the case law of the CJEU in connection to the role played by the European Parliament and Commission, as well as by the European Court of Human Rights in the area of data privacy in order to probe broader questions of constitutional identity and judicial legitimacy.

**Scott Stephenson: Political Backlash in Comparative Perspective**

From Australia and Indonesia to Russia and the United Kingdom it is increasingly common to find politicians across the world attack courts for decisions with which they disagree. Yet outside of the United States our understanding of political backlash is still in its infancy. Existing scholarly accounts tend to fall into one of two categories. The first is predominantly descriptive and approaches the matter as one of constitutional politics, suggesting that political backlash occurs where judges make strategic calculations exceeding the “tolerance interval” that politicians grant courts before they challenge their decisions. The second is predominantly normative and approaches the matter as one of constitutional law, denouncing political backlash as a threat to the rule of law because it has the potential to erode the independence and impartiality of the judiciary. This paper will argue for a third approach that conceptualises political backlash as the meeting point of constitutional politics and constitutional law. It will suggest that it is not impossible to provide an accurate account of political backlash that strips away one side of the law/politics divide because the phenomenon is the pursuit of legal contestation.
This paper concerns developments in social welfare policies within Europe following the great financial crisis that began in 2008. This focus on the new “age of austerity” as it is often termed requires little justification. The combined impact of economic recession and the fiscal austerity that followed in its wake have had profound impacts across many aspects of many societies. In turn of course such deep and wide impacts prompt academic attention. The implications of the great financial crisis have already been subject to a vast amount of scholarly analysis. Our ambition however is to examine the topic from a distinctly legal perspective. Thus we not only seek to deepen our understanding of the impact of the economic crisis on social welfare programmes but also to explore the capacity of constitutional law and legal rules to shape or even inhibit policy developments. We adopt a case study approach to the pursuit of our research aims by analysing and discussing five national case studies – France, Germany, Italy, Spain, and the UK – and focusing on the attempts to use fundamental public laws to challenge or to limit the capacity of such policy developments and the responses of the courts to these test cases. Our understanding is that irrespective of differing legal traditions regarding the constitutional status of social rights and differing social welfare regimes the courts have been restricting their capacity to rule on the merits of social welfare policy.

The main idea of this presentation is that the neoliberal turn in the development of liberal capitalism did cause the current global and Euro zone crisis, that austerity measures represent the neoliberal mechanism and crisis response. But also to explore the capacity of constitutional law and legal rules to shape or even inhibit policy developments. We adopt a case study approach to the pursuit of our research aims by analysing and discussing five national case studies – France, Germany, Italy, Spain, and the UK – and focusing on the attempts to use fundamental public laws to challenge or to limit the capacity of such policy developments and the responses of the courts to these test cases. Our understanding is that irrespective of differing legal traditions regarding the constitutional status of social rights and differing social welfare regimes the courts have been restricting their capacity to rule on the merits of social welfare policy.

174 SOCIAL WELFARE

Participants
Stefano Civitarese and Simon Halliday
Dragica Vujadinovic
Walter F. Carnota
Matteo De Nes
Moderator
Matteo De Nes
Room
7C-2-02

Stefano Civitarese and Simon Halliday: Constitutional Law and Social Welfare after the Economic Crisis

This paper concerns developments in social welfare policies within Europe following the great financial crisis that began in 2008. This focus on the new “age of austerity” as it is often termed requires little justification. The combined impact of economic recession and the fiscal austerity that followed in its wake have had profound impacts across many aspects of many societies. In turn of course such deep and wide impacts prompt academic attention. The implications of the great financial crisis have already been subject to a vast amount of scholarly analysis. Our ambition however is to examine the topic from a distinctly legal perspective. Thus we not only seek to deepen our understanding of the impact of the economic crisis on social welfare programmes but also to explore the capacity of constitutional law and legal rules to shape or even inhibit policy developments. We adopt a case study approach to the pursuit of our research aims by analysing and discussing five national case studies – France, Germany, Italy, Spain, and the UK – and focusing on the attempts to use fundamental public laws to challenge or to limit the capacity of such policy developments and the responses of the courts to these test cases. Our understanding is that irrespective of differing legal traditions regarding the constitutional status of social rights and differing social welfare regimes the courts have been restricting their capacity to rule on the merits of social welfare policy.

Dragica Vujadinovic: Causes of the Current EU Crisis and Ways Out – Viewed upon the Welfare Lenses

The main idea of this presentation is that the neoliberal turn in the development of liberal capitalism did cause the current global and Euro zone crisis, that austerity measures represent the neoliberal mechanism and crisis response. But also to explore the capacity of constitutional law and legal rules to shape or even inhibit policy developments. We adopt a case study approach to the pursuit of our research aims by analysing and discussing five national case studies – France, Germany, Italy, Spain, and the UK – and focusing on the attempts to use fundamental public laws to challenge or to limit the capacity of such policy developments and the responses of the courts to these test cases. Our understanding is that irrespective of differing legal traditions regarding the constitutional status of social rights and differing social welfare regimes the courts have been restricting their capacity to rule on the merits of social welfare policy.

Walter F. Carnota: Social Adjudication at Its Best: The tale of the Argentine Social Security Court of Appeals

In 1987, the Argentine Congress created the National Social Security Court of Appeals to sort out pensioners’ cost-of-adjustment claims and other judicial measures directed against Social Security agencies. In 1989, the new Court was installed. Initially, it closely followed the steps of its predecessor, the National Labor Court of Appeals. But judicialization of Social Security claims is quite different from employer-employee relationships. It basically entails oversight of huge administrative bureaucracies and ponder budgetary effects in the meanwhile. The Social Security Court became federal in 1995. That year Congress also enacted legislation making lawsuits more difficult for pensioners. Procedure was streamlined so as to give administrators an upper hand. Finally, the Supreme Court which began to take shape in 2003 was instrumental in crafting new judicial decisions in this area.

Matteo De Nes: Balancing Fundamental Rights and Budgetary Needs: The Jurisprudence of the Italian Constitutional Court

Within the current economic crisis of the Eurozone, Constitutional Courts have played a pivotal role, since they have been called to deal with clashes between budgetary needs and fundamental constitutional rights. As is well known, macroeconomic choices are firstly negotiated between the Executives of Member States and European Union institutions; from there, fiscal and financial policies are implemented by domestic budgetary law adopted on the basis of such negotiations. Constitutional Courts come in at the end of the chain, as they are often asked to assess whether the adopted policies comply with fundamental rights granted by national Constitutions. Consequently, at least three problems arise: 1) whether and how these Courts have legitimate authority to scrutinize highly political choices in economic, fiscal and financial matters; 2) how the Courts can obtain sufficient information related to these policies and their potential consequences on fundamental rights; 3) determining the boundaries of the Courts’ power of scrutiny in these cases. This presentation is aimed at investigating these three theoretical questions in the context of the most recent jurisprudence of the Italian Constitutional Court (ICC). Indeed, after earlier self-restrained behavior, the ICC has progressively expanded its scrutiny of fiscal and financial policies, conferring an increasing weight upon fundamental rights when examining budgetary actions and fiscal policies.

175 THE JUDGE AND POWER: EMPIRICAL REVELATIONS OF JUDICIAL PRACTICE

This panel seeks to deepen understanding of the exercise of public power by the courts and judges by bringing together scholars who have undertaken empirical research into different facets of judicial practice. The panel will explore questions around the interplay of judicial philosophies, personalities, dynamics and relationships as influences upon the decision-making process. In turn, what is the influence of process on the outcomes of judicial decision-making? At a more fundamental level, how does institutional design – including for example, the design of appointments processes, disciplinary processes, the use of acting judges – affect the judges’ capacity to fulfill their functions? This panel thus seeks to address the question of the conditions under which courts succeed in achieving the exercise of public power with independence, impartiality and integrity.

Participants
Mathilde Cohen
Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin
Hugh Corder and Cora Hoexter
Julia Hughes and Philip Bryden QC
Alan Paterson
Limor Zer-Gutman and Kari Perlman
Moderator
H. P. Lee
Room
8A-2-17

Mathilde Cohen: Qualitative Research Methods and Judicial Practice – Notes from a French Field Study

How can one study and make sense of invisible – or less immediately visible – aspects of judicial work, such as a court’s decision-making processes, its internal organizational culture, or some of its hiring practices? Qualitative research methods, including observing hearings and behind-the-scene judicial work as well as interviewing judges and their support staff is an emerging method in the field of legal studies, raising the question of its value and adequacy to the field. Which research questions lend themselves to a qualitative approach? What methodological considerations should be taken into account? I will elaborate on these issues based on my own research projects, in particular a field study on judicial diversity in France – a country that prohibits the collection of racial and ethnic data, ruling out any quantitative analysis. I will discuss the questions of access (which recruitment strategies can a researcher use to interview judges given that random sampling is usually out...
They facilitate an understanding of the degree to which accountability and efficiency have been more difficult and support structures that prioritize more contemporary judicial values such as diversity, transparency, and accountability and efficiency have been more difficult to achieve. This paper reports on a survey of Australian judicial officers (n=142) from across the different Australian jurisdictions. Participants were asked what they considered to be the most pressing challenges that face the various levels of the Australian judiciary and whether the current regulatory and support environment achieves international best practice. The data provide a nuanced picture of the state of the Modern Australian judiciary as it appears to those within it.

They facilitate an understanding of the degree to which judicial officers are satisfied with the current regulatory framework, and, where they are dissatisfied, the nature of their disquiet. This work has the potential to inform the reform of the judiciary, which is both desirable and desired.

Hugh Corder and Cora Hoexter: Navigating the Straits of Deference: ‘Lawfare’ in South Africa and its Implications for the Judiciary

Lawfare is not a new phenomenon in South Africa, for judicial review has always been a prominent method of holding the government to account even in disputes of a distinctly political nature. Before the introduction of constitutional democracy in 1994, there were barely any political safeguards against oppressive legislative and executive action, and the courts generally presented the citizen’s only hope (though often a feeble one) of having individual rights protected or constitutional obligations upheld. That is no longer the position, at least in theory, since the Constitution of the Republic of South Africa, 1996, includes a wide range of safeguards against unconstitutional conduct on the part of the legislature and executive. In particular, the Constitution’s support for constitutional democracy may be regarded as the core of a growing integrity system. However, contrary to expectations, lawfare has not diminished as a result but has actually been increasing in recent years. This paper discusses the increasing resort to litigation in contentious political matters with reference to several examples, explaining the factors that have encouraged the trend in this country. It goes on to show how lawfare compromises the courts, threatens the separation of powers, and places strain on the relationship between the judiciary and the other branches.

Jula Hughes and Philip Bryden QC: What does empirical research on the Canadian judiciary tell us about the judicial exercise of power?

Our empirical study of the views of Canadian Provincial Court judges shows a surprising diversity of opinion on reasonably common, but analytically marginal, issues involving judicial disqualification. This is notable because the issues of judicial impartiality and disqualification are intrinsically linked to the credibility of the justice system and because they have profound constitutional resonance. The results of our research suggest that, in an area in which the relevant legal principles are open-textured and guidance from case law is highly fact-specific, the exercise of judicial power is a highly individualized one. Judges not only disagree on outcome, but they also display a surprising resistance to consultation and to inviting submissions from counsel. In this paper, we argue that, at least in Canada, notions of judicial power at the level of courts of first instance should be viewed through the lens of the power of individual judges. This has important implications for judicial selection in proceedings to appoint judges are focused on controlling for temperament and work ethic. They de-emphasize subject matter expertise and skills related to conducting effective and fair hearings. Suggestions for proving section three of proceedings over which they preside, and one of its innovative aspects is that these techniques will be identified and examined from the perspective of lawyers who participate in such proceedings as representatives of the disputing parties. The study addresses an international phenomenon, for the shift to collaborative judging is taking place in all countries where the Anglo-American judicial method is prevalent. The results of the study will therefore be relevant to many additional countries besides Israel.

Limor Zer-Gutman and Karni Perlman: Lawyer Perceptions of Judicial Techniques

The examination of settlement-oriented judicial techniques as perceived by lawyers is a new research direction. Lawyers frequently participate in the judicial process as “repeat players” and are exposed to the judicial techniques applied in the context of Settlement Judging. The new study will examine the formation of lawyers’ attitudes regarding the fairness of the judicial proceeding. Such attitudes can either establish or undermine lawyers trust and satisfaction with the judiciary. The study will be conducted by asking lawyers to respond to questionnaires. The study will help identify the various judicial techniques implemented by judges in the settlement of disputes, and influence the selection of judges.

Alan Paterson: The Supreme Court Decision-Making in the United Kingdom – Eleven Individuals or a Team?

Building on his publication – Final Judgment: The Last Law Lords and the Supreme Court (Hart Publishing 2015) Alan Paterson will show how the Supreme Court has developed a different decision-making model from that which prevailed in the House of Lords. Although their decisions continue to be significantly influenced by their dialogues with counsel, with themselves, with academics, with judicial assistants, with lower courts and with Parliament, the balance between these dialogues has changed, as has the Court’s approach to judgment writing. Yet if email has transformed the post hearing dynamic with regard the composition of judgments, orally continues to dominate the earlier stages – though not as counsel may wish. The new courts’ mantra includes increasing transparency but this sits uneasily with studies of psychological values and the refusal to have a register of interests. This paper explores the changing relationships between the court and its publics – as mediated through the influence of its leaders, and explores the likely impact of the new judicial appointment procedures on the composition of the court in the next few years.

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In the globalised legal context, the role and practices of national (highest) courts are changing under the effects of systemic changes – such as the proliferation of international law and the development of regional legal integration, e.g. in Europe – and practical changes such as the increase in transnational judicial networks and the facilitation of access to comparative sources through online databases. These changes have affected the role and practices of courts in North-America and in Europe in two ways. In a formal or jurisdictional sense, courts increasingly refer to international and comparative legal sources; whereas in an informal or social sense judges from different jurisdictions increasingly meet and discuss about issues of common interest. The papers in this panel explore aspects of the development of judicial dialogue and its impacts in the contexts of the Supreme Court of Canada (SCC) one of the most active and respected courts in transnational judicial communication; and the European Union (EU) where the development of judicial cooperation creates top-down and bottom-up incentives for judicial engagement in transnational exchanges. The third paper critically assesses the appropriateness of the judicial dialogue metaphor in the context of references to foreign law.

**Participants**

Elaine Mak, Niels Graaf and Erin Jackson

Klodian Rado

Moderator

Vicente Fabian Benitez-Rojas

**Room**

8B-2-09

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**Elaine Mak, Niels Graaf and Erin Jackson: Old, New, Borrowed and Blue: A Comparative Analysis of European Judicial Culture(s)**

The Lisbon Treaty (2009) has set new goals for judicial cooperation between member states of the European Union (EU) with an eye to providing effective legal remedies and fundamental rights protection. This cooperation is stimulated by the European Commission's agenda (e.g. judicial training) and practices of 'transnational borrowing' between courts in the EU. However it remains unclear to what extent national judicial culture, ideas and practices regarding judging and judicial organisation which have developed over time, can and should converge into a shared European judicial culture. This project, which will run between 2016-2021, analyses the possibilities and constraints regarding further alignment of judicial cultures in the EU. Comparative-legal and empirical studies describe and explain the content and development of three aspects of judicial culture: 1) professional values for judges (moral dimension) (Mak); 2) judicial ideologies in the interpretation of legal rules and concepts for European cases (legal dimension) (Graaf); and 3) leadership in judging EU law cases (institutional dimension) (Jackson). The papers for this panel elaborate the concept of 'judicial culture' for each of these three dimensions, in this way setting the scene for the project's study of the development of the judicial role and judicial practices in the evolving European legal context.

**Klodian Rado: Transnational Judicial Communication and the Supreme Court of Canada**

Since 1997 when the notion of "dialogue" between the Supreme Court of Canada (SCC) and the other branches of government on interpreting the Canadian Charter of Rights and Freedoms and generally the Constitution, entered the Canadian constitutional law mainstream, it has remained central. The "dialogue" metaphor occupied not just the academic arena but also the Canadian judiciary legislature, and even the realm of politics. In this paper, I will address the transnational judicial dialogue with foreign courts and judges. Many foreign and Canadian scholars, judges, and even the media, consider the SCC one of the most important courts in the world. Particularly after the implementation of the Charter, SCC has been an active participant in the global conversation on human rights and other important constitutional issues, by using both judicial as a judicial tools. The aim of this paper is to analyse how the SCC, on the one hand, seeks to shed light on the dialogue of the SCC and its judges with other foreign and international courts and judges; and on the other its goal is to identify some of the main constitutional impacts of such a dialogue. In order to do this, the paper first introduces the concept of "transnational judicial dialogue" in the era of globalisation; second, the main mechanisms or means of this dialogue used by the SCC are explored; and finally, the paper exposes some of the main impacts of transnational judicial dialogue of the SCC in particular its impact on judicial identity within the Court. Besides the transformation of the SCC's and its judges' judicial identity, other notable effects are: it causes constitutional changes by driving Canada towards a monist system contributes to harmonized international legal standards, advances consistent transnational jurisprudence, shapes the outcome of national judgments, and impacts other important actors, such as national politics, bar associations and law schools.

**Oran Doyle: It's bad to talk: judicial dialogue and the judicial role**

Globalisation, understood as the intensification of worldwide social relations that link distant localities, is a phenomenon that affects and includes judicialities. This occurs through formal and informal judicial networks but also through the decision-making processes that lie at the heart of the judicial function. One aspect of this concerns the citation of foreign law in constitutional cases. The metaphor of judicial dialogue has been employed to understand and guide this practice. However, as a concept, judicial dialogue fails to capture the most salient features of judicial practice: its role in changing the law. In its most ordinary meaning, judicial dialogue is not an account of current practice but rather a call for radical globalization of the judicial role. In this paper, I argue that such a development would transform judicial identity in the most fundamental way. Judges would cease to be judges since their core task of deciding the cases before them would have become subservient to their new mission of developing transnational judicial networks. Resistance of this development requires a better understanding of the ways in which foreign law can truly enrich the decision-making of national courts without undermining the core responsibility of judges to decide disputes according to national law.

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**The Transformation of Judicial Identity: Mechanisms and Impacts of Transnational Judicial Communication**

Natalia Serebryeva: Russian Constitutional Court’s role in the implementation of the European Court of Human Rights judgments: some lessons from the judgment in the N.V. Korolev and V.V. Koroleva v. Russia case

This paper looks at some recent Russian Constitutional Court judgments, particularly, the 2016 Korolev and Koroleva case based on the European Court of Human Right’s (ECHR) Grand Chamber Khoroshenko v. Russia judgment, in order to answer the question whether current Russian Constitutional Court case law implementing the ECHR judgments constitutes an effective tool in the latter’s implementation process. Moreover, the paper will also reflect upon whether and to what extent the Russian Constitutional Court judgment in question contributes to the possibility of re-establishing a constructive dialogue between the two judicial bodies in the future. Particularly, it will be argued that the adoption of a Constitutional Court judgment declaring a law earlier found by the ECHR to be in violation of the European Convention on Human Rights (ECHR) unconstitutional does not necessarily mean that such a judgment represents a successful and effective implementation of the ECHR judgments on the national level. In fact, such national constitutional bodies’ practice might have negative consequences and result in a more restrictive application of the ECHR’s judicial practice. At the same time, it will be suggested that in some ways even doubtful Constitutional Court judgments might still constitute an important “bridge” between the Russian Constitutional Court and the ECHR.

Dmitry Mednikov: The Russian Constitutional Court vs. Judgments of the European Court of Human Rights: Breaking or Bending International Law When Non-Enforcing It?

The Russian Constitutional Court of Russia has recently declared two European Court of Human Rights judgments – the cases of Anchugov and Gladkov v. Russia and Yukos v. Russia – unenforceable. Apart from pointing out the legal supremacy of the Russian Constitution the Constitutional Court sought to ground its conclusions, in particular, in the rules governing the interpretation of international treaties as well as in alleged violations of the principle of subsidiarity by the European Court of Human Rights. My presentation is aimed at both providing a critical assessment of the arguments regarding further alignment of judicial cultures in the EU. Comparative-legal and empirical studies describe and explain the content and development of three aspects of judicial culture: 1) professional values for judges (moral dimension) (Mak); 2) judicial ideologies in the interpretation of legal rules and concepts for European cases (legal dimension) (Graaf); and 3) leadership in judging EU law cases (institutional dimension) (Jackson). The papers for this panel elaborate the concept of ‘judicial culture’ for each of these three dimensions, in this way setting the scene for the project’s study of the development of the judicial role and judicial practices in the evolving European legal context.
What makes a “peripheral” Constitutional Court enough to be considered one of the most powerful and proactive in the world? Analogous with the case of “Benjamin Button” in the story of F. Scott Fitzgerald, this young but mature Court has developed a wide-ranging and remarkable case law, thus attracting the attention of global scholars, policy makers, along with business and social actors. In doing so, it has not hesitated in confronting public authorities and strong external powers. Reformulating the ancient division of powers, it has created interesting and innovative approaches to face the challenges of contemporary judicial review and the protection of human rights. For instance, blocking presidential reelection under the doctrine of unconstitutionality, many decisions of constitutional amendments, restructur- ing the healthcare system or protecting historic discriminated groups such as indigenous peoples, afro-descendants, women, LGBTI, internally displaced people, amongst others. Naturally, such eruption in the judicial tradition has attracted the interesting critiques and challenges that we would like to share.

Participants
David Landau
Andrés Gutiérrez
Juan C. Herrera
César Vallejo
Moderator
Victor Ferreres
Room
8B–2–19

David Landau: Constitutional Non-Transformation? Socioeconomic Rights beyond the Poor

There is now a substantial literature on the judicial enforcement of socioeconomic rights. While this literature has largely focused on whether courts can enforce these rights at all, it raises new questions about how enforcement is being carried out. Emerging empirical work suggests something of a contradiction with the theoretical literature on the purpose of social rights. Put simply, the empirical literature shows that courts are often less interested in, or less able to, use social rights to promote social transformation than is commonly assumed in theoretical work. This transformative assumption runs deep, affecting debates for example on the framing of these rights in international instruments and in constitutions, their interpretation, and remedies for their violation. But a growing literature shows that courts often enforce socioeconomic rights in a robust way without focusing exclusively on or marginalizing the marginalized. Across a number of different contexts, courts instead often seem to use socioeconomic rights to defend the status of higher-income groups that are not extremely poor. This emerging empirical literature points towards a theoretical gap. Very little literature explores the question of when and why courts engage in these patterns of enforcement or how we should conceptualize them from a normative perspective. This chapter will examine some possible (and non-exclusive) explanations for the emergence of social rights jurisprudence on behalf of higher-income groups.

Andrés Gutiérrez: Against the Tide: Is it Possible to Obtain Social Changes Through the Judiciary when there is no Political Will? The Case of Forced Displacement and the Colombian Constitutional Court

The Colombian Constitutional Court is well known in comparative studies because of its progressive case law and especially for its determination in pursuing the satisfaction of social rights. Due to its strong com- mitment in the consecution of social change for the people in need and because of the transformations it accomplished in the field of Constitutional Law, most of academics argue the Court has become a powerful institution able to perform deep and lasting changes in the Colombian society. The most paradigmatic decision of this kind is the judgment T-025-04. Through this decision the Court ordered acknowledging, in a profound and ambitious transformation of public policies ad- dressed to solve the violations of human rights suffered by displaced people. In such a way it pretended to guarantee the rights especially social rights – of more than 3 million people who found themselves in appealing conditions as a result of the internal conflict. In this paper I affirm that besides the symbolic chang- es that seemed to have appeared in public opinion and the growth of Budget and bureaucracy, little change has been achieved from the victim’s perspective. This case reveals the strong limitations that face the Con- stitutional Court when trying to promote issues that are not included in public agenda. Even more, it underlines the risks that emerge when social movements focus their efforts exclusively in courts. Finally, I maintain that the Court has been successful in promoting these changes where authorities find additional incentives to obey the orders delivered. This conclusion should contribute to the improvement of the strategies de- veloped in order to secure the realization of human rights by not expecting the Courts to do the entire job.

Juan C. Herrera: Constitutionalism of the Global South or How a “Peripheral” Court is Transform- ing the Rights of Indigenous and other Cul- tural Minorities

Protection of indigenous peoples and other cultural minorities is one of the examples that have put the Colombian Constitutional Court on the global map or at least in the category constitutionalism of the global south. I would like to share a working paper that shows an emblematic example of a two-way judicial dialogue. It presents jurisprudential case law in its entirety of both Courts – Interamerican Court of Human Rights and the Constitutional Court of Colombia for a 25- year period (1992 to 2017). I will present detailed con- cepts, tables and graphics, highlighting: (i) the context and type of interventions carried out in the territories of cultural minorities; (ii) the main outcomes of the landmark cases Saramaka v. Surinam and decisions C-030/08 and T-129/11; (iii) the potential of “binding consent” as an alternative to the problematic category of the so-called “veto power”; and (iv) the “indigenous question” and the standards of protection are taken to indicate the relevance of regional integration in the framework of a broader Ius Constitutum Commune en América Latina.

César Vallejo: “I am the State”: The Distortive effect of the Colombian Constitutional Court on the Rule of Law

Most scholars of judicial activism recognize the Colombian Constitutional Court as a world reference. As it is well known, many of its rulings have advanced in the protection of individual freedoms and social rights; however, such decisions have not been handed down without criticism. The Court is accused, among other things, of assuming functions that correspond exclusive to the legislative branch, which do serve punitive purposes, but do not carry the degree of stringency that is usually associated to that traditional hard core.

Participants
Marta Cartabia
Paulo Pinto de Albuquerque
Francesco Vigà
Oreste Pollicino
Moderator
Marta Cartabia
Room
8B–2–33

Marta Cartabia: The Engels criteria in the perspec- tive of a national constitutional court

Since the Engel case (1976) the European Court of justice defines “la matiére penale” according to a soft law approach, which diverges from the formal approach followed in most national systems. This difference is causing a number of tensions in front of national constitutional courts. Who defines “la matiére penale”? Is it a matter for the national judge or for the European Court? What is the place of national Constitutional Courts? Moreover, which guarantees apply to administrative sanctions quali- fied as criminal only from the European perspec- tive? Do article 6 and 7 CEDU be interpreted as a minimum standard guarantee? Examples of tensions caused by the different approaches to “la matiére penale” will be taken from the case law of the Italian constitutional case law concerning the principle of “ne bis in dem”, the ban of retroactive application of criminal penalties, the opposite rule governing the “lex mitior”, the notion of “base legale”, the authority of “res judicata”.
ConCurring panels

The ECHR stand-point: challenges and perspectives

The ECHR has not yet provided a clear conceptual framework for the definition of the dividing line between administrative and criminal offences. Until now it sought to distinguish hard-core criminal cases from others which carry a significant degree of stigma and those which do not, limiting the applicability of the criminal head guarantees in the case of the latter group. But case-law clarified neither the substantive criterion of significant degree of stigma nor the distinction between the disposable and non-disposable procedural guarantees. This case law impacts hugely in the field of tax, stock-exchange, customs and other business and corporate related offences. Reaction by Constitutional and Supreme Courts raises the issue of constitutional limits to such European case law. The question now is not only how to define the matière penale in Europe, but also who defines it.

Francesco Viganò: Are Confiscation Measures Penalties for the Purposes of the ECHR?

Confiscation measures are becoming more and more popular in modern criminal systems as effective tools to fight against economic offences and organized crime. Corruption and human rights laws status is, however, still largely unclear. While certain forms of confiscation have been considered as “punitive” measures by some ECHR judgments, other kinds of confiscation have been held to be merely preventive measures, which only attract, as such, the guarantees provided for the right to property and the fair process rights in their civil limb. And this in spite of their being conceived as consequence of the commission of criminal offences, and of their huge impact on the interests of the individual concerned. The question now is whether and to which extent the courts themselves began to acknowledge the doctrine: asserting the judiciary’s independence of the legislative branch but not only how to define the matière penale in Europe, but also who defines it.

Jose Pollicino: Discussant

The paper will draw some conclusions on the points discussed by the other panelists and focus on how courts (both Constitutional courts and the European courts) can address the existing challenges through dialogue. The Taricco case will be brought as an example of how cooperation can be reached in a way that ensures that the growing complexity of EU competence is neverthess consistent with the respect of the fundamental principles of domestic constitutional orders.

180 VARIETIES OF CONSTITUTIONALISM

This panel explores the understanding of constitutionalism that is dominant within the US, Canada, the UK, Germany and elsewhere. How does the historical context affect the way the various branches of government interact? The law of the EU competence is nevertheless consistent with the doctrine: asserting the judiciary’s independence of the legislative branch but not only how to define the matière penale in Europe, but also who defines it.

Carissima Mathen: The “Elusive” Separation of Powers in Canadian Constitutional Law

Historically, the separation of powers has occupied a curious position in Canada. As a Westminster-style democracy, the nation has been associated with, at most, a weak version. In the post-American revolution period, the doctrine was generally absent from legal and political discussion. Greater attention by far was paid to vertical issues of governance, namely federalism and the division of powers. The Constitution Act, 1982, which included the Charter of Rights, introduced robust US-style judicial review. The new framework was decreed as impinging on “Parliamentary sovereignty”, a charge that continues to this day. Parliamentary sovereignty is not necessarily associated with the separation of powers. But in Canada the link was clear because of the perceived threat posed by a newly empowered judiciary. At the same time, the courts themselves began to acknowledge the doctrine: asserting the judiciary’s independence and crafting distinct norms under which they have aggressively scrutinized the other branches. Recent opinions demonstrate that the separation of powers is now paid more attention in the Canadian context but not under the American Law of judicial review. But its more tenuous position in the larger constitutional order is a continuing source of tension and uncertainty.

Nick Barber: The Principle of Separation of Powers in the UK

The principle of the separation of powers is commonly thought not to apply to parliamentary systems such as the United Kingdom. I argue that this objection turns on a mistaken understanding of the principle and, also, a mistaken understanding of the structure of parliamentary systems. Once these misunderstandings are cleared away, not only can the parliamentary model be seen as embodying a form of separation of powers, it is arguable that, in some respects, it more closely aligns with the principle than presidential models.

Ioanna Tourkochoriti: “Apology” of the Law or Distress towards the law? Comparing US and French Constitutionalism

This presentation analyses the spirit of “legicism” that inspires the French Constitutional order in opposition to the distress towards the legislative that is characteristic of US constitutionalism. Is the “patriarchism of the legislative” that marks the separation of powers in France the most effective and necessary conception of constitutionalism for the protection of rights and liberties? The distress towards the law characteristic of US Constitutional order leads to an understanding of the separation of powers in a way that gives priority to the judiciary. Political scientists have criticized this conception as implying an aristocratic form of government. The presentation explores the differences in the kind of rights and liberties that are protected in the context of these variations of constitutionalism. It traces the emergence of these different conceptions to the French and the American Revolutions and the different sociopolitical needs with which they responded. And it explores the operation of these variations of constitutionalism in reference to contemporary human rights questions.

Anna Frhuštofer and Felix Petersen: Continuity and Change Constitutionalism Democratic State and Separation of Powers in German Constitutions (1848-1989)

Germany is a late bloomer with respect to both democracy and constitutionalism. Although after the Revolution of 1848/1849 a popular assembly drafted a progressive constitution, this fundamental law was never adopted and the German States were not united until twenty-two years later. United under the dictate of Prussia in 1871, the regime institutionalized was not a democracy or a liberal monarchy but a conservative nationalist state which based its legitimacy only formally on a fundamental law that it constantly violated. For example, the state was run with an unconstitutional budget only authorized by the house of lords but not approved by the peoples’ chamber, but also in the 1860s and 1870s. A democratic constitution was enacted in Germany only after the Revolution of 1918. But the Weimar Republic did not last for long: Again, an all too powerful executive exhausting the power bestowed upon it paved the way to Hitler’s fascist dictatorship.

A power separating democratic state was only institutionalized under occupation in Western Germany after 1948. On the other side of the iron curtain, the German Democratic Republic (GDR) formally adopted a number of constitutions after WW2. In practice, however, it rather continued the authoritarianism of former German regimes and constantly violated the rules it gave itself. Finally, with reunification in 1989 a democratic state was also accessible for the people in the former GDR. Drawing on continuity and change in the evolution to a constitutional democratic state, we can deconstruct the long road to a free society when we focus on separation of powers and fundamental rights in German constitutions between 1848-1949. To give a few examples: the federal state structure foreseen by the German constitution of 1949 has its roots in the federalism of the 1848 constitution. Family resemblances between the two are also visible when we compare the bicameralism of the constitutions of 1848 and 1949. On the other hand, with view on gender equality we find strong similarities (even in the wording) between the concept adopted in the Weimar Constitution of 1919 and different socialist Constitutions adopted in the former GDR. It is arguable that, in some respects, it more closely aligns with the principle than presidential models.

Franciszek Strzyczowski: The misconception on the principle of separation of powers. A case study of the Polish constitutional crisis
Economic and Market Regulation

Since coming to power in 2013, the Liberal National Party Government of Australia has persecuted its traditional political opponents – trade unionists and union officials – through means (a Royal Commission) led by an avowed anti-union judge. In late 2016 the Australian Government used the outcome of the Royal Commission to implement a new code of industrial legislation designed to ‘bust’ Australian unions and their national grounds. Both the policy leeway of the political branches of government and the constitutional limitations apply with equal strength with respect to state expenditures and state revenues.

181 ECONOMIC AND MARKET REGULATION

participants
Anna Tsiftsoglou and Stylianos- Ioannis Koutztantis
Eugene Schofield-Georgeson
Biancamaria Raganelli
Sofia Ranchordas

Moderator
Sofia Ranchordas
Room 8B-2-49

Biancamaria Raganelli: Banking Crisis, Courts and Power

As clarified by 2015 US Sustainable Development Goals, among the great challenges for sustainable development, there is the proper management of economic resources by strong and accountable institutions. The connection between the rule of law and economic development is essential to ensure sustainable development at national and international level. The European banking system is actually affected by a large amount of non performing loans that make the efficient provision of credit extremely difficult. It is essential to restore the proper functioning of banking within the initial national regulatory framework. The ECU highlights the central role of banking and financial stability for the functioning of the Union. This becomes a superior public interest prevailing even investor protection. Is the European financial institutional framework still in progress able to guarantee strong effective and transparent institutions in Europe as such as those needed to promote inclusive and sustainable growth? How to take care of investor protection without harming market competition? What are we waiting for? How to make of the role of courts in the management and mismanagement of the national and international economic crisis? These are the questions which the paper intends to investigate though aware of the delicate “political” implications related to different legal and economic issues in Europe.

Eugene Schofield-Georgeson: A New Era of Coercive Industrial Relations for Australia

The purpose of this paper is elaboration of the rela- tion of power as a relation between the (vertical) levels of the law as mediated in the legal practice(s) and the critical position of courts in light of the free flow of reputational information or inviting us to redesign existing regulations in light of new challenges to the public interest (e.g. fake reviews).

182 ADMINISTRATIVE LAW AND DUE PROCESS

Participants
Elizabeth Eneroth
Fabiana Ciavarella
Andy C. M. Chen
Giulia Mannucci
Sharath Chandran
Rebecca Ananian-Welsh

Moderator
Elizabeth Eneroth
Room 8A-3-17

Elizabeth Eneroth: Administrative Courts the Relation of Power between the Levels of the Law Social Law

The platform economy (e.g. Airbnb, eBay) has revolutionized traditional regulatory paradigms. While conventional businesses (e.g. hotels) must comply with compulsory authorization schemes (e.g. licenses permits) designed to protect public interests (e.g. fire safety), platform-economy services circumvent them. These platforms suggest that regulations allegedly justified by the public interest are obsolete. They claim that in the information society the notion and the protection of public interests have evolved. Instead these platforms rely on rating and reputational instruments, i.e. digital systems promoting peer-review of performance. The European Commission and several scholars have praised the benefits of reputational mechanisms. Yet, it is unclear whether reputational systems protect the public interest since they tend to be biased, incomplete, and in disregard of negative externality experiences by third parties. In this paper, I discuss from a comparative perspective the historical development of public-interest regulations in the hospitality sector, their current relevance in the platform economy, and the critical position of courts in this debate. I inquire whether the platform economy is making us rethink the notion and protection of the public interest in light of the free flow of reputational information or inviting us to redesign existing regulations in light of new challenges to the public interest.
rulemaking proceedings. Moreover, by looking at the Italian administrative jurisprudence of the Council of State, who does annul rules for non-compliance with procedural standards, a general willingness to expand participatory rights to a growing number of rulemaking proceedings calls into question the difference only a matter of dissimilar legal traditions? How much room do modern democracies leave for public participation in administrative rulemaking processes? And what is the role of the Courts towards the rulemaker, is it deferential or does it translate into a deep control of administrative action? Can judicial review foster participation in administrative rulemaking?

Andy C. M. Chen: Judicial Review of Economic Evidence in Competition Cases by Administrative Courts in Taiwan: An Effect-Based Proposal

Years of reviewing experience by the administrative courts in Taiwan have shown a tendency towards over-formalistic understanding of its major competition legislation, the Fair Trade Act. In particular, the courts’ interpretation of economic evidence in competition cases have demonstrated a rigid reliance on certain time-honored general principles of administrative law, and has rendered the reviewing results increasingly far from the business reality of market interactions. We first introduce the enforcement structure of the Act in Part I of this paper. Part II illustrates how the administrative courts determined the quality and probative value of economic evidence in such cases. For this purpose, we analyze the two types of litigation that sophisticated economic evidence and theories are mostly likely to be raised. We argue in Part III that disputes over the persuasiveness of those decisions are usually attributable to an inability to apply the appropriate principles of administrative law: the principles of legal certainty, judicial deferral and proportionality. We then offer in Part IV an effect-based proposal to adjust the manners those principles are to be applied to avoid over-simplification for the purpose of determining the legal review issues on appeal and arbitrary determinations of penalties meeting the proportionality requirement. Part V describes the policy implications for other jurisdictions from our study and concludes this paper.

Giulia Mannucci: Due Process Administrative Powers and Judicial Review

Public authorities are required to ensure respect for due administrative procedure in the exercise of their powers and individual rights a-vis the competing administrative needs? How courts ensure administrative compliance with the participatory rights of affected subjects, and with the duty to state the reasons for administrative decisions? The answer to these questions depends on the understanding of due process guarantees in respect of public decisions: the “formalist” logic assigns to those forms of protection an independent relevance, which directly affects to the validity of the relevant act; the “substantialist” logic, on the contrary, emphasizes the substantial correctness of decisions and denies formal and procedural defects a direct impact on the validity of the measures. This antagonism reflects the tension between conflicting cooperative tools of the law; on the one hand, the efficiency and expediency of the administrative action; on the other hand, the protection of private positions vis-à-vis the administrative power. The paper aims to examine this tension by comparing the approaches to the issue that have been developed by a national court (the Italian Council of State), a supranational court (the EU Court of Justice) and an international court (the European Court of Human Rights).

Sharat Chandran: Judicial Review of Administrative Action–Perspectives from the Indian Experience

Over the last fifty years, the growth of judicial review in India has seen few parallels. Traditional models of certiorari grounded on jurisdictional errors and errors of law have given way to a rights based model where the legitimacy of State action is subject to exacting scrutiny on the touchstone of fundamental rights. The central premise of this paper is that while the growth of judicial review is a sign of a weakening administrative machinery that has become irresponsible to constitutional values. In enforcing fundamental rights the Court, in many cases, is invited to step aside from hand, the efficiency, as a Court of correction into assuming a pro-active role that involves making value based choices. The Court’s power is, however, limited to evolving a norm on a case to case basis. It is argued that in the long run sensitization of administrative authorities with the core values of a fair and transparent administration could achieve results that are consistent with values that judicial review recognizes and seeks to implement.

Rebecca Ananian-Weisz: Due Process without Rights

Due process in court proceedings is universally recognised as fundamental to achieving justice fairness, the legitimacy of the state and its institutions, the rule of law, and individual rights. This importance is heightened by the expanding role of courts in the lives of citizens and in providing a check on state power. Thus, due process finds protection in human rights documents the world over. But can due process be effectively protected without engaging the framework of individual rights?

183 CORRUPTION AND OFFICIAL DISOBEDIENCE

Participants

Elizabeth Acorn
Franco Peirone
Yoav Dotan
David Fogelson
Johannes Buchheim and Gilad Abiri
Moderator
Elizabeth Acorn
Room
8A-3-27

Elizabeth Acorn: in the Shadow of the Court: the American Innovation and Export of Negotiated Resolutions for Bribery in International Business

The influence of the 1997 OECD Anti-Bribery Convention, a prominent example of international efforts to combat corruption globally by stifling its supply, has extended well past the Convention’s core legal obligation for states to establish domestic criminal prohibitions against foreign bribery. Since implementation of the Convention, many OECD states have continued to modify domestic laws and enforcement practice which, this paper argues, is in response to ongoing international socialization. In particular, the paper points to the OECD Working Group on International Business, which has not only championed the increased enforcement of anti-foreign bribery laws, but also has provided a forum where a particular approach to the enforcement of foreign bribery law—that pioneered in the U.S.-- has served as a continual reference point. The distinctive U.S. enforcement model, characterized by negotiated resolutions, with very few allegations of foreign bribery proceeding to criminal trials, high levels of prosecutorial discretion and strong incentives for corporations to self-monitor and self-report, has come to inform the shared standards and best practices that the OECD promotes and that many states are beginning to adopt. Together, this research highlights not only the continuing influence of the U.S. on the international anti-bribery regime, but also provides a nuanced depiction of the reception of international law into domestic legal orders and their ongoing interaction.

Franco Peirone: Corruption in Member States and the EU Rule of Law: Which anti-corruption tools are enforceable?

The rule of law in December 1973, the Romanian government intended to adopt a decree that would have decriminalized certain abuse of power offences. On February 1st, the EU Commission President Juncker warned Romania not to backtrack on fighting corruption. At last, on February 4th, the government scrapped the controversial decree. This series of events raises significant questions about the existence of a EU-law notion of rule of law as well as which tools EU institutions and citizens could utilize towards dealing with rule of law crisis. The EU rule of law requires a legal framework, both at the EU and MS level, which prevents and tackles corruption since corruption hampers every substantial and formal requirements of the rule of law. Particularly, the reception of the UNCAC obliges the EU legal framework to particular constraints and MS’ non-compliance with them may allow a EU anti-corruption enforcement action. The traditional infringement procedure represents a tailored mechanism for addressing the letter- and non-observance by a member state in serious cases, in which the whole member state legal framework is simply ineffective in fighting corruption, it is possible for the EU Commission to start an Art. 7 TEU procedure. Meanwhile, a grassroots approach could constitute a third and interesting option, by holding the MS liable for failing to ensure an adequate anti-corruption framework under the Francovich regime, relying on the citizens’ commitment against corruption.

Yoav Dotan: Action Expresses Priorities: Judicial Anti-Corruption Enforcement Can Enhance Electoral Accountability

Can judicial decisions affect behavioral? Can they enhance electoral accountability by signaling to voters there is clear evidence for aattaacking institutional weakness? Shortly before the 2013 municipal elections in Israel, the Israeli Supreme Court ordered the immediate removal from office of three city mayors, following their indictments for charges of corruption. We take advantage of this unique political-legal situation to estimate the effect of anti-corruption judicial action on electoral sanctioning of low-integrity incumbents. Relying on actual voting data from 65 Israeli cities for the 2008 and 2013 municipal elections, we apply a difference-in-difference estimation to test this effect. Results indicate that the electoral effect of judicial anti-corruption action on the vote-share of low-integrity incumbents is negative and statistically significant. This effect on electoral sanctioning of corruption is consistent with agencies’ capacity to effectively translate judicial actions into the capacity to influence electoral behavior by signalizing the importance of integrity considerations in electoral choices.

David Fogelson: Official Disobedience and Legal Integrity

Johannes Buchheim and Gilad Abiri: Official Disobedience and the Competition over Legitimacy

This paper develops the notion of official disobedience as mutual checks and balances while remaining acting as mutual checks and balances while remaining within their constitutional boundaries. Here, we find evidence that the OECD promotes and that many states are begining to adopt. Together, this research highlights not only the continuing influence of the U.S. on the international anti-bribery regime, but also provides a nuanced depiction of the reception of international law into domestic legal orders and their ongoing interaction.

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assumed is not the ordinary power conveyed by the constitutional framework. Instead, the overstepping public official claims the (extra-ordinary) legitimacy of shifting the balance of powers of changing the rules of recognition. Official disobedience thus is the act of playing the "legal game" while not quite following its rules. Prevalent in times of Trump's America, competing courts in Europe and constitutional restructuring in Poland, Hungary, and Turkey official disobedience is cut from the same cloth as revolutions and constitutional moments. In all three times of upheaval and drama create the possibility of a shift in the constitutional structure and its legitimizing basis in politics and culture. However, in focusing on official action that stays within the overall shapes and forms of the existing constitutional framework, the notion of official disobedience provides a prism for many struggles within a constitutional/legal system that fall short of constitutional moments and revolutions.

### 184 PUBLIC AND PRIVATE POWERS

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### Eli Bukspan and Asa Kasher: Public Rights for Private Persons: Direct Application of Constitutional Human Rights

Our paper deals with the possibility of, and the need for, applying human rights directly in the realm of private law. This approach contrasts with the prevalent view of constitutional human rights as part of public law, to be applied in private law through an indirect application model that is limited, implicit and unsystematic. We hold that this indirect model is incompatible with a democratic world view that recognizes not only a basic right to the free and undisturbed realization of individual liberties, but also a need for protecting the unexercised exercise of human rights. In a democratic regime, therefore, the identity of the infringing agency – the various branches of government as opposed to individuals or other private entities – should not serve as the litmus test for determining the legal protection granted to human rights. Indeed, our comparative examination demonstrates how, in recent years, the approach acknowledging indirect application of human rights in private law has drawn closer and almost blended with the one acknowledging direct application. In the paper, we also challenge the suspicion which has been raised, according to which adopting the direct application model in private law will actually lead to the violation of human rights, given that private law lacks the tools for deciding on priorities in their regard. Our approach enables profound justifications as well as applications of the direct application model of human rights in private law.

### Kevin Crow: Private Power Public Law Revisited: Intellectual Property at the ICSID through the Vienna Convention: Implications of Eli Lilly v. Canada

Through the vehicle of international courts, private power has the potential to shape public international law and to force revisions to the domestic law of non-hegemonic states. This explores this theme through a study of Eli Lilly v. Canada – a pending (fully argued) case brought by a U.S. investor against Canada before an ICSID tribunal. Initiated under NAFTA's Investment Chapter after two Canadian Supreme Court decisions on the definition of Canada's intellectual property law invalidated the investor's patents Eli Lilly v. Canada is the first case in international investment law's history to address the allegation that a state's interpretation of its own law is inconsistent with international interpretations and therefore incorrect. The arguments Lilly set forth in part depend upon the international trade system's TRIPS Agreement, which binds all WTO Members and falls under the auspices of international law.

### Nancy Marder: Courts Power and the Public: Cameras in the UK Supreme Court

Courts are essential to a democracy because they resolve disputes in public proceedings that reassure citizens that justice has been done. However, as members of the public read less and watch more, and as technology provides unobtrusive cameras and live-streaming, the pressure is greater than ever to allow cameras in the courtroom to educate citizens about the workings of their courts. But on the other side, judges and some legal scholars worry that in the name of transparency trials involving difficult issues will be turned into reality shows for everyone's entertainment. They worry that neither justice nor citizens' rights will be served by potentially self-serving media outlets that focus on increasing their viewership and bottom line. With these critical and diametrically opposed views in mind, this paper presents findings from the first empirical study of how cameras are used in the UK Supreme Court. The UK Supreme Court is one of a number of courts to permit cameras in the courtroom. Such courts have begun to experiment with changes to tradition that they hope will allow them to maintain public trust. They want the public to learn about what takes place in the courtroom and believe that live-streaming is the best way to reach the public. The debate about cameras in the courtroom is raging in the United States and Europe and countries can learn from each other's experiences including how cameras are used in the UK Supreme Court and with what effects.

### Dwight Newman: The Private Law Interfaces of Constitutional Indigenous Rights Adjudication

Some states, including Canada, have constitutionalized Indigenous rights. In adjudicating constitutional and administrative law issues associated with these rights, courts simultaneously affect private law entitlements and rules in relatively significant ways. This paper, building in a theoretical direction on my recent Nebraska Law Review article on Canadian adjudication on Aboriginal title will explore challenges courts may face in adjudicating public law issues on Indigenous rights while in an inevitable interface with private law. Public law reasoning methodologies may fall to take into account certain private law concerns, so the paper is in part about how (or if) courts can try to successfully transcend boundaries between constitutional law and administrative law, international law and private law. At the same time, the paper is an interrogation of the exercise of judicial power in this context, exploring whether courts are institutionally situated to adjudicate such questions successfully with respect to a number of criteria the paper will offer to measure successful adjudication in this context. The paper will move toward conclusions that bear on institutional design of adjudication in the constitutional Indigenous rights context.
Irene Sobrino Guijarro: Constitutional Courts enforcing social rights: achievements and ongoing tensions

The tensions that are often identified between democracy and constitutionalism are especially prominent with respect to the protection of social rights. A conventional argument that pervades literature critical of the subsidiarity norm and constitutional social rights, lies in the assumption that these rights essentially entail political claims regarding strategic choices among means (legitimacy deficit claims) or, at most, they are considered as enforecemental guides for legislative or administrative decision-making (lack of competency arguments). In this paper, I argue that these claims may lose their force when confronted both from a constitutional fact-stating and from a normative sense. In particular, I draw on the German and Spanish Constitutional Courts’ experience to point out two instances of judicial review on social rights legislation carried out by centralized bodies, which have cautiously and progressively incorporated a transversal interpretation of the “social state”, “equality” and “human dignity” constitutional principles, in order to justify the enforcement of the “directive social principles” (Spain) or the protection of certain social rights not explicitly enshrined in the Constitution (Germany).

Alba Nogueira: The role of the Spanish Constitutional and Supreme Courts towards housing rights in the economic crisis turmoil

The economic crisis has risen the awareness toward housing rights in Spain with worrying mortgage foreclosure figures and high rates of non-evacuated young people. There have been efforts to build up a subjective right to affordable and proper housing. Recent reforms of the bills of rights in the Autonomous administrative decision-making (lack of competency arguments). In this paper, I argue that these claims might be one of the explanations as social protection is one of the main Autonomous Communities domain of action while economic competences fall on the State part. Also, an increasing politicization of the designation of both courts might put out the influence of political and economic elites in the judicial decisions.

Karen Kong: Jurisprudence of the United Nations Committee on Economic Social and Cultural Rights and Social Rights in Domestic Courts

Since the entry into force of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights, the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) has heard a few individual communications. As a supranational adjudicative mechanism specifically on economic and social rights, it has an important role in strengthening and reinforcing the ICESCR and continues to monitor the development of norms and standards, and filling in the gap in international economic and social rights adjudication. This paper is a preliminary assessment based on the initial jurisprudence of the CESCR. It will examine the working method, the standard of review, the factors considered and the margin of discretion applied by the CESCR in considering individual complaints. This will be compared with the approaches adopted by the United Nations Human Rights Committee on similar socio-economic issues. What added-value does the CESCR offer in light of its overlapping jurisdictions in some areas with the Human Rights Committee? How is the review standard of the CESCR compared to domestic courts in adjudicating social rights cases? This paper will discuss some challenges of the CESCR in creating constructive dialogues with domestic courts on the progressive realization of social rights.

Johanna del Pilar Cortes-Nieto: Redefining Social Rights in Times of Austerity. The Case of the Constitutional Court of Colombia

In 2011 the Congress of Colombia passed a constitutional amendment that introduced fiscal sustainability in the realm of constitutional law and therefore in judicial matters. Also, the restrictiveness of Supreme Court rulings over mortgage conditions was contested giving place to the leading role of the European case law balancing the protection of this right in front of the extensive construction of other interests (abusive clauses in mortgages). This paper will try to analyse the main judicial decisions relating housing rights in Spain and try to find the rationale to Constitutional and Supreme Court limited protection of housing rights. A decentralization process under way might be one of the explanations as social protection is one of the main Autonomous Communities domain of action while economic competences fall on the State part. Also, an increasing politicization of the designation of both courts might put out the influence of political and economic elites in the judicial decisions.
These patients were isolated in sanatoriums until 1996. According to the literature, the Calderón administration initially admitted that it was unconstitutional because the unfair procedure and trials discriminated against leprosy patients. The Supreme Court’s move to hold special courts at that time was not based on scientific research on the medical condition of leprosy patients. These patients were isolated in sanatoriums until 1996, when the Leprosy Prevention Law was abolished in the Parliament. Then, in 2001, the Kumamoto District Court admitted governmental responsibility for legislative inaction for its compulsory isolation policy from 1996. Judicial administration is the public office of keeping the human and the material structures of the courts, and maintaining rational and efficient operation of the judicial system in order to exercise judicial power. It includes internal control, administration of personnel, budget negotiation, and design of the judicial system. Because of this nascent period of the judiciary under the Japanese Constitutional Court, the Supreme Court’s power of administration was too much enhanced in the selection of the individual judge’s independence and some cases emerged.

Shucheng Wang: Guiding Case System and the Expansion of Supreme Court’s Legislative Authority in China

Given the absence of case law in China, the Supreme People’s Court (SPC) has recently established the guiding case system in 2011. In comparison, the guiding case mechanism operates in a different way from that of other jurisdictions as only the SPC can select guiding cases which have a guiding force in the sense that the lower courts should refer to them when deciding similar cases. Contrary to the general assumption that guiding cases can be taken by judges as useful guidance, this article reveals that, although the guiding case system intends to treat like cases alike, the judges seldom refer to them in practice due to the limited number of the guiding cases selected by the SPC. Moreover, the guiding case system allows the SPC to expand its legislative authority, apart from the one delegated by the National People’s Congress Standing Committee – the highest legislative body in China. The SPC is able to interpret the law directly through adding the “Main Points of the Adjudication” – a part finalizing each guiding case by the SPC.

Michael Hein: Discussant

Yuichiro Tsuji: Judicial Administration in Japan

The Japanese Supreme Court apologized for establishing special tribunals for leprosy patients outside standard courtrooms. The Supreme Court initially admitted that it was unconstitutional because the unfair procedure and trials discriminated against leprosy patients. The Supreme Court’s move to hold special courts at that time was not based on scientific research on the medical condition of leprosy patients. These patients were isolated in sanatoriums until 1996, when the Leprosy Prevention Law was abolished in the Parliament. Then, in 2001, the Kumamoto District Court admitted governmental responsibility for legislative inaction for its compulsory isolation policy from 1996. Judicial administration is the public office of keeping the human and the material structures of the courts, and maintaining rational and efficient operation of the judicial system in order to exercise judicial power. It includes internal control, administration of personnel, budget negotiation, and design of the judicial system. Because of this nascent period of the judiciary under the Japanese Constitution, the Supreme Court’s power of administration was too much enhanced in terms of the individual judge’s independence and some cases emerged.

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The European Union’s competences in the field of criminal law have always been a matter for debate. It has especially been discussed whether there should be criminal law competences at all and if so, what the scope of such competences should be and what type of legislative instruments would be most appropriate. Now that the Lisbon Treaty provides for a body of express competences in the field of criminal law (regarding cross-border cooperation harmonization and enforcement agencies), the time is ripe to evaluate the foundations of these competences. In this panel, four speakers take different angles to reflect on the current foundations of EU criminal law competences. The panel has a twofold aim. First it discusses the foundations of the current competences. Secondly, the panel further enquire into what extent would the EU constitutional order, as well as the political context, allow to go beyond the current competence definitions, in the sense of alternative foundations that may increase the legitimacy of EU intervention in the area of criminal law. The speakers adopt a diversified number of approaches to reflect on the current foundations of EU criminal law to criminal legal theory. They take into account various sources, including CJEU case-law on how they are laid down in the Lisbon Treaty. Moreover, it will be discussed whether, from a normative perspective, harmonisation competences and competences in the field of cross-border criminal justice cooperation) as well as the internal market-rationale is still valid?

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| Jannemieke Ouwerkerk: Rethinking EU criminal law competence: Is the internal market-rationale still valid? | As from their very coming into existence in the 1992 Maastricht Treaty, the European Union’s criminal law competences closely relate to the EU’s original aim of establishing a common market in which the free-dom of goods, capital, services and persons must be ensured. This paper analyses to what extent internal market considerations still shape the current criminal law competences of the European Union (such as harmonisation competences and competences in the field of cross-border criminal justice cooperation) as they are laid down in the Lisbon Treaty. Moreover, it will be discussed whether, from a normative perspective, the internal market-rational as a convincing one for EU action in the field of criminal law, or whether the 2017 European Union demands for alternative foundations to underpin a legitimate EU criminal law.

| Irene Wieczorek: The legitimacy of EU criminalisation: the rise of a normative values-based rationale | The aim of this paper is to analyse the EU approach to the question of the legitimacy of criminal law. More specifically by resorting to a criminal legal theory framework, it enquires into the theoretical justifications the EU legal order has acknowledged as legitimating the resort to harmonised definitions of crimes as a legislative strategy. It challenges the idea that only an effectiveness rationale (i.e. an enforcement-based rationale) has guided institutional and legislative developments in the context of EU criminal law. It takes an historical perspective looking at the evolution of competence definitions from Maastricht to Lisbon, and at policy documents (multi-annual programs, and ad hoc criminalisation policy documents), which interpreted them. It tests the weight given to the enforcement rationale (EU criminalisation used to ensure the enforcement of EU law, or of national criminal law in cross border cases) and the normative rationale (EU criminal law as an expression of a values-based criminal policy). It concludes that the latter normative, values-based rationale has progressively gained more importance over time, and it positively evaluates this trend as being more consistent with the identity the EU has set for itself as a ‘fundamental rights sensitive’ kind of supranational organization (see Article 2 TEU).

| Samuli Miettinen: Choice of legal bases and EU criminal law: Is criminal law special? | Conferral is at the heart of EU constitutional law. It is expressed in EU legal instruments by a specific reference to a Treaty article or other formal legal basis for the relevant instrument. As the CJEU puts in its case-law, ‘the choice of legal basis is of constitutional significance’. But often this decision involves a choice between several plausible alternatives. This is illustrated by the various different express legal bases relevant to EU criminal law. The choice matters. Some allow only directives, thus precluding directly applicable criminal law as a matter of EU institutional law. Others allow Member States to in practice opt out, either because of Protocol 21 and 22 arrangements, or because they could invoke an ‘emergency brake’. It has even been argued by some that criminal law could continue to remain an ancillary element of proposals based entirely outside the AFSJ, such as Article 33 on customs cooperation or Article 325 on fraud against the EU budget. Therefore, EU criminal law is a matter of EU constitutional law. The choice matters. Some allow only directives, thus precluding directly applicable criminal law as a matter of EU institutional law. Others allow Member States to in practice opt out, either because of Protocol 21 and 22 arrangements, or because they could invoke an ‘emergency brake’. It has even been argued by some that criminal law could continue to remain an ancillary element of proposals based entirely outside the AFSJ, such as Article 33 on customs cooperation or Article 325 on fraud against the EU budget. Therefore, EU criminal law is a matter of EU constitutional law. The choice matters. Some allow only directives, thus precluding directly applicable criminal law as a matter of EU institutional law. Others allow Member States to in practice opt out, either because of Protocol 21 and 22 arrangements, or because they could invoke an ‘emergency brake’. It has even been argued by some that criminal law could continue to remain an ancillary element of proposals based entirely outside the AFSJ, such as Article 33 on customs cooperation or Article 325 on fraud against the EU budget. Therefore, EU criminal law is a matter of EU constitutional law.

| Leandro Mancano: Seeking an Anthropological Model behind EU Criminal Law Competences: from Market Criminal to Public Enemy | European Union (EU)’s competences in criminal law as now outlined by the Lisbon Treaty are perfectly consistent with the coming into being and development of EU criminal law. They establish the importance to fight major criminality threats with cross-border dimension, jointly with the need to resort to criminal law for achieving higher effectiveness with Union norms. This paper investigates whether EU criminal law competences are built upon a specific model of human being. The hypothesis is that the Union approaches the wrongdoer mainly as a homo oeconomicus countered through a strategy mostly inspired by security demands. The hypothesis is tested in three scenarios: EU sub-statutory efficacy rationale (judicial cooperation; EU citizenship. The conclusion reveals that starting with the adoption of the rational agent as the main anthropological model of criminal, EU law (at primary and secondary levels) regards the offender as a public enemy that needs to be countered through tight state control and repression.

| Ester Herlin-Karnell: Discussant | Maria Fletcher: Discussant |

Irene Wieczorek: The legitimacy of EU criminalisation: the rise of a normative values-based rationale

Leandro Mancano: Seeking an Anthropological Model behind EU Criminal Law Competences: from Market Criminal to Public Enemy

Discussant

Discussant

Piotr Mikuli: Toward a diffused judicial review system in Poland?

In the paper, the author will consider the possibility of developing a diffused judicial review of legislation in Poland in the context event of the constitutional crisis. Several legal scholars in Poland, especially a number of constitutional lawyers, so far have been rejecting the right of ordinary courts to decide on the constitutionality of statutes. The situation radically changed when at the end of 2015, the crisis around the Constitutional Tribunal broke. In the paper, the author will appraise the hitherto case law of courts (mainly the Supreme Court and the Supreme Administrative Court) and will argue that a model of diffused judicial review in Poland can theoretically be accepted with reference to the doctrine of necessity. This doctrine would legitimise courts to strike down statutory provisions in a concrete case on the ground that the tribunals is incapable of acting in accordance with the constitution. Ordinary judges may encounter many practical problems. These include, for example: 1) how to rule on a case if, as a result of eliminating an unconstitutional provision by a court, a legal loophole arises; 2) what to do if the Tribunal and an ordinary court disagree on the constitutionality of a suspicious provision; 3) how a judge should behave when statutory provisions have been eliminated from the system of law by the tribunal and a court still questions the tribunal’s legitimacy to act.

Arianna Angelii: Selection of the judges of the constitutional courts and rule of law. The cases of Poland and Slovakia

The rules for the selection of constitutional court’s judges ensure the independence of the organ in exercising its functions of constitutional control. Even if European countries have opted for different models of constitutional justice, many of them have experienced problems this is the case of the judges of the courts to perform their activity. Recent crisis in Poland and Slovakia – which will be considered as case-studies – have once again shown to what extent the lack of consensus among the political forces in the procedure for the selection of the judges of the constitutional courts could endanger the entire constitutional system, and the respect of the principle of rule of law in particular. We will therefore analyse
the evolution of the legislation concerning the selection of the constitutional courts’ judges, as well as the behaviour of the different political actors involved in the two case-studies, considering also the role of the courts in the transition from the Socialist system and in the development of the new democratic order. We will further evaluate – from a comparative perspective – how rules on the election of the constitutional judges could represent an actual safeguard for the overall system in maintaining the political confrontation among different forces and if common standards have arisen in the last years at the European level.

Adam Czarnota, Michała Padziore and Michała Stambulski: Constitutionalism and the Politics of Conflict. The Case of Poland

In 2015, a constitutional crisis broke in Poland. Official reason was conflict between former and newly elected parties about procedure of electing judges of the Constitutional Tribunal. Events quickly escalated, revolving in government refusing the publication of judgments of the Tribunal, the opposition accusing the government of a coup, law faculties calling for respect for the rule of law, citizens protesting and gathering in public to read Polish Constitution. Constitution ceased to be the domain of experts and become a pressing public issue. It was a subject of many news comments and pub discussions. Symbolically it was the ending of the post-communist transformation, during which the authority of the Tribunal was not questioned, and it played a leading role in establishing the rule of law. Also in other European countries, constitutional courts were object of (eg. in Hungary Croatia). This cases can also be seen as a clash between “legal” and “political” constitutionalism. Legal implies the possibility of harmonizing conflicting interests in society. It requires adoption of politically neutral rules. For political constitutionalism conflict is constitutive for democracy and any attempt to remove it ends with the establishment of hegemony. This generates resistance to the wording, through which we are currently observing. The question is, whether this mobilisation is capable of producing stable different from liberal, institutions or alternative forms of rule of law?

Kirsty Hughes: EU Nationals Right to Remain in the UK Post-Brexit the Role of the Courts and the Failings of Democracy

Brexit has left EU nationals in the UK anxious as to what the future holds. Many have partners, children, friends, and employment here, it is their home; and they fear it will be ripped away. Instead of reassuring them the Government has declared that they are a bargaining chip for negotiations, MPs have voted down a legislative amendment protecting residency, and EU nationals have found themselves embroiled in a Kafkaesque bureaucratic nightmare with the Home Office, residency applications are being declined and they are being informed that they should leave. Yet the reality is that regardless of what negotiating tools the Government thinks it has at its disposal, Article 8 ECHR clearly precludes deportation. Given that it is beyond doubt that human rights law safeguards residency I will argue that the current state of uncertainty fostered by the Government should itself be regarded as a human rights violation. This provides an opportunity for reflecting upon the role of domestic and international courts in protecting the individual the extent to which courts can and should protect the vulnerable from biasing the nature of their rights, the failings of political constitutionalism and the extent to which democratic objections to rights and judicial intervention fail in the context of migrants.

Micaela Vitaliatti: Anti-discrimination principles and European Court of Justice

Hannah Harendt once wrote that only the principle of equality protects the people from discrimination. The anti-discrimination law is a key-area to achieve inclusion. In this case it will be applied in the field of employment law. The proposal aims to analyze how the European Court of Justice’s case law has shaped principles and solutions in order to make anti-discrimination law effective, with regard to all relevant stakeholders. The paper will also analyze to what degree domestic case-law does follow European decisions on this matter.

190 ENFORCING CULTURAL RIGHTS - CURRENT CHALLENGES AND FUTURE PERSPECTIVES

More than 60 years after the adoption of the Universal Declaration on Human Rights (UDHR), international human rights law has greatly expanded and domestic legal orders have accordingly been largely influenced by the transformative impact of international human rights standards. Within this setting, the intersection between ‘cultural rights’, cultural heritage and human rights has invited debates over their scope and enforcement. Despite developments at universal and regional level, there is still ambiguity as to how to source culture within human rights law and how to guarantee the universality, interdependence and indivisibility of human rights while acknowledging that a variety of cultural issues come into play in relation to their scope of protection. Moreover, cultural rights themselves are often conceptualised as too resource-intensive and too vague to be justifiable. The aim of the paper is to take an in-depth look at the various challenges and perspectives of the direct/indirect enforcement of cultural rights.

Participants

Kalliopi Chainoglou
Mateusz M. Bieczynski
Charlotte Woodhead
Andrzej Jakubowski

Moderator

Kalliopi Chainoglou
Room

8B-3-52

Kalliopi Chainoglou: Enforcing Cultural Rights: The Rebirth of Cultural Human Rights?

International human rights instruments do not define ‘cultural rights’. In a number of international human rights instruments the conservative conceptualisation of ‘cultural rights’ encompasses the right to education and the right to participate in cultural life, to enjoy the arts and to share in scientific advancement, and its benefits. In recent years, the transformative impact of the international human rights standards and the increasing awareness raised by international organisations and international instruments concerning cultural diversity and cultural identity has contributed to shedding light onto the cultural dimensions of human rights, effectively thus cementing the connection between culture and other human rights. International jurisprudence coming from various judicial or quasi judicial bodies stands evidence that on the one hand the concept of cultural rights is evolving while the scope of human rights is realigned through the prism of cultural connotations. This in effect enhances the overall status of cultural rights across the human rights spectrum while it brings forward the issue of the identity of the right-holder (individual/collective). The paper addresses this shift from cultural rights to cultural human rights by reference to recent case-law and draws comparison between the approaches adopted by the UN and the European human rights systems.

Mateusz M. Bieczynski: The Right to Cultural Heritage. Its Enforcement by European International Human Rights Courts (ECJ and ECHR)

The right to cultural heritage is not explicitly mentioned in either the EU Charter of Fundamental Rights or in the European Convention on Human Rights (ECHR), but there are case-law of the European Court of Justice in Luxembourg (ECJ) and the European Court of Human Rights in Strasbourg (ECHR) respectively – mention in their case-law cultural heritage in the context of human rights. Usually, but not singularly, it is invoked by the ECtHR as a collective empowerment – limited to the ‘cultural property right’ of an individual (cases: Beyeler v. Italy, Ruspoli Morenes v. Spain, Bunomo Gaber & oth. v. Italy, etc.). Similarly, the Strasbourg Court does not mention this right in the context of individual claims to cultural access and participation or minority cultural rights. This practice suggests that the ECtHR tends to shape cultural heritage rights as a ‘community privilege’. At the same time the ECJ does not give a strong priority to cultural heritage (apart from the European Charter). The Court rather limits the Member State’s national interest in keeping the cultural good(s) within its own territory, treating this interest as an obstacle for free trade within the EU. In a similar vein, the Luxembourg Court only seems to recognize cultural heritage as an object of the ‘cultural property right’ in its borders in the case of ‘national treasures’ – cultural objects of the highest value. Different definitions of the ‘right to cultural heritage’ in the case-law of both courts raise at least three questions which will be analysed in this paper: 1.) is the meaning of the ‘right to cultural heritage’ equal in both legal regimes? (objective range) 2.) are the courts congruent in their legal application of the scope of protection of the law on cultural property rights? (subjective range) 3.) is it possible/effective to single out territorial claims as a ‘right to cultural heritage’? What interests are coming to the fore in their decision-making? (axiological aspect). While dealing with these dilemmas, the paper will also refer to another aspect of the problem: the formal ‘normative one’. It refers to the legal framework for the coexistence of both courts, which partly influences the scope of the right to cultural heritage in both regimes. On the margin of this investigation another problem will also be addressed: is there – according to the jurisdiction of both European courts – any recognized form of a ‘collective European cultural heritage’?

Charlotte Woodhead: Redressing Past Cultural Injustices and Wrongs: the UK’s Spoliation Advisory Panel

This paper analyses the work of the UK’s Spoliation Advisory Panel and places it within the broader framework of cultural rights discourse. The Panel was
The panel therefore acts as a modern-day forum for the Panel’s Terms of Reference frame claims based on lost possession. No similar panels exist in the UK on this issue. The Washington Conference Principles on Nazi-Confiscated Art, 1998 focused on restitution of confiscated property; frequently the discourse surrounding the Panel’s work is couched in terms of returning property to the ‘rightful owner’ and the Panel acts as arbiter for rejuvenated property tributive justice. A counter-argument might be that the need to repair past wrongs and injustices presupposes equal and free access for all to a variety of goods and products. Arguably, it also involves the right to participate in the decision-making processes with reference to the cultural life of a given community. In fact such an interpretation of the content of the right to participate in cultural life has been enshrined in recent international cultural heritage legal instruments in terms of consultation governance and information sharing perhaps most explicitly in the Council of Europe’s Framework Convention on the Value of Cultural Heritage for Society and the UN Declaration on the Rights of Indigenous Peoples. In this regard the paper will analyse the existing models of participation in cultural matters available under various international regimes and discuss the practice of their realisation in terms of consultation governance and information sharing. The paper will also refer to the theory of Global Administrative Law (GAL) in order to better explain and substantiate these observations from the point of view of governance rather than the more orthodox definitions of justiciability or judicial enforceability of rights.

Ligia Fabris Campos: The Regulation of Trans* Rights in Brazil

The objective of my proposal is to analyse trans-genders’ rights in Brazil because of the degree of complexity and controversy regarding transsexuals nowadays within civil society legislature and judiciary. I maintain that the concept of ‘harm to self’ in light of gender studies’ perspective can be the key to understand the contradictions, setbacks and advance-ments as well as to question and criticise transgenders’ law and rights. My presentation is divided into three parts: Firstly, I will present the main concepts of gender studies that will be the basis of this work. Secondly, grounded on the interpretation of this notion and according to the concepts of gender studies, I will analyse the legislation and the jurisprudence in relation to transgenders’ rights in Brazil. Finally, as it will be shown, I will point out a series of tensions within the processes of recognition of trans rights in this country. These points will lead me to conclude that the reinterpretation of the meaning of the surgery between harm and beneficence was essential to its transformations.

Jan Kratochvili: Subsidiarity of human rights in practice: the use of human rights by first and second instance courts in the Czech Republic

The principle of subsidiarity is viewed as the core of the procedural justice, defined as fairness and promotion of organizational and institutional changes built on the principles of participation, voice, and transparency. Accordingly, it refers to the concept of participation as one inherently linked to both culture and procedural justice. The right of everyone to participate in cultural life, as provided in Article 27 UDHR 1948 and Article 15a IESCR, is fundamental for the realisation of all cultural rights that enable the exercise of other human rights. In fact, it is enshrined in the vast human rights instrumentarium. According to the UN Commission on Economic, Social and Cultural Rights, as expressed in its General Comment No. 21, this right may be exercised both individually and collectively. Yet it may be subject to various societal contexts and cultural practices. It is widely recognized that this right presupposes equal and free access for all to a variety of cultural resources. Moreover, it also refers to distinct participatory forms of cultural manifestations, including inter alia, different means of accessing cultural goods and products. Arguably, it also involves the right to participate in the decision-making processes with reference to the cultural life of a given community. In fact such an interpretation of the content of the right to participate in cultural life has been enshrined in recent international cultural heritage legal instruments in terms of consultation governance and information sharing perhaps most explicitly in the Council of Europe’s Framework Convention on the Value of Cultural Heritage for Society and the UN Declaration on the Rights of Indigenous Peoples. In this regard the paper will analyse the existing models of participation in cultural matters available under various international regimes and discuss the practice of their realisation in terms of consultation governance and information sharing. The paper will also refer to the theory of Global Administrative Law (GAL) in order to better explain and substantiate these observations from the point of view of governance rather than the more orthodox definitions of justiciability or judicial enforceability of rights.
Ranieri Lima-Resende: Submajority Rules in the Brazilian Supreme Court: A Counterbalance to the Presidency’s Discretionary Powers to Set the Institutional Agenda

Due to the monocratic power of the Brazilian Supreme Court’s Presidency to set the agenda of the plenary sessions autonomously there are notorious problems connected to the second order risks which are focused on the absence of predictability and the low level of transparency. According to the premise that the definition of the institutional agenda contains some immanent and unavoidable degrees of discretion it is essential to provide the Court with the compensatory mechanism of deliberation aimed at protecting the pre-decisionsal phase of its judgments from irrational behaviors. In an interesting analytical hypothesis Adrian Vermeule sustains that some institutions adopt submajority rules to deliberate procedural and preliminary questions including for setting their institutional agendas. This empirical pattern can be justified through two good normative purposes: submajority rules may reinforce the accountability of the majoritarian groups and promote transparency within the deliberative process. The Rule of Four applied in the U.S. Supreme Court for instance, establishes a functional mechanism whereby the Court’s agenda can be modified by vote of at least four out of nine Judges. Theoretically, the gain derived from the plurality of participants may improve the institutional dynamic of the Court, and the internal communication among the Judges tends to intensify in proportion to the improvement of the bargain capability of the minorities within the Court.

Vanice Lirio do Valle: Institutional dialogues strategies in the Brazilian Constitutional Court

The application of “institutional dialogue” by the Brazilian Supreme Court has been approached in different ways over the years. Two procedures involve an ex post facto answer from the litigant political branches. The Court will either ask for a specific deliberation from the constitution violator (usually the parliament) in a set amount of time; or admit as a political answer, the legislative reversal of a prior ruling through new legislation or constitutional amendment. The Court can also, as a third strategy, call the parties to discuss possible solutions along the lawsuit, before the ruling. The Brazilian Constitutional Court can sometimes deliver a provisional ruling that neutralizes the same prior decision as a legitimate normative source of the litigants, which hence ensures more receptiveness to dialogue. The three strategies present different levels of efficacy. The simple request for legislative deliberation is usually received with inertia as response fully interrupting the intended “dialogue”. The legislative revision of prior judicial decisions fails in overcoming an enhanced justification burden brought by the Court’s initial reproach. Once again, there will be no dialogue. The ex-ante dialogical intervention seems to be the most effective solution, since the inherent rationale of the Judiciary control is to enable its decision in a rational way bringing forth the same imperative to the dialogue between the parties helping to find consensus.


I use the term international constitutional review to refer to situations in which international courts (ICs), in essence, conduct constitutional review. More international courts today conduct constitutional review than most legal scholars and practitioners realize. International law scholars tend to focus on international courts (ICs) as constitutional arbiters of international institutions, ensuring that international institutions do not exceed their authority and that they are legally accountable. This paper focuses on international courts (ICs) when they review national respect for international law. I define two optics through which national actors view international constitutional review. One optic sees international constitutional review as a luxury good, and the other as a failure. I explain how national cultures of constitutional obedience rather than textual claims determine which optic is used.

Federico Fabbrini and Miguel Maduro: Supranational Constitutional Courts

The paper seeks to identify a typology of supranational constitutional courts within the broader genus of international courts. It outlines six criteria that it regards as necessary for an ordinary international tribunal to become a supranational constitutional court and it discusses this in light of the experience of the European Court of Justice.

Roman Zinigrad: Symbolic Interpretation: Reading Constitutions Through National Laws (And Not Only the Other Way Around)

Many are the methods of constitutional interpretation but none of them draws on primary legislation as having any weight in understanding constitutional provisions. The top-down normative hierarchy of laws leads not only textualists but even disciples of purposive and subjectivist methods of interpretation (e.g. “Living Constitution”) to disregard primary norms as a potential source of constitutional interpretation. Laws are hence interpreted in light of the (already) interpreted constitutional not vice versa. I argue, however, that at least as to the constitutional right to education, the interpretive effort has to be symbolic. The right to education – especially as far as the rights of children, as opposed to parents and state are concerned – has achieved a constitutional status in most liberal democracies only in recent decades. As such, the determination of its scope and substance cannot be made without relying on national primary laws. Educational policies reflect the cultural and social structures of a given regime, they embody historical compromises and national visions. Interpreting the constitutional facets of this right without first studying its manifestations in primary law renders judicial review largely disconnected from the society that is subjected to the constitutional text. To be sure, I do not claim primary laws of education as an exclusive interpretive source, but a binding source that must contribute to constitutional interpretation, nonetheless.

Jędrzej Maśnicki: The autonomous interpretation method as the judge-made instrument to prevent renationalization

The paper argues that the “autonomous interpretation” is still a vivid concept which allows the CJEU to deepen the EU integration. Therefore this judge-made interpretative instrument challenges the renationalisation tendencies within the EU. Moreover, the autonomous interpretation as the CJEU’s concept can be compared to the analogous concepts, developed by the Member States’ constitutional courts. Here, the question remains: who has the authority to deliver the final legal interpretation of the disputed terms and which court (the CJEU or the Constitutional Court of...
ConCurring panels

The article addresses the perennial question regarding the democratic legitimacy of judicial review through analysis of recent decisions in two affairs concerned with politics of the highest degree. The British Supreme Court ruling in Miller (January 24 2017) was concerned with a challenge to the legality of the British government’s decision to withdraw from the EU; the majority found for the applicants. The question of the constitutionality of American President Trump’s executive order regarding non-citizen entry to the US is being debated in courts. At this time, the Court of Appeals for the 9th Circuit upheld the temporary restraining order granted by a Federal district court (February 9 2017). Proceedings on the constitutionality of this executive order and the TRO are still ongoing (updates forthcoming). Both orders seem to be expressions of bold judicial decision-making in areas traditionally directed by executive unilateral power: the British conduct of foreign affairs under the Royal prerogative, and the issuing of executive orders by US presidents. Whether these judicial decisions have changed the balance between executive autonomy and its restraint by courts and whether such a change is to be welcomed are matters for debate. The analysis, addressing the future impact of those decisions as part of a broader understanding of constitutionalism, is linked with two bodies of research: constitutional history and dialogue theory as networked decision-making.

Evanna Malik, Revisiting the Counter-majoritarian Role of Courts: The Judicial Protection of Human Rights in Times of Populist Pressures not to do so

In a number of countries, constitutional courts protect citizens against threats to its democratic foundations, political rights, and liberties. A counter-majoritarian role is contested. Courts engage in a discourse that examines whether the court is a good or bad thing. The combination of the judicial and the legislative is subject to legal scrutiny. The courts are subject to political pressures to make decisions that help them achieve particular political ends.

Franciska Coleman, From victimization to empowerment: Updating American judicial review in response to changing demographics

One of the key disputers among US constitutionalists is whether the constitution is a static document or one subject to political pressures. Similarly, courts have subject to political pressures in their interpretation of human rights. The courts are subject to political pressures to make decisions that help them achieve particular political ends.
THE EUROPEAN COURT OF HUMAN RIGHTS: HISTORY AND EVOLUTION II

Marta Maroni: A Court gotta do what a Court gotta do? A critical analysis of the European Court of Human Rights and the liability of Internet Intermediaries

Much of the current debate on Internet governance focuses on how to regulate Internet intermediaries. The topic is very complex because a wide range of fundamental rights may be affected by the activity of these actors. Choosing what type of regulation should be adopted is related to which kind of Internet the law should contribute to design. In other words, the main questions are the following: a) should the law safeguard the idea of an open-ended Internet or should it create a more disciplined but less free environment? b) Should Internet intermediaries play a more active role in dealing with wrongful activities disseminated through their infrastructure? Or should they still be treated as passive and neutral? The recent case law of the European Court of Human Rights on the liability of internet intermediaries for (unlawful) user generated content helps to shed light on the delicate relation between law and information and communication infrastructures. This presentation shows how the answer to these issues is inherently connected to the performativity of law as such.

Marija Milenkovska: European Court of Human Rights and National Courts in the New Democracies: The Macedonian experience

The paper discusses the relationship between the European Court of Human Rights (ECtHR) and national courts in the new democracies through analysis of the Macedonian experience in this regard. The ECtHR is part of the Macedonian internal order and is above the laws. As the Constitutional Court has established the interpretation of the constitutional provisions should be based on the general principles on which the ECtHR relies and which it promotes. However, does the Court interpret them in the light of the Convention? Does it refer to the case law of the ECtHR in its decisions? How the case law of the Strasbourg Court is integrated in its decisions? These questions are the main concern of the paper. In order to answer them, the paper analyses the Constitutional Court’s decisions reached in the period 1998-2015. The analysis reveals that it is questionable whether the Court seriously considers the case law of the ECtHR. It explicitly refers to the ECtHR and/or to the case law of the ECtHR in a very small number of cases and when the Court does refer, quite often, it does that in a mechanical and superficial way. The paper provides certain explanations for such Court’s position, thus contributing to the debate in the literature about the dialogue between domestic and international courts. Its results are relevant not only to Macedonia but also to the European system for human rights protection in general because they concern a country which has been insufficiently studied.

Marco Bocchi: Judicial Creativity and Binding Precedents: the European Court of Human Rights as a Common Law Court

The international legal system introduced by the European Convention on Human Rights (ECtHR) is inspired by the same general principles of law that characterize civil law legal systems. Indeed, its most prevalent feature is that its core principles are codified into a referable framework that serves as the primary source of law. However, some recent developments in the jurisprudence of the European Court of Human Rights (ECtHR) show the Court’s tendency to act more like a common law court, substantially shaping the law of the ECtHR through its judicial creativity. This trend is particularly clear in the context of systemic violations of the Convention, with the introduction of the pilot-judgment procedure (PJP). In the proposed paper, I argue the legitimacy of the ECtHR to act like a common law court, building the analysis on the creation and evolution of the PJP. Since this single decided pilot case recalls the need to insert general measures, it becomes a wide precedent for similar applications, as it happens for the common law courts’ judgments, under the principle of stare decisis. Far from being advisory the PJP creates law and new obligations on the respondent State in the Convention system. Likewise, in common law systems, courts have the authority to make law where no legislative statute exists, and statutes mean what courts interpret them to mean. Nevertheless, legitimacy is not absolute and depend upon States’ acceptance of new obligations stemming from this trend.

Monika Florczak-Wator: The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State

During the last forty years in a number of cases the European Court of Human Rights (ECtHR) has been developing under the European Convention on Human Rights the concept of horizontal positive obligations of the State. In line with this concept, State authorities are obliged to intervene in relations between private persons (horizontal relations) to the advantage of the weaker party and, at the same time, to the disadvantage of the stronger one. Undoubtedly, the limits of State interference with horizontal relations must be set in such a way to meet both the requirement of respecting individual rights and that of protecting them. In other words, an individual must be given autonomy the power to decide about himself, but at the same time efficient protection of his rights must be guaranteed. Thus implementation by the State of positive protective obligations requires balancing the values underlying the colliding rights and freedoms. Although the authors of the Convention did not intend it to cover private relations, the ECtHR has employed a variety of methods to apply the Convention to the relations between private parties. In my paper, I would like to provide an overview of the ECtHR’s positive obligations case law. However, the aim of my paper is to go beyond the descriptive level. It aims to provide insight into the ECtHR’s application of the concept of positive obligations by bringing structure in and distilling general principles from the case law of the ECtHR.

Chris Wiersma: Judging the lawfulness of conduct in criminal journalism practices by the European Court of Human Rights

Press Freedoms and Duties Responsible Journalism Criminal Law Judging European Human Rights Strasbourg Court/CoE Judicial Systems

Participants

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Room 8B-4-09
This paper explores strategies for localising governance within the Australian federal constitutional legal system in an age of increasing centralisation of legal power. In the last quarter of the twentieth century, approaches to power has made federalist governments vulnerable to the anti-democratic influence of international law norms and insti-


tutions. Constitutional law scholars have overlooked how international law norms have revolutionized the notion of sovereignty – for example, through the 1648 Treaty of Westphalia, end of colonial rule, and rise of international agreements bring forward the in-
novative approaches to the constitutional or statutory jurisdictions. Further, the High Court of Australia has also drawn from the US case for the transnational ECtHR system? Are the two comparable? After all, one is a domestic context. This is also considered in a comparative context. This is done with a view to identifying a relationship between exceptions to the act of state doctrine and the abuse of rights doctrine.

Anat Scolnicov: Fertile soil: legitimacy rational-

ity and constitutional transplants.

I will submit a full abstract tomorrow. I am submit-
ting this now so as not to miss the deadline. The pape

I will submit a full abstract tomorrow. I am submitting this now so as not to miss the deadline. The paper asks what role should constitutional courts play in transposing constitutional ideas between states.

Maxim Sorokin: Should the sub-federal con-
stitutional justice to check the Constitutional Court of Russia?

In the Russian Federation, according to the 1993 Constitution, the constitutional adjudication is exer-
cised by the Constitutional court of Russia (FCC), and by constitutional jurisdictions of the sub-federal enti-
ties within the scope of regional legislation. As the FCC was always trying to expand enormously the scope of its constitutional review (as previously in regards to the federal courts and now in respect to the ECHR’s judg-
ments), the Court has been more and more supported the centralized and authoritarian approach towards the post-soviet Russian public law. However, there are still 16 functioning constitutional courts in the Russian regions. And if the perspective of the open conflict seems hardly possible (for example, in 2013 the FCC confirmed the constitutionality of Chelyabinsk region’s law declaring to be void by the Chelyabinsk region’s constitutional court following which the regional CC was abolished), the case-law made by the regional constitutional court contains the multiple examples when the courts by referencing to the FCC case law or even international agreements bring forward the in-
novative approaches to the constitutional or statutory interpretation in the – ‘non-political’ – cases.

Participants

Eugene Schofield-Georgeson

Dominik Rennert

Catherine Powell

Oliver Fuo

Maxim Sorokin

Eugene Schofield-Georgeson:

Federal Constitutional Strategies for the Localisation of Political Power

This paper explores models of federal constitutional governance that establish clear rules for how power-shifting ar-
rangements between the tiers of government work in practice. It highlights the success of this approach by comparing constitutional governance in Australia and Germany particularly in the spheres of industrial relations and finance.

Dominik Rennert: (Quasi-)Federal Court Sys-
tems in Times of Change

The paper tracks how courts in (quasi-)federal rights systems deal, and should deal, with social change. It does so from a comparative perspective. It first tries to conceptualize how US courts have ap-
proached the issue of homosexuality and same-sex marriage in the past two decades or so. Following Heather Gerken and borrowing from Cass Sunstein, the paper will explain why the way the courts proceed-
ed is an almost ideal-type instance of how a federal system should indeed react to social change. That is the easier part of the paper. The second part, by contrast is more of a challenge: what lessons can we draw from the US case for the transnational ECHR system? Are the two comparable? After all, one is a nation-state democracy; the other a pluralist trans-
national system. And provided that we actually come to the conclusion that at a number of relevant points the two are in fact comparable, the follow-up questions are: Can we perhaps make the US approach work in Europe? Maybe the European courts are already at it? And what role does the ECHR's margin of appreciation doctrine play in all this? Perhaps it is more than just a prudential tool of deference and more of a principled tool of judicial “minimalism” in the Sunsteinian vein? What the paper does is try to give an answer to these questions, and to ground that answer in democratic and pluralist theory.

Catherine Powell: We the People: These United Divided States

A judge has enjoined President Trump's executive order which would have cut federal funds to ‘sanct-
uary jurisdictions.’ Sanctuary jurisdictions share a commitment to limit the use of local resources in implementing federal immigration laws, which infringe their sovereignty to define local policy and are at odds with the interests of their local communities. The resulting social inequalities have seen financial shocks and crashes and a redistribution of public wealth to the wealthi-
test members of a global elite. The resulting social inequality is an almost ideal-type instance of how a federal system. And provided that we actually come to the conclusion that at a number of relevant points the two are in fact comparable, the follow-up questions are: Can we perhaps make the US approach work in Europe? Maybe the European courts are already at it? And what role does the ECHR's margin of appreciation doctrine play in all this? Perhaps it is more than just a prudential tool of deference and more of a principled tool of judicial “minimalism” in the Sunsteinian vein? What the paper does is try to give an answer to these questions, and to ground that answer in democratic and pluralist theory.

Participants

Eugene Schofield-Georgeson

Dominik Rennert

Catherine Powell

Oliver Fuo

Moderator

Eugene Schofield-Georgeson

Room

88-4-19
Han Liu: From Regime to Law: American Constitutionalism In Contemporary China

American constitutional law haunts the constitutional imagination in contemporary China. China’s reception of American constitutional law occurred in two major phases. The first, which spanned from the 1980s to the early 1990s, understood American constitutionalism as a particular political regime to be politically criticized or objectively appraised, with the tripartite separation of powers overwhelmingly highlighted as a core feature of the American constitutional-political system. In the second, which began in the late 1990s, a paradigmatic shift from a political, regime-centered perspective to a legal, court-centered approach occurred in China’s introductions to and studies on American constitutionalism. The U.S. Supreme Court and the concept of judicial review now primarily preoccupy most Chinese constitutional minds; these features of the American system have formed the focal points of reference for Chinese constitutional reform. This shift from the first phase to the second reflects both ideological and social changes since the Reform in China: the development of legal professionalism and the disciplinary specialization of constitutional law.

Luis Claudio Martins de Araujo: The impact of cross-border constitutionalism in the legal systems: The rational of judicial rights review based on the transnational dialogue

The structure of a judicial decision within the current globalized society, it is clear that the decisions of domestic and transnational jurisdiction are made in a dialogue among courts around the globe. Thus, it is undeniable that every day judges form different courts look abroad, looking for new arguments to justify their own cases. Therefore, the judicial decisions are not any longer an isolated process of deliberation of local courts. On the contrary, they are part of a transnational process of dialogue among courts around the globe. Consequently, the use of transnational decisions brings a new standpoint to the Judiciary branch in which the reference to other courts provides an additional and useful instrument to deal with related cases. Thus, it is undeniable the influence of this transnational courts as an important theoretical reference in the different levels of judicial understanding in a cross-fertilization process of ideas and approaches, that helps the courts to examine issues from a different perspective, in an interaction that increases the recognition of decisions taken by local and transnational courts. Furthermore, in this transnational process judicial decisions are developed in light of the international and foreign paradigm, allowing new references for judicial interpreters, in a process that contributes for a mutual respect in the transnational community, with the oxygenation of ideas and paradigms used by courts.


American culture often reaches to the furthest corners of the globe and influences the cultures of other, often quite different, societies. The same is true of American constitutional concepts. This paper explores the influence of American First Amendment Establishment Clause jurisprudence on the jurisprudence of the Constitution of the Independent State of Papua New Guinea, the relevant provisions of which bear no resemblance to the American First Amendment. This paper presents a comparative analysis of recent PNG case law concerning the right to freedom of religion under the Papua New Guinea Constitution and American establishment clause case law in relation to the installation and removal of religious symbols on government property. The influence of American constitutional concepts can be seen in the PNG case law despite that case law making no explicit reference to American concepts or cases.

198 PRACTICAL PROBLEMS OF EU LAW

Participants
Giacomo Tagiuri
Sebastien Platon
Maarten Stremler
Marko Turudic
Moderator
Marko Turudic
Room
8B-4-43

Giacomo Tagiuri: The Cultural Implications of Market Regulation: Does the EU Destroy the Texture of National Life?

A persistent set of arguments rejects EU integration not only because of its adverse economic social or political consequences, but also because of its cultural ones. As markets grow more homogenous and limitless, the argument goes, everyday life looses its national character and citizens are left with a weakened sense of community and identity. In legal scholarship, this argument takes the shape of a denunciation of the free movement decisions of the CJEU and the Commission’s competition interventions as they destroy the internal market. This paper tries to challenge this line of argument, which I call the culturalist narrative. My claim is that EU law is not the cause but the consequence of the Member States’ desire to retain the cultural specificity protected by their preferred market arrangements. In this paper I draw from case studies developed for my dissertation (book pricing rules, zoning rules affecting retail distribution and related complaints) and a paper that asserts that in the case of conflict, there is no neutral point of view from which the differences between the Member States and the EU can be reconciled. After having set out the three approaches in more detail, the paper tests the explanatory power of each of the other two against the existing legal and political regime of the EU and its application in two concrete cases: the controversial constitutional developments in Hungary and Poland, respectively. The paper concludes with a preliminary assessment of the practical effectiveness and normative desirability of each of the three approaches.

Sebastien Platon: Do public entities have fundamental rights under EU Law?

The issue of whether or not public entities actually have fundamental rights may seem absurd. The doctrine of fundamental rights was designed to protect individuals from public entities, not to protect public entities themselves. The European Court of Human Rights, for example, declares any application brought before it by a public entity to be inadmissible. However, this issue is not clear under EU Law and there is even some evidence to suggest that public entities might fact benefit from fundamental rights. If this is true, it could raise interesting questions, some of them are practical such as which kind of public entities? Which rights? Against whom? Could we go as far as to imagine that in some cases public entities could be protected against private entities such as multinational corporations? Other issues are more theoretical. It is a principle of EU Law that the European Union is not supposed to interfere with the national organization of the Member States. The decision to reverse a regional law that regulated the relationship between the central government and regional or local authorities/governments. The national Government is supposed to be an impenetrable middle man between these authorities and the European Union. However, if EU Law grants fundamental rights to public authorities and if they can use them against their own government or even the European Union, what would remain of this “non-interference” principle? Would it imply something or perhaps change something about the nature of the EU?


This paper critically analyses the legal and political regime that regulates conflicts over fundamental values between the supranational EU and individual Member States. Whereas most academic literature focuses on enforcement of compliance with EU values by recalcitrant Member States, this paper takes a more reflective stance and explores and evaluates three distinct and competing approaches to such conflicts. According to the first approach, the EU like the federal level of a federal state, possesses both the competence and the legitimacy for intervening in the Member States’ internal decisions. In the second approach, the EU as an example of an international organisation which conditions its membership on respect for democratic values. The third approach is inspired by the culturalist narrative. My claim is that EU law should be protected against private entities such as multinational corporations? Other issues are more theoretical. It is a principle of EU Law that the European Union is not supposed to interfere with the national organization of the Member States. The decision to reverse a regional law that regulated the relationship between the central government and regional or local authorities/governments. The national Government is supposed to be an impenetrable middle man between these authorities and the European Union. However, if EU Law grants fundamental rights to public authorities and if they can use them against their own government or even the European Union, what would remain of this “non-interference” principle? Would it imply something or perhaps change something about the nature of the EU.

Marko Turudic: Regulating over-the-top services in EU law

This paper analyses the regulation of over-the-top services in European Union law. It starts by defining over-the-top services and analysing their position within the regulatory framework for electronic communications of the European Union. Furthermore, the paper tries to ascertain the influence of over-the-top service providers in the electronic communications sector and the difficulties in the relationship between over-the-top service and electronic communications
network providers. The paper further analyses the regulatory requirements of electronic communications service providers under the current regulatory framework for electronic communications of the European Union, and tries to determine what obligations do not apply to over-the-top services providers. It continues with determining possibilities for the application of some of these obligations to the over-the-top service providers. The paper concludes with an analysis of the proposal for a new regulatory framework for electronic communications of the European Union and tries to establish whether there is a different intention to regulate over-the-top services and their providers.

199 THE COURT OF JUSTICE OF EUROPEAN UNION: HISTORY AND EVOLUTION II

Participants Szalbot Balazs
Graham Butler
Ebrahim Afsah
William Phelan
Moderator Ebrahim Afsah
Room 8B-4-49

Szalbot Balazs: The analysis of the CJEU’s jurisprudence pertaining to the standing of the annulment procedure with special regard to the acts regulating private relations

The paper aims to scrutinize the most current improvements in the interpretation of the Court of Justice of the European Union pertaining to the standing of the annulment procedure. The latest jurisprudence of the CJEU generated widespread criticism from the academia because of depriving ‘non-privileged’ applicants from effective judicial protection. The Lisbon Treaty elevated the status of the Charter of Fundamental Rights of the EU – that also contains the right to effective judicial protection – to the status of the Treaties themselves. Although, in case of annulment procedure the applicants still contest basically the rules of an economic union (as opposed to the constitutional complaints procedure, which is directly linked to the fundamental rights of the individuals), this change highlights the importance of drawing a comparison between the CJEU’s and the constitutional courts’ practice with regard to the individual concern criteria. In this regard, the paper particularly examines the differences between the individual concerns required by the CJEU and by the constitutional courts and how the different roles of the courts influenced their interpretation. In addition, it also underlines the necessity of analysing whether the criteria are the same in case of acts regulating private relations.

Graham Butler: Palpable Choices in Judicial Jurisdiction: Foreign Affairs the Court of Justice and European Union law

The Court of Justice of the European Union plays a pivotal role in the development of Union law. Yet there is an explicit derogation on the Court’s jurisdiction when it comes to the formulation decision-making, and ultimate execution of the EU’s foreign affairs acts, done through the legal regime that has been specially crafted, known as the Common Foreign and Security Policy. The position of the Court in CFSP is in direct contrast to other non-CFSP actions of the Union through other external relations instruments, in which the Court has general jurisdiction, like other normal policy fields. Despite foreign affairs being held as an exceptional field in which the High Contracting Parties to the Treaties had wished to preserve for themselves, shielded from input from supranational institutions, the reality is that this derogation on jurisdiction is slowly evolving. This is despite CFSP as a legal field progressing little in terms of structural design vis-à-vis other areas of law at each constitutional re-design. Thus, it has been left to the Court to chisel-away at the highly restricted field of judicial involvement, by slowly and carefully plotting the Court’s jurisdictions when they arise, by providing nuanced arguments for asserting the Court’s jurisdiction. Is this approach justified in light on the express wishes of the Treaties? This paper critically analyses the Court’s argumentation and justification for this act, in light of its case law since CFSP was established.

Ebrahim Afsah: “Enemies of the People?” Forgotten Virtues of Judicial Self-Restraint: A Comparison between the ECJ and the ICJ

Sheltered behind the unquestionable legitimacy of the integration project, the ECJ developed doctrines of the absolute supremacy and uniformity of EU law. Extending the model of municipal law and its functional division of labour to a ‘supranational legal order’ created ex nihilo, it often dispensed with sovereign consent. The much-lamented ‘democracy deficit’ of European integration is a feature, not a bug. As the ‘motor of integration’ the Court operates as the vanguard of an elite epistemic community toward the supremacy homogeneity and effectiveness of EU law, often dismissive of countervailing constitutional traditions. This is especially apparent in controversial judgments on the free movement of people and Union citizenship. The ICJ, in contrast, has always sought to maintain its institutional legitimacy in a primitive legal order. With tenuous jurisdiction and no enforcement mechanism, the ICJ has exercised an extreme degree of judicial self-restraint. Decisions like the 1966 South-West Africa Case or its 1996 Nuclear Weapons Advisory Opinion show the limits of its own power and the recognised dangers of an activist development of the law. It is argued that the judicial activism of the ECJ has contributed to popular discontent with integration, due to it deliberate disregard for majoritarian preferences and national interests. Its methodological intransigence might thus have pushed a growing faction of the European demos toward exit from the legal order it polices.

William Phelan: “International Fruit” (1972) as a mirror to “Van Gend en Loos” (1963): Rethinking the constitutional judgements of the European Court of Justice

In its famous “Van Gend en Loos” decision of 1963, the European Court of Justice created the ‘direct effect’ doctrine of European law, allowing private parties (individuals and business firms) to enforce European law rights in national courts. The “Van Gend en Loos” judgment has been accurately described as ‘revolutionary’ and remains the subject of intense scholarly debate. This paper looks again at “Van Gend en Loos” using an unusual comparative context, that is, by comparison with an important European Court decision which denied ‘direct effect’ to treaty obligations. In its “International Fruit” decision of 1972, the European Court refused to grant ‘direct effect’ to the obligations of the GATT (‘General Agreement on Tariffs and Trade’ the postwar global trade regime) within the European Community. This “International Fruit” decision is often considered relevant only to the European Community’s external trade relationship with the wider world. This paper will demonstrate that “International Fruit” can also be used to reveal the early ECJ’s deeper thinking behind the doctrine of ‘direct effect’. In fact, as this paper will show, the text of “International Fruit” is clearer, and more compelling about the logic of direct effect, than the text of “Van Gend en Loos” itself.
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The ICON•S 2017 Conference on “Courts, Power, and Public Law” will be held at the University of Copenhagen. All conference activities except the opening ceremony will take place at the University’s South Campus, situated in Islands Brygge near the Copenhagen Harbor. The Faculty of Law will be the heart of the ICON•S 2017 Conference. Here is the address:

University of Copenhagen
Faculty of Law
Njalsgade 76
DK - 2300 Copenhagen S

The opening ceremony of the ICON•S 2017 Conference will take place at Radisson Blu Scandinavia Hotel. Plenary sessions on Thursday and Friday will take place at the Faculty of Humanities with overflow rooms at the Faculty of Humanities and the Faculty of Law. All panel sessions will take place at the Faculty of Law. All buildings are in immediate vicinity of the address mentioned above. You will find a map of the ICON•S 2017 Conference venues at page 330.

REGISTRATION
Registration on Wednesday will take place at Radisson Blu Scandinavia Hotel in the Scandinavia Foyer during the opening ceremony. Registration after the opening ceremony and for the duration of the conference will take place at the Faculty of Law in the open area to the left when you enter at Njalsgade 76.

TRANSPORTATION
If you are traveling to Copenhagen by plane: When you arrive in Copenhagen Airport, you may use the Metro or a taxi from the airport to the Faculty of Law. The journey from Copenhagen Airport to the Faculty of Law takes approximately 25 minutes. The Metro service runs from the far end of the arrival hall in terminal 3 to Christianshavn Station, where you have to change Metro line to go to Islands Brygge Metro Station. The Faculty is located 150 metres from Islands Brygge Metro Station. If you prefer to take a taxi to the Faculty (about 14 km / 24 Euro), you can pay with almost any credit card in any taxi in Copenhagen.

PARKING
We offer free parking for ICON•S participants for the duration of the conference in the South Campus parking areas. No permit required.

WIFI
The University of Copenhagen offers Eduroam. In order to use Eduroam, you only have to connect to the Eduroam network. The authentication will be provided by your home institution. If your home institution does not provide you with Eduroam access, you may use University of Copenhagen’s guest network KU-Guest. You will need to register on location at the Faculty of Law in order to obtain access to KU-Guest. We will be happy to assist you in the Legal Knowledge Centre at the Faculty of Law.

ATTENDANCE CERTIFICATE
Certificates verifying your attendance at the ICON•S 2017 Conference will be provided to you in your Conference package, which you will receive when registering for the Conference. Should you have special requirements for the attendance certificate that are not covered by the one provided to you, please approach us at the registration desk.

CATERING
There will be coffee breaks between the conference sessions as indicated in the schedule on page 3-5. At the end of the first conference day, we would like to invite you to join us for a cocktail reception. On Thursday, we will offer our conference participants a light lunch, and on Friday we will serve a snack to-go before the plenary session. The coffee break in the opening ceremony will take place at Radisson Blu Scandinavia Hotel. All other conference catering will be served at the Faculty of Law in the Atrium. The Faculty of Law canteen will be open during the conference, and the Faculty of Humanities Canteen will be open before the plenary sessions on Thursday and Friday. You may purchase beverages, snacks and light meals. Most credit cards are accepted.

ATM
An ATM is available for cash withdrawals outside Nordea Bank, Njalsgade 72 B.

INFO POINTS
The conference has two info points where help will be available to you. Our personnel will be clearly visible and will be happy to assist you in every way they can, should you encounter any problems or have conference-related questions. The info points are located in the Faculty of Law at the registration desk by the Njalsgade 76 entrance and in the Legal Knowledge Centre on the ground floor.

SUPERMARKET
There is a Fakta supermarket at Njalsgade 72 A-D, where you may purchase convenience foods, toiletries, etc. Opening hours are 7 am – 10 pm.

EMERGENCY SITUATIONS
Should you find yourself in an emergency with no immediate help at hand during your stay in Copenhagen, you may reach Danish emergency services by calling 112 (ambulance, fire department and police) from any phone.
Registration during the opening ceremony

Registration after the opening ceremony

Info Point

Catering / Atrium

Legal Knowledge Centre (ground floor)

Law Canteen

Humanities Canteen

Metro / Islands Brygge

Parking
MAP OF CONFERENCE VENUES & FLOOR PLANS

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from Faculty of Law

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