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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. Copenhagenize 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.

GRÁINNE DE BÚRCÁ
New York University

RAN HIRSCHL
University of Toronto & Universität Göttingen

Co-Presidents, ICON+S, the International Society of Public Law

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

Local host
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**THURSDAY 6 JULY 2017**

**FRIDAY 7 JULY 2017**

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III PLENARY 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.
PENNY'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 money” (Columbia University Press, 2015). In 2012 she received the Max Planck Research Award on International Financial Regulation and in 2015 she was founding Co-Director of 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+S).

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).

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+S).

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MODERATOR
ERIKA DE WET
Professor, University of Pretoria

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

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 Clynes 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, P.Carozza and A.Simoncini, she co-authored the book Italian Constitutional Justice in Global Context (Oxford).

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ANDRÁS SAJÓ
Professor, Central European University

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.

PLenary Panel III
Fri 12:30 – 14:00

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 actively advocates for Argentina 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 effect of 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.

Shaheed Fatima Q.C.
Queen’s Counsel, UK

Shaheed 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. She has appeared before the 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, Shaheed 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).

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 Jurisprudence: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004); Constitutional Theory (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.

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 judgments. 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 improving the legitimacy and credibility of the Court to a new objective of greater deference to national legal and political institutions. In Africa, a number of regional courts have faced pushback from the member states and one might even say that certain international courts are in a precarious situation. In Latin America and the Caribbean, the picture is more mixed but similar trends can be observed. What explains these apparent changes and what are their implications for the global legal order?
# Overview

**Panel Session I**  
*Wednesday, 5 July 2017*  
*17:00 – 18:30*

## 1 Constitutional Actors and Constitutional Change: Comparative Perspectives  
*Participants: Jurgen Goossens, Yvonne Tew, David Landau / Moderator: Yaniv Roznai*

## 2 “The Constitutional Case of the Century”: Miller, the Limits of Executive Power and the Constitutional Force of EU Law  
*Participants: Jeff King, Timothy Endicott, Gavin Phillipson, Stephanie Palmer / Moderator: Gráinne de Búrca*

## 3 Economic Justice  
*Participants: Tarunabh Khaitan, Katie Young, Rosalind Dixon and Julie Suk / Moderator: Rosalind Dixon and Richard Holden*

## 4 Courts and the World  
*Participants: Paul Craig, Oliver Lepsius, Lorne Sossin, Peter Strauss / Moderator: Anne Peters*

## 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*

## 6 Comparative Federalism: Constitutional Arrangements and Case Law – Book Discussion  
*Participants: Francesco Palermo, Karl Kössler, Eva Maria Belsker, James Gardner, Patricia Popelier, Nico Steytler / Moderator: Marco Dani*

## 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*

## 8 Caught in Between: How International and Domestic Courts Reconfigure Political Contests into Legal Questions  
*Participants: Emily Kidd White, Tamar Megiddo, Rocío Lorca Ferreccio / Moderator: Emily Kidd White*

## 9 Challenging Racial Marginality in Public Institutions – Marginality in Practice  
*Participants: Tanya Hernandez, Mathilde Cohen, Hilary Sommerlad / Moderator: Iyiola Solanke*

## 10 Comparative Constitutional Law and Cross Border Constitutionalism  
*Participants: Eduardo Moreira, Luis Claudio Araujo, Marcio Pugliesi, Guillerme Pena de Moraes / Moderator: Eduardo Moreira*

## 11 Competition Law as Public Law Private, Power, and Courts  
*Participants: Elias Deutscher, Maria-José Schmidt-Kessen, Stavros Makris, Maria Ioannidou / Moderator: Ioannis Lianos*

## 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*

## 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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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 court’s 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
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 Catalan 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.

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 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, more than in any other in the UK that was shaped by academics, over eight months of active blogging, article-writing and speaking, including in particular those on this panel.

Participants
Jeff King
Timothy Endicott
Gavin Phillipson
Stephanie Palmer

Moderator
Gráinne de Búrca

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 reason 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 weaknesses of the uncodified, British constitution and the fragility of constitutionalism in a time of populism.

Gavin Phillipson: Miller in the Supreme Court: how we realised (or not) how far EU law had changed the 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 and fails to appreciate the sui 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 pay proper regard to the re-shaping 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 ‘the social state’, and constitutional commitments to equality.

Participants
Taranab Khaitan
Rosalind Dixon and Julie Suk

Moderator
Rosalind Dixon and Richard Holden

Room
7C-2-24

Taranab 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 dissenters, this paper adds to existing literature on constitutional consensus-building techniques, which has largely focussed on political insurance for ethnic-cultural minorities.

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 populist, anti-democratic forms of constitutional politics. Yet despite hints of a different path, few legislatures have adopted socioeconomic status as prohibited grounds 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 constitutionalizing 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 counterproductive 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 will often not only be an effective. They will be affirmatively 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 to seemingly deserving or needy plaintiffs. 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 form. This approach is relatively familiar in 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 explores ways in which a constitutional economic equality guaranteed 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.

4 COURTS AND THE WORLD

Participants
Paul Craig
Oliver Lepsius
Lorne Sossin
Peter Strauss
Anne Peters

Moderator
Room
7C-2-14

Paul Craig: Courts and the World

Paul Craig (Oxford) will consider the ways in which UK courts make use of law from other legal systems, transnational, international and EU, when deciding cases in the UK. The paper will note the tension between the desire/willingness to learn and draw from such diverse sources, and the desire to preserve the autochthony of UK law. The paper will also address how judicial power is perceived in the UK, more particularly the academic debate about judicial activism and the claim that courts are prone to excessive activism.

Oliver Lepsius: Courts and the World

Oliver Lepsius (Beyreuth) will speak to the arrival of a competition among European courts on civil rights jurisprudence. Since 2009 the new EU Charter of Fundamental Rights is in effect, enabling the ECJ to decide on civil rights issues. Since 1999 India has an introduction of the individual complaint) the ECHR has extended its civil rights jurisdiction substantially. Additionally there is the jurisprudential heritage on fundamental rights of well established national constitutional courts, the German Federal Constitutional Court acting as a prime example. Hence is a competition or even a rivalry developed between European, international and national courts in the area of fundamental rights. How is the overlapping jurisdiction to be construed and to be assessed? Will there be a paramount system of fundamental rights or, rather, a model of competing approaches by separate jurisdictions?

Lorne Sossin: Courts and the World

Lorne Sossin (Osgoode Hall, York U) will speak to Canada’s Courts and the Possibilities and Limits of Legal Pluralism. Canada’s constitutional narrative (including English common law, French civil law, Crown-Indigenous treaty law, and a Charter of Rights incorporating American ideals of civil liberties) has made it particularly hospitable to soil in which to cultivate a porous jurisprudence drawing on multiple legal sources. Canada’s strategy for success has been to adapt foreign/international law in concert with companion ideas in domestic jurisprudence. In this sense, foreign/ international law has been integrated into Canadian law without the need to confront anxieties about sovereignty, or a hierarchy of extra-national legal sources.
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 appear both to surrender elements of national 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 resistant to learning from/reliance on foreign law, and fearful of treaty obligations distinct from state, legal authority beyond the legislative power the Constitution confers on Congress.

ConCurring panels

5 BEYOND BALANCING: ASSESSING ALTERNATIVE APPROACHES IN JUDICIAL PROPORIONALITY 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 the same time attracted fierce critique 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 limitations” 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. This panel will explore the 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-Eliya
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 recognise 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. They may 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 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 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, categorisation, 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 into 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 will be 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 dependent 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. It requires 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 them making value judgments on matters which might (it is argued) be better decided by legislatures. In practice, almost certainly with some of these 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 rights. The argument, using cases, suggests that unforeseeable 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-Eliya: Probability Thresholds as deontological constraints on balancing and proportionality

Alexy, along with other scholars who have developed or modified this 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 oversates 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 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 other role, and at least in part of what justification 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 the right. Alexy’s approach to the latter – requiring judges to express that awareness in their judgments, and (b) balancing could arguably come the closest of all 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 other role, and at least in part of what justification does for society.
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 Aarhus Convention, 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 panel adopts a decidedly inter-disciplinary outlook on its subject matter.

CONCURRING PANELS

Participants
Francesco Palermo
Karl Kössler
Eva Maria Belser
Manuela Popelier
Patricia Popelier
Nico Stelter
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 Stelter: Discussant with particular consideration of the South African experience
See panel’s description

Andreas Hofmann: Left to interest 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-prioritising 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 has not. It argues that EU provisions on access to justice in environmental matters are very favourable to interest group litigation, based on both the codification of the Aarhus Convention and subsequent CJEU case law interpreting it. It then looks at the extent to which environmental conditions at the EU level can ‘trickle down’ to provide effective opportunities for the de-centralised enforcement of environmental law “on the ground”, i.e. in the member states. It concludes that where national judges have proven receptive to arguments based in EU environmental law, environmental interest groups can well compensate for the Commission’s absence.

Agnes HELLNER: The Rationales of Access to Justice
For some time, environmental lawyers have argued that the complexity of environmental problems requires that citizens, non-governmental organisations and corporations have the ability to access the courts to ensure that our environment is protected. The first paper discusses whether such arguments can be taken as a call for more citizens to access the courts. The second paper discusses whether current legal systems are able to provide effective access to justice, and whether environmental litigation can be used as a channel for effective environmental protection. The third paper examines whether environmental litigation can be used as a channel for effective environmental protection, and whether current legal systems are able to provide effective access to justice.

CONCURRING PANELS

Participants
Andreas Hofmann
Agnes Hellner
Yaffa Epstein
Moderator
Andreas Hofmann

Room
8A–2–17

Andreas Hofmann: Left to interest groups? On the prospects for enforcing environmental law in the European Union
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ConCurring panels

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 papers in this panel 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-cultural contents are reconfigured for 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 that legal questions that they have the standing and legitimacy to address. Each of the papers in this panel 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-cultural contents are reconfigured for 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 that legal questions that they have the standing and legitimacy to address. Each of the papers in this panel 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-cultural contents are reconfigured for 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 that legal questions that they have the standing and legitimacy to address. Each of the papers in this panel 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-cultural contents are reconfigured for 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 that legal questions that they have the standing and legitimacy to address.

Participants

Emily Kidd White
Tamar Megiddo
Rocío Lorca Ferreccio
Emily Kidd White
8A-2-27

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

One overlooked source 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.

Rocío 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 court designed to hold accountable 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 Lawyers’, ‘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.

Participants

Tanya Hernandez
Mathilde Cohen
Hilary Sommerlad

Moderator
Ilyola 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 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-adequate 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 seems to be “colorblind,” going so far as prohibit- ing 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. The 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).
Similarly, the centered state conception of jurisdiction, based on the constraint of judicial decisions to the national borders, has been analyzed by a complex and interdependent society. 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. The goal of this paper is to understand the impact of cross-border constitutionalism in the legal systems, to support the rational of judicial rights review, based on the transnational dialogue that increases the legitimacy and respect of decisions taken by local and transnational courts, in a process of reciprocity, persuasion, and acculturation in regard of similar complex cases.

**Marcio Pugliesi: Theory of Law and Constitutionalism Adjudication**

The paper has for objective the investigation of legal norms, mainly involving matters of legitimacy and effectiveness of Law. It works with the following question: how legal norms can be understood under the Rule of Law? Different theories proposed a variety of models to understand legal norms, just as Frederick Schauer’s contemporary legal positivism. The present work intends to follow a different path, searching for different sources to understand legal norms. From the works of John Searle, it intends to see legal norms as promises. In order to reduce social conflicts to an optimum level, it is necessary to offer a promise of management in accordance which comprises certain equality under the law (formal eradication of privileges). It is necessary to think about the production of legal texts in the context of power managed by the government in its different meanings – it is necessary to obtain legitimacy through the systematic persecution 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 separable 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.
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 cautious attempt in the context of Huawei. He initiated the substantive inquiry into whether there was an abuse under Article 102 TFEU from a fundamental rights perspective, identifying the right to conduct a business, to property, and to access to justice being at stake. The paper suggests whether a fundamental rights approach could be extended to other Article 102 TFEU cases, which implications this would have for the CJEU’s reasoning, and whether this would constitute an alternative route to the more economic approach generally promoted in EU competition law.

**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 develop a proactive, learning-based and consensual enforcement style that leads to flexibly, 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 various 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—Ut and public redress—in particular, could be more effective in restraining private power and countenancing 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. Against this backdrop, the paper then advances the theoretical argument for promoting public redress and discusses different regulatory and enforcement tools to justify this course. In addition, it offers a practical account of public redress in particular, 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, aspiration, and bring benefits to affected parties, thereby contributing to the “democratisation” of markets.
majoritarianism versus a qualitative link between the candidate and the electorate? Do we wrongly conflate democracy with elections? Should we, in fact, now restructure the latter to better protect or realise the goal of broad representation of the former? This paper evaluates the courts’ role in this debate, at a time when faith in the existing design of electoral systems may be waning. It analyses recent judicial decisions where courts have engaged in reviewing the status quo of an electoral system for its compatibility with “thicker” democratic aspirations such as the quality of representation. Who do electoral candidates represent and how do we ensure their representativeness via elections? These thicker aspirations are found by the judiciary to be implicit in the constitutional and legislative infrastructure of the political system. This has been seen recently, in for example, Abhiram Singh v. C.D. Cornachan (Dead) by Lrs & Ols (2017), where the Supreme Court of India evaluated the need to secularize politics against the practice of campaigning on the basis of religious language or caste-based manifestos. A further example is the recent decision of 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 these 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 these 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 revive faith in it so that it remains a vital and functioning part of the democratic process.

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” ways to constrain the institutional pathologies of authoritarian politics. On the other hand, in dynamic democracies (e.g. India, South Korea, and Taiwan), where political power regularly rotates between competing political parties, courts can more successfully innovate and make systemic changes to the electoral system. Finally, in fragile democracies (e.g. Thailand, Pakistan, and Bangladesh) where the military is not under the firm control of the civilian government and the country regularly oscillates between martial law and civilian rule, their courts – unlike those in dominant-party democracies – tend to consistently overreach. Such high-octane judicial review by partisan or imprudent judges can easily facilitate or precipitate a hostile takeover by the armed forces, and lead to the demise of the rule of law.

Swati Jhaveri: Re-democratization by Courts

Recent electoral outcomes have led to debate over the design of electoral systems and the meaning of political representation. Should there be safeguards built into an electoral system to undo or revisit “bad” majoritarian decisions? How much is political representation defined by reference to quantitative

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

The hybridization path of constitutional justice models – 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 “Elan de la Constitution” in France and the connected 4343

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 includes 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 ICON-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
Elsa D’Alterio
Gianluca Squeo

Room
8B-2-49

Ilaria Ottaviano: The extraterritoriality in the assessment of electoral laws

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 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 home 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 pillar of the construction of the Union. The system allows, as well known, the free movement within the EU without border controls, even for third-country nationals, who, through a national system of the entry into its territory. The system is, however, accompanied by an information system consisting of a non-EU citizens database (Schengen Information
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 which differ with regard to institutional design, procedure and degree of independence. In contrast with the traditional agency-head appeal model, these systems are characterized by the creation of specialized quasi-judicial bodies, which are variously linked to the agency-head, and which tend to be more insulated from political influences.

Besides relevant distinctions and peculiarities the majority of the appeal processes provided for in U.S. law share a common feature: they constitute both control mechanisms at the disposal of the agency and instruments of legal protection for affected parties. As each of the two aspects is emphasized appeals can be described either as more public interest-oriented (i.e. aimed at furthering public policies) or more affected interests-oriented (i.e. aimed at providing individuals with effective remedies). Nevertheless although appeals are generally characterized by this ambiguous nature several rules contained in enabling acts and administrative regulations make the first of the two aspects predominant.

As a partial and last resort for citizens unsatisfied with the result of an appeal process judicial review in federal courts is available provided that all administrative remedies have been previously exhausted. Still the exhaustion of administrative remedies doctrine is complex. First because the exhaustion of administrative remedies doctrine is subject to some exceptions which have been developed by courts throughout the years. Second because the doctrine is generally accompanied by the administrative issues exhaustion doctrine which prevents affected parties from submitting in court issues different from those upon which the appeal has been decided. The paper develops this topic from the perspective of judicial discretion in the remaining case. It has been also proposed that the French administrative courts could use a method which, although exceptional, is not unknown: raise the question prejudicielle transnationale between counterparts judges from different administrative courts. The paper further addresses the issue of the relationship between quasi-judicial bodies operating between courts of different member States, where the vertical relationship would continue to exist between them and the CJEU.
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 peculiarity, 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 paper attempts to contribute to more robust theoretical and conceptual understandings of constitutionalism, while comparatively reflecting on a variety of ‘really existing’ cases of populist constitutionalism.

Participants
Paul Blokker
Bojan Bugaric
Mark Tushnet
Kim Lane Schepps
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 democratic backsliding, illiberal democracy and 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 by defining what is, what is not, what is “more”, what is “less”, and what is “in the making” 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 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, previously marginalist and xenophobic political parties have gained clout speed. 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, the 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 and non-ideological basis. There are quite diverse forms of populism, 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 predominantly nationalist and xenophobic. 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 conditions and rules in constitutional preambles, 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
ConCurring panels

Kim Lane Scheperrie: The Opportunism of Constitutional Populists

Kim Lane Scheperrie: The Opportunism of Constitutional Populists

Myanmar at present remains outside the influence of globalised judicial networks. Instead the Tribunal is seen as a sub-textual critique of the state that the courts might perform. A number of high-profile cases have been challenged in the courts, which make it possible to look more closely at the links between political and judicial networks in Thailand. This study found evidence of a politically biased voting pattern in the increasingly partisan nominations to the bench, though formally appointed procedures are apolitical. It thus provides evidence of the politicization of the court and the growing ties between judicial and political elites. It thus raises serious questions about the legitimacy of the court and prospects for constitutional change in Thailand.

ConCurring panels

Kim Lane Scheperrie: The Opportunism of Constitutional Populists

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

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

The constitutionality of the party as a government in China stands to benefit the field of comparative constitutional law and increasingly partisan nominations to the bench, though formally appointed procedures are apolitical. It thus provides evidence of the politicization of the court and the growing ties between judicial and political elites. It thus raises serious issues about the legitimacy of the court and prospects for constitutional change in Thailand.

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 in 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

Jothie Rajah

Khemthong Tonsakulrungruang and Bjorn Dressel

Bjorn Dressel

Sarah Bishop

Room

8A-3-45


Myanmar is one of the most recent countries in the world to have legislated 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 seen as a sub-textual critique of the state that the courts might perform. A number of high-profile cases have been challenged in the courts, which make it possible to look more closely at the links between political and judicial networks in Thailand. This study found evidence of a politically biased voting pattern in the increasingly partisan nominations to the bench, though formally appointed procedures are apolitical. It thus provides evidence of the politicization of the court and the growing ties between judicial and political elites. It thus raises serious issues about the legitimacy of the court and prospects for constitutional change in Thailand.

Tom Ginsburg: Trumpian Constitutionalism: A Non-Sequitur?

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McMichael Wilkinson: Discussant

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ConCurring panels
ConCurring panels

ConCurring panels

Bjoern 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 referenda. 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 panellists reveal the reality of court initiated constitutional change and debate the difficult questions of democracy, legitimacy, effectiveness, and the rule of law that arise.

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

Participants

Rebecca Ananian-Welsh
Dana Burchardt
Miles Jackson
Caitlin Goss
Moderator
Thomas John
Room
8B-3-03

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

Dr Rebecca Ananian-Welsh looks to Australia, where the absence of a national Bill or Charter of 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 Burchardt: Constitutional identity and the German Constitutional Court

Dr Dana Burchardt 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 Olcay
Emmanuel De Groof
Luis Viveros Montoya
Moderator
Ebrahim Afsah

Room 8B-3-09

Asli Ozcelik Olcay: Judicialised peace-making: The role of courts during peace negotiations

The existing studies on negotiated settlements to internal armed conflicts have left the role of international and domestic courts during the negotiations under-explored. This paper aims to conceptualise the role of international and domestic courts during peace negotiations, with a focus on constitutional courts, regional human rights courts and the ICC. When negotiations take place within their jurisdictional reach, courts cast a shadow on negotiations through their previous jurisprudence, which defines the relevant norms and delineates what should and should not be negotiated. The involvement of courts may also assume a more dynamic character, whereby courts become indirect parties to peace negotiations by interacting with other actors and, at times, changing their position as a process unfolds. The paper surveys the varying forms and degrees of roles the courts have played in the peace processes in Colombia, the Philippines, Uganda, Bosnia, and Burundi. It concludes with a brief assessment of the potential benefits and risks of the judicialisation of peace-making and stresses the need for further explorations of the interplay between peace-making and judicial interventions.

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

Especially since 1898, external actors have impacted 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 instrumentalising the ICC.

The panel focuses on the role of Courts in facing constitutional vacuums, i.e. situations where the constitutional law do not regulate the matter at all or there is no power to intervene conferred to some institutional actor or levels of government. Therefore, rights seem to have become a leverage to fill the absence of power and their impact on positive and constitutional law. The analysis addresses the emergence of new rights and the challenge of ongoing legal transformations, due to a ceaseless dialogue between national and international actors.

Participants
Mario Iannella
Francisco Javier Romero Caro
Maja Sahadžić
Giovanna Spanò
Mimma Rospi
Moderator
Paolo Passaglia
Room 8B-3-19

Mario Iannella: Guarantee of Social Rights in Conditionality: the role of European Commission in Ledra Adv

The recent economic crisis determined the introduction of new mechanisms of assistance in the Eurozone, lastly the ESM. To face asymmetric shocks those mechanisms potentially provide individual financing to the member States. Moreover the provision of funds is strictly linked to the implementation of reform plans contained in the MoU. On legal ground ESM is introduced by an intergovernmental treaty and the conditionality provided in agreements that are not considered as acts of EU order. Thus, in several States reform plans that deeply affected citizens’ social rights have been hardened or even rejected by national Courts. 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. The paper analyses some recent cases of the CJEU trying to solve the question about the existence of an institutional actor that had to assure the respect of social rights of EU citizens also when their State required an assistance plan. In the last crisis, State institutions proved to be only partially able to effectively require the adherence to the citizens by national Constitutional. Particularly, this happens differently among countries requiring assistance and with some degree of intertemporal inequality. To assure some degree of uniformity in the level of protection to the citizens the CJEU cannot only depend on the CCJEU solution seems predictable. Conditionality measures have not been considered as acts of EU order and, consequently, actions against those measures based on this ground have been rejected by CJEU as not admissible. However, the profile of the involvement of EU institutions in assistance plans seems to be able to configure some way to intervene supra-national commitment to assure social rights. The role of EU institutions in such new legislative frameworks is evaluated by CJEU since Pringle and it was assessed also in Gauweiler. The involvement has been considered as a way to better assure the respect of the objective of financial stability of the EU economic Constitution. In Mallick & Dandrea v. Italian Republic two new judgement annulment ex art. 263 TFEU considering conditionality outside EU order. However, it considered configurable non-contractual liability ex art. 340 TFEU. The role of the Commission in ESM is considered as a guardian of the Treaties. Also when it signs acts outside legal order it have to guarantee compliance with EU law: if this does not happen, it could be considered responsible under article 340. Two major consequences came after these judgements. On one hand the scope of application of the Charter of Fundamental Rights seems to be reshaped. While for the States it applies only when they are implementing EU law for EU institutions this limitation is not consistent: They had to apply the Charter also outside EU order. On the other hand, the role of Commission as assesseur is configurative of a mechanism 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.

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 77% 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 other rights covered by 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 context, recognise the importance of the concept of “life, liberty and security of person” seem like the better options to link the Charter values to socioeconomic rights. Particularly the notion of security of the person contained
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 sets out the scope of the Charter and makes up for the lack of supreme judicial instance at the state level. In other words, the Constitution has gone beyond its prescribed appellate competences for the purpose of protecting human rights and freedoms in the whole territory of Bosnia and Herzegovina. 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 expand on how human rights and freedoms have been provoking the Constitutional Court to gain a vigor to flow through its sui generis status and act 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 assessment of asylum requests is brought into the picture. As far as this situation is concerned, actually, the main task may not be to rely solely on the assessment of the completeness of each State’s internal (immigration) law rather it shall depend on verifying the existence of asylum and 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 another challenge of fundamental right. In particular the case of end-life intervention in Bioethical tasks.

Mimma Rospì: 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 judicial gaps in the protection of new fundamental rights. In particular, there are new claiming of protection, but several actual constitutions don’t seem to guarantee them thoroughly. So the role of Courts is important because they recognize the new fundamental rights by stating that the Courts are the de facto Legislator, waiting for positive law to follow up. This process of “Juristocracy” may be observed in several European countries, such as France and Germany, though with some differences that will be overwritten. Besides the administrative core of the request, on one hand, their rulings can significantly impact the individual’s fundamental rights but on the other hand, an appeal is not carried before an administrative court, because fundamental rights are at stake! Can policy urgency justify the sacrifice of fundamental rights? The adjective “political”, which defines the concept of “asylum” seems to be assumed by legislative criteria. But is this 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 obstetrics” recognized the right to die with dignity as a facet of the right to lifethis. In particular, in the dialogue between the ECHR and national Courts, the judgments of ECHR bind all members. State. Thanks to the ECHR and its protocols, national Courts can consequently 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 decisionis, though it would be a quite innovative tool in civil law one. Then, a question may arise: do Courts own an autonomous constitutive power facing constitutional gaps in order to recognize new fundamental rights and in spite of legislative inertia? Has a new era of constitutionalism begun? 
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 perspective 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 get an 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 recap the possible objectives of the project for assessing the quality of justification (judicial independence, diversity of judicial styles, problem solving). In the second part, I try to answer these challenges and I outline some examples of the possible forms of quality control on the reasoning activity of judges.

Agnes Kovacs: The right to a reasoned judgment: theory and practice

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. The content of the indicators are not homogenous across countries, nor do they present a full picture of the justice process (e.g., judicial activities only at first instance limited set of cases) or link related indicators (e.g., outcomes of judicial process and resources). Furthermore, efficiency does not automatically guarantee the quality and independence of justice. The paper analyses the Scoreboard from a three-pillar approach grouping existing indicators around legality, efficiency and effectiveness as well as information on the systems scoring high in achievements. The content of the indicators are not homogenous across countries, nor do they present a full picture of the justice process (e.g., judicial activities only at first instance limited set of cases) or link related indicators (e.g., outcomes of judicial process and resources). Furthermore, efficiency does not automatically guarantee the quality and independence of justice.

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 in the justice 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 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.

The proposed paper investigates if and, in case, how Conflicts over EU public authority have been able to manage 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. The paper seeks 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.
manage the political conflicts arising from the ‘Euro-crisis’ law. It is argued that while the EP has tried to play a role in the Euro-crisis-related conflict management, despite its limited competence in matters of economic policy, national parliaments to some extent have abdicated this role, unless courts have forced them to act. As for the comparative analysis on national parliaments, the proposed paper intends to focus on selected national cases – France, Germany and Italy – representing different economic conditions experienced throughout the crisis and various systems of government, in terms of powers structure between the legislature and the executive and the powers of constitutional courts.

Tomás de la Quadra-Salcedo Janini: Conflict management by the Spanish Constitutional Court in times of crisis

In this presentation, we want to analyze how the Spanish Constitutional Court has approached the control of the reforms that have occurred as a consequence of the Eurozone crisis. This includes legislative but also constitutional reforms that have affected both the constitutional economic model and the model of territorial decentralization. With regard to crisis-related measures, the Constitutional Court has notably been confronted with the question as to the value of international treaties in interpreting the rights contained in the Constitution. In contrast to greater activism by other constitutional courts such as the Portuguese or the Italian constitutional courts, the Spanish Constitutional Court has formally accepted the constitutionality of most of the reforms introduced. An area that seems prima facie unrelated to crisis and perhaps quite surprisingly if we have in mind the constitutionality of most of the reforms introduced.

Anuscheh Farahat and Christoph Krenn: Conflict management by the European Court of Justice in times of crisis

In this presentation we wish to analyse how the European Court of Justice is managing conflicts in times of crisis, in particular how it has dealt with the increasing 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 member states. The role of the ECJ in this case will 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 complex and changing 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 Olilnyk: Dialogue beyond litigation: a contextual approach to constitutional interpretation

Constitutional dialogue theory recognises that constitutional interpretation is a dynamic process involving multiple, interacting participants. Courts may have an important voice, but do not have the only – or even the final – say in discerning the meaning and effect of a constitution. In addition, the legislature, the executive, and other communities engage with the constitution and with one another in an ongoing process of interpretation. It is through this engagement that a ‘vibrant and durable’ constitution is sustained. This panel intends to widen the ambit of discussion about constitutional dialogue. The papers will consider the impact that judicial review and judicial decisions (in their different forms) have on executive and legislative engagement with and deliberation about constitutional norms; the judicial role beyond the context of rights-based litigation; and the impact of legislative and executive action on judicial exegesis of a constitution. By drawing together perspectives from three different jurisdictions (Australia, the United Kingdom and Canada), the panel will explore the ways in which institutional capacities and community context affects the operation of constitutional dialogue.

Participants

Gabrielle Appleby and Anna Olilnyk
Grant Hoole
Mary Liston
Jack Simson Caird
Scott Stephenson
Room 8B-3-49

Gabrielle Appleby and Anna Olilnyk: Doctoral uncertainty and legislative and executive constitutional deliberation in Australia

There is a growing debate in Australia around the responsibilities of the political branches to uphold 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 abundant evidence that dialogue does occur. This paper uses the case study of legislative and executive responses to serious and organised crime to examine how constitutional dialogue operates in Australia. Over the last 20 years, Australian governments have sought to implement increasingly tough preventative measures against organised crime groups and serious violent or sexual offenders. These measures have been shaped and sometimes stymied by the High Court’s uncertain, undeveloped and shifting constitutional jurisprudence. While there has undoubtedly been dialogue between the three branches of government, this dialogue has failed to deliver effective law and order policy. Public policy action by government, in a state of uncertainty about the law, has led to an increase in innovation. Inexperience, this paper reflects on how each branch of government could better fulfil its role in responding to uncertainty in constitutional doctrine and in developing constitutional principle. The political branches ought not to refrain from engagement with the uncertainty and development. Rather, it is to bring its institutional strengths into dialogue with judicial development. The political branches are uniquely placed to form novel responses to contemporary social challenges that may responsibly push at the edges of established constitutional doctrine. Such pressure may result in clarity and extension of judicial exegesis. Further, by demonstrating institutional capacity for political scrutiny and deliberation to provide both informative and analytical assistance, it can inform judicial adoption of the most jurisdictionally appropriate level of deference in emerging constitutional doctrine.

Grant Hoole: Interinstitutional Dialogue and Reference Power in Canada

Scholarship on the metaphor of interinstitutional dialogue, or advocating a particular conception of dialogue ‘theory’, is predominantly concerned with the institutional dynamics of implementing constitutional rights. This focus is understandable given the origins of the metaphor as a reply to scepticism about judicial review under Canada’s Charter of Rights and Freedoms. It nevertheless overlooks a valuable case study for understanding interinstitutional dynamics in interpreting and applying the Constitution. The reference power which allows Canada’s federal and provincial executives to refer advisory questions to the courts more closely resembles an actual conversation between the political and judicial branches than does conventional rights-based litigation. It has also played a role in Canada’s constitutional development equal to that of litigation, clarifying and consolidating the effect of both written and unwritten aspects of the Constitution. These references use the reference power as a lens through which to explore the accuracy and normative significance of describing the process of constitutional interpretation as institutionally dialogic. Situating the courts’ responses to referred questions within the context of constitutional dialogue theory, and thus devoting attention to the procedure underlying judicial decisions and to the observance of boundaries related to institutional role and competence, the
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 interference in each branch 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 diminish 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 dialogic systems 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 the latter challenge 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 prioritization of substantive instances; the desirability of strong rights, and the nature and scope of interpretive pluralism in constitutional matters. By bringing conceptual baggage to the surface in part one, the paper advances a plea for normative reflexivity and adaptability and sets out a conceptual typology (see also Macfarlane 2013). The second part of the paper suggests a different analytic path. This path is pragmatic and understands institutional dialogue as both a process and a set of identifiable institutional practices. To illustrate this approach, the paper uses Miller as an example to highlight how institutions dialogue in action. Each branch examining and providing different answers to the constitutional issues raised by the court. The dialogue between the branches of government and the political and legal worlds more broadly. This paper examines the interaction between Parliament and the courts over the constitutional questions arising from the case. The paper seeks to explain why Parliament and the Courts have approached the issues so differently, and seeks to critically evaluate the value of their distinctive modes of operation. Parliament and the courts speak a very different constitutional language, and while many see this as a cause for concern, there are strong reasons to defend the conflict in style and substance that has been so apparent since June 23 2016.

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 crimes reminiscent of stronger regional power in this field, and 2) that only by clearly identifying the field of power around the courts can the actual power of these institutions themselves be discerned 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, and the dynamics 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 balance are apparent and their contestability in which institutions of internationalized criminal justice can potentially yield symbolic and material power. The participants of this panel are: Mikkel Jørg Christensen and Astrid Kjeldgaard-Pedersen; Nandor Knust; Gleb Bogush; and Mikkel Jørg Christensen.

Participants: Mikkel Jørg Christensen and Astrid Kjeldgaard-Pedersen: Competing Perceptions of Hybrid Justice: International Regional and National Interactions of Extraordinary 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, how they have been written into its legal and financial structures. 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, the power of 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 contribute to a more tentative analysis of how regional power balances and diplomatic relations shape investments into international criminal law. As such the paper will investigate regionalization of international criminal law in a broad sense – that is not only a question of a new 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 Relocated Specialist Judicial Institution (KRSJI). Through this case study, the paper will analyze 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 focus on the development of different regional approaches to ICJ and their linkages to regional political and legal institutions in Africa Asia Latin America and Europe. This comparison will provide new perspectives on different regional responses to the limited cross-over and mutual understanding that has come out 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 discuss the regional context of the effective integration of regional political and legal institutions into the holistic and pluralistic system of ICJ.

Gleb 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 the failure of the UN Security Council 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 decision-making process 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 aspects 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 regionalization international criminal
justice and will be situated in the wider political economy of regional actors. The paper also addresses the substantive law issues related to the MH17 incident. In this light, the MH17 incident itself reflects new realities of the contemporary armed conflicts and as such may serve to stimulate the development of international criminal law beyond the traditional core international crimes, as well as diversity of international criminal justice more generally as this form of law becomes increasingly regionalized.

25 ERNST-WOLFGANG BÖCKENFÖRDE’S CONSTITUTIONAL THOUGHT IN COMPARATIVE CONTEXT

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 contex-
teories 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 rules 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 conceptual presuppositions of the old Staatslehre with the challenges of an interdepen-
dent 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 Cassese
Kai Möller
Michaela Hailbronner
Alexander Somek
Moderator
Mirjam Künkler
Room
8A – 4.35

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

Contributions to this session discuss Böckenförde’s constitutional thought in comparative, 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 Cassese: 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.

Kai Möller: Böckenförde, the objective order of values, and the provincialism of Staatsrecht-
slehre

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 yet 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 crisis of German Staatsrechtslehre which until this day 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 interpreta-
tion of the Basic Law.

Michaela Hailbronner: Böckenförde’s view of the Constitution as a Framework Order: Fit for Ger-
many 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 insti-
tutional failure.

Alexander Somek: Böckenförde’s Staatsrecht-
slehre 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 pro-
visory order Hegel, the ways in which they provided both the intellectual apparatus and imagination for legalizing world affairs is operational. The combination of both a utopian and a practical dimension implies that the model it is never fully realized, but nevertheless continuously being

26 THE CONTINUOUS AUTHORITY OF INTERNATIONAL LAWYERS IN MODERN INTERNATIONAL POLITICS. THE “INTERNATIONAL-LAW POLICY” 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 law-
yers. 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-Policy” (ILP). This model underlines the strikingly stable relationship between law and the government of global affairs that has been consolidated since 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 Klabbers
Moderator
Mikael Rask Madsen
Room
8A – 4.47

Mikael Rask Madsen: The Genesis and Perpetu-
atian of the International Law-Policy (ILP): A Theory of the Power and Evolution of Interna-
tional 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 Wilhelm Fuld’s “international 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
Jan Klabbers: Functionality in International Institutional law

The presentation outlines how functionality 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 functionality, 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 functionality with the ILP project.

Antoine Vauchez: 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 legal 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 co-exists with overlapping and competing domestic law, which can be preferred because it is more local. And it co-exists 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.

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

The paper explores the potential solutions 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. These have a strictly practical dimension (concerning notably the impact on the procedure for the execution of the warrant and on its overall length) 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 relations 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 is an end in itself any more. 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 examines 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 abscording” 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 Lazzerini: 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 Aranoyosi 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 length) 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).

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
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’s empowered to enforce the law against 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. 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.

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’s 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
Ejallii 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 grand ideas associated with Plato and Locke in contemporary discussions about judicial review.

Bas Schotel: The jus inculendi et excluendi trust and colonial empire: migration law as fiduciary powers

The paper explores the state’s power to include and exclude migrants seeking admission to its territory from the perspective of fiduciary powers. The goal is to examine legal frameworks that may offer protection to migrants but that do not rely on concepts of citizenship membership full equality human rights or strong notions of autonomy. To this effect the paper will explore the structural features of fiduciary powers in the context of the legal status of subjects under colonial rule. The paper will look for structural features when applied to the structure of contemporary migration law 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 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 no 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.

Ejallii 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.
ConCurring panels

29 GENDER, COURTS AND CONSTITUTIONS

This panel aims to investigate how gender power structures are reflected and dealt with by constitutional law across the world. 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 constitutional adjudication in gender equality cases. 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 Brodeál show, the courts need a favorable political and historical context in which to adjudicate. The paper is divided into three parts: the 2014 Scottish independence referendum, the 2011-14 Irish Constitutional Convention, and the 2011–2012 Constitutional Court. Western democracies do not appear poised to clearly differentiate 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, raising questions as to whether participation should be gendered or with significance for women’s equality. Whether writing as the only, often the first, woman on a national Constitutional Court since 1992 and her proposal for an all-women Court and how active it is in reviewing state action, remains 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 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. If the first three were challenges to legislative gender power relations, the fourth 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 substantial understanding of equality than do challenges to differential 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 by lower courts which impacts human rights.

Elena Brodeál: 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 on one of its decisions, 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 Constitutional Court. The initiative, backed by a group of women, proposed revising and financing of US conservative organizations specialized the constitutional litigation, aimed to replace the term ‘spouses’ from the text of Article 48 on family with the expression ‘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 affirm towards women, that the 2015 Obergefell v Hodges litigation of the US Supreme Court that legalized same sex marriage across the whole US could not be replicated in the Romanian context. Moreover, like the authors of the dissenting opinions in Obergefell, the supporters of the popular initiative thought that the issue of same sex marriage and the definition of family should be subject to a popular referendum. This gave birth to a serious public and political debate on gender and the family powers structures. Questions related to the biological versus the social differences between men and women, to women and men’s roles in the family or questions concerning family’s, or more correctly said, gender power relations under Romanian law.

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 2011-14 Irish Constitutional Convention, and the 2011-14 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 divorce law, essentially reframing them from questions of gender equality into ‘moral issues’, has not fared well for women. Relying on courts as guar- dians of women’s rights in these cases, whether to green light the participatory process or to certify its result, has often resulted in 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.

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 cases in which the CCC has declared the cases admissible or inadmissible. Only five cases have so far been decided on merit by the CCC, and all of them were brought by men. The first three were challenges to legislative measures benefiting women, all legacies of state measures benefiting women, all legacies of state. The fourth 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 chal-
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 exclusion of migrants might 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.

Violeta Moreno-Lax: Reversing the Rule of Law? From Effective Rights to Effective Remedy: The Changing Nature of the Principle of Effectiveness in the Area of Migrant Rights

Since the introduction of the ‘Area of Freedom Security and Justice’ (AFSJ) as an objective of European integration (Art. 50 TEU), there has been a subtle transformation in the understanding of the principle of effectiveness by the Court of Justice (CJEU) in relation to the fundamental rights of migrants (For the general trend see Opinion 2/13 (2014) ECLI:EU:C:2014:2454). While in other areas of law the principle of effectiveness is invoked for teleological purposes, in view of the full realisation of fundamental rights (See e.g. Case C-342/05 Uintet [2007] ECR I-2271, on effective judicial protection), in the field of migration and asylum effectiveness appears to increasingly relate to the ultimate fulfilment of policy objectives of deterrence and control (See e.g. Joined Cases C-411/10 and C-493/10 N.S. & M.E [2011] ECR I-13909). This paper proposes to analyse this trend through a critical examination of the case law of the CJEU on the Returns Directive (Case C-357/09 PPU Kadzoev [2009] ECR I-11189, and subsequent case law). The objective is to unveil not only the tension between security-oriented goals and fundamental right, but also the inherent danger that the ‘security’ to the rank of legal principles through the re-conceptualisation of ‘effectiveness’ entails. Whereas ‘Freedom’ and ‘Justice’ constitute two of the values on which the EU is founded (Arts. 2 and 6 TEU and CFR), ‘Security’ has hitherto been characterised as a policy objective, whose attainment remained subordinated to ‘respect for fundamental rights’ (Art. 6(1) TFEU). The suggestion by the CJEU in recent decisions that the effectiveness of the rights of migrants may be put on balance with the effectiveness of removals in the realm of return policy (See Case C-61/11 PPU El Dridi [2011] I-3015. Confirmed in Case C-329/11 Achughbabian [2011] ECR I-12695 (general rule); Case C-430/11 Md Sagor [2012] ECLI:EU:C:2012:777 (irregular migrant); Case C-534/11 Arslan [2013] ECLI:EU:C:2013:343 (asylum seeker), if confirmed and expanded to other areas, may undermine the value of fundamental rights within the EU legal order, potentially subverting the rule of law.

Ciodhna 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 Malik 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 constitutional or ECHR 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 explores trends in judicial decision-making in 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 comfortably in “saying no” to the State when there is a rule of law basis for the decision. This has resulted in reasonably strong protection for migrants’ rights in certain areas including: procedural fairness; issues around the criminal enforcement of immigration law; and deportation cases with a strong civil and political rights dimension. However, a sharp line between civil and political rights and socio-economic rights together with continued judicial deference to the executive power to regulate immigration, has hampered the development of a truly human-rights based body of jurisprudence in immigration law.

Patricia Brazil: The Right to Asylum in European Law: Underecked Terrain?

In the absence of an international refugee court, the significant role of the Court of Justice of the European Union and the European Court of Human Rights as supranational asylum courts has been welcomed (see eg Costello “Couting Access to Asylum: Recent Supranational Jurisprudence Explored” (2013) 12(4) Human Rights Law Review 287). While the early decisions of the Luxembourg court firmly underlined the human rights basis for its decision-making in this area (eg Bundesrepublik Deutschland v Y (C-71/11), and Z (C-99/11) Court of Justice of the EU, 5 September 2012 and A B & C v Staatssecretaris van Veiligheid en Justitie (C-148/13 149/13 & 150/13) Court of Justice of the EU, 2 December 2014) the scope and impact of the right to asylum pursuant to Article 16 of the Charter of Fundamental Rights is, to date, relatively under-explored in EU law. The Strasbourg court, on the other hand, has interpreted Article 3ECHR so as to give rise to extensive obligations on States in respect of non-refoulement (eg Chahal v United Kingdom (1997) 23 ECHR 413 and Saadi v Italy (2009) 49 ECHR 30), but to date has declined to apply the Article 6 right to a fair hearing in the asylum context (Maouia v France [2001] ECHR 42) in the absence of a right to asylum in that migrant’s country as France, the Cour de cassation was en-trusted in the late xIx century the power to discipline judges. Historically, any country experienced some kind of participation of judges in courts’ administration. To mention few examples, in a mostly judges’ host-country as France, the Cour de cassation was entrusted in the late XIX century the power to discipline judges. In Italy, the precursor of today’s judicial councils emerged at the very beginning of the last century. In the United States, the Administrative Office of the U.S. Courts was established under the Conference of Senior Circuit Judges in the late 1930s. Even before, in the same as well as in other countries, formal and informal arrangements allowed the participation of judges in courts’ administration. This paper aims at providing a comparative and historical overview of the incorporation or removal of self-governance arrangements in three classical jurisdictions: France, United Kingdom and United States.

Simone Benvenuti: Images of Judicial self-governance. A comparative and historical study of three main jurisdictions: France, United Kingdom, United States

Historically, any country experienced some kind of participation of judges in courts’ administration. To mention few examples, in a mostly judges’ host-country as France, the Cour de cassation was entrusted in the late XIX century the power to discipline judges. In Italy, the precursor of today’s judicial councils emerged at the very beginning of the last century. In the United States, the Administrative Office of the U.S. Courts was established under the Conference of Senior Circuit Judges in the late 1930s. Even before, in the same as well as in other countries, formal and informal arrangements allowed the participation of judges in courts’ administration. This paper aims at providing a comparative and historical overview of the incorporation or removal of self-governance arrangements in three classical jurisdictions: France, United Kingdom, United States.
Giulia Aravantinou Leonidi: 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 the judiciary well protected within the present system, and did not advocate a new role for the judiciary. The Norwegian Court Administration, established in 2002, has itself been increasingly concerned with the fact that it is not involved in the national budget process, and hence is an economic bound organ protecting the independence of the judiciary. While the budget situation also worries judges, they see the ideology of New Public Management as an independence problem.
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.

Participants
Mark Tushnet
Niels Petersen
Or Bassok
James Fowkes
Moderator
Jaclyn L. Neo
Room
4B-2-22

Mark Tushnet: Remarks from a US comparative lawyer

Niels Petersen: Remarks from a German comparative lawyer

Or Bassok: Remarks from the perspective of US constitutional theory

James Fowkes: Remarks from the author

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
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 perceived in a negative light as obstacles to closer integration and co-operation. At the same time, a small but also influential body of scholars is concerned 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
Annalí Albi
Mariana Rodrigues Canotilho
Rui Lanceró
Aida Torres Pérez
Dimity Kochenov
Christian Joerges

Moderator
Room 4B-2-58

Annalí 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 Domestic Law: The power of constitutional review in the context of EU law’. After a brief introduction to some of the central issues, 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 review to the ECJ has had a significant impact on 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 uniformisation through the autonomous, self-referential EU constitutional law is the optimal direction of travel. Additionally, the paper puts forward the suggestion that the concept of national constitutional identity is not well placed to characterise the rights and values at stake in recent national and EU adjudication, which often represents a more continental (colonial) European constitutional achievement.

Mariana Rodrigues Canotilho and Rui Lanceró: The Portuguese Constitutional Court and fundamental rights: a constitutional review of the continental 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 regarding legislative measures approved in the context of the economic and social crisis, many of them as a consequence of the Memoranda of Understanding that the country signed with the infamous Troika (European Commission ECB and IMF). The Court’s decisions were heavily discussed by scholars, politicians 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 second bailout, with potentially devastating ‘economic 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, and it has done so within the framework that the Court has left open important questions concerning 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 defended the Court’s role and its rejection of the general idea that the national legal orders are more effective than the European standard in protecting fundamental social and political rights, or protection of workers’ rights? Can the Court’s decisions be considered in a negative light as obstacles to closer integration and co-operation? The way in which these principles have been interpreted 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 European Union in protecting the fundamental social and political rights, or protection of workers’ rights? Can such national protection function in the context of EU constitutional law?

own earlier work). He will argue that doctrines of judicial restraint that modulate the relationship between courts, government and legislatures without renouncing legality are a better way to sustain and fortify the collaborative constitutional, 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, Editorial Committee Member of the journal Public Law, and Co-Editor of the journal Current Legal Problems. He is also the author of Judging 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 Gardbuaum’s work entitled ‘Rights and the Rule of Law in Third Way Constitutionalism’ in Marie Luce Paris & John Bell (eds), Rights-Based Constitutional Review – Con
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 the Union deploys the ‘Rule of Law’ viewed to a large extent as the ascendency of 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 the Member States were not implementing EU law when they enacted the ESM Treaty and that therefore the Charter was not applicable. Also, the CJEU stepped back from reviewing state austerity measures in several preliminary references brought by Romanian and Portuguese courts that questioned the compatibility between domestic legislation cutting public sector pay and several Charter rights. The CJEU laconically declared that it lacked jurisdiction since the domestic courts had failed to specify the connection with EU law. At the same time, in a recent and unprecedented judgment (Ledra Advertising C-87/15 P to C 10/15 P) the CJEU opened a new door by confirming the application of the Charter to the Commission and the ECB acting under the ESM Treaty. The judgment may well open an avenue for further actions that (indirectly) challenge measures adopted under bailout programmes against the backdrop of the Charter. The paper will argue that the complexity of the Euro-crisis law demands that the CJEU move beyond a formalistic approach to judicial review and intensify collaboration with domestic courts to avoid gaps in judicial protection that jeopardise the rule of law.

ConCurring panels

Plural and multilevel constitutionalism implies inter- nal 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 global 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 Fabrichio, Angela Costaldello 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 institutions of the EU, and the CJEU. The CJEU has become the guarantor of human rights in the context of the exclusive domain of constitutional and state sovereignty. In this way, a new public law – based on the coexistence of several parallel and congruent orders – emerges gravitating around the pro person principle. It is impossible that the internal and external angles communicate with each other for the consolidation of the democratic constitutionalism of human rights. The horizontal dialogues are marked by the exchange and free argumentative integration between the agents and interpreters. Openness to international juridical repercussions shows a perspective in the internalization of international norms and in the convictionality of the purpose. The purpose of this coexistence is to expand and enhance the protection of human rights, based on a plural complex impure and mixed logic.

Vera Karam de Chueiri: South–south dialogue: Brazilian and South African supreme court in times or (re)democratization

There has been an experience of transition to democracy and both constitutional courts have had a significant role in this process merging political and judicial issues in some landmark decisions. The paper intends 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.

ConCurring panels

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 an evolving methodologically consistent. 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 constitutional 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 giving in account the necessary methodology to do it and the difference among constitutional contexts.

Rodrigo Kanayama, Tomio Fabricio, Angela Costaldello 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 in 1978, 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 constitutional models, there are several differences and influences on the decisional process (the relationship between government and parliament, and parliamentary minorities) which are not identical as the degree of political consensualism. In this sense, the aim of this article is to answer what 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 democratic stability, for the decisions capabilities of the government and majorities, and for the institutional consensualism? 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 article is to abstract judicial review on democratic consolidation and on the decisional capability of all these countries. The research presents, in a comparative view: 1) AÇÕES DIRETA DE...
Concurring panels

1988-2016); 2) Acciones de Inconstitucionalidad in Portugal (563 law - act according to public interest and to consider the analysis will be: (i) institutional variables (the actors different types of lawsuits, the procedure to nominate judges, etc.) (ii) politics variables (composition of the parliament/government, coalitions, decision stability, nomination of judges, government or parliamentary majoritarian opinion on unconstitutionality/constitutionality of the law). The studies, specifically analyses the empirical validity of this hypothesis: if the Courts do not decide against the majorities or against the rights and interests of the central government. The preliminary conclusions of the data analysis indicate empirical validity on this hypothesis in Brazil Mexico and Spain, but not in Portugal.

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

Nowadays, the legitimacy of political representa
tion is in crisis in Brazil especially on account of the fortification of the civil society's role as a key politi
cal actor (through increasing social media articula
tion, broadening of public political debate in private spheres and strengthening of the Constitution's role after the process of re-democratization post 1988) and the increasing discredit in the ability of rulers to act in accordance 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 of in 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 of 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 the popular participation in the processes of determining agra
das, deliberation and decision-making, as well as to consider the importance and materialization of ac
countability and responsiveness. Finally, it highlights the importance of the actuality and strength of what remains and resist not represented as a negativity that pushes and enables the permanent resignification of the process of representation.

36 CONCEPTUAL AND INTERPRETIVE ASPECTS OF CONSTITUTIONAL CHANGE

Constitutional change can take various forms and meaning. It could be formal, informal, judicially made or through formal amendment mechanism. Various constitutional concepts influence our understanding of constitutional change. But constitutional change can also influence how we grasp such concepts. This panel is aimed to explore various conceptual and interpretive aspects of constitutional change, from comparative (for example Latin America and Japan) and theoretical perspectives.

Participants

George Karavokyris
Juliano Zaiden Benvindo
Craig Martin
Yaniv Roznai
Moderator
Yvonne Tew
Room
7-2-1-14

George Karavokyris: Constitutional change and legal interpretation

The concept of constitutional change and its inter
dplay 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 of constitutional change (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 constitutional design/engineering. Most of all, behind the lines, 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. the impossibility of flexible, formal/material, juridi
cal/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 embrace a specific concept of the constitution as a method
cological condition for the very notion of change. In this sense, the theory reproduces a traditional distinction of formal/informal change or amendment/transfor
mation of effective instruments of popular participation in the processes of determining agen
das, deliberation and decision-making, as well as to consider the importance and materialization of ac
countability and responsiveness. Finally, it highlights the importance of the actuality and strength of what remains and resist not represented as a negativity that pushes and enables the permanent resignification of the process of representation.

Yaniv Roznai: Discussant

The government of Japan has purported to rein
terpret the famous war-renouncing provision of the Constitution in a controversial process that immedi
ately circumvented 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 issues that remain underdeveloped and unresolved in the debate over informal amendment. Theories on informal amendment suggest that there are some constitutional changes that exceed the reasonable range of formal interpretive development, but which are not implemented through formal amendment proce
dures. 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, legal change, neutrality, and strength of what remains and resist not represented as a negativity that pushes and enables the permanent resignification of the process of representation.
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 in the field outside of the region itself. In this Article, I 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 played an active role since the very beginning of the 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 transitional 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.

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 constitutionalists usually refer to as ‘the constitution in the formal sense’. The second approach, more political or philosophical in nature, identifies the constitution with the most fundamental rules of a particular constitutional order. These rules (such as those that establish the structure of the state or that regulate the process of law-making) can be contained in a formal constitution, but are sometimes found in unwritten customs or in other extra-constitutional rules. Constitutional theorists refer to this as ‘the constitution in the material sense’. The first approach is naturally attractive to lawyers, as it allows one to identify ‘the constitution’ almost with the precision of natural science. The second approach, while interesting, is not always conducive to clear answers: what is ‘material’ to one observer is not necessarily ‘constitutional’ to another. In the case of Puerto Rico, however, identifying the formal constitution can be as hard as identifying – or trying to agree on – the content of the material one. True, there is a document titled ‘Constitution of the People’s Government of the Porto Rican Province of the United States’ (Estadío Libre Asociado de Puerto Rico) but that document is far from containing all the written norms that have formal constitutional status in the island. This is a direct result of the evolution of Puerto Rico’s territorial relationship with its metropolitan, and was dramatically exemplified by the recent adoption of the Puerto Rico Oversight, Management and Economic Stability Act, 2016 by the U.S. Congress (An Act that altered in fundamental ways the functions and powers of the ordinary institutions of government in the island). In this paper, I try to provide an answer to the question of ‘What is the constitution of Puerto Rico?’, by examining the ways in which constitutional norms emanating from the island’s legal system interact with the formal constitution, as well as with the juridical apparatus that regulates its relationship to the metropolis.
ConCurring panels

ConCurring panels

After having exposed the merits and shortcomings of New Constitutionalism has affected the legitimacy of constitutional courts in European public law. This justifies those related to the rise of governmental structures and the discontents with some elements of NC, particularly to the systems of global governance, and also when it comes to the examination of their place in the EU.

In resistance national constitutional courts oppose what constitutional courts can possibly do to address the discontents with some elements of NC, particularly to the systems of global governance, and also when it comes to the examination of their place in the EU. In search of the terms of engagement, and most importantly, it needs to be seen how national constitutional courts act in supranational litigation.

The shaping force of comparison in and for public law.

The paper examines deference correction and resistance the judicial strategies inspiring the activity of national constitutional courts in supranational litigation. In depth use of comparative legal reasoning, including foreign jurisprudence in their judgments. This mirrors a broader process of strengthening the shaping force of comparison in and for public law.

Deference, correction and resistance: in search of the terms of engagement

The public law of our time is a law in multiple layers. 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 the normative claims.

The shaping force of comparison in public law

The shaping force of comparison in public law is systematic. The shaping force of comparison in public law is in layers. While this multi-layered structure is usually examined in its spread vertical (international – European – national etc.), this contribution focuses on its horizontal dimension. Horizontal relationships between legal orders can 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 history. Developing modern constitutional courts wouldn’t 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 far as the law itself demands that legal rules or principles must be enacted or interpreted in accordance with comparative standards. Furthermore, national courts have recently taken a path towards a more in-depth use of comparative legal reasoning, including foreign jurisprudence in their judgments. This mirrors a broader process of strengthening the shaping force of comparison in and for public law.

After having exposed the merits and shortcomings of New Constitutionalism has affected the legitimacy of constitutional courts in European public law. This justifies those related to the rise of governmental structures and the discontents with some elements of NC, particularly to the systems of global governance, and also when it comes to the examination of their place in the EU. In search of the terms of engagement, and most importantly, it needs to be seen how national constitutional courts act in supranational litigation.

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 writing 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 the present day context? Is truth a constitutional right? And consequently, do lies to suspects 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

Miguel Soares
Room

8A-2-17

Rinat Kitai-Sangero: Prohibition on Police Lies Regarding the Incriminating Evidence

The paper addresses the question of whether lying to suspects during interrogations regarding the incriminating evidence against them is a legitimate deceit. Despite the condemnation of lying by suspects during interrogations is a common phenomenon and has even been dubbed an “art”. This paper argues that lies of this type are illegitimate because they create an increased risk of false confessions and because they force suspects in general and innocent suspects in particular to shape their defense in view of false evidence. Consequently lies infringe upon fundamental principles of constitutional criminal law such as the right to remain silent the presumption of innocence and the imposition of the obligation to prove the accusations on the prosecution. All the arguments against using lies ultimately revolve around the linkage between lies and the obligation imposed on the state to prove guilt.

Boaz Sangero: Safety from False Confessions

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 systematic identification of the patterns, 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 serious error and accident than a plane crash. Yet in criminal proceedings it is perhaps even more fatal. The consequences of a false conviction 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 confession 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 criminal law in legitimizing and recognizing new types of legitimate evidence (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

In early 2014, Amendment 10 of the Prevention of Sexual Harassment Law came into effect. Under key German law, in certain circumstances the possession of a photograph, video, or recording of a sexual nature, without the consent of the subject, constitutes sexual harassment and is punishable by a maximum of five years in jail. The amendment was passed, in part, in reaction to the growing phenomenon of “revenge porn” that is the deliberate dissemination of sexually explicit material over the internet, particularly 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 privacy, public order, etc. However, it is obvious in that case it can and should be a key tool in deal-
The practical result is allowing situations where the ability to direct people conduct and hence constitutes appellate enforcement is very developed in Israel. However, that this is where the court need to use meta-textual the law meets the demands of proper purpose and 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 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 there is no violation of equality because there is a relevant distinction; and allowing violations in 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. A behavioral approach explores the cognitive mechanisms at play when making decisions that involve conflicting values and experiments with interventions that may affect the final outcome.

Participants  Mordechai Kremnitzer  Talya Steiner  Raanan Sulitzeanu-Kenan
Moderator  Mordechai Kremnitzer
Room  8A-2-27

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 entails of 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.

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 senior 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 Preferred: 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.

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 marginalized 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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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. It will begin by exploring the challenges of courts in ensuring legal accountability in the secret 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 of EU courts in scrutinising 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.

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

The 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 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 public interest groups remain rare. In order to address this problem, the EU court jurisprudence has developed a new limb of Article 263(4) TFEU, added in the Lisbon Treaty, that allows for the direct access of private applicants to the EU courts. This turns out to be a highly contentious issue, as the new criteria of admissibility of direct access raise constitutional issues, as the new criteria of admissibility of direct access raise constitutional issues, putting in question the role of the national courts in cases of direct access to the EU courts. The paper explores the secrecy effects of the principle of originator 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 to privacy. Yet not all can be seen and challenges also exist at the further layers of interplay. This paper, in particular, is concerned with the hidden security phenomenon, the existence of which cannot be revealed to 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 action of authorities involved in composite procedures don’t fall under the rule of law. They have done so by respecting the principle of the rule of law as much as possible. The limits of the jurisdiction of EU courts may arise which compromise the principle of the rule of law. The paper further argues that the case law has shown that the location of discretion at the national or EU level 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 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 composite decision-making.

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 entwinement between 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 procedures and to different courts. Potentially opening gaps in law’s ability to structure public authority and leading to instances of uncoordinated 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 uncoordinated authority and to examine how they have scrutinized decisions when the EU institutions involved have resorted to 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 internationalised rulemaking procedures.

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

The EU judicial review system relies on a strict division between the jurisdiction of national and EU courts whereby only EU courts may review the exercise of EU powers, and that only the Member States’ courts may review the exercise of national powers. This 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 jurisdiction 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 action of authorities involved in composite procedures don’t fall under the rule of law. They have done so by respecting the principle of the rule of law as much as possible. The limits of the jurisdiction of EU courts may arise which compromise the principle of the rule of law. The paper further argues that the case law has shown that the location of discretion at the national or EU level 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 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 composite decision-making.
Recent developments in Africa indicate that the federal idea that was never given a chance to develop is now re-entering the political agenda of several African countries, above all as a response to communal tensions. Despite constitutions that provide for a robust and dynamic federal system, the federal or semi-federal systems in Africa operate in a centralised manner. In most of those countries, the federal arrangement that, by definition, multiplies opportunities for offices and helps to promote subnational democracy has been undermined by 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 act as institutional guardians and challenge the constitutionality of government actions? This question 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 Mugoya: 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 legislation and executive powers are 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 federal 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, 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 and its constitutional implications, the degree of trust and political influence. 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 the effectiveness of ensuring the “federal balance”.

Yonatan Fessha 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 devolution of power between the federal and state government has not led to a dynamic interaction between two autonomous units of government. The national government has translated state governments into implementing agents. This begs the question whether the role of the judiciary 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 umpiring 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 context of federalism, is the existence of a shared interpretation of the federal system. The paper identifies the institutional factors that 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, 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 and its constitutional implications, the degree of trust and political influence. 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 the effectiveness of ensuring the “federal balance”.

Yonatan Fessha and Zemelak Ayele: Umpiring Federalism in Ethiopia

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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 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 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
Tomasz Tadeusz Konczewicz
Gabor Halmai
Paul Blokker

Moderator
Oreste Pollicino
Room 8B-2-19

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

Despite its bold position in its Lisbon I Lisbon II and Holbein judgements, 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 play a helpful starting point for reconstructing one constitutional identity it is a dormant concept in the Czech Republic. The lack of public debate and the limited involvement of other constitutional organs in the identity discussion of power between the federal and state government has not led to a dynamic interaction between two autonomous units of government. The national government has translated state governments into implementing agents. This begs the question whether the role of the judiciary provides for an umpire that promotes vertical constitutionalism. Even though the concept of constitutional identity is a normative one, the process of discovering and defining it cannot be limited to a textual analysis of the constitution itself or even of the power struggle case of a constitutional court. Hence, it is important to bear in mind that the judicially created understanding of constitutional identity does not necessarily have to find
National(ist) Constitutional Identity

Before and right after the EU accession, the Hungarian Constitutional Court, a powerful and still independent institution developed a standing jurisprudence 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 ‘il-legal’ 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 efforts 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.

Paul Blokker: Discussant

45 CONSTITUTIONAL COURTS AND CONSTITUTIONAL ADJUDICATION IN EAST ASIA

In order to contribute to the theme of this conference: ‘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 constitutional 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 Taiwan, South Korea, Mongolia, Thailand and Indonesia. The second paper engages in a case study of the constitutional court of Taiwan, which is the oldest constitutional court in East Asia. The third paper explores the peculiar constitutional complexities arising from the practice of “One Country, Two Systems” in Hong Kong. The paper strives to illuminate how this court has travelled such a long journey and its contextual dynamics by highlighting different roles of the power of the development in 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.

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 Korea, Mongolia, Thailand and Indonesia (listed here according to the chronological order of their establishment). 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 judicial politics which consists of the fourfold categorizations 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.

Participants
Albert H.Y. Chen
Wen-Chen Chang
Cora Chan
Po-Jen Yap
Moderator
Po-Jen Yap
Room
8B-2-43

Po-Jen Yap: Discussant

Wen-Chen Chang: The Constitutional Court of Taiwan: An Evolving Strong Court against Contextual 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 became a powerful judicial institution and an indispensable strategic player in the development of constitutional democracy in Taiwan. This paper is to illuminate how this court has travelled such a long journey and its contextual dynamics by highlighting different 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 institutions: pluralism autonomy power balance in Hong Kong 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 the relationship between the Chinese and 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 Joint Declaration and being the foundation of Hong Kong’s autonomy vis-a-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.

Albert H.Y. Chen: The Politics of Constitutional Identity, Between Constitutional Essentials and Unconstitutional Capture

The constitutional identity stands for distinctiveness 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 unconstitutional capture that has swept across Poland after 2015 elections. With 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

Katarína 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, restart of democratization 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 distinctiveness 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 unconstitutional capture that has swept across Poland after 2015 elections. With 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.
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 how courts have interpreted the separation of powers 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 Clevés 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 that ruled Chile between 1973 and 1989, the Chilean Constitutional Tribunal unexpectedly helped to set up the 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 scholarship exaggerates the contribution 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 also able to support the demands of the regime’s soft-liners, who advocated for a consensual return to democracy. The Tribunal helped to legitimate 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.

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 only 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 stormy environment of a matter of deep political nature and places 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. The possibility is drawn that a Court that acted as merely the guardian of the constitution, it may have in the end nudged the impeachment itself.
Courts are increasingly relied on to deal with politically salient questions. Judicialization of politics does not en- tirely remove the courts from the political sphere. Well aware of the possible consequences of their judg- ments 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, literature on judicial strategy is focused on conversa- tions with other courts rather than Parliaments. 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 presenta- tions, 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 legisla- tive strategy of non-compliance for dialogue theory are presented as a framework to understand judicial-parliamentary relationship.

**Josephine De Jaegere:** Strategic behavior of constitutional courts in consociational sys- tems: empirical analysis of the Belgian Constitution and implications

In contrast with the extensive body of literature on judicial behaviour on countries with a common law tradition (especially on the US Supreme Court), there is little systematic empirical knowledge relating to European constitutional courts. By systematically analysing the case law of the Belgian Constitutional Court (BeCC), which shares many features with other European ‘Kelsenian’ constitutional courts, I aim to understand the constitutional court’s knowledge on the factual questions that play upon constitutional judging. Building on the literature with regard to judicial behaviour, I hypothesize that the BeCC’s reasoning and outcome of constitutional cases is (in part) shaped by strategic considerations. Although judicial behaviour may be fuelled by the will- ingness to maximize its impact on the legitimacy and quality of democratic policy making, it is also con- strained by what is politically feasible. The Court may act strategically within the institutional boundaries of its competences, taking into account the anticipated reactions from Parliament next to litigants or other judges. To study the strategic behaviour of the BeCC, an extensive database on the case law of the CC was built including all cases – annulment procedures as well as to the constitutionality – since its inception until 2015 (n=3145). The presentation focuses on three aspects of the Court’s case law that may be af- fected by strategic considerations. First, it is argued that modulated outcomes may serve as a strategic communication tool. Furthermore, the Court may apply a ‘simple’ declaration of unconstitutionality would ex- ceed the ‘tolerance interval’ acceptable to political actors. Although these outcomes are not necessarily more deferential towards legislative majorities, they do offer courts the opportunity to be consistent with the strategic considerations. However, the study of judicial behaviour should go beyond binary codings of case outcomes and look into the motivational part of constitutional rulings. In particular, it is argued that the Court may employ its rulings more strongly in citations to external authorities in order to ensure compliance with its decisions. At the same time, the Court may be less clear on the implications of its ruling for the legis- lative branch when it estimates a vague opinion may be beneficial for the Court’s reputation. Several regression analyses aim to lay bare whether strategic considerations are inherent to the BeCC’s behaviour. Although other causes cannot be entirely partitioned, if the analysis reveals strong significant effects, this supports the hypothesis that strategic considerations at least in part determine the BeCC’s behaviour. This empirical analysis contributes to funda- mental discussions about the appropriate role for judicial institutions in a democratic society and the structure of their reasoning as strategic instrument to enforce compliance through dialogue.

**Sarah Lupo:** Discussant: the Italian perspective

The first presentation will introduce both the re- written judgments of the Spanish Constitutional Court's case ‘R.M.S v Spain (European Court of Hu- man Rights) from an integrated approach to the 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 brief 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 presenta- tion will introduce the idea of a ‘global human rights conversation’ as a central feature of smart human rights integration.
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, there is a lack of evidence suggesting 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 the care of the 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 to human rights calls for reading R.M.S from the perspective of regional and universal normative developments on the rights of women, children and people living in poverty. This paper analyses and rewrites the Strasbourg judgment by adopting such an integrated approach to grasp the material, symbolic and decision-making injustices that took place in R.M.S. Firstly, the paper problematizes the allocation of children’s care and wellbeing 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 control 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 right to family life. The United Kingdom – concerning the reduction in night-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 incursion 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 territory. The paper re-examines the “proportionality test” 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 Court should have explicitly acknowledged that non-state actors bear 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.

Paul Craig: Courts and Administrative Power

Giulio Napolitano: Courts and Administrative Power

Eduardo Jordao: Courts and Administrative Power

Alfredo Moliterni: Courts and Administrative Power

Guy Seidman: Courts and Administrative Power

Participants Paul Craig Giulio Napolitano Eduardo Jordao Alfredo Moliterni Guy Seidman

Moderator Marco D’Alberti

Room 8A-3-45

Sanja Baric: Constitutional Court of Croatia as a Facilitator of Democratic Transition: From the Ex-Yu 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, at least as included in the right to life. Sixth, the paper argues that the Court should move towards not only an integrative approach to human rights norms, but to one of human rights holders as well.

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 territory. The paper re-examines the “proportionality test” 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 Court should have explicitly acknowledged that non-state actors bear 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.

Participants Sanja Baric Tatjana Papic Edin Hodzic

Moderator Tatjana Papic

Room 8B-3-03

49 COURTS AND ADMINISTRATIVE POWER

This paper 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 underlining the role of the Courts in shaping the balance between public power on the one hand, and individual and collective rights on the other. 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 paper will deal with the relationship between judicial review and extra-judicial control of 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.
The paper addresses the role of the Constitutional Court of Serbia (SCC) in the legal and political life of the country and examines its role in the process of democratic consolidation in Serbia. It examines social and political context and other relevant factors – historical and institutional setting in particular – to frame the discussion pertaining to the legitimacy of the SCC in contemporary and sociological terms. The paper argues that from all these standpoints, SCC’s legitimacy is weak. Accordingly, it shows that the SCC has been having only marginal role in political and legal life in Serbia 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 recent 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 political figures or public has been relatively low. In discussing the contributing factors, the SCC has been less assertive with respect to the internal factors, such as the institutional texts and legal norms. The paper looks at how the court tackles – or avoids – controversial cases within the context of EU competition law EU Social Policy and European human rights law.

Participants: Zane Rasnača, Juha Tuovinen, Haukur Karlsson
Moderator: Haukur Karlsson
Room: 8B3-09

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 cases. The paper argues that far the CJEU has failed to develop satisfactory techniques to solve them. The judgments in Dano, Almanovci, Brey, and Commission v. United Kingdom, all illustrate a clash between the CJEU, member states and the financial interests of the member states in the light of politically charged accusations of “welfare tourism”. Furthermore, besides dealing with these controversial issues, these cases also represent a clash between the CJEU, member states and EU legislator and various levels of EU law sources. Instead of analysing the “human cost” of these judgments represent, I am interested in tech- niques the CJEU employed in solving them. I show that in these cases the CJEU seemed to yield to the political pressure rather that follow its own previously developed approaches (e.g. margin of appreciation) and re-interpreted the EU law by shifting its underlying objectives away from the past interpretation and decision. This results in the transformation of the Court into a massive instrument for political decision making.

Such approach has a consequence of further compli- cating the CJEU’s own role and also the relationship between various levels of EU law. In the final part of the paper I argue that the principle of “institutional balance” could serve as one source of inspiration for developing new techniques on how to accommodate controversial issues in the Court’s case law. I propose some mechanisms that might allow the CJEU 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 Rel y on European Consensus in Article 8-11 Why It Should, and How To Fix the Situation

The main argument of this paper is that European consensus plays in the proportionality and balanc- ing exercises in terms of article 8-11 of the European Convention on Human Rights (ECHR). I argue that the standard account does not represent the way the Court decides or should decide cases but that with some adjustments the situation could be remedied. According to the standard account, proportionality and balancing represent the main devices for resolving cases brought in terms of articles 8-11. In this paper, I argue that the decision of appreciation is often argued to relate to the standard of review with which the court undertakes the proportionality exercise. The role of a European consensus in this process is sometimes argued to be to determine the breadth of the margin of appreciation with a consensus indicative of a nar- rower margin and no consensus requiring a broader margin. Here, I argue that this standard picture of the relationship between proportionality, the margin of appreciation and European consensus does not reflect the Court’s approach of the years. In particular, in the way in which the substantive arguments (that is the normative and empirical policy arguments used in balancing) are not connected coherently. The Court relies on a European consensus quite haphaz- ardly at different parts of the balancing approach. That is, the Court takes into consideration different norms and rules, defining what counts as a consensus. Consequently, the European consensus plays a relatively arbitrary role in the way in which proportionality and balanc- ing exercises are carried out. Finally, I will suggest how the margin of appreciation and European consensus can be reconciled by defining the variables of the proportionality exercise. Furthermore, the normative and empirical questions that it poses. It also involves the recognition that with regard to the questions that arise in proportionality and balanc- ing (and especially with regard to balancing there are different consensuses that may be relevant. In at- tribute the different weights to the situation at hand, as balancing requires the ECHR to do, the court must then consider various European consensuses in the course of its decision making. Finally, having elucidated the relationship between balancing and European con- sensus, we can reconstruct the relationship between the three concepts for a more satisfactory account of the role of European consensus in the balancing case law of the European Court.

Haukur Karlsson: Court techniques for balancing procedural rights: compensating for undue procedural delays in EU’s competition procedure

In a recent string of case law (i.e. Gasconge and Others) cases before the CJEU, the issue of which procedural design is the most appropriate to address for undue procedural delays was tried. Interestingly, two fundamentally different approaches had previously been used by the CJEU (i.e. in Bausch and others and in the Der Grüne Punkt case) and thus it became imperative to decide which procedural design should prevail. The different approaches on one hand sug- gested addressing the issue of compensations for procedural delays either with a substantive cartel procedure, and on the other hand that it should be addressed in a new court procedure before the Ger- manal Court. In resolving this dilemma, which ultimately was a dilemma about procedural fairness within the meaning of Article 47 of the Charter, the Court referred to an unusual technique by asking some of the stakeholders for their preference with regards to the two alternatives, as is discussed in AG Sharpston’s Opinion: ‘The Court invited the 27 Member States, the European Parliament and the Council to indicate in written observations which of the two procedural designs they find preferable. In so doing, the Court thereby expresses a clear preference for a substantive cartel procedure before the General Court. This conclusion, which the Court has expressed in the context of its decision in the Der Grüne Punkt case, is not based on any specific preference expressed by the stakeholders. It is rather a methodological recognition of the fact that, given the lack of clear, agreed preferences, the Court should be guided by the criteria relevant in any event to a substantive cartel procedure before the General Court. The Court has indicated that the criteria underscored by the stakeholders should be as follows: (1) Experience; (2) Transparency; (3) Efficiency; (4) Effectiveness; (5) Limitation of Costs; (6) Respect for national legal systems; (7) Respect for the rights of the parties; (8) Respect for the rights of third parties; (9) Respect for the rights of the general public; (10) Respect for the rights of the European Institutions; (11) Respect for the rights of the General Court; (12) Respect for the rights of the Court of Justice; (13) Respect for the rights of the European Parliament; (14) Respect for the rights of the Council; (15) Respect for the rights of the Member States; (16) Respect for the rights of the citizens; (17) Respect for the rights of the European Union; (18) Respect for the rights of the European Union’s citizens; (19) Respect for the rights of the European Union’s Member States; (20) Respect for the rights of the European Union’s institutions; (21) Respect for the rights of the European Union’s Member States’
52 INTERNATIONAL COURTS AND SOLIDARITY

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 shows the reversibility of 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 legislators/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 ECtHR and the ECHR.

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
Helle Krunke
Achilles Skordas
Hanne Petersen
Moderator Helle Krunke and Ulla Neergaard
Room 8B-3–19

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

The term 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 intellectuels political actors and citizens’ movements. By providing an analytical framework for the analysis of such solidarity contestation in times of crises, we argue that a new political of differentiated solidarity in the EU can be distinguished, which is different from the old politics of European identity. In line with and as a consequence of the intensified argument in favour of differentiated integration, differentiated solidarity entails a shift of emphasis from the promotion of European integration to establish a reciprocal relationship among equals to the promotion of flexible arrangements among EU members discretionary redistributive mechanisms and hegemony.

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 egalitarian 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 forsaking any form of solidarity beyond national borders are gaining in momentum, epitomised by the UK’s decision to leave the EU among others, 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 express that solidarity is one of the EU’s values. In a Community of Law the validity of this value would depend on its capacity as a legal principle. This paper explores whether and how far the case law of the Court of Justice supports solidarity as an EU legal principle. The thesis that we suggest is whether solidarity as a transactional category between citizens of different nationalities is supported. We distinguish between receptive 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 decide whether jurisprudence on solidarity between Member States and solidarity of Member States with citizens on the move has the potential.

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’s use and application of solidarity from two different angles. One approach is the ECtHR through the CLP, the other is the Court’s development of a quite far-reaching practice of international law and enabling the ICJ to build a normative project for what ‘peace’ and ‘order’ mean in the 21st century.

Hanne Petersen: Discussant

53 INTERNATIONAL COURTS AT A CROSSROADS: REGIONAL INTEGRATION IN CRISIS?

This panel revisits the concept of judicialization specifically within the realm of regional governance. Regional courts are experiencing significant pushback, embodied in a variety of attempts to undermine their authority and legitimacy (Alter, Gathii and Helfer 2016). The most extreme form of backlash is withdrawal from the regional legal system, while the ECtHR shows the reversibility of the integration process. Examples include Brexit in the EU, the Swiss referendum on withdrawal from ECtHR, the Venezuelan withdrawal from the IACtHR and the dissolution of the SADC Tribunal. Other possible hurdles include insufficient financial resources, potentially disruptive procedural reforms and changes in institutional design. The panel explores the systemic factors that are at the source of the pushback as well as the different judicial response strategies. Particular attention is paid to the role national courts play in the transnational judicial construction of authority and legitimacy. Equally, the panel will consider the instrumentalization of the “EU model”, where on the one hand, actors in other regional organizations invoke the EU model for solutions in view of increasing their legitimacy. On the other hand, the actual application of the EU model differs significantly in every region.

Participants
Salvatore Caserta
Mica Webusch
Maksim Karliuk
Pola Cebulak
Marcelo Torely
Moderator Pola Cebulak
Room 8B-3-33

Salvatore Caserta: Regional Integration through Law and International Courts – The Central American Court of Justice

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 (CACEJ) and the Caribbean Court of Justice (CCJ), and it compares them with the European Court of Human Rights (ECHR). Both the CACEJ 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 human rights laws. 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 in-
tiation lie for the most part outside the direct con-
trol of the judges most notably in other institutional,
political, and societal actors, such as national judges,
regional organs, legal and political elites, as well as
academics. The article hence suggests that ICs can
become engines of de facto supranationality only to
the extent to which these are supported by a set of
institutional, political, and societal pre-conditions ac-
knowledging the concrete enforcement of the rulings of
the IC at the regional and national levels.

Micha Wiebusch: The African Judicial System: resilience or despair?
The continental judicial system in Africa is mak-
ing great strides. Increasingly, political initiatives are
undertaken to confer a greater role to the continental
court system. First, a Court was established to deal
solely with human rights (1998). Then, the Court’s ju-
sisdiction was expanded with a general international
jurisdiction (2003) to eventually allow for adjudica-
tion in criminal matters as well (2014). However, the
protocols that would expand the Court’s jurisdiction
have not yet been sufficiently ratified to enter intoorce. Concerning the criminal jurisdiction protocol
this process might be expedited in light of the African
Union declaration to withdraw from the International
Criminal Court. However, despite this apparent politi-
cal confidence in the continental judicial system, justi-
fied concerns exist concerning its future. A number
of recent developments prompts such concerns. Firstly,
light of the withdrawal of Rwanda from allowing in-
dividual access to the Court, questions may be raised
whether other countries will follow suit and whether
this will deter countries from accepting such jurisdic-
tion. Secondly, in a recent decision, the African Court
has accepted the violation by the Charter on Democracy Elec-
tions and Governance as a justiciable human rights
instrument. This could lead to innovative but perhaps
too radical jurisprudence to be politically accepted
by the member states. The paper will consider these
dimensions in greater detail focusing on the political
and legal arguments behind these recent trends, and
argue that due to increasing faith in the regional vis-à-
vis the international system, the African court system
holds more promise than any other alternative.

Maksim Karlik: The disintegration of judiciary within Eurasian integration
Eurasian integration has created a new legal order of
the Eurasian Economic Union (EAEU). This legal or-
der has its own hierarchy of rules and certain innovations. The approaches of member
states’ legal orders towards it differ. However, even the accommodating ones, such as the Russian one, are
not free from tensions. The recent practice of the Rus-

sian Constitutional Court has claimed that Russia can
cast aside international obligations based on national
constitution, which targets the viability of the EAEU
legal order. This is further complicated by the Eurasian
judiciary, which as the main interpretative authority
within the integration, has tried to take on an activist
role, somewhat borrowing approaches from the Eu-

ropean Union. In its turn, the Russian Constitutional
Court has voiced its differences in certain approaches. This variability of practices and approaches clearly
undermines the ‘unity’ of the EAEU legal order and the
interweaving of national and regional legal frameworks. This paper analyses the relationship of the national
and regional legal orders through their judiciaries to
assess the possibilities for tensions between them. It
points out the sources of such tensions, which lie in
certain indeterminacies within the EAEU legal order,
temptations to assert power, and recent far-reaching
practices of the Russian Constitutional Court (such as
the Yukos case and others).

Polà Cebulà: Preliminary Ruling Questions from Highest National Courts in the EU: Disobedi-
cence, Subversion or Dialogue?
National judges are the ordinary judges of EU law
and it is an obligation of the Member States to ensure
effective judicial protection. However, the position of the highest (constitutional or supreme) courts in terms
of judicial politics and Europeanization of national ju-
diciary is particular, because these courts perform
the constitutional review function and are inherently
more politicized. 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 adjudicat-
ing 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 con-
cerned specifically human rights (Ireland 2014, Austria
2014). This increased dialogue appears, however, to be
a result of increased tensions rather than increased
convergence. Some preliminary ruling references in-
cluded skepticism as to compatibility of the EU law
measures with human rights protection guarantees at
national level (Melloni (2013)), others amounted nearly
up to an ultimatum (Gauweiler (2015)). Finally, two consti-
tutional 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 de-
veloped 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 develop-
ing 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.
Stéphanie Henrette-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 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 a mini-}

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

Ruth Rubio Marin: “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 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 a mini-

55 INTERNATIONAL SETTLEMENT BODIES AND JUDGES: RIGHTS, NATIONAL PRIVILEGES AND LAW PRINCIPLES. LOOKING FOR A BALANCE.

Bilateral and mega-regional agreements usually provide several dispute settlement mechanisms based on international arbitrations. Because of the peculiar features that characterize these resolution systems and the fact that we are managing them, many arbitrations take place on several legal sides, especially constitutional ones linked to their legitimacy and independence from all the parties: States, citizens and companies. Furthermore, this panel deals with the concerns related to the lack of protection international dispute settlement mechanisms guarantee to individual rights and with their discussed compatibility with the traditional separation of powers’ doctrine. This panel also aims at tracing the current and underground dynamics governing the dispute resolution mechanisms in order to identify common traits not directly depending on the agreement they are included in.

Participants
Federico Caporale
Valerio Turchini
Andrea Averardi
Marsel Laze
Elisabetta Morlino
Moderator
Room 8B 3–49

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 ISDS 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/service public issues. I will show that ISDS is practicing a kind of legality supervision (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.

Valerio Turchini: Challenges of Investor-State Dispute Settlement Mechanism: Current Perspectives After the Novartis v. India Case

Investor to State Dispute Settlement (ISDS) mechanisms are provided by several international and mega-regional agreements. Their goal is to guarantee foreign investors a flexible tool to institute legal proceedings before specialized arbitral courts bypassing national judiciary ones, when they consider a domestic regulation in conflict with the provisions of an international agreement. Adopting an empirical approach, this paper explores how ISDS proceedings have been influenced by the experiences and cases prevailing at the ISDS mechanism on a general basis, taking into account a worldwide political trend that appears basically unfavorable to international agreements.

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 between the European Community and the United States. But it is not bound by a stare decisis rule and BITs apply only inter partes, the number and the consistency of ISDS arbitrations on these topics allow talking of a strengthened interpretative trend. Thirdly, I will stress that, at the same time, ISCID broaden 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, itstraitifies a limited number of cases that have only few rights of participation in international arbitrations. Then I will explore the solutions and the arguments given by ISCID arbitrators vis-à-vis public utilities/service public issues. I will show that ISCD is passing a kind of domestic courts’ judgment (under BITs’ clauses) of national administrative measures. Through this via, ISCID 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.
ConCurring panels

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

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Article 8.31(2) CETA is consistent with this monopoly. The second question, which the paper addresses, is how the CETA Tribunal should determine the content of law under its consideration. Whereas Article 8.31(2) of CETA points to the prevailing interpretation given to a number of social rights, this does not solve the problem of interpreting EU rules where a relevant ruling by the CJEU is lacking. The paper also aims at analyzing procedural considerations related to the scope of powers of the CETA Tribunal in this regard.

Anna Aseeva: Representation of public interest through Investment Court System: prospects of access to justice and focus stand of local communities in investment disputes

A judicialised model of dispute-settlement generally relies on domestic and regional courts alike as institutional fora. It is largely assumed that a number of regional courts can provide through economic integration or development agreements have jurisdiction to adjudicate disputes related, for example, to human rights. Things are different with the investor-state disputes settlement (ISDS). Only a small number of EU courts, as well as EU-Canada Comprehensive Economic and Trade Agreement. Other regional courts may adjudicate individual complaints, but only so far as they do not challenge the competence of the community or domestic law. The paper analyses the role of the relevant European and domestic courts in the ISDS. The analysis of national examples, the application of the European Social Charter by ordinary and constitutional domestic courts will be explored. Lastly, the potential of adversarial models of social rights adjudication to mitigate the democratic deficit and facilitate decision-making over social welfare will be discussed.

Participants

Olga Chesalina
Kyrka Pavlidou
Tanja Abbatte
Andrea Bogata
Alexandre de le Court
Anastasia Poulou

Moderator

Veronica Federico

Room

8A-4-17

57 JUDICIAL PROTECTION OF SOCIAL RIGHTS: OPPORTUNITIES AND CHALLENGES

Despite the increased constitutionalization of social rights, courts often rely on general principles or civil and political rights in order to protect people's material needs. Our paper aims to analyze the role of courts in the protection of social rights under the lens of constitutional and international human rights. First, the paper identifies the social rights component of legal frameworks and their consequences in the current context of financial crisis will be explored through critical analysis of the unexplored case law of the Constitutional Court of Russia and of the lowest and Supreme Greek Courts. Moving to Africa, light will be shed on the underresearched jurisprudence of African courts with the aim to identify regional strengths and weaknesses of new democracies judicially enforcing social rights. Moreover, the paper examines the procedural peculiarities of social law cases, the existence of mechanisms which enable easier access to the justice on the basis of social rights will be investigated. After the analysis of national examples, the application of the European Social Charter by ordinary and constitutional domestic courts will be explored. Lastly, the potential of adversarial models of social rights adjudication to mitigate the democratic deficit and facilitate decision-making over social welfare issues will be discussed.

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

The paper focuses on the judicial adjudication of social rights in the context of the implemented austerity measures in the Greek legal order. At first, the paper examines how domestic courts safeguard social rights by indirectly enforcing constitutional provisions in order to constitutionalize social rights and to interpret those in relation to the constitutional guarantee of human dignity. The paper then juxtaposes this practice to the opposite interpretation of austerity 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 multifaceted structure of constitutionalism and human rights architecture in Europe. The paper aims to highlight the undocumened 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.

Tanja Abbatte: An Overview of Social Rights Adjudication in Africa

The constitutional wave which has interested Africa scholars and activists has seen a new impetus in the last years has produced advanced constitutions 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 struggle for their effective enforcement. These issues include broad discussions on the judiciary and political rights, which the paper will consider the procedural peculiarities of social rights adjudication in some African constitutional systems. Moreover, it will be considered whether regional legal instruments may have a role in modernising the judicial process in Africa. The paper will analyse regional and international legal instruments which is more nuanced than those provided for by the national legal order. It will be considered whether the role of the Constitutional Court of South Africa in the protection of social rights may be derived from the Constitution.

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 protection law-making, which may differ from those of administrative or civil courts. There are inequalities between the parties in terms of resources, knowledge and experience. In my paper, I examine the role and functioning of the Constitutional Court of Slovenia in respect of the protection of social rights. The paper attempts to answer these questions by examining the decisions of the Constitutional Court of the Russian Federation relating to retirement and unemployment social benefits.
ConCurring panels

ConCurring panels themselves as a new ‘counterpower’, or are there any practical use. Maybe a sound political process is also entrusted to private actors. Public law has experienced an all-out shift from government to governance, replacing centralized bureaucratic rule with all kinds of ‘co-regulatory mechanisms’ and ‘multilevel partnerships’ as allegedly more efficient methods of regulating public actions in the neoliberal era.

Panel I: reTHInG TriAS POlITIc A

The present era of privatization, decentralization and individualization has seen an unprecedented fragmentation of the public sphere a break up 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 rule 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 governmentality 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 Scheppelle: Discussant

58 INSTITUTIONS OF THE RULE OF LAW: NEW BALANCE OR NEW POWERS?

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 also entrusted to private actors. Public law has experienced an all-out shift from government to governance, replacing centralized bureaucratic rule 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 governmentality 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 Scheppelle: Discussant

59 JUDGING DEMOCRATIC AND OPEN DECISION-MAKING, CITIZEN PARTICIPATION AND THE ROLE OF TRANSPARENCY IN THE EU IN THE POST-LISBON ERA

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 also entrusted to private actors. Public law has experienced an all-out shift from government to governance, replacing centralized bureaucratic rule 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 governmentality 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.
EU Charter of Fundamental Rights), it also looks into the pivotal role so far played by the Court of Justice to ensure such a right together with a critical analysis of the shortcomings of such a jurisprudence.


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 Secrecy

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 Zicchittu: 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 courts and the protection of social rights by domestic judicial review.

Participants
Michal Kramer
Ha Lê Phan
Bruck Teshome
Misha 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 the nature of 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 justifiable 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 review. 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.

Ha 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 (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 monitoring 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 deal with cases 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 encompasses 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 rights regime for access to justice is often ineffective or non-existent. Do regional human rights regimes afford sufficient protection to the 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.
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 in the context of cross-border migration. The papers cut across various substantive areas, including constitutional criminal jurisprudence on immigration and human rights laws. The papers compare the different approaches of regional tribunals and national courts in addressing such issues as online incitement to terrorism, bulk interception of communications and mass surveillance, military operations abroad, and increased restrictions on migration across borders.

Participants
Jonathan Hafetz
Myriam Feinberg
Silvia Borelli
Dimitrios Kagiaros
Moderator
Jonathan Hafetz
Room
8B-4-09

Jonathan Hafetz: Courts, Legal Rights, and the Politics of Exclusion; Denying Constitutional Protections by Redefining Borders

This paper attempts to limit constitutional protections available to noncitizens in the United States facing immigration detention and removal. In line with the conference theme, the paper examines the role of courts in mediating between 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 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 resurgent 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 adheres to a discipline 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 are first 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 terrorism espoused and 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 consider the reasons why such content is subject to European courts with those that are not 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 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 armed conflict, the methods of war, and the rights of members of a State’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 and restrictions 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 interception 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 ECtHR has identified state surveillance as a legitimate means to safeguard democratic institutions and to protect citizens from other subversive elements seeking to undermine the democratic order. At the same time however the Court has established stringent requirements that states are expected to comply with when building a surveillance framework. The requirements were reinforced in more recent judgments where the Court examined the compatibility with the Convention of new surveillance technologies that permit bulk interception of communications and indiscriminate mass surveillance. 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.

Consideration given to judicial reasoning in legal scholarship is underdeveloped. However, the material expansion of law and the proliferation of judicial and quasi-judicial fora necessitate scholarship to expand on the methods relied on by judges. Our proposed panel aims at exploring the practice of law identification. The paper draws from diverse standpoints: the function of formalistic reasoning, the interplay between sources of law and judicial reasoning, the abuse of deductive techniques by judges, as well as judicial authority and its impact on the law as a system. The panel will thus make an impressionistic vignette of issues relating to judicial reasoning whilst traversing the network of judicial control over public power.

Participants
Mehdi Belkahia
Matina Papadaki
Parvathi Menon
Gleider Ignacio Hernández
Moderator
Andre Delgado Casteileiro
Room
8B-4-09

Mehdi Belkahia: Is There Still Something To Learn From Formalism(s) In and About Judicial Reasoning?

Formalistic accounts of the way adjudicators interpret and apply the law to reach their decisions came under fire with the rise of sociological and realist legal theories. Few nowadays venture the opinion that this judicial decision-making is tantamount to what Roscoe Pound would wittily call mechanical jurisprudence. Logic-based models – of which the syllogistic form is the hallmark – fall short of providing an all-encompassing understanding of judicial reasoning. Yet there is much to be said about this approach which some theorists resist discarding. Beyond that some instances of contemporary judicial practice seem to reveal the permanency of the (idealized) Aristotelian heritage. In this regard, I will demonstrate how and why in some circumstances and in many jurisdictions, judges appear to make use of logico-deductive reasoning when they apply certain specifically articulated legal norms.

Matina Papadaki: General Principles of Law as a Judicial Technique

This presentation will focus on the use of general principles of law in judicial decisions of international courts as a technique employed by judges rather than a source of law. General principles are conceived as gap-fillers and as an antidote to sparse international law rules as the drafting of the Permanent Court of International Justice shows. On the contrary,
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 Minor(fy) 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 linguistics 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 un-explored 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 social dynamics 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 the UK and EU’s judicialisation of 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 political divisions 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 Juridicisation 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
Titia Loenen

Room 8B-4-43

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

Titia Loenen: Judicialization of social rights and the tension 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 E CJ 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 well as some move, the paper will explore the role of CEE legal institutions in triggering such questions (in the preliminary reference procedure) as well as the impact of such decisions on national
Sara Raazaj: Judicialisation of Politics in the Arab World

Kirk Ewans: 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 prolitigation stance of the Fiar Debt Collection Practices Act

65 LANGUAGE IN INTERNATIONAL COURTS

This paper 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 legal 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 questions of the law, which are usually politically highly charged, 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
Moderator Dana Schmalz
Room 8B 4-49

Jacqueline Mowbray: Linguistic nationalism and the practice of international courts

This paper considers the relationship between linguistic nationalism and international law in the context of the practice of international courts. It argues that while international law claims to transcend the national offering a “universal” regime which is to address global issues, the rise of international law and the emergence of supranational courts in fact open up opportunities for linguistic nationalism, both within and among states. The development of modern international law as a constraint on the exercise of state power has opened up space for the claims of national minorities within states, with dealings between states and these minority groups now understood as a legitimate subject of regulation by international law. In particular the claims of linguistic rights to use their own language have been the subject of numerous decisions of international courts and tribunals, including particularly the European Court of Human Rights and the UN Human Rights Committee. At the same time, the language policy of international courts themselves becomes a site of contest between competing (state) nationalisms. By tracing the development of language practices within international courts, I demonstrate how nationalism and national politics are in work in debates over what languages should be used as the official and working languages of these bodies, and consider the implications of this phenomenon for the structure of international law. I conclude that linguistic nationalism has become a major factor in the politics of international courts and a force which shapes the nature and operation of international courts themselves.

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 significance of a person’s mother tongue in adjudicating language rights cases. With regard to language as a prerequisite of democratic processes, a broad range of considerations exists about the complex interweavings of linguistic and normative settings. Thinking beyond the “linguistic turn” revealed in the current focus of language rights cases, this paper will also be concerned with the medium of conveying information. Especially cases concerning 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 can also be deciding 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, what I refer to as “linguistic design.” What is at stake is the choice a court’s official or 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.”

CONCURRING PANELS 122

CONCURRING PANELS 123
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.

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 constitutional purposes. The Upper House of Congress protected small states from logrolls by the larger states and promoted bisectional 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 intertwined 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 non-justiciable 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
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.

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.
Art in the Italian courts: Just a Justice Matter?

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 Certifi- cates in Italy and its Judicial Review: an Ancient Story

Parliamentary discussions of the first republican Italian Parliament, upon the approval of the draft U7/2 Law “Modifiche dell’attuale disciplina delle mostre d’arte” (NL 299/1950), reflect 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 instruments of protection and the complexity of the law. Cultural heritage cannot be restrained within one single country and/or community. An international normative framework can significantly help develop the existing legal tools of global governance.

the CJEU as a Fundamental Rights Court: New Perspectives in Light of Recent Case Law

This paper examines 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 rights of asylum seekers and refugees – highlights the dichotomy between what is considered art by courts and what is generally considered art by the art system and the art market.

Anna Pirri: Artworks under "Indictment"

This paper aims to discuss 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.

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) carried within it the potential for the CJEU to shape EU asylum, and by extension international refugee law, as well as to enforce asylum seekers and refugees’ rights. Strict procedural rules on direct access somewhat circumscribe CJEU’s potential to become an ‘asylum Court’. Nevertheless, provisions in the various legal instruments comprising the EU asylum acquis influence the conditions for asylum seekers and refugees to gain access to national courts. One of the main advantages of the CJEU over the national courts is its potential 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 UN 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 actors differentiating between the broad array of society organisations and independent organisations as well as that of UNHCR, in judicially enforcing the rights of asylum seekers and refugees. The research scrutinizes selected provisions of the EU asylum instruments that matter for the success of 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
refugees’ rights. The study then draws examples from CJEU case-law on asylum involving collective actors, examining the nature of the organisations in question, the type of their involvement, and their influence on the outcome of the case. It comments on the intervention strategies of UNHCR, including its practice to issue statements in the context of preliminarily ruling references. Apart from secondary sources, the research integrates empirical findings from a limited number of qualitative semi-structured interviews. On this basis, the paper sheds light on the hidden processes behind asylum litigation and the—often—ignored influence of collective actors. It also critically reflects on the suitability of the existing legal framework to accommodate an increasingly complex administrative environment that includes joint forms of processing and potentially in the future extra-territorial processing.

Clara 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 Akerven 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 for the application of national fundamental rights. Three different standards of review employed by the CJEU between complete and partial deference to national fundamental rights are identified. In the first group of cases, the ECJ fully defers the fundamental rights review to the national courts. In the second group, the court actually leaves for the application of national fundamental rights in parallel to 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 CJEU 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, the respect of the “supremacy unity and effectiveness” of 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 CJEU 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, 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 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.

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 developed through the strengthening of concurrent jurisdiction in federal courts, thus providing litigants with an alternative forum in which to resolve federal claims. In addition, through its incorporation doctrine, the Supreme Court created rights protections for individuals litigation at state courts. Conversely, 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. Extrapolating from the protection of 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 federal, major areas of private law are distinct to individual provinces, with Quebec and its use of a civil code as the most obvious examples. This system 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 federalism. That said, Canada’s judicial federalism is among the more unifying features of the system. 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 Third 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, basing, at times perhaps even competing, state and federal judicial systems, with a view to avoiding any or most Kompetenzzwergel among the Landes- and Bundes-courts. And it was thought that integration would ensure an efficient judicial system, one that effectively integrates nation-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 Judicial Federalism in Brazil: Angela oliveira: ConCurring panels

In one of the states there exists a number of fundamental issues which challenge the notion that the constitution was intended to provide for both federal and state courts to ensure judicial independence from both national and international courts, which are de jure not part of the German judicial system, will also be considered.

ConCurring panels

HP Lee and Richard Foo: The Judicial System in the Malaysian Federation

The contemporary Malaysian federation first came into being in 1957 as the Federation of Malaya comprising 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 Malays who were 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 centralised and is largely because of the historical colonial factor. Nevertheless one aspect which influenced the nature of the judicial system is 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 constitution was intended to 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 centralisation/federalism 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 and the Syariah courts. 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 National Uniformity

A devolutionary federal state, Brazil organizes its judiciary as a national power, prescribing general rules for both federal and state courts to ensure judicial independence from an institutional perspective, as well as within the framework of the Grundgesetz. Where the necessary, the de facto impact of supranational and international courts, which are de jure not part of the German judicial system, will also be considered.

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

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 not controversial nor original assertion (Holmes and Sunstein, 2000). Nonetheless, empirical research about the protection of rights tends to overlook this dimension of the problem. To amend this deficiency, this paper analyzes how economic conditions at the provincial level and the strategies of the judicial system are functioning to create the integrated hierarchy of the Argentine federalism – which allocates ample powers to the provinces to decide which appeals it will hear (Constitutional Amendment 45 of 2004). Considering these key features, this paper discusses the structure of judicial federalism in Brazil, and how the Supreme Federal Court has struggled to reconcile its previous tradition of mandatory appellate jurisdiction and its newly-granted discretionary power to turn down cases. It argues that empowering state courts, as well as lower federal courts, by narrowing the current standards of admissibility of appeals at the Supreme Federal Court level, is pivotal to address the lengthy delays in the final disposition of cases in the Brazilian court system.

71 THE PUBLIC’S DIFFERENT FACES

The public appears in different forms in discussions of the relationship between courts, elected institutions and public debate. Sometimes it appears as a deliberative entity; on other occasions it is presented as offering a decisive voice; some put emphasis on populist tendencies while others speak of the ‘enlightened’ public. In this panel we aim to explore different faces of the public as they come into play in a variety of public law arenas, both in the domestic arena and in the international arena. Independent judicial systems on national, transnational and international levels are source of public deliberative processes in various forms. Shai Dothan discusses the public as a discursive partner for international courts. A contrasting picture is presented by Ida Kivisto’s paper in which she provides an account of a constitutional debate in Finland, where the public has developed an ‘anti-intellectualism’ suspicion directed against the Supreme Court of the UK in 2005 gave the public a new and central role in assessing the Court’s legitimacy. Finally, Dmitri Kursonov explores the complex relationship between public discourse, media, and judicial decisions.

Participants

Shai Dothan
Ida Kivisto
Or Bassok
Dmitry Kursonov
Catalina Smulovitz

Moderator
Shai Dothan: International Courts Improve Public Deliberation

Public deliberation is essential for democracy to flourish. Taking decisions away from elected bodies and transferring them to courts seems to diminish deliberation. The damage seems even greater when decisions are taken away from domestic bodies and given to international courts – organizations which seem completely independent from the public. But this view is mistaken. It stems from perceiving courts as saying the last word on the issues on their agenda. International courts are in fact engaging in a dialogue with the public, with governments, and with an elite of professional lawyers. International courts can spark a debate instead of silencing it. This paper explains how international courts shape public discourse by supplying legal arguments to the public and by building networks of activists, how these courts interact with governments, and how they form an international community of lawyers. Considering all this, the paper concludes that international courts improve public deliberation.

Iida Kivisto: Expert power and constitutionality control

The presentation discusses the constitutionality control in Finland and the institution of consulting legal experts therein. Judging from recent public debate, the control of experts or its use in the constitutionality system. Why is this happening right now? The theme is approached from three different angles: those of cognitive authority, the makeup of legal expertise and political implications of it. It is argued that while the nature of legal expertise or its use in constitutionality control has not really changed, the way they are perceived has; in other words, it is a question of the public and changes in its receptivity. Apart from questioning the legitimacy of the current system of constitutionality control, there may be weaknesses with new societal acceptance of anti-intellectualism.

Or Bassok: The Supreme Court of the United Kingdom: How More Independence from Political Institutions 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. My paper, 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 intended one. The new institutional design has 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 Kursonov: 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 produce more informed citizens, 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 independent 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 paraadoxical relation between itself and that which consti-tutes 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 hav-ing a “secure” ground for their accommodation. Pro-gressive constitutionalism and radical political theory, particularly radical democrac, are different, internally variegated but share some points of view, such as a critical attitude towards liberal democracy and, paraadoxically, a commitment to certain elements of the liberal tradition. Radical democracy favors participa-tion 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 lib-eral principles. The purpose of this panel is to discuss to what extent constitutionalism and radical democrac-ry 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

Vera Karam de Chueiri: Radical constitution, progressive constitutionalism and radical de-mocracy: a theoretical and practical effort

Progressive constitutionalism and representation can be associated either with judicial or political action. Some progres-sive constitutional scholars deny the first kind of as-sociation. Yet, for the purpose of this paper, political action and judicial action are very much related in the idea of a radical constitution. Regardless the signifi-cant internal differences among progressive constitu-tionalism there is sufficient common ground such as the benefit of reason over power by means of dialogue and deliberation, according to normatively grounded procedures and principles. The idea of a radical consti-tution is an effort to build a more critical and politically committed notion of the Constitution on which radical political action can be grounded and by which it can be mediated. This mediation associates social power (contestation), political and legal institutions (legisla-tive houses, courts etc.) so that people’s claims for rights, as well as their enforcement, entail a permanent movement from outside to inside and vice– versa.

Melina Girardi Fachin: Human Rights against democracy: Is that possible?

In times of intensification of intolerance of rights-restricting policies, and especially in the face of a re-presressive and conflicting international political land-scape the “triumph” of the hegemonic discourse of human rights emerges, on the one hand, and, on the other, its evident contemporary bankruptcy shaped by the apathy to the deaths and sufferings of others, arises. Why have human rights become an empty, abstract and remote discourse of real human needs? The pres-ent context analysis demonstrates the insufficiency of the prevailing discourse to fulfill the emancipatory aims, thus revealing a process inversion of rights that bases the obliteration of the Other. This contradic-tion went even further, since in the name and in the defense of the rule of law these rights departed from the very essence of democracy. The challenge, therefore, is to focus a critical theory of rights, committed with substantial democracy and capable of confronting concretiveness to human rights especially in the Latin American context.

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 in a liberal political articulation, broadening of public political debate in private spheres and strengthening of the Constitu-tion’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 impossibility 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 in-superability 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 irreducible, ethical and strength of the idea of representa-tion in the processes of determining agen-das, deliberation and decision-making, as well as to consider the importance and materialization of ac-countability and responsiveness. Finally, it highlights the importance and strength of what remains and re-sist not represented, as a negativity that pushes and enables the permanent resignification of the process of representation.

Participants
Francesco Natoli
Balthazar Durand
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 imple-mented 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 procedure manner, the over-invocation of emergency can affect the balance of power by granting permanent and unjusti-fied discretion powers to the executive. As a con-sequence, the constitutionality of those measures represents an actual debate in modern democracies. In France, the constitutionality of the state of emergency 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 case, the French authorities and 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 along the terrorist attacks of November 2015 have re-opened the debate. The paper’s purpose is to analyse the efficiency of the Constitutional priority question as an instrument to counterbalance the power of public authorities within the state of emergency. This study will be based on empirical analysis of the most recent decisions of the Constitutional council in order to determine the conditions and the extent of its scrutiny during formal times of crisis.

Balthazar Durand: The decisions of administrativa French courts under the state of emergency: what place for the strategic analysis of judicial decision-making?

In France, the recent establishment of the state of emergency has re-opened the relations between state institutions both at international and internal level. The judicial review of the measures taken by the administration may have appeared to be weakened: on the one hand by a request for a derogation addressed to the Council of State (‘lesions blanches’ produced by the Home office before courts. Those "notes blanches" raise difficult questions in the context of administrative procedures, for it make it difficult, if not impossible, for both litigants and judges, to challenge and thus effectively exercise control over the actual existence of a threat to the public order. Thus, the rise of Home office prerogatives significantly demised the jurisdictional control and the defence’s rights. Based on an empirical legal cases study, this paper has attempted to analyse the administrative courts control on the "notes blanches" and to expose the implications of its relative efficiency for fundamental rights


In most jurisdictions, courts have been led to leave Intelligence Agencies a very broad margin of interpretation regarding what situations can constitute oppressive or terrorist threats, very few judges having been eager to exercise thorough control on the operations of the Intelligence Community. Yet since intelligence agencies are under direct supervision of the executive power, the protection of the rights of individuals against the瀕 intelligence communities such a broad margin of appreciation has led to an unprecedented rise of the executive power at the expenses of the judiciary and the legislature. The paper will assess how the decline of the court’s role in implementing Intelligence agencies accountability has led to a worrisome rise of the executive in three jurisdiction: The United States, the United Kingdom, and France. In doing so, we will bring to light three causes for such situation. First of all, since November 15, 2015, France lives under the state of emergency’s regime, due to its proclamation by the French government after Paris’ attacks. The peculiar character of this regime lies in the fact that Home office’s administrations have been granted increasing discretionary powers as well as an amplification of legal tools at their disposal, in order to accurately address threats to public order and security (called house arrests, order of surveillance, etc.). Due to civil liberties’ restrictions implied by such measures, administrative courts are confronted to an unusual task, that is, assessing the proportionality of such measures, by striking a fair balance between the threat to public order (posed by terrorism, 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 Intelligence agencies documents, namely the “notes blanches” produced by the Home office before courts. Those “notes blanches” raise difficult questions in the context of administrative procedures, for it make it difficult, if not impossible, for both litigants and judges, to challenge and thus effectively exercise control over the actual existence of a threat to the public order. Thus, the rise of Home office prerogatives significantly demised the jurisdictional control and the defence’s rights. Based on an empirical legal cases study, this paper has attempted to analyse the administrative courts control on the “notes blanches” and to expose the implications of its relative efficiency for fundamental rights

Nicolas Klausser: The control of state of emergency measures by administrative courts: An impossible effort?

Since November 15, 2015, France lives under the state of emergency’s regime, due to its proclamation by the French government after Paris’ attacks. The peculiar character of this regime lies in the fact that Home office’s administrations have been granted increasing discretionary powers as well as an amplification of legal tools at their disposal, in order to accurately address threats to public order and security (called house arrests, order of surveillance, etc.). Due to civil liberties’ restrictions implied by such measures, administrative courts are confronted to an unusual task, that is, assessing the proportionality of such measures, by striking a fair balance between the threat to public order (posed by terrorism, 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 Intelligence agencies documents, namely the “notes blanches” produced by the Home office before courts. Those “notes blanches” raise difficult questions in the context of administrative procedures, for it make it difficult, if not impossible, for both litigants and judges, to challenge and thus effectively exercise control over the actual existence of a threat to the public order. Thus, the rise of Home office prerogatives significantly demised the jurisdictional control and the defence’s rights. Based on an empirical legal cases study, this paper has attempted to analyse the administrative courts control on the “notes blanches” and to expose the implications of its relative efficiency for fundamental rights


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 also intelligence agencies documents, namely the “notes blanches” produced by the Home office before courts. Those “notes blanches” raise difficult questions in the context of administrative procedures, for it make it difficult, if not impossible, for both litigants and judges, to challenge and thus effectively exercise control over the actual existence of a threat to the public order. Thus, the rise of Home office prerogatives significantly demised the jurisdictional control and the defence’s rights. Based on an empirical legal cases study, this paper has attempted to analyse the administrative courts control on the “notes blanches” and to expose the implications of its relative efficiency for fundamental rights

Colm O’Cinneide: Against Dialogue: Why the Dialogue Model Represents a Dead End in Irish Constitutional Law

The dialogue model of judicial review, whereby courts and the legislature are expected to engage in a responsive process of constitutional norm generation,
ConCurring panels

Australian Constitution’s unusually strong commitment to territory. I use this to explore different constitutional conceptions of peoplehood which have implicitly or explicitly been bound by geographical space. A territory is central to the constitutional order. And of course, somehow bound by geographical space. A territory as embodied in measures such as the UK’s Human Rights Act 1998. However, like any fashionable theory, dialogue has begun to generat...

Claire-Michelle Smyth: Legislative Supremacy: The Ultimate Death Knell for Social and Economic Rights?

The legal status of social and economic rights in national and international law is one that has been keenly debated for decades. While initial controversies centred on whether or not these could be classified as rights, more contemporary considerations focus on whether or not the courts or the legislature, or indeed the executive are best place to vindicate social and economic rights. The concept of legislative supremacy at its core relegates the role of the court to one that interprets and applies the legislation. This leaves no room for the court to develop new rights or indeed to expand existing ones as their efforts could be undone with an act of parliament. However, when it comes to social and economic rights there are further considerations, the courts themselves tend to defer to the legislative branch. A paper examines why the exclusion of these rights from justiciability is overwhelmingly harmful to their development. Firstly, it examines the reasons for legislative supremacy in this area being; competence, capability and democratic legitimacy. It suggests that excluding an entire function 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. Thus the presumptive priority and fundamental limits of legislative supremacy, and – perhaps shockingly to some ditching dialogue as an important means to allow constitutions be updated so as to reflect the preferences of the contemporary generation. In this sense, constitutional amendment serves the value of democracy. But constitutions are not universal. They are the constitutions of and for a particular people, having force in a particular geographic space. Little attention has been paid to the way in which constitutional amendment processes can be utilised to shift the democratic frame of reference for the constitutional order. In this paper, I draw on a recently compiled dataset of clauses in all national constitutions that relate to territory. I use this to explore different constitutional attitudes to amendment of territory. These range from unamendability to special amendment processes to the specification of a simple parliamentary vote. In a related paper, I argue that the territory of a constitutional order is an object of a constitutional ultimate rule of recognition. In other words, territory is not determined by the text of the constitution. If this is so, what purpose is served by constitutional clauses that allow for amendments to territory? I argue that such clauses can serve a number of purposes, including an expressive purpose, emphasising the centrality of territory to the constitutional order. Second, they can emphasise the link between territory and people par-

75 CONSTITUTIONALISM AND CONSTITUTIONAL CHANGE

This paper focuses on specific and 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 critically back the question of the people territory? This dilemma also appears 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 sub-constitutional quasi-constitutional amendments? The paper will elaborate on these vexing questions.

Participants

Oran Doyle Zoran Oklopcic
Richard Albert Michaela Hailbronner
Moderator
Yaniv Roznai
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 important means to allow constitutions to be updated in response to their context or from the perspective of the contemporary generation. In this sense, constitutional amendment serves the value of democracy. But constitutions are not universal. They are the constitutions of and for a particular people, having force in a particular geographic space. Little attention has been paid to the way in which constitutional amendment processes can be utilised to shift the democratic frame of reference for the constitutional order. In this paper, I draw on a recently compiled dataset of clauses in all national constitutions that relate to...
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 Choudhry: What can constitutional law learn from the past of democratic breakdown?**

**Tom Daly: Preventing ANC Capture of South African Democacy: A Missed Opportunity for Other “Constitutional Court”s**

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 key 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 a great deal on 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)**

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

This paper analyzes the legitimacy challenges of arbitrating private-public 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 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 law. Arbitrators thereby become important law-makers that generate the law governing private-public relations rather independently of specific domestic legal systems and their democratic processes. 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.

**Participants**

Sujit Choudhry
Tom Daly
David Landau
Rosalind Dixon
Moderator Sam Issacharoff

**Room** 8B-2-03

**Participants**

Stephan Schill
Kerem Gulay
Flavia Foz Mange
Moderator Stephan Schill and Bertil Emrah Oder

**Room** 8B-2-09
and their democratic processes. Do some national laws play a more significant role in the formation of "transnational law" than others? If so, does this pertain to the selection of the seat of arbitration and/or the lex arbi, or does it extend to substantive standards as well? Ultimately, the paper is a thought experiment, which, based on empirical data, tests the hypothesis that transnational arbitration is more than individual dispute settlement and generates rules that structure public-private relations at a transnational scale.

Flavia Foz Xang: The Expanding Role of Arbitral Institutions in Private–Public Arbitration and Their Legitimacy

When discussing the expanding role of international courts since 1990, the development of arbitration is often overlooked. This is even more true as regards the role of arbitral institutions in private–public arbitration. The main reason for this is that arbitral institutions regularly market themselves as "soft" service providers for, and hence peripheral actors in, the resolution of international disputes. However, when looking carefully at their activities, arbitral institutions can play an important role in the field that comes along with considerable "hard" authority, thus putting them at the center of the arbitration system. Just to mention some of their activities, arbitral institutions foster the common functionality: An aspect of public authority and its legitimacy concerns that arise when private-public disputes involving public actors and 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.° 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, or this reason, it can be said to mark the boundary between the universality of human rights and the irreducible State sovereignty.

Participants

Catarina Santos Botelho
Benedita Mac Crorie
Anabela Costa Leão
A. Sofia Pinto Oliveira

Moderator

Luísa Neto
Room

8B - 2 - 19

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 develops such integration by favoring 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 restriction 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 admissibility of the presence of religious symbols including religious attire in public sphere. The coexistence of different understandings concerning the relationship between State and religious confessions among Contracting States and the lack of "uniform conceptions" and "European consensus" in the field, opens the path to recognize a domestic margin of appreciation, naturally submitted to ECHR supervision. By discussing the specific use of margin of appreciation doctrine by the Court in cases concerning religious symbols, we intend to highlight its main strengths and weaknesses in the protection of religious freedom in culturally diverse societies and assess whether or not it is able to perform as a legitimate instrument of "intercultural dialogue" in multilevel systems of protection.

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.
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, these autocrats are strikingly similar to one another. 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 separatist purposes. Its uses in the case law of the ECHR 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 order. 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 and 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. The present paper will focus on one recent case in which the threat of anti-austerity politics to currency stability will be carefully micromanaged, the threat of political nationalism to European integration will be largely overlooked. This suggests that the dialectic of constitutional identity and constitutional difference in the federation must be understood not merely formally but as a material dynamic and one which places the European project in a precarious position.

Federico Fabbrini: Disscussant

‘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 are often defended against the principle of mutual respect and consider whether the EU and national courts have struck the balance properly.

Jiewuh Song: Equality, Democracy, and Judicial Legitimacy

Debates on judicial review center on the question of whether judicial review could be a democratic institution. 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 unhelpful. For our determination of the 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 inequality. 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: Impeaching the President: Democratic Authority of 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 his power with his party leader without holding any public position who manipulated various sectors of the state for vast personal profit. The scandal caused grave damage to democracy and
the role 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 unanimous 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 failing. 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 theconstitutional moment was achieved through citizens’ democratic movement answered and confirmed by the court.

Anmart Tangkiripham: 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 decided several critical cases that significantly shaped Thailand’s political landscape, including the acquittal of Thaksin Shinawatra from his failure to declare assets properly, the nullification of the general election, the dissolutions of de facto Shinawatra’s political parties, and the disapproval of a government’s plan to spend the national budget. As for its function to determine the constitutionality of law, the Court dismissed the petition claiming that Article 112 of the Criminal Code (lèse-majesté law) was unconstitutional. Due to these controversial judgments, several 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’état. 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. Additionally, it will project the Court’s role under the recently approved constitution.

Swati Jhawer: Reconstitutionalising Political Reform in the Hong Kong SAR of China

The question of whether constitutional law can protect consolidate and advance democracy has been considered extensively in multiple jurisdictions. The issue 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 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 unanimous 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 failing. 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 theconstitutional moment was achieved through citizens’ democratic movement answered and confirmed by the court.

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While it is customary to dichotomize between liberal and illiberal regimes and to associate constitutionalism with the former but not with the latter, this binary 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 understanding 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
Aslı Bálli and Hanna Lerner
Gila Stopler

Moderator

Moshe Cohen Eliya

Room 8B 2-49

Mark Tushnet: The Possibility of Illiberal Constitutionalism

Liberal 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 constitutionalism illustrates the former distinguishing between “full” citizens and others. Franck’s dual commitment to the rule of law and democracy illustrates 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 Chinese Law Review) we elucidate the essence of religion’s challenge to modern constitutionalism. We focus on the alternative belief system aspect of religion, with its own symbolic, moral, and interpretive logic, separate constitutional narratives, different jurisdictional concepts and conflict resolution norms, cross-border affiliations and solidarity, transnational mobilization capacity and 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.

Aslı Bálli and Hanna Lerner: Constitutional Design in Religiously Divided Societies

When drafters in religiously divided societies fail to achieve consensus in debates concerning religious identity or law, they may adopt more incrementalist approaches to mitigate religious conflict. A diversity of such approaches is possible including ambiguous, drafted text, deferral of choices to a post-drafting stage, adoption of conflicting principles/provisions, and inclusion of non-justiciable principles. We analyze such strategies in constitution making exercises in Egypt, India, Indonesia, Israel, Lebanon, Turkey and Tunisia. Drawing on these cases, we present a critical analysis of the liberal constitutional paradigm as applied to countries marked by religious plurality and conflict outside of the Western context.
The role of the Courts during transitional processes is a matter of huge debate. As long as its functions have been designed for times of normality, the scope of judicial review in those extraordinary events arise important questions about the limits of the judiciary and the extent of its duty in the protection of human rights. This panel will address these questions based on three recent experiences in the American continent. First, the Peruvian transition to democracy will be analyzed, stressing the importance of the contribution given by the Supreme Court in the investigation of Dictator Fujimori. Secondly, the current peace process in Colombia 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 seemingly 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. Finally, the case law of the Inter-American Court on Human Rights will be considered, especially with regard to the limits it has been designed for times of normality, 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 legitimation of political and democratic powers during transitional processes?

Elizabeth Salomón: The Case of Alberto Fujimori: An Memorable 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.

83 NATIONAL AND EUROPEAN COURTS IN SEARCH OF THE RULE OF LAW PRINCIPLE

The panel will focus on a matter that has been the subject of discussion for the past several years within the European Union and its Member States, and that is namely the respect for the principle of the rule of law. In particular, the objective is to focus on the judicial protection of the same. Although some authors consider that the judicial protection of the rule of law is not appropriate at the EU level so as not to involve the European Court of Justice in issues with political ramifications, we intend to focus on the existing judicial mechanisms and their possible activation in a framework not limited to the recent rule of law crisis. Further, we will take a wide ranging view of the judicial enforcement of the principle concerned at the EU level (the Court of Justice of the European Union; at the level of the Member States of the Union (with a particular focus on the case-law of Constitutional Courts); of the candidate countries of the Balkans and the Associated Countries of the Eastern Partnership.

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 jurisdiction 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 their judgments concerning the jurisdiction 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 jurisdictional positions that are perfectly in-line with European values.

Tanja Cerruti: The rule of law and the role of the Judiciary in the EU enlargement to the Balkans

This paper analyzes the use of the rule of law principle in the jurisprudence of Constitutional Courts in the Candidate Countries to make progress primarily in some of the accession criteria, including the rule of law. It analyzes the way in which the rule of law is currently defined among the other political criteria, during the previous enlargement the rule of law was scrutinized by the Commission together with the criterion on democracy, thus taking into consideration the functioning of the State bodies (from the legislative, executive and judicial power) and the fight against corruption. In the current enlargement, the Candidate Countries are evaluated on the respect of the rule of law as a single criterion that refers to the functioning of the Judiciary and the independence of the Judges. In light of the above, this paper will reflect on the aims that the imposition of this criterion try to reach in the legal systems of the Candidate Countries, analyzing if and how it is different from the experience of the previous enlargement and focusing on its relations with the judicial system.

Caterina Filippini: Courts and Rule of Law in the Associated Countries of the Eastern Partnership

Within the Eastern Partnership since the ratification of the EU/Georgia EU/Moldova and EU/Ukraine Association Agreements the rule of law principle is not anymore recalled only by political instruments of ‘soft law’ (as it is even now with respect to other non associated Eastern and Southern neighbours) but is also incorporated in instruments of hard law which commit the parties to cooperate in order to guarantee the respect, the strengthening and the promotion of the same. Despite

CONCURRING PANELS

Alfonso Palacios: The Colombian Constitutional Court as a political actor in the Colombian Peace Building Process

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. The existing institutional Court overreached its main function as a guardian of the Constitution.

Germán Lozano Villegas: Constitutional Court, Peace Process and democratic legitimacy

This paper aims to discuss the role and limits of Constitutional Courts during transitional processes from two different points of view. In one hand, the control of the government activity will be considered, particularly regarding the restrictions on maintenance of public order, among others. On the other hand, judicial scrutiny over people’s decisions will be analyzed from this perspective. The Colombian Court handed down several decisions restricting the scope of government’s faculties related to the implementation of 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 discretionaly during transitional processes, the extent of its duty in the protection of human rights. 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?

CONCURRING PANELS

Elizabeth Salmón

Tanja Cerruti

Caterina Filippini

Alfonso Palacios

Germán Lozano Villegas

Elizabeth Salmón

Moderator

Magdalena Correa Henao

Room

8A–3–17

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 fundamen- tal values. This special mechanism is politi- cal in nature and the actual level of control exercised by the Court of Justice is rather lim- ited. 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 of law for 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.

Alessandra Lang

Angela Di Gregorio

Tanja Cerruti

Caterina Filippini

Moderator

Alessandra Lang

Room

8A–3–27
84 NEW TRENDS IN ELECTORAL MATTERS: THE ROLE OF COURTS AND THE VENICE COMMISSION

The Panel deals with the role of Constitutional Courts and international actors on electoral law matters. Antonia Baraggia and Luca Vanoni will address the recent case law of the Italian Constitutional Court; Beke Zwingmann will look at the Bundesverfassungsgericht case law on electoral matters. Ezster Bodnár will deal with two different aspects of the Hungarian regulation concerning the voting rights of Hungarian citizens living abroad. Cristina Fasone and Giovanni Piccirilli will look at the main ECHR judgments on electoral issues, focusing on the ECHR decisions where the Code of good practice in electoral matters was cited, on the nature of those cases, the parties involved. Last but not least Pierre Garrone will discuss the broad topic of the European electoral heritage, focusing on the Contribution of the Venice Commission.

Starting from the Italian case law the paper will reflect, in comparative perspective, on the constitutional implications of Courts intervention on electoral laws.

Cristina Fasone and Giovanni Piccirilli: The European Court of Human Rights and the Code of good practice in electoral matters

Over the last twenty years the European Court of Human Rights (ECHR) has rendered many significant judgments on several aspects of electoral law from electoral thresholds to the issue of disenfranchisement and the right to vote in the election of the European Parliament. On electoral matters since 2003-2004 the Council of Europe through the Venice Commission and with the support of the Parliamentary Assembly and the Committee of Ministers has promoted the Code of good practice in electoral matters a non-binding document with sets common guidelines for electoral competition as well as for the pre- and post-electoral stages. Starting from 2007 the ECHR has recognized the principles enshrined in the Code of good practice as standards for its judgments. The proposed paper aims to investigate how often in which cases and to what extent has the ECHR used the Code of good practice to deliver its decisions. This way the paper is intended to assess if and how the Code has indirectly become a binding instrument for the Council of Europe’s Member States by means of the ECHR case law. The paper will proceed as follows: firstly it looks at the main ECHR judgments on electoral issues; secondly it considers the content of the Code of good practice; thirdly it focuses on the ECHR decisions where the Code was cited, on the nature of those cases, the parties involved (in particular, the Member State concerned) and the impact of the Code on the final judgment.

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

Since its creation the Venice Commission has been involved 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 Bundesverfassungsgericht described as being no more or less ‘activist’ than in other areas of law. The German Constitution 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. 38, 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 representative 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 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 design of the boundaries of the political community, design of the boundaries of the political community in a highly political sensitive field as the electoral rules. However, there are special cases where the effectiveness of this principle is questionable. This paper deals with two different aspects of the Hungarian regulation concerning the voting rights of Hungarian citizens living abroad. The paper gives an overview of the regulation and presents the recent constitutional disputes and relevant case law of Hungarian and European fundamental rights protection mechanisms. Finally, it opens the debate by posing some key questions concerning the future of the Hungarian situation and more generally on the level of protection of voting rights before the national and international institutions.
85 NORDIC COURTS AS CONSTITUTIONAL ACTORS: AGENTS OF CHANGE OR RELUCTANT PARTICIPANTS?

The panel will discuss interaction between parliaments and courts in the Nordic countries. Traditionally courts have played a peripheral role in the constitutional order, but the role of the courts might be changing. The panel sets out to understand what factors drive this change, how these changes play out within the courts, and what 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 parliaments and courts, and finally, what internal and external factors drive these changes, or possibly uphold the status quo? There is a general perception that the membership of the EU and the ECHR empower Nordic courts. Still, relevant case law has been judicial tradition since the ECHR decisions against Norway in the 1990s, 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.

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 analyses the Supreme Court’s approach beginning with the Maastricht judgment, over the Lisbon judgment to the recent Ajos judgment. During this period we see a move towards a more active Supreme Court stepping increasingly into the Constitution, general legal principles and the People. The reasons for and the scope of this development are discussed.

Benedikte Moltoymyr Hegberg: Constitutional review and constitutional interpretation in Norway

In Norway, constitutional review and constitutional interpretation has been a judicial tradition since the late 1800s. The Norwegian Supreme Court has to some extent been more willing to strike down legislation than the courts of the other Nordic countries, but yet reluctant in the decades after WWII. In June 2015, constitutional review was codified in the 1814-Constitution – a year after the Norwegian constitutional reform on human rights. However, some voices were critical, especially pointing out that the judiciary would gain more power on behalf of the legislature. This paper sets out to show that the shift in constitutional review and interpretation clearly came earlier than the 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.

Tuomas Ojansen: 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 judiciaries have traditionally assumed rather marginal roles on the Nordic scene of constitutionalism, particularly in Denmark, Finland and Sweden.

86 ON AUTHORITY: THE POLITICS OF THE WEST

Talking about authority is to talk about memories. Trusting our own memory and believing in a memory laid behind the writing history of a nation or of a constitution has been driving modernity upon a promise of a better future. In spite of such regarding, time and again memory widely reproduces aberrations, as Paul de Man would state. On this chaotic scenario lies the ghost of the authority. Following Kojève by organizing authority as categories, or Kafka and his Jewish notion of authority, legal, and constitutional order have been involved by many Gordian knots concerning to authority. While “the people” was elected by the constituent power to be sovereign, modernity has been a burden to “the people”. Beyond legal issues, the authority has been presented in main or in irrelevant questions, but independently of its size it bears upon each person with the other. This panel seeks to shed some lights on the relation between public law and authority and the many possible outcomes that could be grasped under the sign of authority. Further, our goal is to bring up a political and philosophical inquiry into the legal aspect of authority in order to confront it with subversive experience of every day’s political life.

Participants
Alexander Somek
Hauke Brunckhorst
Jonathan White
Octaviano Padovese
Moderator
Iderpaulo Carvalho
Room
8B-3-09

Alexander Somek: Legitimacy and Authority

Hauke Brunckhorst: Liberalism and Authority

Jonathan White: Emergency rule and the authority of technocracy

What does a period of emergency rule of the kind witnessed in the euro crisis imply for the prospects of technocracy? Two contrasting theses present themselves. On one view, emergency and technocracy are complementary logics: exceptional situations are where the claim to expertise-based government carries furthest. Knowing how to act in such situations, and when to circumvent existing politico-legal norms, is the ultimate measure of expertise, perhaps even a capacity whose performance is a condition of technocratic authority. On a competing view emergency rule spells significant problems for technocracy, partly because it leads to the intrusion of non-scientific criteria on decision-making, partly because it questions the adequacy of institutional expertise itself. Especially when crisis management forces collaboration between multiple institutions, the technocratic credentials of each are likely to come under strain. The
We take as a starting point the notion of the ascendancy 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.

Ana Koprivica: Justice In (and Out of) Sight: Revisiting the Role of the Court

This paper entertains the general assumption of the traditional role of the court as the chief adjudicator. It is based on the notion of historical analysis of the evolution of the role of the court. Albeit an ancient practice, adjudication in democratic societies has been transformed acquiring the four key attributes: access to justice, judicial independence, requirements of public processes, and the ideal of fair procedures. Accordingly, through examining these features, the paper attempts to identify what and how has shaped the aforementioned assumption. The paper places a particular focus on the publicity of processes (as synonymous with the obligations of fairness and independence) and looks into how the public adjudication stimulates participatory obligations, provides for the public oversight of legal authority, and to what extent the publicity of court proceedings contributes to the public articulation of the legal rights of the leading justice providers. Ultimately, the aim of the paper is to set the stage for further discussion and open the floor for challenges to this expectation in those areas where the processes of outsourcing and delegation of judicial powers have taken place consequently leading to the removal of dispute resolution from the public view.

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 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, fairness 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 ECtHR case law (including C-317/08 Alassini).

Martina Mantovani: The Role of the Notary in Dispute Settlement

Over the last few years, a number of civil justice reforms have outsourced specific adjudicatory powers to public servants in general, and to notaries in particular, as a strategy for improving judicial efficiency and reducing the courts’ backlog. As a result, notaries are steadily carving out an operational sphere of their own in a range of different matters, typically with respect to undisputed claims. Nevertheless, at the cross-border level, other States might not be as willing to depart from the abovementioned “expectation” as to the orthodox role of courts, thus creating barriers to the circulation of “final output” of said activities. Following a brief overview of the competences entrusted to notaries at the domestic level, this paper purports to critically assess the place they currently occupy within the framework of the European judicial cooperation in civil matters. Specific attention will be paid to the wording of the instruments dealing with family (Brussels II/ Maintenance Regulations) inheritance (Succession Regulation) and commercial (Case currently pending before the ECJ) matters.
Despite this tension the ICJ has clarified that treaty bodies adhere to rules of procedure or procedural obligations and requires treaty bodies to balance the progressive nature of human rights treaties to interference in domestic affairs. This balancing exercise has put treaty bodies at odds with states due to the simplicity of establishing procedural rights. The first, formalist, approach is to define the criminal law by reference to the concept of first-order moral judgments, a number of criminal scholars have instead begun to focus on the institutional and political dimensions of criminalization, at both 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

**Room**
- 8B-3-39

**Moderator**
- Vincent Chiao

**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” for purposes of allocating constitutional rights. 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 entering its laws and you are 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” in the formalist sense of the “criminal law” for purposes of procedural rights allocation in terms of capabilities rather than in terms of punishment. I suggest that there are reasons to prefer the pragmatist approach. In part, this is because of the troubling implications of formalism (especially for 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.

**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 inexistence of first-order moral judgments. As a general claim, conflicts 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**

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 binding. 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 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 about the stay 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 imposition 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
Roxan Venter
Irene Broekhuijse and Huub Spoormans
Moderator
Irene Broekhuijse
Room
8B-3-4.9

Haibin Qi: The Ground Motive of Arising of Populism and the Dilemma of Modern Democratic Society

The rise of populism in Europe and the United States preludes the crisis in liberal democracies in the twenty-first Century. Populism is always a threat to the contemporary world because of its potential subversive force to instituted social structures and the possible future of chaos and totalitarianism it may bring about. The existing social structures in contemporary western society is instituted under the influence of neo-liberalism and moves toward a mechanized society. The ground motive of control is intertwined with deep political conflict, generally on the level of resistance of a legal system, but which role freedom of expression would play with 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 can be identified. This paper will demonstrate 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

The realisation of democracy and the protection of democracies and democratic rights can be achieved through the regulation of political parties. The Netherlands is a multi-party system, which enjoy broad media coverage in most modern states. The role of freedom of expression gives effect to democracy within the judicial branch of government, 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 can be identified. This paper will demonstrate 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.
The enforcement of human rights law entitles the individual with unprecedented freedoms. However, with 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 previously analyzed 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.

Participants
Fabienne Bretscher
Tania Pagotto
Lisa Harms
Stefan Schlegel

Moderator
Stefan Schlegel

Room
8B 3–52

Fabienne 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 the 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, recognized a right to conscientious objection first in a General Comment and then in their analysis in order to extend or not the legal protection to “new” cases of conscientious objections.

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 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

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 bioethical 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.
The three cases are allegedly related to judicial review and election dispute authority. Constitutional court procedural law did not limit and provide numerous possibilities for justices in providing the verdicts. Manipulating cases can be detected from submitting the application of the Constitutional Court. This manipulation occurred because there is no commitment towards constitutional court procedural law. It takes too much time and phases on several cases that potentially can be used to manipulate the case. The staffs need to manage better in the 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 function. However, almost three years later, Justice Patrialis Akbar had been arrested for accepting a bribe. Those two Justices have their similarity, which both of them were a former politician, Mochtar was Golkar Party’s member, and, on the other hand, Akbar was National Mandate Party leader. Both of them had served as the member for Indonesia National Parliament. The arrest of two constitutional justices that has similar background, lead public seen the Court as another institution that had been filled by people that have the corruption mentality. Until today, former politician has been named and nominate to the various governing 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 questioned. 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, the constitutional justices have 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 effectively. This paper recommends two arguments. First, there is a need to reform internal regulations of the Court, particularly on the Ethics Board and the Honorary Council of Constitutional Justices. Both internal regulations should be more accountable 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 Constitutional Justice Decision. This manipulation occurred because there is no commitment towards constitutional court procedural law. It takes too much time and phases on several cases that potentially can be used to manipulate the case. The staffs need to manage better in the 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.

Lutfi Widagdo Eddyono: Mixing Support of Political Parties Towards Judicial Independence of Indonesia Constitutional Court

This paper will examine the dynamics of the independence 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 institutions. This paper attempt to answer two research questions. First, what are political factors that support and undermine the independence of the Court? Second, whether political support for the Court could be imposed by reviewing Court’s performance since 2003? The outcome of this paper will enrich discussions of the explanatory factors that shape the dynamics of the independence of the constitutional court that may 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 domestic counterparts? The focus of the paper will be on the scope and mandate of such actors and on the relationship to the domestic branches of government.

Participants

Ingo Venzke and Joana Mendes
Lando Kirchmair
Thomas Rietschls
Cormac Mac Amhlaigh
Jan Klabbers
Moderator
Thomas Rietschls and Sanne Taekema
Room
8A-4-35

Ingo Venzke and Joana Mendes: The Idea of Relative Authority in European and International Law

The present contribution reacts to concerns about the legitimacy of supra- and international public authority 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 always stands in relation to others and second, that the division of authority should be informed by the legitimacy assets that different actors can bring into the governance process. It develops an argument in favour of a qualitative, articulated civil and public authority. 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 institutional settings at the European and even more so international level, the core normative programme embedded 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 Kirchmair: What is Transnational Balance of Power And How To Achieve It?

This article argues that an understanding of transnational balance of power is essential for dealing with outsourcing (elements of) balance of power from national legal orders. The article 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 a transnational balance of power faces, however, the challenge that a balance of power differs greatly in extent and content depending on the national legal order. This article, hence, aims at mapping the fundamentals 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 transnational balance of power? The need is to work out 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 newly defined transnational countries as argued by Samuel Issacharoff. The research also concludes that there is a new model that need to be developed to identify what is the degree of judicial independence that Indonesia Constitutional Court should enforce.


Constitution and Democratic Initiative conducted performance review towards Indonesian Constitutional Court’s decision since 2003. Since established in August 2003 until December 2016 the Court had issued 861’s decision. The enthusiasm of the public come to the Court and file judicial review petition had been increased over time. On one hand, it portrays public support towards the Court. However, a performance review is required in order to challenge whether public expectations public in line with the intent of the establishment of the Court. The method used in this study using a quantitative approach. Each decision shall be classified, such as a category of legal standing, the length of examination and landmark decision. Analyze towards that classification shall be provided to inform the trend of Court’s decision.

Ingo Venzke and Joana Mendes: The Idea of Relative Authority in European and International Law

The present contribution reacts to concerns about the legitimacy of supra- and international public authority 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 always stands in relation to others and second, that the division of authority should be informed by the legitimacy assets that different actors can bring into the governance process. It develops an argument in favour of a qualitative, articulated civil and public authority. 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 institutional settings at the European and even more so international level, the core normative programme embedded 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.
ConCurring panels

When populism reigns constitutions, constitutional abuse tends to be magnified manifold. As such not as specific attacks against institutions charged with things elite is, of course, the regular trashing of the institutions. Caught within this tendency to denigrate all only are they elite institutions, upholding elitist values but, worse, they are the ‘other’ – foreign courts, foreign domestic elite institutions with the distinction that the elite with foreign values with no legitimate claim to cormac mac Amhlaigh:

The fragility of multi-level governance systems up-holding these ideas, usually Courts. (Möller 2016) in the light of the growing disabling of democracy at the national level. The question I would like 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.

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

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 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: A la recherche du temps perdu: Reinforcing national constitutional courts to save national and European constitutional democracies?

Our paper ‘A response to Jan Komárek’s “National Constitutional Courts in the European Constitutional Democracy” disagrees with Jan Komárek’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 Komárek’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 Komárek’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 evi-dence, as the Court’s case law is often grounded in considerations of European public autonomy.

This Panel explores the question of whether and how rights are considered in the process of policy mak-ing in the particular context of counter-terrorism. This question will be explored from a comparative perspec-tive 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 oppor-tunity to draw broader conclusions regarding the question of the optimal consideration of rights in the policy process.

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

Participants
Andrei Lang
Lila Margalit
Mattias Kumm
Rebecca Ananian-Welsh
Moderator
Andrei 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 Reten-tion 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.

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The Panel will provide a comparative survey of the approaches that national, international and supranational courts are implementing when coming to assess legitimacy of laws and acts regulating medical activities 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 different jurisdictions – at the national international and European level – the Panel will aim to detect the existence 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?

Lucia Busatta and Marta Tomasi: BioLaw and the ECtHR: between political discretion and judicial scrutiny

In the specific area of BioLaw, the analysis of the case law of the European Court of Human Rights allows to reflect on the difficult relationship between the extension of the political discretion of the lawmaker and the intensity of the scrutiny the Court can exercise on national decisions affecting human rights and bio-scientific issues. 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 margin of appreciation, which serves as a boundary line to define the extension of states’ discretion in regulating matters relevant to the field of BioLaw, such as abortion, assisted procreation 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, international human rights orders), in order to ascertain if the measure is vitiated by a manifest error or a misuse of powers, and that the competent 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 evaluate is reduced by a "margin of discretion". Indeed, it is not the Courts' role to substitute their assessments on 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 review possible without giving rise to a review of the scientific basis of the authorisation decision? Do the limits to the review affect the Courts’ duty to establish whether the evidence relied on is factually accurate, reliable and consistent?

Benedetta Vimercati: Science, patient autonomy 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 and legal aspects. Scientific advances interfere with death, a purely natural process traditionally excluded from the juridical – political space. However, and especially in bio-law, a scientific perspective: the capability to prolong or sustain human life through medical technologies has influenced legal reasoning in order to protect and improve decision-making autonomy. Hence, given the importance placed upon the claim of the patients’ right 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 consciousness or conditions of severe immobility; the lack of consensus on futile medical care or, finally, the classification of artificial nutrition and hydration as medical treatments or life-sustaining measures. These are important subjects of debate in all parts of the world as well as recently in the Swiss legal 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 between law and science in the bio-law field.
between the patient’s autonomy and scientific data concerning medical treatment, but also between science, political discretion and judicial scrutiny. How has scientific evidence been taken into account by the Italian courts in solving cases related with withholding and withdrawing of medical treatment? Does a supposed right to enjoy benefits of the scientific progress entail the recognition as a fundamental right of every possibility offered by the scientific progress? To which extent constitutional provisions may be interpreted to accommodate the scientific development? When scientific data are disputable, what should be the best judicial practice? Does scientific evolution require the adoption of specific types of legal intervention (political, technical, judicial, etc.)?

Lorenza Violini: Chairman – Discussant

ConCurring panels

97 SEARCHING FOR THE CONSTITUTIONAL IDENTITY WITHIN EU: BEYOND COURTS’ INTERPRETATION

In the recent time identity of the constitutional order has become a challenged topic within the European space both in respect of its subjective sense of self-ness of a member state vis-à-vis others and regarding the construction of a European Constitutional identity. The panelists and experts will discuss the evolvement 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 extend the constitutional identity became the explicit arena of disputes between Courts, and how its definition goes beyond their interpretation.

Participants

Timea Drinóczi
Giacomo Delledonne
Pietro Faraguna
Marco Bassini
Neliana Rodean

Moderator

Neliana Rodean

Room

8B - 4 - 19

Timea Drinóczi: Theorizing the legal concept of constitutional identity in the European legal sphere

The paper presents what interpretations the definition of constitutional identity may have from a legal perspective. Compared to the theories of Jacobsohn and Rosenfeld, constitutional identity appears in the European 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. These can be developed as a result of dialogue between the CJEU and the national constitutional courts at a slow pace. Based on different doctrinal positions and the European case laws on constitutional identity, this paper offers a constitutional law based understanding of constitutional identity. It also argues in which 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.

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 by providing some arguments regarding the constitutional identity of the Union itself. Respect of national identities, including constitutional identities, has been entrenched at Art. 4 TEU by the Lisbon Treaty. In more general terms identity – a two-sided notion in which introverted and extroverted co-exist – has been one of the leading concepts in law and political theory in the last two decades. The goal of this paper is to apply the constitutional identity language with regard to the EU legal system. At first sight, this attempt might look very promising, as the self-definition of the then Communities as an order based on the rule of law has traditionally lain at the heart of the supranational constitutionalisation process. In order to address the issue of the constitutional identity of the EU, the paper will adopt a multi-perspective approach. The paper will mainly – but not exclusively – consider the discussion about (and the problems arising from) Articles 2 and 7 TEU: in particular the autonomy of the values mentioned at Art. 2 TEU as well as their possible shortcoming. Moreover, the paper will consider the emergence of an uncontrollable scope of supranational constitutional law in the Kadi judgments (relations between the EU and the international order) and the substantial requirements with which European politicians have to comply in order to be financed (in the political sphere of representative democracy). In spite of the overlaps among these dimensions, the paper will also underline the subtle nuances which make distinction possible and for the constitutional identity of the European Union.

Pietro Faraguna: Constitutional identity 2.0: Member States lay down the shield and take up the sword

Most recently constitutional identity became the explicit battleground of disputes between the CJEU and national Constitutional and Supreme Courts. This trend emerged very clearly between the end of 2016 and the beginning of 2017. In less than a month, the Hungarian Constitutional Court issued a European Court's unfriended decision (22/2016 (XII. 5.) AB) developing a fundamental rights review and an ultra vires review, the latter composed of a sovereignty review and an identity review; the Danish Supreme Court ruled a CJEU decision as ultra vires (SCDK Case no. 15/2014 Dansk Industri); and the Italian Constitutional Court submitted a new reference for preliminary ruling in the Taricco case, alleging a possible violation of Italian constitutional identity (ICC order 24/2017). Although each of these cases is different from each other, they seem to reveal a new trend in the national constitutional and supreme courts’ use of constitutional identity. The paper will explore this new trend and claim that these decisions share a common mis-understanding of the influential BVerfG case law on methods of constitutional review of EU law. The paper will argue that these methods only apparently aimed at acting as swords against EU law, whereas practically they served as shields to protect constitutional identity against undesired developments of EU law.

Marco Bassini: From Melloni to Taricco passing through Fransson: higher standard of protection and constitutional identity

The recent order taken by the Italian Constitutional Court referring a preliminary question to the Court of Justice of the European Union in the Taricco saga has led to an interesting point that provides room for revisiting, to a certain degree, the inheritance of the Melloni case. One of the possible objections against the enforcement of the counter-limits doctrine, in fact, could lie with the case law of the Court of Justice in the Melloni and Fransson cases: these judgments prevent Member States from arguing fundamental rights a greater protection than that deriving from EU law when the operation of the domestic standard may undermine the primacy, unity, and effectiveness of EU law. The Italian Constitutional Court has pointed out in the Melloni case whether the constitutional identity was not compatible with EU law as far as it introduced additional requirements for the execution of an arrest warrant. According to the Italian Constitutional Court, in that case a different decision (the Court of Justice would have compromised the unity of EU law while, on the contrary, the primacy of EU law is not called into question in Taricco: the ruling of the Court of Justice is not challenged but rather the Italian Constitutional Court aims at exploring the existence of a constitutionally mandated obstacle to the enforcement of the same. Against this background, it should be questioned whether the protection of domestic constitutional identity, to the extent it results in a more extensive or even restrictive interpretation of fundamental rights, is likely to have a different impact on the safeguard of the primacy, unity, and effectiveness of EU law and whether this outcome may be desirable according to the Court of Justice.

Neliana Rodean: Between cooperation and resistance: new challenges for the constitutional identity in East Europe

Considering that the foundation for a constitutional identity can be found in the Constitution and a Constitution acquires an identity through experience, this paper will discuss the search for the constitutional identity of some East-European States (Poland, Croatia, Romania, and Hungary). First of all, the paper will analyze the higher values of the Fundamental Laws, which represent the ground of interpretation, and the case law of Constitutional Courts. Among former communist states, this argument is still uncertain and more
linked to the national approaches in the light of EU integration. Moreover, in the case-studies reference to constitutional identity has appeared and discussed recently and it seems that some sort of constitutional identity is emerging in these countries. Grasping its main elements and summarizing leading cases in these East-European States serve well to illustrate this point. On the other side, the paper provides arguments and justifications over sincere cooperation when the constitutional values prevail, and stresses the new tendency in the Courts’ interpretation.

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 received and used by national courts. The empirical focus is on three policy fields: competition law, environmental law, and financial regulation. This panel is organised by the Commission funded Jean Monnet Network “European Network on Soft Law Research” (SoLaR).

Participants
Emilia Korkea-aho and Mariolina Eliantonio
Kathryn Wright
Napost Xanthoulis
Zlatina Georgieva
Moderator
Emilia Korkea-aho and Mariolina Eliantonio
Room
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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 assumed, and 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 use EU soft law in parallel, 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 administrative authorities. Ultimately, putting 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 already occur 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, the examination of this paper is to examine 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 ‘mitigating’ account of 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.

Napost 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 normative and institutional framework for addressing such circumstances. Under the threat of insolvency of certain Eurozone members, the ECB announced its intention to implement non-standard monetary policy measures towards calming the markets and securing the supply of credit. In parallel, in certain member states, used sui generis decision-making fora such as the Euro Group, the Euro Summit and the European Stability Mechanism (ESM) for negotiating the appropriate measures in response to the crisis and the provision of financial assistance. EU institutions also became involved in those processes, despite the absence of a regulatory and procedural framework. As a result, unprecedented measures, such as the bail-in of Cyprus and the introduction of the Eurozone Stability and Growth pact (MoUs), whose legal relevance was unclear. The aim of the paper is to examine the elements that would render soft law instruments mandatory for national courts to be perceived as such in the areas of monetary policy and economic governance, in the light of the recent euro crisis litigation before national and EU courts. It contributes to the literature by introducing analytical tools for distinguishing acts having legal effects from those that are intended purely for information or other non-binding purposes in these policy areas. As far as monetary policy is concerned, the paper discusses the ECB press releases and public announcements. It first presents a critical analysis of the Gauweiler case (Case C-62/14 Gauweiler v Deutsche Bundesbank) litigation pertaining to the ECB’s OMT program and folds the constitutional tensions between the ECJ and the German Constitutional Court. Second, it enforces soft law characteristics to the reviewability of the ECB’s ESRF Policy Framework regarding the location of central counterparty clearing systems (Case T-496/11 United Kingdom v ECB). Moving on to economic governance, this 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 ECJ judgments on the bail-in that applied in the Cypriot banking sector (Joint Cases C-815 to C-10/15 Mallios and Malli et al v ECB and Commission). Second, it engages with the reviewability of the MoUs that contain the macroeconomic conditionality 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-815 P to C-10/15 P Ledra surnamed Advertising et al v ECB and Commission). The 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.
This paper is based on an empirical dataset of 112 national competition cases from four EU Member States, which contain judicial reasoning on supranational soft law. Those findings broadly fit within the frameworks used by Hillary Green to study the judicial treatment of the federal antitrust merger guidelines in US courts and by Tamara Hervey who traced adjudication in the shadow of informal settlements in the social welfare sector. Considering these two works and further theoretical literature, this paper goes on to enquire as to the possible reasons for detected national judicial attitudes to supranational competition soft law. Firstly, it is argued that the observed judicial attitudes are determined by vertical interactions between the national and supranational (EU) level. Those interactions comprise of informational exchanges with regard to the judicial endorseability of said soft law instruments. With their competition judges familiar with their position on Commission-issued competition soft law and thus send a signal to the national judiciary, which – in turn – absorbs/transforms the signal and sends it back to the supranational level. Secondly, it is maintained that the practical potentials of competition enforcement and the legal systems of each Member State under observation influence judicial engagement with supranational soft law. The particular peculiarities examined in this study are: 1) intensity of judicial review for public enforcement cases 2) type of court handling the case (specialized or not) for both public and private enforcement cases and 3) the existence or not of a national soft law instrument that is equivalent or identical to its supranational counterpart. All of the above-enumerated factors, it is argued, can influence the judicial attitude which in turn affects the judicial role of competition soft law and its attitude towards it. As a final point, the paper observes that divergence in national judicial treatment of supranational competition soft instruments, although minimal with regard to some instruments (the Vertical Guidelines that get predominantly recognized) is quite significant with regard to others (the 102 Guidance Paper and the Horizontal Guidelines that get a mixed judicial response). The focus here is on how the horizontal and vertical interactions of national courts and the likelihood of their reception in the courts are determined. Executive research shows that patent offices set standards which favour their clients, whilst the appointment of patent lawyers to specialist courts in the US and Australia has resulted in the interpretation of more lenient standards of patentability often reversed by the highest courts. In Europe, national courts are increasingly following the European Patent Office’s standards even though they are not legally obliged to do so. Yet, specialist patent courts and patent offices’ appeal boards differ in institutional design, in the type and level of specialization in the judicial or quasi-judicial/administrative function of their judges, in the degree of oversight and mechanisms for judicial review to which they may be subject to, and in the criteria of openness and transparency. The UPC is detached and insulated from review in the legal system, 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 systems of the EU and by its very nature, 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 external judicial review, the UPC is adapted to the same time subject 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 have reversed the Federal Circuit’s approval of gene patents on the theory that fundamental science must be freely available to all innovators, it has taken steps to predictably, others may argue, the Federal Circuit from sheltering patents from the mainstream has led it to give short shrift to human rights, competition and innovation policy as well as social welfare. Review by the generalist Supreme Court has therefore acted as an important safeguard. For example, the Supreme Court reversed the Federal Circuit’s approval of gene patents on the theory that fundamental science must be freely available to all innovators, it has taken steps to predictably circuitous from its historical jurisprudence, and it has stepped up its scrutiny of the Federal Circuit’s decisions, thus shifting the burden of proof onto the challenger. As a final point, the paper observes that diversity is particularly true in the field of patents where the dangers of specialization are particularly strong, and thus the CJEU in clarifying the scope of its review authority.

Xavier Seuba: Technical judges and scientific complexity in patent law

The presence of technically qualified judges or, simply put, judges with scientific or technical expertise, rather than law, is one of the key characteristics of the Unified Patent Court (UPC). Specialist judges are an important institutional tool of the UPC to respond to the technical and scientific complexity characterizing patents. The presentation will also discuss the ways in which the insulation of the Unified Patent Court (UPC) compared to that of other technical judges in specialist patent courts in other jurisdictions in Latin America.

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. The present case study is based on the Chilean Patent Office (INAPI) as the most important institution where patents are granted. The Chilean Patent Office is therefore identified as the most crucial institution in the field of intellectual property rights. The influence of the Chilean Patent Office on the Chilean Supreme Court appears to be significant. 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 unreasonably period. The Chilean Supreme Court then had the power to reverse or revoke the 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

99 SPECIALIST PATENT COURTS: CONSTITUTIONAL AND COMPARATIVE PERSPECTIVES

Specialist courts are often the result of deliberate institutional design aimed at achieving functional efficiency and consistency. The downside is that specialization can lead to narrow focus, and external capture by interest groups. A growing body of scholarship indicates that this is particularly true in the field of patents where patent byes as well as the Court of Justice touch the most critical role in determining what may be patented. Empirical research shows that patent offices set standards which favour their clients, whilst the appointment of patent lawyers to specialist courts in the US and Australia has resulted in the interpretation of more lenient standards of patentability often reversed by the highest courts. In Europe, national courts are increasingly following the European Patent Office’s standards even though they are not legally obliged to do so. Yet, specialist patent courts and patent offices’ appeal boards differ in institutional design, in the type and level of specialization in the judicial or quasi-judicial/administrative function of their judges, in the degree of oversight and mechanisms for judicial review to which they may be subject to, and in the criteria of openness and transparency. The UPC is detached and insulated from review in the legal system, 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 systems of the EU and by its very nature, 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 external judicial review, the UPC is adapted to the same time subject 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 have reversed the Federal Circuit’s approval of gene patents on the theory that fundamental science must be freely available to all innovators, it has taken steps to predictably circuitous from its historical jurisprudence, and it has stepped up its scrutiny of the Federal Circuit’s decisions, thus shifting the burden of proof onto the challenger. As a final point, the paper observes that diversity is particularly true in the field of patents where the dangers of specialization are particularly strong, and thus the CJEU in clarifying the scope of its review authority.

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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. The present case study is based on the Chilean Patent Office (INAPI) as the most important institution where patents are granted. The Chilean Patent Office is therefore identified as the most crucial institution in the field of intellectual property rights. The influence of 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 unreasonably period. The Chilean Supreme Court then had the power to reverse or revoke the 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
TRUST AND EUROPEAN JUDICIAL GOVERNANCE

Current European debates underline the relevance of trust-enhancing solutions for addressing some of the challenges the European Courts are facing. Particularly important, in this role as judicial policy-maker, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) has been repeatedly criticized by national authorities in charge of implementing its decisions. In the light of such developments, trust is widely recognized as a factor that may enhance legitimacy and complement institutional efforts when achieving and coordinating important public purposes and compliance. In fact, the CJEU has been pushing forward for the incorporation of trust between Members States as a regulatory mechanism for the implementation of EU law based on mutual recognition. Despite these recent debates, we still lack a proper conceptualization of trust as an EU (judicial) governance mechanism in the policy and scholarship debate. This panel will try to cover this lacuna by reflecting about trust as a cooperation-enhancing mechanism based on the current debates about the relevance of trust for judicial governance in the European context.

Participants

Vigilencia Abazi
Monica Claes
Juan A. Mayoral
Zuzanna Godzimirsk

Moderator
Urška Šadl

Room
8B - 4 - 49

Vigilencia Abazi: Judging 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), in order to map whether there is coherence or dissimilarity in judicial and administrative cases. It utilises case law and document analysis and draws from a comparative approach for the study of the role and positions of the CJEU and EO. In mapping the understanding of trust by the CJEU, the article discusses claims under the Transparency Regulation as an exemplary case and raises questions whether the Court’s take on trust is actor specific, treating interests in information or confidentiality by EU institutions different from those of industry or individuals. The paper identifies a lack of coherence and rather an actor-dependent understanding of trust by the Court. In the Court’s view, trust seems salient to defend institutional discretion and the confidence of certain private interests, but marginal in the relation towards the citizens.

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

Does the CJEU Ascribe to 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 (EU 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 responsibility for oneself is of fundamental importance for this highly interdependent system to function. However, the practice shows that trust – rightly or wrongly – is not complete: constitutional courts do not always unconditionally trust the CJEU to protect fundamental values as transpires from their positions on fundamental right protection and ultra vires review. The CJEU does not always trust national courts to give priority to EU law and take the ‘right’ decisions, while national courts do not always trust others that have to comply with fundamental principles, such as the rule of law and fundamental rights. This paper looks into the manner in which CJEU and the national courts deal with these trust issues and which legal mechanisms have developed by the Courts and the national courts to foster mutual trust, while at the same time ensure that the fundamental principles they cherish are not undermined.

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 highlighted the relevance of judicial trust for the acceptance and compliance by national judges with their duties imposed by the CJEU as EU decentralised courts. This study takes this novel approach for the judicial construction of Europe and proposes that the judges’ grasp of supremacy is highly influenced by their individual attitudes towards the CJEU which created and supported this doctrine. By analysing original survey data, the findings confirm how supremacy is affected by judges’ evaluation of supranational and national judicial institutions.

Zuzanna Godzimirsk: Builders of (dis)trust: The Role of Registries 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 Registries 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 Registries’ 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 these actors play when they use to form trust in the 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.
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 related to who has the authority to deliver the final legal interpretation of the disputed terms and which court (the CJEU or the Constitutional Court of a Member State) has more interpretative power to persuade other courts and tribunals in particular the administrative courts!

The concept of normative parallelism has traditionally been linked with the phenomenon of normative fragmentation of international public law norms, but currently relates to the interaction of norms derived from a given national legal order of a member state of the EU in the field covered by EU law or standards. Recent developments in Poland have heightened the need for an in-depth analysis of the problem of systemic threats to the rule of law at a time of constitutional crisis in Poland. New concerns have arisen since the Commission’s Recommendation of 27 July 2016. Polish legislature and executive continuously lead to the other new concerns which are incompatible with EU law or standards, including EU fundamental rights and freedoms. The purpose of the presentation is to demonstrate clear indications of a systemic threat to the rule of law in Polish legislature particularly in the context of doubtfulness of the effectiveness of constitutional review of new legislation. Legal issues arising out of parallel norms engender dual normative reality which in turn affects the Single Market especially business relations very sensitive to unstable and unpredictable legislation. Moreover, the problem relates to the jurisdiction and potential parallel adjudications dependent on the judge personal relation to recent Polish authorities. All the more important is the role of the Court of Justice of the EU within the proceedings between the Commission and Polish state as well as within the preliminary ruling procedure. The proposed analysis makes part of the discussion aimed at preventing the escalation of the problem resulting in sanctioning Poland for a serious and persistent breach of EU law or standards.

Ireneusz Paweł Karolewski: Power and the Constitutional Court in Poland: Democratic backsliding or just another political conflict?

On January 13 2016 the European Union launched an investigation against its member state – Poland. The reason for it was, among others, the constitutional crisis in Poland involving a conflict between the ruling PiS party and the newly elected President on the one hand and the incumbent Constitutional Court judges and the opposition parties on the other. The ruling PiS passed another unconstitutional law and set-up Lord of new PiS majority in the Constitutional Court. This was seen by the opposition parties and the Constitutional Court itself as unconstitutional and problematic regarding the separation of power principle. In addition, the Venice Commission of the Council of Europe, who explored the issue as well as the European Commission questioned some of the contents of the new law, thus giving the opposition additional arguments against the PiS government. As a reaction Prime Minister Szydło denied that there were any attempts by her government to impede democratic backsliding in Poland. At the same time, the PiS policy-makers argue that the new law was merely a response to an attempt of the formerly ruling PO-PSL government to rig the court’s set-up in its favor by passing its own law on the reform of the Constitutional Court in June 2015 and by unconstitutionally electing new judges. According to this argument, it was the PO-PSL government that politicized the Court against its original setup as an independent institution. In consequence, the PiS saw the Constitutional Tribunal as an effective guardian of the Constitution. Lack of the effective control of the Tribunal and start to serve as a guardian of the Constitution. It is extremely complex and controversial issue due to limited legal instruments, limited know-how, readiness to be learned, courage and lack of experience of the ordinary judges (courts). Use of the ECJ preliminary question procedure, possibility to ask legal question to be answered by the Supreme Court, direct use of the Constitution, as a foundation to intervene to the interaction of norms derived from the very function of the Constitution of Poland. Avoidance of fragmentation of the legal system became much more difficult, but not excluded, yet.
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

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 organizations

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 unrestrained exercise of institutional power, and a pre-condition to the enjoyment of the right to the individual access...
to justice. This demand for the individual's right to access to justice includes both access to national courts, as well as international mechanisms set up to deliver justice, as the case may be. Both international and domestic mechanisms should be considered as occupying critical positions in the international legal order. Instead of isolating the national from the international it is important to understand the links between 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 'justiciability' at the national and the international level.

Anne van Aaken: Can Behavioral Economics Inform 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 contain implicit assumptions about how people and/or states behave and why. But they are disconnected from social science and behavioral insights. Public-good games are concerned with the question under what conditions social cooperation arises. They include behavioral insights deviating from the rational choice assumption. This paper asks what those insights can contribute to our understanding of international 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.

Oleksandr Vodiannikov: Reclaiming Legitimacy through International Law: Friendly Treatment of International Law Jurisprudence of the Constitutional Court of Ukraine in Turbulent Times for International Law

General distrust of international law and institutions has lurked into courtrooms of many states. Judicial dialogue between the national courts and international tribunals is tainted with growing distrust and frustration. Against this background Ukraine's Constitutional Court of Ukraine in Turbulent Times for International Law

Can a constitutional amendment be unconstitutional? This paradox is now one of the most important questions 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 Roznai’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 Jacobsohn
Yaniv Roznai
Kim Lane Schepple
Moderator
Richard Albert
Room
4B-2-58

Richard Albert: Discussant

Joel Colon-Rios: Comment on Roznai’s “Unconstitutional Constitutional Amendments”

Rosalind Dixon: Comment on Roznai’s “Unconstitutional Constitutional Amendments”

Gary Jacobsohn: Comment on Roznai’s “Unconstitutional Constitutional Amendments”

Yaniv Roznai: Response to comments on Roznai’s “Unconstitutional Constitutional Amendments”

Kim Lane Schepple: Comment on Roznai’s “Unconstitutional Constitutional Amendments”

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

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 democracies 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 constitutionalism - and on empirical case studies from Bulgaria, Hungary and Serbia. An important dimension of the analyses is to investigate the emerging politicization 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
Violeta Beširević
Moderator
András Sajó
Room
7C-2-24

Denis Galligan: Judicialization of Politics in Illiberal 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 constitutional 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 “counter-majoritarian difficulty II”. The paper explores this question on the basis of evidence from Central Eastern Europe with a specific focus on developments in Bulgaria. The main argument is that constitutionalism is a complex mixture of formal rules and informal conventions. Institutional transplants from the 1990s were successful in creating rather robust formal frameworks. However, the creation of necessary informal conventions was lagging behind and was even non-existent in
In the field of constitutional theory, normative questions such as those of the appropriate role of courts, the nature of constitutional adjudication and the appropriate approach to interpretation are often discussed within the context of a specific institutional setting in which those normative answers are expected to be obtained. In examining the case of Hungary, this paper argues that constitutional courts may be able to function as laboratories of democratic values and democratic participation. The paper further argues that the counter-majoritarian difficulty (the original Bickel’s idea) has probably been an over-exaggerated problem. In order for courts to serve social purposes, courts have to have powerful political allies among the parties, the media, the civil society organizations and social movements. If there are no such allies, or if these have been systematically weakened and marginalized, as is the case in some Eastern European countries, courts are in a very weak position to make any political difference. The rise of political illiberalism in Eastern Europe is used as evidence supporting this thesis.

Judit Sandor: From Checks and Balances to Wigs and Robes: Facing Illiberal Democracy at the European Court of Human Rights

In a country ruled by civil law, such as Hungary, courts are rarely used for testing policies and initiating their change. Moreover, the Hungarian model has been characteristic of the civil sphere, one may note that the political arena originating from the state socialist period has become an enduring tradition, preempting the development of a culture of rational political debate. The 2008 financial and economic crisis hit the country hard and various forms of scapegoating emerged as a convenient form of explaining economic hardships and social conflicts. It seemed that after a little more than 20 years of experimenting with creating a liberal democracy, the country opted for strong leaders and autocratic solutions. In the summer of 2014, at an annual youth festival that takes place in Transylvania, the Prime Minister of Hungary, Orbán Judit Sandor: 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 opinion on the legality of 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 2000. In this paper, however, I choose a somewhat different approach. I focus on the role of the Constitutional Court of Serbia as a laboratory of democratic values and democratic participation. The rise of political illiberalism in Eastern Europe is used as evidence supporting this thesis.

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

In the political dialogue between two parties with an aim to normalize the relations between Belgrade and Pristina, while the UN General Assembly gave to the International Court of Justice a clear mandate to deliver the opinion, the constitutional mandate of the Constitutional Court of Serbia to decide on the constitutionality of the Brussels Agreement, reached in 2000, was aimed to fill the gap between the Belgrade and Pristina, while the UN General Assembly gave to the International Court of Justice a clear mandate to deliver the opinion, the constitutional mandate of the Constitutional Court of Serbia to decide on the constitutionality of the Brussels Agreement, reached in 2000, was aimed to fill the gap.
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 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 challenges 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 threat to the European integration. 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.

**Angela Schwerdtfeger: The Case Law of the German Federal Constitutional Court: Between Attack and Dialogue**

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 Halmai: 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 rubber-stamped 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 national(ist) constitutional identity.
This panel seeks to explore the role of colonialism in court systems past and present. If this year’s ICON conference asserts that expanding role of courts is arguably one of the most significant developments in the late-20th and early-21st century government, could it be due in part to the forces of empire and post-colonialism? This panel will explore three different mechanisms by which colonialism has been transmitted to the legal systems of the former British colonies in the Caribbean and in Asia/the Pacific: judicial independence, the right of jury, and the concept of an independent judiciary, robust as it may be.

Participants

Binyamin Blum
Mathilde Cohen
Tanya Hernandez
Erin Delaney
David Law

Moderator

Room

7C–2–02

ConCurring panels

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, this right was not strongly protected in the British empires. While the colonial legislatures often provided a constitutional mechanism for the appointment of a single member of the judiciary, and the powers of the judicial任职 often been derived from the colonial office, the court system were transformed by the indigenous courts and the rules of evidence.

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. Not only are nominees subjected to extensive public questioning, but preliminary lists of those being considered for nomination are widely publicized. The typical nomination since at least 1986 receives attention from interest groups, with attempts made to mobilize popular support and opposition. This process has been heavily criticized, but it is at least the United States, because it dissipates what is thought to be an appropriate focus on the nominees’ legal qualifications. Until recently the Canadian nomination process was quite opaque. Reforms to the selection process in Canada have made the process somewhat more transparent without—or so it seems—adverse effects on the attention given to the nominees’ legal ability. The difference between the processes may result from the fact that the Canadian initiatives are relatively new and may evolve in the U.S. direction, as they are implemented, or from the fact that the Canadian process, while more open than in the U.S., remains rather tightly confined, or from differences in the U.S. and Canadian political-legal cultures.

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).

Erin Delaney: Understanding the Post-Colonial Judicial Independence in the African Commonwealth Countries

Scholars have studied the impact of colonialism on the judicial systems of the former British colonies in the Caribbean and in Asia/the Pacific, but far less is known about the enduring effects of British rule on present day judiciaries in Africa. This project will explore how the legacy of the Judicial Committee of the Privy Council (the court of final appeal in colonial times) and the current practice of sharing judges among African Commonwealth countries complicate our understanding of the role of a national judiciary and the concept of judicial independence. What are the institutional mechanisms that allow foreign judges to sit on national courts? Who are the judges that travel? How are they received by their colleagues? Does this movement foster judicial independence or does it reinforce old colonial principles and organizational norms? Given that the data-collection is still at an early stage, the presentation will focus on methodological and conceptual questions.

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 steered 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.

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 court was one of the key public bodies in the country, and it was responsible for interpreting and enforcing the laws. As a result, the court was often under attack by the executive branch for its decisions in favor of the opposition. The 2009 Constitution changed this by creating a new body, the Constitutional Court of Justice, which has the power to appoint judges to the Constitutional Court. This change has had a significant impact on the court’s independence, as it is now subject to political control by the executive branch.

The panel will discuss three different mechanisms for selecting Supreme Court judges. Mark Tushnet analyzes the new Canadian process for appointing judges of the Supreme Court. Micaela Alterio and Roberto Niembro study the Bolivian process 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
In our panel we wish to discuss various aspects related to the relation between law and cities, a field that is attracting increased attention from public lawyers across jurisdictions. The panelists discuss four papers by Anél du Plessis, Michelle Finck, Malcolm MacLaren, and Josephine van Zeben. Janne Nijman will be commenting on the papers.

Anél du Plessis: Legally Constructing the Spaces We Want: The Tale of Two South African Cities

The recently adopted Global Sustainable Development Goals (SDGs) includes a distinct goal dedicated to cities. A couple of months after its release, the United Nations’ (UN) New Urban Agenda was adopted. While urbanisation is celebrated as this its potential to make cities more prosperous and to kindle development, many cities of the world have been described as being “grossly unprepared for the multidimensional challenges associated with urbanisation,” (UN-Habitat 2016: 5). South Africa is no exception in this regard as it stands challenged by the apartheid legacy of poor urban planning and unprecedented levels of urbanisation. In response the national government adopted its new Spatial Land-use Management Act in 2013 and an Urban Development Framework in 2016. The national law and policy framework liberally calls for spatial justice and spatial sustainability. For the first time, prominent links are drawn between core principles of environmental law and spatial planning law as far as it concerns urban development specifically. While the national government has been paving the way at the more conceptual policy level, two city governments in South Africa recently took the bold step to actually use its planning powers towards transformation of the kind envisaged in a) the SDGs and the Vision 2063: the Africa We Want; b) the environmental right in the Constitution of the Republic of South Africa 1996 and c) the framework environmental legislation of South Africa. The eThekwini Metropolitan Municipality (Durban) developed a D’Moss which stands for the Durban Metropolitan Open Space System. D’Moss is a system of open spaces some 74 000 ha of land and water, that incorporates areas of high biodiversity value and the network of open spaces. Examples of areas included in D’Moss are nature reserves, large rural landscapes in the upper catchments and riverine and coastal corridors. Some areas 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 environment. The city developed new spatial plans in line with Joburg 2040 the Growth Development Strategy based on transport-oriented 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 authority of city governments. The City of Johannesburg’s undertaking has not been the subject of specific litigation but the development may be seen as a positive 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 important role of domestic courts in the interpretation and protection of the power of city governments to progressively guard over spatial planning as part of the pursuit of SDG 11.

Michelle Finck: Who Owns Big Data? A Smart Cities Perspective

Big data is profoundly transforming business models as an entire industry has emerged around data collection, mining and analysis. Big data has thus transformed numerous industries, but also local governments, and has triggered the emergence of smart city governments. My paper examines rights of access and ownership to data under EU law by looking towards smart cities and enquiring who should own the data on which they run, and under which conditions access should be granted to such datasets.

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 efforts. Experts have studied the dynamics of violent conflict, peace-building, and state-building in this context as well as the conflict management strategies of authorities in particular areas. On the basis of these comparative 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 useful 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 management 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 focus on mixed-use development. The eThekwini development has been contested in court on the basis of the alleged limited environmental authority of city governments. The City of Johannesburg’s undertaking has not been the subject of specific litigation but the development may be seen as a positive 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 important role of domestic courts in the interpretation and protection of the power of city governments to progressively guard over spatial planning as part of the pursuit of SDG 11.

Josephine van Zeben: Local Citizenship in the European Union

Local governments in the European Union act as democratic conduits and service providers for residents – national citizens, EU citizens and third country nationals alike. The ability of local governments to fulfill 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 governments. It does so in order to assess whether EU citizenship affects the centrality of the nation state with respect to citizenship: i.e. are local rights still anchored in national citizenship or has European citizenship started to trickle down to the local level? The paper focusses on three specific case studies – London, Amsterdam and Berlin – each operating within a distinct national framework with various levels of local autonomy.
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 interdisciplinary, it has become more and more limited to a specific method. Interdisciplinary approaches have themselves become increasingly questionable within the 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 interdisciplinary lines.

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 posed by judicial activism. The European Court of Justice has been identified as a significant actor in the enlargement of the European Union’s jurisdictional authority and power. The panel paper seeks to challenge this consensus, drawing on an empirical analysis of CJEU’s case law. The analysis covers 250 judgments from 1974 until 2013. The data expose some fundamental changes in the review behaviour of the Luxembourg Court since the 1970s. Contrary to the activation tale, the CJEU’s jurisprudence is ever more marked by self-restraint, a development which manifests itself in two ways: (1) The Court increasingly avoids interfering in the policy choices of national legislatures; (2) it passers more and more review duties onto national courts.

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 Explain the “Status” of Social Rights Protection in Europe?

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 also 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.

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 2013), 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. In the paper will compare the case law of Supreme Courts of bailout 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, EU treaties) to the role of the state in securing “social states” (Soazialstaat in the German constitutional terminology) and/or contain lists of fundamental social rights (i.e. social citizenship) and sensates 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 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 thinness of the European social constitutionalism at both the national and supranational level.

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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 direct 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 thinness of the European social constitutionalism at both the national and supranational level.

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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 2019. But are things really that black and white? For exactly this “European Pillar of Social Rights” will be (“an expression of [...] principles”, a “framework of principles”, “a reference framework to screen [...] perfor-
ConCurring panels

as one of the starting points for the Pillar, and second, it is even less clear what role for judicial review?

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 cooperation frameworks set up by the EU institutions so far fail to accommodate the case law in a meaningful way resulting in legal uncertainty and even obstruction of EU level law-making process. I will look at the potential “judicial” role in the Pillar project and will construct an argument for the instrumentalisation of the judicial element in this new framework.

Michael Ioannidis: Judicial review of economic policies: the CJEU as adjudicator of EU economic governance

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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 Eliantonio: 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 contribution 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 reinvigorated 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 experience of those 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 Member States’ national regulatory regimes, but also of 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 an efficient administrative governance in Europe is possible by first questioning the legal nature of the standards created through the process at stake. In particular, it will be question whether these standards qualify as “public law acts” both on the European and on the national level. Second, it will be considered to what extent the standards respect or ought to reflect general principles of (European) administrative law. Finally, the contribution will address the question of which form and degree of legal protection (both at European and at national level) is available against the standards.

Javier Barnes and Alicia Israel Saavedra-Baza: New Frontiers of Administrative Law

A Functional and Multi-Disciplinary Approach Private Life of Administration Public Life of Private Actors

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 responsibilities 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 collaboration 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 (in a direct or indirect way) on the behalf of private interests and institutions. Finally, Part III summarizes some preliminary features of new administrative law dealing with these new scenarios. When I refer to private bodies or to non-state actors in this chapter, I mean certain specific non-governmental 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.

Carlo Colombo: The advent of the collaborative state: towards a new paradigm for the law on 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 seen as a strategic approach to the challenges of the governance of administrative tasks, globalization of national markets, and the increased complexity of societal problems, collaboration between public administrations and private actors is increasingly seen as a strategic approach to the challenges of the governance of administrative tasks.

Indeed, collaboration is said to promote experimentation and improve knowledge, thereby leading to more effective solutions for complex problems. These new forms of cooperative decision-making are especially important in the context of urban and regional governance, due to the close proximity of all actors in the same area. In addition, contrary to the global and European level, mechanisms of collaboration in public decision-making within urban and regional environments are not in place, which is a matter of concern. Collaboration is a tool that can be considered to what extent the standards respect or ought to reflect general principles of (European) administrative law. Finally, the contribution will address the question of which form and degree of legal protection (both at European and at national level) is available against the standards.

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 explore the themes of representation, democracy, constitutional equality, accountability for human rights, and promoting political freedoms in extra-territorial settings, and the adjudication of extra-territorial human rights violations. For this purpose, the proposed papers will draw on a range of sources emanating from a number of jurisdictions, including the recent decisions reached by the UK Supreme Court; the French Constitutional Court and the EU Courts. The broad aim of the proposed panel is to discuss how we can improve our understanding, and awareness, of the ways in which courts harness, or fail to harness, ‘external’ norms to interpret and institutional sites of action in an effort to provide principled coherence when reaching decisions of major constitutional significance. It is anticipated that the issues explored in the diverse, but interconnected papers included in the proposed panel will provide a basis for a stimulating and rewarding discussion for all those ICON conference delegates participating in the proposed session.

Participants

- Paul Gragl
- Stephen David Allen
- Mario Mendez
- Savinder Juss

Moderator

Violeta Moreno-Lax

Room

8B.2-33

114 THE ROLE OF “EXTERNAL” NORMATIVE SOURCES AND PERSPECTIVES IN SAFEGUARDING CONSTITUTIONAL ORDERS

The panel will explore the role of “external” normative sources and perspectives in safeguarding constitutional orders. The panel will bring together scholars with specializations in Public Law, EU Law, Public International Law and International Human Rights Law to deliver papers which explore the themes of representation, democracy, constitutional equality, accountability for human rights, and promoting political freedoms in extra-territorial settings, and the adjudication of extra-territorial human rights violations. For this purpose, the panel will draw on a range of sources emanating from a number of jurisdictions, including the recent decisions reached by the UK Supreme Court; the French Constitutional Court and the EU Courts. The broad aim of the proposed panel is to discuss how we can improve our understanding, and awareness, of the ways in which courts harness, or fail to harness, ‘external’ norms to interpret and institutional sites of action in an effort to provide principled coherence when reaching decisions of major constitutional significance. It is anticipated that the issues explored in the diverse, but interconnected papers included in the proposed panel will provide a basis for a stimulating and rewarding discussion for all those ICON conference delegates participating in the proposed session.

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8B.2-33

Paul Gragl: Concealed Monism in the Supreme Court’s Judgment in Miller: Externalizing Representational Democracy

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Room

8B.2-33
Stephen David Allen: Adjudicating External Human Rights Violations: The Decisions of the EU Courts in the Western Sahara Cases

The case of Frente Polisario v Council 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 their terms the Agreements 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 EU/International Law. In 2015 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 applied the Agreements could only be applied in relation to territory over which Morocco exercises lawful sovereign authority (pursuant to Art. 29). Secondly, it decided that neither of the Agreements generated legal effects for the territories in question. It noted that such activities did not amount to a subsequent practice which revealed the agreement to be within the EU’s jurisdiction but also those externally located individuals/groups who are victimized by the implementation of EU trade agreements which are proven to be incompatible with the peremptory norms of international law.

Mario Mendez: The Access to Justice Provisions of the Aarhus Convention in the EU: A Predictable Collision Course between Luxembourg and Geneva

Sатvinder Juss: The Royal Prerogative in Colonial Constitutional Law

Timea Drinoczi: Recent systemic developments in Poland and Hungary

In the paper, using the example of Poland and Hungary, we argue that how constitutions may be ‘captured’ and ‘used’ by political decision-makers to fulfil their political agenda. These states have been turned from a constitutional democracy to something else, which is described by many scholars as illiberal, 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 they have led to this crisis. Against this background, we 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 institutionalism are captured by the leading political parties. The illiberal constitutionalism is thus formed by capturing the constitution and constitutionalism in a legal way by the populist political majority, 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: Timea Drinoczi

Tomasz Milej: Liberal principles for East Africa – the judiciary’s perspective

Although the constitutions of 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 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, what do they stand? The normative 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 constitutional courts, 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 is...
ConCurring panels

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 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
Eduardo Stoppioni
Lorenzo Gradoni
Laurence Burgorgue Larsen
Remy Jorritsma

Moderator
Andrea Delgado Casteleiro

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 or 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 mosaico 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 exploring this methodology, the paper seeks to question the relationships between two legal regimes: a court sets the conditions under which an external legal act may produce legal effects in its legal system; at the same time, the regime where the act originated may decide to ignore these conditions or to conform to them. The interaction so originated might eventually allow the two regimes to find a modus vivendi, a synthesis between their respective values and rationalities. This ‘horizontal Solange’ may also be seen as a last-resort instrument to protect fundamental values, premised on a logic of complementarity: if no legal review based on human rights is available in the regime to which the act belongs, such a review has to take place in the regime where the act is applied. In this way, it could be seen as a sort of ‘gentle humanization’ of multi-level governance.

Eduardo Stoppioni: General principles as purveyors of inter-systemic linkages

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 has morphed 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 be they systemic or inherent to the international legal order as a whole. 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 national 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 practice, but to international judicial practice(s). The paper aims to discuss this topic in comparative perspective, trying to rethink the conventional ways of understanding this freedom in front of the new challenging conceptions.

Martin Kopa: Freedom of expression of judges in times of constitutional crises
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 when 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 leave the political discussions to the political branches?

These are generally the questions I would like to normatively answer in my paper. Certain principles may be abstracted from the comparative case-law. I would like to test these principles on several cases – or real cases – to work only with the law. The questions raised are also a matter of legal ethics. In current constitutional crises it will often be up to judges to be an effective component of militant democracy (Strömbäck demokrati) protecting democratic systems from the self-destruction. But how do they know when to trigger this concept? If they speak up too early the danger is that they might overshoot 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

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 violation of a national anthem, flag or pledge infringes their constitutional rights. The cases share the characteristic of 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 put the onus on the court to prove that the purpose 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
This piece of legislation, which was passed with the Constitution - against other public interests said to be promoted by the government policies in question. 

Elisika 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 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.

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 the Court of Justice of the European Union (CJEU) to the Strasbourg rulings to the approach adopted by the CJEU in cases such as Digital Rights Ireland or Maximillian 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.

119  BUILDING THE PEACE

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 as the search for society to make it robust state to be able to prevent the reoccurrence of hostilities. I suggest that these actors representing often bypass the national government to directly address the local communities. I 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 concepts can be brought to the environment that may keep post-conflict states under the dictates of international actors.

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’ practiced forms of institutionalisation and legalised interaction. Internally, cities are prone to “intra-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, needs to be updated to a re-conceptualisation 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 explorations harmonise with 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 local citizens. Core-questions for the paper are: How do cities govern intra-city (violent) conflict situations? How are new political settlements negotiated in cities, by whom, and according to which norms for building and keeping peace in the city? In sum, the paper will give an overview and discuss selected legal and political analytical challenges that arise when building and keeping lasting peace in 21st century cities.

Huub Spoormanns and Irene Broekhuijsje: 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

whether, and if so how, judges have balanced the relevant freedoms of thought and conscience guaranteed by Article 19 of the Japanese Constitution; and the right to profess practise and propagate one’s religion protected by Article 15(1) of the Singapore Constitution – against other public interests said to be promoted by the government policies in question.

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ConCurring panels

120 THE LAW OF CONSTITUTION(S)

Ori Aronson: The Constitution in Trial Courts: An Empirical Study

The study is an extensive empirical survey of 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 a political culture of instituting 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 knowledge’. 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 of mastery and autonomy. Mastery and autonomy form prominent constitutional orientations historically taking the form of solidified instituted meanings identified here as the modernist and the democratic imaginaries. The two instituted constitutional 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 reverting 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 constitution-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 constitution-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 constitution-making processes. The idea of ‘constitutionalized constitution-making’ has been brought about before by Andrew Arato and German scholars Christian Starck and Christian Winterhoff. Based on the empirical study of modern constitution-making processes, a new type of constitution-making can be observed in which the traditional model of constitution-making is preceded by a “third step” the previous adoption of an interim constitution that lays out the constitution-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 constitution-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 I develop the concept of "constitutional replacement" as a tertium 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 constitutional repertoire, norms, and values. 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 culture and constitutional conventions as a model, this paper investigates the role that conventions may play in both common law and continental constitutional systems.
The story of the development of legal protections for forced migrants in international law is, in terms of the scope of protection, a progressive one. Yet a corresponding trend in the opposite direction can also be detected: a diminution in states’ commitments to refugee protection, as evidenced in the expanded use of non-enterable measures, from visa restrictions to carrier sanctions and push-back operations. The present paper asks: how can and should we understand the causal relationship, if any, between these two concurrent, divergent developments? Has progressive legal developments played a causal role in the broader trend of resistance to the protection of forced migrants? The paper will explore this question through the case study of progressive legal developments in one area of protection: the application of human rights to the extraterritorial migration-policy-related activities of states, from interception and push-back at sea, to the extraterritorial posting of immigration officials, and the operation of offshore migrant processing centres. The paper will consider what are and may be the negative and protective implications of the progressive legal developments that have taken place in relation to these activities. Might they drive states towards even more extreme non-entree measures? When allied to other progressive developments in human rights law generally, might they lead states to place into question their continued commitment to human rights.

Ralph Wilde: Unintended consequences: Do progressive legal developments protecting forced migrants undermine protection in other areas?

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 that the particularly protracted and vexatious nature of the issue 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 Mandane 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 imprority.” 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 specialty 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 special is its legality. Due to the exclusive nature of political rights, which those 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 curtailed or nullified. Giving up such a right is not a neutral act. In his book on the exercise of prerogative powers, Lord Denning said that the exercise of prerogative powers is a matter of public policy and public law. The exercise of prerogative powers thus has to be scrutinized to determine the reason why they have been used, the nature of the intervention, the type of protection, the test which has to be met to determine the existence of a public policy objective, the public interest, and the extent to which the protection is effective. These are the criteria that should be applied to a decision of a court when it reviews a decision of a public authority. The criteria must be applied in light of the circumstances of the case and the nature of the intervention.

The story of the development of legal protections

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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 advanced 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 have nevertheless remained focused on 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 extent deliberation and participation is present in 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 multi-level 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 ECtHR jurisprudence, and in particular the structure of opportunities that creates different judicial procedures. 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.
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.

Enyebi Ogu: ‘Can regionalisation solve the ICC’s legitimacy crisis?’

The paper will scrutinise the Rome Statute to try and explain some of the current crisis around the International Criminal Court [ICC]. The recent prospective withdrawal of three states parties from the court marked the tipping point of a series of controversies that have engulfed the ICC’s work since its inception in 2002. The court has been demonised as ineffective and hindering diplomatic efforts to resolve political conflicts. It has also been criticised as focusing only on situations involving leaders from weak states while ignoring worse crimes being committed by others in major states. In light of these criticisms, the paper will grapple with the question of whether regionalisation can effectively address the controversies around the ICC. To this end, it will identify and examine certain articles of the Rome Statute as the root causes of the disagreements. Thus, the following provisions will be closely analysed: the court triggering mechanisms under Article 13 the deferral power of the Security Council in Article 16 and the conflict between Articles 27 and 98 regarding the diplomatic immunity of international officials. However, it will be shown that staunching the looming crisis will require short term amendments to the said provisions and/or judicial acquiescence in taking up cases involving powerful states.

Satwant 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 Preamble to the ICC outlines that the most serious crimes of concern to the international community must not go unpunished and emphasizes the determination to put an end to impunity for the perpetrators and thus contribute towards the prevention of such crimes. The Court was developed as “an organ of global jurisdictional reach and thus potentially able to respond to violations occurring anywhere.” However, the Statute 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 to interpret and enforce 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’s Office falls short. This paper contributes to debates on the International Criminal Court and the role of the Office of the Prosecutor.
The Limits of Judging?

Mary Rogan

and monitoring by external bodies and complaints according to the last Court's resolutions regarding the distance of inspection and oversight as mechanisms of the establishment of a permanent procedure inside the European Union. 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 and Interinstitutional Dialogue. This study offers an unconventional interpretation of the legal invalidity of the Amnesty Laws, it is possible to uphold the rule of law in prison. While the importance of the independent court is conducted under enhanced indeterminacy and the ECI legal order as a complement to legal systems and prompt improved protection of rights in prison.

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 the legal order as a complement to legal systems and prompt improved protection of rights in prison. 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 authority of 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 precedential 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 (Bengoechea 2011) to reveal relevant instances of ambiguity.

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 Lausanne and subjected to Swiss private international law. Yet, if one goes beyond the formal consensual foundations of the CAS, in practical 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 systemic 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.

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 certainty that promotes greater efficiency (Piantadosi et al: 2012), coherence, and acceptability (Paunic: 2013; Leczykiewicz: 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 authority of 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 precedential 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 (Bengoechea 2011) to reveal relevant instances of ambiguity.

The Legal Mobilization of Indigenous People's Right to Natural Resource: Focusing on the Role of Court

The purpose of this paper is to analyze the legal obstacles of indigenous people's right to natural legal resources, by observing decisions regarding illegal logging or hunting by courts in Taiwan. I observed that the enactment of "the protection of indigenous people's status land and economy" clause into the Constitution stimulates some revisions of right to natural resources laws. At the same time, the argument level of court activities is enhanced when indigenous people are indicted for committing relevant crimes. Moreover, the routine provision of legal resources to indigenous people by Legal Aid Foundation facilitates indigenous people's arguing their right to natural resources in courts. Through legal mobilization, the legal system institutionally accepts the feedback from the social system and even accumulates the energy of constitutional transformation. However, court decisions show that collecting and hunting rights of indigenous people are still under the sponsor of the state. The main reason would be the nature of right to natural resources of indigenous people is obviously different from mainstream society's conception of right to property. Besides, the right to natural resources as a group right is incompatible with personal rights prescribed in the Constitution. The state should positively recognize the distinct culture of indigenous people. Only by doing so, indigenous people may freely exercise their rights.
that truth finding is not a desideratum for ICTs (no one expects ICTs to find a cure for cancer; it is not a rea-
sonable desideratum, and it is for that reason alone irre-
levant to examine further whether they are good at it). In this paper by way of introduction I therefore
recreate what I have entitled “criminal law: a statistical challenge”: in that in spite of widespread claims to the contrary, it is
reasonable to expect that ICTs produce roughly ac-
curate historical truths about atrocities. Truth in law is
not merely a technical legal notion defined in strictly
procedural terms, but is the triality of arms, etc.). It is
therefore reasonable in the legitimacy debate to
engage in a substantive discussion of the second
epistemological question proper, i.e. with strength of
the epistemic critique that has been raised. In the
second and main part of the paper I therefore un-
dertake 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 panop-
ny 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 each other?
The aim of this examination is to get a better under-
standing 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 pros-
eduction of international crimes is unique. While the
prosecution of domestic crimes is ordinarily limited to
the co-prosecution of a state with a connection to the of-
fence 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; (3) and 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.

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 litera-
ture 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
define and “state failure” theory 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 ex-
amine 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 subject constructions
as free and equal moral agents.
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 rule” sovereign rights in relation to judicial and quasi-judicial dispute resolution systems “to other systems (i.e. to the proposed investor-state dispute settlement (ISDS) “court mechanism”). In Canada, a statement has been filled at the Federal Court of Canada claiming that CETA is unconstitutional because it “guts and extinguishes the constitutionally protected Judiciary in Canada by creating foreign tribunals” for ISDS arbitration. A third obstacle may reside in the possible triggering of Article 218 of the Treaty on the Functioning of the European Union by Belgium, if it requests that the CJUE render an Opinion as to the compatibility of CETA with the European Treaties due to the fact that the Investment Court System does not guarantee the respect for the autonomy and unity of EU law.

When Constituational 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 in the form of ISDS to address conflicts unlike those of previous centuries, which usually centered exclusively on matters arising from expropriations. That investment arbitrators can exercise this type of authority implies legal so- stitutional and structural changes to the legitimacy of this new judicial system. On these premises, I argue that legitimacy on investment arbitration could be constructed from the non-hierarchical interactions with national adjudicative bodies, specifically 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, toileration, and resistance. Finally, the third section will develop a specific strategy of legitimation for investment arbitration for further cases.
states in order to comply with the anti-terrorism reso-
olutions, 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-
vocate for transparency and protection of human rights.
These practices are susceptible of endangering the 
transparency and openness of administrative proce-
dures, the right to a due process, and the privatization of the 
public good. The drones may be used for attacking 
minority groups in a growing context of legal pluralism.


This paper discusses the growing privatization of public 
law enforcement in the context of social welfare 
fraternal organizations who lead top-down policies and who 
challenge national spatial policies. National and 
transnational NGOs became the watchdogs of national 
public interest. Third, the outsourcing of anti-
fraud prevention in the United States, Australia, United 
Kingdom, and the Netherlands. These practices are 
problematic in both civil law 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 
never eroded traditional public tasks and the pursuit of 
the public interest. Third, the outsourcing of anti-
frad enforcement tasks has been detrimental for due 
process and procedural fairness, 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-
cusses 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).

Octaviano Padovese: Paul de Man and Constitu-
tionalism

In a groundbreaking article, The Rise of World Consti-
tutionalism, Bruce Ackerman spare no effort to describe a new global constitutional era.

Mayu Terada: Legislation of Special Law and its 
Necessity on National and Local Level: A Study 
on Legal Restrictions of Drones in Japan

In contemporary society where change is rapid, 
legislation of special law is often used instead of leg-
islation of permanent law. Although the definition of 
special laws varies and it is different from situations 
and people, in general, it is necessary to think about 
the position of special law in this modern society, 
including discussions whether the legislation is ap-
propriate for the current situation that many special 
laws are made. In this paper, focusing on Japan, 
concerning the regulation of drones and the establish-
ment of a special law and ordinances related to the 
regulation of drones, current situation and issues of 
society and legal regulation are considered. Plus, the 
current situation of the drone is an urgent point in gen-
eral are examined. The regulation of drones is picked 
up because it shows one of the interesting situations 
of special legislation. The drones (unmanned aerial 
vehicles), which were originally developed for military 
purposes are now used by private enterprises through 
development and technology development of the ma-
chine and the numbers of drone usage is increasing. 
Private companies use them for transporting monitor-
ning and surveillance of companies and other items. However, the drones may be used for attacking 
someone etc. thus it is the subject of various special 
laws and regulations in the world including Japan.

Rehan Abyaretna: Dominion Constitutionalism 
in Sri Lanka

On February 4, 1948, Sri Lanka (then Ceylon) 
achieved “fully responsible status within the British 
Commonwealth of Nations.” The events leading up to 
1948 and the political and social ramifications of the 
dominion period (1948–72) have been the subject of 
in-depth study. Ceylonese leaders’ shrewd negoti-
ations to achieve dominion status, their neglect of 
minority rights and representation, and their failure 
to anticipate the rise of Sinhala-Buddhist nationalism 
and violent Tamil opposition have been thoroughly 
investigated. The legal implications of dominion status, 
however, have not been as fully explored, particularly 
with respect to the case law of this period. This Article 
hopes to fill that gap. It argues that constitutional law 
judgments of the Ceylon Supreme Court and the Privy 
Council reinforced doubts as to the true nature of do-
mignonhood, particularly as to Ceylonese sovereignty 
and the role of the judiciary in Ceylon’s constitutional 
scheme. The constitutional jurisprudence in this pe-
riod also sees litigants and courts grappling with the 
meaning of dominion status through comparative 
analysis. The regular citation to cases from the “set-
tier dominions” of Australia, Canada, and South 
Africa, shows that the courts in Ceylon, much like their 
political brethren, saw themselves as loyal subjects of the 
British Empire more akin to the “settler dominions” 
than their revolutionary neighbors, India and Pakistan.

Eugenie Merieau: Illiberal Constitutionalism 
and the Post-Political Constitution in Thailand

Authoritarian constitutions are usually defined as 
“the form of a constitution, but without fully ar-
certified institutions of limited government” (Ginsburg 
2008). In Thailand, however, institutions of 
limited government lie at the very core of illiberal 
constitutionalism. Rather than empowering the ex-
ecutive, post-2007 semi-authoritarian constitutions 
have disempowered to the widest extent possible the 
executive and the legislature, using modern constitu-
tional techniques, they recreated a regime in which 
selected representatives are hemmed in by appointed 
bureaucrats in the well-known “bureaucratic polity” 
(Riggs 1966) or “Deep State” (Merieau 2016). This pa-
per seeks to analyze how in the post-1992 context, 
post-coup contestation has led constitutional drafters to 
adopt populist constitutionalism, under both civil-
ian (1997) and military rule (2007, draft 2015). Elite 
resistance has disempowered to the widest extent possible the 
role of the judiciary in Ceylon’s constitutional 
scheme. The constitutional jurisprudence in this pe-
riod also sees litigants and courts grappling with the 
meaning of dominion status through comparative 
analysis. The regular citation to cases from the “set-
tier dominions” of Australia, Canada, and South 
Africa, shows that the courts in Ceylon, much like their 
political brethren, saw themselves as loyal subjects of the 
British Empire more akin to the “settler dominions” 
than their revolutionary neighbors, India and Pakistan.
Cormac Mac Amhlaigh: Does Legal Theory have a Pluralism Problem?

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, public and private 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. This paper will take up this argument. 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.

Flavia Piovesan: Power of Law vs. Power Of Force: Fighting Terrorism Or Human Rights?

This reflection aims the challenges and prospects for confronting the religious-based terrorism from the perspective of international human rights law. There is a consensus among the theme is undeniable, stamped on adverse events that take contemporary scene. Based on this assumption two central issues arises: the first on the impact of terrorist attacks on contemporary human rights agenda, and the second about the main challenges and prospects for confronting the religious-based terrorism. In order to create a better election, many actors has been established in Indonesia. Election Commission had been created to organise the election. 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 to increase the quality of election to make sure quality of democracy and social peace. In order to do this, the state creates election and Administration court will adjudicate the election 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 through merger process, it will able to create one election court or criminal court and the idea to create an Election Court is a possibility.

Michael Mihalyova: Constitutional Design or apex courts? The gatekeepers of international human rights law in South America 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 by not only allowing direct judicial enforcement as also giving preeminence to international over domestic law. The practices of courts, however, reveal different methods of dealing with domestic judicial claims of international human rights law (IHRL) violations. Courts’ responses to concrete cases ultimately give distinct meanings to equivalent constitutional norms in different countries. Thus, the purpose of this paper is to revisit and confront the ten South American apex courts considered IHRL 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 IHRL domestically. This research shows judicial claims of IHRL violation may be divided in a) decisions applying IHRL, b) decisions considering IHRL claims and finding no violation, and c) decisions dismissing or rejecting the application of IHRL. The content of the review in connection with discrimination based on sexual orientation, religion against civil partners violated the general principle of equality before the law (Art. 3 sec. 1 GG). Some have argued, that in 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 legitimate 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? The following paper considers qualitative social research methods, such as discourse analysis, will be used.

Participants

Michael Pal
Fritz Edward Siregar
Michael Mihalyova
Deyana Marcheva and
Ekaterina Mihaylova
Paul Scherer
Moderator
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8 A-4–35

128 DEMOCRACY AND HUMAN RIGHTS

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 so as 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 to increase the quality of election to make sure quality of democracy and social peace. In order to do this, the state creates election and Administration court will adjudicate the election 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 through merger process, it will able to create one election court or criminal court and the idea to create an Election Court is a possibility.

Michael Mihaley: Constitutional Design or apex courts? The gatekeepers of international human rights law in South America states

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Bulgarian judges have recently participated in a number of protests to defend their independence against political interventions in the justice system. Judicial activism is stigmatized as illegal, but turned out to be the only instrument for the judges to raise their voice against the continuing failure of the judicial reform in post-communist Bulgaria. In this paper we shall discuss the communist legacy in the construction and functioning of the judicial power under the new democratic constitution of Republic Bulgaria of 1991, and especially the hierarchically organized and extremely centralized Prosecutor’s office that prepares different levels of decisions on recruitment and career development of judges. The constitution of 1991 proclaims the separation of powers and the independence of the judiciary. However, the development of
However, the most common approach towards this and economic consideration are also being seen as all States with the right to instigate proceedings before international law environmental obligations can be classified as erga omnes obligations, however, the ICJ judgements the paper suggests that the Court of the voluntary nature of state commitments under international law is one of the most important positive obligations of the states. 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 protection is one of the essential element for human life is a mixed one. The court’s decisions the paper will demonstrate that in line with developments in international law environmental obligations can be seen 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 of legislation 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 Galvao 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 analyses the role of international environmental law in overcoming some of the obstacles for American constitutions can reflect this obligation in two ways – by making environmental protection one of the states goals and/or by giving individuals the right to healthy environment. Such right can serve as powerful tool, by which individuals can force the states to fulfill their positive obligation to protect the environment. However, at least in Central and Eastern Europe there is a significant obstacle to effective use of this tool – the absence of clear definition of the substance of executive decisions 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 substance of executive decisions to promote or to refrain from promoting climate policies. Part II argues that the 2016 American election for President 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 producing executive and legislative climate action in this context, and highlights the obstacles presented by the “political question doctrine” and redressability. Part IV argues that the case of Urgenda v. the Netherlands offers valuable lessons for how American courts can use international environmental law to help address these two challenges.
To what extent shall the content depend on statutory legislation? If environment is global, is there a universal standard for its substantive content? And what if other fundamental rights are violated through deteriorated environment (right to healthy property privacy)?

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 11/70 Internationale Handelsgesellschaft). Some 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 constitution itself and, as a result, primacy is or can be limited by the national constitution itself (Claes 2016). Many constitutional courts have eventually claimed a competence to review EU law in order 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 law has.

Agnieszka Frąckowiak-Adamiska: National Courts as Guardians of the Charter in 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 AFSJ, 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 analyse 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.
This paper aims to analyze the constitutional position of the Constitutional Court on the Front Line 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 list of 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 arguments to the public, in the Republic of Macedonia in the past two years emphasized political power and the Constitutional with special emphasis on the situation in Macedonia. The article will argue that the political system sustainable in a democratic representative system. The constitutional review on the impeachment can tame the uncontrollable revolutionary energy of the people into a constitutional frame by providing a last and independent resort. In addition, the argument can 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 polarized groups. Thus, the constitutional court in the impeachment cases plays a cardinal role in restoring the undermined legitimacy of the representative democracy.

CONCURRING PANELS

132 FAMILY AND DISABLED RIGHTS

Participants

Sara Benvenuti
Sanjay Jain
Delia Ferri
Janine Silga

Moderator

Sara Benvenuti

Room

8B 4-19

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 most 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 contentiousness. 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 consequences. The paper 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?

Younisk Kim: The Role of the Constitutional Court on the Front Line between Law and Politics: Lessons from Two Impeachment Cases in Korea

This paper will articulate how the constitutional court 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 list of 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 arguments to the public, in the Republic of Korea in the past two years emphasized political power and the Constitutional with special emphasis on the situation in Macedonia. The article will argue that the political system sustainable in a democratic representative system. The constitutional review on the impeachment can tame the uncontrollable revolutionary energy of the people into a constitutional frame by providing a last and independent resort. In addition, the argument can 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 undermined legitimacy of the representative democracy.

CONCURRING PANELS
of both the Court of Justice of the European Union and the European Court of Human Rights shows an increasing convergence in their reasoning, as both Courts appear to put more emphasis on fundamental rights and interpret more strictly the possibility to limit the right to family reunification, especially when considering the best interest of the child. The objective of this paper is to highlight this paradoxical situation between a fragmented legal regime for family reunification and the emerging similarities of the Courts’ reasoning by looking at selected recent cases.

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. More broadly, 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

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 reserve. 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.

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

Participants
Kasper Lippert-Rasmussen
Tarunabh Khaitan
Julie Suk
Reva Siegel

Moderator
Ruth Rubio Marin

Room
8B-4-43

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

133 INTELLECTUAL FOUNDATIONS OF INTERNATIONAL ORGANIZATIONS LAW

134 THEORIES OF DISCRIMINATION
A concluding section of the paper will discuss obvious limitations of the America’s anti-discrimination approach to the accommodation of pregnancy in the workplace, as well as its distinctive contributions. What if anything can discrimination law add to social welfare frameworks that mandate leave to accommodate new mothers and mothers-to-be in the workplace.

**Julie Suk: Affirmative Action and Discrimination**

There are at least two quite different understandings of the relationship of affirmative action to the idea of discrimination. On one view, affirmative action has been called “positive discrimination”, “affirmative discrimination”, and “reverse discrimination”, revealing the baseline understanding that affirmative action is a form of discrimination, and shares with discrimination some significant feature that has moral salience. On another view, affirmative action is in the DNA of the norm against discrimination. On the latter conception, affirmative action shares with the concept of nondiscrimination a significant feature that has moral salience. This chapter lays out these two conceptions and explores how the law of many legal orders treats affirmative action as discrimination which may or may not be justified. This chapter challenges this conceptual framework, and argues that it fundamentally misapprehends the essential features of discrimination.

**Reva Siegel: “On the Basis of Sex”: Antidiscrimination Approaches to Pregnancy Accommodation in the Workplace**

When, and why, is discrimination on the basis of pregnancy discrimination on the basis of sex? This question has been answered differently over time in the United States and in Europe. In 2015, the United States Supreme Court announced a new reading of federal employment discrimination law in Young v. United Parcel Service. In this paper I discuss disparate treatment and disparate impact claims of pregnancy discrimination under Young, and the many state statutes in the United States that mandate that an employer reasonably accommodate pregnancy in the workplace. The paper builds from the simple premise that one needs to focus on questions of social roles as well as physiological traits in order to understand what pregnancy discrimination is and why we should care about it. When we locate the pregnancy discrimination inquiry in an account of evolving social roles, we have a basis for probing the forms of rationality that guide busienss judgments about pregnant workers. The paper draws on examples outside the pregnancy context to illustrate how anti discrimination law can promote the integration of pregnant workers in the workplace.

135 HUMAN DIGNITY IN EAST ASIAN COURTS

In the current literature on human dignity, the presence of East Asia is relatively weak. This panel is our attempt to fill in the gaps from traditional (East) Asia. 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? 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 Chai-Shin Hsu
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 has common law origins and a 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 deliberate the applicability 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 express constitutional 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 property, 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 domestic 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 as “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 insuring 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 2013, the Supreme Court struck down article 900-4 of civil law which provided inheritance of 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 Constitution providing individual dignity and equal protection. Therefore, the Court held that the provision was unconstitutional because it didn’t respect illegitimate
The compensation case for the vaccine also referred to individual dignity 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.
ConCurring panels

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 judicial 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 annulling 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.

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 judicial 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 annulling 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 distinctively ‘weakened’ model of judicial review, according to which legislatures enjoy formal authority to over- ride court decisions simply by way of ordinary majority vote. The aim of this model is also to address long-standing 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 ef- fectiveness 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 deci- sions having any truly final status, and it yet responds to widespread blockages in modern legislative pro- cesses. For courts to play this role effectively, however, they will often need to have quite broad and strong
This panel tackles the different ways in which the Court of Justice of the European Union (CJEU) contributes to solving the national social justice issue in the EU. These range from the definition of what justice is, to the role of the CJEU in the national level. In the EU, the CJEU has the competence to foster justice within the EU. The panel is particularly relevant in the context of economic, social, and political rights. It is not the CJEU’s responsibility to constitute justice within the EU. The role of the CJEU in this context is to provide a framework for evaluating national referendums, including those that deal with the redistribution of wealth and welfare.

Participants
Leticia Diez Sánchez
Betül Kas
Martijn van den Brink
Inira Domurat
Moderator
Martijn van den Brink
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. The paper argues that (a) the case law of the CJEU can be seen as a manifestation of the social conflicts at the core of EU law, and (b) the manner in which the CJEU resolves such conflicts can be seen as an expression of different theories of distributive justice. To provide a legal basis for evaluating national referendums, a particular interest is given to the CJEU’s responsibility to constitute justice within the EU. The panel is particularly relevant in the context of economic, social, and political rights. It is not the CJEU’s responsibility to constitute justice within the EU. The role of the CJEU in this context is to provide a framework for evaluating national referendums, including those that deal with the redistribution of wealth and welfare.

Maya Hertig Randall: Taming the Demons Through Courts? The example of Swiss Departation Initiative

Sergio Gerotto: Direct Democracy and Liberalism: Can Illiberal Elements be introduced via Referendum?

Tomás de la Quadra-Salcedo Janini: Jurisdictional Controversies on Referenda: The Spanish constitutional system

Marta Takacs: 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 explores 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, highlighting how the substance of such a European legal order can replace the national legal orders with their competence to establish a social welfare paradigm but supplement them. It will be argued how the legitimacy-gap of the judge-made legal order built up by the CJEU can be closed by the CJEU acknowledging the political struggles underlying the collective disputes before it and by engaging in an open balancing of the various interests at stake.
During the last two decades, the ECtHR’s traditionally 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 the 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 paper 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 European Convention on Human Rights (ECHR) system as it encompasses both theoretical and empirical analyses. This paper authors by lawyers and political scientists.

Participants
Jan Petrov
Oyvind Stiansen
Anne-Katrin Speck
Nino Tsereteli
Moderator
Andreas Fallesdal
Room
7C-2-24

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 concurs 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 form part of the implementation process. In particular, I discuss the clarity, persuasiveness and the level of minimalism/maximalism of the ECtHR’s reasoning, and the remedy that is then offered. This practice is then combined with the ECtHR’s newly developed pilot judgment procedure, which directs 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 ununder-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 European Convention on Human Rights (ECHR) system as it encompasses both theoretical and empirical analyses.

Anne-Katrin Speck: The Impact of the ECtHR’s Increasingly Directive Approach to Remedies on the Supervision of the Execution of Judgments

This paper will present emerging findings from the Human Rights Law Implementation Project, an ESRC-funded research involving four academic institutions (Bristol, Essex, Middlesex and Pretoria) and the Open Society Justice Initiative. Focusing on nine states in Europe, Africa and the Americas, the project is using qualitative research methods to trace states’ responses to (i) selected judgments from the three regional human rights systems and (ii) selected decisions deriving from individual complaints to UN treaty bodies in order to identify and elucidate the factors which impact on implementation. The project starts from the premise that human rights regimes are a complex web in which three interrelated institutional actors, none of which can secure the objectives of the regime alone, but only through their interrelationships. Implementation is seen as depending on a multitude of variables pertaining to the ruling itself, the oversight of its implementation, the domestic constitutional institutions, and external factors. Within this framework the paper will present early findings from research conducted in Belgium, the Czech Republic, Georgia and Strasbourg on the CJEU’s use of 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 socio-economic 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.

The paper thus provides for an analytical framework that can be used for analysing the significance of the international input to domestic implementation mechanisms.

Oyvind 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-related characteristics, and apply Cox regression models estimated on the matched data. The results indicate that indications of measures aimed towards remediating the situation of individual applicants have consequences for later compliance. Thus, the ECtHR’s ability to establish a complementary and cooperative relationship with the domestic level and not as a sign of the Court’s intention to establish a hierarchy within the Convention system. For this purpose, interlocking the domestic and the international level, the Court has employed the guiding structural principles of shared responsibility and subsidiarity. As opposed to the Inter-American Court of Human Rights, the ECtHR has interpreted individual measures as an exceptional remedial power that requires a high standard of judicial justification, applying particularly in cases of serious human rights violations, where only one specific measure was held to redeem the unlawfulness or in cases where systemic and structural deficiencies in the respective domestic institutional setting prevented an effective domestic implementation process.

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 the operation of the Court’s 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 the Strasbourg Court’s Supreme Court judge at the earliest possible date. A combination of these features implies the level of constraints imposed on the State by the Strasbourg Court and sets the starting point for the domestic implementation mechanisms.

The ECtHR’s Changing Remedial Practice – Implications for Legitimacy and Effectiveness

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 rebut concerns of democratic legitimacy that have been raised by domestic actors. For the Court, individual measures serve the purpose to bolster the individual’s position vis-à-vis state power by enhancing the effectiveness and the efficiency of individual measures, and to reinforce democratic legitimacy by enhancing the effectiveness and the efficiency of the Court as the protector of human rights. Despite current setbacks by certain Convention states’ unwillingness to follow the Court’s individual measures, it is argued that the Court has substantially reduced the Convention state’s executory discretion. This development will be analyzed with reference to the Court’s case law.
The aim of the panel is to explore the increasingly central role that courts play in the promotion of policy 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 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 dynamics of the rule of law, human rights promotion, environmental protection, banking supervision, and also provides a view on the powers of EU institutions to pursue these policies.

Panicipants
Valentina Volpe
Kostantin Peci
Elisabetta Morlino
Giusa Bertezzolo
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 systematic 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 illiberal developments? Over the last two decades, 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’s and the ECtHR’s judgment in the case C-286/12. The judgment had at its core the reform of the mandatory retirement age for judges and prosecutors promoted by the Orban 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 Hungarian government tried to take advantage of the ECJ’s judgment to draw the measure. The second part focuses on the ECtHR Grand Chamber case Baka v. Hungary of June 2016. In this case the Court decided on constitutional amendments and legal measures that determined the early termination of the mandate of the President of the Hungarian Supreme Court André Baka. Through such reforms the country violated both the right of access to a court (Art. 6 ECtHR) and the freedom of expression (Art. 10 ECtHR) 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. Relying on the supranational guarantee 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 systemic violations of the rule of law at the national level. It suggests the adoption of a multi-level Pan-European system of dialogue and reaction, although imperfect and yet unfinalized, is emerging on the continent. Multiple actors (domestic and European courts, regional organizations, civil society, the press) are increasingly active and credible actors 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. Accountabilities for violations of human rights are particularly relevant in cases of systemic violations of the rule of law at the state level. The case of the European Court of Justice 2012 in the case C-286/12 concerning the Hungarian judiciary is a crucial example of ruling in this case. The long-standing practice of the ECJ and the ECtHR has been the recognition of the principle of separability of powers, which is the common framework for the protection of fundamental rights generally. The paper will focus on the role of the judiciary in the context of specific proceedings as well as in the course of reform-related discussions. This process is bi-directional with the ECtHR influencing (albeit not conclusively controlling) the audiences’ attitudes and at the same time, displaying some responsiveness to their concerns. Having carefully assessed 129 judgments, adopted between 2004 and 2016 and other related documents, I observe that the strategies for legitimacy management vary, depending on whether the ECtHR seeks to gain maintenance or repair legitimacy. This can be discerned from the language used in the judgments as well as overall dynamics of judicial decision-making: speed, decision-making, timing and case selection both as regards selection of states and of issues). The types of legitimacy (legal, moral, political) and the strategies (constructive or normative responses to regime legitimacy) sought by the ECtHR also vary, inter alia, depending on the preferences of audiences, as anticipated by the ECtHR or expressly voiced by them.

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 rules on environmental protection and judicial review of such decisions. The paper will focus on the role of the judiciary power on granting effective protection against the violations of human rights by corporations. Accountabilities for violations of human rights are particularly relevant in cases of systemic violations of the rule of law at the state level. The case of the European Court of Justice 2012 in the case C-286/12 concerning the Hungarian judiciary is a crucial example of ruling in this case. The long-standing practice of the ECJ and the ECtHR has been the recognition of the principle of separability of powers, which is the common framework for the protection of fundamental rights generally. The paper will focus on the role of the judiciary in the context of specific proceedings as well as in the course of reform-related discussions. This process is bi-directional with the ECtHR influencing (albeit not conclusively controlling) the audiences’ attitudes and at the same time, displaying some responsiveness to their concerns. Having carefully assessed 129 judgments, adopted between 2004 and 2016 and other related documents, I observe that the strategies for legitimacy management vary, depending on whether the ECtHR seeks to gain maintenance or repair legitimacy. This can be discerned from the language used in the judgments as well as overall dynamics of judicial decision-making: speed, decision-making, timing and case selection both as regards selection of states and of issues). The types of legitimacy (legal, moral, political) and the strategies (constructive or normative responses to regime legitimacy) sought by the ECtHR also vary, inter alia, depending on the preferences of audiences, as anticipated by the ECtHR or expressly voiced by them.
Administrative authorities weight and balance the interests case by case and make assessments that often involve economic political and social considerations. Administrative procedures, thus, are necessary to conduct administrative decisions. With regard to environmental issues, however, the administrative ability to effectively compose such interests and generate stable administrative decisions is questioned. National courts, namely criminal courts, often intervene ex post to dismantle the final decisions of the administrative authorities. 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 administrative procedures and decisions to be taken to avoid environmental damage. Public administrations are the guardians of this system. In this context, ex post criminal 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 environmental protection from prevention to evaluation of 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 regulating the setting of the principles and regulating the main administrative procedures instrumental to environmental protection; the second will provide an empirical analysis, comparing three environmental cases in which administrative authorities weight and balance 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 depth of the scrutiny that the European Court of Auditors can undertake and is interwoven with the scope of its auditing powers in relation to a certain body. With regards to the ECB or the SSM, the Statue 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 Regulation. There can be thus different interpretations concerning the powers of the European Court of Auditors and the obligation of the SSM to provide information in relation to such supervisory tasks. These interpretations have to take into account the independent role of the SSM in performing the supervision of banks as well as the scrutiny of the ECB. Market 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 of the SSM to perform its supervisory tasks in order to perform its supervisory tasks. The paper also reflects, more generally, on the impact that a more or less intrusive scrutiny of the European Court of Auditors may have on the banking sector and on financial stability.

Giulia Bertezzolo: Access to information and auditing 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 set up under 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 protection of fundamental rights, vis-à-vis EU authorities, that are guaranteed in the context 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 Justice provide for adequate protection of private parties, given the growing spread of this model of enforcement 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, setting an information 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, and questions its compatibility with the standards set by the European Court of Human Rights.

Mauro 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 proceedings, 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 inspections 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-à-vis EU authorities, that are guaranteed in the context 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 Justice provide for adequate protection of private parties, given the growing spread of this model of enforcement 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, setting a 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, and questions its compatibility with the standards set by the European Court of Human 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 family. From abortion to assisted reproduction, the free circulation of services is disrupting national efforts to regulate surrogate motherhood, post mortem insemination, and same-sex parenting. The CJEU has developed an extensive body of case law on the question of whether equality is anchored in the European Court of Human Rights. 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.

Participants
Julie Suk
Stéphanie Hennette-Vauchez

Ivana Isailovic

Moderator
Mathilde Cohen

Room
7C–2–12

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 Europe that emerged after World War II. Drawing on the Weimar Constitution of 1919 postwar constitutions 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 panel examines the transitive scrutiny of the European Court of Auditors and how constitutional courts are adapting these provisions for twenty-first century working parents. The relationship of this evolution to EU interventions on pregnancy, maternity, and gender equality will also be explored.

Stéphanie Hennette-Vauchez: Gender Reproduction and Freedom of Circulation

This paper illustrates the ways in which biomedical law and its related INRFs (in particular) increasingly 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 insemination in France) have been in part circumvented through the exercise of the free of movement of persons, even though explicit references to EU-grounded fundamental economic freedoms re-
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-

art triggers. In particular, it looks at the increasingly

natural and principled approach of legal regulations on biomedicine that takes place in reaction to what is framed as excessive and uncontrolled commodifica-

tion 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 proj-

ect – 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. The project on the impact of the ECtHR religion-related jurisprudence in national and religious worldviews. In light of scholarly debates questioning the direct effects of cases, this panel reflects research focused on devel-

opments that take place in ‘the shadow’ of the ECtHR.

It engages especially with the extent to which ECtHR
decisions define the ‘political opportunity structures’
and the discursive frameworks within which citizens act to what we learn about the relevance and mobiliz-
ing potential (or lack thereof) of the ECtHR’s case law when examining its uses (or lack thereof) in national/local level case law? The proposed panel explores this question by drawing on empirical research conducted 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’s case law on the grassroots level (Grassrootsmobilisation).

Margarita Markoviti: Religious pluralism and

Grassroots Mobilizations in Greece: The dif-
certent 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 (ECtHR) decisions around religion 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. Drawing 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 uses and repercussions of ECtHR 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 Alberta Giorgi: A two speeds impact? Italy religiously motivated claims and the European Court of Human Rights

Italy, as other countries, has recently developed a complex 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 claimants 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-
cnical aspects, the decisions of the Strasbourg Court provide also an environment for discursive narratives 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 interviews, we assess how and to which extent claims based on provisions of the Convention and decisions of the Court have contributed to mobilization and out-
comes in national courts. We find that secular actors have been more willing to mobilize on the basis of arguments based on the use of supranational and European norms.

Mihai 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 (‘ECtHR’ or ‘the Court’) has recently become arguably the most visible international court in Romania, its legitimacy hard to contest. The use of ECtHR 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 ECtHR’s visibility. This paper invest-

gin-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
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:

The interpretive shifts in constitutional case law, systemic weaknesses 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), right to elect and to be elected (Mehmet Özgüç), and impact of rights-based approach of the Constitutional Court on Court of Cassation (Sümeyle Elif Biber).

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

Sümeyle Elif Biber: The Impact of the Individual Complaint Case Law of the Constitutional Court on the Judgments of the Court of Cassation: Learning Experiences

Christopher Kuner: Third-country legal regimes and the CJEU

Recent case law has given the CJEU an unprecedented role in rating the adequacy of data protection standards in third countries. The CJEU is the ultimate authority 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 provisions in 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.

Is the “uncontrolled” and “growing power” of Supreme Courts and Constitutional Courts so obvious? Are there not elements which show that the power of courts is not so absolute as their detractors present it? When we look at the concrete institutional environment and the political dynamics embedding Supreme Courts and Constitutional Courts, how can we describe the real “independence” of the Courts and what real margin of autonomy in their organisation and communication can the Courts derive from it? The purpose of the panel is to move beyond a static analysis of the power of Supreme Courts and Constitutional Courts as a disembodied power. It aims at qualifying the assumed strong normative power of these Courts and thereby at putting into perspective the “counter majoritarian difficulty” by contextualising it in a particular institutional environment and dynamics. It aims at portraying the independence of Supreme Courts and Constitutional Courts by taking into account their political environment and by looking at their communicative tools to see how they self-portray their position in the balance of powers. The speakers – guided by a preliminary questionnaire – will, first, analyse institutional procedures and resources of Supreme Courts and Constitutional Courts. Second, they will concentrate on tools and techniques of communication of courts, e.g. annual reports, press releases, annual case law collections, etc. The hypothesis here is that those techniques are of special importance for portraying themselves and their interactions with the other powers.

Sophie Weerts: Annual reports as indicators of the Independence of the Swiss Federal Supreme Court and the Supreme Court of Canada

Dr. Sophie Weerts (University of Neuchâtel/Uclouvain) will discuss the impact of Parliament and Government in the administration of Supreme Courts in light of the implementation of tools of New Public Management on the Swiss Federal Supreme Court and the Supreme Court of Canada.
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 dimension of the judiciary with special reference to insights provided by contemporary political theory which, we claim, remains an underused 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.

Søren 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 question of legitimacy or, more precisely, of the court as a whole with regard to the law and the state. To analyze this question, a concept of the subjectification of the law will be developed on the basis of Levinas’ phenomenologically sustained philosophy according to which subjectification is the result of an encounter with the entirely other, the Other. It is argued that the subjectification of the law and of the state raison likewise depends on an encounter with non-law without which law would remain for-itself. Then, not only the law but also the state would be at risk of becoming totalitarian. Whereas such encounters between law and non-law are only poorly facilitated within administrative law, courts offer a more adequate scene for the law and the state represented by the judge to encounter the Other in the shape of the unique and concrete case and its parties. Without the judicial process the law therefore would be at risk of remaining for-itself and thereby lose its legitimacy. This realization opens up towards the question of the legitimizing role of international courts and tribunals: Do such courts and tribunals ensure the necessary encounter between law and non-law? And is there in fact a need for international courts and tribunals to have such a legitimizing function?

Julien Etxabe: Courts and the Authority of the Dialogical

The twofold challenges of the countermajoritarian difficulty and the judicialization of politics worldwide make the legitimacy of courts ever more necessary, albeit no less complicated. In this presentation I focus on the phenomena of “judicial dialogues” (i.e. cross-fertilization, judicial borrowing, uses of comparative and foreign sources), which has come to the forefront in recent years. Departing from authors who have analyzed this phenomenon in an international context (Slaughter, Jackson, Tushnet, Choudry, Bobek), I rely on a rather specific notion of dialogue borrowed from philosopher and literary theorist Mikhail Bakhtin. Whereas Bakhtin famously presented the dialogical against a monological style of discourse – in the arts, sciences, religion, philosophy and the law – I adopt a narrower definition of dialogism as the kind of utterance internally constituted by many and opposing voices. Dialogism is thus a form of authority that appears to us as constitutive of the self. In the talk I will elaborate on examples from the European Court of Human Rights, where the dialogical ushers new forms of authority and legitimacy. Unlike the principle of deference, based on the identity of autonomous and clearly demarcated spheres of action the dialogical is profoundly inter- (as well as intra-) penetrated. Most importantly, and contrary to the communicative ideal of dialogue, dialogism is characteristically confrontational and polemic, which is to say political.

Massimo Fichera: Transnational Courts and the Image of Conflict

The relationship between transnational courts is often portrayed as a conflict relationship either in terms of conflict of laws (private international law), or in terms of cross-border dialogue, or in terms of constitutional tensions between organs claiming ultimate authority according to the criteria and paradigms belonging to their own legal system. While cross-references and mutual influence are very much a part of transnational law today, endogenization and self-assertion are also increasingly detected. Yet, conflict is mostly seen as an integral part of law, entirely manageable through legal rationality. This paper seeks to redefine the image of conflict as not only an essential aspect of transnational law, but also one of the key indications of the “return of the political” within the broader phenomenon of transnational integration. It will focus on the interplay between the Court of Justice of the European Union (CJEU) and national constitutional courts as an emblematic example. The aim is not merely to show the pitfalls of the liberal paradigm expressed in the development of transnational law, but also transnational law’s evocative and transformative character – always already intimating the manifold possibilities disclosed by alternative visions of the Real. Courts are thus always called upon to stand as the gatekeepers of parallel worlds, and the choice among these worlds ought not to be necessarily predetermined.

Panu Minkkinen: The Whirlwind of Rights?: Claude Lefort’s Radical Phenomenology of Human Rights and Judicial Politics

Unlike their Anglophone counterparts, French representatives of the so-called ‘post-Marxist’ or ‘radical democratic’ movement have often entertained a more optimistic view of the revolutionary potential of human rights. Whereas in the English-speaking world human rights are often seen as (yet) another neo-liberal ploy, the French have considered human rights more as a challenge to the very same neo-liberal regime. After decades of Marxist human rights criticism, the discussion in France took this decisive turn in 1980 with Claude Lefort’s seminal article ‘Politics and Human Rights’. This paper attempts to, first clarify the position of human rights in Lefort’s unique blend of phenomenologically and psychoanalytically inspired political theory. Human rights, as human rights, more generally, are an integral element in the ‘savagery democracy’ that Lefort envisioned as the only plausible challenge to neo-liberal totalitarianism. From this starting point, the paper will then continue to discuss the position of the judiciary in contemporary democracies. Standard accounts of the separation of powers reduce the courts’ constitutional functions to the application and interpretation of laws passed by an elected legislator. But as the relationship between the legislative branch and the executive has changed, so too has the relative position of the judiciary.

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Massimo Fichera: Transnational Courts and the Image of Conflict

The relationship between transnational courts is often portrayed as a conflict relationship either in terms of conflict of laws (private international law), or in terms of cross-border dialogue, or in terms of constitutional tensions between organs claiming ultimate authority according to the criteria and paradigms belonging to their own legal system. While cross-references and mutual influence are very much a part of transnational law today, endogenization and self-assertion are also increasingly detected. Yet, conflict is mostly seen as an integral part of law, entirely manageable through legal rationality. This paper seeks to redefine the image of conflict as not only an essential aspect of transnational law, but also one of the key indications of the “return of the political” within the broader phenomenon of transnational integration. It will focus on the interplay between the Court of Justice of the European Union (CJEU) and national constitutional courts as an emblematic example. The aim is not merely to show the pitfalls of the liberal paradigm expressed in the development of transnational law, but also transnational law’s evocative and transformative character – always already intimating the manifold possibilities disclosed by alternative visions of the Real. Courts are thus always called upon to stand as the gatekeepers of parallel worlds, and the choice among these worlds ought not to be necessarily predetermined.
Towards a Normative Justification for Constitutional Unamendability

Yet, while there are numerous countries in which this issue is considered a matter of constitutional importance, two elements dominate the debate. The first is the organic justification, which is based on the idea that every constitution has an unamendable core, through which it protects the democratic will at the founding moment. The second element is the constituent power that is the author of the constitution. Through Carl Schmitt’s distinction of the constituent power and the constituted powers and the French distinction of pouvoir constituant and pouvoir constitutionnel, the organic justification discerns how the organic justification rests on the understanding of ‘democratic decisionism’ which fervently favours the constituent decision over constituted politics and thus sees the doctrine of unconstitutional constitutional amendments as the protection of democratic decision from the contingent and temporary democratic majorities. By definition, the organic justification focuses on the underlying principles of constitutions, yet it is hardly interested in what these principles should be. Consequently, it serves to justify 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 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 constitutionalism, the normative justification aims to uphold the very idea of constitutionalism, by selectively and minimally justifying only the limitations on the constitutional amendment power that are not necessarily arbitrary exercise of governmental power. Offering a value test for the constitutionality of a polity, rather than defining the constitution as the embodiment of the democratic will at the founding moment, it argues that the courts either lack legal power to make the constitutional amendment 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 of many jurisdictions that their courts are among the major agents of constitutional change and that, in some circumstances, they are the main agents. However, this conflicts with widely held intuitions among lawyers of many jurisdictions that their courts either 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 of many jurisdictions that their courts are among the major agents of constitutional change and that, in some circumstances, they are the main agents. However, this conflicts with widely held intuitions among lawyers of many jurisdictions that their courts either 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 of many jurisdictions that their courts are among the major agents of constitutional change and that, in some circumstances, they are the main agents. However, this conflicts with widely held intuitions among lawyers of many jurisdictions that their courts either lack legal power to make law of such great significance as constitutional law.
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, memory, and new institutional settings, often overriding 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 IACtHR case law. Papers presented in the panel address both normative issues and empirical evidence of their impact, discuss cycle of 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 IACHR State organs and civil society. In this virtuous cycle States made human rights and their protection by the IACHR 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 acceptance will be guided by 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.

Participants
David Kosar
Ximena Soley
Antoine Buyse
Martin Krygier
Moderator
David Kosar
Room
BB-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 trial: investigate-prosecute-punish. This push for more accountability and for TJ as 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 harm 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 TJs 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 case law 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 Transnational Justice as Identity-Forging Moment in the Inter-American System

This paper offers an alternative narrative of the Inter-American Court of Human Rights (IACHR) and transitional justice. Instead of describing how the IACHR 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 IACHR State organs and civil society. In this virtuous cycle States made human rights and their protection by the IACHR 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 acceptance will be guided by 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 regimes. The weakening of democratic rule of law and human rights in a number of European countries turns 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. The question is not just to what extent 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
Thomas Streinz: Advocates of EU Law: The Advocates–General at the Court of Justice of the European Union

The Advocates–General (AGs) at the Court of Justice of the European Union (CJEU) are a unique feature of the supranational judicial system. They assist the Court “with complete impartiality and independence” by providing individual and reasoned Opinions which influence the EU law discourse both within and outside the CJEU. To shed light on the role of the AGs, I advance three distinctive yet interrelated claims. The first is institutional: While it is true that the AGs were modeled after their French counterparts at the Conseil d’État, their role at the CJEU is markedly different because of the specific character of EU case law production in Luxembourg. The second is theoretical: The Opinions of the AG, while non-binding, are an important legal resource whose authority depends entirely on their persuasiveness. The third is descriptive and challenges the most persistent myth about the relationship between the Court’s judgments and the AG’s Opinions. It is a misconception to think that the Court follows the AGs. Attempts to gauge their influence via this metric are misguided. Only a careful, contextual analysis of the legal discourse between AGs, judges, and academia, reveals how the AGs have shaped EU law as “Advocates of EU Law”.

VANESSA MCDONNELL: SOCIAL SCIENCE EVIDENCE AND QUASI-CONCRETE/QUASI-ABSTRACT CONSTITUTIONAL REVIEW

Scholars tend to characterize constitutional cases 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 changes in 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/or unfairness? Can they be said to expand access to courts for equality-seeking groups or are they a poor substitute for better-coordinated legislative law reform efforts? I examine some of these questions in this paper.
ConCurring panels

This paper argues that proportionality analysis is essential to the transparent adjudication of modern rights conflicts within mature constitutional cultures. But the context sensitivity that features prominently in proportionality analysis must be accompanied by an approach that effectively supports adjudication of social or legislative facts. Social facts are not historical or 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. 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 information, and a diluted notion of expertise has led to a new 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. 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.

Narratives in Constitutional Adjudication

The analysis will provide then a first description of what 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/ expert knowledge necessary to adjudicate on proportionality grounds by two different means: one by analyzing what the Plenary Chamber explicitly said about this matter in resolving the 2009 HIV amparos (where the Court stroke down the Mexican Army regulations ordering the expulsion of HIV-positive personnel). And second, by analyzing what the Court has actually done — without never again theorizing specifically about the matter — in recent high-profile proportionality cases such as the one on the recreational use of marihuana. In general, it is clear that the Court is struggling to find new paradigms for addressing proportionality in the amparo setting. The core concern is the need to develop a new channel for proportionality cases, and the project’s core concerns look in an “intermediate” system and set the grounds for future comparison of adjudication exercises on the same issues in Colombia, Argentina, and Brazil.

Thomaz Pereira: The Relationship between Historical Facts and Culturally Dominant Historical Narratives in Constitutional Adjudication

This paper argues that proportionality analysis is the dominant model for human rights adjudication around the world. However, if the broad role and structure of proportionality enjoys wide support, the normative content of the steps and its precise relation to legality and legitimacy is subject to harsh disagreement. In response to developments in the practice, the theoretical literature on proportionality has recently offered various accounts of the substance and principles that should govern the application of the test. Yet theorizing runs the risk of detaching conceptual refinements to the proportionality test from the contexts within which they have emerged which may result in a contextual fault line between theory and practice.

Participants

Matthew Kumm
Jannke Gerards
Alain Zysset
Moderator
Matthew Saul and Alain Zysset
Room
9A-3-17

Matthew Kumm: Legitimate and Illegitimate ways of avoid Proportionality in Rights

This paper has been claiming that the idea of rights is analytically connected to proportionality and proportionality analysis has become the dominant paradigm used by courts, there are contexts in which proportionality analysis is avoided in practice. The paper presents examples of legitimate and illegitimate ways and situations in which courts avoid proportionality analysis.

Jannke Gerards: The specificities of proportionality by the European Court of Human Rights

The test of justification applied by the European Court of Human Rights (ECHR) is often mentioned as one of the most significant and representative examples of proportionality review. It is far from clear, however, what the ECHR’s balancing and proportionality rhetoric really entails. Not only does the ECHR use a number of proportionality tests which do not have any clear and well-established meaning — such as the ‘pressing social need test’ or the ‘relevance and sufficient test’ — but also it appears to apply such tests rather randomly and inconsistently. Moreover, when a closer look is taken at the ECHR’s reasoning, arguments of proportionality often appear to play a limited role in determining the Court’s judgment on the quality of the process of decision-making underlying an interference with a Convention right, or the ECHR may simply review the compatibility of a measure against specific requirements and standards it has defined in previous case-law. In this light, this paper firstly aims to provide a brief typology of the different modalities and functions of proportionality review by the European Court of Human Rights. Secondly, it will try to explain the specificities of the Court’s proportionality review by connecting them to the particular context in which this Court has to do its work. In combination the typology and its contextual explanation will highlight the contingency of this Court’s proportionality review, and, thereby, confirm the reasoning that there is no such thing as a uniform or generic set of standards for proportionality.

Alain Zysset: Freedom of Expression the Right to Vote and Proportionality at the European Court of Human Rights: An Internal Critique

This article offers an internal critique of the European Court of Human Rights’s deferential approach to the content and limits of the right to vote (under the right to free and fair elections, Article 3 of Protocol 1 ECHR). Rather than imposing an independent theory of democratic rights, my critique is internal as it relies on the Court’s own conception of democracy developed under Article 10 (freedom of expression) and 11 (freedom of reunion and assembly). I use democratic theories to show that the Court’s deferential approach to democracy is an utmost concern for political inclusion and that this conception is systematically used by the Court to balance alleged interferences with Articles 10-11. I then argue that this concern has implications for the Court’s approach to proportionality. Declaring the complementarity between expression and vote, under P-1, the Court refrains from balancing interferences and limits its review to proportionality stricto sensu. I argue that it should do so based on its own cherished and substantive democratic principles.

Matthew Saul: Proportionality: a theory for courts and legislatures?

The theory of proportionality analysis targets the judicial context. Should more theoretical attention be given to proportionality analysis in the legislative context? This paper examines how varying the structure and content of judicial proportionality analysis informs the intensity of subsequent legislative processes. The main focus is on process tracing of three adverse judgments from the ECHR against Norway: Folgero, TV Vest, and Lindheim. To the extent that the ECHR is influencing the intensity of legislative processes, it is potentially spreading its model of proportionality across national contexts, strengthening the democratic model and high compliance rate make it a most likely case study for finding evidence of judicial impact on legislative processes and for illuminating the causal mechanisms. The findings provide a basis for reflecting on the need for a new ability to turn attention to legislators and whether this should be as part of a general theory of proportionality or a legislative theory of proportionality.
The panel aims to explore the relationship between Constitutional/Supreme Courts and Parliaments as far as electoral laws (in the broad sense) are concerned. Especially in Europe, the crisis of political systems seems to determine as side effect an increase of constitutional litigation over electoral laws. The impact of those controversies on Constitutional and Supreme Courts’ role is worthy of investigation also in light of the more general political tensions that are moving the European scenario. The five papers will address how constitutional and/or supreme courts engage in the regulation of elections, from both a descriptive and a normative perspective. The papers will cover selected European jurisdictions (namely Italy, Germany, Hungary), which have been chosen because they represent examples of courts’ intervention in the dynamics of political competition in times of highly adversarial parliamentary debates. In those cases, Courts counterbalance the lack of ordinary solution of political conflicts thus positioning themselves in a somehow extraordinary position (from the point of view of the pure Kelsenian model of constitutional adjudication) as ultimate guardians of the democracy. The European examples are coupled with the analysis of the US Supreme Court case law.

Participants

- Mathew John: Framing Religion in Constitutional Law: A View from Indian Constitutional Law
- Toon Moonen: Ordering the executive what to do and how to do it: separation of powers in enforcement issues impact court authority?

**Participants**

- Hans-Martien ten Napel
- Mathew John
- Toon Moonen
- Paolo Bonini
- Moderator
- Elena Griglio
- Room
- 8A–3–4–5

**Hans-Martien ten Napel: In Defense of the Classical Liberal Conception Regarding Religious Freedom**

Leading U.S. scholar of constitutional interpretation Michael Paulsen has developed an interesting theory of religious freedom called ‘The Priority of God’. Paulsen distinguishes, first of all, a liberal conception of religious freedom, according to which it is widely assumed that religious truth exists in a society and the state is tolerant towards the various faiths and other traditions. The U.S., however, has developed in the direction of a modern conception of religious freedom, which no longer recognises religious truth although the state remains tolerant. Moreover, still according to Paulsen, several European countries have adopted a postmodern conception of religious freedom. This conception does not just no longer recognise religious truth, but also implies a considerable lack of tolerance as secularism becomes the established ‘religion’. This view paradoxically resembles the pre-liberal stance of religious intolerance out of the conviction that religious truth exists. In response to such developments and in light of the meeting’s general theme with special attention to the role of courts in achieving this, the proposed paper will make a case for the classical liberal position with respect to religious freedom. In light of the current religious diversity in society, this position still stands to be considered a less tolerable state as secularism becomes the established ‘religion’. This idea that the interpretation and implementation of fundamental rights raises the executive-legislative balance of powers, as set in legal provisions of binding force (usually at constitutional level), is open to politics and to the political reconciliation of disagreements. It specifically intends to assess the executive-legislative interaction in international affairs, approaching it as an instrumentally political dimension shaped by relational notions that struggle to be defined legally: influence, scrutiny, oversight, accountability. The political salience of the executive-legislative relationship in international affairs raises a myriad of questions on the feasibility of judicial interpretations, as in Miller. Two arguments, respectively dealing with the constitutional significance of the confidence relationship and with the risk that a judicial interpretation may fall short of expected outcomes, are specifically taken into consideration.

**Mathew John: Framing Religion in Constitutional Law**

Modern constitutions are texts of power that framed to make explicit claims on vast swathes of social and cultural life, religion being no exception. Against this background the essential matter for this paper is the state explicit power to regulate religion and even to reform ethically deformed aspects of religious practice. These powers are justified on the grounds that they are vital to shape the ethical horizons of constitutional practice but more importantly for the present purpose it also opens up considerable room for judicial intervention and management of religious questions. Therefore instead of taking the traditional route of examining the legitimacy of judicial intervention in matters of religion this paper explore the claims on religious practice that are facilitated by constitutional design and judicial intervention. Accordingly it will be argued that epistemic frames that Indian courts employ to characterise religion are a misrecognition that transforms religion understood as traditions of practice and ethical striving into practices founded in dogma and doctrine. Thus through the Indian case the paper foregrounds the extent to which contemporary debates on religious freedom are driven by constitutional design and the epistemic frames through which judiciaries manage the challenges raised by religious freedom rather than a simple commitment to the norm of non-interference.

**Elena Griglio: Judicial interpretation of the executive-legislative balance of powers in international affairs and its limits**

The R (Miller) v Secretary of State for Exiting the European Union case of judicial engagement by the UK Supreme Court offers a significant case of judicial interpretation of the relationship between the Parliament and the Government. The case deals with the question of how to set the executive-legislative balance of powers in core areas of regulation. The question-making on a major theoretical issue affecting the relationship between constitutional law and politics. A part from the Miller case, the proposed paper intends to discuss the idea that the interpretation and implementation of fundamental rights raises the executive-legislative balance of powers, as set in legal provisions of binding force (usually at constitutional level), is open to politics and to the political reconciliation of disagreements. It specifically intends to assess the executive-legislative interaction in international affairs, approaching it as an instrumentally political dimension shaped by relational notions that struggle to be defined legally: influence, scrutiny, oversight, accountability. The political salience of the executive-legislative relationship in international affairs raises a myriad of questions on the feasibility of judicial interpretations, as in Miller. Two arguments, respectively dealing with the constitutional significance of the confidence relationship and with the risk that a judicial interpretation may fail short of expected outcomes, are specifically taken into consideration.

**Toon Moonen: Ordering the executive what to do and how to do it: separation of powers in enforcement issues impact court authority?**

Across the globe, courts review executive branch decisions in an increasing number of areas, even foreign relations. We know this as judicialisation of politics. Using South African case law as an example, I will examine whether courts’ intervention relating to the relief a court can grant. Depending on the case, courts engaging in concrete review have a variety of options. On one end of the spectrum, the judge en
in terms of ensuring equality and legal certainty in the protection of human rights.

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, indigenous people, and detainees. Human rights advocacy is closely tied to civil society groups, organizations, and institutions, such as the Inter-American Commission of Human Rights, which pursue 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 examine 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 states 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 courts!

Marlene Wind: Who cares about international law?
Although Scandinavians are often celebrated as the vanguards of human rights and international law, we make an empirical study of how these countries have embraced those 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 more resistant approach to international case law than would normally be expected from this region in the world.

Juan A. Mayoral: Mapping the scholarship in International Courts: An exploration of networks created in the face of the COVID-19 pandemic
The paper explores the development of the inter-disciplinary communities of knowledge devoted to the study of International Courts. For that purpose, and following previous contributions in other social sciences, we present the expected information about co-authorships up to 2018 from the core journals in law, political science, history and international relations. The papers aim to offer a general overview of the main links between actors and of the main scholars and journals leading the production of knowledge in the field. Moreover, the paper explores the different sub-networks organized by type of court, discipline and academic institution to identify processes of cross-fertilization between the scholarships in International Courts.

Natalia Caicedo and Andrea Romano: International Courts dealing with the concept of vulnerability: the different approach of the IACHR and ECtHR
Vulnerability as a criterion for allocating rights is an emerging legal concept both in EU and Latin American experiences. It has been progressively used to enhance protection of groups with special needs such as asylum seekers, minors, persons with disabilities. Both the IACHR and the ECtHR have taken into account vulnerability with the aim of identifying positive obligations for national institutions. However, whilst the IACHR has made a broad use of this concept, developing an objective interpretation of situation of vulnerabilities so that this can be applied to a wide categories of persons (including irregular migrants, political opponents or homeless) and taking particularly into account collective conditions of risk. On the contrary, the ECtHR seems to have adopted a more cautious attitude, identifying vulnerability in concrete and subjective situations of the individuals at stake, avoiding identifying wide categories and applying vulnerability in circumscribed hypothesis. In this paper we will compare the approaches of both courts, trying to understand their different use of this concept, asking whether this is a fractuous category or – on the contrary – it may entail counterproductive effects for the protection of human rights.

155 CHALLENGES UNDER THE ISRAELI’S CONSTITUTION
Tamar Hostovsky-Brandes: The Diminishing Status of International Law in the Israeli’s Supreme Court Rulings Concerning the Occupied Territories
This article examines the attitude of the Supreme Court of Israel towards international law focusing on the application of international law in the Occupied Territories in the past decade. The article argues that while the Israeli legal and political system still operates officially as the governing law in the territories, the emphasis on compliance with the norms of international law in the Courts’ decision has weakened, leaving a void filled, among other things, by Israeli constitutional law. The article suggests that this shift can be partially explained by changes in the Court’s self-perception. The paper uses two methodologies. First, the paper examines changes in the past two decades in the diversity of the Israeli Judiciary and the Prosecution. As shown in the paper, the prosecution did not include even a single Arab prosecutor as recently as about two decades ago. Through active policies of reaching out to the Arab minority, the prosecution is now increasing its representation as several Arab judges have been appointed to the various courts. Second, the paper delves into the history of attempts to increase judicial diversity in Israel. As shown through archival sources, in the first 20 years of Israel’s existence, between 1948 and 1968, it appointed only three of the Arab citizens who are entitled to vote in the 1969, Israeli appointed three additional Arab judges. Two interconnected changes account for this small increase in judicial diversity. First, in the 1960s the Arab legal elite began to exert pressure on Israeli officials to appoint Arab judges. Second, and perhaps partly due to this pressure, the Judges Appointment Committee made the concern to have a diverse judiciary a top priority. This paper shows that without outside pressure, the Judges Appointment Committee does not prioritize judicial diversity as a top priority. The judiciary should seek to adopt the relevant active employment policies of the Prosecution.

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 the Israeli judiciary to be a pillar of the nation, citing its role as the guarantor of national and social cohesion, and its staunch defenders of human rights and democracy. Other scholars situate themselves in the comfortable area that combines praise to the Court’s ruling with mild criticism. More critical and less celebratory accounts explain the institutional deadlock when it comes to Israeli extra-territorial constitutional application is the Schmittian “friend/enemy” distinction, which is the only distinction concerned more with the machinery of the state than with individual rights.

Guy Lurie: Diversity in the Israeli Judiciary and Prosecution: The Case of the Arab Minority
This paper examines the diversity of the Israeli Judiciary and Prosecution, focusing on appointments of judges and prosecutors from the Arab minority. The paper uses two methodologies. First, the paper examines changes in the past two decades in the diversity of the Israeli Judiciary and the Prosecution. As shown in the paper, the prosecution did not include even a single Arab prosecutor as recently as about two decades ago. Through active policies of reaching out to the Arab minority, the prosecution is now increasing its representation as several Arab judges have been appointed to the various courts. Second, the paper delves into the history of attempts to increase judicial diversity in Israel. As shown through archival sources, in the first 20 years of Israel’s existence, between 1948 and 1968, it appointed only three of the Arab citizens who are entitled to vote in the 1969, Israeli appointed three additional Arab judges. Two interconnected changes account for this small increase in judicial diversity. First, in the 1960s the Arab legal elite began to exert pressure on Israeli officials to appoint Arab judges. Second, and perhaps partly due to this pressure, the Judges Appointment Committee made the concern to have a diverse judiciary a top priority. This paper shows that without outside pressure, the Judges Appointment Committee does not prioritize judicial diversity as a top priority. The judiciary should seek to adopt the relevant active employment policies of the Prosecution.
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

Participants Zdenek Cervinek, Caroline Henckels, Jimmy Chai-Shin Hsu, Anne van Aaken
Moderator Anne van Aaken
Room B8-3-33

Zdenek Cervinek: Proportionality and Judicial Self-Empowerment: Empirical Analysis of “Transplanting” Proportionality into Czech Constitutional Court’s Case-Law

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 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 features prominently in recent decisions. Jurisdictions featured most prominently will be Japan, the US, Hungary, South Africa, and South Korea. The dialogue is presented in this paper as an exercise of self-consciously conducted by the courts. I critically reconstitute 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 these transnational judicial decisions, what lessons can be drawn from them? Are certain approaches more tenable than others?

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 relation 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 often underestimated 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 features prominently in recent decisions. Jurisdictions featured most prominently will be Japan, the US, Hungary, South Africa, and South Korea. The dialogue is presented in this paper as an exercise of self-consciously conducted by the courts. I critically reconstitute 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 these transnational judicial decisions, what lessons can be drawn from them? Are certain approaches more tenable than others?

157 A GLOBAL DIALOGUE WITH CONSTITUTIONAL JUDGES: THE I-CONNECT 2016 YEAR-IN-REVIEW

In our present era of “global constitutionalism” reliable access to high court case law has become a necessity for scholars of comparative public law. Language barriers pose an obvious challenge but the sheer volume of case law around the world also raises a challenge of time and resource management. In 2016 I-CONNECT inaugurated a series of year-in-review reports on developments in the constitutional law of various jurisdictions, with a focus on the case law of Constitutional and Supreme Courts. I-CONnect expanded the project in 2017: all reports will be published in a book in order to offer a first-of-its-kind resource for scholars of public law interested in an overview of the case law of Supreme and Constitutional Courts (possibly) all over the world. Edited by Richard Albert, Simon Drugda, Pietro Faragna, and David Landau this annual book is published under the auspices of the Clough Center for Constitutional Democracy at Boston College. In its first year, the Year-in-Review book will cover over 40 jurisdictions. This panel will feature some of the high court judges involved in the Year-in-Review project at the beginning of the academic year in review. It will also provide an overview of the developments in constitutional law in their jurisdictions, and on the value of this project to the study of public law.

Participants Marta Cartabia, Dieter Grimm, Luc Lavrysen, Pedro Machete, Jan Zobec
Moderator Richard Albert and represented by Pietro Faragna
Room B8-3-39

Marta Cartabia: Developments in Italian Constitutional Law: The Year 2016 in Review

Dieter Grimm: Developments in German Constitutional Law: The Year 2016 in Review

Luc Lavrysen: Developments in Belgian Constitutional Law: The Year 2016 in Review

Pedro Machete: Developments in Portuguese Constitutional Law: The Year 2016 in Review

Jan Zobec: Developments in Slovenian Constitutional Law: The Year 2016 in Review
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, and the status of court decisions 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 of a more general character.


In difference 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 since 2001. Therefore, 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 also is a clash between different approaches to the protection of the freedom of the press. The European Court often reasons that freedom of the press is a fundamental right that is part of the ECHR’s right to freedom of expression. This is because the freedom of the press can be enforced not only by national courts, but also by the ECtHR. Consequently, the question whether Tele2 has freedom of the press is answered by the ECtHR, which finds that the Tele2's action is not protected by the ECHR.

**Tormod Otter Johansen: Depending on an Autonomous Concept of Court or Not? Comparative Discrepancies in European Law**

In European law, an autonomous concept of court has been developed in the case law of the CJEU and ECtHR. This concept has a functional and a structural side, combining aspects of adjudicative function and autonomous organisation with the general principles of the right to a fair trial. This means that the legal order is not defined by the ECHR but by the law of the state. In this case, the Swedish law implementing the directive has remained in place. In the Swedish example, the national court has decided that the Tele2 had violated the ECHR's right to freedom of the press. This decision was based on the fact that the Tele2's action was not protected by the ECHR.

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, and the status of court decisions 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 of a more general character.
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 shaped around the minimalist versus the common law tradition. In sum, despite objections and analogies, courts have refused 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 ICDN conference as it shed light on the kind 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 being engaged by public lawyers as to the extent that judges should be involved. Nevertheless, in recent years UK judges have been increasingly ruling on such issues. It is therefore pressing for lawyers to analyze closely how UK judges have been deciding whether one legal norm can derogate from another, and why. In general, it seems that 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 legal system, increasingly courts worldwide 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 capital trials in China in the past decade. Through structured interviews with judges, this paper provides an in-depth analysis of the legal reasoning in those cases where the judges have refused to uphold part or all of the US 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 ICDN conference as it shed light on the kind 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 being engaged by public lawyers as to the extent that judges should be involved. Nevertheless, in recent years UK judges have been increasingly ruling on such issues. It is therefore pressing for lawyers to analyze closely how UK judges have been deciding whether one legal norm can derogate from another, and why. In general, it seems that 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.

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ConCurring panels

ConCurring panels

1993-2015 and whether there has been a period in
Norwegian Supreme Court when negotiating
Nordic Exceptionalism: The Function of the
and guarantees of fundamental rights. Yet there is a
analysis of the existing situation. Thus the influence
answer whether and why the SCC acted as a legislator
in Turkey and up until today, the TCC has delivered
constitutionalism’ which successfully helped establish
democratic standards through the division of power
and guarantees of fundamental rights. Yet there is a
lack of research on its decision making since the ac-
cession of Slovakia to the European Union, and the dif-
fences 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
that allows 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
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 Func-
tion of the Norwegian Supreme Court when negoti-
ing public policies and constitutional rights

Ulás Karan: Constitutional Complaint Proce-
dure in Turkey: An Empirical Research on Suc-
cess and Failure

Since 23 September 2012, individual applications
to the Turkish Constitutional Court (TCC) represent
an additional remedy for the human rights violations
in Turkey and up until today, the TCC has delivered
thousands of judgments and decisions. Although all
the decisions and judgments are legally-binding, in
contrast to European Court of Human Rights (ECtHR),
there is no supervising mechanism for the judgments
of the TCC. Moreover, so far the adherence of the
other courts and administrative organs are unknown.
Although the TCC is responsible for monitoring the
implementation of its judgments, it does not have
any official statistics or any action in this regard. Con-
sidering the ongoing lacunae, there is a need for an
analysis of the existing situation. Thus the influence
of the newly established procedure has not known
yet. The proposed paper, which will encapsulate the
first research that focused on the effectiveness of the
individual application procedure, will seek to explore
the outcomes of judgments of the TCC on individual
applications. Within the scope of the paper, firstly all
judgments delivered by the TCC (circa 1270) finding
at least one violation of rights and freedoms that set
forth in the Constitution until the end of September
2016 will be analysed. Following the analysis, along
with the results of interviews with the applicants or their
counsel, an assessment of the current organizational struc-
ture of the TCC, the results will be summarized in order
to identify de jure and de facto limitations concerning
the execution of judgments of the TCC, together with
providing a new policy and legal framework to enhance
monitoring of the execution of judgments to empower
the effectiveness of the Court.

161 LEGALITY AND LEGITIMATE AUTHORITY

Participants

Nimer Sultany

Gordon Geoff

Nico Krisch

Ayete Berman

Fred Felix Zausmile

Zhai Xiaobo

Tania Atlan

Moderator

Nico Krisch

Room 8A-4-47

Nimer Sultany: Revolution and legality in the
Arab Spring

What is the effect of revolutions on the legal sys-
tem? Unlike Kelsenian emphasis on the rupture in
rules, and Dworkinian emphasis on the continuity in
the scheme of principles, this paper argues that the
relation between legality and revolution can not be
represented in a systematic way. The choice between
legal continuity and revolutionary rupture is a false
binary because the law is not a coherent gapless sys-
tem and thus there are enough resources in the law
for different parties to play it both ways. Taking
the case of Egypt and Tunisian in the aftermath of the
Arab Spring, I argue that the law is incoherent and cannot
be reduced to a singular voice. I examine three lines
of cases that seem to re-enact the binary opposition
between continuity and rupture as a choice between
judicial independence and judicial purification/reform,
and between criminality and exceptionality/ extra-le-
gal. My case study will the Egyptian and Tunisians
debates about reforming the judiciary after the Arab
Spring, the trials of former regime officials and rulers
(like Mubarak and Ben Ali), and the restitution of prop-
erty from corrupt officials and cronies that
were associated with the regime or ruling families. In
all these cases, the essential task for the Binay opposition
between the law and revolution is misleading and hin-
ders an understanding of the choices at stake and the
effects of judicial choices.

Gordon Geoff: Discourses of authority in the
context of backlash: questions of performance
and perception

This paper joins the attention to backlash against
international courts, with an inquiry into issues of per-
fomance and perceived legitimacy in international judicial
judgments. By backlash, I mean reactive opposition to expanding
authorities of international courts and tribunals. By performance,
I mean the choices of vocabularies and arguments deployed in the exercise of authority by
lawyers and judges. By perception, I mean the ways in
which those performances are received. In addition I
also examine the representation of discursive acts of
judges and lawyers by commentators and other court
personnel and the technologies by which those acts
and representations are communicated. In observing
backlash through a discursive prism and its media
technologies, I will interrogate the scope of hegemonic
strategies at play in legal practices and the represen-
tations of those practices as possibly one or more of the
possibilities opened up by the confrontation between exercises of authority representations of those exer-
cises and reactions against either or both. Hegemonic
strategies here include aims to consolidate legal re-
gimes around particular texts with particular
value systems, often by recourse to universalistic or
naturalistic legal vocabularies. Constitutive possibili-
ties here include the constructive potential of backlash
as a form of productive contestation. Hegemonic and
constitutive possibilities may sometimes appear at
odds, and sometimes consonant with one another.

Nico Krisch: Liquid Authority – Accountability
and Law in Global Governance

Most accounts of the law of international organiza-
tions and of global governance are based on an idea
of authority that follows an image of domestic ‘govern-
ment’ but can hardly capture the particularities and
complexity of authority in the global sphere. This paper
recognizes that recent transformations of authority re-
creates this idea of ‘solid’ authority and juxtaposes it
with a notion of ‘liquid’ authority opening up a
continuum of different degrees of viscosity in between.
The paper argues that the analysis of liquid authority,
which is often driven by informal and a multiplicity of
actors is one that can help us to better understand the specific challenges
for accountability, legitimacy, and the construction of
legality we face in the global order.

Ayete Berman: Participation in International
Governance 2.0

Of ways to improve the democratic legitimacy of
international governance, opening-up the state-
based international system to the participation of
non-state actors (e.g. civil society, private sector) has
captured the imagination of scholars, activists and
policy-makers alike: The Global Administrative Law
project stresses the importance of participation in
international governance, as does the One World Trust’s
Pathways to Accountability project. The Sustainable
Development Goals similarly promote participatory
governance, and these are just some of many ex-
amples. The idea that the democratic legitimacy of
international governance can be improved through
inclusion and participation of non-state actors, and, rather, in prac-
tice the evidence is compelling that in the past two
decades international governance has undergone a
tremendous transformation, and non-state actors now

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participate alongside governments in most interna-
tional institutions, be it in traditional IOs, or through
public-private partnerships. My argument in this paper
is that while international governance is opening-up,
and the voices supporting openness remain strong,
the risks associated with the shift are largely being ig-
ored: Participation by non-state actors introduces
risks, such as imbalanced representation of interests
and capture to special interests, potentially undermin-
ning the public interest in the regulation of global public
goods. Understanding these risks, I argue, has the poten-
tial to undermine the integrity of international gover-
nance, such as when corporations use participation
opportunities to influence international rule-making in
a manner that benefits their commercial interests. At
the national level, many states have laws that manage
the risks associated with governments’ collaboration
with private actors, such as lobbying or conflicts of
interest laws. At the international level, such rules are
missing, and lawyers have not devoted enough at-
tention to the development of rules for managing the
risks of participation.

Fred Felix Zaumseil: The Authority of Legality

What role, if any, does the authority of legality play in
the concept of sovereignty? One of the most important
debates that has come up against various legitimacy
risks associated with governments’ collaboration with
private actors, such as lobbying or conflicts of
interest laws. At the international level, such rules are
missing, and lawyers have not devoted enough at-
tention to the development of rules for managing the
risks of participation.

Zhai Xiaobo: Bentham and Legally Limited Gov-
ernment

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 of
and arguments. I will demonstrate that Bentham’s com-
mand 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 theory cannot explain
LLSL. Bentham then developed a theory of legislating in
principes to explain LLSL and international law. I will
offer a detailed account of Bentham’s theory of legislating
in principes, and argue that this theory is a better
explanation of LLSL than Hart’s theory of authorita-
tive reason.

Tania Atliano: The notion of Sovereignty in Mexi-
can after Donald Trump’s election

Since President Donald Trump made announce-
ments about building a wall between the United States
and Mexico President Pería Nieto as well as numerous
authorities of the executive branch have appealed to
the defense of national sovereignty and national inter-
est. After signing the NAFTA and after Mexican for-
eign policy pursued to leave aside it’s “no intervention”
principle reclaiming national sovereignty seemed to
be outdated. Nevertheless traditional notions of sov-
eignty persisted or in other constitutional and political
realms. For example defending “national sovereignty”
was the core argument in the Senate against the Intern-
ational Criminal Court (ICC) jurisdiction by arguing
that the ICC was a threat to sovereignty. Therefore
appeals to national sovereignty are not a new phe-
nomenon but might indeed merge 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 Sov-
eignty might also lead to military control of the Mexican
borders not only in a symbolic sense against Trump’s
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.

ConCurring panels

162 CONSTITUTIONAL REVIEW II

Participants

Tom Hickey
Guilherme Pena de Moraes
Eduardo Moreira
Paula Pereira
Daniel Bogéa
Yen-tu Su
Moderator
Room 8B-4-03

Tom Hickey: A republican alternative to ‘public
reason’ as justification for a more limited form of
judicial review

The ‘public reason’ related defenses of judicial
review claim that the democratic ideals of reason-
giving reciprocity and consensus flourish in court set-
tings, and that judicial review is therefore legitimate. This scholarship has come up against various legiti-
macy or democracy-based objections, but the ones
that have really gained traction are those centering
on the risks associated with governments’ collaboration
with private actors, such as lobbying or conflicts of
interest laws. At the international level, such rules are
missing, and lawyers have not devoted enough at-
tention to the development of rules for managing the
risks of participation.

Paula Pereira: Deliberation and voting in judicial
review

Constitutional Jurisdiction is seen as a con-
temnporary mechanism for making decisions on
matters in which citizens consider it to be of utmost
importance. This is the locus of the most important
debate in contemporary constitutional theory. This
debate is about how, at the political and juridical
levels, we can ensure that the decisions we take are the
right ones, and that they are made in a way that is
democratic and just. The most important results will
undoubtedly be related to the role of contemporary
court jurisdiction in safeguarding democracy
promoting and protecting 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 im-
portance in South America, which can be transplanted
to different constitutional issues. The rigours will
highlight the main aspects of judicial power to recog-
nize unconstitutional situationals 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 re-
construction in affected areas by the Farc’s forced
replacement of people landmark case) and brazilian
prisonal sistema (daily tragedy of prisoners main debate)
are two good examples of unconstitutional state of affairs.
These requirements, objective goals and other judicial
discussion with the others state fields in a long
conversation between constitutional branches and
national structure will be discussed in details. The de-
veloped and all phases of judicial dialogue and it’s
consequent displacements are those centering on the
risks associated with governments’ collaboration
with private actors, such as lobbying or conflicts of
interest laws. At the international level, such rules are
missing, and lawyers have not devoted enough at-
tention to the development of rules for managing the
risks of participation.

Philip Pettit’s recent work as analogous to, but as
explained as such hard cases that demonstrate the
difficulty and necessity to reach this new step in the
judicial public sphere.

Paula Pereira: Deliberation and voting in judicial
review

Constitutional Jurisdiction is seen as a con-
temnporary mechanism for making decisions on
matters in which citizens consider it to be of utmost
importance. This is the locus of the most important
debate in contemporary constitutional theory. This
debate is about how, at the political and juridical
levels, we can ensure that the decisions we take are the
right ones, and that they are made in a way that is
democratic and just. The most important results will
undoubtedly be related to the role of contemporary
court jurisdiction in safeguarding democracy
promoting and protecting civil rights.
The article presents an argument for gender diversity in constitutional courts. In order to recommend distinct 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 narrow, 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 in the decision-making process itself, instead of the results of the court's deliberations per se. The argument aims to prevent the focus from the presence of women and their 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. Gender diversity promises an improvement of the deliberative quality of these institutions. Gender diversity promises an improvement of the deliberative quality of these institutions. Gender diversity promises an improvement of the deliberative quality of these institutions. Gender diversity promises an improvement of the deliberative quality of these institutions.
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 international law in the region. The analysis presented takes as a starting point the results of the EUROCORES research project 10-ECPR-02 International Law through the National Prism: The Impact of Judicial Dialogue. The contributions build on the project results to identify success stories in which the CEE courts contributed to the development of international 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 CEE courts are 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 Czaplińska
Magda Matusiak-Frączak
Karolina Podstawa

Moderator

Anna Wyrozumska and Timea Drinóczki

Room

8B-4-33

Anna Wyrozumska: The CEE Courts’ shaping of international law - the missed and lost opportuni-ties 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. In the analysis, we focus on the CEE courts as one of the most important developments occur, where the courts in their adjudication receive the doctrines of international law and the court systems (including the protection of human rights and the interactions between national constitutions and international law implementation measures, which frequently are defined as worlds apart. The examples will be drawn from the practice of CEE courts within which the CEE courts contributed to the development of international law through engagement in the regional integration affected the behaviour of the courts vis-à-vis international legal problems. The CEE courts are 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.

The protection of human rights and the interactions between national courts and the CEE courts in the shaping of international legal order is adopted underling its different functions, especially conflict resolution and classifies dialogue in regard 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 proposes a generalisation 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 regional engagement in the shaping of international law. The examples will be drawn from the jurisprudence 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 Europe 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 law making 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 CJEU, at least in the medium term, is it reasonable to expect that this judicial saga is a never ending process and ultimately beneficiary from a global perspective?

Joan Barata Mir: Territorial scope of the right to be forgotten: European vs. Global

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 entirely established and previously only applicable 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 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 contentious one - advises that national data protection authorities should act to ensure that在此之前 right not be circumvented, detailing should be applicable not only to EU domains but also to .com domains accessible from the European territory. A step further in this debate has taken place in France, where there is an ongoing legal battle between the data protection authority and Google as the former required that delisting decisions taken in an EU state should be applied at the global level, thus raising a very important dilemma with regards to effectiveness of Internet law. Beyond widely debated freedom of expression and freedom of information implications, the paper aims at exploring how the right to be forgotten – or the right to erasure – presents a series of uncertainties in terms of territorial scope that may lead to future conflicts and contradictory interpretations within the European Union itself. Moreover, the fact that at a global level several states have decided to adopt an EU-inspired regime in this area, while others have clearly rejected the enactment of it, makes this debate particularly open and challenging for legal actors beyond national and regional borders.

Thomas Wischmeyer: Why “Schrems” is a dead end. The false premise of the CJEU’s transborder data flow jurisprudence

The CJEU’s landmark judgments in Schrems has been praised by EU privacy specialists and vilified by U.S. national security lawyers. These reactions could be attributed to the fact that the CJEU has hit a boundary, a line of cases is internally consistent and in line with the new General Data Protection Regulation, in this paper argues that the attempts by privacy advocates to use the CJEU as a tool for challenging the U.S. surveillance architecture are daring and will ultimately let the Court bruised. To this end, it shows that the plaintiff and transatlantic agreements. The CJEU’s model of transborder data flow regulation, which is not only ineffective in light of the current state of global foreign intelligence surveillance, but which might actually be counterproductive for reaching the Court’s goals, i.e. ratcheting up standards in the US, the influences be significant. As a result, the future of data protection personal data. The paper proposes to drop the idea of “safe data spaces” and to strengthen instead the principle of organizational responsibility that is underpinning the SCC and the BCR regimes.

Bilyana Petkova: Domesticating the “Foreign” in Making Transatlantic Data Privacy Law

Research shows that in the data privacy domain, the regulation promoted by frontrunner states in federated systems such as the United States or the European Union generates races to the top, not to the bottom. Institutional dynamics or the willingness of major interstate companies to work with a single standard generally create opportunities for the federal lawmakers to level up protection. Conversely, this article uses federalism to explore whether a similar pattern of convergence (toward the higher regulatory standard) emerges when it comes to the international arena, or whether we witness a more nuanced picture. I focus on the most contentious one – advisor for the United States, looking at the migration of legal ideas across the (member) state jurisdictions with a focus on breach notification statutes and privacy officers. The article 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.

Giovio Enea Vigevani: Privacy and data protection over the top: is there room for a freedom of speech exception?

The important decisions delivered by the Court of Justice of the European Union over the last three years, particularly in the Digital Rights Ireland and Tele2 Sweden cases, do probably amount to a reaction to the overwhelming need of safeguarding national security that led to the adoption of overbroad and disproportionate measures. However, the Google Spain case suggests that, even to a certain degree, the free speech could still constitute, in the digital age, a value that counterweights the right to privacy and data protection, as it was in the ‘world of atoms’, or whether the relationship between these rights may be revised in light of the decisions taken by the Court of Justice and any possible future judgments of the same.

Marco Bassini: Discussant

The paper will draw some conclusions on the points discussed above. Particularly, it will be explored whether the adoption of a new 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.

Andrej Savin: CJEU Case-law on Data Protection and the Extraterritorial Application of EU Privacy Laws on Companies With Business Models Based on Data Flows

In its recent case law, the Court of Justice of the European Union (CJEU) fundamentally changed the European data protection landscape. The CJEU Digital Rights Ireland Google Spain and Schrems judgments annulled the 2006 Data Retention Directive introduced the right to be forgotten into EU law and invalidated the EU-US Safe Harbour Agreement respecting the extraterritoriality of the rules that connect to the cases, not least their CJEU-activist pro-fundamental rights stance, which makes them particularly stand out more than everything else is their extraterritorial effect. The signal that CJEU is sending in each case is that European data protection laws apply to all situations where European citizens’ rights are affected, irrespective of the place of establishment of the company or the location of the equipment. What
The system of constitutional democracy (in which the Constitution is the supreme law and the Tribunal is the 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.

Miroslaw Granat: From Constitutional Democracy to Representative Democracy (Is it Possible to Live without a Constitutional Court?)
This paper discusses the uniqueness of ‘the Polish way’ to judicial review of the constitutionality of the law and the role of the Constitutional Court role in the establishment of constitutional democracy in Poland. In this light it discusses recent challenges to the Court’s authority and their aftermath. Specifically, there has been a return to disputes on who has the final word in a democratic system and whether a constitutional court is needed. In consequence, the importance of 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...
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 will 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 and how the courts have addressed those protections. Can we find patterns, i.e. situations in which equality means 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 conductive to democratic regimes? Answers to this puzzle mostly work with concepts such as non-majoritarian institutions or counter-majoritarian difficulty as well as jurisprudence (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 may 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
ConCurring panels

The constitutional histories of the United States of America, Austria, Germany, and Spain offer examples of the public authorities’ reluctance to the enforcement of the highest courts’ decisions. Prominent cases include judicial resistance to the granting of enforcement powers to constitutional courts as a means to empower domestic courts. However, this function has been taken up by international organizations. Secondly, as mediators between legal spaces, many legal systems witness the revival of civic participation initiatives. Prominent among those initiatives 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 political 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 substantive nature. The rise to prominence of the referendum as a political instrument is largely due to increased litigation before the courts. The [in)famous ruling of the UK Supreme Court on the Brexit-referendum serves 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 entitled to some kind of special deference? And to what extent should courts be considered to enter the political 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 political participation rights. Firstly, although the Court does not review them according to the political participation rights/principles filter. Secondly, political participation rights are enshrined in the Charter, the Court does not review them according to the rights/principles filter. Secondly, political participation rights are indeed individual rights in the classic sense, i.e. correlative of the obligations of public authorities. Thirdly, in performing these obligations the EU institutions 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, sometimes mysterious, powers. One common characteristic of these normative frameworks is that they may invigorate a democracy, particularly at the ballot box. This paper challenges that notion. In particular, it examines a number of jurisdictions that have recently

Chien-Chih Lin: The Wax and Wane of Judicial Power in the Four Asian Tigers

Recent decades have witnessed the rapid growth of judicial power at the expense of the political branches since World War II. This trend of judicialization of politics is so evident that it has been dubbed a government of judges or “juristocracy”. Although the judicialization of politics has swept the world, its development varies from one country to another. This paper focuses on the judicialization of politics in the so-called Four Asian Tigers – that is Hong Kong, Singapore, South Korea, and Taiwan. I suggest that historical institutionalism 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 Singapore is least developed in this regard, notwithstanding their similar economic achievements. South Korea and Taiwan are young and consolidated democracies that adopt civil law system, a legacy of the Japan Empire. In contrast, Singapore and Hong Kong are semi- or competitive authoritarian societies that were former British colonies immersed in common law tradition. Despite similar political and institutional backgrounds, it is intriguing that the judicialization of politics is more intense in Korea than in Taiwan, in Hong Kong than in Singapore. Furthermore, the comparison may shed light on several issues, such as legal transplantation, judicial reputation, and the concept of East Asian constitutionalism.

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Participants

Jerf Uzman
David Kenny
Catherine Warin
Brian Christopher Jones
Ana Cannilla
Catherine Warin: Citizen participation in the post-Lisbon EU democracy: striking the balance between individual rights and political discretion

In a context of growing concern for ensuring democratic 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 Parliament; the right to petition; and the right to submit a European Citizens’ Initiative. This contribution analyses the cases concerning the latter and asks the following 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 political participation rights are enshrined in the Charter, the Court does not review them according to the rights/principles filter. Secondly, political participation rights are indeed individual rights in the classic sense, i.e. correlative of the obligations of public authorities. Thirdly, in performing these obligations the EU institutions 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.

Ana Cannilla: Participation initiatives. Prominent among those initiatives 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 political 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 substantive nature. The rise to prominence of the referendum as a political instrument is largely due to increased litigation before the courts. The [in)famous ruling of the UK Supreme Court on the Brexit-referendum serves 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 entitled to some kind of special deference? And to what extent should courts be considered to enter the political 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.

Catherine Warin: Citizen participation in the post-Lisbon EU democracy: striking the balance between individual rights and political discretion

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Dana Burchard: Multilevel Judicial dialogue at its limits? The challenges to the courts’ role as mediators between the international and the national

During the past decades, courts have been perceived of as mediators between different legal spaces. Although this function has been taken up by international and supranational courts as well the bulk of the mediatory initiative has been with the domestic courts. Judicial dialogue has developed into a somewhat unilateral endeavor. As a result, judicial dialogue is facing considerable challenges. Domestic courts have started not to follow some of the decisions of international and supranational courts anymore. This paper claims that this has a dual cause. Firstly through judicial dialogue courts have aimed to fill a gap: In the transnational sphere, legal regulation often does not fulfill its cooperative function sufficiently. Courts had to step in to fulfill this function. However, this is too much a task for courts alone. Insufficient and unbalanced coordination can lead to a predominance of unilateral considerations. Secondly, as mediators between legal spaces, courts also fulfill the function of counterbalancing each other. Considering the strong position of international/ supranational courts, judicial dialogue has been used as a means to empower domestic courts. However, the more powerful the position of the courts, the more likely conflicts between them. Conversely, when the dialogue is led between unequal partners, this also presents a danger. If judicial dialogue is to be effective, supranational and international courts have to take domestic law and courts more seriously.

Jerf 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 populism and the increased concern for political legitimacy, many legal systems witness the revival of civic participation initiatives. Prominent among those initiatives 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 political 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 substantive nature. The rise to prominence of the referendum as a political instrument is largely due to increased litigation before the courts. The [in)famous ruling of the UK Supreme Court on the Brexit-referendum serves 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 entitled to some kind of special deference? And to what extent should courts be considered to enter the political 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, examining whether this change should be brought about by referendums or by democratic processes. 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 aftermath 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 successful 2015 referendum to change the Irish Constitution to legalise same-sex marriage. Is there evidence from Ireland that this process leads to better outcomes than judicial innovation? Does Ireland’s distrust of referendums is misguided? I will suggest that each approach has drawbacks, and the fears that attend each are real but often exaggerated. I argue that there is no right answer; what is needed is a pragmatic approach to constitutional change and expansion 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.

Chien-Chih Lin: The Wax and Wane of Judicial Power in the Four Asian Tigers

Recent decades have witnessed the rapid growth of judicial power at the expense of the political branches since World War II. This trend of judicialization of power in the Four Asian Tigers – that is Hong Kong, Singapore, South Korea, and Taiwan. I suggest that historical institutionalism 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 Singapore is least developed in this regard, notwithstanding their similar economic achievements. South Korea and Taiwan are young and consolidated democracies that adopt civil law system, a legacy of the Japan Empire. In contrast, Singapore and Hong Kong are semi- or competitive authoritarian societies that were former British colonies immersed in common law tradition. Despite similar political and institutional backgrounds, it is intriguing that the judicialization of politics is more intense in Korea than in Taiwan, in Hong Kong than in Singapore. Furthermore, the comparison may shed light on several issues, such as legal transplantation, judicial reputation, and the concept of East Asian constitutionalism.
implemented constitutions and bill of rights, finding that in many of them voter turnout decreased after passage, sometimes significantly. As the argument for a codified British constitution endures, the findings of this paper demonstrate that those advocating for such a device should be wary of touting its potentially invigorating democratic effects.

**Ana Camilla: 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 brought to it. International law domestic lenses – 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 offer 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 Kalmo: 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 lenses – 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 overemphasise 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 reveal some culturally determined conception 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 arrange 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 account-ability of individuals, and generally, in processing the past and strengthening the trust in justice institutions. However, they are criticized upon ignoring cultural di-versities of existing rules, it may well conclude that its constraints on other actors.

**Aeyal 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 considers that occupation 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 did the occupation of Iraq end, 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

Judicial supervision today fails to address the core questions of occupation when looking at specific questions of implantation or humanitarian and human rights law, often ending up legitimizing the occupation 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 Åkenson: 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 observing an approach are complementary, and both are needed. They are self-conscious efforts to re-invent the principles of sovereign equality, non-intervention and interpretations.

ConCurring panels

Charter and 1970 Declaration on Principles of International Law or whether we are observing a re-invention of international law by certain groups as a discipline harbouring conflicting narratives of law – but also from a socio-legal perspective – as a plethora of conflicting sources 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 repudiation of the foundational character of a constitution that they should not be considered amendments but as a form of diamemberebr 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 deliberative 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

Richard Albert: Constitutional Dismemberment

Some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate constitutional practice and understanding. They act to disassemble and 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 uncoded, without breaking the legal continuity that is necessary if not useful for 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 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: Constitutioonal 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 associated with the revolutions? Suppose a constitution is 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 these cases and other essentially non-revolutionary developments? This, of course, would be contrary to Hans Kelsen famous formulation that a revolution occurs – whenever the legal order of a community is nullified and replaced by a new order in an ultimate 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 constitutional culture 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 deterministic 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 practice and understanding, or in which a 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 article examines the legitimacy of such judiciary-led transformations and argues 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 to implement its will; 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 state of the art and the existing work, in this paper I elaborate 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: Constitutional 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 delated what happens to the actual text of the constitution. This in turn has two stand in an internal relation. From this fundamental point we proceed, in the first section of the paper, to sketch out the basic tenets of the idea of the material constitution by contrasting this approach with other informal taken 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 constituent 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 change 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.
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 significant 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
- Gianluigi Palombella
- Jan Klabbers
- Sanne Taekema
- Scott Stephenson

**Room** 7C–2–14

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**Mikael Rask Madsen:** Inter-legality: beyond conflicting legal orders

**Jan Klabbers:** Inter-legality: beyond conflicting legal orders

**Gianluigi Palombella:** Inter-legality: beyond conflicting legal orders

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**Michaëla Hallbrunner:** Courts and Institutional Failure

It is a recurring argument in judicial decisions and academic writing in the Global South that when other institutions fail in their role, 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 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 changes 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-terrorism 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 the European Court of Human Rights in the area of data privacy in order to probe broader questions of constitutional identity and judicial legitimacy.

**Christoph Bezemek:** The Best Joke About Democracy: Abuse of Human Rights

When a collection of essays by Joseph Goebbels were published in the mid-1930s, the introduction to the chapter on democracy famously stated that: “[i]t overre 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 authoritarian excesses, 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 particular, has generated a comprehensive (even if diverse) body of case law denying protection to those who want to overcome the reinforcements of democracy by (ab)using 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 phenomena which rather 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 recent human rights law cases, examining their application and assessing the danger attached to their frequent invocation.

**Bilyana Petkova:** Who is afraid of the right to privacy?

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 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 politics, denouncing political backlash as a threat to the rule of law because other 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 recent human rights law cases, examining their application and assessing the danger attached to their frequent invocation.

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**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 politics, denouncing political backlash as a threat to the rule of law because other 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 recent human rights law cases, examining their application and assessing the danger attached to their frequent invocation.

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**CONCLUDING PANELS**

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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 which cannot solve crisis, that the welfare turn, e.g. new forms of welfare economic and political strategies of development are necessary for overcoming the crisis, for diminishing overextended inequalities at the global, regional and nation-state levels, and for finding new balances between economic efficiency and free market mechanisms, on the one hand, and welfare system human rights protection, and right to a dissent life for each individual, on another.

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.

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
of the question), of representativeness (how many respondents are “sufficient” to make a claim?), and of identity interplay (does the researcher’s identity and self-presentation affect the nature of the data collected?).

Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin: Contemporary Challenges Facing the Australian Judiciary

The modern Australian judiciary faces a number of contemporary issues involving judicial regulation and support structures that prioritize more contemporary judicial values such as diversity, transparency, accountability and efficiency. However, reform and introduction of regulatory and support structures that prioritize more contemporary judicial values such as diversity, transparency, accountability and efficiency have been more difficult to achieve. This paper presents a survey of Australian judicial officers (164) from across 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 discontent. This work has the potential to illuminate the extent to which reform of the judiciary is both desirable and desired.

Hugh Corder and Cora Hoexter: Navigating the Straits of Defence: ‘Lawfare’ in South Africa and Its Implications

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 case. Nor is the judiciary’s role as an institution supporting constitutional democracy 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 intricately 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. The current criteria for appointing 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 providing selection criteria have been focused on the importance of diversity on the bench. If we are correct in suggesting an individualized focus, we may have to revisit how diversification might impact the judicial exercise of power. In particular, it is not obvious that judges at the trial level influence the decisions of one another other than through mechanisms of published jurisprudence. It also appears that the judiciary is only marginally impacted by national standards of appointment, which may explain the increasingly central role that is placed on judicial education, particularly socio-economic context.

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 2013) – 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 to 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.

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 the judiciary and explore the implications in 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.

176 THE CHANGING LANDSCAPE OF RUSSIAN CONSTITUTIONAL JUSTICE: NEW ACTORS, NEW PROCEDURES, NEW PRACTICES

The Russian system of constitutional justice has been functioning for more than 25 years now and should guarantee the realization of basic rights, the rule of law and, last but not least, market economy. But how effective is it if one takes at first from the outside and within the context of the Russian political system? This question was addressed by a group of litigators of the Russian Institute for Law and Public Policy in the course of their practice-oriented research project focused on the mobilization of constitutional justice in Russia by strengthening the participation of civil society organizations in strategic litigation. Below are abstracts of four presentations, prepared by the institute’s scholars within this project.

Participants

Grigory Vayan
Olga Podoplelova
Natalia Sekretaryeva
Dmitry Mednikov
Moderator
Aleksander Blankenagel
Room
BB 2-03

Grigory Vayan: Amici Curiae before the Russian Constitutional Court: Assistants or Challengers?

for improving the rule of law, 2013, amicus curiae submissions by NGOs and independent human rights experts have become a practice firmly embedded into the Russian Constitutional Court proceedings. For the past four years the Constitutional Court has been accepting independent amici curiae briefs from NGOs, and – in one notable case – inviting an NGO to argue as amicus curiae at a Court’s hearing. Yet, despite this trend, there are fundamental differences in the way various actors in the Russian constitutional justice system perceive the role of independent amici curiae. Are they simply experts assisting the Court? Or are they (also) public advocates who have their own agenda? Is the Court ready to listen to amici’s criticism of its judgments? And what is the future for the institution of amici curiae at the Russian Constitutional Court and (possibly) other Russian courts?

Olga Podoplelova: Strategic Litigation Before the Russian Constitutional Court: Cases, Challenges, Trends

In Russia, strategic litigation has started to acquire recognition as a powerful tool for human rights promotion and protection. Within the national judicial system, it is the role of amici curiae that has emerged as prominent for advancing human rights through strategic litigation by civil society groups. This paper reflects on opportunities, restrictions, and risks that applicants, lawyers,
Concurring panels

Natalia Sekretaryeva: Russian Constitutional Court’s role in the implementation of the European Court of Human Rights: Breaking or Bending International and NGOs are faced with when engaging in strategic aims at both providing a critical assessment of 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 ECtHR to be unconstitutional does not necessarily mean that such a judgment represents a successful and effective implementation of the ECtHR 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 ECtHR.

Dimitry Mednikov: The Russian Constitutional Court vs. Judgments of the European Court of Human Rights: Breaking or Bending International Law When Non-Enforcing It?
The 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 put forward by the Constitutional Court from the standpoint of international treaty law and suggesting alternative arguments that might have been resorted to by the Constitutional Court.

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 (ECtHR) Grand Chamber Khoroshenko v. Russia judgment, in order to answer the question whether current Russian Constitutional Court case law implementing the ECtHR judgments constitutes an effective tool for 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 ECtHR to be in violation of the European Convention on Human Rights (ECtHR) unconstitutional does not necessarily mean that such a judgment represents a successful and effective implementation of the ECtHR 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 ECtHR.

177 THE TRANSFORMATION OF JUDICIAL IDENTITY: MECHANISMS AND IMPACTS OF TRANSTATIONAL JUDICIAL COMMUNICATION

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 of 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 juridical 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 new incentives to engage in transnational exchanges. The third paper critically assesses the appropriateness of the judicial dialogue metaphor in the context of references to foreign law.

Elaine Mak, Niels Graaf and Erin Jackson

Klodian Rado:

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 active courts in the global judicial community of courts. 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 well as judicial mechanisms. The aim of this paper is to explain 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 globalization; 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, national bar associations and law schools.

Oran Doyle: It’s bad to talk: judicial dialogue and the judicial role

Globalisation, understood as the intensification of women’s activities that link different legal systems, is a phenomenon that affects and includes judicia- ries. This occurs through formal and informal judicial networks but also through the decision-making pro- cesses 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 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.
This transformative assumption runs deep, affecting the protection of human rights. For instance, the Colombian Constitutional Court has largely put to rest old debates about 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 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 exclusively or even primarily on the marginalized. It presents jurisprudential case law in its entirety of constitutionalism of the global south or how a “Peripheral” Court is transformed? Socioeconomic Rights beyond the Poor

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 the question of whether courts can enforce these rights at all, it raises new questions about how such enforcement is being carried out. Emerging empirical work suggests something of a contradiction with the theoretical literature on the protection of individual freedoms and social rights. But simply, the empirical literature shows that courts are often less interested or, what is worse, of assuming functions that correspond exclusively or even primarily on the marginalized. This case reveals the strong limitations that face the Constitutional 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 developed 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 Transforming the Rights of Indigenous and Other Cultural 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 concepts, 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 lus Constitucional Comune in 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 exclusively or even primarily on the marginalized. It presents jurisprudential case law in its entirety of constitutionalism of the global south or how a “Peripheral” Court is transformed? Socioeconomic Rights beyond the Poor

Participants
Marta Cartabia
Paulo Pinto de Albuquerque
Oreste Pollicino
Moderator
Marta Cartabia
Room
8B-2–33

Marta Cartabia: The Engels criteria in the perspective of a national constitutional court

Since the Engel case (1976) the European Court of Human Rights (ECHR) has been assuming a substantive 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 qualified as criminal only from the European perspective? Three cases: 6 and 7 CEDU can 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 idem”, the incriminatory application of criminal penalties, the opposite rule governing the “lex mitior”, the notion of “base legale”, the authority of “res iudicata”.

The ECHR jurisprudence has been developing since Engel an autonomous notion of matiére penale, which follows the Court’s interpretation of the criminal nature of proceedings and sanctions, irrespective of their formal qualification in the domestic legal orders. Unfortunately, the relevant criteria for this assessment still appear unclue in the framework of a sheer case by case logic, where it is hard to derive the general principles underlying the Court’s approach. As a consequence, national courts are left without any guidance, particularly in sensitive fields such as confiscation of disqualification measures. It is time now, perhaps, to rethink the issue and possibly to assist the Court in the elaboration of some basic principles, with the aim of better understanding the existing case law and proposing some guidance for its evolution. Special attention should be devoted to the question whether it is possible – as the ECHR has been suggesting at least since Jussila (2006) – to distinguish between the guarantees which shall be ensured to the “hard core criminal law” and those that might appear sufficient for more peripheral sectors of the law. Through which do serve punitive purposes, but do not carry the degree of stigma which is usually associated to that traditional hard core.
ConCurring panels

Paulo Pinto de Albuquerque: 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 seemed difficult to distinguish hard-core criminal cases 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. But case-law clarified neither the substantive criterion of a 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 Courts raises the issue of constitutional guarantees. This case law impacts hugely in the field of administrative and criminal offences. Reaction by Constitutional and Supreme Courts raises the issue of constitutional rights in their civil limb. And this in spite of their larger constitutional order is a continuing source of tension and uncertainty.

180 VARIETIES OF CONSTITUTIONALISM

This panel explores the understanding of constitutionalism that is dominant within the US, Canada, the UK, and Germany and an understanding of how does the historical context affect the way the various branches of government operate in general, the executive, and the legislative interact? What is the impact of this interaction upon the liberties of the citizens? How does the separation of powers apply to parliamentary systems such as the UK and Canada? How does the court system support or undermine democratic constitutionalism and the interplay between the three branches of government? These are some of the questions that will be explored by the participants in this panel.

Participants
Carissima Mathen
Nick Barber
Ioanna Tourkochoriti
Anna Fruhstorfer and Felix Petersen
Franciszek Strzyczkowski
Moderator
Ioanna Tourkochoriti
Room
8B-2.43

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-Confederation period, the doctrine was generally absent from legal and political discussion. Greater attention by far has been paid to the powers of government, namely federalism and the division of powers. The Constitution Act, 1867, which included the Charter of Rights, introduced robust US-style judicial review. The new framework was criticised as imitating “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 knew the doctrine: asserting the judiciary’s independence and confronting distinct norms under which they have aggressively scrutinized the other branches. Recent opinions demonstrate that the separation of powers is now regarded as an attractive strategy for the future in many other countries. This paper sets out to critically discuss these issues, and to propose a comprehensive theoretical framework to assess the compatibility of constitutional measures with constitutional and international human rights law.

Oreste Pollicino: Discussant

The paper will draw some conclusions on the points discussed by the other panelists and focus on how democratic (both Constitutional courts and the European courts) can address the existing challenges through dialogue. The Tariro case will be brought as an example of how cooperation can be reached in a way that ensures that the growing complexity of EU constitutionalism is nevertheless consistent with the respect of the fundamental principles of domestic constitutional orders.

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 is more closely allies with the principle than presidential models.

Ioanna Tourkochoriti: “Apology” of the Law or Disturb towards the Law? Comparing US and French Constitutionalism

This presentation analyses the spirit of “legicentrism” that inspires the French Constitutional order in opposition to the disturbance towards the liberal structure of the 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 disturbance towards the law characteristic of the 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 by implying an aristocratic form of government. The presentation explores the difficulties in the understanding of the political sciences 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 to which they respond. And it explores the operation of these variations of constitutionalism in reference to contemporary human rights questions.

Anna Fruhstorfer 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 1848/49 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 classical liberal democracy but a constitutional monarchist 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 people’s chamber. The Constitution and 1870s. A democratic constitution was enacted in Germany only after the Revolution of 1819. But the Weimar Republican 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 bicamerality 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 early GDR. In other words, it is found with respect to the persistent authoritarianism: unclear or dysfunctional separation of powers and the centralization of power in too few hands has played a negative role in all authoritarian German regimes. Assessing the political development of Germany through its constitutions, in particular through the organization and separation of state powers and the state-citizen relationship, we can reconstruct key elements that characterize both democratic and autocratic footholds that shaped the state in modern Germany. Thus we can contribute to literature on democratic and authoritarian constitutionalism. And we will illustrate on the transition from one to the other.

Franciszek Strzyczkowski: The misconception on the principle of separation of powers. A case study of the Polish constitutional crisis
**ECONOMIC AND MARKET REGULATION**

**Participants**
Anna Taftsgoulo and Stylianos-Ioannis Koutnatzis
Eugene Schofield-Georgeson
Biancamaria Raganelli
Sofia Ranchordas

**Moderator**
Sofia Ranchordas
Room 8B-2-49

Anna Taftsgoulo and Stylianos-Ioannis Koutnatzis: Economic Crisis and Judicial Asymmetries: The Case of Greece

Greek courts have recognized constitutional supremacy as the basis for judicial review of the constitutionality of legislation since the late nineteenth century. However, they have long maintained a deferential attitude to the political branches of government. Following the proportionality’s explicit constitutional guarantee since 2001, courts and constitutional scholars have undertaken rigorous scrutiny more often. However, in the wake of the financial crisis the standards of constitutional scrutiny remain asymmetric among different domains of constitutional law. Initially, the Greek financial emergency emphatically resulted in a self-restrained variation of proportionality. In the last years, a tendency of judicial empowerment has prevailed thus reenforcing the crisis jurisprudence. However, courts have targeted almost exclusively cuts in state expenditures, e.g. striking down reductions in pensions as well as cuts in the wages of specific categories of public officials, such as judges, military personnel and university professors. In contrast, Greek courts have left intact tax and other measures that aim at increasing state revenues; in this respect, courts have intervened solely on peripheral issues. This paper argues that this approach is untenable on constitutional 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.

**Eugene Schofield-Georgeson: A New Era of Coercive Industrial Relations for Australia**

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 regulatory rules (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 traditional grounds. Both the policy leeway of the building and construction industry (this industry has one of the highest rates of death and injury in Australia, corresponding with high rates of unionisation and union militancy). The new legislation establishes a quasi-criminal tribunal that treats unionists in a similar manner to the suspects of terror offences. Defendants before the tribunal are deprived of their right to silence and the presumption against retrospective while a series of quasi-criminal penalties follow the imposition of a civil standard of proof in prosecutions of workers and unions. This paper explores the potential impact of this legislation on unions and workers in the Australian building and construction industry by reference to international examples of similar policy – the US in particular. Apart from the obvious breach of workers’ and unionists’ civil liberties, this paper highlights a strong correlation between such laws and an increased risk to occupational health and safety as well as a reduction in union density or coverage.

**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 tenure 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 ECJ 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 such as those needed to promote inclusive and sustainable growth? How to take care of investor protection without harming market competition? What are we 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 through aware of the delicate “political” implications related to different legal and economic issues in Europe.

**Sofia Ranchordas: Rethinking the Public Interest in the Platform Economy**

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 externalities experienced 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 (e.g. fake reviews).

**ADMINISTRATIVE LAW AND DUE PROCESS**

**Participants**
Elisabeth Eneroth
Fabiana Ciavarella
Andy C. M. Chen
Giulia Mannucci
Sharath Chandran
Rebecca Ananian-Welsh

**Moderator**
Elisabeth Eneroth
Room 8A-3-17

**Elisabeth Eneroth: Administrative Courts the Relation of Power between the Levels of the Law Social Law**

The purpose of this paper is elaboration of the relation of power as a relation between the (vertical) levels of the law as mediated in the legal practice(s) and by the legal actor(s) in their actor-specific text(s) through the language of the law in the levels of the law. Focus is on power inherent in the levels of the law. The relation of power shall in turn constitute the basis for elaboration of the relationship between the relation of power and the relation of criticism between the levels of the law. Focus is on power effect(s) created by the levels of the law. This provides an alternative critical approach for analyzing the relationship between law power and criticism in legal science. This approach is applied on the example of the Supreme Administrative Court of Sweden and young persons at homes for care or residence in Swedish social law. What explains this, in this case, rare network of judicial control over public power with regard to placements of young persons at homes for care or residence by the social services, and rare transnational judicial interaction in cases regarding these placements? To what extent do, for example, the Supreme Administrative Court of Sweden, succeed in achieving its goals, and under what linguistic conditions? To make of the role of courts in the management and mismanagement of the relationship between courts power and public law in theory and in practice.

**Fabiana Ciavarella: Can judicial review foster participation in administrative rulemaking?**

The Italian general law on administrative proceedings excludes the participation of interested parties from proceedings leading to the adoption of a rule. However, it rules out the rule of participation, i.e. that, by definition, will be general in content and will address several people. Isn’t it contradictory that public participation is not taken into consideration for the issuance of such an act? By comparing and contrasting the Italian experience with foreign ones, the participatory exclusion provided for by the Italian legal system seems an isolated exception, since in other legal systems participatory rights are fully recognized even in...
We argue in Part III that disputes over the persuasive
effect of regulations and case law are a direct consequence of
the quality and probative value of economic evidence. We first introduce the enforce-
ment model from the perspective of public authorities. It is argued that in the long run sensitiz-
ing judicial authorities with the core values of
due administrative procedure in the exercise of
enforcement authority is subject to constitutional roles. This makes official disobedience
a sign of a weakening administrative machinery that
has become irresponsible to constitutional values. To enforce foundational rights the Court, in many cases,
is invited to step aside from hand, the efficiency of 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 sensitiz-
ing judicial authorities with the core values of
a fair and transparent administrative procedure
could achieve results that are consistent with values that
decisional law recognizes and seeks to implement.

183 CORRUPTION AND OFFICIAL DISOBEDIENCE

Participants
Elizabeth Acorn
Franco Peirone
Yoav Dotan
David Fagelson
Johannes Buchheim and
Gildaf Abu

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 Con-
vention, a prominent example of international efforts
to combat corruption globally by stigmatizing its supply, has
extended well past the Convention’s core legal obliga-
tion for states to establish domestic criminal prohibi-
tions 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 interna-
tional socialization. In particular, the paper points to
the OECD Working Group on International Business,
which has not only championed the increased en-
forcement 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 prac-
tices that the OECD promotes and that many states are
browsing for adoption. Together, this research high-
lights 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 in-
dependence which we define as fierce mutual opposition be-
 tween holders of public office. This phenomenon goes
well beyond separate powers/branches of government
acting as mutual checks and balances while remaining
within their constitutional boundaries. Here, we find
public officials (over)stretching and trying to alter their
constitutional roles. This makes official disobedience
a sign of a weakening administrative machinery that
has become irresponsible to constitutional values. To enforce foundational rights the Court, in many cases,
is invited to step aside from hand, the efficiency of 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 sensitiz-
ing judicial authorities with the core values of
a fair and transparent administrative procedure
could achieve results that are consistent with values that
decisional law recognizes and seeks to implement.

Rebecca Ananian-Weisch: Due Process without Rights

Due process in court proceedings is universally
recognised as fundamental to achieving justice fair-
ness, the legitimacy of the state and its institutions,
the protection of individual and collective interests. The
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?

Advocates for Open Government: Today’s,{\textasciitilde}s Challenges and the
Future of Open Government

Yoav Dotan: Action Expresses Priorities: Judicial
Anti-Corruption Enforcement Can Enhance
Electoral Accountability

Can judicial decisions affect electoral behavior? Can they enhance electoral accountability by signaling to voters,
can they determine winners and losers? There is clear evidence from recent events in Brazil and
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 effective anti-corruption judicial
activity 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-corrup-
tion activity on the vote-share of low-integrity incumbents is negative and substantively significant. This
effect on electoral sanctioning of corruption is mediated by two distinct channel: a direct effect where courts
have the capacity to influence electoral behavior by signal-
ly the importance of integrity considerations in electoral
choices.

David Fagelson: Official Disobedience and Legal
Integrity

Johannes Buchheim and Gildaf Abu: Official Dis-
obedience and the Competition over Legitimacy

In this paper, we argue that the rule of law is a
function which we define as fierce mutual opposition be-
 tween holders of public office. This phenomenon goes
well beyond separate powers/branches of government
acting as mutual checks and balances while remaining
within their constitutional boundaries. Here, we find
public officials (over)stretching and trying to alter their
constitutional roles. This makes official disobedience
a struggle for legitimacy: the kind of power which is
ConCurring panels

assumed is not the ordinary power conveyed by the constitutional framework. Instead, the overstepping public official claims the (extra-ordinary) legitimacy of public official claims the (extra-ordinary) legitimacy of disobedience provides a prism for many struggles within a constitutional/legal system that fall short of constitutional moments and revolutions.

Chapter after two Canadian Supreme Court decisions

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 view that recognizes not only a basic right to the free and undisturbed realization of individual liberties, but also a need for the protection of individual 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.


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 public international law.

Public Rights for Constitutional Individual Rights Adjudication

Our paper takes place in the courtroom and they 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. 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 they believe that live-streaming is the best way to reach the public. Cities 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 fail 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, 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.

Nancy Marder: Courts Power and the Public: Cameras in the UK Supreme Court

Courses 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 they 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 constitution-alized 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
ConCurring panels

Participants
Irene Sobrino Guijarro
Alba Nogueira
Karen Kong
Johanna del Pilar Cortes-Nieto
Elena Pribyttoka
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8B-3-03

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 judiciary, is that judicial non-intervention in 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 unenforceable 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 present two stances 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 foreclosures figures and high rates of non-emancipated 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 Communities have been the legal basis to promote housing rights. A centralization 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 politicisation of the designation of both courts might point towards 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 accountability for the ICESCR, and protecting 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 in 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 as a criterion which should guide legislative, executive and judicial decisions. It was claimed to be an instrument necessary to achieve progressively the objectives of the social state governed by the rule of law proclaimed in the Constitution – including the satisfaction of those who refuse to give up the entitlements promised by previous welfare arrangements.

Elena Pribyttoka: The Voice of One Man Is the Voice of No One? Individual Complaints Against Extraterritorial Violations of Socio-Economic Rights

An old English proverb says: “The Voice of One Man is the Voice of No One”. The basic idea is that a person alone has very little chances (if any) to stand against power players and protect himself adequately. It is interesting that the concept of universal human rights is based on precisely the opposite thesis. A person, her rights and dignity are absolute values and ultimate goals of international legal order. It means that the voice of every person, regardless of her social status, nationality, place of residence or any other factors, should be heard. In the age of globalisation, actions of states and non-state actors have a crucial impact on the enjoyment of socio-economic rights worldwide. Especially they affect those in poverty. Examples include wars and military interventions, trade and investment policies, inadequate financial regulations and illicit financial flows, environmental destruction, economic sanctions, as well as development aid. It is important that every person whose rights are infringed by a foreign state or a non-state actor enjoy the right to secure, direct, effective and affordable access to justice and remedies. In my paper, I provide an overview on main problems, potential and limitations of existing international and regional individual complaints mechanisms capable to address states’ extraterritorial violations of socio-economic rights and suggest short-term, medium-term and long-term measures for their improvement.
These patients were isolated in sanatoriums until 1996, when the Leprosy Prevention Law was abolished in Thailand. This article highlights the serious constitutional law problems that relate to the decision, and their effect on the judicial system and political fragmentation. The Supreme Court blocked the Parliament’s effort to amend the 2007 Constitution that allowing for the creation of a new Constitution under a fully-fledged democratic rule. Moreover, Thailand’s regional prestige as a stable and relatively prosperous democracy may turn its constitution-making experience into an attractive alternative to the “Bolivarian model” that has dominated the Latin-American context during the last decades.


This paper critically analyses the constitution-making process currently taking place in Chile discussing its origins stages inconsistencies and complications. The main hypothesis is that the new Constitution has to comply with the idea of “the democratic regime of government with the King as the Head of State” or the so-called “Thai-style democracy”. Additionally, new constitutional amendment rules and a Constitutional Court’s explicit jurisdiction on reviewing a constitutional amendment will be founded. Both are reflections of the constitutional controversies before the coup. In 2012, the Constitutional Court blocked the Parliament’s effort to amend the 2007 Constitution that allowing for the creation of a new constitutional assembly to write a new constitution. Again in 2013, the project to democratize a senate was turned down. The Constitutional Court decided that last amendment was unconstitutional. Those decisions were huge political and legal controversies, to review the decisions of the Constitutional Court and its effect, and to critically analyse them.

Neliana Rodean: People Amendments’ Power within unconstitutional amendment processes

This paper sheds light on the constitutional amendments that have dominated the Latin-American context during the last decades. It aims to provide the historical and legal background of these constitutional controversies, to review the decisions of the Constitutional Court and its effect, and to critically analyse them.
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 law 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 (regarding EU constitutional law to criminal legal theory. They take into account various sources, including CJEU case-law on how express competences have been interpreted.

Participants
Jannemieke Ouwerkerk
Irene Wieczorek
Samuli Miettinen
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8B-3-39

Jannemieke Ouwerkerk: Rethinking EU criminal law competence: Is the internal market-ratio nale 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 freedom 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-rationality of 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 legitimizing 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 player’.

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 interests. This paper discusses the prospects of a choice of legal basis where Article 83 is not cited. It argues the case-law of the Court of Justice is in favour of such a solution, but that there is evidence of sufficient opposition from Member States that this solution is not currently a realistic prospect. Finally the paper evaluates proposals that failed and that have been recently passed – could the institutions have positioned EU criminal law as part of an instrument without an AFSJ legal basis? Ultimately the answer depends on whether criminal law is special, or an ordinary policy among other EU policies.

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 substantive criminal law; 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

188 CRIMINAL LAW COMPETENCES OF THE EUROPEAN UNION: A QUEST FOR LEGITIMATE FOUNDATIONS

189 LEGAL PROBLEMS IN EUROPE

Participants
Piotr Mikuli
Arianna Angeli
Adam Czarnota, Michaic Padziora and Michaic Stambulski
Kirsty Hughes
Micaela Vitalitti

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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 grounds that the tribunal 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 Angeli: 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 Poland and Slovakia. Decommissioning the ability 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

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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 managing the political confrontation among different forces, and if common standards have arisen in the last years at the European level.

Adam Czarnota, Michaic Padziora and Michaic Stamburski: 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, resulting in government suspending 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 of the rule of law. Also in other European countries, constitutional courts were object of attracts (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 outbreak of 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 being misled about 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 Vitalletti: 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-arena 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 aspects of a personal situation: the employment; rupture of the employment). The paper will also analyze to what degree domestic case-law do 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 human rights, cultural identity and cultural 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 to be practical. 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

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Charlotte Woodhead
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9B-3-52

Kalliopi Chainoglou: Enforcing Cultural Rights: The Rebirth of Cultural Human Rights?

International human rights 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 cultural life and to share in its social, economic, cultural and spiritual 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 as 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 regional 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). As the European courts – 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 ECHR as a collective empowerment – limited to the ‘cultural property right’ of an individual (cases: Beyeler v. Italy, Ruspoli Morenes v. Spain, Buonomo 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 ECHR 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 issues (entering the ECHR in 2011). 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 recognise ‘cultural property right’ as a ‘community privilege’. At the same time, the ECHR does not define the ‘right to cultural heritage’ in 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.) who is the ultimate body to share in the cultural heritage within its borders.

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 objective of my proposal is to analyse transgenders’ 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 understanding the contradictions, setbacks and advancements 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 recognizing such 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.

Ligia Fabris Campos: The Regulation of Trans* Rights in Brazil

The principle of subsidiarity is viewed as the cornerstone of protection of human rights. It is the primary responsibility of states to ensure that human rights are respected and protected on a domestic level and any international protection mechanism is only supplementary. Taken to the domestic level also apex courts in a country provide only subsidiary protection of human rights, which is consistently endorsed 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 Kratrochvíl: 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 cornerstone of protection of human rights. It is the primary responsibility of states to ensure that human rights are respected and protected on a domestic level and any international protection mechanism is only supplementary. Taken to the domestic level also apex courts in a country provide only subsidiary protection of human rights, which must be protected by lower level courts. Yet little attention has been focused so far on how human rights are in fact applied by the primary level of court systems as opposed to apex courts. This paper contributes to public as a case study and by empirical analysis of hundreds of decisions of Czech first and second instance courts it maps the use of human rights at the primary level of the court system in that country. The paper also contributes to the discussion whether the more the rights use in their reasoning human rights it is less likely to result in a finding of a violation of a human right by an apex court. It thus shows that human rights arguments used by primary level courts result in better and earlier human rights protection and provides empirical support for the insistence of international and apex courts on subsidiarity.

Fernanda Farina: Policy tug-war: a socio-legal reflection about judicial intervention in public policy from a case study of healthcare litigation in Brazil

This paper is interested in reflecting about the role of the judiciary in the enforcement of social and individual rights and to what extent such enforcement interferes in public policy. It proposes a socio-legal reflection about important aspects of public law: the role of courts in modern democracies, the amount of power granted to judges via constitutionalisation of rights, the influence of the judiciary in public policies, and the distribution of powers in modern democracies. I address those topics from an in-depth single case study about healthcare litigation in Brazil. The Brazilian judiciary has ruled on over 300,000 cases of individuals asking for drugs and treatments not covered by the public healthcare policy. The rate of success of such cases has been so high that over 60% of Sao Paulo’s health budget has been compromised with drugs/treatments not covered by the scope of the healthcare policy. All decisions based on the interpretation that the Brazilian constitution promises universal health to every citizen. To substantiate the discussion, I explore the results of 50 qualitative interviews I conducted with litigants, judges, lawyers, and bureaucrats in Brazil over 3 months which indicates a true policy tug-war among powers and an institutional trust crisis in the country.

Chun-Yuan Lin: AIDS on trial: Empirical Study on Cases Involving People Living with HIV/AIDS (PLWHA) in Taiwan

Since its first legislation in 1990, HIV Control Act of Taiwan has evolved significantly because of democratization, globalisation, and the improvement of medication on HIV/AIDS in Taiwan. The HIV Control Act today has evolved as “HIV Control and Patients’ Rights Protection Act” and provides anti-discrimination doctrine. However, legal progress does not necessarily eliminate social stigma against PLWHA. How courts make decision in the dynamics between the progress of medication, risk on public health, and the rights of PLWHA determines the social reality of PLWHA. This article reviews all courts decisions involving PLWHA in Taiwan since 1996 in order to reveal the situation of PLWHA and the courts’ attitude toward them. Statistics indicates a systematic exclusion of PLWHA from family and social institutions, which is consistently endorsed by the courts. This article further examines courts’ reasoning and finds that the more rights use of PLWHA, wrongly interpret the approaches and risk of AIDS infection, and therefore exaggerate the threat of HIV/AIDS to public health. The courts didn’t follow 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. The discourse surrounding the Panel’s work is couched in the need to repair past wrongs and injustices. The Panel acts as arbiter for rejuvenated property and genocide. Current claimants, as heirs of the original owners, could be seen as enforcing an inherited cultural right which has passed inter-generationally. The panel therefore acts as a modern-day forum for hearing cultural claims based on remedial and redistributive justice. A counter-argument might be that the Panel acts as arbiter for rejuvenated property claims for cultural objects. 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’s Terms of Reference frame claims based on the need to repair past wrongs and injustices. The need to repair past wrongs and injustices. The Panel acts as arbiter for rejuvenated property.
ConCurring panels

192 COMPARING SUPRANATIONAL AND CONSTITUTIONAL COURTS

Participants
Ranieri Lima-Resende
Vanice Lirio do Valle
Karen J. Alter
Federico Fabbrini and Miguel Maduro

Moderator
Karen J. Alter

Room
8A - 4 - 35

Ranieri Lima-Resende: Submajority Rules for 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-decisional 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 Constitutional 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) or admit as a political answer, the legislative reversion 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 a position of superiority that benefits one 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 reversion of prior judicial decisions falls in overcoming an enhanced justification burden brought by the Court’s initial reproof. Otherwise, there will be no dialogue. The ex-ante dialogical intervention seems to be the most effective solution, since the inherent rationale of the Judiciary bound by the need to motivate its decision in a rational way brings that 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 failsafe. 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.

CONCURRING PANELS

193 CONSTITUTIONAL INTERPRETATIONS II

Participants
Roman Zinigrad
Jędrzej Maśnicki
Matthias Klatt

Moderator
Matthias Klatt

Room
8A - 4 - 47

Roman Zinigrad: Symbiotic 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 constitution not vice versa. I argue, however, that at least as to the constitutional right to education, the interpretive effort has to be symbiotic. 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 should be 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 renationalization 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 a Member State) has more interpretative power to persuade other courts and tribunals, in particular the administrative courts?
ConCurring panels

Matthews Klett: Constitution-conform Interpretation

Many legal systems contain an explicit or implicit obligation to interpret the law in accordance with the constitution. Yet what this obligation means in the practice of legal argumentation differs widely between various legal systems. This paper engages in comparative analysis and addresses the problem of how constitution-conform interpretation (its purported missing legal basis, its missing interpretative character, and the competence problem). Overall constitution-conform interpretation is defended as a valid and powerful legal argument.

Margit Cohn: Judicial Review of Executive Powers: On Trump Brexit and Other Sundries

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 (and forthcoming). These rulings seem to express the British and US courts’ reluctance to defer the executive power, in a slightly different form: (i) describes the court’s role as minor, due to a resistance to defy the executive power, in a slightly redefined version of the Dahlian argument, or (ii) pictures a complete preponderance of the court over the other branches, coining the term supremocracy to illustrate the current state of affairs. I attribute these different results to two major methodological flaws: (i) the underdevelopment of a theoretical perspective that incorporates the role of the court for the study of constitutional presidentialism, and (ii) the absence of detailed qualitative studies that delve into the political context in which the court operates.

Eva Maria Belser: Revisiting the Counter-majoritarian Role of Courts: The Judicial Protection of Human Rights in Times of Popular Pressure not to do so

In a number of countries, constitutional courts protecting human rights are subjected to political pressure. Courts taking a counter-majoritarian stance in order to protect human rights of citizens are more and more frequently challenged by parliaments presidents and popular votes. This paper will revisit the counter-majoritarian role and examine how the judicial protection of human rights evolves under increasing popular pressure not to do so. It will look at recent court cases in countries such as Switzerland, Hungary, Poland, Turkey and the USA and attempt to explore differences and commonalities in the approaches of judges to counteract political pressure to unduly limit human rights. The paper will also look at judicial independence and contemporary threats to it and compare the different approaches of judges to deal with the counter-majoritarian dilemma. In doing so the paper will pay particular attention to the question whether international human rights guarantees – and other forms of transnational constitutionalism – play a role in the dynamics of judicial review and in the effectiveness of human rights protection.

Daniel Bogea: Judicial review of executive decrees in Brazil: coordinate constitution in coalition presidentialism

The article argues that the role of the Brazilian Supreme Court in reviewing executive decrees part of a coordinate constitution, in which each branch takes part in a complex dialogue that is vital for the relative stability of the constitutional presidentialism installed by the 1988 constitution. The court’s performance is characterized by a selective assertiveness, through which it positions itself as a check on the Executive, while also encouraging the opening of the deliberative role of Congress. Nevertheless, the court is continuously constrained by the political environment, in a slightly redefined version of the Dahlian argument, or (ii) pictures a complete preponderance of the court over the other branches, coining the term supremocracy to illustrate the current state of affairs. I attribute these different results to two major methodological flaws: (i) the underdevelopment of a theoretical perspective that incorporates the role of the court for the study of constitutional presidentialism, and (ii) the absence of detailed qualitative studies that delve into the political context in which the court operates.

Franciska Coleman: From victimization to empowerment: Updating American judicial review in response to changing demographics

One of the key disputes among US constitutionalists is whether the constitution is a static document or one that evolves over time. A similar question could be asked of courts – does the protective function of courts change as democracies mature and become more diverse? This paper suggests that the answer is yes, and that the substantive/process distinction in constitutional courts should be viewed as a continuum which reflects the changing role of the courts as a democracy matures. This paper argues that as US society outgrows its de jure discrimination against ra
cial and ethnic minorities, the role of courts should shift from substantive efforts to protect these minorities as the objects of constitutionalism to process efforts that enable these minorities to protect themselves as the enlightened subjects of self-governance. This paper suggests that US democracy is an incomplete realization of minority political autonomy or become a source of further diminution in minority rights. It uses the empowerment and capability theories of Paulo Freire and Amartya Sen’s approach to judicial review centered upon equal capacity for self-governance. This approach applies Sen’s concept of “basic capability equality” to minority citizens’ experiences of self-governance and advocates making self-governance a justiciable positive liberty, measured in terms of equality and identified political capabilities.

Dean Knight: The Meta-structure of Anglo-Commonwealth Judicial Review: Scope and Limits

Drawing a balance between vigilance and restraint is a fundamental feature of judicial review of administrative action in the Anglo-Commonwealth. While this modulation of the depth of scrutiny is ubiquitous, it takes different shapes and forms in different legal traditions. This paper explores the different meta-structures employed in judicial review in England, Canada, Australia and New Zealand over the last 50 years or so to modulate the depth of scrutiny. Four organisational schemata are synthesised: scope of review (multi- or univariate categories), grounds of review (simplified and generalised set of grounds), intensity of review (explict calibration of the depth of scrutiny), and contextual review (structured or instinctive overall judgement). Drawn from the changing language and format of the Smith’s acclaimed textbook, these schemata allow us to understand the key aspects of the supervisory task without getting lost in the doctrinal quagmire and controversial lexicon that often comes with discussion of variable intensity deference and the like. The focus on the meta-structure allows us to more clearly identify the virtues of modulating the depth of scrutiny in different ways. Fuller’s rule-of-law-based criteria – generality, public accessibility, prospectivity, clarity, non-contradiction, non-impossibility, stability and congruence – are proposed as a useful way to assess the efficacy of different schemata and inform debates about the nature of the courts’ supervisory task.

João Archegas: The Constitutionalization of Power: How the Brazilian Supreme Court is Raising the Stakes on Jurisprudence

Following Hirsch’s study in Towards Jurisprudence, this paper discusses the role of the Brazilian Supreme Court in the judicialization of politics. It analyzes how the court is facing its own protagonism in the political arena it’s necessary to point out Justice Barroso’s view on the matter. Barroso is a judicial re...
view enthusiast and has recently defended a peculiar position in his paper Reason without vote, stating that the Court must “interpret social demands, the spirit of its time and history’s path.” By assuming this responsibility, the Court would have the legitimacy to “push history forward” and work as a representative (and not only counter-majoritarian) institution. Such an ambitious purpose is indeed being practiced by other Brazilian Justices and reflects the prominence given to the courts in the era of the new constitutionalism. Nonetheless, the constitutionalization of rights has not propitiated structural changes in the country’s political (and economic) reality. An example is a recent ruling given by the Supreme Court that upheld a new federal legislation known to smother smaller political parties and favor the political elites. Here lies the importance of this work: can history really be on the “right track” and should the Judiciary be the protagonist to lead the people in its direction? Up until now, the Court is just pushing forward the “right interpretation” of the Constitution that works in favor of the political elites.

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 (ECHR) and national courts in the new democracies through analysis of the Macedonian experience in this regard. The ECHR 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 ECHR 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 ECHR 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 ECHR. It explicitly refers to the ECHR and/or to the case law of the ECHR 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 (ECHR) 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 (ECHR) show the Court’s tendency to act more like a common law court, substantially shaping the law of the ECHR 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 ECHR 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 (ECHR) 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’s 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 ECHR 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 ECHR’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 ECHR’s application of the concept of positive obligations by bringing structure in and distilling general principles from the case law of the ECHR.

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

CONCURRING PANELS 318

CONCURRING PANELS 319
This paper explores strategies for localising govern-ance within the Australian federal constitutional legal system in an age of increasing centralisation of legal power. In the last quarter of the twentieth century centralisation of power has made federalist govern-ments vulnerable to the anti-democratic influence of global monetary institutions and markets. Accord-ingly, federal governments across the global north have undertaken systematic programs of deregulation (particularly within labour markets) privatisation and a redistribution of public wealth to the wealthi-est members of a global elite. The resulting social inequalities have seen financial shocks and crashes and have led, most recently, to domestic political ex-tremism and intransigent nationalism (i.e. Trumpism, Brexit and ‘Hanssonism’) in Australia). In the wake of these failures, this paper suggests that centralising approaches to federal constitutional legal systems might be rethought in a manner that establishes a greater ‘geographical rootedness’ of legal power within intra-state and local government. Drawing on the current German approach to federalism, this paper explores models of federal constitutional governance that establish clear rules for how power-sharing ar-rangements between different 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 an historical 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 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 ECtHR system? Are the two comparable? After all, one is a nation-state democracy; the other is a pluralist trans-na-tional 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 ECtHR’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 ‘sanctu-ary 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 idea of national sovereignty, but also related notions of popular sovereignty, self-soverignty, as well as the rethinking of sovereignty prompted by the expansion of international law norms and insti-tutions. Constitutional law scholars have overlooked how international law norms have reinterpreted the notion of sovereignty – for example, through the 1648 Treaty of Westphalia, end of colonial rule, and rise of trade immigration, and human rights. My project will examine ways sanctuary jurisdictions are reasserted in a domestic context, the principle operates in much the same way. For example, a number of civil-law codes have provisions that prohibit the use of a right for a purpose other than for which it is intended. The principle, however, is generally found in a private law context and in civil law jurisdictions. It is lesser known in common-law systems or in a public law context. There are, however, analogous legal concepts. For example, in Australia, the tort of abuse of process has been described as ‘the clearest illustration in Austra-""

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.

Giacomo Tagiuri: The Cultural Implications of Market Regulation: Does the EU Destroy the Texture of National Life?

A persistent set of arguments reject 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 forms of market regulation that have been part of the national fabric for decades and have taken on a certain cultural significance. Through case based research and socio-legal methodology my dissertation tries to challenge this line of argument, which I call the culturalist narrative. My claim is that EU law is loose enough for member states 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 regulation of certain professions) to develop a conceptual framework that allows to better describe the implications – cultural and otherwise – of these forms of market regulation. The question I try to answer is: what are the real concerns that the “culturalist” narrative points to? Other words what do member states really protect through these rules that the EU supposedly destroys?

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 some evidence to suggest that public entities may in 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? 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 its member states, that is the ships 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 local 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 Union 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 State’s regime and enforcing the supra-national standard of values. The second approach understands the EU as an example of an international organisation which conditions its membership on respect for democratic values. The third approach is inspired by constitutional pluralism and 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 expectations of each 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.

Marko Turudic: Regulating over-the-top services in EU law

The research 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.

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 concern criteria. The ICJ, in contrast, has always sought to maintain its institutional legitimacy in a primitive legal order. 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.

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 pervasive 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 judgments 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.
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VENUE
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.
Radisson Blu Scandinavia Hotel
Amager Blvd. 70
DK – 2300 Copenhagen S
Registration during the opening ceremony

Faculty of Law, University of Copenhagen
Njalsgade 76
DK – 2300 Copenhagen S
Registration after the opening ceremony

Info Point
Catering / Atrium
Legal Knowledge Centre (ground floor)
Law Canteen

Faculty of Humanities, University of Copenhagen
Karen Blixens Plads 8
DK – 2300 Copenhagen S
Humanities Canteen

Metro / Islands Brygge
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