ICON•S CONFERENCE
COURTS, POWER, PUBLIC LAW
COPENHAGEN
5–7 JULY 2017

I WELCOME STATEMENTS

We warmly welcome all of the participants in the 2017 Annual Meeting of ICON•S, the International Society of Public Law. The challenging global and domestic political developments of the last few years make the interdisciplinary study of public law at the local, national, regional and global level ever more urgent and important. This, yet again, will be our largest Annual Meeting since the foundation of the Society in 2013. The panels, roundtables and plenary events address the Conference's overarching theme of "Courts, Power, Public Law" and other topics at the heart of contemporary public law inquiry. We are grateful to our Copenhagen hosts for their extraordinarily hard work and creativity in putting together such a truly mega-sized event, and we thank our sponsors for their generous support. Most of all, we thank you, the ICON•S members, for your overwhelmingly positive response to the call for papers this year, and for volunteering your time and energy to promote the success of the Society and its annual conference. Together, we have created what we believe to be a rich, inclusive and intellectually exciting program featuring scholars, jurists and policy makers from various disciplines and from literally four corners of the world. We wish you a very enjoyable and rewarding conference!

GRÁINNE DE BÚRCA
New York University

RAN HIRSCHL
University of Toronto &
Universität Göttingen

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

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.

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

Local host

II SCHEDULE

WEDNESDAY 5 JULY 2017

12:00 – 13:00	**REGISTRATION** → Radisson Blu Scandinavia Hotel	
13:00 – 13:20	**OPENING REMARKS** → Radisson Blu Scandinavia Hotel	
13:20 – 14:30	**KEYNOTE ADDRESS** → Radisson Blu Scandinavia Hotel	
14:30 – 15:00	*Coffee Break* → Radisson Blu Scandinavia Hotel	
15:00 – 16:30	**PLENARY PANEL I** **GLOBAL ECONOMIC INJUSTICE** → Radisson Blu Scandinavia Hotel	
16:30 – 17:00	*Walk to The Faculty of Law (500 m)*	
17:00 – 18:30	**PANEL SESSIONS I** **SESSIONS 1 – 31** → Faculty of Law	**p. 28 – 75**
18:30 – 19:30	**OPENING RECEPTION** → Faculty of Law, Atrium	

THURSDAY 6 JULY 2017

09:00 – 10:30	**PANEL SESSIONS II** **SESSIONS 32 – 66** → Faculty of Law	**p. 76 – 125**
10:30 – 11:00	*Coffee Break* → Faculty of Law, Atrium	
11:00 – 12:30	**PANEL SESSIONS III** **SESSIONS 67 – 101** → Faculty of Law	**p. 126 – 177**
12:30 – 14:00	*Lunch Break* → Faculty of Law, Atrium	
14:00 – 15:30	**PLENARY PANEL II** **HIGH COURTS AND POLITICAL POWER: A CONVERSATION WITH THREE PROMINENT JURISTS** → Faculty of Humanities (Aud. 23.0.50, Aud. 23.0.49 / overflow hall) → Faculty of Law (Aud. 9A-1-01 + Aud. 9A-3-01 / overflow hall)	
15:30 – 16:00	*Coffee Break* → Faculty of Law, Atrium	
16:00 – 17:30	**PANEL SESSIONS IV** **SESSIONS 102 – 135** → Faculty of Law	**p. 178 – 230**

FRIDAY 7 JULY 2017

09:00 – 10:30	**PANEL SESSIONS V** **SESSIONS 136 – 167** → Faculty of Law	**p. 231 – 277**
10:30 – 10:45	*Coffee Break* → Faculty of Law, Atrium	
10:45 – 12:15	**PANEL SESSIONS VI** **SESSIONS 168 – 199** → Faculty of Law	**p. 278 – 325**
12:15 – 12:30	*Snack Break* → Faculty of Law, Atrium	
12:30 – 14:00	**PLENARY PANEL III** **INTERNATIONAL COURTS IN THE 21 ST CENTURY** → Faculty of Humanities (Aud. 23.0.50, Aud. 23.0.49 / overflow hall) → Faculty of Law (Aud. 9A-1-01 + Aud. 9A-3-01 / overflow hall)	

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. Helfer, and 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems', *I•CON, International Journal of Constitutional Law* (forthcoming), with A. Huneeus.

KEYNOTE ADDRESS 13:20 – 14:30

BRYAN STEVENSON
Professor, Equal Justice Initiative / New York University

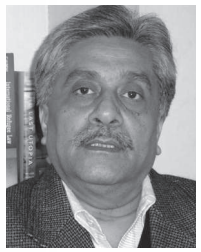
Bryan Stevenson is the founder and Executive Director of the Equal Justice Initiative in Montgomery, Alabama. Mr. Stevenson is a widely acclaimed public interest lawyer who has dedicated his career to helping the poor, the incarcerated and the condemned. Under his leadership, EJI has won major legal 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.

PLENARY PANEL I
WED 15:00 – 16:30

GLOBAL ECONOMIC INJUSTICE

GLOBAL ECONOMIC INJUSTICE: A NOTE

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



BHUPINDER CHIMNI
Professor, Jawaharlal Nehru University, Delhi

Prof. Dr. B. S. Chimni is Professor of International Law, School of International Studies, Jawaharlal Nehru University. He has served as Vice Chancellor of the West Bengal National University of Juridical Sciences, Kolkata (2004 – 2006). He has been a Visiting Professor at Brown and Tokyo Universities and held visiting positions at Harvard, Cambridge, Minnesota, and York universities. He is an associate member of Institut de Droit International, and Member, Academic Council, Institute for Global Law and Policy, Harvard Law School. He is the Editor-in-Chief of the *Indian Journal of International Law*. His most recent publication is the second edition of his book *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2017).

MONEY'S LEGAL HIERARCHY

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

KATHARINA PISTOR
Professor,
Columbia Law School

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

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

JOSEPH H. H. WEILER
Professor, New York University

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

MODERATOR
ERIKA DE WET
Professor, University of Pretoria

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

PLENARY PANEL II
THU 14:00 – 15:30

HIGH COURTS AND POLITICAL POWER: A CONVERSATION WITH THREE PROMINENT JURISTS

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BEVERLEY MCLACHLIN
Chief Justice,
Supreme Court of Canada

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

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

Marta Cartabia is full professor of constitutional law. In September 2011, she was appointed at the Italian Constitutional Court and since November 2014 she is serving as Vice-President. Her research focuses on national and European constitutional law, constitutional adjudication and protection of fundamental rights. She taught in several Italian Universities and was visiting scholar and professor in France, Spain, Germany and US. She was Inaugural Fellow at Straus Institute for Advanced Study in Law and Justice and 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).

PLENARY PANEL III
FRI 12:30 – 14:00

INTERNATIONAL COURTS IN THE 21 ST CENTURY

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.

MODERATOR
RAN HIRSCHL
Professor,
University of Toronto

Ran Hirschl (PhD, Yale University) is Professor of Political Science & Law at the University of Toronto and holder of the Alexander von Humboldt Professorship in Comparative Constitutionalism at the University of Göttingen. He is the co-president of ICON•S, the International Society of Public Law. Hirschl is the author of Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004); Constitutional Theocracy (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.

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 acted as a representative of 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
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, UN treaty bodies, arbitral tribunals and the EU courts. In January 2017 The Lawyer magazine named her one 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 'A' 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).

AUTHORITY IN QUESTION: INTERNATIONAL COURTS IN THE CHANGING WORLD ORDER

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

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

MIKAEL RASK MADSEN
Director of iCourts,
University of Copenhagen

See CV on page 7

MODERATOR
PHOEBE OKOWA
Professor, Queen Mary

Phoebe Okowa is Professor of Public International Law at Queen Mary, University of London. Born and educated in Kenya, she holds a Bachelor of Laws degree from the University of Nairobi. She was a graduate student at the University of Oxford where she obtained her Bachelor of Civil Law degree and a Doctorate in Public International Law. She previously taught at the University of Bristol and has been a Visiting Professor at the University of Lille and Stockholm. Most recently, she was Global Visiting Professor at New York University, School of Law. Professor Okowa has had extensive academic and practical involvement in the application of international law. She is also both a member of the Kenyan bar and the Permanent Court of Arbitration at The Hague. Her teaching and research interests are in the broad area of Public International Law, especially the law of armed conflict, international environmental law and international criminal law. She has published extensively on a range of specific contemporary international law topics including the law of state responsibility, use of force and the protection of natural resources in conflict zones, as well as the relationship between state and individual responsibility for international crimes.

IV CONCURRING PANELS

OVERVIEW

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

PANEL SESSION II
THURSDAY, 6 JULY 2017
09:00 – 10:30

PANEL SESSION III
THURSDAY, 6 JULY 2017
11:00 – 12:30

p. 127 67 POWER AND ITS CONSEQUENCES: THREATS TO THE AUTHORITY AND INDEPENDENCE OF INTERNATIONAL COURTS AND ARBITRAL TRIBUNALS
Participants: Jeffrey L. Dunoff and Mark A. Pollack, Filippo Fontanelli, Taylor St. John / Moderator: Jeffrey L. Dunoff

p. 128 68 CULTURAL HERITAGE BEFORE THE COURTS
Participants: Daria Brasca, Felicia Caponigri, Anna Pirri, Elena Pontelli, Lorenzo Casini / Moderator: Sabino Cassese and Lorenzo Casini

p. 129 69 THE CJEU AS A FUNDAMENTAL RIGHTS COURT: NEW PERSPECTIVES IN LIGHT OF RECENT CASE LAW
Participants: Shreya Atrey, Lilian Tsourdi, Clara Rauchegger / Moderator: Bruno de Witte

p. 131 70 JUDICIAL DESIGN IN FEDERAL SYSTEMS
Participants: Gabrielle Appleby and Erin Delaney, Gerry Baier, Thomas John, HP Lee and Richard Foo, Angela Oliveira, Catalina Smulovitz / Moderator: Vicki Jackson

p. 133 71 THE PUBLIC'S DIFFERENT FACES
Participants: Shai Dothan, Ida Koivisto, Or Bassok, Dmitry Kurnosov/Moderator: Achilles Skordas

p. 134 72 RADICAL DEMOCRACY AND CONSTITUTIONALISM OR POLITICAL ACTION AND JUDICIAL ACTION: HOW FAR CAN ONE GO?
Participants: Vera Karam de Chueiri, Melina Girardi Fachin, Maria Francisca Miranda Coutinho / Moderator: Vera Karam de Chueiri

p. 135 73 JUDICIAL CONTROL OVER STATE EMERGENCY REGIMES
Participants: Francesco Natoli, Balthazar Durand Nicolas Klausser, Jean-Philippe Foegle, Jessie Blackbourn / Moderator: Stéphanie Hennette-Vauchez

p. 137 74 LEGISLATIVE SUPREMACY: CONTEMPORARY DEBATES
Participants: Eoin Daly, Colm O'Cinneide, Fergal Davis, Claire-Michelle Smyth / Moderator: Eoin Daly

p. 139 75 CONSTITUTIONALISM AND CONSTITUTIONAL CHANGE
Participants: Oran Doyle, Zoran Oklopcic, Richard Albert, Michaela Hailbronner / Moderator: Yaniv Roznai

p. 140 76 COURTS, CONSTITUTIONS & DEMOCRATIC HEDGING
Participants: Sujit Choudhry, Tom Daly, David Landau, Rosalind Dixon / Moderator: Sam Issacharoff

p. 141 77 LEX MERCATORIA PUBLICA: PRIVATE-PUBLIC ARBITRATION AS TRANSNATIONAL REGULATORY GOVERNANCE
Participants: Stephan Schill, Kerem Gulay, Flavia Foz Mange / Moderator: Stephan Schill and Bertil Emrah Oder

p. 143 78 MARGIN OF APPRECIATION IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS
Participants: Catarina Santos Botelho, Benedita Mac Crorie, Anabela Costa Leão, A. Sofia Pinto Oliveira / Moderator: Luísa Neto

p. 144 79 IS THERE A SPECIAL EAST-CENTRAL EUROPEAN CONSTITUTIONAL IDENTITY? – II. COMPARATIVE AND EUROPEAN ASPECTS
Participants: Bojan Bugaric, Andras Sajo, Armin von Bogdandy, Kim Lane Scheppele, Signe Rehling Larsen and Michael A. Wilkinson, Federico Fabbrini / Moderator: Oreste Pollicino

p. 145 80 DEMOCRACY AND THE ROLE OF CONSTITUTIONAL COURTS IN ASIA
Participants: Jiewuh Song, Yoon Jin Shin, Amnart Tangkiriphimarn, Swati Jhaveri / Moderator: Jiewuh Song

p. 147 81 MIXED CONSTITUTIONS
Participants: Mark Tushnet, Ran Hirschl and Ayelet Shachar, Aslí Bâli and Hanna Lerner, Gila Stopler / Moderator: Moshe Cohen Eliya

p. 148 82 MORE THAN FIFTY SHADES OF GREY: THE ROLE OF COURTS IN PEACE MAKING PROCESSES IN LATIN AMERICA
Participants: Alfonso Palacios, Germán Lozano Villegas, Elizabeth Salmón / Moderator: Magdalena Correa Henao

p. 149 83 NATIONAL AND EUROPEAN COURTS IN SEARCH OF THE RULE OF LAW PRINCIPLE
Participants: Alessandra Lang, Angela Di Gregorio, Tanja Cerruti, Caterina Filippini / Moderator: Angela Di Gregorio and Alessandra Lang

p. 150 84 NEW TRENDS IN ELECTORAL MATTERS: THE ROLE OF COURTS AND THE VENICE COMMISSION
Participants: Antonia Baraggia and Luca Pietro Vanoni, Cristina Fasone and Giovanni Piccirilli, Pierre Garrone, Beke Zwingmann, Eszter Bodnár / Moderator: Pierre Garrone

p. 152 85 NORDIC COURTS AS CONSTITUTIONAL ACTORS: AGENTS OF CHANGE OR RELUCTANT PARTICIPANTS?
Participants: Helle Krunke, Benedikte Moltumyr Høgberg, Anna Jonsson Cornell, Tuomas Ojanen, Ragnhildur Helgadóttir / Moderator: Janne Salminen

p. 153 86 ON AUTHORITY: THE POLITICS OF THE WEST
Participants: Alexander Somek, Hauke Brunckhorst, Jonathan White, Octaviano Padovese / Moderator: Iderpaulo Carvalho

p. 154 87 OUTSOURCING DISPUTE RESOLUTION? EXPECTATION VERSUS REALITY
Participants: Ana Koprivica, Stephanie Law, Martina Mantovani / Moderator: Stephanie Law

p. 155 88 PROCEDURAL REVIEW: DEFINITION, FUNCTIONS AND LIMITATIONS
Participants: Leonie Huijbers, Eva Brems, Janneke Gerards, Kasey McCall-Smith / Moderator: Aileen Kavanagh

p. 157 89 CRIMINAL LAW, CONSTITUTIONAL PRINCIPLES AND HUMAN RIGHTS
Participants: Vincent Chiao, Hamish Stewart, Malcolm Thorburn, Javier Wilenmann, Leora Dahan Katz / Moderator: Vincent Chiao

p. 158 90 PROTECTING DEMOCRACIES AND DEMOCRATIC RIGHTS: THROUGH COURTS AND OTHER MECHANISMS
Participants: Haibin Qi, Roxan Venter, Irene Broekhuijse and Huub Spoormans / Moderator: Irene Broekhuijse

p. 160 91 RELIGIOUS PLURALISM AND INTERNATIONAL HUMAN RIGHTS LAW: THE CASE OF CONSCIENTIOUS OBJECTION
Participants: Fabienne Bretscher, Tania Pagotto, Lisa Harms, Stefan Schlegel / Moderator: Stefan Schlegel

p. 161 92 JUDICIAL INDEPEDENCE & THE INDONESIAN CONSTITUTIONAL COURT
Participants: Fritz Edward Siregar, Feri Amsari, Donal Fariz, Iwan Satriawan, Luthfi Widagdo Eddyono, Veri Junaedi / Moderator: Fritz Edward Siregar

p. 163 93 INSTITUTIONS OF THE RULE OF LAW: NEW BALANCE OR NEW POWERS? PANEL II: TRANSNATIONAL BALANCE OF POWERS
Participants: Ingo Venzke and Joana Mendes, Lando Kirchmair, Thomas Riesthuis, Cormac Mac Amhlaigh, Jan Klabbers / Moderator: Thomas Riesthuis and Sanne Taekema

p. 164 94 NATIONAL CONSTITUTIONAL COURTS AND EUROPEAN INTEGRATION
Participants: Marco Dani, Sabine Mair and Elias Deutscher, Jan Komárek / Moderator: Christoph Möllers

PANEL SESSION IV
THURSDAY, 6 JULY 2017
16:00 – 17:30

PANEL SESSION V
FRIDAY, 7 JULY 2017
09:00 – 10:30

PANEL SESSION VI
FRIDAY, 7 JULY 2017
10:45 – 12:15

WEDNESDAY 5 JULY 2017 17:00 – 18:30

PANEL SESSION 1

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 rigidness 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 Catalonian 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*

2 "THE CONSTITUTIONAL CASE OF THE CENTURY": MILLER, THE LIMITS OF EXECUTIVE POWER AND THE CONSTITUTIONAL FORCE OF EU LAW

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 reasoning of the majority of the Supreme Court and offer a critique of some aspects of the dissenting judgment. He will also reflect briefly on how the affair exposes the weaknesses of the uncodified, British constitution and the fragility of constitutionalism in a time of populism. Jeff King is a Professor of Law at University College London, Co-Editor of the United Kingdom Constitutional Law Blog, Executive Member of the UK Constitutional Law Association, Editorial Committee Member of the journal Public Law, and Co-Editor of the journal Current Legal Problems. His co-authored blog 'Pulling the Article 50 Trigger: Parliament's Indispensable Role' (27 June 2016) can be found on the website of the UK Constitutional Law Blog. He is also the author of Judging Social Rights (CUP 2012), The Doctrine of Odious Debt in International Law (CUP 2016), and co-editor of the forthcoming volumes The Cambridge Handbook of Deliberative Constitutionalism (CUP 2018) and Parliament and the Law (2nd Edn) (Hart 2017)

Timothy Endicott: ***Miller and the Necessity of Constitutional Executive Power***

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

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

point was crucial in their decision that the Crown's residual prerogative powers could not be used to bring about a change of the constitutional magnitude that Brexit would entail. Gavin Phillipson has held a Chair in Law at Durham University since 2007. He has published widely in the fields of public law and human rights in top UK Canadian and US law journals, including Modern Law Review, Cambridge LJ, Oxford Journal of Legal Studies, Public Law, McGill LJ and Law & Contemporary Problems. His article on Miller in the November 2016 issue of Modern Law Review was cited to the High Court during the hearing (day 2) and included in the bundle for that hearing and in the bundle for the Supreme Court. It was extensively cited by Lord Carnwarth in the judgment. His blogpost https://ukconstitutionallaw.org/2016/11/25/gavin-phillipson-the-miller-case-part-1-a-response-to-some-criticisms/ was read and used by counsel in preparing their arguments for the appeal and included by them in the court bundle.

Stephanie Palmer: ***Beyond Brexit: The Broader Implications of Miller for the UK Constitution the Role of the Courts and International Law Obligations***

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	Tarunabh Khaitan Rosalind Dixon and Julie Suk
Moderator	Rosalind Dixon and Richard Holden
Room	7C-2-24

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

This paper argues, using India as a case study, that constitutional directives can be a useful tool for the expressive accommodation of ideological dissenters who would otherwise lose out in constitutional negotiations in deeply divided societies. The strategy of expressive accommodation was tempered in the Indian case through containment and constitutional incrementalism. A calibrated expressive accommodation of ideological dissenters can give them enough (and genuine) hope of future victories to keep them on board, without going so far that the majority rejects the accommodation or their ideological opponents in turn leave the constitutional negotiation table. By focussing 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 ethnocultural 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 newly populist, anti-democratic forms of constitutional politics. Yet despite hints of a different path, few legislatures have adopted socio-economic status as prohibited ground for discrimination, and even fewer constitutions expressly list wealth or income as prohibited grounds. This article explores whether this current pattern is inevitable, or whether there is a potential case for a significant expansion in the current scope of constitutional equality law – to embrace a distinctly economically focused form of constitutional equality jurisprudence. The article suggests that there are in fact strong arguments for 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 equality 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
Moderator	Anne Peters
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 competetion 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 (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 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 make use of law from other legal systems – national, transnational, and international – in their decisions. In the US as in the UK and elsewhere, there is a tension between a desire/willingness to learn and draw from diverse sources, and a desire to preserve the independent character of American law, associated not only with sovereignty, but also its written Constitution. The more conservative voices on the Supreme Court, as Justice Breyer's book makes clear, have been particularly resistant to learning from/reliance on foreign law, and fearful of treaty obligations (e.g. the North American Free Trade Agreement) that may appear both to surrender elements of national sovereignty and to expand the domain of federal, as distinct from state, legal authority beyond the legislative powers the Constitution confers on Congress.

5 BEYOND BALANCING: ASSESSING ALTERNATIVE APPROACHES IN JUDICIAL PROPORTIONALITY 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 criticism 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. The panel will break new ground exploring these 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 role, and they need to express that awareness in their judgments. In 'hard' cases concerning fundamental rights, this poses special challenges for courts – how can they design the reasoning of their judgments in such a way as to meet the above requirements? The answer to be given often seems to be 'by clarifying that there is a conflict of interests, and by balancing these interests'. As this paper will strive to demonstrate, however, using the balancing rhetoric', seldom provides for clear, persuasive and flawless reasoning, and in many cases balancing language does not help to do justice to the courts' constitutional position. If that argument is accepted, the question arises as to whether there are alternatives that courts can use to avoid the pitfalls of balancing review. This paper claims that there are – at least to a certain degree. It will base this claim on a tour d'horizon of the potential of three methods or instruments of judicial argumentation that can be used to decide in fundamental rights cases: analogical reasoning, 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. Worldwide 'balancing' has become the way for courts to deal with conflicts between individual rights and general rules and policies. 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 having a closer look at core rights reasoning and the way in which it can form an alternative or at least an addition to balancing techniques. This paper will show several underdeveloped characteristics of core rights reasoning; namely that it not necessarily determines absolute and inflexible limits to limitations of rights, and can also be useful for interpreting i.e. giving prima facie content to rights norms. Core rights, as 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 (re)-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 that secures 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 with confidence, using clear tests to produce foreseeable results. Such alternatives might offer the only answer, but this paper attempts the defence of another: do balancing better through extensive reform of doctrine and institutional cooperation.

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

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

6 COMPARATIVE FEDERALISM: CONSTITUTIONAL ARRANGEMENTS AND CASE LAW – BOOK DISCUSSION

The panel explores from a comparative perspective what the major challenges are for federal studies from the perspective of constitutional law. The discussion's point of departure are the findings of the book "Comparative Federalism: Constitutional Arrangements and Case Law" (Hart Publishing forthcoming in 2017) which has two distinct features. First, it explores federal systems from the perspective of comparative constitutional law and analyses how different government levels exercise their powers and interact in several highly topical policy fields like social welfare environmental protection or migrant integration. Second, the book incorporates in the text case law boxes discussing seminal judgments from federal systems worldwide in order to demonstrate the practical impact of constitutional jurisprudence on policy-makers and citizens alike.

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

Francesco Palermo: ***Presentation of the book's findings (together with Participant 2)***
See panel's description

Karl Kössler: ***Presentation of the book's findings (together with Participant 2)***
See panel's description

Eva Maria Belser: ***Book Discussion***
See panel's description

James Gardner: ***Discussant with particular consideration of the US experience***
See panel's description

Patricia Popelier: ***Discussant with particular consideration of the Belgian experience***
See panel's description

Nico Steytler: ***Discussant with particular consideration of the South African experience***
See panel's description

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 have 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.

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***

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 steps off it. The paper demonstrates 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 process by which those favourable 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, corporations and other actors all do what they can to enhance environmental protection. To that end, international law proposes that individuals and environmental organisations shall have access to justice in matters concerning the environment. But what is access to justice? Determining the basic conditions that an applicant needs to fulfil to be eligible to have her complaint heard (legal standing) and deciding what claims she is allowed to raise within a judicial procedure (the scope of the procedure) means outlining the relationships between the legislature the executive and the citizen. These relationships are reflected in the reasoning of courts interpreting rules on access to justice. They are guided by more than written law. French administrative procedural law generally allows anyone who has an interest in the act under review to launch a complaint. However, limitations to judicial review reflect a fear of the return of judge-made law a trauma from the days of the Ancien régime. The French interest-based approach to legal standing can be contrasted by the German constitution and system of administrative law which limits standing and the scope of procedure so as to protect individual rights, which are at core of the 1949 Grundgesetz. In the EU, there are yet other rationales for access to justice: individuals and organisations raising claims based on EU law before national courts become agents of the European Commission who help ensure that EU member states respect obligations under EU law, and thereby extend the force of EU law. When environmental lawyers speak of access to justice, what do they really speak of? While there might be agreement on strengthening the right of access to justice, that agreement may not extend to the reasons for doing so. In embracing access to justice, do environmental lawyers rationalize actions that primarily serve other interests than that of stopping environmental degradation? In my paper I describe access to justice in environmental matters in a way that goes beyond the mere wish that a wider interpretation of access to justice would automatically guarantee better protection of the environment.

Yaffa Epstein: ***Adversarial Legalism in the European Union and the Conservation of a Controversial Carnivore***

The article argues that through litigation, NGOs assist the EU to delimit Member States' competence to manage the wildlife within their borders. It compares species protection laws in the EU and US, which locate the responsibility for their implementation, administration, and enforcement at different levels of government, or governance. The division of responsibility between the Federal authority, state governments, and non-government actors is perhaps the most significant distinction between these two systems. As the EU continues to gain federation-like competences, it is not surprising that responsibility for biodiversity protection has shifted from the states to the central authority. This responsibility is also shifting from the state to the non-state actor as non-governmental organizations increasingly enforce EU law through public interest litigation in the Member State courts. In this way, biodiversity protection in the European Union is becoming more similar to that in the United States in that policy and decision making are increasingly negotiated through adversarial legalism, or what Daniel Kelemen calls "Eurolegalism". Using the litigation surrounding wolf protection in Sweden as an example, I argue that the EU has consolidated or centralized power in environmental matters through decentralizing or democratizing the right to enforce EU law and that the evolution of Swedish wolf policy of the past several years can be explained as part of this movement towards European adversarial legalism and the hollowing out of state power. To make this argument, I compare the protection of wolves through adversarial legalism in the United States with the emerging legalism in Sweden. I describe the impact of litigation on the understanding and administration of several aspects of the species protection laws, including their legislative goals and how those goals are determined to be met, prohibitions on killing protected species, and amendments to the lists of protected species. I then discuss how differences and similarities in the availability of public interest litigation have impacted these results. As Kelemen has highlighted, litigation by individuals and groups has played an important role in promoting the effectiveness of EU law. Public interest litigation not only facilitates enforcement of EU environmental protection laws, but by enlisting Member State courts and empowering NGO litigants, the EU's reach is extended beyond what its administrative and enforcement capacity would have otherwise allowed. Kelemen's prediction that adversarial legalism would continue to expand and shape the European legal terrain as it has the American has proved prescient, perhaps even beyond his expectations. Kelemen argued that European legal cultures, institutions and traditions may result in a less litigious version of adversarial legalism,"Eurolegalism". However, the Swedish example indicates that entrenched legal institutions such as limitations on standing, legal cultures resistant to litigation as a way to solve policy disputes, and cost barriers, are giving way. As the cases and controversies over the conservation and killing of wolves in Sweden illustrate, the administration and enforcement of EU law has in part been decentralized to interest groups which have so far quite successfully helped to expand the EU's reach through litigation.

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

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

Participants	Emily Kidd White Tamar Megiddo Rocío Lorca Ferreccio
Moderator	Emily Kidd White
Room	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 to 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 rule of law that would supplement domestic courts where those responsible for crimes against human rights remained consistently beyond the reach of the law. In practice, however, it has been vulnerable to criticisms questioning its legitimacy and its capacity to fulfill the role it was meant to serve. In order to understand the source of this alleged lack of legitimacy, the paper looks at the essential functions that courts serve. It argues that the punishment of crimes and enforcement of laws is not a court's primary function in the establishment or maintenance of a rule of law. Rather, the essential role of courts is one of transformation – turning violence and bare power into something attaining to "the just." This analysis will allow us to take a new approach to the challenges of international criminal justice.

9 CHALLENGING RACIAL MARGINALITY IN PUBLIC INSTITUTIONS – MARGINALITY IN PRACTICE

In addressing the conference theme of courts, power and public law, the papers in these panel will consider the production and consequences of homogeneity in law and politics. This is not only relevant as a result of shocking public events in 2016 such as Brexit in the UK and Trump in the USA. Over the last few years, questions such as 'where are the Black 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.

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

Tanya Hernandez: ***Latino/a Perspectives on Law Faculty Diversity***

Despite the improvements in Latino student enrollment numbers at colleges 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 in the same period, a crisis of exclusion exists. The issue of academic colonialism and inaccessibility remains a stubborn and diffuse problem justified by a high-demand/low-supply mythology about minorities persists, in the face of a more-than-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 sees itself as "color-blind," going as far as prohibiting the collection and analysis of "sensitive data"-defined as including race and ethnicity. To bypass these hurdles, I collected original qualitative data shedding light on judges', prosecutors', and other legal actors' discourses on racial and ethnic diversity. I found that these professionals deploy various strategies to dodge or downplay the relevance of race and ethnicity to the judicial work. How should one understand the role of racial identities when the majority of research subjects refuse to see them as relevant to their work? This paper focuses on some of the concrete obstacles to entry in the judiciary for blacks in particular but also for Maghrebis and other French minorities, starting with educational barriers, all the way until judicial selection, transfer, and promotion.

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

This presentation will focus on the effect that globalization has had on social inequalities within large corporate professional firms, in England and Wales. While globalization is an imprecise term, there is general agreement about its destructive impact on traditional society. Some see this as producing a range of negative effects (such as psycho-social fragmentation and insecure employment). Others, however, have viewed it as opening up the possibility for individuals to create their own biography. This is due in part to globalization's "capitalization of everything" which, in the case of the legal profession, has transformed the large law firm from a relatively parochial organization, in which personal relations remained highly significant, into a multinational organization governed by Human Resource Management (HRM), commonly employing Diversity Management (DM) techniques and dominated by discourses of entrepreneurialism. These developments could be expected to have resulted in significant progress toward a more socially representative profession. Yet statistical surveys and qualitative research suggest that gender, race, and class remain strongly determinant of career progress in the English legal profession, including in the globalized corporate sector. The presentation 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).

10 COMPARATIVE CONSTITUTIONAL LAW AND CROSS BORDER CONSTITUTIONALISM

The panel focus in new advancements and perpectives for the application of comparative constitutional law in different ways and analyses.

Participants	Eduardo Moreira
	Luis Claudio Araujo
	Marcio Pugliesi
	Guilherme Pena de Moraes
Moderator	Eduardo Moreira
Room	8B-2-09

Eduardo Moreira: *New Trends on Comparative Constitutional Law*

The seminar highlights the methodology and new possibilities in comparative law field. Also explains practical effects in such quotations for foreign precedents. The focus on international cross-borders uses of constitutional law will bring some controversial rules for use of foreign constitutional law matters and provisions and not only foreign constitutional decisions.

Luis Claudio Araujo: *The cross-border constitutionalism.*

In the structure of a judicial decision within the current globalized society it is clear that the decisions of domestic and transnational jurisdiction are made in a dialogue among courts around the globe. Thus it is undeniable that every day judges form different courts look abroad looking for new arguments to justify their own cases. Therefore the judicial decisions are not any longer an isolated process of deliberation of local courts. On the contrary they are part of a transnational process of dialogue among courts around the globe. Moreover the classical concept of nation-state sovereignty raised from the peace of Westphalia in 1648 (treaties of Osnabrück and Münster), after the end of the Thirty Years' War, based on territorial integrity and states as the primary actors in international relations, is taking new formats in the current international agenda. With the rise of a new globalized justice, based on the concept of globally-ordered world, the concept of sovereignty is replaced by a more complex interdependent cosmopolitan society, in which the idea of jurisdiction has be rewritten to endorse the concept of a fully integrated and harmonious interconnected world. Hence, mostly in the Twentieth century, the theory of sovereignty has been re-discussed in light of contemporary views about the nation-state. 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 Constitutionalims 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 (the constitution, for instance) by those that take over, by any means, the right to do so. Beyond the mechanisms constructed by neoliberalism of concessions tending to establish a formal equity (like those of individual rights remedies and social rights) proposed in legal texts in the system of power managed by the government in its different meanings – it is necessary to obtain legitimacy through the systematic 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 failing 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.

11 COMPETITION LAW AS PUBLIC LAW PRIVATE, POWER, AND COURTS

While imposing checks and balances on the exercise of public power traditionally lies at the core of public law, raising concerns about the accountability and democratic legitimacy of private power exercised by transnational corporations and non-state actors confronts public law with new challenges. On many occasions, competition law plays a primary role in regulating the behaviour of such private, transnational players and in holding them accountable. Yet, the emphasis put by the current academic debate on competition law's private law character, its increasing technicality and fixation on the normative goal of consumer welfare obfuscate the fundamental role that competition law plays as public law for our democratic societies in drawing the bounds of legitimate private and public power. For these reasons, we propose a panel which focuses on (a) how competition law addresses concerns of legitimacy and democratic accountability of private power of non-state actors and (b) how public law hermeneutics inform the administrative practice of competition authorities and judicial reasoning of courts when balancing conflicting goals and rights and imposing checks-and-balances on private power.

Participants	Elias Deutscher and and
	María De La Cuesta De Los Mozos
	Maria-José Schmidt-Kessen
	Stavros Makris
	Maria Ioannidou
Moderator	Ioannis Lianos
Room	8B-2-19

Elias Deutscher and María De La Cuesta De Los Mozos: *Nudging and the accountability of private power*

This paper analyses how EU courts and competition authorities address the issues of accountability and democratic legitimacy of private actors by applying competition law in the context of private or semi-public regulation. More precisely, it examines the recent phenomenon of nudging by private entities. Relying on techniques, such as default settings, which steer market actors' choices into a certain direction, nudging by private parties carries the promise of reducing compliance and enforcement costs, enhancing welfare and encouraging more sustainable forms of production and consumption. Nudging by private parties has, therefore, been heralded as innovative, liberty-enhancing and cost-reducing alternative to the traditional model of public command-and-control regulation. Irrespective of its allegedly beneficial outcomes, we argue in the present paper that nudging by private parties raises fundamental constitutional issues about the accountability, democratic legitimacy and transparency of private power, as it empowers

private companies to regulate consumer and business behaviour pursuant to self-defined 'public interest' goals. In our paper, we, therefore, examine how EU courts and enforcement authorities could use competition law to address these issues of accountability, legitimacy and transparency of private nudging, while ensuring policy-space for an increased participation of the civil society and private entities in public interest regulation.

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

The elevation of the European Charter of Fundamental Rights to an instrument of primary EU law by the Lisbon Treaty has become a constant source of inspiration and support in the legal reasoning of the CJEU, even in cases squarely falling into the realm of private law. This paper analyses the potential of using fundamental rights reasoning when it comes to questions of substance in competition law cases before the CJEU, in particular in abuse of dominance cases where the interest of safeguarding undistorted competition conflicts with other (non-economic) interests. Advocate General Wathelet undertook a first cautious attempt in this direction in 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 explores 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 road 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 flexible, negotiated, tailor-made remedies. However, the proliferation of commitments in conjunction with their idiosyncrasies may create a tendency for privatizing antitrust enforcement. In particular, it has been argued that commitments have triggered a paradigm shift towards consensual antitrust. Courts are deprived of the opportunity to clarify and develop the law, while market players negotiate and tailor antitrust enforcement with competition enforcers behind closed doors and in the shadow of law. This consensual and more bureaucratic-technical turn may undermine "the struggle for law" and bring antitrust enforcement closer to regulation. The present paper evaluates the merit or demerit of the said criticisms and, after casting some doubt on the "paradigm shift" argument, explains how commitments could contribute to legal clarity and allow antitrust intervention become responsive.

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

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

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

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

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

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

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

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

Yota Negishi: ***The Interaction between Human Rights Courts and Domestic Courts in Transitional Justice***

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

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

Recently two conflicting trends in inter-American human rights law are surfacing. On one hand, the Inter-American Court has increasingly adopted the stance of a regional constitutional court, one that aims at transforming social practices through constitutional law. On the other hand, some states question – directly and indirectly – the Court's authority. This paper is an initial effort to expose these two approaches and reflect on how they may reshape the contours of inter-American constitutionalism, for which I mean the interaction between domestic constitutional case law and regional, human rights law. In previous work, I have examined one salient feature of the Inter-American Court's trend towards judicial maximalism, the conventionality control doctrine, first as a problematic doctrine for the implementation of the dialogic relation among States and the Court – an approach that the Court itself and many commentators fervently embrace – and later as a demonstration of the inter-American human rights system's reluctance to adopting any mechanisms for subsidiarity – a notion that international courts should not rule out ab initio. Here I look at the Court's influence on states, through the articulation of the anti-impunity doctrine as reflected in cases on states', self-amnesty laws and the recent judicial pushback that the Court has experienced at the hands of one of its (traditional) strongest allies, the Argentinean Supreme Court.

13 COURTS AND DEMOCRACIES IN COMPARATIVE PERSPECTIVES

This panel explores how courts around the world have enhanced or impeded democratization within their political systems. In "Courts and Democracies in Asia", Po Jen Yap explores the symbiotic relationship between democracy and judicial power, and how they mutually reinforce each other. In "Re-democratization by Courts", Swati Jhaveri examines the role that courts may play in unravelling aspects of popular majoritarianism in favour of 'thicker' conceptions of democratic values or aspirations. Stephen Gardbaum and Samuel Issacharoff will serve as Discussants for both papers.

Participants	Po-Jen Yap
	Swati Jhaveri
	Sam Issacharoff
	Stephen Gardbaum
Moderator	Po-Jen Yap
Room	8B-2-43

Po-Jen Yap: ***Courts and Democracies in Asia***

This paper explores the role that Asian courts play in the democratization of their political systems and illuminates how law and politics interact in the judicial construction of constitutional doctrines. In dominant-party democracies (e.g. Singapore, Malaysia, and Hong Kong), courts can only take a limited range of actions adverse to the government's interests before the latter retaliates by deploying constitutional or unconstitutional means to discipline the courts. While their courts are unable to successfully challenge the core interests of their governments, they must pursue "dialogic" pathways to constrain the institutional pathologies of authoritarian politics. On the other hand, 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 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. Comachen (Dead) by Lrs & Ors (2017), where the Supreme Court of India evaluated the need to secularise 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 such cases is between a particular national democratic status quo, which may comply with a definition of democracy and thicker democratic aspirations, centring on ideas of broad representation. This paper evaluates the courts' role in such contests. It looks at the possibility of legitimising the judicial role in this contest on the basis that, by revisiting aspects of an electoral system, the courts are able to revive faith in it so that it remains a vital and functioning part of the democratic process.

Sam Issacharoff: ***Discussant***

Stephen Gardbaum: ***Discussant***

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
Moderator	Elisa D'Alterio and
	Gianluca Sgueo
Room	8B-2-49

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

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

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

Ilaria Ottaviano: ***The extraterritoriality in the assessment of the administrative acts***

Traditionally, national administrative law has been considered subject to the principle of strict territoriality. It is well known, however, the evolution that has enabled to recognize the extraterritorial effects to a national administrative act. In the EU system, such result has been achieved firstly by applying the principles of mutual recognition (art. 49 TFUE) and freedom of establishment (art. 54 TFUE). However, administrative law has continued to remain subject, also in a supranational system, to the legality checks of its 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, once a member State has authorized the entry into its territory. The system is, however, accompanied by an information system consisting of a non-EU citizens database (Schengen Information

System second generation SIS) which contains alerts concerning third-country nationals for the purpose of refusing entry or stay, issued by administrative or judicial authorities, in accordance with the procedural rules laid down by national legislation, adopted on the basis of an individual assessment (art. 24 Regulation (EC) n. 1987/2006, hereinafter 'SIS II regulation', or an overall evaluation (art. 36 Council decision 2007/533/JHA, hereinafter 'SIS II decision'). These alerts can be appealed by the person concerned before the court or competent authority of any Member State, even different from the one which had issued the alert, for the purpose of accessing, rectifying, cancelling, obtaining information or compensations in connection with an alert relating to him (art. 43 par. 1 SIS II regulation; art. 59 SIS II decision). The judge hearing the case, even a judge of a State other than the one having issued the contested decision, could be asked to assess on a preliminary basis the regularity of the alert decision, at least in respect of the compatibility with the requirements of the Schengen system. Such assessment it was noted, involves 'une rupture sans precedent' vis-á-vis the principles of EU law in general and of the mutual recognition mechanism in particular, giving a national court the power to assess the compliance of a foreign administrative act with the principles of the Schengen information system. While as a rule the judge requested considers himself not competent to assess the compliance of a foreign alert decision to the SIS the French Conseil d'Etat has accepted to carry out such assessment of an alert decision adopted by the authority of another Member State. Having regard to Article 111 of the Convention implementing the Schengen Agreement, the decision of the Conseil d'Etat might appear daring to the extent that, in principle, courts are competent to appreciate only the validity of acts adopted by the authorities of their home State. And in fact the traditional position of the French Conseil d'Etat is to decline jurisdiction in respect of acts of foreign authorities or international organizations. In these cases, however, the control of the administrative court was focused on the correctness of the factual basis of the decisions. The Conseil d'Etat has affirmed its competence to verify whether the decisions adopted by foreign authorities could be included among the ones warranting, under Article 96 of the Schengen Convention, a registration to SIS; therefore, the Conseil d'Etat has limited the scope of its assessment to cases of manifest error in the registration. In order to avoid the denial of justice for declining jurisdiction 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 préjudicielle transnationale between counterparts judges from different Member States, completing an horizontal cooperation between courts of different member States where the vertical relationship would continue to exist between them and the CJEU.

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 the U.S. 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 aforementioned aspects sensibly prevalent.

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 relationship between administrative and jurisdictional remedies is more 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 an affected individual challenging the legitimacy of an agency action and enquires the relationship between quasi-judicial bodies agency-heads and courts.

Although the U.S. appeal system surely presents specific features, which differentiate it from solutions adopted elsewhere (especially with regard to the influence of Politics in general on the functioning of quasi-judicial bodies), it nevertheless offers interesting comparative insights revealing, for instance, some elements in common with the administrative remedies provided for within the framework of the European Union.

The proposed paper intends to explore the relationship between Courts, Politics and Policies within the peculiar frame of the attribution of supervisory tasks to the European Central Bank (ECB), in the context of the establishment of the European Banking Union. It is well known that the ECB has been entrusted with a wide variety of supervisory tasks and powers over credit institutions established in the Eurozone, being able to exert strong restraints to their activities and internal organisation by means of individual administrative measures. Besides the technical considerations underpinning the exercise of banking supervisory tasks, one cannot underestimate the role played by administrative discretion when setting up supervisory policies, strategies and priorities, as well as in the definition of the day-to-day standards of supervision. Moreover, besides the "technical legitimation" of the ECB, it is not possible to forget that, in the middle of the turmoil of the crisis, precise political considerations have driven the institution of the Single Supervisory Mechanism and the conferral of traditionally sovereign functions to a supranational independent authority. This, however, raises some concerns in terms of political legitimacy of the ECB. Against this background, the proposed article analyses the administrative remedy provided by the Administrative Board of Review (ABoR) of the ECB, as an example of quasi-judicial protection mechanism. The ABoR is in fact an internal body entrusted with the task of carrying out the review of decisions taken by the ECB in the exercise of supervisory powers. A particular attention will be given to the standard of review, the intensity of the scrutiny, the legal effect of the act concluding the proceeding and its impact on the contested decision and, lastly, the relationship with the judicial remedy before the European Court of Justice (ECJ). In light of the above, a number of elements affecting the relationship between judicial and quasi-judicial protection, discretionary choices and political considerations will be examined. First of all, it is argued that the physiognomy of the administrative remedy reflects the structural and functional features of the administrative authority. In particular, the paper intends to investigate the relationship between the intensity of the review and the impact on the administrative activity on the one hand, and the margin of discretion enjoyed by the authority in the exercise of its administrative powers, on the other. Secondly, it is observed that the introduction of trial-like administrative procedures is aimed not only at granting third parties a protection guarantee, but also at protecting the interest of the public administration in having its act reviewed by an internal body before ending up before the court. The presence of an administrative remedial tool may be seen as an important filter in the interest of: a) individuals against the decisions of the authority; b) the authority, vis-á-vis the "judicial risk" of being exposed to the scrutiny of the courts; c) the courts, in avoiding to deal with a potentially high number of complaints. Thirdly, the paper claims that administrative remedies are suitable tools to strengthen the accountability regime of the administration. As the international experience shows, the presence of internal independent bodies in charge of reviewing the activity of the respective institution may be seen as a tool for "civilizing power" and ensuring the respect of the rule of law. This also contributes to counterbalance the low level of political legitimacy of a non-majoritarian and independent institution.

15 COURT'S UNPOPULAR AUTHORITY AND DEMOCRATIC ACCOUNTABILITY: A STORY OF TWO TALES

Our proposal explores some crosscutting challenges of Political Power as regards the authority and responsibility of the Judiciary. In order to delve into the makings of judicial accountability, we want to frame our debate in terms of constitutional design and practices. Our concern is to put forward a comparative outlook from different legal sensitivities and political perspectives. The grammar of right protections have been modeled by experiences whose internal connections are randomly entwined by subtle comparative acknowledgment. Populist, liberal, democratic and/or republican goals are likely to bring about dilemmatic constitutional arrangements ready to build up – or to undermine – Courts' independence. The core normative elements that we would like to address, then, are likely to be better singled out in a setting of competing constitutional values and goals. Judicial accountability, in this context, is historically determined by a combination of constitutional blunders and solutions. How do constitutional drafters tackle the counter-majoritarian difficulty? Which are the secondary effects of an unaccountable Judiciary? What are the constitutional responses surveyed in diverse regions of the planet? These are the challenging questions we would like to grapple in Copenhagen.

Participants	Suzannah Linton Donna Greschner Benedetta Barbisan Pablo Riberi
Moderator	Pablo Riberi
Room	8A-3-17

Suzannah Linton: ***"Guarding the Guardians" or abuse of power? Reflections on the Impeachment of Chief Justices in the Philippines and Sri Lanka***

Through the two case studies, this presentation will trace three issues that appear to be critical in ensuring that when exercising punitive action against judges, a correct balance is achieved: due process; the preservation of structural and substantive independence of the judiciary; and the maintenance of professional standards on the bench.

Donna Greschner: ***Judicial Control of Abusive Primer Minister Power: Recent Canadian Experience***

With the 2015 election of a progressive Liberal government, Canada may seem immune from the 'democratic decay' that is eroding democratic practices in some European countries and beyond. However, the previous Conservative Government led by Prime Minister Stephen Harper (2006-2015) was marked by numerous exercises of imperious – if not abusive – executive power. Several of these exercises came before the courts. This paper will examine whether the Canadian judiciary was effective in limiting high-level abusive exercises of executive power, what lessons may be drawn for other parliamentary systems, and what insights the experience may offer for broader debates about judicial legitimacy and accountability.

Benedetta Barbisan: ***The "Unpopular" European Court of Human Rights: A Report from the Unyielding Political Power in Europe***

Judicial power in Europe seems more powerful than ever and yet under a certain deescalation. In the United Kingdom, just a few months ago, the Government has pledged to scrap the Human Rights Act in favour of a more domesticated British Bill of Rights, intending to disempower the foreign European Court of Human Rights (ECtHR) by avoiding its jurisdiction on national laws. Concurrently, the Turkish President Erdogan has announced the suspension of the European Convention of Human Rights (ECHR), blocking the ECtHR's jurisdiction out. Already in 2015 France had opted out of some of the ECHR's guarantees during the state of emergency. How popular is still the judicial power in Europe and what is its relation with political powers?

Pablo Riberi: ***Unfettered Judges. Untamed Presidents. Reckless Representatives – Prevailing traits in Latin American new reading of separation of powers***

There are lessons driven from Latin-American constitutional design. Power encroaching instincts and non-democratic hyperboles have seldom been deterred by normative previsions. In several countries, the atavistic tenet of "checks and balances" has been faltering in either oligarchic impulses or populist ruling. In many polities, the interplay of the political branches and the judiciary has come along with a partisan hijacking of the public sphere, when not a blatant colonization of the very idea of the common good. The lack of fair constitutional conditions for administrative, legal and political accountability makes judges vulnerable targets and/or aggressive agents of authoritarian impulses.

16 IS POPULIST CONSTITUTIONALISM THE NEW TREND?

The combination of populism and constitutionalism, a phenomenon originally particularly related to experiences in Latin America, is increasingly evident in some of the new EU member states (notably Hungary and Poland and perhaps also Romania). In a somewhat astonishing set of developments, populist constitutionalism now even threatens what were widely seen as the most durable, established constitutional democracies of the Western world, that is, the United Kingdom and the United States. The peculiar, and worrying tendency in constitutional politics and practice that populist constitutionalism represents, leads to significant tensions in democratic regimes grounded in fundamental values, human rights, representative democracy and the rule of law. But the relation between populism and constitutionalism seems more complex than one that is simply reducible to the latter being undermined by the former. The panel 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 Scheppele 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 wield 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 both democratic backsliding and illiberal democracy 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 democracie, 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 than has be done so far. While there is some literature emerging on the phenomenon (Mudde 2013; Thio 2012; Mueller 2016), a more robust and theoretical treatment of populist constitutionalism stills seems absent. The paper will provide a first step towards such an attempt by "deconstructing" the phenomenon in a number of (interrelated) dimensions: the will of the People, majoritarianism, legal resentment, and constitutional instrumentalism.

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

Western democracies are facing a surge of nationalist populism that represents the most serious challenge to the liberal international order and its core constitutional form, liberal constitutional democracy. 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 fringe political parties are growing with alarming speed. The article examines the constitutional implications of the populist surge, situtating it in a broader theoretical legal framework where first, different versions of populism are identified ('varieties of populism'), and second, their variegated 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 ideology. Hence, there are several quite different versions of populism, ranging from agrarian, political, reactionary, authoritarian and revolutionary populism (Canovan 1981). What distinguishes the current form of populism are two characteristics: first, current populism is predominatly nationalist and xenophobic in its character (exceptions Syriza in Greece Podemos in Spain) and, second, like many older versions of populism, it is anti-liberal but not necesarily anti-democratic. Moreover, the new populism represents a novel adaptation of populism using democracy as a form but skilfully eroding its substance and turning it into various forms of illiberal and authoritarian regimes.

Mark Tushnet: ***Populist Constitutionalism: Thick and Thin***

As I think of it, populist constitutionalism is a practice of political discourse (that is, primarily outside the context of litigation and adjudication) in which the broad statements about a nation's fundamental constitutional commitments – for example, in 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

to motivate and justify limitations on actions that are concededly within the scope of government action. That practice is, as I have put it, one that implements the "thin" constitution through political discourse and action. There is another practice, in which "thick" proposals – that is, ones that are specified to some degree, in contrast to abstract proposals, are made the object of popular deliberation and decision. The models for this "thick populist constitutionalism" are popular referenda on specific policy proposals: gay marriage in Ireland and California, a minaret ban in Switzerland. The literature dealing with such referenda is quite ambivalent about them, primarily because of concerns that they license the transfer into the domain of direct public decision-making some pathologies of ordinary politics (such as bias and the risk that interest and passion with dominate deliberation when voters choose). This paper does not argue in favor of either thin or thick populist constitutionalism, or both, but only for the proposition that they are different from each other, and that one can have good reasons to support one but not the other.

Kim Lane Scheppele: *The Opportunism of Constitutional Populists*

Constitutionalism is under attack from a new breed of politicians who identify with populism. But a closer analysis of these "populists" reveal that few are really committed to populism in any serious sense. Instead, these new leaders have a history and practice of opportunism and they have used the current popularity of populism to ride a wave of political discontent with stagnating "politics as usual" to a position where they can begin to dismantle checks on power. Populism is not necessarily associated with a constitutional program like this; therefore I tend to see opportunism and populism as two separate forces sweeping constitutional democracies these days. By peeling back the cover of populist ideology, we can see that the new breed of autocrats has a remarkable similar program of constitutional deconstruction. They seek to concentrate all power in their hands, regardless of the superficial ideology that swept them into power. I argue that populism is simply a cover for something else going on – which is the destruction of constitutionalism as such.

Tom Ginsburg: *Trumpian Constitutionalism: A Non-Sequitur?*

Michael Wilkinson: *Discussant*

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 common to these courts is the potential and risk of becoming deeply involved in matters of politics. In some countries, courts have come to play a critical role in building constitutionalism, but more often in Asia courts remain peripheral to the project of building constitutionalism. This panel seeks to explore and explain the role of courts in Myanmar, China, Singapore, Thailand and the Philippines.

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

Melissa Crouch: *Dialogue Among Dictators and the Many Lives of Constitutional Courts: The Constitutional Tribunal of Myanmar*

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

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

This paper argues that it is a mistake – for both the field of comparative constitutional law and the development of constitutionalism in China – to define the core concepts of 'constitution' and 'constitutionalism' in a manner that excludes China. Even if such a move is well intentioned, it is likely to have the effect of marginalizing the comparative study of China by constitutional scholars. The marginalization of China as an object of study has deleterious effects not only for the field of comparative constitutional law but also potentially for the development of constitutionalism in China itself. The goal should be to place China at the core of a genuinely comparative constitutional discourse rather than relegating it to the domain of China specialists. This can be accomplished, moreover, without lapsing into apologism for either the Communist Party of China (CPC) or the PRC regime. Part II of this paper summarizes the competing views that scholars have taken on the state of constitutionalism in China. Part III develops a typology that highlights the numerous options for defining constitution[alism]. The definition of constitution[alism] can incorporate a combination of normative practical and formal standards, each of which in turn can be defined leniently or stringently. The fact that scholars have available to them not just the familiar binary choice between "thick" and "thin" definitional approaches, but rather a rich matrix of definitional possibilities, means that there are numerous options for placing China at the heart of comparative constitutional discourse without appearing even implicitly to endorse its current government. Part IV explores the value to the field of comparative constitutional law of taking China seriously as an appropriate object of study. Even though – or, perhaps, especially because – China lacks judicial review, the study of constitutionalism in China stands to benefit the field in several ways. China is not only an intrinsically important case to study, but also a rich and unique source of comparative data and experience with respect to three phenomena of considerable and increasing importance to comparative constitutional scholars' namely, (1) the role of statutes in the constitutional order; (2) the availability and operation of political rather than judicial forms of constitutional implementation and enforcement; and (3) the relationship between domestic constitutional law and international law. Finally, we conclude by theorizing as to the potential long-term impact of the Chinese Constitution on an authoritarian regime that seems at times committed to constitutional noncompliance. To the list of functions that other scholars have imputed to constitutions in authoritarian regimes, we nominate an additional function – namely, that of constructive irritant. Thanks to its extreme dissonance with the actual practice of constitutionalism, China's formal constitution generates a dialectical and critical discourse that is uniquely difficult for the regime to suppress.

Jothie Rajah: *Cultural Texts as Constitutional Courts: Perceiving Public Power in Singapore*

In the context of Singapore's authoritarian politics, are courts the sites in which constitutional issues most potently and publicly unfold? This paper argues that, rather than the courts Singapore's cultural texts – specifically, the theatre of playwright Kuo Pau Kun – offer a rich and revealing record of constitutional contestation. The constitutional jurisprudence of Singapore courts continues (overwhelmingly) to illustrate the acuity of Worthington's 2001 assessment that the judicial system negotiates a balance between "the need for a reputable judiciary with the requirement by the political executive for the judicial system to assist with the control of political opposition". Turning therefore away from the courts, this paper delves into the public power of masked constitutional challenges through a discussion of the theatre of Singapore playwright Kuo Pau Kun. Detained without trial from 1976 to 1980 Kuo's scripts express the struggle to be a rights-bearing citizen in the face of bureaucratic and securitized accounts of law; accounts that annihilate the emblematic fundamental freedoms guaranteed by the Constitution. At the same time, the arena of theatre enables an engagement with publics advocacy for rights, and a sub-textual critique of the state that the courts might not facilitate. Tracing the constitutional challenges articulated through cultural texts – from Kuo's theatre to more contemporary instances – this paper illuminates public power and constitutional discourses situated beyond the walls of Singapore's courtrooms.

Khemthong Tonsakulrungruang and Bjoern Dressel: *Who Is Doing the Judging?: the Thai Constitutional Court 1998 – 2016*

Created in 1997 as part of a major constitutional reform, Thailand's Constitutional Court (CC) has since become embroiled in major political controversies. Since the 2006 coup, because a number of high-profile decisions have favoured one political camp, its ability to act as an independent arbiter has been questioned. Observers have attributed this to close and long-standing relations between the judiciary and traditional political elites. Is this view justifiable? To answer this question, we first analyse how the court has behaved across political administrations in 32 high-profile cases since 2001. We then look at the socio-biographic profile of the bench, the political nature of nominations, and changes to its composition, particularly since 2006. Finally, we complement this analysis with network data on participants in classes offered by the Constitutional Court, 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 and increasingly partisan nominations to the bench, though formally appointment 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 public legitimacy of the court and prospects for the rule of law in Thailand – issues critical to Thailand's continuing political transition.

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 judiciaries 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 rests 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, effectivenes, and the rule of law that arise.

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

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

Dr Rebecca Ananian-Welsh looks to Australia, where the absence of a national Bill or Charter of 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.

19 COURTS DURING POST-CONFLICT TRANSITIONS

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

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

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

20 COURTS FACING CONSTITUTIONAL GAPS. RIGHTS AS A TOOL TO DETECT INSTITUTIONAL ACCOUNTABILITY

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 Spanó
	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 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 hardly challenged or overturned 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 lasts crisis, State institutions proved to be only partially able to guarantee the rights conferred to their citizens by national Constitution. 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 EU citizens, according the Chart, only a EU-based solution seems predictable. Conditionality measures have not been considered as acts of EU order and, consequently, actions against these 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 involve supra-national commitment to assure social rights. The role of EU institutions in assistance plans has been positively 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 Mallis and Ledra Adv. CJEU rejected the action for 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 Chart 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 Chart also outside EU order. On the other hand, the role of Commission in assistance plans is configured in a way that seems to solve our research question. The Court fixes this frame: when it had to sign MoU the Commission had to balance social rights and overall economic interest of Eurozone. A restriction of social rights is admissible only if it could pass the proportionality test.

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

Since the global financial crisis started in 2007 there has been an increase in unemployment and a downgrade of the labour conditions in most of the western world. Although on a smaller scale than in other countries, Canada is not an exception in this matter. According to Canada Health 7,7% of Canadian households were food insecure in 2007-2008. Other reports show that this figure has increased to 10% in 2014. Therefore, food poverty is a significant social and health problem in Canada. The Canadian Constitution dates from 1867, and it did not have a Bill of Rights entrenched in the Constitution till 1982. The Canadian Charter of Rights and Freedoms does not contain any explicit provision concerning social rights or any mentions to the guarantees of 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, sections 7 "equality rights" and 15 "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 could be interpreted as to include positive rights that will result in obligations on governments to guarantee a certain degree of social assistance. This provision expresses some of the basic values of the Charter and has to be regarded as a dynamic and not frozen legal provision. These considerations left the door open for the possibility of adopting new social rights by constitutional interpretation when the right circumstances concur. The questions that follows is are we there yet? Following these considerations this paper aims to analyse the possibility of creating new social rights, particularly regarding food security, by adopting a novel interpretation of s.7 of the Canadian Charter of Rights and Freedoms.

Maja Sahadžić: ***Unfinished judicial system and legal vacuums: the case of Bosnia and Herzegovina***

In the states with the Continental European legal tradition, the supreme court is the highest judicial body within the judicial system. Its purpose is, among other, to ensure the uniform application of law and equality before the law. Although Bosnia and Herzegovina belongs to the countries of Continental European law, its constitutional and legal construction contains certain particularities with regard to the judiciary. Complete judicial systems have been established in the entities and the Brčko District. Nevertheless, the Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Constitution) has not provided norms establishing the existence of the judiciary at the state level. In other words, the constitution has not provided prerequisites for the establishment of the integral judicial system. In the course of 2002 the Law on the Court of Bosnia and Herzegovina established the Court of Bosnia and Herzegovina at the state level. However, due to a narrow and specific jurisdiction and non-hierarchical relationship towards the courts in the entities and the Brčko District the Court of Bosnia and Herzegovina could not compensate for the lack of the supreme court. Strictly speaking, the Court of Bosnia and Herzegovina has been functioning as a special court at the state level. The Constitutional Court of Bosnia and Herzegovina has been, indeed, established by the constitution, and, needless to say, as a sui generis institution. However, the Constitutional Court has a specific jurisdiction over appellations based on articles VI 3 b) and VI 3 c) of the Constitution of Bosnia and Herzegovina. This refers to the jurisdiction over issues arising out of a judgment of any other court in Bosnia and Herzegovina and issues referred by any court in Bosnia and Herzegovina concerning whether a law is compatible with the Constitution of Bosnia and Herzegovina, with the European Convention on Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina, or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision. Even though the constitutional norms do not provide a proof that the Constitutional Court should make up for the lack of supreme judicial instance at the state level, it happened that the Constitutional Court has gone beyond its prescribed appellate competences for the purpose of protecting human rights and freedoms on 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 elaborate 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 Spanó: ***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 surge ingrowth of asylum requests comes 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 how Courts may enhance or re-evaluate 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 a huge discretion in order to choose how to meet the obligations, not enabling a thorough verification of the concrete degree of harmonization. The main problem, though, can be retrieved in the procedure for the recognition of refugee status itself, which seems more focused on the request rather than the obligation imposed by European and international humanitarian law. In particular, the committees or officers in charge to supervise the whole course of action- from the interview to the results- can be pictured as administrative authorities, not Courts in the strict sense but affecting individual spheres like other "judges". In Italy, they are made up of several actors: governmental, local and UNHCR representatives. Due to the linkage with territoriality, a potential discrimination may be envisaged simply according to the place where the migrants happen to reach (first?), casting doubts on the fairness of the proceeding itself, taking into account that the decision of the authorities serves the purpose to "create" or "reject" the recognition of fundamental rights protected at European as well as international level. Obviously a Court is able to intervene in the single application, though at a later time and (again) on the basis of a territorial relevance. All of the above raises more than one issue owing to the significant devolution carried out on matters concerning fundamental rights, potentially leading to differing solutions and contradictory case law. The aim of the proposal then is to try to address the hybrid nature of this committee that can be retrieved throughout several European countries, such as France and Germany, though with some differences that will be underlined. Despite the administrative core of the request, on one hand, their rulings can significantly impact the individual's fundamental rights but on the other hand, an appeal is not carried before an administrative court, because fundamental rights are at stake! Can policy urgencies justify the sacrifice of fundamental rights? The adjective "political", which defines the concept of "asylum" seems to be assumed as the leading criterion, but precisely in this regard it is of paramount importance to pave the way towards a greater uniformity of responses. Simple "circumstances" in fact, can confine fundamental rights beyond the law and the Courts as well.

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

Current social, economic and cultural changes highlight the constitutional 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 existence of new fundamental rights through the judicial review. Scholars define this phenomenon as a "Juristocracy" because of Courtsimpact on Constitutions as de facto Legislator, waiting for positive law to follow up. This process of "Juristocracy" may be observed in issues concerning biolaw, due to Courts intervention in Bioethical tasks. The case of end-life can well serve the purpose to explain all of the above. The aim of this paper is to verify if Courts are managing to affirm the "right to die" with dignity's a new emerging, fundamental right. In particular, I propose a comparison between the case ruled by Canadian Supreme CourtCarter v. Canada (Attorney General) 2015 SCC 5 – 015 SCC 5 No: 35591. 2014 and the case of ECHR No 46043/14 Lambert et all v. France. In the former case (Carter) the Canadian Supreme Court decided in accordance with article 7 of Charter of Rights and Freedoms, whereas the ECHR took article 2 CEDH into account. Both Courts, assessing "therapeutic obstinacy" recognized the right to die with dignity as a facet of the right to lifeitself. In particular, in the dialogue between the ECHR and national Courts, the judgments of ECHR bind all members State. So national Courts can presumably introduce this new right in their constitutional frameworks, without a precise constitutional review procedure and through conformation with supranational case law. "Juristocracy" is a typical feature within common law systems because of stare decisis, though it would be a quite innovative tool in civil law one. Then, a question may arise: do Courts own an autonomous costitutive power facing constitutional gaps in order to recognize new fundamental rights and in spite of legislative inertia? Has a new era of constitutionalism began?

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

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

Participants	Matyas Bencze Agnes Kovacs Elena Alina Ontanu Petra Pekkanen
Moderator	Petra Pekkanen and Mátyás Bencze
Room	8B-3-33

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 of measurability). 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 underlining 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 democracy. It explores whether existing indicators address the three pillars and offer sufficient information to promote legal reforms inspired by better-performing systems. Thus, sharing better practices to improve the quality of justice systems and monitoring the results of implemented reforms.

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

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

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

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

Participants	Jenny Preunkert Cristina Fasone Tomás de la Quadra-Salcedo Janini Teresa Violante Anuscheh Farahat and Christoph Krenn
Moderator	Marius Hildebrand
Room	8B-3-39

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

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

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

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 measures, but which could become important also in relation to them, is the tension between the case law of the Spanish Constitutional Court and the European Court of Justice on determining the level of protection of fundamental rights (the "Melloni-saga"). Also this aspect will be addressed in this contribution.

Teresa Violante: *The Portuguese constitutional case-law on austerity legislation: Protecting social rights by curbing the legislator's choices?*

Social rights have been heavily affected by the economic crisis that Portugal has been facing, especially through the approval of concrete austerity measures. The right to work and the rights of workers, social security, health and education were the most important targets of the foreseen reforms. A significant bulk of austerity legislation taken to the Constitutional Court was ruled unconstitutional. However, and perhaps quite surprisingly if we have in mind the detailed constitutional catalogue of social rights, the most common reasoning employed by the Court to support its decisions has not been the violation of social rights per se, but the violation of well-established constitutional principles, such as equality, legal certainty and the protection of legitimate expectations. This contribution will analyse these decisions from the perspective of social rights' protection within the framework of a dialogue between constitutional justice and the legislator.

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 increasingly politicized nature of the conflicts brought before it during the Eurozone crisis and the emergence of new conflict parties. We argue that the ECJ has only reluctantly accepted the challenges arising from these conflicts. After its initial denial of jurisdiction, the ECJ only recently accepted its responsibility for the fundamental constitutional changes resulting from the Eurozone crisis, when it accepted a claim for damages against the Commission in a case concerning Cypriote 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 simultaneously is more willing to also restrict the power of these institutions to the advantage of domestic legislators and their peculiar welfare state arrangements. This suggests that the ECJ is increasingly aware of the politicized nature of conflicts it is confronted with in an increasingly polarized political environment. If this is true, the ECJ may indeed contribute to the productive potential of conflicts or at least mitigate their destructive effects.

23 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 the community each 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 and cultural context affects the operation of constitutional dialogue.

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

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

There is a growing debate in Australia around the responsibilities of the political branches to upholding constitutional norms. These debates have arisen when the legislature or executive has sought to act within the context of doctrinal uncertainty often caused by judicial development of nascent constitutional principle. 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, unclear 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 rights protection or consensus on constitutional values. In light of this experience, 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 to judicial review, the political branches 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 fostered by the litigation of 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. This paper uses Canada's experience with 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 reference questions within legal process 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 interinstitutional tensions – 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 against normative applications that would 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 this apparent argumentative impasse is to make clearer the conceptual baggage that accompanies these positions: baggage such as: preferences for weak versus strong form judicial review; positions on the optimality of weak or strong dialogue when considering the principle of deference; normative stances about 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 transparency 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. Thinking about dialogue this way concretizes the metaphor and permits a perspective on the various points in the system where dialogue currently exists, is lacking, or may be created. This section, largely descriptive, presents a process model of institutional dialogue indicating where normative positions from part one view the various components positively or negatively. The author also considers the under-examined interaction between constitutional and administrative law in a common law system as part of a larger system of institutional dialogue. The third and final part contextualizes the two previous sections by applying them to the Canadian example – the original site of institutional dialogue. The Harper years saw the rise and fall of institutional dialogue in theory and in practice. Following Young (2017) the author advances a conception of institutional dialogue, understood as a set of relations between the rule of law and democracy that is crucially dependent on political context. The argument here presents the Canadian trajectory to address how institutional dialogue is both related to and dependent on the state of democracy.

Jack Simson Caird: ***Brexit: The UK Parliament and the Courts***

Brexit has pushed constitutional law, and the relationship between Parliament, the Courts and Government, to the top of the political agenda in the UK. The level of public, media and political interest in the Supreme Court's consideration of Miller was unprecedented. The Miller litigation is in many ways a classic example of the dialogue metaphor in action. With each branch examining and providing different answers on major questions of constitutional interpretation, namely on the meaning a major constitutional statute: the European Communities Act 1972, the nature of prerogative powers and the workings of devolution. These differing answers have arguably shown the mechanics of the constitution working well under pressure and enhancing the level of justification for a major constitutional change. At the same time, the episode has brought the contrasting institutional approaches to the constitutional issues raised by Brexit into sharp relief. In terms of procedure and substance, but also in terms of culture and tone, the worlds of law and politics have appeared very far apart. This chasm appears to undermine the dialogic metaphor. The very fact that it has been so unusual for a constitutional case to have such political significance has revealed the limited crossover and mutual understanding between parliament and the courts, and the political and legal worlds more broadly. This paper examines the interaction between Parliament and the courts over the constitutional questions arising from Brexit. The contrasting cultures of partisan conflict in Parliament and detailed statutory interpretation in the courts has led to trenchant criticism of both institutions' procedures and decision-making. Some of this criticism has overlooked the constitutional importance of having such contrasting cultures of legal and political accountability in the United Kingdom's constitution. This 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 reveal broader dynamics of 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 development of a field of stakeholders around these institutions that itself has specific power dynamics. From this point of departure, the papers will investigate how regional power dynamics affect the field of international criminal law and how these balances structure the space of maneuverability in which institutions of internationalized criminal justice can potentially yield symbolic and material power.

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

Mikkel Jarle Christensen and Astrid Kjeldgaard-Pedersen: ***Competing Perceptions of Hybrid Justice: International Regional and National Ideals about the 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 and how these balances are written into its legal financial and professional structure. Specifically, the paper investigates how international diplomatic battles and the historical power dynamics of the region shaped the legal and institutional design of the Chambers and, consequently, the 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 international(ized) criminal courts – this section of the paper will contribute a 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, focusing on a hybrid tribunal that is not formally a regional institution, but was deeply impacted by regional and international power struggles.

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

This paper will discuss Regional Criminal Justice Mechanisms (RCJMs) by focusing on a case study of Kosovo and the newly created Kosovo 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 compare briefly 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 combating international crimes as it plays 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 research project will build a model for 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 a 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 main remaining options for prosecution and trial of those responsible for the tragedy of MH 17, including the national trial and organization of a special tribunal. While discussing the advantages and disadvantages of the said options, particular attention is paid to the possible involvement of regional organizations and triggering the potential of Chapter VIII of the UN Charter. This option is investigated as part of a wider trend of regionalizing international criminal

justice and will be situated in the wider political economy of regional actors. The paper also addresses the substantive law issues related to the MH 17 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 controversies from vexed questions about potential states of emergency to the ethics of genetic engineering. As a judge on Germany's Federal Constitutional Court (1983 – 1996) and the author of the highest number of dissenting opinions in the court's history, Böckenförde has significantly influenced the way law and politics are conceived of in Germany. This panel re-visits Böckenförde's work as a late beacon of the German statist tradition and probes its relevance amid contemporary debates about the constitutional implications of a globalized world order, where notions of a post-state, post-sovereign, and multi-level ordering, have taken center stage. Böckenförde is unique in that he confronts the basic concepts and conceptual presuppositions of the old Staatslehre with the challenges of an interdependent world. Focusing on his notions of the state and of the constitution, participants explore the timeliness of Böckenförde's work and ask whether and to what extent it can serve as a basis for a European public law.

Participants	Tine Stein and Mirjam Künkler Sabino 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 Staatsrechtslehre***

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 to but rather at the very core of any doctrinal interpretation of the Basic Law.

Michaela Hailbronner: ***Böckenförde's view of the Constitution as a Framework Order: Fit for Germany futile for democratizing societies?***

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

Alexander Somek: ***Böckenförde's Staatsrechtslehre as a basis for a European public law?***

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

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

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

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

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

International law (IL) and international lawyers have come to play a major role in world affairs since the beginning of the 20th century. We argue that this rise to power of international law and lawyers is closely linked to the institutionalization of world affairs around international organizations and courts that started to take form at that historical moment. The specific power of international lawyers, we further contend, is due to the 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.

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

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Karen J. Alter: ***The Contested Authority of International Law***

Where the rule of law exists, legal communities become the keepers of the keys to legal authority, collectively defining what law means, and how law applies to a specific issue or case. The first part of this paper argues that international law's authority meaningfully resides in the national based legal communities, the actors who interpret, apply and give meaning to the law. The second part of the paper focuses on contestation over international legal authority. International law 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.

Jan Klabbers: ***Functionalism in International Institutional law***

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

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

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

Participants	Karolina Podstawa Madalina Moraru Nicole Lazzerini Federica Casarosa Elena Carpanelli
Moderator	Deirdre Curtin
Room	8B-4-09

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

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

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

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

Nicole Lazzerini: ***Horizontal judicial dialogue as a duty (and its limits): the case of cooperation within the European Arrest Warrant System***

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

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

The analysis of judicial interactions among courts within the EU law context is usually taken from the perspective of a relationship between two courts, the one presenting the preliminary ruling and the CJEU 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 lays in a vacuum, rather they are part of a wider debate which usually involves several actors at the national level and, in some cases, may impact also on foreign actors. These actors include not only courts (lower higher and constitutional ones) but also legislators and regulators which may have different incentives to participate and react. Using as example the Spanish jurisprudence related to the over-indebtness of consumers (in particular the Aziz and Sanchez Morcillo cases) and Italian jurisprudence on mandatory mediation (following the Alassini case) the paper will provide a description of the wider concept of judicial dialogue.

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

Recently the Court of Justice of the European Union and the European Court of Human Rights have

been called more and more frequently to scrutinize indiscriminate data collections and mass surveillance practices vis-á-vis privacy and data protection concerns. Whilst both Courts are currently in the process of consolidating their case law on the subject with several cases still pending, some of their most recent decisions (see, in particular, ECJ Schrems; Digital Rights Ireland; ECtHR Zakharov v. Russia) already allow questioning whether we are now assisting to a new instance of 'horizontal judicial dialogue'. In this perspective, the proposed paper aims at exploring the issue by going beyond formal textual 'cross-references' and rather focusing on whether the emerging approaches of the two European Courts converge in substance.

28 FIDUCIARY CONSTITUTIONALISM

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

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

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

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

Bas Schotel: ***The jus incluendi 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 or cosmopolitan view whereby migration law is contrasted with the autonomy of individual human beings. The typical legal category here is human rights. Both opposing views share two common values: autonomy and equality. Either migrants are not to be treated as equals and their (individual or political) autonomy should not be promoted fully because they are 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.

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

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

Ester Herlin-Karnell: ***Fiduciary Obligations Courts and the European "Area of Freedom Security and Justice"***

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.

29 GENDER, COURTS AND CONSTITUTIONS

This panel aims to investigate how gender power structures are reflected and dealt with by constitutional law across the globe. It discusses three 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 (in) 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 women'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 Havelkovó and Brodealé show, the courts need a favorable political and historical context in which to adjudicate. The panel does not have a local or regional focus, but rather a global one, and discusses examples from Western Europe and North America as well as from the Middle East Asia, Africa and Central and Eastern Europe.

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

Silvia Suteu: *Women and Participatory Constitution-making*

This paper critically analyses the capacity of participatory mechanisms of constitutional reform to incorporate and respond to the views of women. It aims to provide initial answers to the question of whether and how participation in constitution-making delivers for women. I first outline the contours of the debate surrounding popular participation in constitution-making, identifying the benefits and potential pitfalls such participation may yield. I then examine three case studies: the 2014 Scottish independence referendum, the 2012-14 Irish Constitutional Convention, and the 2011-14 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 reform of divorce law, essentially reframing them from questions of gender equality into 'moral issues', has not fared well for women. Relying on courts as guardians of women's rights in these case, whether to green light the participatory process or to certify its result, has also produced 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.

Beverley Baines: *Women Judges on Constitutional Courts: Why Not Nine Women?*

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

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

The paper looks at the sex equality case-law of the Czech Constitutional Court ('CCC') in the almost 25 years of its existence. It discusses not only cases which have been decided on merit, but identifies and assesses cases which the CCC turned down as 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-socialist protectionism towards women. 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 in itself not an accident, but whether it means that the CCC has stayed away from more complex cases brought by women, which challenge deeper structural inequalities and require a more substantive understanding of equality than do challenges to clearly differentiating provisions or practices which benefit women. This question is, of course, tied to the wider question about the role of the Constitutional Court and how active it is in reviewing state action, especially of lower courts which impacts human rights. At a more general level, the paper will thus reflect on the usefulness of a method which looks at admissibility decisions.

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

2016 was a year without precedent for the Romanian Constitutional Court. Not only that the Court asked the Court of Justice of the European Union for a preliminary ruling for the first time in its history, but it did so in a case regarding the recognition of same-sex marriage in Romania. Moreover, last year the Court also issued a decision on the constitutionality of the first citizens' initiative meant to review the Romanian Constitution. The initiative, backed by the know-how 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 'a man and a woman'. The purpose of this revision would have been to ban same sex marriages in Romania and protect what in the US context are called 'traditional family values'. The amicus curie sent to the Romanian Constitutional Court by human rights organizations like Amnesty International or ILGA Europe emphasized that such a change was not needed, since the Romanian Civil Code adopted in 2009 already prohibited same sex marriages. Yet, the US trained lawyers argued the contrary. In their view, such a definition was needed in the constitutional text, so that the 2015 Obergefell v. Hodges case 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 women's role in human reproduction and reproduction of the nation were fiercely debated. This paper aims to bring these debates to the light and critically discuss the position of the Romanian Constitutional Court within these debates. For this aim the paper will undertake a three-step approach. First, it will outline the main facts of the two cases on same sex marriage that arrived at the Constitutional Court last year. Second, it will place these facts in the historical and social context of gender (in)equality in Romania and lastly, will explain how does the position of the Constitutional Court influence the current staus quo and gender power relations under Romanian law.

30 HUMAN RIGHTS AND THE RULE OF LAW IN THE FIELD OF ASYLUM AND IMMIGRATION

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

Participants	Violeta Moreno-Lax Cliodhna Murphy Patricia Brazil
Moderator	David Fennelly
Room	8B-4-43

Violeta Moreno-Lax: ***Reversing the Rule of Law? From Effective Rights to Effective Removal 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. 3(2) 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 EU law the principle of effectiveness is invoked for teleological purposes, in view of the fulsome realization of fundamental rights (See e.g. Case C-432/05 Unibet [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-13905). 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 elevation of '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 characterized as a policy objective, whose attainment remained subordinated to 'respect for fundamental rights' (Art. 67(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.

Cliodhna 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 Mallak 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 comfortable 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: Underexplored 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 "Courting 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 arena (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 18 of the Charter of Fundamental Rights is, to date, relatively underexplored 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 EHRR 413 and Saadi v Italy (2009) 49 EHRR 30), but to date has declined to apply the Article 6 right to a fair hearing in the asylum context (Maaouia v France [2001] EHRR 42) in the absence of a right to asylum in the Council of Europe framework. This paper will consider the role of both the Luxembourg and Strasbourg courts in safeguarding the right to asylum in the light of Article 18CFR, with a focus on challenges to the rule of law posed by pushbacks (as in Hirsi Jamaa v Italy ECtHR 23 February 2012), the right to asylum and the right to a fair hearing (see Kneebone ed Refugees, Asylum Seekers and the Rule of Law (Cambridge University Press 2009) and the potential impact of the right to asylum on the issue of safe passage/humanitarian visas (Case C-638/16 PPU X and X v átat Belge), and will critically assess the limits of each court's competence in this important, but highly contested, context.

31 IMAGES OF JUDICIAL SELF-GOVERNANCE. NORMATIVE JUSTIFICATIONS AND SOCIO-POLITICAL ROOTS

The panel addresses judicial self-governance, understood as any kind of participation of judges in courts' administration. Under this meaning, the concept is broader than that of self-government, i.e. the domination of judges in judicial administration. The aim is to have a more broadly informed understanding of self-governance, which is not per se a new or exceptional phenomenon. The panel focuses on: a) the normative values on which self-governance arrangements are grounded and justified; b) the substantive relationship between political and judicial lite within the broader socio-political context under which self-governance arrangements have been strengthened or reduced or changed over time. Besides avoiding explicit reference to the normatively charged concept of self-government, the proposal steps back from mainstream analysis based of formal typified models of judicial governance, be it their specific impact or the short-term dynamics shaping them. Institutional models may obviously matter, but are not of direct concern here. The panel rather looks at specific moments of the recent or past judicial history of selected jurisdictions investigating the structural factors revealing the breaking points in politico-judicial relations determining governance arrangements.

Participants	Simone Benvenuti Nino Tsereteli Giulia Aravantinou Leonidi Jørn Øyrehagen Sunde
Moderator	Davide Paris
Room	8B-4-49

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

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

This paper will address the evolution of judicial self-governance in the post-Soviet countries since early 1990s until now. Specifically, it will focus on (still ongoing) judicial reforms in Russia, Ukraine and Georgia. It will explain how the need for breaking away from the past dependency of judges on political and judicial superiors (or creating the appearance thereof) shaped the agenda of judicial reforms and made judicial empowerment relevant. It will follow up subsequent waves of reforms (some of which could have been labelled as "counter reforms") in the three countries, up to the latest significant changes in Ukraine in early January 2017 and in Georgia in February 2017. In addressing these reforms, it will look into how views of external and internal actors blended and influenced their outcome. It will highlight how the values, such as independence, accountability and legitimacy of judiciary, informed regulation of judicial participation in matters of court administration and observe how the risk of granting too much or not enough powers to judges motivated the search for more balanced solutions (e.g. engaging not only political and judicial elites, but also the public). It will identify the correlation between changes in composition and in powers of the bodies responsible for court administration to see whether increased representation of judges in the relevant bodies of court administration also led to granting them meaningful decision-making power. Finally, it will assess how the soviet heritage (existence of informal practices alongside the laws as well as mindset of judges) influenced the process of transformation and actual functioning of the institutions.

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 élite 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 lite 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.

Jørn Øyrehagen Sunde: ***Judicial self-governance in Norway 1999-2017: human Rights, emotions, democracy, budget and New Public Management***

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.

THURSDAY 6 JULY 2017 09:00 – 10:30

PANEL SESSION 2

32 BUILDING THE CONSTITUTION – THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA – BOOK DISCUSSION

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***

33 BEYOND "DIALOGUE" AND THE LEGAL/POLITICAL CONSTITUTIONAL DEBATE: TOWARDS COLLABORATIVE CONSTITUTIONALISM?

Under a well-known strand of contemporary public law scholarship judicial decisions on rights are seen as not necessarily ultimately determinative but rather as part of a broader inter-institutional 'dialogue' on the meaning of and permitted limitations to protected constitutional rights. Stephen Gardbaum's 'New Commonwealth Model' shares some of these insights but identifies balance rather than dialogue as a key feature of this mode of constitutional ordering. However both the 'dialogue' and Gardbaum models have been subject to recent criticism. Eoin Carolan (2016) has identified a range of problems with what it sees as the idealised dialogue model while Gavin Phillipson has coined the notion of 'negative dialogue' (2011 – below) Meanwhile Jeff King has made a number of important criticisms of Gardbaum's alternative model (2015). The purpose of this panel is to reflect on whether the best way forward for scholarship in this area is to refine or replace the above models. It will consider the suggestion made by several scholars of moving to a notion of 'collaborative constitutionalism' – a move that would also signal a turn away from what has become a polarised debate between proponents of legal and political constitutionalism to a more realistic and reasonable approach.

Participants	Jeff King Eoin Carolan Gavin Phillipson
Moderator	Stephen Gardbaum
Room	4B-2-34

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

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 constitution. 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 Gardbuam's work entitled 'Rights and the Rule of Law in Third Way Constitutionalism' (2015) 30(1) Constitutional Commentary 101.

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

The second paper, by Eoin Carolan (UCD), is concerned with the conference call's reference to an enduring question of public power: how, and under what conditions, do courts enjoy the power, legitimacy and independence necessary to serve as a meaningful check on national actors? The traditional dichotomy between legal or political constitutionalism has been challenged in recent times by the development of new more nuanced models of legislative-judicial relations. The new Commonwealth model of constitutionalism and other dialogical accounts have been the most influential in the field. One of their chief attractions has been the way that these models de-emphasise the conflict between legislative and judicial supremacy that featured prominently in the debate between legal and political constitutionalism. This paper argues that this approach (while welcome) rests on the same assumption that a constitutional model must ultimately privilege either judicial or political power. This paper (briefly) challenges that assumption before making the case for an alternative model of judicial-political relationships ('collaborative constitutionalism'). Unlike dialogical theories that aim (implicitly) to solve conflict this model argues that conflict between these institutions is capable of being normatively and democratically justified in a way that speaks to the conference call's concern about the legitimacy (and authority) of judicial power. Eoin Carolan is Associate Professor in University College Dublin, where he lectures and researches in constitutional law and theory, media law, and privacy and data protection. His recent work in the field includes 'Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations' (2016) 36 Legal Studies 209; 'Leaving behind the Commonwealth model of rights review: Ireland as a model of collaborative constitutionalism' in Marie Luce Paris & John Bell (eds). Rights-Based Constitutional Review – Constitutional Courts in a Changing Landscape (2016); and 'The relationship between judicial Remedies and the separation of powers: collaborative constitutionalism and the suspended declaration of invalidity' (2011) 46 Irish Jurist 180.

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

In the third paper, Gavin Phillipson will explain how his previous work has found instances where dialogue has become negative (Phillipson, 2011) or has simply not existed – as where the political response to judicial findings of rights violations has been to 'weaponise' them, in order to attack the legitimacy of the judicial role in protecting rights and of the rights instruments under which judges make such rulings (Phillipson, 2013). But he has also recently shown how some instances of judicial protection of rights through interpretation can be regarded as successful instances of 'dialogic' protection (Phillipson, 2014). From this he will seek to suggest that theories like 'dialogue' or 'New Commonwealth' need to become more nuanced and granular, in order to identify particular issues or circumstances in which fruitful collaboration between the judicial and democratic branches of government are possible and those in which outright conflict, or misuse of judicial rulings, are to be expected. In this regard, he will claim that aspects both of Gardbuam's model and some of King's criticism of it both rest on idealised premises. While a turn to stressing collaborative constitutionalism would be a welcome one, he will suggest that it needs to engage fully with, rather than glossing over, the sometimes uncomfortable realities of political engagement with rights issues and the judicial role. Gavin Phillipson has held a Chair in Law at Durham University since 2007. His recent work in this area includes: 'Covert derogations and judicial deference: redefining liberty and due process rights in counter-terrorism law and beyond' (2011) 56(4) McGill Law Journal 864-918 (with Helen Fenwick); 'Deference and Dialogue in the Real-World Counter-Terrorism Context' in de Londras and Davis (eds) Critical Debates on Counter-Terrorist Judicial Review (CUP, 2014); 'The Human Rights Act Dialogue and Constitutional Principles' in R. Masterman and I. Leigh (eds), The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives (Proceedings of the British Academy/OUP, 2013).

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

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

Participants	Anneli Albi Mariana Rodrigues Canotilho and Rui Lanceiro Aida Torres Pérez Dimitry Kochenov
Moderator	Christian Joerges
Room	4B-2-58

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

The paper presents some of the findings of the ERC funded large-scale comparative research project 'The Role of National Constitutions in European and Global Governance'. It explores the observation of some scholars that in European economic co-operation, a shift has occurred towards a thin, weak, procedural version of judicial review, with increased difficulty for individuals to challenge public decisions (Harlow Galera). The paper outlines the three main approaches to constitutional review within the EU Member States, along with statistical data regarding the rate and grounds of annulment of legal measures. The paper observes that the relocation of judicial review to the ECJ has put under strain 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 represent common (continental) European constitutional achievements.

Mariana Rodrigues Canotilho and Rui Lanceiro: ***The Portuguese Constitutional Court and fundamental rights: on counter-limits and 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 bail-out, entailing 'serious economic and social 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 of certain Member States. By doing so 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 affirmed the openness of Portugal's legal order to EU law and accepted that the executive and legislative powers are committed to the European integration process. However, it has declared the unconstitutionality of laws that have enacted public policies openly demanded by the EU, justifying its decisions not by quirky constitutional norms that could be regarded as country-specific and part of the national constitutional identity, but on the basis of fundamental principles that are common to the European constitutional tradition: equality, legitimate expectations and proportionality. 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 standard in protecting fundamental social rights especially in the areas of access to education and healthcare, or protection of workers' rights? Can such national protection function in the context of EU

law as a counter-limit to the application of European rules of economic governance? Should these stronger standards of fundamental rights and principles be incorporated into the EU legal order? The paper aims to propose some answers to these questions.

Aida Torres Pérez: ***Judicial Review by the CJEU at Times of Crisis***

The goal of this paper is to examine the role of the CJEU in reviewing measures adopted in the context of the economic and social crisis in Europe. Judicial review of the acts of public authorities to check that they do not overstep their powers or encroach upon fundamental rights is an essential feature of the rule of law. At the same time, the exceptionality of the crisis the heterogeneous array of sources of Euro-crisis law, and the blurring line between the national supranational and international spheres have 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 8/15 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.

Dimitry Kochenov: ***EU Law without the Rule of Law***

I aim to provide a critical analysis of the Rule of Law in the EU, concluding that the Union is not driven by the Rule of Law as an institutional ideal. Instead, the Union deploys the 'Rule of Law' viewed to a large extent through the lens of the autonomy of the EU legal order, to shield itself from potential internal and external contestation. This is precisely the opposite of what the classical understanding of the Rule of Law would imply. The Union thus suffers, it is argued, as a result of misrepresenting legality at the EU level selling it to friendly observers under the label of the 'Rule of Law', while there exist compelling reasons to distinguish the two. To do so, Gianluigi Palombella's vision of the Rule of Law as an institutional ideal is employed, implying that the law – gubernaculum – should always be controlled by other law – jurisdictio – lying outwith the sovereign's reach. Unable to boast any jurisdictio expressly intended as the legal aspect of positive law beyond the internal market logic programmed into the Treaties, the EU emerges as a somewhat rudimentary legal system, with no strong guarantees of legal non-domination extending beyond the Treaty text. My paper demonstrates the clear negative consequences of the prevalent deficient understanding of the Rule of Law for both constitutional levels: the EU and the Member States. One of the curious outcomes of the current reading of the Rule of Law in the EU is that this principle can be presented as demanding to trump the values of the Treaties as well as of the national constitutions in the name of upholding formal organisational considerations which seemingly underpin the EU legal system, resulting in anarchical confusion. Once the rhetoric of the promotion of democracy is added to the picture, the problematic essence of the EU's Rule of Law acquires even more visible and potentially dangerous undertones.

35 DIALOGUES BETWEEN COURTS: HUMAN RIGHTS CONSTITUTIONALISM

Plural and multilevel constitutionalism implies internal dialogues within each constitutional domain and external dialogues among each one of them having in mind the ius commune idea and the centrality of human rights. Constitutional jurisdiction is no longer a matter of local constitutionalism but it has to deal with human rights and 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 Fabrício, Angela Costaldello and Ilton Robl 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 implementation of these rights, which ceased to be 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 imperative 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 jurisdictions reveals the vertical perspective articulated in the internalization of international norms and in the conventionality control. 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***

Brazil and South-Africa experienced a 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.

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 made use of comparative cases, but lacking a methodological consistence. Brazilian Supreme Court has constantly made use of foreign constitutional cases in its decisions but it rarely pays due attention to the context and nuances that have given rise to similar or alternative interpretation or practice of 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 taking in account the necessary methodology to do it and the difference among constitutional contexts.

Rodrigo Kanayama, Tomio Fabrício, Angela Costaldello and Ilton Robl Filho: ***Comparative studies on Constitutional Courts: 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 and the two biggest Latin American federations (Brazil and Mexico) forged or expanded the abstract judicial review in their Supreme Courts in the 1980's and 1990's, which were the democratic consolidation decades. Despite the similarities between these countries, the degree of influence on the decisional process (the relationship between government and parliaments, and parliamentary minorities and parliamentary majorities) are not identical, as is the degree of political consensualism. In this sense, the central questions are: How effective is the abstract judicial review on the decisional process? What are the differences? Do the Constitutional Courts interfere and cancel the decisions of the other branches and political institutions with no distinction or prejudice or they support the decisions of the majority? How autonomous are the Courts and their decisions? Is the abstract judicial review an important ingredient for the democracy stability, for the decisions capabilities of the government and majorities, and for the institutional consensualism? The Law 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 is to determine the role of the abstract judicial review on democratic consolidation and on the decisional capability of all these countries. The research presents, in a comparative view: 1) AÇÃO DIRETA DE

INCONSTITUCIONALIDADE in Brazil (5.457 lawsuits, 1988-2016); 2) Acciones de Inconstitucionalidad in Mexico (1.146 lawsuits, 1994/2015); 3) Recursos de Inconstitucionalidad in Spain (643 lawsuits, 1980-2016; and 4) Fiscalizacao Successiva in Portugal (563 lawsuits, 1983-2016), besides the powers and institutional prerogatives assigned to Constitutional Courts and Supreme Courts, whose are capable to realize the abstract judicial review. To understand the impacts of the abstract judicial review, the methodology of 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 majority 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 representation is in crisis in Brazil especially on account of the fortification of the civil society's role as a key political actor (through increasing social media articulation, broadening of public political debate in private spheres and strengthening of the Constitution's role after the process of redemocratization post 1988) and the increasing discredit in the ability of rulers to act according to public interest and to consider the heterogeneity of perspectives involved. However, in a complex society like the Brazilian one, the complete overcoming of the category of representation can not be sustained. The present article intends to approach the impossibility of the representation to be thought by the philosophical principle of the identity, like a closed totality and zero sum. It also maintains that legitimacy shouldn't be attached to the act of authorization. On the contrary, it is suggested that representation should be thought as an ethical relation marked by the insuperability of radical difference and as a dialectical process in permanent production and reconstruction delimited by the logic of the non-whole. Legitimacy, then, would be in the process itself. This reinforces the need to think of effective instruments of popular participation in the processes of determining agendas, deliberation and decision-making, as well as to consider the importance and materialization of accountability and responsiveness. Finally, it highlights the importance 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	7C-2-14

George Karavokyris: *Constitutional change and legal interpretation*

The concept of constitutional change and its interplay 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 patterns of constitutional change, especially on the amending formulas (formal or informal) of the constitution, constitutional theory aims at explaining the constitution-making processes and introducing 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. rigid/flexible, formal/material, juridical/political etc.). Consequently, it goes without saying 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 methodological condition for the very notion of change. In this sense, the theory reproduces a traditional distinction of formal/informal change or amendment/transformation of the constitution, which in my view is necessarily related to the preconception of a core and static constitutional meaning. The aim of my paper is to test the validity of these epistemic premises of the constitutional change theory from a realist and hermeneutical standpoint. I shall address, in particular, the essential -but I believe underestimated- link between constitutional change and legal interpretation in order a) to identify the interpretative theory, which lies behind the concept of constitutional change b) to draw out that the mainstream patterns of constitutional change may be revisited from a realist/hermeneutical point of view c) to provide concrete examples, mainly from the field of judicial review, that verify the abovementioned hypothesis and imply an interpretative concept of the constitution and its normativity.

Juliano Zaiden Benvindo: *Conceptual Constitutional Change in Latin America*

Political crises are a rich source for constitutional law. Whether damaging or beneficial for democracies, they provide the perfect breeding ground for placing traditional concepts on the edge of their underlying rationale. More interesting, they unfold the undeniable coupling between change and instability, which is paradoxically neglected by leading constitutional theories that provide an evolutionary approach to constitutional change. Drawing from some examples in Latin America, this paper aims to challenge common wisdom normally associated with concepts such as presidentialism, mechanisms of formal constitutional change and judicial activism. By placing these concepts on the ground of a rich history of a region where change and instability have been a recurring reality, although continuously revamped, the minimal ambition of this paper is show that concepts can only be properly grasped if challenged by experiences that may also change them.

Craig Martin: *The Legitimacy of Informal Constitutional Amendment and the "reinterpretation of Japan's War Powers"*

The government of Japan has purported to reinterpret the famous war-renouncing provision of the Constitution in a controversial process that deliberately 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 normal interpretive development, but which are not implemented through formal amendment procedures. The existence, scope, and legitimacy of such informal amendments remains hotly contested. This article focuses on the key issue of legitimacy, using the Japanese reinterpretation as the lens through which to explore the relationship among a public ratification, the intent of the agents of change, and the passage of time as factors affecting the legitimacy of any particular informal amendment. It also suggests a new way of conceptualizing the relationship among authority, legitimacy, and time in thinking about informal amendments, in that time creates a divergence between the level of constitutional authority and legitimacy that may be enjoyed by contested changes. The article argues that deliberate attempts to effect significant constitutional change in a manner calculated to circumvent the formal amendment process – such as the Abe government's reinterpretation effort in Japan – are prima facie unauthorized and illegitimate at the time they occur. Moreover, only the most explicit and deliberate expressions of popular sovereignty can serve to legitimate such changes. But while such deliberate informal change will always remain unauthorized, it may be legitimated with the passage of time, though I argue it may and should take longer than for less contested forms of change.

Yaniv Roznai: *Discussant*

37 CONSTITUTIONAL CHANGE IN LATIN AMERICA AND THE CARIBBEAN

During the past few decades both Latin America and the Caribbean have experienced major institutional changes that have been translated either into the enactment of new Constitutions or into profound constitutional reforms. This panel aims to offer explanatory and critical accounts about a broad variety of issues pertaining constitutional change in these regions that range from the role of Constitutional/Supreme Courts in these transformations and the influence of external factors on the amendment power, to new solutions to traditional dilemmas drawing on the experience of underexplored cases in comparative constitutional law. These critical and explanatory approaches are relevant taking into account that they will provide useful analytical theoretical and practical instruments to enhance the toolkit of constitutional designers in charge of facing the permanent political (and constitutional) transformations that Latin America and the Caribbean must face and have faced year after year.

Participants	Richard Albert Mariana Velasco Rivera Diego Andrés González Medina Joel Colón-Ríos Magdalena Correa Henao
Moderator	Vicente Fabian Benitez-Rojas
Room	7C-2-12

Richard Albert: ***Constitutional Reform in the Caribbean***

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

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

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

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

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

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

There are two main ways of thinking about what a constitution is. The first, and more legalistic one, focuses on form: a constitution is a document that contains rules that are more difficult to change than ordinary laws. This is what constitutional theorists usually refer to as 'the constitution in the formal sense'. The second approach, 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 may appear to be 'non-material' 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 Commonwealth of Puerto Rico' (Constitución del Estado 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 metropolis, 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 U.S. legislation of constitutional significance, as well as with the juridical apparatus that regulates its relationship to the metropolis.

Magdalena Correa Henao: ***Constitutional judges, constitutional transformations and economic order. The other side of the coin.***

Constitutional judges have become a great power for Rule of Law transformations. It does not escape the scope of this article the case of Colombian Constitutional Court, considered by Landau as the strongest in the world! Nevertheless, that is not evident in the constitutional review of economic intervention measures. In this matter, Colombian Constitutional Court has adopted some judicial rules using a light proportionality test, which have allowed broader normative powers and competences for the Legislator and the Government. This jurisprudence, so typical of political liberalism in interpreting the competences of other public powers, far from eliciting constitutional transformations, has contributed to preserve the status quo in some cases and in others have permitted the implementation of economic models that neglect pressing structural issues. The thesis formulated in this article is that to complete that (symbolic) transforming power of constitutional jurisprudence, the constitutional review of economic measures must be subjected to different intensity tests (light, moderate, serious). This, depending on the impact that the economic regulation had produced or might reasonably produce in areas such as realization of liberal, competitive, social and environmental constitutional values, that were not considered during the political debate and that can be measured by legal standards or its effectiveness.

38 CONSTITUTIONAL COURTS RESISTING, SHAPING AND DEVELOPING PUBLIC LAW OF EUROPE

Constitutional courts have always been reluctant to accept the full force of supranational law. For a very long time this has been seen as a sign of constitutional patriotism going wrong: constitutional parochialism (or worse, nationalism) dressed in the noble words of a universalist constitutional language. With the ongoing crisis of the post-war liberal world order their contribution to its maintenance should be reconsidered: the four papers collected in this panel do this in different ways: from a critique of the sweeping notion of "New Constitutionalism" a study of the terms on which national constitutional courts engage EU law, to the relevance of comparative law and quite detailed study of the influence of the German Federal Constitutional Court's contribution to the politics of Euro-crisis in Germany.

Participants	Jan Komarek Marco Dani Mattias Wendel Nik de Boer and Christophe Majastre
Moderator	Michaela Hailbronner
Room	7C-2-02

Jan Komarek: ***Resisting "New Constitutionalism" through constitutional adjudication in Europe***

The paper examines the challenges faced by constitutional courts in Europe ,which result from institutional and ideological transformations of law often referred to as 'New Constitutionalism' (also 'NC'). These transformations are usually thought to empower courts at the expense of other branches of government, to entrench the vested interests of ruling elites, and to expose democratic institutions of the nation state to the forces of untamed globalization. Scholars who study NC are usually critical of it; they disapprove of (neo-)liberal politics, which emphasizes rights and the rule of law over politics, and are suspicious of various projects of 'global' or 'cosmopolitan' constitutionalism, which seek to imbue governance 'beyond the state' with constitutional values. The EU is the most advanced example of structures which come under this sort of critique, although the NC framework has been only scarcely used to study it. In contrast to what the leading New Constitutionalism scholars contend, however, constitutional courts in the EU member states – which must be distinguished from the rest of the judiciary at the national level – have lost some of their powers in the process, to which they have been reacting in different ways. The unique position of constitutional courts has hitherto been rather neglected in academic research, both concerning their relationship

to the systems of global governance, and also when it comes to the examination of their place in the EU (in contrast to the abundant research concerning the relationship between national constitutional and EU law, or courts in general). It also remains to be tested what constitutional courts can possibly do to address the discontents with some elements of NC, particularly those related to the rise of governmental structures 'beyond the state' and more broadly globalization. Finally, and most importantly, it needs to be seen how New Constitutionalism has affected the legitimacy constitutional courts in the EU.

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

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

Mattias Wendel: ***The shaping force of comparison in public law***

The public law of our time is a law in multiple layers. While this multi-layered structure is usually examined in its vertical spread (international – European – national 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 orders 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 elaborate and sometimes even critical evaluations of foreign jurisprudence in their judgments. This mirrors a broader process of strengthening the shaping force of comparison in and for public law.

Nik de Boer and Christophe Majastre: ***With the law on our side: judicialisation and juridification of German EU politics in the Euro crisis***

This paper enquires how the GCC's case law on European integration has affected German political and public discourse on the Euro crisis. We ask whether and in what way the Court's rulings on several of the Euro crisis measures have led to a problematic 'judicialization' and 'juridification' of politics. These processes entail a shift of decision-making authority from democratically legitimated and politically accountable institutions to courts and legal experts. The paper's empirical focus is twofold. First, we analysed the role of legal expertise in German public debates on the Euro crisis. This was done through an analysis of lawyers' public interventions on the crisis in German newspapers. Second, we assessed the consequences of constitutional review for German political discourse. For this purpose we assessed the place of the GCC's case law and the role of constitutional discourse within key German parliamentary debates on the Euro crisis. We believe that these enquiries are crucial to evaluate justificatory accounts of the GCC's constitutional judgments on European integration. Our paper provides insights about whether and how a supposed process of judicialisation and juridification takes place within German political and public discourse.

39 CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCEDURE

The constitutional revolution in Israel has led to a broad discourse regarding rights of suspects defendants 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 consult with 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 criminal process? Is truth a value? Is it 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	Michal Tamir
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 lying to 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 future hazards analysis of the probability of their occurrence and a complete neutralization of the risk or at least its reduction to an acceptable level. A false conviction is no less a system error and accident than a plane crash. Yet in criminal law a Hidden Accidents Principle governs 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 innovative "System-Theoretic Accident Model and Processes" (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 this amendment, in certain circumstances publication 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 other criminal acts. Hopefully, pointing out these inconsistencies will spur the legislature to enact further amendments. Other solutions, may assist the courts in interpreting the Amendment as they apply it, with regard to such issues as: the scope of the prohibition, the elements of the crime, and the scope of the defenses provided. The importance of appropriate application of the this Amendment is obvious in that it can and should be a key tool in deal-

ing with this unpleasant phenomenon, which often causes serious damage to both the individual victims and society in general.

Michal Tamir: ***Selective legislation***

Enforcement authorities supposed to enforce the law in a way that fulfill the main goals of the law. Thus, they are limited in creating enforcement categories. Otherwise they might act selectively. But is the Legislature not restricted in making classifications? Can the legislature act a selective law? The subject of selective enforcement is very developed in Israel. However the phenomenon of selective legislation rarely gets discussed. The fundamental principle of the rule of law in its substantive sense, requires that the norms will be general in nature, namely refers to non-specific group of people. The rationale is to reduce the fear of harassment of someone, on the one hand; or unjustified preference of others, on the other. Selective legislation – that is legislation that addresses some person or persons using the name or characteristic distinguishes – contradicts the rule of law. Selective legislation contradicts the separation of powers principle too. Personal legislation intervenes with the realm of the Executive (if the matter is administrative) or with the realm of the Judiciary (if the matter is judicial). Moreover, selective legislation impairs the ability to direct people conduct and hence constitutes a retroactive application of the law. Although selective legislation is contrary to the basic foundations of a democratic, the Supreme Court refrains from enforcing the restriction that the legislation should be general, limiting the judicial review to situations where the constitutional right to equality is infringed. The practical result is allowing situations where 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 judiciary 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. 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 entailed by the differences in goals and in the challenges involved in policy making and judicial review. Based on this comparative analysis, we demonstrate the incompatibility of the analyses adopted in judicial review to the public process, and conclude with several alternative practices for rights-consideration in the policy making.

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 Favored: An Empirical Analysis of the effect of the label "Rights" on Balancing Between Considerations***

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

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 lesss homogeneity? The panels will seek to address this topic from multiple perspectives. Papers will highlight factors of debate on arenas of opportunity and oppression – from schools to universities firms and courts – that link power and public law in ways that may be detrimental to the interests of marginalised people.

Participants	Terry Smith Audrey McFarlane Gregory S. Parks
Moderator	Iyiola Solanke
Room	8B-2-03

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

Audrey McFarlane: ***Race Class & Moral Claims for Justice***

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

42 COURTS, THE RULE OF LAW AND EUROPE'S CHANGING ADMINISTRATION

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 those challenges. The panel will begin by exploring the challenges of courts in ensuring legal accountability in the secretive cross-border data exchanges that occur between EU, international and state bodies in the context of Europe's interoperable information systems. The panel then explores the role of EU courts in scrutinizing rulemaking power in instances of regulatory cooperation between EU and international bodies. Doubts are also raised by how EU courts have attempted to preserve the rule of law in joint administrative decision-making by national and EU authorities when the EU's judicial review system is designed for decisions taken by only one of the two levels. Lastly relying on quantitative analysis of the litigation initiated by private applicants before EU courts the panel will examine whether EU courts have indeed gone beyond their initial role of administrative courts to assume a more mature constitutional role.

Participants	Deirdre Curtin Joana Mendes Filipe Brito Bastos Michal Krajewski
Moderator	Diana-Urania Galetta
Room	8B-2-09

Deirdre Curtin: *"Second Order Secrecy. Challenging Invisible Visibility in European Law"*

Citizens' trust in law enforcement took a massive dive when the invisible security handshake became visible through leaking by Edward Snowden. The main driver for this initially secret private-public collaboration is national security, in particular after 9/11. Information is shared among many sources (national and supranational; internal and external; private and public) and the information thus shared tends to be a commingling of both internal and external security aspects. There is a certain level of dislocation in the operational function of information, affected by the overall fragmentation characteristic of this area, more broadly. Ultimately, it makes it impossible to independently verify the reliability of such information. What is particularly striking in the context of the European Union is not only the different ways that the security 'handshake' exists but also the way that law and politics have inter-twined in a manner that challenges or tries to challenge the hidden security phenomenon, the existence of which may be revealed in different ways and with regard to different components of the information. This paper explores the secrecy effects of the principle of 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 cause or reveal further layers of invisibility. This is in particular revealed to be the case where the principle of inter-operability spreads in European and national data-bases and seems to fall below the radar of any possible judicial control, perhaps systemically.

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 intertwinement 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 controls, potentially opening gaps in law's ability to structure public authority and leading to instances of unrestrained authority. Taking these premises as a starting point, this paper will, first, examine the ways in which the EU Courts have approached the legal problems arising out of the circular effects between international and domestic rulemaking. Its aim is to assess whether judicial review by EU Courts has prevented or contributed to instances of unrestrained authority and to examine how they have scrutinize decisions of domestic (EU) institutions and bodies the substance of which is defined via international regulatory cooperation. The paper will, secondly, address the legal position of holders of rights and legally protected interests excluded from internationalised rulemaking procedures.

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

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

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 only the EU acts addressed to them on a direct and individual basis, whereas private challenges to generally applicable legislative and executive acts as well as challenges by workers' organisations, social actors and public interest groups are excluded. High hopes expressed with regard to a new limb of Article 263(4) TFUE, added in the Lisbon Treaty, have been swiftly dispelled due to its strict interpretation by the EU courts. The admissibility criteria of annulment actions determine what type of cases come before the EU courts. Interestingly, despite fundamental changes in the EU legal order – the inclusion of fundamental rights standards, development of general principles, expansion of EU law to new regulatory fields – the admissibility criteria have never been substantially revised by the member states or reinterpreted by the EU courts. Moreover, in practice the procedure for preliminary reference from a national court on the validity of an EU act does not fill in the gaps in the EU judicial protection system left by the annulment procedure. The paper will present the quantitative analysis of the type of private applicants and subject-matter of their cases completed by the EU courts between 2014 and 2016. It will argue that most of the EU courts activity under scrutiny can be classified as the judicial review of individual administrative decision-making carried out at the request of economic operators. In contrast the constitutional review of legislation, the judicial review of executive rule-making as well as the challenges to any EU acts by social actors and public interest groups remain rare or almost inexistent. In conclusion, the paper will claim that the EU courts, by applying the strict interpretation of Article 263(4) TFEU, refuse to fully use their potential as administrative and constitutional courts. This, in turn, undermines the rule of law in the EU.

43 COURTS AND AFRICAN FEDERALISM IN A GLOBAL PERSPECTIVE

Recent developments in Africa indicate that the federal idea that was never given a chance to develop is now re-entering the constitutional scene of several African countries, above all as a response to communal tensions. Despite constitutions that provide for a robust and dynamic federation, the federal or semi-federal systems in Africa operate in centralised manner. In many of those countries, the federal arrangement that by definition multiplies opportunities for offices and helps to promote subnational democracy has been undermined by a political practice that largely ignores the system. This begs the question whether the gap between the Constitution and the practice can be partly explained by the absence of constitutionalism. Can it be explained by the fact that most African countries, even after the adoption of the Constitution, have not seen the emergence of independent institutions that champion vertical constitutionalism and challenge the constitutionality of government actions? This session focuses on one particular independent institution that can curtail government actions that flout the basic principles of constitutionalism: the Courts. It focuses on the impact of courts on the operation and functioning of the federal experiment in Africa.

Participants	Nico Steytler Conrad Bosire Mugoya Yonatan Fessha and Zemelak Ayele Karl Kössler
Moderator	Francesco Palermo
Room	8B-2-19

Nico Steytler: ***South African Courts: The Protectors of the Hybrid Federal System***

A democratic South Africa opted for a hybrid federal system of governance in 1994. Despite the fact that a single party, the African National Congress (ANC) dominated most provinces (and at one time all), the provincial sphere of government did not became the de facto administrative arm of the national government. Provinces in opposition hands have use the courts, with the Constitutional Court at the apex, strategically to protect their autonomy. The Constitutional Court has not, however, adopted a pro-provincial interpretation of the constitutional provisions establishing provincial autonomy (however limited it was). Over the years it followed a restrictive approach that favoured the national government. Also when interpreting the division of powers between provinces and municipalities, it mainly favoured the latter. However, when it came to the adoption of national legislation affecting provincial interests, the Court has been robust in protecting the role that the National Council of Provinces plays in the national legislative process. The reasons for such judicial behaviour are further explored.

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 legislative and executive power is devolved to these units, judicial power is retained at the centre and bestowed on a unitary judicial structure. Devolution of power was one of the contentious issues in the entire review process; however, at no point was the issue of federating judicial power strongly mooted. Kenya's legal system (common law) and general legal tradition is inherited and firmly rooted in the British legal system that is unitary. Even when the British bequeathed a semi-federal system of government at independence, they left the judicial structure unitary. This may well explain why the federal debate did not extend to the Judiciary. While the Judiciary is structurally part of the national government structure, it is functionally a shared institution that plays an "umpire role" in Kenya's devolved government structure. The Judiciary's role is set against a political and institutional culture that is centralised, a culture which the Constitution seeks to change into one where there is shared horizontal as well as vertical state power. It is therefore inevitable that courts are confronted with disputes whose content is the balance of national and county powers. While courts have applied the Constitution to such disputes or matters, there are a few factors limiting the ability of courts, including the newness of the devolved system and its constitutional implications as well as subtle 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 place of "federal balance" in the Constitution, capacity limitations have impeded 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 division 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 constitution 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 are the following: the dual or integrated structure of the court system, the organisation of the apex court and the issue of subnational participation in the appointment of judges as well as several factors affecting its jurisprudence (e.g. the embeddedness in a common or civil law system, the degree of rigidity of the federal constitution, the scope of judicial review, the detailedness of the distribution of powers and rules for its interpretation). As the recent turn in several African countries towards federal arrangements has mainly been driven by a perception of federalism as an effective tool to manage ethno-cultural diversity, the paper places particular emphasis on experiences from countries that feature such diversity.

44 IS THERE A SPECIAL EAST-CENTRAL EUROPEAN CONSTITUTIONAL IDENTITY? – I. COUNTRY CASE STUDIES

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

Participants	David Kosar and Ladislav Vyhnánek Katarína Šipulová Tomasz Tadeusz Konczewicz Gabor Halmai Paul Blokker
Moderator	Oreste Pollicino
Room	8B-2-33

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

Despite its bold position in its Lisbon I Lisbon II and Holubec judgments the Czech Constitutional Court has not engaged with the concept of constitutional identity good and proper. While the founding principles of the Czech Constitution in particular the Eternity clause and the relevant case law of the Czech Constitutional Court provide a helpful starting point for reconstructing one constitutional identity is a dormant concept in the Czech Republic. The lack of public debate and the limited involvement of other constitutional organs in the identity discourse pose another challenge to conceptualizing Czech constitutional identity. Even though the concept of constitutional identity is a normative one, the process of discovering and defining it cannot be limited to a textual analysis of the constitution itself or even of the relevant case law of a constitutional court. Hence, it is important to bear in mind that the judicially created understanding of constitutional identity does not necessarily have to find

traction among the people. Put it more bluntly, "legal" concept of constitutional identity developed by the Czech Constitutional Court may significantly differ from the people's "political" understanding of constitutional identity.

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.

Gabor Halmai: ***Hungary: Non-constitutionalist 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 became an 'illiberal' member state of the EU, which does not comply with the shared values of rule of law and democracy, the 'basic structure' of Europe. The new government of Viktor Orbán from the very beginning has justified the non-compliance by referring to national sovereignty, and lately – as an immediate reaction to the EU's 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 a former British colony and now a Special Administrative Region where constitutional adjudication flourishes in an English common law based system that contrasts sharply with the legal system of the People's Republic of China.

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

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.

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 partisan politics in the context of "divided government" in the 2000s. In the course of tackling these challenges, the Constitutional Court has not only sustained itself but also become a powerful judicial institution and an indispensable strategic player in the development of constitutional democracy in Taiwan. This paper is to illuminate how this court has traveled 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's constitutional adjudication***

Beijing's exercise of its power of interpreting the Basic Law – Hong Kong's constitution – seems to suggest that it has final say over what the law is in Hong Kong. This paper argues that it is possible to conceptualize 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 courts missed an important opportunity to do so in the latest oath-taking saga.

Po-Jen Yap: ***Discussant***

Prof. Yap will serve as Chairman (Moderator) and Discussant in this Panel.

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

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

Participants	Sabrina Ragone Sergio Verdugo Juan Manuel Mecinas Montiel Juliano Zaiden Benvindo Diego Werneck Arguelhes and Thomaz Pereira
Moderator	Elizabeth Trujillo and David Landau
Room	8B-2-49

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

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

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

During the authoritarian regime that ruled Chile between 1973 and 1989, the Chilean Constitutional Tribunal unexpectedly helped to 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 legitimize the dictatorship at the same time that it was forcing the Pinochet regime to establish the electoral rules that allowed the opposition to win the plebiscite. This nuanced approach suggests that, under certain circumstances, authoritarian and non-authoritarian judicial functions can reinforce each other.

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

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

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

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

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

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

47 INSTITUTIONAL DIALOGUE: COURTS AND PARLIAMENTS

Courts are increasingly relied on to deal with politically salient questions. Judicialization of politics does not entirely remove these questions from the political sphere. Well aware of the possible consequences of their judgments 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 dialogue focused on conversations 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 presentations, the participants give evidence from Belgium and Canada to show that courts as implementer-dependent institutions do not dominate the political playing field and therefor rely on dialogue as a judicial strategy to ensure compliance. Also, the implications of the legislative strategy of non-compliance for dialogue theory are presented as a framework to understand judicial-parliamentary relationship.

Participants	Sarah Verstraelen James Kelly Josephine De Jaegere Nicola Lupo Sarah Lambrecht
Moderator	Patricia Popelier
Room	8A-3-17

Sarah Verstraelen: ***Constitutional Dialogue on legislative lacunae***

In approximately 120 judgments, the Belgian Constitutional Court found legislative lacunae to violate the Constitution. These judgements incite a constitutional dialogue, first and foremost with Parliament, especially in those cases where the Court explicitly emphasizes that only the legislator can amend an unconstitutional absence of legislation. Although the case law of the constitutional court regarding these legislative omissions has already been largely explored, the actual legislative reaction has not received much attention. Consequently, in this paper the legislative response to these "lacuna-judgements" was examined. The lack of any regular or systematic follow up or specific parliamentary proceeding to comply with the case law of the Constitutional Court complicated the task. One of the findings is that in one third of the cases where the Court instructed the legislator to amend the legislation, a legislative reaction is still missing. Consequently, the Court cannot be seen as a dominant actor in the dialogue. This may explain the judicial innovation of remedying certain gaps through judicial completion under the conditions set forth by the Constitutional Court and the Supreme Court. Hence, the constitutional dialogue on legislative lacunae does not end with Parliament's non-response. Also the judicial response needs to be taken into account. After all, the Constitutional Court often offers guidelines to the ordinary courts on how to fill the legislative ga, thus eliminating the unconstitutionality.

James Kelly: ***The Supreme Court of Canada as an Implementer-dependent Institution: why dialogue theory must consider the political response to judicial review***

This paper challenges the general assumption that highest appellant courts are powerful policy actors particularly those that exercise 'strong-form' judicial review (Tushnet). Instead of accepting that they are powerful, this paper asks the following question – under what conditions can a final appellant court such as the Supreme Court of Canada be considered a powerful policy actor? Relying on Mathew Hall's framework, final appellant courts are viewed as 'implementer-dependent' institutions as they are reliant on lower courts or political bodies such as the Parliament of Canada to implement their rulings. Two variables are employed: whether decisions involve vertical or lateral issues; and the popularity of the decision. Subordinate judicial actors implement vertical issues, where the highest appellant court is confident that the ruling will be fully implemented. Non-judicial actors such as Parliament implement lateral issues, where compliance may be conditional upon the popularity of the judicial ruling. This paper considers several lateral issues reviewed by the Supreme Court of Canada where the Court declared Acts of Parliament unconstitutional: safe-injection facilities; prostitution reform; and physician-assisted death. All three rulings involve issues where the governments of Stephen Harper (Conservative Party of Canada) and Justin Trudeau (Liberal Party of Canada) passed legislative responses that can be characterized as non-compliance. This occurred because the rulings involved morally contentious issues where a political coalition formed against the judicial ruling, thus allowing Parliament to override 'strong-form' judicial decisions by simple statutory amendment. This paper seeks to present a realistic assessment of judicial power in areas where highest appellant courts, as 'implementer-dependent' institutions, deliver unpopular judicial rulings. In addition, it seeks to understand the implications of the legislative strategy of non-compliance for dialogue theory as a framework to understand the judicial-parliamentary relationship.

Josephine De Jaegere: ***Strategic behavior of constitutionals courts in consociational systems: empiical analysis of the Belgian COnstitutional Court and implications***

In contrast with the extensive body of literature on judicial behaviour in countries with a common law tradition (and 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 widen the scope of knowledge on the forces 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 willingness to maximize its impact on the legitimacy and quality of democratic policy making, it is also constrained 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 preliminary references – since its inception until 2015 (n=3145). The presentation focuses on three aspects of the Court's case law that may be affected by strategic considerations. First, it is argued that modulated outcomes may serve as a strategic compromise when a violation has been found but a 'simple' declaration of unconstitutionality would exceed the 'tolerance interval' acceptable to political actors. Although these outcomes are not necessarily more deferential towards legislative majorities, they do not confront the legislature in the same way as a declaration of unconstitutionality. 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 embed 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 legislative branch when it estimates a vague opinion may better serve the purpose of ensuring implementation. 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 fundamental 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.

Nicola Lupo: ***Discussant: the Italian perspective***

Sarah Lambrecht: ***Discussant as referendaire at the Belgian Constitutional Court: perspectives from the Constitutional Court***

48 INTEGRATED RIGHTS IN THE PRACTICE OF REGIONAL HUMAN RIGHTS COURTS

The panel will introduce concrete proposals for a holistic ('integrated') approach to supranational human rights justice through a hands-on legal exercise: the rewriting of decisions of supranational human rights courts. The paper presenters have thus redrafted crucial passages of supranational human rights judgments. They will discuss their interventions in the cases as well as the methodology and/or theoretical framework that guided their approaches, and demonstrate how human rights monitoring bodies may adopt an integrated approach to human rights law. This panel is a spin-off of a book project. The book 'Integrated human rights in practice. Rewriting human rights decisions' will be published by Edward Elgar Publishes in August 2017 (http://www.e-elgar.com/shop/integrated-human-rights-in-practice). The panelists have rewritten judgments 'as if human rights law were really one' borrowing or taking inspiration from developments and interpretations throughout the whole multi-layered human rights protection system. In this perspective, indivisibility and intersectionality are some among many manifestations of a holistic approach to human rights. The rewriting exercise shows how theoretical and conceptual approaches from scholarship can be translated into judicial practice.

Participants	Eva Brems Valeska David Marijke De Pauw Lieselot Verdonck
Moderator	Eva Brems
Room	8A-3-27

Eva Brems: ***Integrated human rights***

The first presentation will introduce both the rewriting methodology and the overall idea of 'human rights integration'. The presentation will discuss both the potential benefits of human rights integration, and its necessary limits, introducing the concept of 'smart integration'. Without putting forward a singly model for human rights integration, it will give a 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 presentation will introduce the idea of a 'global human rights conversation' as a central feature of smart human rights integration.

Valeska David: ***Caring rescuing or punishing? Rewriting R.M.S v Spain (European Court of Human Rights) from an integrated approach to the rights of women and children in poverty***

The 'rescuing' of children from poor and otherwise 'deviant' families is a longstanding and yet unsettled

concern in many countries. Members of the Council of Europe are no exception. The Council's Parliamentary Assembly recently acknowledged that while children from 'vulnerable groups' are disproportionately represented in the care population of member states, no evidence suggests that parents who are poor, less educated or who belong to minorities are more likely to abuse or neglect their children. R.M.S v. Spain deals with this paradox. In 2005 Spanish social services removed a girl aged nearly 4 years old and placed her in foster care on the sole account of her 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 (ECtHR) 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 integrated approach to better 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 ECtHR addressed the impermissibility 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 ECtHR 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 ECtHR 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. The case of McDonald v. 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 discussion of external instruments as regards the positive obligations of Member States to provide care and to ensure the enjoyment of the right to independent living. In addition to the main international (CRPD) and regional (Revised European Social Charter) relevant binding instruments, soft norms are also used as interpretive tools. Secondly, it is argued that the Court in McDonald failed to adequately consider the proportionality of the contested measures, namely the reduction in care. This part of the judgment has thus been re-written in light of those relevant external norms and what is considered to be a newly emerged European consensus on the rights of persons with disabilities. In addition, the concept of dignity – which has thus far remained vague and ambiguous in the Court's jurisprudence – is elaborated further and utilised in the proportionality test and the interpretation of positive rights. Finally, an equality perspective will is integrated in the interpretation of the right of persons with disabilities to care assistance and independent living.

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

This paper rewrites the judgment by the Inter-American Court of Human Rights in the case of the Kichwa Indigenous People of Sarayaku v. Ecuador of 2012, concerning oil exploration activities in indigenous territories. A more sustained integrative 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, at least as included in the right to life. 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.

49 COURTS AND ADMINISTRATIVE POWER

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

Participants	Paul Craig Giulio Napolitano Eduardo Jordao Alfredo Moliterni Guy Seidman
Moderator	Marco D'Alberti
Room	8A-3-45

Paul Craig: ***Courts and Administrative Power***

Giulio Napolitano: ***Courts and Administrative Power***

Eduardo Jordao: ***Courts and Administrative Power***

Alfredo Moliterni: ***Courts and Administrative Power***

Guy Seidman: ***Courts and Administrative Power***

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

It is widely assumed both in constitutional scholarship and in international decision-making circles that constitutional courts have a potential to act as crucial actors in states undergoing democratic transition and consolidation. By and large they are expected to play a role of a key democratic control and dispute-resolution mechanism in the face of considerable constitutional and political uncertainty characterizing transitional states. But have the courts managed to attain this assumed potential in accordance with high scholarly expectations and public demand for justice in such states? The panel 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.

Participants	Sanja Baric Tatjana Papic Edin Hodzic
Moderator	Tatjana Papic
Room	8B-3-03

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 and public perception have significantly deteriorated. The paper sketches the Court's trajectory from early years of democratization to the country's integration into the European Union, identifying different factors contributing to the variations in impact and legitimacy.

Tatjana Papic: ***At the Margins of Transition: The Role and Impact of the Constitutional Court of Serbia***

The paper addresses the role of the Constitutional Court of Serbia (SCC) in the legal and political life of the Serbian society and its impact on the process of the democratic consolidation in Serbia. It examines social and political context and other relevant factors – history and institutional setting in particular – to frame the discussion pertaining to the legitimacy of the SCC in input, output, normative and sociological terms. The paper argues that from all these standpoints, SCC's legitimacy is weak. Accordingly, it is shown that the SCC has been having only marginal role in political and legal life in Serbian society and modest impact on the process of democratic consolidation. Even though the SCC has been more assertive in cases pertaining to parliamentary democracy and human rights, when one considers the public perception of the SCC and the effects of its decisions in general, it appears that even those rare decisions have had only a limited effect. This reveals poor output legitimacy of the SCC. Namely, the effect of its decisions with respect to the dominant political values in Serbian society is close to insignificant. Finally, the perceptions of the CC by the general and expert public also reveal that it lacks both sociological and normative legitimacy.

Edin Hodzic: ***The Role of Post-Yugoslav Constitutional Courts in Democratic Transition and Consolidation: A Reflective Look from the Bosnian Exception***

Using the case of Bosnia and Herzegovina as a point of departure, this paper takes a comparative look at the role and impact of constitutional review in the processes of democratic transition and consolidation in countries of the former Yugoslavia. Given the dominant doctrinal presuppositions, one could expect that constitutional courts would be weaker and less influential in the more complex states and political contexts studied: Macedonia, Kosovo, and, particularly, Bosnia and Herzegovina. The main argument of this paper is, however, cautiously counter-intuitive: despite their common tradition, similar origins, competences, institutional features, and similar social challenges, they have been facing, the respective roles activism and impact of the constitutional courts in post-Yugoslav constellation vary significantly with those operating in the politically more challenging environments generally scoring higher. In discussing the contributing factors, the paper shows that the equation of judicial influence in transition is complex and multi-layered. Acknowledging that the role of constitutional courts in such contexts is largely influenced by the external environment, such as the international involvement and the extent of political diffusion, the paper also points attention to important internal factors, such as the institutional details, assertion of authority, expertise of the judges, and overall quality of their decisions.

51 INTERNATIONAL COURTS AND POLITICS

The papers of the panel explore the relationship between legal arguments and politics. In particular, the papers look 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	8B-3-09

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 "controversial" cases and argue that so far the CJEU has failed to develop satisfactory techniques to solve them. The judgments in Dano, Alimanovic, Brey, and Commission v. United Kingdom, all illustrate a clash between the EU citizens' rights to equal treatment and the financial interests of the member states in the light of politically charged accusations of "welfare tourism". Furthermore, beyond dealing with these controversial issues, these cases also represent a complex interaction between the CJEU, member states and EU legislator and various levels of EU law sources. Instead of analysing the "human cost" these judgments represent, I am interested in techniques 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 also away from the approach taken by the legislator. Such approach has a consequence of further complicating 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 cases in 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 Rely on European Consensus in Article 8-11 Why It Should, and How To Fix the Situation***

This paper looks at the role that the European consensus plays in the proportionality and balancing 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 picture, the margin 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 narrower 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 practice of the court. The problems lie primarily 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 haphazardly at different parts of the argument, very rarely defining what counts as a consensus. Consequently, the European consensus plays a relatively arbitrary role in the way in which proportionality and balancing exercises are carried out. Finally, I will suggest how the situation may be begun to be remedied. This irequires the disaggregation of proportionality into the various normative and empirical questions that it poses. It also involves the recognition that with regard to the questions that arise in proportionality and balancing (and especially with regard to balancing) there are different consensuses that may be relevant. In attributing the different weights to the situation at hand, as balancing requires the ECtHR to do, the court must then consider various European consensuses in the course of its judgment. Finally, having elucidated the relationship between balancing and European consensus, 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. Gascogne and Others) cases before the CJEU, the issue of which procedural design is the most appropriate to address compensations for undue procedural delays was tried. Interestingly, two fundamentally different approaches had previously been used by the CJEU (i.e. in Baustahlgewebe and Der Grüne Punkt) and thus it became imperative to decide which procedural design should prevail. The different approaches on one hand suggested addressing the issue of compensations for procedural delays parallel with the substantive cartel procedure, and on the other hand that it should be addressed in a new court procedure before the General Court. In resolving this dilemma, which ultimately was a dilemma about procedural fairness within the meaning of Article 47 of the Charter, the Court resorted 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 writing their views on the approach taken in, respectively, Baustahlgewebe and Der Grüne Punkt. Seven Member States indicated a preference for the former, three favoured the latter, and six Member States expressed no preference. The Council endorsed Baustahlgewebe whilst acknowledging that the two remedies coexist and neither is perfect. The European Parliament considered the Der Grüne Punkt approach to be better. (ECLI:EU:C:2013:360 para 119). By this approach, the Court's decisional modality shifts from the backward looking adjudicative function where a decision is reached based on the pre-existing legal and material evidences; over to the forward looking political function where the consequences of the decision are the primary determinants of its adequacy. Without prejudice to the constitutional implications when a Court explicitly enters the sphere of inherently political decision making this paper examines how the Court and its advocates general argue in their capacity as political decision makers that seek to rationalise how the procedure for compensating for undue procedural delays ought to be designed, rather than revealing how it is designed according to the law as it stands. This analysis reveals three incompatible rationalisations for how this procedural dilemma should be solved: one by AG Sharpston; second by AG Wathelet; and the third by the CJEU. This discontent about how a seemingly simple problem of procedural design should be approached, hints at a methodological confusion. The CJEU and its officials seem out of their league in balancing procedural fairness; using consequential arguments without engaging in proper quantitative analysis which the political decisional modality requires.

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 in 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. However, the EU is presently challenged regarding solidarity, due to among others the migration crisis, the economic crisis, Brexit, and some wider aspects of legal disintegration. Whereas solidarity is often associated with civil society (bottom-up) or national/int'l 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 CJEU and the ECtHR. Thirdly, finally, the perspective is broadened, so as to understand solidarity at int'l courts beyond Europe by focusing on the ICJ.

Participants	Hans-Jörg Trenz Dagmar Schiek 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 principle of European solidarity, which was originally conceived as one of the founding values of the European Union and as a motor for social cohesion is currently redefined. European solidarity has become one of the most contested claims in public debates turning it into a mobilization force for intellectuals 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 politics 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 aiming 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 forgoing any form of solidarity beyond national borders are gaining in momentum, epitomised by the UK's decision to leave the EU among others, but by no means limited to English voters who decided the EU referendum by their overwhelming majority for "LEAVE". Can the EU survive as a project of a community based on law which promotes transnational solidarity between citizens of different Member States, and partly even with citizens of non-member states? The EU Treaties at least 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 in how far the case law of the Court of Justice supports solidarity as an EU legal principle. The litmus test we suggest as a hypothesis 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

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 will take the outset in how the court applies the provisions in the European Convention of Human Rights and its protocols, which relate to solidarity. The Court's development of a quite far-reaching practice on the protection of social rights based on Article 1, Protocol 1, on protection of property is at the core of this analysis. The second approach will take its outset in a search for case law from the Court, which uses the term 'solidarity' in order to determine how the Court uses the term 'solidarity' in its argumentation, and whether new fields of solidarity are appearing in the case law of the Court. Both approaches are based on empirical data gathering through data base searches. Together the results will together feed into an analysis of the European Court of Human Rights's use and application of solidarity.

Achilles Skordas: ***Solidarity as Contingency Formula: International Court of Justice and World Order***

If 'hostility' is the contingency formula of a 'Hobbesian' international order, and 'exchange' is the formula of the Lockean/Grotian order, then solidarity is the contingency formula of world society as a highly complex, asymmetrical, and all-encompassing global system. Risk is pervasive in the operations of function systems, and world society has been transformed into 'world risk society', characterized by the bifurcation 'integration/disintegration', by collisions of systems rationalities, and by the expansion of areas of exclusion and violence. Solidarity is not taken here to mean the core substantive value of a 'Kantian' order or of an order focusing on global justice and welfare; it is rather the value-neutral contingency formula of the current world order in the sense that the participants in international relations can manage risks of a global scope only by coordinated action on all levels. This action can take a variety of forms, such as regulatory agreements and disarmament agreements, or may lead to a mutation of traditional legal concepts through unconventional state practice, or generate extra-legal and para-legal patterns viewed as informal international law. At this juncture, the role of the ICJ is crucial in operationalizing solidarity as a contingency formula. The Court sometimes decides bilateral disputes on narrow grounds but in other instances it has developed the governance dimension and indicated the need of concerted action. In such cases, solidarity appears as a 'guiding principle' facilitating the interpretation 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 structures, which shows the reversible nature 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 European 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 Micha Wiebusch Maksim Karliuk Pola Cebulak Marcelo Torelly
Moderator	Pola Cebulak
Room	8B-3-33

Salvatore Caserta: ***Regional Integration through Law and International Courts – the Central American and Caribbean Cases***

The article builds an innovative theoretical framework with the goal of unveiling the preconditions allowing ICs to become engines of supranationality in different institutional and socio-political contexts. In so doing, the article nuances the theoretical approaches on the relationship between supranationality and supranational adjudication. The article focuses on the Central American Court of Justice (CACJ) and the Caribbean Court of Justice (CCJ), and it compares them with the Court of Justice of the EU (CJEU). Both the CACJ and the CCJ have been branded as institutional copies of the Luxembourg Court. The two Courts have also borrowed key jurisprudential principles from the CJEU with the goal of expanding the reach of Central American and Caribbean Community 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-

tegration lie for the most part outside the direct control 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 allowing 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 making 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 jurisdiction was expanded with a general international jurisdiction (2003) to eventually allow for adjudication 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 force. 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 political confidence in the continental judicial system, justified concerns exist concerning its future. A number of recent developments prompts such concerns. Firstly, in light of the withdrawal of Rwanda from allowing individual access to the Court, questions may be raised whether other countries will follow suit and whether this will deter countries from accepting such jurisdiction. Secondly, in a recent decision, the African Court has accepted the African Charter on Democracy Elections 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-á-vis the international system, the African court system holds more promise than any other alternative.

Maksim Karliuk: ***The disintegration of judiciary within Eurasian integration***

Eurasian integration has created a new legal order of the Eurasian Economic Union (EAEU). This legal order has its own narrative, principles, 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 Russian Constitutional Court has claimed that Russia can set 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 European 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).

Pola Cebulak: ***Preliminary Ruling Questions from Highest National Courts in the EU: Disobedience, 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 judiciary 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 adjudicating more on human rights issues and performing constitutional review at EU level (Digital Rights Ireland (2014)). Thereby, it encroached upon the traditional role of highest courts as protectors of fundamental rights. Several highest courts in the EU have asked their first preliminary ruling questions to the CJEU about validity or interpretation of EU law in the recent years (Spain 2013, France 2013, Germany 2015) and several other preliminary ruling questions from highest courts concerned specifically human rights (Ireland 2014, Austria 2014). This increased dialogue appears, however, to be a result of increased tensions rather than increased convergence. Some preliminary ruling references included skepticism as to compatibility of the EU law measures with human rights protection guarantees at national level (Melloni (2013)), others amounted nearly to an ultimatum (Gauweiler (2015)). Finally, two constitutional courts went as far as to expressly decide not to apply a preliminary ruling judgment from the CJEU (Czech Republic (2012), Denmark (2016)).

Marcelo Torelly: ***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 (IACtHR) and its recent development into a judicial review doctrine. It focuses on the protagonist role the IACtHR has developed in the region and the expansionist nature of its legal regime. Comparatively, while the adoption by the European Court of Human Rights of the doctrine of national margin of appreciation has been criticized for not imposing supranational and international law more firmly, from the 2000's onwards the Inter-American Court of Human Rights (IACtHR) has started developing a strict legal review doctrine and practice based on the American Convention. This emerging doctrine uses a domestic analogy to build up a constitutional claim that the American Convention is some sort of regional constitutional document and that the San José Court is likely to be its final interpreter, as same as a constitutional court in the domestic order. The article describes this emergence and questions whether the traditional hierarchical constitutional framework may constitute an adequate structure to the human rights regional regime.

54 WOMEN AND COURTS: EMPIRICAL BACKGROUND FOR THEORETICAL THINKING

This panel seeks to address the issue of courts' legitimacy from a specific perspective: that of their composition – and more specifically that of their gendered composition at their composition. In the world of international courts, the issue of gender has grown in significance over the past decade. Women judges have started to be appointed in some courts where they had never been offered seats and in some cases (see in particular the works of N. Grossman for international courts), gender balance has become or more or less stringent element in rules governing courts' composition (African Court of Human and Peoples' rights, European Court of Human Rights, Canada Supreme Court). This evolution towards greater inclusion of women on judicial benches also causes backlash in some places (see for instance reluctance and resistance to a gender balance rule at the European Court of Human Rights).

Participants	Rosemary Hunter Stéphanie Hennette-Vauchez Ruth Rubio Marin Cecilia Bailliet Neus Torbisco-Casals
Moderator	Gráinne de Búrca
Room	8B-3-39

Rosemary Hunter: ***Feminist Judgments: Real and Imagined***

Feminist judgment re-writing projects have been launched in a number of common law countries in the past 10 years. The Women's Court of Canada published six rewritten judgments of the Canadian Supreme Court in 2008, and this was followed by feminist judgment projects in the UK, Australia, the USA, Northern/Ireland, New Zealand, India and in International Law. The premise of these projects has been to take an existing case and imagine the judgment a feminist judge might have written had she been sitting on the court. By working with the same facts and law and at the same time as the original decision, these alternative judgments demonstrate powerfully that the decision rendered was not inevitable and that bringing a feminist perspective to the case can give rise to different reasoning and often a different result. The feminist judgment projects have in turn prompted reflection on the relationship between feminism and law and the ways in which feminist judging might be accomplished. They have also prompted further research on instances of feminist judging in the 'real world' and the implications for judicial appointments. This paper will present an account of some of this work with a particular focus on public law decision-making and the value of judicial diversity.

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

In September 2014, we organized a closed workshop at the European University Institute in Florence that brought together an extraordinary group of female justices from around 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 up 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 minimally adapted questionnaire. The goal of the present paper is to contribute to process of agenda-setting on the issue of gender balance in the judiciary, on the basis of these prominent "voices from the bench" that were generous and honest enough to share their views with us for two days. On the basis of the original material that we gathered, we have identified a number of main topics or concept that help (i) frame the issue and (ii) illustrate the debate over possible normative grounds for gender-balance in the judiciary. A number of proposals for reform that were discussed and seemed particularly interesting are presented in the form of concluding remarks, based on a number of empirical observations and experiences that were brought to the fore.

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 up 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 minimally adapted questionnaire. The goal of the present paper is to contribute to process of agenda-setting on the issue of gender balance in the judiciary, on the basis of these prominent "voices from the bench" that were generous and honest enough to share their views with us for two days. On the basis of the original material that we gathered, we have identified a number of main topics or concept that help (i) frame the issue and (ii) illustrate the debate over possible normative grounds for gender-balance in the judiciary. A number of proposals for reform that were discussed and seemed particularly interesting are presented in the form of concluding remarks, based on a number of empirical observations and experiences that were brought to the fore.

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

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

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

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 bodies managing them, multiple issues arise 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 lacking 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 Marsid Laze
Moderator	Elisabetta Morlino
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 ICSID is the main forum for their dispute resolution. Under BITs' umbrella, ICSID has scrutinized public authority/puissance publique acts connected with the regulation of public utilities given in concession to foreign companies, as the nullification of tariffs fixed by Compañía de Aguas del Aconquija S.A. by the Ente Regulador de Agua de Tucumón (ERSACT); the tariffs, the fines and the concession cancellation established by the Organismo Regulador de Aguas Bonaerense; the measures taken by the Tanzanian Minister of Water against the Dar es Salaam Water and Sewerage Authority; the water supply concession renegotiation and cancellation imposed by the Ente Regulador de Servicios Sanitarios (ENRESS). The paper will be structured in five parts. Firstly, I will briefly show that both the traditional notions of public utilities and service public imply some authoritative powers (or at least some powers which waive common law/civil law principles). Secondly, I will sketch that, although ICSID is not bound by a stare decisis rule and BITs apply only inter partes, the number and the consistency of ICSID arbitrations on these topics allow talking of a strengthened interpretive trend. Thirdly, I will stress that, at the same time, ICSID broaden and curb individual rights. It allows foreign legal companies which would not be protected by domestic courts to file a(n international) lawsuit against national regulatory measures; however, it provides a limited protection to citizens who have only few rights of participation in international arbitrations. Then I will explore the solutions and the arguments given by ICSID arbitrators vis-á-vis public utilities/service public issues. I will show that ICSID 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 aims at highlighting the main constitutional issues raised by ISDS systems, especially ones related with the potential "erosion" of domestic courts' powers and role. Furthermore, the lack of independence from state parties represents a concern typically associated with international arbitrators that this paper tries to analyze in depth. For this purpose, the paper examines the famous judgment Novartis vs. Union of India, in which a narrow interpretation of Indian law given by the Supreme Court seemed to hold back ISDS mechanism provided by TRIPS. This leading case's prevailing consequences on the pharmaceutical sector will be analyzed too. The conclusions tries to draw a line and understand the future and potential perspectives for 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 subsides to 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 United States and the European Community of the recent global trade history. Since 2004, as the negotiations between the European Community and the United States failed, each part

filed different claims in front of the World Trade Organization (WTO) Dispute Settlement Body (DSB), alleging counterpart to provide "illegal subsidies" to the two aircraft companies. The Airbus-Boeing case arises relevant issues about the ability of the WTO DSB to solve "hard cases" – as the Airbus-Boeing one – and, furthermore, about the relations between EU state aid law and WTO law. More in detail, moving from the Airbus-Boeing case, this paper aims at providing a critical analysis of the WTO DSB's role in antitrust global governance, considering particularly the problem of the interactions between national and regional industrial policy choices and supranational trade law regulations. At this regard, the paper is divided into three parts. The first part examines briefly the legal background of the Airbus-Boeing Case. The second part provides an in-depth analysis of the WTO Dispute Settlement procedure, in the light of the Airbus-Boeing case most recent development. The third and final part focuses on the "blurred lines" which divide UE state aid law and WTO law and emphasizes how uncertain arethe relationship between industrial policies strategies and antitrust global governance.

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

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

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

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

Participants	Joanna Jemielniak and Shai Dothan Güneş Ünüvar Pawel Marcisz and Joanna Jemielniak Anna Aseeva
Moderator	Shai Dothan and Joanna Jemielniak
Room	8B-3-52

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

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

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

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

Pawel Marcisz and Joanna Jemielniak: ***Interpreting European Union Law under the Comprehensive Economic and Trade Agreement***

Interference of the Comprehensive Economic and Trade Agreement between the European Union (EU) and Canada (CETA) with the powers of the Court of Justice of the EU (CJEU) has been one of the key concerns raised in the doctrinal and political discussion of CETA. This paper seeks to examine the potential conflict of competences between the CJEU and the CETA Tribunal in regard to construing EU law. According to Article 8.31(2) CETA "in determining the consistency of a measure with this Agreement, the Tribunal may consider as appropriate the domestic law of the disputing Party as a matter of fact". Whereas the adopted approach is consistent with an established common law tradition of determination of content of foreign law before a municipal court, it is not widely shared by the continental systems. Furthermore, this approach is particularly problematic when the applicable rules are those of the EU law. One of the main challenges in determining the content of applicable law in comparison with determining facts is that the former requires construction. In the paper, we adopt the semiotic stance that this is unavoidable even if the law is treated as a fact (which in the discussed context is further augmented by the explicit wording of the CETA provisions). It is further argued that the CJEU enjoys, to a great extent, a monopoly for interpreting EU law. This paper seeks to examine whether

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) CETA points to the prevailing interpretation given to the law by "the courts or authorities", 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 required and admissible evidence, as to the content of applicable law and 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 locus standi 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 created 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 few – and very recent – arrangements and initiatives actually bear investment court-like mechanisms: EU-Vietnam Free Trade Agreement, as well as EU-Canada Comprehensive Economic and Trade Agreement agreement. Other regional courts may adjudicate individual complaints, but only so far as they allege violations of community or domestic law. These tribunals typically do not have jurisdiction to interpret or apply international investment law. Still, they are authorised to determine state compliance with the regional integration agreement and related legal instruments, which often include some protections of individual or communal rights. This contribution will seek to discuss possible effects of introducing international investment court-like mechanisms on the welfare distribution at the local level and related public interest questions. I see the term 'welfare' as extending beyond economic considerations and comprising rights, institutions, etc. More precisely, it will attempt to answer the following questions. What would be the effects of introducing investment courts on the welfare, and whose welfare? Would the economic integration agreements' potential judicialisation impede or enhance participatory rights of local communities? Potential issues for discussion include but are not limited to: Authoritative interpretation at different stages (negotiation, law-making, adjudication). Especially crucial to examine is a feasibility of creation and empowerment, as well as struggles for power/ simply strategies of adaptation of potential local community commissions on authoritative interpretation within states partaking in economic integration. Such commissions might have (or seek) authority to interpret and eventually modify economic integration agreements, and especially their tribunals' decisions.

57 JUDICIAL PROTECTION OF SOCIAL RIGHTS: OPPORTUNITIES AND CHALLENGES

Despite the increased constitutionalization of social rights, courts more often rely on general principles or civil and political rights in order to protect people's material needs. Our panel aims to analyze the role of courts in the enforcement of social rights under the lens of constitutional and international human rights law. First, the protection by the judiciary of social rights in times 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, given 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 procedural models of social rights adjudication to mitigate the tension between democratic decision-making over social welfare decisions will be discussed.

Participants	Olga Chesalina Kyriaki Pavlidou Tania Abbiate Andreja Bogataj Alexandre de le Court Anastasia Poulou
Moderator	Veronica Federico
Room	8A-4-17

Olga Chesalina: ***Judicial protection of social rights in Russia in times of financial crises***

In the absence of specialised social courts in Russia claims related to social rights must be brought before civil courts. However, decisions of courts of the first and second instances are often contradictory. This explains the important role that higher courts, and in particular the Supreme Court and the Constitutional Court of the Russian Federation, play in the protection of social rights, especially in times of financial crisis. The Russian Constitution does not directly stipulate any minimum standards of social security. Hence, the question arises as to whether minimum standards regarding the level of social protection can be derived from the decisions of the Constitutional Court. What obligations of the state regarding the protection of social rights may be derived from the Constitution and the decisions of the Constitutional Court? This paper attempts to answer these questions by examining the decisions of the Constitutional Court of the RF related to retirement and unemployment social benefits.

Kyriaki 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 lowest courts safeguarded 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 multilevel structure of constitutionalism and human rights architecture in Europe. The paper aims to highlight the undocumented clash in constitutional control which took place at a domestic level in Greece and brought forward questions of legitimacy and constitutionalism at a national and supranational level.

Tania Abbiate: ***An Overview of Social Rights Adjudication in Africa***

The constitutional wave which has interested Africa since the 1990s and 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 strengthening of the judiciary. The paper aims at shedding light on the jurisprudence of some African courts, making reference to specific social rights such as the rights to healthcare, food and adequate standard of living. The protection of these rights is often provided through civil and political rights, and the paper will consider the procedural peculiarities of social rights adjudication in some African constitutional systems. Moreover, it will be considered whether some regional trends can be recognised, and which ones are the most promising judicial developments and the most disappointing ones.

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

Social law is meant to protect citizens in times of need and in this regard domestic courts play a crucial role in enforcing social rights. Individual entitlement to protection under social law requires standards of procedural law that may differ from those used in civil or administrative judicial procedures. There are inequalities between the parties in terms of resources, legal knowledge and experience. In my paper, I inquire into the existence of mechanisms which compensate the procedural inequality between the parties and enable easier access to the justice on the basis of social rights for the plaintiffs. From a comparative perspective, I explore the procedural peculiarities of social law cases in the European Union in terms of costs, formality of a lawsuit, the role of judges and issues around mandatory attorneys.

Alexandre de le Court: ***Social rights and the role of courts: the case of the application of the European Social Charter by domestic judges***

While the European Social Charter has been generally considered as containing only obligations of an international character, partly reflecting the vision of social rights as non-justiciable rights, it has been applied in various forms by ordinary and constitutional domestic courts. The study of the jurisprudence on the justiciability of the European Social Charter in The Netherlands, Belgium, France, Spain and Germany reveals a framework of application of international social rights instruments which is more nuanced than those centered on the doctrine of self-execution, and, at the same time, allows the development of a critical view on some forms of use of that doctrine. Moreover, the combination of the previous observations with the analysis of the evolution of domestic jurisprudence in the studied cases adds new elements to the debate on the legitimacy of courts in the adjudication of social rights in general, and international social rights in particular.

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

Academics and international bodies have so far put emphasis on the substantive parts of social rights, such as the minimum core obligations and the progressive realization doctrine. Equally important though, is the procedural dimension of social rights, which guarantees the ability of individuals to effectively participate in the making of welfare policy decisions. Referring to cases from the South Africa and India, my contribution aims to show how courts can adjudicate social rights in a way that is not antagonistic but rather facilitative to the democratic process. Special emphasis will be laid on the potential of procedural models of social rights adjudication to mitigate the tension between democratic decision-making over social welfare decisions and the exclusionary effects of litigation. In order for the pitfalls of the procedural approach to be overcome, a suggestion will be made to establish a link between the procedural and the substantive approach of social rights.

58 INSTITUTIONS OF THE RULE OF LAW: NEW BALANCE OR NEW POWERS? PANEL I: RETHINKING TRIAS POLITICA

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

Participants	Christoph Möllers Sanne Taekema Dimitrios Kyritsis Lukas van den Berge Kim Lane Scheppele
Moderator	Sanne Taekema and Thomas Riesthuis
Room	8A-4-35

Christoph Möllers: ***Is there a value of separated powers in the rise to populism?***

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

Sanne Taekema: ***In search of counterpowers. Can non-state actors curb government power?***

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

Dimitrios Kyritsis: ***A Moral Map of Constitutional Polyphony***

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

Lukas van den Berge: ***Judicial review of government actions in the neoliberal era***

The present era of privatization, decentralization and individualization has seen an unprecedented fragmentation of the public sphere a breakup of public imperium into separate pieces, not only left in the hands of supranational or subnational authorities but also entrusted to private actors. Public law has experienced an all-out shift from government to governance, replacing centralized bureaucratic 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 Scheppele: ***Discussant***

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

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

Participants	Maria Elena Gennusa Stefania Ninatti Antonio Tanca Emilio De Capitani Giulia Tiberi Paolo Zicchittu
Moderator	Giulia Tiberi
Room	8A-4-47

Maria Elena Gennusa: ***"As openly and as closely as possible to the citizen": the constitutional dimension of "openness" and "transparency" after the Lisbon Treaty***

The paper discusses the constitutionalisation of the principle of openness as a cornerstone of the European democracy reflecting upon the link between transparency and democracy.

Stefania Ninatti: ***The fundamental right of access to documents in the European Union: reflecting on participatory democracy in the recent CJEU's case law regarding Art. 42 of the EU Charter and Art. 15 TFEU***

The paper investigates the new dimension acquired by accessing documents after the Lisbon Treaty (as expressly granted by art. 15 TFEU and Art. 42 of the

EU Charter of Fundamental Rights). It also looks into the pivotal role so far played by the Court of Justice to enforce such a right together with a critical analysis of the shortcomings of such a jurisprudence.

Antonio Tanca: ***"Trilogues" transparency: the Council's perspective***

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

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

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

Giulia Tiberi: ***Transparency v. Privacy and 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 211/2011 (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 the protection of social rights by domestic judicial review.

Participants	Michal Kramer Hà 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 justiciable nature. Although economic and social rights have grown increasingly common in national constitutions, the protection of economic and social rights via constitutional jurisprudence is not limited to a judicial interpretation of social rights provisions in written constitutions. The understanding that a constitution is more than its text together with a judicial culture of developed judicial or quasi-judicial review for civil and political rights provide the underlying conditions for the protection of social rights on the basis of other constitutional principles by ways of judicial interpretation and judicial 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.

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

In May 2013, the entry into force of the Optional Protocol to the International Covenant on Economic Social and Cultural (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 claims 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?

Bruck Teshome: ***Reciprocal Influences of Judicial Decisions and Policy Arguments in the Implementation of the Right to Health: Trends and Dilemmas***

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 discuss the same term, but in different ways and with different expectations of what should be performed by the state and legal institutions. This paper explores the development of the term access to justice by the Supreme Court of India. The development of the term in Supreme Court case law has evolved from the more traditional access to lawyers and non-discriminatory access to courts, to addressing the socio-economic needs of litigants. The importance of the right is further illustrated by the proposed constitutional amendment to add access to justice as a substantive right to the Constitution of India. As the gap in access to judicial institutions remains problematic in Indian society, how the Supreme Court conceptualizes and addresses the social and economic factors that impeded such access, have major implications on the ability of marginalized communities to enforce their fundamental rights.

61 NATIONAL SECURITY: THE POWER OF COURTS TO SHAPE PUBLIC LAW WITHIN AND ACROSS BORDERS

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 and jurisdictional borders. The papers in this panel examine the growing power of courts to shape public law on matters implicating domestic and international security, including military operations, terrorist threats, and cross-border migration. The papers cut across various substantive areas, including constitutional criminal immigration and human rights law. The papers compare the different approaches of regional tribunals and national courts in addressing such issues as online incitement to terrorism, 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***

The paper examines current 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 public power and law. It focuses on the clash between security and legal rights, and its implications for courts in a pluralistic society. The paper examines two prominent immigration cases, both pending in the U.S. Supreme Court. One case, Jennings v. Rodriguez, challenges the denial of bond hearings to noncitizens facing prolonged immigration detention; the other, Castro v. Department of Homeland Security, involves the denial of judicial review to asylum seekers from Central America subject to expedited immigration removal procedures. 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 boundary lines inside the country to exclude individuals historically considered within the Constitution's protections. The paper explains why courts play an important role in the face of efforts to restrict constitutional rights and as a buffer against a 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 draws on a cross-disciplinary approach that combines law, political theory, and sociological perspectives on membership.

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

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

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

In recent years, the extra-territorial applicability of the European Convention on Human Rights (ECHR) has been recognized by the European Court such that the European Convention now undoubtedly applies to at least some action of States parties conducting military operations abroad. As a direct consequence, a series of new issues concerning the interaction of international humanitarian law and international human rights law have emerged and have been litigated before the courts of ECHR Contracting States including issues relating to the obligation to investigate killings, disappearances and allegations of torture during military operations, questions of the legal basis for preventive detention of individuals during situations of occupation, and questions of the incidence of the rights of members of a State Party's own armed forces. To the extent that the relevant obligations involve constraints upon the freedom of a State to conduct military operations, questions of national security are thereby implicated. Further all of these issues involve the reconciliation 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 laws interfering with rights are framed in a manner that guarantees they are compatible with Convention standards. In light of this the paper seeks to examine the influence of the Court in European law-making in the area of 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 from the threats of terrorism espionage and 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. These 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.

62 JUDICIAL REASONING AND TECHNIQUE: NAVIGATING ITS INS AND OUTS

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, interpretation and application in adjudication 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 Belkahla Matina Papadaki Parvathi Menon Gleider Ignacio Hernández
Moderator	André Delgado Casteleiro
Room	8B-4-19

Mehdi Belkahla: ***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 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 still 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 of law were initially 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 converse,

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(ity) 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 judicialisation in the area of human rights; b.Judicialisation in relation to substantive areas of human rights; c.Potential and limitations of judicialisation for the effective protection of fundamental rights.

Participants	Ingrid Leijten Titia Loenen Jan-Peter Loof Hans-Martien ten Napel Jerfi Uzman
Moderator	Titia Loenen
Room	8B-4-33

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

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

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

Hans-Martien ten Napel: ***The European Court of Human Rights' "constitutional morality" in the religious domain***

Jerfi Uzman: ***Power to the people or institutional courtesy? Judicialization and counterjudicialization of rights in an era of populism***

64 JUDICIALIZATION 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 UK and in Europe. 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 Mańko Liviu Damsa Sara Razai Kirk Ewan Catalin Gabriel Stanescu
Moderator	Liviu Damsa
Room	8B-4-43

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

The paper will explore, from the perspective of Central and Eastern Europe, the role of the European Court of Justice as an actor taking political decisions. The notion of the 'political' will be understood here especially along the lines of Chantal Mouffe as denoting existing agonisms within European societies, especially of an economic nature (e.g. consumers vs. traders, employers vs. employees, debtors vs. banks). First of all, the paper will focus on significant ECJ case-law in which the existing body of legal texts did not provide a clear answer ('hard cases'), forcing the Court to take what was ultimately a political decision. Special focus will be given to cases of social agonisms mentioned above. In a second move, the paper will explore the role of CEE judiciaries in triggering such questions (in the preliminary reference procedure) as well as the impact of such decisions on national

courts. The paper will look no only on the aftermath of concrete preliminary reference procedures initiated by CEE judges but also on spontaneous references to ECJ case-law outside the content of the preliminaty reference procedure, as for instance in the litigation between Polish mortgage debtors and Polish banks over loan agreements denominated in Swiss francs. As a third step, the paper will try to give an overall assessment of the role of the ECJ case-law in determining the outcomes of agonisms (the realm of the political) in CEE Member States by assessing whether such impact can be considered as meaningful, durable and broad, or rather selective, erratic and ocurring merely on a case-by-case basis in some specific sectors.

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

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

Sara Razai: ***Judicialisation of Politics in the Arab World***

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

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

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

65 LANGUAGE IN INTERNATIONAL COURTS

This panel explores the role of language in international courts, in its dual role as medium and as subject of adjudication. International courts are places in which actors from different states argue about the law bringing to the courtroom a variety of linguistic backgrounds. To enable communication and frame the conditions for decision-making, procedural rules contain provisions about the working 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 in a state, 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 Dana Schmalz Mathilde Cohen
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 within which 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 minorities 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 is both the subject of 'management' by 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 intertwinements of linguistic and normative settings. Thinking after the "linguistic turn" conceived language as not only a medium of interpretation and communication but more fundamentally as structuring all perception of the world. At the same time, adjudication of linguistic rights has treated language mostly with a fixation either on cultural aspects as group rights or as mere 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 be acknowledged in adjudicating 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 Multinational Courts: The Case of French***

This talk discusses the importance of language in the institutional design of European and international courts, which I refer to as "linguistic design." What is at stake in 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."

66 COURTS, CONSTITUTIONAL DEFERRAL & SECOND CONSTITUTIONAL "TRANSITIONS"

Comparative constitutional scholars in recent years have devoted increasing attention to the subject of constitutional transitions, i.e. the process of constitutional transition from conflict to peace, authoritarian to democratic rule, or colonial rule to self-government. Far less attention, however, has been given to what might be called 'second' constitutional transitions – or the transfer of power from the founding constitutional generation to the next set of institutional actors. In many countries, second transitions of this kind are also exactly the moment at which constitutional orders are at greatest risk: the average endurance of constitutions worldwide is now 19 years. Many constitutions thus simply do not survive the process of a second transition. This panel reflects on this problem and its implications for debates over constitutional design and decision-making, with particular attention to problems of institutional transition in the US Senate, in constitutional courts, and in divided societies.

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

Mark Graber: ***Charles Buckalew and the Origins of the Stupid Senate***

February 26, 1866 is the day the Senate became stupid. From the framing until the end of the Civil War, the Senate of the United States served clear 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 interwoven both in the makings of constitutions and, when subsequent generations seek significant constitutional reform.

Hanna Lerner: ***Interpreting Constitutions in Divided Societies***

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

Rosalind Dixon: ***Constitutional Court Transitions***

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

Sam Issacharoff: ***Constitutional Court Transitions (with Rosalind Dixon)***

THURSDAY 6 JULY 2017 11:00 – 12:30

PANEL SESSION 3

67 POWER AND ITS CONSEQUENCES: THREATS TO THE AUTHORITY AND INDEPENDENCE OF INTERNATIONAL COURTS AND ARBITRAL TRIBUNALS

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

Participants	Jeffrey L. Dunoff and Mark A. Pollack Filippo Fontanelli Taylor St. John
Moderator	Jeffrey L. Dunoff
Room	4B-2-22

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

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

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

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

Taylor St. John: ***No Exit Strategy? Explaining the Institutional Persistence of Investor-State Arbitration***

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.

68 CULTURAL HERITAGE BEFORE THE COURTS

Courts can exert power over cultural heritage in a number of ways: judges may decide a case that deals directly with cultural property, their judgments may indirectly influence culture heritage and the perception of it, or judges may deliberately reason in such a way as to avoid making any judgment that would at all affect cultural heritage. This interdisciplinary panel presents specific examples of these three scenarios, spotlighting how courts have historically and still currently reframe the public's relationship with cultural heritage, and the roles of State non-state, and individual private actors active in the cultural heritage field. Indeed, when judges and their courts are faced with a legal issue that involves cultural heritage, the judgments they render inevitably attempt to substitute the voice of the court for the voice of society at large, other governmental agencies, and private stakeholders. While the courtroom is often conceived as the proper place for justice to be rendered, it may or may not be the proper place for a public discourse about cultural heritage: this interdisciplinary panel aims to fully consider the powerful mediating role that courts play in shaping and defining cultural heritage and the repercussions of that mediation.

Participants	Daria Brasca Felicia Caponigri Anna Pirri Elena Pontelli Lorenzo Casini
Moderator	Sabino Cassese and Lorenzo Casini
Room	4B-2-34

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

Despite Italy's acceptance of international declarations over the last decades, Italian courts have rejected any request for restitution of Holocaust Looted Art. The recent "forced" return of a Gerolamo Romanino masterpiece conserved in a National Museum to the heirs of an Italian Jew persecuted in France during World II is the result of a ten years long litigation. This paper explores how the courts' inability to evaluate the cultural implications of certain Holocaust Looted Art cases before them reflects a "cultural amnesia" present in the Italian collective memory.

Felicia Caponigri: ***Imagination Preservation and Practicality in U.S. Courts: Fashion as cultural heritage?***

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

Anna Pirri: ***Artworks under 'Indictment'***

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

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

Parliamentary discussions of the first republican Italian Parliament, upon the approval of the draft U71law "Modifiche dell'attuale disciplina delle mostre d'arte" (N. 561/1950), reveal common traits with the debate fueled in those years by art historians and archaeologists on the increasing numbers of exhibitions involving the movement abroad of parts of national artistic heritage. Over the decades, courts have become a meeting point for archaeology and law, reflecting the debate between these two worlds. This paper will analyze the legal reasoning given by courts in their judgments in cases where the denial of an exportation certificate was appealed in order to show the close relationship (whether in agreement or not) between the legal reasoning and the dominant cultural theories in archaeology and art history.

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

Cultural heritage sway between international and national legal dimensions, and between universal and outstanding values: one property may be simultaneously outstanding – and extremely relevant to a given single nation and its community – and universal – and significant to all mankind, assuming that culture cannot be restrained within one single country and/or community. International regulation of cultural heritage sheds light on the multifarious relationships between different levels of interests and actors in this field: global, national, local, public, but also non-governmental. How can international law effectively deal with such interests? What are the patterns and dimensions of the international regulation of cultural heritage? What are their limits and opportunities? While addressing these questions, the paper shows that cultural heritage law can significantly help develop the existing legal tools of global governance.

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

This Panel explores the transformative potential of the CJEU in enforcing fundamental rights guaranteed under EU law. The Court's recent jurisprudence in at least three areas – discrimination, Charter rights and the rights of asylum seekers and refugees – highlights the possibilities in developing the Court as a fundamental rights court. The Panel surveys this trend and lays down the groundwork for fully exploiting this potential. Atrey examines the CJEU's failed opportunity to address intersectionality in a case explicitly argued on two grounds of discrimination – Parris v TCD. Her critique hopes to revive the promise in the Court's preliminary ruling mechanism for addressing complex and structural inequality through EU law. Rauchegger examines the role of the CJEU in enforcing Charter obligations. She surveys comparative law to understand the framework conditions within which the CJEU has sought to enforce national fundamental rights within the scope of the Charter. Tsourdi's paper explores the relationship between collective actors and courts in the enforcement of rights of asylum seekers and refugees. In light of the Common European Asylum System (CEAS), she studies the obligations imposed by EU law on collective agents such as the UNHCR.

Participants	Shreya Atrey Lilian Tsourdi Clara Rauchegger
Moderator	Bruno de Witte
Room	4B-2-58

Shreya Atrey: ***Facing the challenge: CJEU's turn to redress intersectionality***

The Court of Justice of the European Union decided its first ever discrimination claim argued explicitly on two grounds – sexual orientation and age – on 24 November 2016. It found that no discrimination could exist on two grounds combined together where no discrimination existed on the grounds considered separately. With this, the Court rejected the first possibility of recognising discrimination based on two grounds and thus the relevance of the theory of intersectionality in EU discrimination law. The claim in Parris v Trinity College Dublin thus failed. The failure in Parris signifies the lost opportunity for the Court to recognise complex and structural inequality under EU law. The Court's reasoning appears in sharp contrast with over a decade of work on intersectionality in EU discrimination law. Instead of judicially backing the development of discrimination law beyond its limited single-axis model and exploit the transformative potential of the EU equality Directives, the Court gives a short shrift to the trenchant accounts of intersectional discrimination developed in EU Law scholarship. This paper presents a critique of the Parris decision which falls by the wayside of the trend to redress intersectionality. The CJEU's reasoning in Parris appears faulty at both the normative as well as the doctrinal level. At the normative level, the Court fails to appreciate patterns of discrimination created by the combination of grounds by steadfastly focusing on a single ground at a time. This feeds into its doctrinal analysis which fails in appreciating at least three things: (i) the complex nature of the claim as based on one ground directly (age) but causing indirect discrimination based on two grounds (age and sexual orientation); (ii) the strict or narrow application of exceptions or justifications in a way that does not override the right to equality and non-discrimination per se; and (iii) the importance of carrying out proportionality analysis in claims of intersectional discrimination. The paper thus offers a normative and doctrinal framework for the CJEU to address inequalities that matter; with the purpose of developing the Court's preliminary ruling mechanism as a way of advancing substantive equality in Europe.

Lilian Tsourdi: ***The role of collective actors in the enforcement of asylum seekers and refugees' rights under EU law***

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 advances of CEAS in relation to the international refugee law regime is that it seeks to harmonise in a detailed manner rules around asylum procedures at national level, including provisions on the right to an effective remedy and related guarantees. In addition, refugee-assisting organisations, at national and EU level, as well as the Office of the 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, understood in the broad sense to cover civil 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 to ascertain what functions they foresee for 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 Akerberg Fransson cases of February 2013, the Court of Justice of the EU clarified that national fundamental rights can be applied in parallel with the EU Charter of Fundamental Rights if three conditions are fulfilled. First, the provision of EU law which triggers the applicability of the Charter has to leave a degree of implementing discretion to national authorities, second, the minimum level of protection of the Charter has to be respected and third the "supremacy unity and effectiveness" of EU law cannot be compromised. The proposed conference paper sheds light on the actual meaning of these three conditions. It examines the abundant Charter case law of the CJEU of the past four years in order to determine how much leeway the court actually leaves for the application of national fundamental rights within the scope of the Charter. After having explored the first condition the distinction drawn by the CJEU between complete and partial determination by EU law, the paper aims to understand to what extent the applicability of domestic constitutional rights is restricted by the second condition, the respect of the Charter as a minimum standard of protection. Three different standards of review employed by the CJEU under the Charter and therefore three degrees of deference to national fundamental rights are identified. In the first group of cases, the ECJ fully defers the fundamental rights review to the national court, in the second group, it opts for a light-touch review, and in the third, for full substantive review under the Charter. Regarding the third condition for the application of national fundamental rights in parallel to the Charter, 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.

70 JUDICIAL DESIGN IN FEDERAL SYSTEMS

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

Participants	Gabrielle Appleby and Erin Delaney Gerry Baier Thomas John HP Lee and Richard Foo Angela Oliveira Catalina Smulovitz
Moderator	Vicki Jackson
Room	7C-2-24

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

The United States and Australia each initially designed its judicial federalism with an understanding that state courts would perform a role in the new federal system. But each constitutional text was silent as to how judicial integrity of state courts would be assured. In the United States, a partial solution 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 litigating state claims in 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 protections 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 federation. Major areas of private law are distinct to individual provinces, with Quebec and its use of a civil code the most distinct among the provinces. This is not a surprising trait for a federation. Moreover, a federalized judiciary oversees the enforcement and interpretation of those laws. There are distinct provincial and federal court systems with differing jurisdictions. However, the federal government appoints the most senior justices of the provincial systems as well as the Supreme Court of Canada, a court which has plenary jurisdiction over all provincial and federal laws. The appointment of a significant portion of the judiciary by the federal government demonstrated the distrust that Canada's founders had for local particularisms as well as their desire for centralization of power and standards at the national level. Legal particularities among the former colonies were a sticking point of the Confederation project, so the ability to pull off this particular bit of uniformity was uncharacteristic of other compromises that are features of the legal landscape in Canada's federation. That said, Canada's judicial federalism is among the more unifying features of a very decentralized federation 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, based on separated, at times perhaps even competing, state and federal judicial systems, with a view to avoiding any or most Kompetenzgerangel among the Landes- and Bundes-courts. And it was thought that integration would ensure an efficient judicial system that can best deliver non-fragmented 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-

tive norms designed to create the integrated hierarchical judicial system and to allocate the competencies between Landes- and Bundes-courts. It will then critically assess whether the approach reached what it set out to achieve. The starting point for the analysis and critical assessment will be the Grundgesetz. Where 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.

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

The contemporary Malaysian federation first came into being in 1957as 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 in 1957 the main focus was on ethnic issues rather than a struggle for powers between the states and a new central polity. The judicial system which operated in the federation is highly 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 central/state division of legislative powers and the jurisdictional boundaries between the civil courts and the Syariah courts. In one of the states there exists a sub-national tier of courts the Native Courts of Sarawak. This paper will provide the Malaysian perspective on some aspects of the judicial system and the controversies engendered in the Malaysian federation.

Angela Oliveira: ***Judicial Federalism in Brazil: Constitutional Structure and the Supremacy of 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 from an individual judge's viewpoint. Federal legislation in Brazil also regulates several subject matters usually considered within the realm of state law in other countries, such as criminal, civil and procedural law. At the same time, the Federal Constitution has only recently granted the Supreme Federal Court discretion 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.

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

Protection of rights is not free. To ensure their implementation states must allocate resources to finance a bureaucratic apparatus to enforce them. States need financial support to fund a judiciary with qualified staff, agencies throughout the territory, policing capabilities and support services such as shelters, hospitals, schools and prisons. To state that the protection of rights has economic costs is neither 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 Argentine provincial states allocate and spend resources to ensure the protection and implementation of rights promised by 35 provincial laws sanctioned between 1992 and 2009 regarding domestic violence. In particular the paper identifies and calculates a) the magnitude of the economic resources provinces allocate to ensure the rights they promised to protect and b) analyzes the factors determining how districts make those allocations. The article argues first, that the heterogeneity in the allocation of economic resources is related to the specific institutional design of each federal setting rather than to the impact of federalism tout court. Specifically it argues that likelihood and intensity of the legal and economic heterogeneity depends on the combination of legislative competences and authority between levels of government. These institutional scenarios determine, in turn, whether local social and political actors are able to operate and to influence outcomes at the subnational level. In particular the paper shows that the institutional design of the Argentine federalism – which allocates ample legislative capacities to subnational districts – enables the working of provincial factors such as the level of competitive threats and the strength of local women's organizations, which determine differences in the way economic resources to implement the domestic violence laws sanctioned by the provinces are allocated.

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; in 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 Koivisto'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 involvement of experts in the constitutional discourse. Or Bassok argues that the establishment of 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 Koivisto Or Bassok Dmitry Kurnosov
Moderator	Achilles Skordas
Room	7C-2-14

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.

Ida Koivisto: ***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 there are signs of decreasing legitimacy of this 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 weak signals of new societal acceptability 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. I 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 one intended. 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 Kurnosov: ***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 opinions, 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 try to explore the role of the courts as facilitators of democratic deliberation in the light of new developments in the media. Principal among them are the concentration of traditional media in single hands,

the explosion of social media with all the associated phenomena. My paper will concentrate on jurisdictions within the ambit of the European Convention on Human Rights, both international and domestic.

72 RADICAL DEMOCRACY AND CONSTITUTIONALISM OR POLITICAL ACTION AND JUDICIAL ACTION: HOW FAR CAN ONE GO?

The constitution faces from its very beginning a paradoxical relation between itself and that which constitutes it and there is no big news. Yet the difficulty to deal with it still remains for political and constitutional scholars. The idea of a radical constitutional takes this paradox as foundational. Another way of looking at this foundational paradox between constituent power sovereignty and the constitution is focusing on the relation between democracy and constitutionalism which poses the same difficulties in terms of not having a "secure" ground for their accommodation. Progressive constitutionalism and radical political theory, particularly radical democrac, are different, internally variegated but share some points of view, such as a critical attitude towards liberal democracy and, paradoxically, a commitment to certain elements of the liberal tradition. Radical democracy favors participation and enhanced opportunities for popular control over the limitations of parliamentary democracy. It is attentive to the inequalities that undermine people's capacities to access liberal rights yet it depends on liberal principles. The purpose of this panel is to discuss to what extent constitutionalism and radical democracy can join an agenda for political and judicial action.

Participants	Vera Karam de Chueiri
	Melina Girardi Fachin
	Maria Francisca Miranda Coutinho
Moderator	Vera Karam de Chueiri
Room	7C-2-12

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

Progressive constitutionalism can be associated either with judicial or political action. Some progressive constitutional scholars deny the first kind of association. 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 significant internal differences among progressive constitutionalism 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 constitution 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 (legislative 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-e-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 repressive and conflicting international political landscape, 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 distant discourse of real human needs? The present 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 contradiction 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 conferring concreteness 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 as a key political actor (through increasing social media articulation, broadening of public political debate in private spheres and strengthening of the Constitution's role after the process of redemocratization post 1988) and the increasing discredit in the ability of rulers to act according to public interest and to consider the heterogeneity of perspectives involved. However, in a complex society like the Brazilian one, the complete overcoming of the category of representation can not be sustained. The present article intends to approach the impossibility of the representation to be thought by the philosophical principle of the identity, like a closed totality and zero sum. It also maintains that legitimacy shouldn't be attached to the act of authorization. On the contrary, it is suggested that representation should be thought as an ethical relation marked by the insuperability of radical difference and as a dialectical process in permanent production and reconstruction delimited by the logic of the non-whole. Legitimacy, then, would be in the process itself. This reinforces the need to think of effective instruments of popular participation in the processes of determining agendas, deliberation and decision-making, as well as to consider the importance and materialization of accountability and responsiveness. Finally, it highlights the importance and strength of what remains and resist not represented, as a negativity that pushes and enables the permanent resignification of the process of representation.

73 JUDICIAL CONTROL OVER STATE EMERGENCY REGIMES

Drawing on case-studies from various jurisdictions, panel papers will outline the way in which state of emergencies have challenged traditional views on the issue of judicial control over national security activities. In France, the control exercised by Constitutional judges (Conseil Constitutionnel) on the amended law on the state of emergency's raises questions about the efficiency of such a control in the context of the Constitutional Priority Question or "question préjudicielle de constitutionnalité" (Francesco Natoli). More broadly, it is relevant to question jurisdictional strategies restraining or strengthening judicial control over the state of emergency and their impact on civil liberties (Balthazar Durand). In the context of the French state of emergency for example, exceptional measures restraining liberties are mostly based on documents that are not readily available to the litigants (Nicolas Klausser). The UK and the US courts have been led to leave Intelligence Agencies a very broad margin of appreciation which has led to an unprecedented rise of the executive power at the expenses of the judiciary (Jean-Philippe Foegle). Finally the last paper will draw a comparison with the experience of the UK (Jessica Blackbourn).

Participants	Francesco Natoli
	Balthazar Durand
	Nicolas Klausser
	Jean-Philippe Foegle
	Jessie Blackbourn
Moderator	Stéphanie Hennette-Vauchez
Room	7C-2-02

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

From a legal standpoint, the concept of emergency refers to a situation characterized by an immediate risk of damage towards personal safety, environment or goods. Therefore, exceptional measures are implemented by providing public authorities with derogatory powers. The rise of executive prerogatives at the expense of ordinary procedures is justified in those cases by the necessity for institutions to quickly act on a public threat. However, even though the efficiency of such an intervention is closely related to the ability of government or local authorities to react in a promptly way, the over-invocation of emergency can affect the balance of power by granting permanent and unjustified discretional powers to the executive. As a consequence, the constitutionality of those measures represents an actual debate in modern democracies. In France, the constitutionality of the Parliament Act 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

council in its decision of the 25th of January, 1985. On that occasion, the Court stated that the competence of conciliating the safeguard of civil liberties with public order exclusively belongs to Parliament. After having implicitly declined its jurisdiction with regard to the constitutionality of exceptional measures, 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 after 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 administrative 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 affects 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 Europe, and on the other hand by the jurisdiction given to the administrative courts known for their proximity to the government. This kind of litigation mainly occured within the context of administrative urgent proceedings, which were introduced in the 2000s. Considering legal discourses on this topic, one of the issues underlined by the authors concerns the modification of the relationship between judges and other institutions and between ordinary and administrative judges particularly with regard to the protection of rights and freedoms. The study of the legal commentaries made on decisions taken by administrative courts reveals different conceptions of the interactions between organs and of their effects on legal decision-making. From this example, this paper aims at: a) Identifying the weight given by legal academics to institutional factors in explaining legal decisions, while noting the conception of judicial activity it reveals (formalist realist or else); b) Suggesting some insights by stressing that judges may anticipate potential reactions from other institutions, and adopt strategies in writing their decisions in order to maintain or modify their relations with them.

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

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 peculiarity 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 administrative search inadmissibility briefs, 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 persons (potentials jihadists but also 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 proposed to analyse the administrative courts control on the "notes blanches" and to expose the implications of its relative efficiency for fundamental rights

Jean-Philippe Foegle: ***Reclaiming Executive's Accountability: National Security, Courts, and the Demise of the Balance of Powers***

In most jurisdictions, courts have been led to leave Intelligence Agencies a very broad margin of appreciation in deciding what should be the appropriate operative responses to 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 in most countries, granting 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, it will be shown that the lack of effective means of controlling classified documents and condemn undue classification of information has led judges to only have a partial picture of intelligence activities and, thus, be unable to effectively control these activities. Using Denis Galliga's concept of discretionary power, it will then be assessed how the blurring of the very notion of National Security in legal discourses has laid the foundations for allowing the executive to regain control on a growing number of activities in social and political life without being paralleled by the development of more means of controlling those activities. Lastly, we will assess the way in which the highly complex nature of the techniques of digital surveillance creates a barrier to the effective control over intelligence activities. Finally, the paper will assess how the implementation of some best practices identified in international law (Cleared counsel, mandatory disclosure of classified information, protection of whistleblowers...) could improve the efficiency of democratic control on intelligence activities

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

Drawing on the themes raised in the first four presentations in this panel, this paper provides a view from the United Kingdom. Parliaments 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 their right to liberty and security. The UK's response to terrorism in the twenty-first century did not reveal a significant degree of 'lesson-learning'; a new state of public emergency was established after 9/11. This enabled the enactment of legislation that seriously infringed upon a number of rights, including through the use of secret material in judicial proceedings and raised questions as to the extent to which courts should show due deference to the executive in national security cases. The UK has thus already experienced a number of the same challenges now faced by France in its efforts to counter terrorism. This papers act first and foremost as a discussion of the four preceding papers, however, by drawing a comparison with the experience of the UK, it also serves to raise awareness of the convergences and divergences of approach taken by neighbouring states to the threat of terrorism. The themes that emerge in this discussion highlight how different legal systems, common and civil – cope with the challenges posed when national security is at stake.

74 LEGISLATIVE SUPREMACY: CONTEMPORARY DEBATES

This panel will address normative arguments both for and against legislative supremacy in relation to rights and consider how these apply in contemporary debates in various jurisdictions. While democratic legitimacy and democratic equality are commonly invoked as justifications for giving legislatures the "final word" on social and political controversies concerning rights the democratic credentials of legislative politics are reconsidered. Alternative justifications for legislative supremacy beyond democratic proceduralism are addressed. Intermediary models mediating between legislative and judicial power – particularly concepts of dialogue and collaboration – are critically evaluated. And crucially, the effects of legislative supremacy on rights in specific jurisdictions are analysed.

Participants	Eoin Daly Colm O'Cinneide Fergal Davis Claire-Michelle Smyth
Moderator	Eoin Daly
Room	8A-2-17

Eoin Daly: ***Transparency as a justification for legislative supremacy***

While most arguments against rights-based judicial review are grounded on a procedural account of democratic equality, others appeal not to the abstract qualities of legislative process but rather to the mystifying or non-transparent nature of judicial review itself. In this paper, I revisit what we understand by the non-transparent nature of constitutional jurisprudence, compared with legislative decisions concerning rights. Most commonly, critical and Marxist scholars understand judicial review as a mystifying practice in which contrived "legal" modes of reasoning obscure the real grounds of decision. That is to say, judicial reasoning obscures interests that are extraneous or antecedent to law. However, relying on Pierre Bourdieu, I will argue that while judicial review can be understood as a quintessentially esoteric and thus as a dominating practice, its doctrinal artifice is nonetheless irreducible to interests that are antecedent to law itself. Rather, it generates forms of symbolic and social capital that are peculiar to law as a semi-autonomous social "field". Nonetheless, non-transparency of this kind can be understood as an important kind of political domination that can support the argument for legislative supremacy.

Colm O'Cinneide: ***Against Dialogue: Why the Dialogue Model Represents a Dead End in Justifying Judicial Review of Legislation***

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

has been widely acclaimed as representing a solution to the perennial legitimacy issues associated with judicial review of legislative acts. It has been embraced by academics and judges alike (see e.g. Lord Neuberger's opinion in the UK Supreme Court case of Nicklinson [2014] UKSC 38). It has also fuelled much of the enthusiasm in recent years for weak-form review and 'third way constitutionalism' as embodied in measures such as the UK's Human Rights Act 1998. However, like any other fashionable theory, dialogue has begun to generate a critical backlash. In particular, it has been accused by commentators such as Rosalind Dixon and Eoin Carolan of inter alia (i) being inherently unstable, on the basis that it tends to degenerate into either judicial acquiescence or judicial dominance; (ii) favouring particular modes of juridical-style discourse over alternative modes of political/normative articulation; and (iii) glossing over the existence of serious value incommensurability in contemporary democratic societies. All these criticisms have bite. However, critics of dialogue have pulled their punches when it comes to treating this defective model, generally advocating modest adjustments of its settings to favour either stronger judicial protection of rights or greater de fact legislative supremacy. The honourable exception is Eoin Carolan, who has suggested that this model be ditched in favour of what he describes as the embrace of 'collaborative constitutionalism' – which he defines as 'accepting the distinct character of institutional processes denying the necessity for an accepted consensus and providing a specific template against which institutional behaviour or proposed reforms can be measured' ((2016) 36(2) Legal Studies 209-229 229). This has potential. But it will only be realised if the flaws of the dialogue model are squarely confronted and the specific character, functioning and limits of the various institutional processes that make up current systems of democratic constitutional governance are acknowledged in full. This will mean clarifying the authoritative role of judges in determining the content of legal norms, acknowledging both the presumptive priority and fundamental limits of legislative supremacy, and – perhaps shockingly to some ditching dialogue as a model for reconciling judicial power with democratic will-formation.

Fergal Davis: ***The Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth): a case study of legislative supremacy***

Uniquely amongst democratic nations, Australia does not have a judicially enforceable Bill of Rights or human rights instrument. This is, in part, due the Australian Constitution's unusually strong commitment to Parliamentary Supremacy. This makes it the ideal jurisdiction for testing the effectiveness of legislative supremacy in securing human rights. Human human rights protection in Australia relies on legislative scrutiny under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). The Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth) was one of a suite of anti-terror laws adopted by the Australian government in recent years. It raised genuine human rights concerns. The paper will reveal a series of flaws which impeded effective scrutiny during the enactment of the legislation. The paper does not suggest that the passage of the Foreign Fighter Act was typical. However, examining the structural flaws in the scrutiny process in this case will highlight potential problems with the Parliamentary Scrutiny model more broadly. It is a case study in the dangers of legislative supremacy.

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 legislature. This 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 then argues that excluding an entire cache of rights from the purview of the judiciary arguably breaches the separation of powers by creating a situation which it was designed to prevent. Further, this exclusion compounds the view that these rights are inferior to their civil and political counterparts. This paper will argue that legislative supremacy, particularly in a neoliberal system, would effectively end any prospect of meaningful vindication for these rights.

75 CONSTITUTIONALISM AND CONSTITUTIONAL CHANGE

This panel focuses on major themes central to constitutionalism and constitutional change. What is the relationship between a constitutional order and a state's territory? Democratic choices of a polity are somehow bound by geographical space. A territory is central to the constitutional order. And of course, there is a strong link between the people territory. But can the people – and which people – amend the 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-á-vis major constitutional changes? Finally, must we resort to formal constitutional amendments in order to change the constitution, or we may resort to sub-constitutional quasi-constitutional amendments? The panel 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 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 a function of a conventional 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 different purposes. First, they can serve an expressive purpose, emphasising the centrality of territory to the constitutional order. Second, they can emphasise the link between territory and people particularly where they allow territory to be amended by referendum. Third, they can allow for the cession of territory. At a broader level, the paper focuses our attention on an understudied fundamental of constitutional orders. In particular, it highlights how the democratic choices of a polity are bounded by geographical space as well as the way in which democratic choices can be made to alter that space.

Zoran Oklopcic: ***Brexit demos dixit?***

Over the last two and a half centuries, these binaries – yardstick/allegory and top-down global/bottom-up/local – shaped our understandings of popular sovereignty. They did so subtly, and indirectly: by shaping our understandings of what kinds of questions we can ask about it, and in which contexts. This essay is an attempt to explore other possibilities. Instead of asking What (are the normative criteria for the legitimate exercise of political power)? I will ask When and Where (in our imagination of popular sovereignty, are those criteria applicable)? Instead of asking Who is the people in a particular case, and whether a particular event may be understood as the manifestation of its will – I will ask How do those who answer that question imagine its identity and the scene in which that event occurs? In the context of sovereignty referendums, this means not siding with one view or another, but exploring the question of When is the figure of a sovereign people at its most compelling in the context of such forms of democratic decision-making? Finally, instead of asking Whether a particular event – the outcome of a majority vote – can be seen as the manifestation of the people's will, I will ask how can that majority be understood without a recourse to the image of a willing constitutional subject. While asking these new questions was always possible, there are contexts where they appear more sensible than in others. This is why my argument proceeds through a contextual exploration of the meanings of peoplehood which have implicitly or explicitly been relied upon in the contexts of the controversies generated by Brexit: the outcome of the sovereignty referendum in the United Kingdom, whereby the winning majority supported the exit of Britain from the European Union. Brexit is a unique opportunity to change the terms of the debate about popular sovereignty: not only because a number of different questions that have haunted that debates separately have now appeared together, but also because they occurred in the context dominated by different terms of debate. Unlike elsewhere, the British doctrine of parliamentary sovereignty precluded answering the Who? and What? questions with recourse to the standard disciplinary and theoretical bannisters made intelligible within the matrix organized by the two binaries.

Richard Albert: ***Quasi-Constitutional Amendments***

The difficulty of formal amendment in constitutional democracies has given rise to an increasingly common phenomenon: quasi-constitutional amend-

ments. These are sub-constitutional changes that do not possess the same legal status as a constitutional amendment, that are formally susceptible to statutory repeal or revision, but that may achieve constitutional status over time as a result of their subject matter. The impetus for a quasi-constitutional amendment is an intent to circumvent onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution. Where constitutional actors determine, correctly or not, that the current political landscape would frustrate their plans for a constitutional amendment to entrench new policy preferences, they resort instead to sub-constitutional means whose successful execution requires less or perhaps even no cross-party or inter-institutional coordination. This strategy sometimes results in significant changes that have the functional effect though not the formal result of a constitutional amendment. In this Chapter, I illustrate this phenomenon with reference to the Constitution of Canada, though I stress at the outset that we can observe this phenomenon elsewhere in the world.

Michaela Hailbronner: ***Discussant***

76 COURTS, CONSTITUTIONS & DEMOCRATIC HEDGING

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'.

Participants	Sujit Choudhry Tom Daly David Landau Rosalind Dixon
Moderator	Sam Issacharoff
Room	8B-2-03

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

Tom Daly: ***Preventing ANC Capture of South African Democracy: A Missed Opportunity for Other "Constitutional Court"'?***

When we think of constitutional courts and South Africa, we inevitably (and understandably) think of one institution: the Constitutional Court in Johannesburg. As regards dominant party democracy, the constitutional framework reposes considerable faith in the Constitutional Court to act as a 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 tiering is 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)***

77 LEX MERCATORIA PUBLICA: PRIVATE-PUBLIC ARBITRATION AS TRANSNATIONAL REGULATORY GOVERNANCE

Arbitrations between private economic actors and public law bodies are on the rise, both under international investment treaties and public contracts. Yet, arbitral tribunals not only settle disputes, but also review the legality of government acts and incrementally develop the applicable law. Arbitrators thereby become important law-makers that generate the law governing public-private 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. Settling 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	Stephan Schill Kerem Gulay Flavia Foz Mange
Moderator	Stephan Schill and Bertil Emrah Oder
Room	8B-2-09

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

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

arbitrations can be developed through comparative analysis of concrete constitutional regimes. To this end, it explores the conditions under which different domestic legal systems, as well as supranational regional regimes, permit private-public arbitrations. Based on a multi-authored edited volume that is currently in the making, the paper covers domestic legal systems from all continents, and all major models of constitutional and administrative law. It will show to which extent distiling common principles is feasible or whether, at least, different models can be outlined for showing how domestic constitutional law deals with private-public arbitration and how it ensures that the public interest is not compromised by private-public disputes moving from domestic courts to arbitral tribunals. To this end, the paper will explore the legal basis and implications of constitutional law in several jurisdictions in respect of the involvement of public actors in settling disputes with private actors through arbitration, rather than in permanent courts. It assesses whether under which circumstances and subject to which constraints and control mechanisms constitutional law permits or restricts government-involvement in arbitration in a comparative perspective. Its core question is a comparative assessment of whether and how arbitration in private-public arbitration is compatible with the public interest and the core constitutional values of democracy, human rights, and the rule of law.

Kerem Gulay: ***How to Do Things with Domestic Law? An Empirical Study on National Law(s) in Transnational Private-Public Arbitration***

The paper explores how arbitral tribunals deciding on transnational disputes between private parties and public law bodies tackle domestic law. It adopts a broad conception of "public entity" which includes government agencies as well as state-owned enterprises. The paper provides an empirical survey of more than 300 decisions where national law was either applicable to the merits or constituted the lex arbitri. It relies upon an original database specifically created for the project and involves cases from both ad hoc and institutional arbitration, such as ICSID, UNCITRAL, ICC, AAA, and CRCICA. Initially, the paper investigates if the handling of national law by arbitral tribunals presents common patterns in different institutional fora; and/or reflects a certain consistency within a given institutional forum in both substantive and procedural matters. Do the arbitral tribunals mediate transnational and domestic elements? Do they, instead, appropriate national law for transnational law? Do arbitrators act as a national judge would have or are they especially conscious and cautious to act like transnational adjudicators? Is there a significant difference in the quality (depth) of analysis between different institutional fora? Subsequently, the paper analyzes if the identified forms of engagement with national law display a common functionality: An aspect of public authority which is external to specific domestic legal systems 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 arbitri, 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 Mange: ***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 international arbitration system. Just to mention some of their activities, arbitral institutions foster the expansion of arbitration; promote conferences and trainings; enact arbitration rules and promote soft-laws; are responsible for administering arbitrations and financial resources; and decide a variety of legal issues related to arbitration proceedings (from arbitrator appointments and challenges to the admissibility of joinders and consolidation). After describing, in the first part of the paper, these multiple functions of arbitral institutions in the settlement of private-public disputes, the second part will focus on the main legitimacy concerns that arise when private-public disputes is resolved institution-administered arbitration. Are arbitral institutions suitable for the resolution of disputes involving public actors and public interests? Are the arbitration rules available on the global market appropriate to deal with proceedings involving public interests? Are recent changes made to the procedural rules sufficient to address legitimacy concerns. Or do we need to rethink how arbitral institutions work to ensure private-public arbitration concerns are dealt with in an appropriate manner?

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

With the signature of Protocol n.¬∫ 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 criticism of 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 forces such integration by authorizing 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 respect of diverse sensibilities of Contracting States, or whether it involves a lack of human rights protection by the Court against violations by States, particularly of a 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 Sate 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.

79 IS THERE A SPECIAL EAST-CENTRAL EUROPEAN CONSTITUTIONAL IDENTITY? – II. COMPARATIVE AND EUROPEAN ASPECTS

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

Participants	Bojan Bugaric Andras Sajo Armin von Bogdandy Kim Lane Scheppele Signe Rehling Larsen and Michael A. Wilkinson Federico Fabbrini
Moderator	Oreste Pollicino
Room	8B-2-33

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

Former communist countries, after the collapse of the regime in 1989-1991, started following the West. They wanted to go "back to Europe!". Transformation had begun throughout the region towards market economy and pluralistic political democracy. In the 2010s however, a nationalist populism has challenged the dominance of liberal paradigm in several CEE countries. Whether this new trend of illiberal populism in the region represents a clear break with the previous hegemony of liberal institutions and policies is too early to tell. Nevertheless it shows that the period of liberal hegemony is definitely over and liberalism is being challenged by an alternative set of authoritarian and illiberal forms of constitutionalism. As various examples of democratic fatigue, regression, and backsliding into various forms of constitutional authoritarianism in Central and Eastern Europe show, the "return to Europe" is far not yet complete. The ease with which democratic regression has occurred in these countries in many ways calls into question the supposed sharp divide between the Central European "success stories" and other, more problematic countries from the Balkans and further east. Although the post-Soviet East and the Balkans represent a more extreme form of corrupt, nationalist illiberalism than Central Europe, the similarities are striking. We are witnessing a gradual disappearance of "Central Europe" and the return to "two Europes" West and East.

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

Constitutional identity, uncertain and controversial a concept as it may be, offered some interesting vista for constitutional theory. As a normative concept it is a defensive tool used for sovereigntist 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 space, Article (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. By applying 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 Scheppele: ***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. These new autocrats work to consolidate executive power in a constitutional system from which all checks on this power have been removed. EU institutions must now face claims that constitutional identity should 'trump' EU law at precisely the moment when acquiescing in such claims will make it justifiably harder for states to trust each other's governmental structures. In this paper, I examine the idea of constitutional identity against the principle of mutual respect and consider whether the ECJ and national courts have struck the balance properly.

Signe Rehling Larsen and Michael A. Wilkinson: ***Constitutional Identity and Constitutional Difference in the Federation: What Lessons Can Be Learned from East-Central Europe***

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 identity requires conservation of difference. This tension has been softened in the EU, until recently, by a shared ethos of liberal constitutionalism and a shared telos of 'ever-closer union'. Since the outbreak of the financial crisis and the refugee crisis however, the tension has revealed serious fault-lines. The special East-Central European identity offers an illuminating perspective on the materiality of these fault-lines, because of its particular promise of a 'return to Europe' and its distinct relation to economic and political liberalism. As integration now demands the transformation of fiscal authority through attachment to economic liberalism and the ideology of austerity, identity demands the reclaiming of territorial authority through attachment to political illiberalism and the ideology of nationalism. The preliminary lesson seems to be that if 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: ***Discussant***

80 DEMOCRACY AND THE ROLE OF CONSTITUTIONAL COURTS IN ASIA

This panel examines the role of courts at critical democratic moments. Panelists engage in a comparative cross-national conversation about constitutional review in Hong Kong, South Korea, and Thailand. All three societies are now at crucial junctures in their democratic histories, and in all three societies courts are making pivotal decisions. By engaging in this cross-national conversation, the panelists hope to illuminate the democratic function and legitimacy of courts in young democracies. They also seek to discover informative similarities and differences among Asian democracies. This regional focus is both informed by and expected in turn to shed light on broader issues about the relation between courts, constitutions, and political democracy.

Participants	Jiewuh Song Yoon Jin Shin Amnart Tangkiriphimarn Swati Jhaveri
Moderator	Jiewuh Song
Room	8B-2-43

Jiewuh Song: ***Equality, Democracy, and Judicial Legitimacy***

Debates on judicial review center on the question of whether judicial review could be democratically legitimate. 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 inegalitarian relation. 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: Democracy and the Role 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 her presidential power with her close friend not holding any public position who manipulated various sectors of the state for vast personal profit. The scandal caused grave damage to democracy and

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 filing. In the subsequent election, citizens chose the leader of the major opposing party as the next president, who was a human rights lawyer in the military dictatorship era. Ending the legacy of the authoritarian past is one of his administration's top priorities. This latest development in South Korea provides a vivid example of bottom-up democratic constitutionalism contrasting with recent populist movements around the world with nationalist and authoritarian nature. The research examines the constructive role played by the constitutional court in this process and how the constitutional moment was achieved through citizens' democratic movement answered and confirmed by the court.

Amnart Tangkiriphimarn: *The Role of the Constitutional Court in the Thai Politics*

The Constitutional Court has been one of the most active and effective participants in Thai politics since its establishment by the 1997 Constitution. It has 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 (lése-majesté law) was unconstitutional. Due to these controversial judgments, numerous commentators have questioned the Court's role in a democratic society. For some, the Court, as part of the coalition among the monarchy, the military, certain political parties, and the Yellow shirts, is essentially a potent political apparatus used by the conservative elites to maintain the status quo, a process that has been ongoing since the 2006 Coup d'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 Jhaveri: *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 eventual election of the Legislative Council and Chief Executive of Hong Kong by some form of universal suffrage: these provisions are at the core of the 'democratic constitution' of Hong Kong. Achieving this goal requires consensus between the executive in Hong Kong, members of the Legislative Council in Hong Kong and the legislative body in China. Although not a formal requirement, any democratization efforts will also require popular buying from Hong Kong residents in order to function effectively. However, it is increasingly clear that the views of all concerned do not converge on how and when these constitutional aspirations should be realised. In addition, all parties have started moving outside of the constitutional framework when deliberating issues of political reform. This paper looks at the problems in the constitutional design and setup of the Hong Kong special administrative region that have resulted in this political deadlock. The paper will then look at one key solution to resolving this deadlock and design issues: litigating the democratic constitution in the courts. This paper evaluates the use of the courts thus far by Hong Kong residents to correct and advance political reform. This is with a view to evaluating why applicants have failed and what can be done to better position the courts in political reform. The ultimate goal is to utilize the courts to reconstitutionalise political debate on electoral issues.

81 MIXED CONSTITUTIONS

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 Hirschl and Ayelet Shachar Aslí Bâli and Hanna Lerner Gila Stopler
Moderator	Moshe Cohen Eliya
Room	8B-2-49

Mark Tushnet: *The Possibility of Illiberal Constitutionalism*

Illiberal constitutionalism would reject the inherent equality of all persons, reject the priority of the right over the good, or both, while maintaining some limits on government power. A sharply nationalist constitutionalism illustrates the former distinguishing between "full" citizens and others. Fraenkel's dual state attempts to theorize this form of illiberal constitutionalism, and suggests that it is likely to be unstable. Theocratic constitutionalism might illustrate the second possibility. The difficulty for perfectionisms is that the existence of limits on government power to enforce perfectionist principles is unclear, though Raz has argued for a form of power-limited perfectionism.

Ran Hirschl and Ayelet Shachar: *The Limits of Constitutionalism: The Challenge of Religion*

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

Aslí Bâli 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 ambiguously 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.

Gila Stopler: *Semi Liberal Constitutionalism*

Can semi-liberal constitutionalism be coherent as a theoretical idea and in practical reality? We think of liberalism as guaranteeing a range of individual rights. Countries that respect these rights are liberal while those that do not are illiberal. However, some countries have intentionally set up a semi liberal constitutional system built on dual commitments to liberal rights and to non-liberal values that partially circumvent some of these rights. I will show that the application of liberal principles by well-intentioned courts trying to protect liberal rights in semi-liberal settings may further dilute these rights. I will suggest ways to resolve that.

82 MORE THAN FIFTY SHADES OF GREY: THE ROLE OF COURTS IN PEACE MAKING PROCESSES IN LATIN AMERICA

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 drawn to the approbal of amnesty and pardon laws.

Participants	Alfonso Palacios Germán Lozano Villegas Elizabeth Salmón
Moderator	Magdalena Correa Henao
Room	8A-3-17

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 function as a tribunal and ended up becoming a crucial political actor within the Colombian peace building process. This situation has undermined partially the credibility of the Court and has arisen serious remarks on its main function as a guardian of the Constitution.

Germán Lozano Villegas: ***Constitutionl 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 discretionality during transitional processes, 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 Salmón: ***The Case of Alberto Fujimori: A 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 desitions Barrios Altos and La Cantuta, handed down by the Inter-American Court, I 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.

Participants	Alessandra Lang Angela Di Gregorio Tanja Cerruti Caterina Filippini
Moderator	Angela Di Gregorio and Alessandra Lang
Room	8A-3-27

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

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

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

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

Setting out a medium-term enlargement strategy in 2015, the EU Commission posed particular emphasis on the so-called 'fundamentals first' principle, that imposes to the Candidate Countries to make progress primarily in some of the accession criteria, including the rule of law. Maybe the hardest to be 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 fight against corruption and organized crime. In light of the above, the 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 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

this positive step the enforcement of the rule of law in Georgia Moldova and Ukraine may be effectively guaranteed only departing from a common (or almost an even more approximated) concept of the same principle by both the EU Member States and the Associated Countries. Starting from this premise the paper will thus analyse the jurisprudence of the Constitutional Courts of the Associated Countries which, besides the legal doctrine, play a major role in the disclosure of the rule of law principle.

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 Bodnór's paper 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 ECtHR judgments on electoral issues, focusing on the ECtHR 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.

Participants	Antonia Baraggia and Luca Pietro Vanoni Cristina Fasone and Giovanni Piccirilli Pierre Garrone Beke Zwingmann Eszter Bodnár
Moderator	Pierre Garrone
Room	8A-3-45

Antonia Baraggia and Luca Pietro Vanoni: *Electoral laws under scrutiny: judicial activism or judicial subsidiarity?*

The paper deals with the most recent cases (Decision no. 1/2014 and no. 35/2017) of the Italian Constitutional Court on the constitutionality of the electoral laws. Before the leading case decision no. 1/2014 the Italian Constitutional Court – differently from other constitutional judges – has been resilient in entering in a highly political sensitive field as the electoral rules. But with decision no. 1/2014 it declared unconstitutional some profiles of law n. 270/2005 paving the way for the judicial intervention in electoral matters. Indeed with decision no. 35/2017, the ICC ruled on the constitutionality of the Italicum (law n. 52/2015) and it struck down two key features of such law (in particular the second ballot provision). This turn of the ICC has been sharply criticized under procedural and substantial point of views. How we can evaluate such "turn" of the ICC? Is it a case of judicial activism or of judicial subsidiarity – in the light of the persistent legislative inertia? Is the ICC following the path of other Constitutional Courts, which traditionally scrutinize electoral laws? Which are the arguments used by the Court in balancing the different constitutional values at stake and which is the weight of the proportionality test? 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 (ECtHR) 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 ECtHR 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 ECtHR 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 ECtHR case law. The paper will proceed as follows: it firstly looks at the main ECtHR judgments on electoral issues; secondly, it considers the content of the Code of good practice; thirdly it focuses on the ECtHR 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 active in electoral field in order to promote the principles of the European electoral heritage and to assess the conditions necessary for their application. The paper deals with the role of the Venice Commission in fostering the spread of the European Electoral Heritage.

Beke Zwingmann: *The Bundesverfassungsgericht and the 5% threshold*

In matters of electoral law, the approach of the German Bundesverfassungsgericht can be 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 proportional representation and a first-past-the-post system. The feature that is currently discussed rather controversially is the so-called "5% threshold" which provides that all parties which do not gain a share of 5% or more of the proportional vote are not considered for the eventual allocation of seats in parliament. The Bundesverfassungsgericht has consistently ruled that 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.

Eszter 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 design of the boundaries of the political community, electoral system and electoral procedure. 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 on 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 in Nordic constitutional orders. But the role of the courts might be changing. The panel sets out to understand what factors drive this change, how such a change plays out within the courts, and what the impact might be on the relationship between the legislature and the courts. We are interested in the ex ante and ex post constitutional review mechanisms, methods of constitutional interpretation, changes in the dialogue between parliaments, their review bodies and the courts, and finally, what internal and external factors drive these the 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 does not point in one direction only. There are signs of complicated patterns developing and important strategic choices made by the courts. The overall question that this panel will try to answer is what these strategies are, what external and internal factors impact on them, and what implications they will bring with them for the relationship between courts and parliaments?

Participants	Helle Krunke
	Benedikte Moltumyr Høgberg
	Anna Jonsson Cornell
	Tuomas Ojanen
Moderator	Janne Salminen
Room	8B-3-03

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 at a move towards a more active Supreme Court stepping increasingly into a role as protector of the Constitution, general legal principles and the People. The reasons for and the scope of this development are discussed.

Benedikte Moltumyr Høgberg: ***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 legislative. 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.

Anna Jonsson Cornell: ***Changing Methods of Constitutional Interpretation in Swedish Constitutional Law?***

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

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

All five Nordic countries – Denmark, Finland, Iceland, Norway, and Sweden – have a written constitution with catalogues on constitutional rights, in some countries even fairly broad ones (e.g. Finland), and their track record in human rights treaty ratification is excellent in international comparison. Yet, rights and 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 submissive 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: ***Liberalism and Authority***

Hauke Brunckhorst: ***Legitimacy 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 when 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

paper evaluates these two contending theses with the recent experiences of the EU in mind, and looks at the role of courts in validating or challenging claims to expertise. It concludes by exploring the merits of a third perspective, in which emergency rule signals neither the augmentation nor termination of the technocratic logic but rather its transformation.

Octaviano Padovese: ***Remarks on authority: Kafka and "Kairos"***

Disregarding a strictly scientific overview on authority, no one has understood better than Kafka the implications of authority. Each of his writing was about authority, including a letter addressed to his father, accusing him of years of an abusive relationship. Further Kafka was able to pinpoint that authority occurs even in horizontal relations. Kafka cosmological writing is able to interrupt our uncrushable believing in the world's order. Kafka has the incomparable skill to use his own personal experience and to translate it to a general feeling that things happen according to Kafka's narrative. On the other hand, Kojève efforts to explain briefly the meaning of authority elucidate a sheer difficulty to define and to frame a structural semantic of authority. Although Kojève is well known for being inspired by Hegel and his slave/master analysis, Kojève reaches the conclusion that Hegel wrote a general ("Allgemeine") theory of authority. For Kojève, it would be relevant to detail the differences between types of authority.

Briefly speaking, for Hegel the relation of authority summons in an allegorical relation between a master, which overcame his animality condition of fearing death, while the slave flunks out his trial. As Kojève explains "Mastery arises from the Struggle to death of 'recognition' (Anerkennung)". So to speak Hegel's idea of authority is a quite strong example of how a word which is performative, however, it is normally used to make statements, indeed has more allegorical images of authority than an adamant concept. This paper seeks to demosntrate how the concept of authority may be rehtorical and how it may engaged with "kairos", the moment of a decision.

87 OUTSOURCING DISPUTE RESOLUTION? EXPECTATION VERSUS REALITY

We take as a starting point the notion of the ascendency of the court (the extension of its jurisdiction, its adjudicatory role and its control over the exercise of (public and private) power). We examine the legal and normative framework within which this "expectation" exists, and the general assumption derived from it, namely that the court is the only institution to provide "real" justice. We then examine the nature of dispute resolution in diverse areas, including consumer protection and judicial cooperation in civil matters. In these specific areas a fragmentation of adjudicatory power is observable, which emerges at once through and 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.

Participants	Ana Koprivica
	Stephanie Law
	Martina Mantovani
Moderator	Stephanie Law
Room	8B-3-19

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 firstly aims at providing a brief historical account 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 synergistic 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 perception of the courts as 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 liberty. 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.

88 PROCEDURAL REVIEW: DEFINITION, FUNCTIONS AND LIMITATIONS

In deciding on cases about infringements of fundamental rights, it is generally expected that courts protect the substance of these rights through reasonableness or proportionality review. Scholars have argued, however, that it could be valuable for courts to take a 'procedural turn' in their argumentation. Instead of (only) reviewing the substantive reasonableness of interferences with a fundamental right, they might (also) expressly take account of the quality of the legislative, administrative or judicial procedure that has led up to the alleged violation.

Participants	Leonie Huijbers
	Eva Brems
	Janneke Gerards
	Kasey McCall-Smith
Moderator	Aileen Kavanagh
Room	8B-3-33

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

Procedural-type review appears to be increasingly applied in fundamental rights cases. Scholars have noticed a 'procedural turn' in relation to the case-law of the European Court of Human Rights, the European Court of Justice and constitutional courts; also in relation to the United Nations Treaty Bodies a trend of 'proceduralization' is mentioned. The notion of 'procedural-type review' can generally be said to refer to judicial reasoning in which the decision-making procedure or process of a public authority has played a role. Furthermore, procedural-type review is distinguished, or opposed to, substantive-type review. However, whilst different scholars seem to be referring to a similar phenomenon in their discussions of this 'procedural trend', the concept of procedural-type review remains rather elusive. For example, different terms have been suggested to describe this procedural phenomenon, such as 'process oriented review' and 'semi-procedural review', and debates focus on different types of processes, such as enactment of legislation and judicial decision-making.

Eva Brems: ***The 'Logics' of Procedural-Type Review by the European Court of Human Rights***

In the case law of the European Court of Human Rights, a 'procedural turn' can be noted. That is to say it seems that in its assessment of the compatibility of a particular measure or situation with the European Convention on Human Rights, the Court increasingly includes an appreciation of the quality of the domestic processes that lead to this measure or situation. Scholars have noted this procedural turn, and have started to analyse it, by mapping and assessing its various manifestations. Building on such mapping

exercises, this paper adopts a normative approach. It explores several potential motivations for the Court's turning to a quality assessment of domestic procedures and processes.

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

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

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

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

89 CRIMINAL LAW, CONSTITUTIONAL PRINCIPLES AND HUMAN RIGHTS

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

Participants	Vincent Chiao Hamish Stewart Malcolm Thorburn Javier Wilenmann Leora Dahan Katz
Moderator	Vincent Chiao
Room	8B-3-39

Vincent Chiao: *Formalism & Pragmatism in Criminal Procedure*

What is "criminal" law? In many contexts, this might be thought of as a largely academic question, one for practical people to wonder about in their spare time. But in at least one type of context, it is a question with very significant practical repercussions. This is the context of criminal procedure. Many jurisdictions define a special procedural regime for people facing criminal charges. Of course, in many – probably most – cases, this question will not be controversial. However, there will be cases that are controversial, and then it will be important to have a principled way of deciding which procedural rights should apply. In this chapter I consider two methods for deciding when a legal matter qualifies as "criminal" for purposes of allocating procedural 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 enforcing its laws against you is trying to punish you. If so, chances are you are in a criminal case. If not, then probably not. The second pragmatist approach defines the criminal law by reference to the interests that are at stake for the non-moving party. Drawing upon the capabilities approach, I sketch a pragmatist model for rights allocation that is sensitive to effective access to a range of central capabilities, regardless of whether the action in question qualifies as "punishment". In other words, I propose defining 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.

Hamish Stewart: *The Constitutional Right to Procedural Fairness*

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

Javier Wilenmann: *Criminalization Conflicts and Constitutional Norms*

Legal literature tends to relate itself with criminalization assuming a substantive justice approach: a theory of criminalization should establish the conditions under which a legislative criminalization decision can be justified in principle. Although more ambiguous and less assertive, a similar approach can also be seen in constitutional literature: constitutional law would establish certain substantive definitions on what can be criminalized and constitutional courts may have review powers of legislative decisions that violate such definitions and therefore violate constitutional rights. The presentation "Criminalization conflicts and constitutional norms" in the panel on "criminal law constitutional principles and human right" aims at showing the shortcomings of such 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 conflictive 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 status of a given conduct 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

decisions by its detractors. Constitutional courts have historically had problems with controlling criminalization decisions precisely because of this: as the decision is intertwined with deep political conflict, generally attempting to rationalize the output of legislative decisions on criminalization through a substantive correction control is short-sighted. Aggressive decisions to stop a criminalization process or to decriminalize a given action (for instance: abortion) may have impact on the standing of a constitutional court, trapping it in the political conflict that was related to the decision. The main approach to criminalization seems therefore to fail as an institutionally aware constitutional solution to criminalization problems. On the other hand, the rights or justice centred approach is generally too focused with legislative (de)criminalization and therefore unaware of the institutional relevance of innovative criminalization decisions (decisions that deem that certain conducts that were not prosecuted or punished now fall under the criminal law) that are taken on other (judicial bureaucratic) levels. As political conflict may also attempt to be solved outside of legislative disputes, political conflict also plays a major part here. The constitutional significance of these dynamics is higher here, as the disruptive power of political conflict is all the more important in areas where, unlike legislation actions should be motivated by other factors. Criminalization conflicts that take place at this level can therefore create international institutional frictions. At the same time, the general tendency towards (over)criminalization that the political system manifests makes a pure laissez faire constitutional approach unsatisfying. Whatever constitutional theory one may defend, simply declaring that criminalization decisions are not constitutionally relevant does not seem to be satisfying at all. By exploring other institutional arrangements such as "weak" forms of judicial review or special legislative procedures when related to criminalization decisions, the presentation aims at analysing the way in which constitutional norms and institutions may have a positive impact on the legislative outcome of criminalization discussions and generally on the level of resistance of a legal system to over-criminalization without compromising legislative sovereignty and democratic legitimacy. For this purpose, the presentation will present the general claim regarding the power issue that is at the centre of most conflictive criminalization decisions. It will then proceed to show the shortcomings of a purely rights or justice centred approach when dealing with such decisions, and finally explore the way in which constitutional norms and institutions can be understood (and designed) when related to criminalization.

Leora Dahan Katz: ***How Victims Matter***

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

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/Spoormans (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-3-49

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. This process is inspired by the ground motive of control. If mechanization of society motivated by the intent to control is the only way to realize the social structuralizing, the established social structures will inevitably cause suffocating individuality. As the reaction of overextension of this ground motive, freedom as its counterpart which is stirring populism in the recent years, is gunning for emancipation, exposing the structure of democrats to the crisis of being undermined. This crisis can be temporarily alleviated within the background of this humanist antithesis. A well-organized liberal democratic society is characterized by its capacity to keep a balance between anarchy of free individuals, on the one hand, and total control by structural power mainly through actions of government and corporations, on the other hand. The control/freedom dialectic of the ground motive as a drive, a tendency as well as a motive could be restrained by ways found in institutions such as families, universities, the media, independent cultural institutions, and so forth, to avoid the complete successive of one pole of the dialectic to overcome the other pole. However, the external constraints can never guarantee a final solution. Concerning that the diverse social institutions are gradually eroded by technological society, the overexpansion of technological control will drag the dialectical ground motive to the pole and expose itself on the crisis of radical reaction by its opponent. Then the balance would be replaced by alternate occurrence of chaos and stifling total control. The radical antithesis between ground motives of control and freedom which acts as a formative force of populism puts forward an impossible task for contemporary liberal and democratic to uproot this crisis completely.

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 a parliaments, or even within the executive branch, both of which enjoy broad media coverage in most modern states. The role of freedom of expression within the activities of the judicial branch, however, is much less obvious. The purpose of this paper is therefore to explore the less obvious branch of government when it comes to the use of freedom of expression by discussing the different ways in which freedom of expression gives effect to democracy within the context of the judicial authority. In order to determine how freedom of expression gives effect to democracy within the judicial branch of government, different elements of democracy will have to be identified and it will be shown how these elements are applied within judicial organs and which role freedom of expression would play with regard to each of these elements. 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***

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) have become stronger over time, at least with regard to the financial dependence, of parties on the state and the increasing regulation of parties by the state. In particular, she has drawn attention to the remarkable judicialisation of political parties in post-war Europe. This judicialisation consists of the constitutive codification of political parties and the legal regulation of political parties. The Netherlands seems to deviate from the European pattern. Political parties are not even mentioned in the constitution and there exists no Party Law. Because of this particularity, this contribution aims provide insights in the Dutch legal framework. In this paper, we describe the development of political parties in the Netherlands and the discussion on the legal regulation of parties. We argue that the developments of parties is quite similar to other European polities, but that legal regulation took a different route; i.e. not by the front door of constitutionalization and a Party Law, but by a backdoor through international law and via the Courts. We conclude our analysis by giving some reasons for this Dutch route to judicialisation.

91 RELIGIOUS PLURALISM AND INTERNATIONAL HUMAN RIGHTS LAW: THE CASE OF CONSCIENTIOUS OBJECTION

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 analysed 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, recognised a right to conscientious objection first in a General Comment and then in individual complaints. In 2011 then, in the well-known Grand Chamber decision of Bayatyan v. Armenia, the ECtHR reversed its standing case law and recognised a right to conscientious objection. This paper inquires the development of the two international human rights bodies' case law concerning conscientious objection to civil and military service from divergence to coherence based on the theoretical framework of ordered pluralism (pluralisme ordonné) put forward by Mireille Delmas-Marty. Drawing on such analysis, potential prospects of the future relationship of the ECtHR and the UNHRC are addressed.

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

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.

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***

92 JUDICIAL INDEPEDENCE & THE INDONESIAN CONSTITUTIONAL COURT

Indonesian Constitutional Court comes with its own controversy. Since its establishment, the Court has shown its significant in to develop democratic process. However, the Court may overuse its authority and claim it on judicial independence. Parliament and the Government's attempt to reign Court judicial activism in 2011 and 2013, had been overthrown by the Court. This panel intends to challenge two approaches. First, whether judicial activism through issuing conditional constitutionality is the right thing to do. Second, whether there is need to redefine selection and supervision towards constitutional justice.

Participants	Fritz Edward Siregar
	Feri Amsari
	Donal Fariz
	Iwan Satriawan
	Luthfi Widagdo Eddyono
	Veri Junaedi
Moderator	Fritz Edward Siregar
Room	8A-4-17

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

Since its establishment, the Indonesian Constitutional Court has had the capacity to issue three forms of conditionally constitutional decisions. One form occurs when the Court states that the law in question is constitutional but only if it is interpreted in the way the Court interprets it. The second form occurs when the Court issues a conditionally constitutional or conditionally unconstitutional decision by inserting a new word into the law ('reading in'). The third form of conditionally constitutional decision declares the law unconstitutional and then provides a period during which the decision should be enforced, giving the President and the Parliament time to amend the existing law according to the Court's interpretation ('suspension of invalidity'). The main purpose of this paper is to investigate the practical operation of conditionally constitutional decisions so as to assess their impact on the separation of powers in Indonesia. Do these decisions in fact give the Court a role in policy-making beyond that which was originally envisaged during the constitutional amendment process, or is the legislature's attempt to rein in this aspect of the Court's work an interference with its independence, as the Court alleges?

Feri Amsari: ***Manipulating the Gavel: Regulate Constitutional Justices***

Three constitutional court juctices had been embroiled in manipulating cases in which two of them had arrested by Corruption Eradication Commission.

Those three cases are allegedly related to judicial review and election resput dispute authority. Constitutional court procedural law did not limit and provide numerous possibility for justices in providing the verdicts. Manipulating cases can be detected from submitting the application up to the Court rendered its decision. This manipulation occured 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. This paper explore three fact. First, how manipulation of a verdict and court procedure had been occured. Second, which cases in Court's docet 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 strength. However, almost three years later, Justice Patrialis Akbar had been arrested for accepting a bribe. Those two Justices has their similarity, which is both of them were a former politician. Mocthar was Golkar Party's members, 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 justice that has similar background, lead public seen the Court as another institution that had been filled by people that have the corrupt 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 became constitutional justice. Through existing selection process, political parties success to nominate "their agent" to became 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 integrity of the constitutional justices has put at stake. The Court actually has an Ethics Board and the Honorary Council of Constitutional Justices which are an internal supervision of constitutional justices and the staffs. However, the internal supervision does not work 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 Indonesian Constitution. Having better internal and external supervision of it is expected that the integrity of the constitutional justices would be more guaranteed.

Luthfi 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, what is the judicial accountability that needs to 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 in newly democratic 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.

Veri Junaedi: ***Performance Review Report of Indonesian Constitutional Court (2003-2016)***

Constitution and Democratic Initiative conducted performance review towards Indonesian Constitutional Court's decision since 2003-2016. 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 portraits 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.

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

At the core of the current rule of law crisis is a problem of concentration of power, or conversely, a lack of separation of powers. This shows the failure of classic trias politica: a constitution with a formal separation between three branches of government is not enough to safeguard the rule of law. The central question we seek to answer is whether new powers or a new balance between rule of law institutions can be identified in constitutional democracies. Starting point for these two panels is the core of the doctrine: there should not be concentration of the powers to regulate to enforce and to review. Panel 2 will discuss the promises and pitfalls of involving transnational actors in the balance of powers. All three government powers 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 of Court of Human Rights, review national legislation. Is it possible to outsource one power, yet keeping that power in check by domestic counterpowers? The focus of the panel 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 Riesthuis Cormac Mac Amhlaigh Jan Klabbers
Moderator	Thomas Riesthuis 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 specific, articulated division of 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 this idea offers traction. The contribution 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 same 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 balance of power differs greatly in extent and content depending on the national legal order. This article, hence, aims at mapping the fundament of transnational balance of power. While this is already quite daring, it is – despite its title – not as bold as aiming to present already a final definition. What we 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. Imagine only that by far not all legal orders do have a constitutional court despite of having a sophisticated balance of power. Nevertheless, such criteria must be concrete enough to deliver results: the transnational balance of power must not be a vague and nebulous concept, falling short of delivering meaningful results when tested in a particular case. Otherwise, we risk being arbitrary.

Thomas Riesthuis: ***International Courts as Actors in a Transnational Balance of Powers***

International courts are generally understood to function outside of the balance of powers of domestic constitutional legal systems. Although significantly influential in domestic legal systems, international courts are not considered actors in the balance of powers. In this paper, I unpack the theoretical assumptions underlying the idea that international courts are to be considered external to domestic constitutional legal systems. It will challenge a common positivist conception of the balance of powers that excludes transnational actors, such as, for example, international courts. Moreover, I will develop a non-positivist conception of the balance of powers that includes transnational judicial actors based on the work of Ronald Dworkin and Philip Selznick. It will be argued that the European Court of Justice and the European Court of Human Rights are best understood as judicial actors in a transnational balance of powers.

Cormac Mac Amhlaigh: ***Transnational Legitimacy in a Populist Age***

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

Jan Klabbers: ***Discussant***

94 NATIONAL CONSTITUTIONAL COURTS AND EUROPEAN INTEGRATION

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

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

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

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

Sabine Mair and Elias Deutscher: ***A la recherché du temps perdu: Reinforcing national constitutional courts to save national and European constitutional democracies?***

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

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

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

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

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

Participants	Andrej Lang Lila Margalit Mattias Kumm Rebecca Ananian-Welsh
Moderator	Andrej Lang
Room	8B-4-03

Andrej Lang: ***Rights Considerations in the Legislative Process in Germany***

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

Lila Margalit: ***Rights Considerations in the Policy Process: The Case of the Israeli Combating Terror Law***

This case study focuses on the role played by rights considerations during the initiation shaping and approval of the 2016 Israeli Combating Terror Law, a comprehensive piece of legislation granting the government broad powers with significant human rights implications. The study describes and then analyzes the way in which rights and questions of proportionality were conceived and articulated by decision-makers throughout the process; the dynamics through which they were raised and deliberated; and the impact they ultimately had. Tracing the development of the law from the internal government deliberations through the public hearings in the Israeli parliament, the study identifies significant constraints upon the effective consideration of rights in the process while at the same time identifying factors which facilitated rights-based changes in the law.

Mattias Kumm: ***Commentator***

Rebecca Ananian-Welsh: ***Commentator***

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

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?

Participants	Lucia Busatta and Marta Tomasi Simone Penasa and Elisabetta Pulice Giada Ragone Andrea Rovagnati Benedetta Vimercati Lorenza Violini
Moderator	Lorenza Violini
Room	8B-4-09

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 ethically sensitive topics. 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, artificial reproduction 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, internal coherence of legal orders), in order to verify whether it could be argued that a "conventional" set of bio-rights is currently emerging in the case law of the Court.

Simone Penasa and Elisabetta Pulice: ***Towards a "scientific question" doctrine? A comparative survey of national approaches to the judicial review of laws regulating science***

Scientific data and expertise are becoming more and more a relevant issue within the judicial review of legislation in the field of biomedicine. When a law regulating medical or scientific activity comes before a Supreme or Constitutional Court the approach implemented by the latter in assessing the legitimacy of laws seems to be conditioned by the ethical sensitiveness and scientific complexity of the issues at stake. The paper will analyse the case-law characterising different national jurisdictions within the European framework, in order to provide for a classification of the different approaches and methods national Courts usually implement for assessing legislation in the biomedical field. Central issue will be the comparative analysis of the role played by scientific dimension within the Courts' reasoning. The paper will specifically address the effect of the scientific dimension as well as its interplay with other dimensions (e.g. social, ethical, economical) on the attitude – towards a more restraint or active approach – of Courts when coming to assess legislature's discretionary power in the regulation of science.

Giada Ragone: ***Scientific assessments and limits to the review by the Courts of the European Union: the GMO case***

It is settled case-law that where a EU institution is called upon to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a judicial review restricted to verifying that the measure in question is not 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 UE jurisprudence, in order to ascertain if the measure is vitiated by a manifest error, the Courts are tasked to do a review of "plausibility", in which the evidence adduced by the applicant must be sufficient to make the factual assessments used in the act implausible. Indeed, it is not the Courts' role to substitute their assessments of complex facts for that made by the institutions which adopted the decision. In recent years, several cases have been brought before the Courts of the European Union, challenging the authorizations to cultivation or commercialization of GMO products. As well known, the scientific assessments on this kind of products are often controversial and based on complex technical knowledge. The paper aims to point out how the abovementioned limits to the review by the Courts of the European Union operate in cases challenging GMOs' authorizations. Is judicial review limited to manifest errors of assessment that are so serious that even a non-scientist can easily detect and correctly identify them? Is a "plausibility" review possible without giving rise to a review of the 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?

Andrea Rovagnati: ***Experimentation on Humans: Who Decides What?***

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

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 ethical and legal aspects. Scientific advances interfere with death, a purely natural process traditionally excluded from the juridical – political space. However, death has become a relevant issue for debate in a legal perspective: the capability to prolong or sustain human life through medical technologies has influenced legal response 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 Italian 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 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***

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 selfness of a member state vis-á-vis others and regarding the construction of a European Constitutional identity. The panel invites scholars to discuss the ambivalent meaning 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	Tímea Drinóczi
	Giacomo Delledonne
	Pietro Faraguna
	Marco Bassini
	Neliana Rodean
Moderator	Neliana Rodean
Room	8B-4-19

Tímea 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 develop 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 practice in relation 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 in order to make some points 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 features always coexist – 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 will be highlighted. Moreover, the paper will consider the emergence of an untouchable core of supranational constitutional law in the Kadi judgments (relations between the EU and the international order) and the substantial requirements with which European political parties 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 make 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***

Only 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 Europarechtsunfreundlich 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 misunderstanding 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 (Konstadinides 2010) 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 marked 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 affording 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 that the in Melloni it was questioned whether the domestic legislation was compatible with EU law as far as it introduced additional requirements for the execution of an European arrest warrant. According to the Italian Constitutional Court, in that case a different decision by 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 understanding 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 analyzes those 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 Napoleon Xanthoulis Zlatina Georgieva
Moderator	Emilia Korkea-aho and Mariolina Eliantonio
Room	8B-4-33

Emilia Korkea-aho and Mariolina Eliantonio: *The Legitimacy of EU Soft Law through the Eyes of National Courts: a Survey on the Water Framework Directive guidance documents*

Soft law has long constituted an important part of the EU legal order, complementing and augmenting the legislative framework. Its legitimacy and effectiveness to fulfil the expectations laid on it are often assumed and not studied, 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 judiciaries know EU soft law? Do they use it in deciding cases? How do national approaches towards soft law influence the use of soft law by national judges? Provided that soft law is non-binding guidance, its guiding 'force' rests on the extent to which it has social legitimacy that is accepted by those using it. Based on a survey conducted among the selected national judges in the autumn 2016, this paper presents the first empirical findings concerning the use of Water Framework Directive guidance documents in national courts. The results show that the status and legal effects of non-binding guidance for national courts are not clear, and there is a diversity of approaches to their binding value, creating much uncertainty amongst national courts and administrations and 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 allows for greater judicial scrutiny at the EU level. However, legal accountability gaps remain, deriving from prominent features of European regulatory networks: shared administration and soft law rule-making. While the legal literature tends to concentrate on the EU courts, the contribution 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 'utmost 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.

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

When the global financial and economic crisis hit Europe, the Eurozone lacked a robust 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 liquidity in the euro area. In parallel, 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 Cypriot banks and cuts in benefits in several member states, reached the public domain in the form of inter alia, Conclusions and Memoranda of Understanding (MoUs), whose legal relevance was unclear. The aim of the paper is to examine the elements that would render soft law instruments mandatory, or cause them 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 C-62/14 Gauweiler v Deutsche Bundestag) litigation pertaining to the ECB's OMT program and unfolds the constitutional tensions between the ECJ and the German Constitutional Court. Second, it engages with General Court's reasoning pertaining to the reviewability of the ECB's Eurosystem Oversight 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-8/15 to C-10/15 Mallis 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-8/15 P to C-10/15 P Ledra 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.

Zlatina Georgieva: ***Commission-issued Competition Soft Law and National Courts (An empirical overview of judicial attitudes to soft law in Germany France the UK and the Netherlands)***

This paper is based on an empirical dataset of 112 national competition cases from four EU Member States, which contain judicial reasoning on supranational, Commission-issued competition soft law. The observed judicial treatment of the said instruments can be categorized as positive (endorsement, persuasion) or negative (rejection, neglect). Those findings broadly fit within the frameworks used by Hillary Greene 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 judgments, the CJEU (the ECJ and GC) show 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 peculiarities 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 ability of national courts to engage with supranational competition soft law and/or their 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). This fact poses a problem for the maintenance of the principles of consistency and legal certainty that the Commission hoped to further by means of soft law in the aftermath of decentralization of EU competition law enforcement. It is therefore argued that, in order for national courts not to hamper the said principles – on the contrary to further them – national judicial engagement with soft law needs to be explicit and meticulously reasoned, thus reflecting the important EU Governance criteria of openness and transparency.

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 offices as well as courts play a 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 introduction 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 by generalist courts. This panel will compare and evaluate how the design of patent courts impacts on the protection of human rights.

Participants	Aurora Plomer
	Tuomas Mylly
	Rochelle Dreyfuss
	Xavier Seuba
	Dhanay Cadillo Chandler
Moderator	Athanasios Psygkas
Room	8B-4-43

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

The aim of this paper is to investigate the role of the European Patent Office and its linkage to the judicial systems of its members. The EPO was historically created as a quasi-administrative body vested with the power to grant European patents on the basis of the new 'common' European law on patents set out in the European Patent Convention (1973) against the diversity of national patent laws in Europe. In reality, the existence of opposition and appeal procedures within the EPO system means that EPO boards have developed a quasi-judicial function reflected in the description of their jurisprudence as 'case-law'. As the institution fronting the grant of European patents, the EPO thus has a critical role in setting legal patent policy for its members in Europe. Yet the EPO is an autonomous intergovernmental organization whose specialist jurisdiction and operation is completely detached and insulated from review in the legal system of the European Union, the Council of Europe's human rights system, and the national legal systems of its members. This paper will analyse how the legal insulation of the EPO together with its pivotal quasi-judicial role in the grant of patents has facilitated the increasing dominance of EPO standards applied in patent litigation by national courts and the likely similar path ahead with the UPC. More generally, the paper will reflect on the imbalances created by harmonization of norms and specialist patent offices and courts in Europe and consider how to address over-representation of patentees interests and under-representation of the public interest in the grant of exclusive property rights.

Tuomas Mylly: ***Does the insulation of the Unified Patent Court from EU law and outside influences hold water?***

The purpose of the contribution is to address the ways in which the jurisdictional domain of the Unified Patent Court (UPC), the "unitary patent package", is shielded against external judicial review: systemically operationally and substantively. The norms providing the unitary patent its substantive contents, the Agreement on a Unified Patent Court and the European Patent Convention (EPC), are shielded against judicial review. The UPC is detached from any background legal system with limitations anchored in domestic 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 shared expert rule, European Union (EU) law is at the same time subjected to fragmentation. Its core principles concerning legality and judicial review are being undermined in the process. In the cases challenging the legality of the patent package, the Court of Justice of the European Union (ECJ) appears to permit the related disintegration of Union law, its legal instruments and the ECJ's powers for the sake of a specialist autonomous hybrid regime functioning on the borderline of Union and international law. Despite the institutional design of the package intended to limit the impact of EU law and the role of the ECJ to the minimum, general EU norms and legal principles may still affect the package considerably more than envisioned by the architects of the patent package. The presentation will also discuss the ways in which such non-patent specific EU norms principles and values may still penetrate the unitary patent package and thus affect the adjudicative practices of the UPC.

Rochelle Dreyfuss: ***Specialization: Lessons from the U.S. experience with the Federal Circuit Court of Appeals***

The Federal Circuit was established to put patents on a surer footing: to increase uniformity predictability, and patent value. To many observers, however, isolating the court 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 prevent the Federal Circuit from sheltering patents from challengers, and it has cautioned the court against patent exceptionalism. In contrast, the drafters of the UPC decided to limit the role of the Court of Justice of the European Union. A close study of experience with Federal Circuit can alert European adjudicators to their responsibility to incorporate social policy into their patent jurisprudence, help the public in identify areas where the dangers of specialization are particularly strong, and assist 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 patent litigation. This presentation will analyse and evaluate the reasons for the inclusion of this type of specialist judge in patent courts and the specific form of regulation of technical judges in the UPC. The approach taken will be comparative and analyse how the role of technical judges in the UPC compares to that of other technical judges in specialist patent courts in other jurisdictions in Latin America.

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

The expression "specialist courts" is traditionally understood to refer to courts or tribunals with limited or exclusive jurisdiction in a determined field of law (Zimmer 2009). One of the benefits of creating specialist courts is their capability to improve decision making due to the expert judges' ability to decide on such complex matters. Chile is a case in point. The Chilean Patent Office (INAPI) created a specialist court in accordance with the Chilean Intellectual Property Law. Nevertheless, intellectual property rights infringement cases are heard and solved by generalists in either civil or criminal courts, depending on the IP right infringed, with expectation of applications to extend the term of patent protection due to unreasonable curtailments of time in granting patent protection or the marketing 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

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

100 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	Vigjilenca Abazi Monica Claes Juan A. Mayoral Zuzanna Godzimirska
Moderator	Urška Šadl
Room	8B-4-49

Vigjilenca 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-depended 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***

The European Union lacks a full-fledged EU federal court system, and hence, is dependent on national courts to enforce EU law and protect the EU rights of individuals. Over the years, the CJEU has, in its case law, developed a European mandate for national courts: a set of duties and obligations for national courts in the enforcement of EU law (built on doctrines and principles such as direct effect, primacy, conform interpretation, effet utile, mutual recognition and mutual trust). More recently, the EU legislature has developed additional duties for national courts, as is the case in the areas of criminal law (European Arrest Warrant) and asylum law. The CJEU is the supreme court of this decentralized European and transnational judicial system. Mutual trust between the CJEU and national courts and the national courts among themselves 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 national identity 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 each other 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 and techniques they use 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 strengthen 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 remarked the relevance of judicial trust for the acceptance and compliance by national judges with their duties imposed by the CJEU as EU decentralized courts. This study takes this novel approach for the judicial construction of Europe and proposes that the judges' grasp of supremacy is generally influenced by their individual attitudes towards the CJEU which 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 Godzimirska: ***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 Keleman (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 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.

101 THE DISABLING OF THE CONSTITUTIONAL COURTS AND FRAGMENTATION OF THE EU LEGAL ORDER

The panel explores in how far the disabling of the constitutional courts in the EU Member States leads to the fragmentation of the EU law. This question will be elaborated in an interdisciplinary perspective including both the legal and political sciences. The panel will elaborate the issue by analysing what anti-fragmentation techniques the CJEU can apply exploring the relevance of political conflicts disabling the constitution courts and reflecting on how the CJEU can fill in the gap left by disabled constitutional courts. One of the main issues here will be whether the constitutional crisis in Poland (2015-2017) can be in fact interpreted as a democratic backsliding or rather a temporary political conflict. Disabled constitutional courts can be prevented from referring preliminary questions to the CJEU. However, in the absence of an active constitutional court, Member States' courts could be encouraged to refer preliminary questions more often to the CJEU in particular within the freedom of establishment and to provide services. Thus, the CJEU could more effectively guarantee individual rights within the areas covered by the EU law than the disabled constitutional courts. Therefore, the disabling of the constitutional courts might lead to unexpected integration tendencies.

Participants	Jędrzej Maśnicki Ireneusz Paweł Karolewski Sylwia Majkowska-Szulc Mirosław Wyrzykowski
Moderator	Robert Grzeszczak
Room	8B-4-52

Jędrzej Maśnicki: ***The autonomous interpretation method as the judge-made instrument to prevent renationalization***

The paper argues that the "autonomous interpretation" is still a vivid concept which allows the CJEU to deepen the EU integration. Therefore, this judge-made interpretative instrument challenges the renationalisation tendencies within the EU. Moreover, the autonomous interpretation as the CJEU's concept can be compared to the analogous concepts developed by the Member States' constitutional courts. Here the question remains: who has the authority to deliver the final legal interpretation of the disputed terms and which court (the CJEU or the Constitutional Court of a Member State) has more interpretative power to persuade other courts and tribunals in particular the administrative courts?

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 a new law in December 2015 changing the set-up of Poland's Constitutional Court and its rules of decision-making, forcing it, among other things, to make decisions exclusively with a two-third majority, which made it, as critics pointed out, difficult for the court to act at all. 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 values and pluralism 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 its 2015 law on the Constitutional Court as a remedy to unconstitutional steps taken by the preceding government. Against this backdrop, the paper explores the political power issues involved in the constitutional conflict in Poland. By using two competing concepts of "state capture" and "juristocracy" the paper will discuss whether the constitutional crisis in Poland can be in fact interpreted as a democratic backsliding – a thesis expressed by some pundits or rather a political conflict.

Sylwia Majkowska-Szulc: ***Normative parallelism at a time of constitutional crisis in Poland***

The concept of normative parallelism has traditionally been linked with the phenomenon of normative fragmentation of international public law norms, but currently it also 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 doubtful 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.

Mirosław Wyrzykowski: ***Decline of control of constitutionality v. fragmentation of the legal system***

Polish constitutional crises of annus horriblis 2016 is caused by abuse of competences of the constitutional authorities: the President, the Parliament and the Government. The intention of this abuse is to eliminate the Constitutional Tribunal as an effective guardian of the supremacy of the constitution. War on the Constitutional Tribunal is indeed war on the constitution. Because of lack of required qualified majority to amend the Constitution the simple parliamentary majority is using the legislative rules to change the constitutional order in Poland (by-passing the Constitution). The new rulings of the status of the Constitutional Tribunal was overwhelmingly declared by the Tribunal as violation of the Constitution. Lack of the effective control of constitutionalism of the legal system leads to its fragmentation. To avoid dramatic consequences of this situation the ordinary court have to replace the function 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 solve individual cases are now instrument to protect the very function of the Constitution of Poland. Avoidance of fragmentation of the legal system became much more difficult, but not excluded, yet.

THURSDAY 6 JULY 2017 16:00 – 17:30

PANEL SESSION 4

102 WHERE OUR PROTECTION LIES: CONSTITUTIONAL REVIEW AND SEPARATION OF POWERS – BOOK DISCUSSION

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

Participants	Dimitrios Kyritsis Mattias Kumm Stephen Gardbaum Kai Moller
Moderator	Dimitrios Kyritsis
Room	4B-2-22

Dimitrios Kyritsis: ***Where Our Protection Lies***

Mattias Kumm: ***Discussant***

Stephen Gardbaum: ***Discussant***

Kai Moller: ***Discussant***

103 THE FUTURE OF INTERNATIONAL LAW AND INTERNATIONAL ORGANIZATIONS

Participants	Michael B. Krakat Rishi Gulati Anne van Aaken Oleksandr Vodiannikov
Moderator	Anne van Aaken
Room	4B-2-34

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

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

Rishi Gulati: ***Justiciability of disputes involving international organisations***

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

104 BOOK ROUNDTABLE: A DISCUSSION ON "UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS"

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 Scheppele
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 Scheppele: ***Comment on Roznai's "Unconstitutional Constitutional Amendments"***

105 JUDICALIZATION OF POLITICS IN ILLIBERAL DEMOCRACIES: EFFECTS AND CHALLENGES

The panel explores how the rise of illiberalism affects the rule of law and increases the political importance of courts. It draws mostly on Central and South-East European examples, but also advances hypotheses and develops arguments that could be applicable well beyond this region. In Central and South-East Europe constitutional values of liberal parliamentary democracies have not only became 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 Judit Sandór Violeta Beširević
Moderator	András Sajó
Room	7C-2-24

Denis Galligan: ***Judicalization of Politics in Illiberal Democracies***

Daniel Smilov: ***Illiberalism and the counter-majoritarian difficulty II***

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

certain places). On the contrary, since the beginning of the 2000s the rise of political populism has helped to create a wide array of illiberal conventions underlying the functioning of many constitutional bodies, courts including. The failure to create proper constitutional culture thus is not a contingent phenomenon, but follows from the political agenda of specific actors. The paper further argues that the counter-majoritarian difficulty I (the original Bickel's idea) has probably been an over-exaggerated problem. In order for courts to seriously oppose a democratically elected legislature they 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 Sandór: ***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, in the wider legal context of the civil sphere, one may note that the political apathy originating from the state socialist period have 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 majority in 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 Viktor, gave a speech on his political vision and his future ambition of moving Hungary to the direction of an illiberal democracy. This declaration simply added a brand name for a process that had gradually developed since Fidesz, his party won the parliamentary elections in 2010 and remained in power since then. Constitutional changes, such as limiting the role of the Constitutional Court or appointing the president of the Republic from the ranks of the ruling party, soon spread to every aspect of the political and business spheres in the country. Courts were extensively used to criminalize the socialist politicians of the previous government. This illiberal turn could be analyzed from various angles, including its effects on the private lives of the citizens. In this paper, however, I choose a somewhat narrow focus and explore how the European Court of Human Rights have reacted to the gradually increasing number of applications from Hungary – especially those cases in which violations of the fundamental rights encompassed in the Convention were closely related to the new direction of governmentality. In the analysis of the Hungarian cases, one can observe that although there is only a minor increase in the number of applications, the content of these cases reveal the legal fabric of an illiberal democracy. The presentation will address various cases – such as Karácsony and Others v. Hungary, Baka v. Hungary, Vókony v. Hungary, and the Vajnai group case – that would illustrate this change in the political regime through the lenses of the European Court of Human Rights. To generalize from these cases, one might conclude that political matters seem to be increasingly judicialized (Hirschl) and when courts of the nation state are unable to act as a balancing power, internationalized (Garoupa) – which, in turn, transforms the role of the judiciary in shaping political issues.

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

It was only a matter of time when the long-lasting Serbia/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 advisory opinion as to 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 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 both constitutional courts to decide watershed political questions touching state sovereignty, the organization of territory and nation-building concerns was clearly susceptible from the separation of powers perspective. Yet, neither of the two constitutional courts assessed the task under the political question doctrine and separation of powers principle. While the judicalization of Serbia/Kosovo dispute fits well in the global trend of 'judicalazation of mega politics', its effects are rather modest: it did not resolve the conflict, nor brought political leaders closer to its resolution. On the contrary, it only "offer[ed] refuge for politicians seeking to avoid "no win" decisions" (Hirschl). Based on Kosovo example, this paper aims to reassess the political question doctrine and examine whether 'judicalization of mega politics' merely frustrates rather than facilitates constitutional democracy.

106 CONSTITUTIONAL POLITICS AND COMPARATIVE INSTITUTIONAL DESIGN

In the field of constitutional theory, normative questions such as the appropriate role of courts, the nature of constitutional adjudication and the appropriate approaches to interpretation are often discussed without any explicit reference to a specific institutional setting in which these normative answers are expected to obtain acceptance. But variations in institutional design can be linked to different answers in these questions: they can be shaped by different understandings in that community of the role of courts and of public law; moreover, differences in institutional design can also help shape these understandings and normative expectations themselves. In this panel, the papers approach recurrent problems in constitutional theory and public law in a comparative fashion, or that contextualize and explain answers to these problems by means of case studies that make visible the possible connections between theory and variations in institutional arrangements.

Participants	Thomaz Pereira Jaclyn L. Neo Diego Werneck Arguelhes James Fowkes
Moderator	Jaclyn L. Neo
Room	7C-2-14

Thomaz Pereira: ***Constitutional Review of Constitutional Amendment Law: The Brazilian Case***

The Brazilian constitutional framework is characterized by the existence of an extremely long and open-ended list of unamendable constitutional clauses as a central feature of its institutional set-up. Nevertheless, its constitutional culture lacks a consensual narrative capable of justifying the legitimacy of their constitutional supremacy. In this context, the Brazilian Supreme Court has been situated itself at the center of any major institutional reform, but lacks an elaborate theory to justify its substantive interference in the process of constitutional amendment of the very Constitution that legitimates its power of judicial review. Through the analysis the Brazilian Supreme Court case law on the constitutional review of constitutional amendments, this article debates this broader theoretical issue and tries to elaborate the framework for a constitutional theory of unamendable constitutional clauses.

Jaclyn L. Neo: ***"All Power Has Legal Limits": Towards a Normative Theory for Judicial Review in Singapore***

Theoretical justifications of judicial review typically respond to this dominant critique: when unelected judges wield the power of judicial review to strike down actions of elected legislators and executives, they are acting contrary to the will of the majority as expressed by these (more) representative institutions. Constitutional theories addressing this counter-majoritarian difficulty include the idea that judges are merely protecting minorities, are ultimately advancing democratic politics, or are upholding certain values that are superordinate to democracy. This article examines judicial review in Singapore and notes that the underlying critique embodied within the counter-majoritarian difficulty that judges are unelected and that the legislature and the executive are more legitimate purveyors of democratic values critically frame the judicial approach to constitutional law. It identifies however a more recent trend towards a more assertive conception of judicial role and judicial review. Indeed in many cases the courts have increasingly invoked the principle first articulated in the seminal case of Chng Suan Tze v Ministry of Home Affairs [1988] 2 SLR(R) 525 to justify their power to review legislative and executive action. This principle states: "All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power." In examining the cases that have invoked this principle, this article argues for an emerging normative theory of judicial review in Singapore as one of legitimacy rooted in legality.

Diego Werneck Arguelhes: ***"The Court it is I": individual judicial review in Brazil and its implications for constitutional theory***

Constitutional theorists have debated extensively how constitutional courts should decide, and under which conditions the institution of judicial review could be reconciled with democratic commitments. Such debates have been largely based on the assumption that, even as they can be counter-majoritarian in relation to the broader political institutions, the constitutional courts themselves are internally organized according to majority rule. That is, judicial intervention in legislative or executive politics, when it does take place, can only be the outcome of some kind of collegiate decision-making process; individual judicial positions and preferences could therefore only affect the world outside the court after going through an aggregative procedure. In this sense, constitutional theory – including the criticisms on the legitimacy of judicial review – typically assumes that, internally, courts are majoritarian institutions, and minority positions will ultimately be silenced or forced into becoming dissenting opinion. In this scenario, the goals of this paper are twofold. First, from a descriptive point of view, we challenge this majoritarian assumption by means of a case study of the Brazilian Supreme Court. We will analyze a set of informal and formal mechanisms of court's decision-making process in which individual Justices can make their preferences prevail against both external (political) and internal (judicial) majorities. In the Brazilian court, a single justice can bypass the court as a collegiate body and directly affect poli-

tics – even to the point of creating counter-majoritarian outcomes. We call this phenomenon individual judicial review. Second, we discuss the (potentially serious) normative implications of non-majoritarian judicial decision-making for constitutional theory and democratic politics in general. We argue that the possibility of individual judicial review should be tentatively avoided by institutional designers.

James Fowkes: ***Development the Global South and Courts: Engaging the new reality***

To a surprising degree, non-legal development professionals are operating with a 19th-century conception of what courts are, in which judges spend their time enforcing contracts, trying criminals, protecting property rights and upholding the rule of law, thinly defined. As an abstract model, this has its advantages and drawbacks. As a description, it is more than half wrong, since emerging systems have largely made different choices and their courts are far more involved in development, holistically defined. The argument that needs making, in response to these views, is two-fold. First, the subject matter of development theorists is now to a significant degree a judicial story in many of the countries those theorists address. Descriptive correction is needed, which means pulling together an often-fragmented area of study and coming to terms with a global trend. Second, it needs to be asked how and where this matters. Lawyers themselves are still coming to terms (consciously or not) with the fact that many emerging courts are playing roles in development that have no counterpart in the role that courts played in earlier transitions of countries from poor to rich. Historical events in the Global North offer some guidance, but lawyers also need the tools of development theorists – which is why it matters that the two disciplines, currently, talk past each other.

107 FROM DIALOGUE TO DEFIANCE: EXPLORING THE LIMITS OF CONSTITUTIONAL COURTS' CHALLENGES TO EU LAW

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 abstract the possibility to refuse compliance with EU law in the name of a Member State's constitutional identity. A preliminary reference by the Italian constitutional court is currently pending before the ECJ: While showing a rather dialogical approach, it envisages 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. Through national reports and comparative remarks, this panel aims at exploring the procedural and substantial limits of a 'sustainable' judicial dissent in the European multilevel constitutionalism.

Participants	Davide Paris
	Ladislav Vhynánek
	Angela Schwerdtfeger
	Gábor Halmai
	Diletta Tega
Moderator	Marta Cartabia
Room	7C-2-12

Davide Paris: ***Constitutional limits to EU law primacy: A comparative overview***

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

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

The Czech Constitutional Court ('CCC') famously declared an ECJ's judgment ultra vires. Does this mean that the CCC intends to be a guardian of the Czech sovereignty and constitutional order against foreign intrusions? This paper argues that this would be a misunderstanding of the CCC's position and that the ultra vires judgment was a negligible episode with peculiar domestic roots. It firstly analyses the concept of the Eternity Clause of the Czech Constitution, which constitutes the only foreseeable normative obstacle to the supremacy of EU law within the Czech legal order. This 'constitutional core' does not draw on some specific Czech constitutional identity but rather on shared values and principles of liberal democracies. 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 rubberstamped the government's constitutional identity defense of its policies on migration, and everywhere it may disagree with the EU. When the Hungarian Constitutional Court on behalf of the government protects Hungary's current constitutional identity, which is inconsistent with many of the joint values of Article 2 TEU, it promotes an unconstitutional national constitutional identity. If the EU will still be unable to protect its joint values towards Member States, such as Hungary (and lately also Poland), which do not want to comply with them, the case of Hungary (and Poland) will have a negative impact both on countries with genuine and legitimate national constitutional identity claims and on the constitutional pluralism in the EU abandoning the common European constitutional whole and emphasizing only the unconstitutional national(ist) constitutional identity.

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

In its 2015 Taricco judgment, the Grand Chamber of the ECJ held that the Italian legislation concerning the limitation period for VAT frauds is too lenient to ensure the protection of EU financial interests, as required by Art. 325 TFEU, and has to be disapplied. In its order no. 27 of 2017, the Italian Constitutional Court ('ICC') reacted poignantly. It found that this disapplication would infringe one of the supreme principles of the Italian Constitution, i.e. strict legality in criminal matters. Consequently, in an urgent preliminary reference, the ICC asked the ECJ to reconsider its conclusions and to take into greater account national constitutional concerns, arguing that they have some relevance also under EU law. In this instance, the dialogue between the two courts is indeed strained. Nevertheless, both courts would do well not to try to assert their own ultimate authority and instead to use it most sparingly and prudently. Narrowing the scope of the controversy might be the best path to find a common ground and to distinguish this case from other more serious and far-reaching challenges to EU law that come from other national jurisdictions.

108 THE JUDICIARY: FROM EMPIRE TO POST-COLONIAL CONSTRUCTS

This panel seeks to explore the role of colonialism in court systems past and present. If as 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 represents group of scholars working in different geographic and historical settings who will provide case studies or raise overarching questions on the role of (post-)colonialism in creating designing and transforming courts and judiciaries.

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

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

Though central to the English common law trial by one's peers was an idea firmly rejected in most British colonial settings. With the exception of some settler colonies, most British dependencies did not allow trial by jury. With its subversive potential, the jury bestowed far too much power in the hands of the colonized and thus posed a significant threat to colonial rule. Though sometimes willing to employ hand-picked assessors or local magistrates to bestow legitimacy upon an imposed legal order, juries for non-Europeans were rarely introduced. Yet considering the place of the right of trial by jury in American Constitutional history, it remains puzzling why a similar right was not introduced in other former colonies after they gained independence. By exploring debates around the adoption of the jury in Israel, India and Cyprus, this paper analyzes the post-colonial rejection of the jury. I argue that the concept of an independent judiciary, robust as it may be in some former colonies, is nevertheless restricted by the colonial legacy of a hierarchical judiciary responsible and often deeply intertwined with the other branches of government.

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 Judiciary: 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 steeped in binary "colonial" construct of race cannot comprehend. I dispute that premise and deconstruct its Personal Identity Equality approach to anti-discrimination law and demonstrates its ill effects reflected in Supreme Court affirmative action litigation.

109 MECHANISMS FOR SELECTING SUPREME COURT JUDGES

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 appointing procedure.

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

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 widely criticized, at least outside 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. Recent developments 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 new Canadian process, while more open than in the past, remains rather tightly confined, or from differences in the U.S. and Canadian political-legal cultures.

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, law faculties, bar associations, and Justice Department proposed a list of candidates to a Congress Committee that organized a public contest based on merits. Then, five judges were selected by two-thirds of the members present of both chambers. Since 2009, the judges are elected through universal suffrage, from 28 candidates designated by two thirds of the present members of the National Assembly, among candidates that should meet certain criteria, such as holding a lawyers degree and expertise or specialty in areas of public law. Next, the Electoral body organizes an election process. The seven candidates that obtain a simple majority of the votes are elected for a period of six years and they may not be re-elected. The following seven candidates are appointed substitutes. Finally the President of the State administers the oath for office. The new Bolivian procedure for electing judges is praised for accomplishing diversity in the bench. In 2011, the first time in history constitutional judges were elected, two of the seven judges were women and three were indigenous. However, the procedure was criticized because 60% of the votes were annulled. This unique procedure in comparative constitutional law introduces new and interesting questions related to the legitimacy of judicial review, the design of judicial elections, the judges' political accountability, and the representation in constitutional courts.

Camilo Saavedra: *Mexico judicial appointment process*

On December 5th, 1994, just four days after taking office, Ernesto Zedillo, the last president emerging from the once hegemonic National Revolutionary Party (PRI, for its Spanish abbreviation) before alternation, promoted a constitutional amendment of the institutional design of the Supreme Court of Justice. The so-called 1994 judicial reform substantially expanded the Court's constitutional review powers, reduced size from 26 to 11 justices established a 15-year fixed-term in office, and set a new appointment method combining elements: three-member shortlists, presidential nomination and senatorial confirmation. In the period 1917-1994, the rotation in the Court's membership reached an average of 2.6 appointments per year. Conversely, since the enactment of the 1994 judicial reform, 23 justices have come to the bench, including the 11 appointed in 1995. Certainly, for the first time in the Mexican history, the membership of the Supreme Court remained unaltered for an eight-year period (1995-2003). And, besides, along the last two decades all the vacancies have resulted from either the conclusion of the appointment period or the death of a sitting justice What factors could explain this unprecedented stability? The sociolegal literature on Mexican judicial politics has flourished along the last two decades. Judicial selection, however, has remained a topic dominated by legal academia. This scholarship has arrived to insightful conclusions that stress the perverse incentives set by the current rules that allow the president to have a major control over appointment processes. Nonetheless, it has not provided persuasive explanations of why, for instance, the Senate has rejected the first presidential shortlist in four out of the last twelve process. The purpose of this paper is, instead of analyzing the effects of judicial stability or focusing on the appointments legal framework, to explore what the factors have promoted

such unprecedented stability in the Supreme Court by empirically researching the appointment processes in the period 1995-2015. In particular, this paper is interested in examining the role three factors played in such processes: a) presidential anticipation; b) legislative composition; c) nominees profiles. I order to attain this objective this study will conduct a revision of each process that led to the appointment of a new justice employing process-tracing as its main methodological tool.

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 panel will discuss four papers by Anél du Plessis, Michéle Finck, Malcolm MacLaren, and Josephine van Zeben. Janne Nijman will be commentating on the papers.

Participants	Anél du Plessis
	Michéle Finck
	Malcolm MacLaren
	Josephine van Zeben
Moderator	Janne Nijman
Room	8A-2-27

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 for 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 linked together in a viable 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-orientated development. The shape of the future Johannesburg will consist of well-planned transport arteries – the Corridors of Freedom – linked to interchanges where the focus will be on mixed-use development. The eThekwini development has been contested in court on the basis of the alleged limited environmental 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.

Michéle 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 cities. 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 as this concerns recommendations about urban government. My thesis is that the extent to which urban areas are able to – and should actually – 'learn from each other' in their policy-making is significantly less than experts presume. What seems a more promising strategy is for authorities in the Global South to engage in individual experimentation in coping with challenges of urban transformation: these should recognise the singularities of their urban areas and seek to develop their own, possibly unique, governance arrangements.

Josephine van Zeben: *Local Citizenship in the European Union*

Local governments in the European Union act as democratic conduits and service providers for residents – national citizens, EU citizens and third country nationals alike. The ability of local governments to fulfil both these roles depends primarily on their legal form and status, which in turn is determined by the constitutional arrangements of their respective Member State. This paper considers to what extent EU citizens are able to rely on their citizenship rights at the local level with respect to these two roles, and what the legal sources for divergence might between local 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.

111 LAW AND... EVERYTHING: INTERDISCIPLINARY PERSPECTIVES ON COURTS

The traditional doctrinal approach to the study of courts is no longer dominant. The new paradigm is interdisciplinarity. But as the field has ventured into the uncharted territories of interdisciplinarity, it has become more and more limited to a specific method. Interdisciplinary approaches have themselves become inward-looking and in a sense disciplinary. This panel seeks to examine the frontiers of the interdisciplinary study of courts. It aims to bring into conversation three different approaches to the research of courts and adjudication – which combine legal research with insights from social sciences political theory and metaphysics – and seeks to discover possible venues for a more comprehensive understanding of courts, one that would transcend the new interdisciplinary fault lines. The purpose is two-fold: first to present three different approaches to the study of courts, and second to initiate a discussion about possible ways of engaging in a dialogue across interdisciplinary lines.

Participants	Bosko Tripkovic
	Sabine Mair
	Jan Zglinski
Moderator	Urška Šadl
Room	8B-2-03

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

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

Sabine Mair: ***Can Political Theory Alter Judicial Reasoning?***

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

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

It has become a commonplace to say that the Court of Justice of the European Union has constantly 'seized the opportunities presented to it to enlarge its jurisdictional authority and power'. This is the narrative of judicial activism. Few, if any, observations have produced such an overwhelming consensus in EU legal scholarship, beyond the traditional frontiers of euro-sceptics and euro-enthusiasts. The paper seeks to challenge this consensus, drawing on an empirical study of free movement 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 activism tale, the CJEU's jurisprudence is evermore 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 passes more and more review duties onto national courts.

112 THE "STATUS" OF SOCIAL RIGHTS PROTECTION IN EUROPE: PERSPECTIVES AND CHALLENGES

The Panel deals with a highly debated issue in Europe: the status of social rights protection in Europe after the Eurozone crisis, which highlighted the flaws of the EU social model. Antonia Baraggia and Anastasia Poulou will address the issue of social rights protection looking at the case law of national supreme courts during the Eurozone crisis. Colm O'Cinneide will address the the limits and the potential of European Social constitutionalism. Zane Rasnača and Michael Ioannidis will look at the CJEU case law with regard to the European Social Pillar (Rasnača) and to the Judicial review of economic policies (Ioannidis).

Participants	Antonia Baraggia
	Anastasia Poulou
	Colm O'Cinneide
	Zane Rasnača
	Michael Ioannidis
Moderator	Bruno De Witte
Room	8B-2-09

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

"Juristocracy charges cannot be the same in times of EU sovereign debt": starting from this assumption (Kilpatrick 2015), this paper deals with the Courts' approach to social rights violation in time of economic crisis. The paper aims at addressing such a claim through a comparative analysis of the national constitutional courts' case law on social rights protection during the Euro-zone crisis. 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. conditionality, ECB letters, balance budget rules) on the Courts balancing between the needs of the public interest and fundamental constitutional rights. The paper will address the Courts' attitude in the light of the peculiar political and institutional context of the Eurozone-crisis where the protection of social rights – often guaranteed by national constitutions – is challenged by the economic conditions negotiated by national executives and international financial institutions.

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

The public debt crisis in Greece and Portugal resulted in severe cuts on social expenditure and successive restrictions on social rights. The Portuguese Constitutional Court and the Greek Council of State have been repeatedly confronted with the legal assessment of the austerity measures and their compatibility with social rights and principles. Even though in many cases the challenged cuts were of similar nature, the courts' reasoning and verdict varied significantly. My paper aims, first, to present the case-law of the Portuguese and Greek courts related to austerity measures, especially underlining its evolution throughout the crisis years. Second, the paper will critically analyse the legal grounds and arguments on the basis of which restrictions on social rights were assessed. Lastly, the question will be tackled whether in times of crisis the judicial protection of social interests is better achieved on the basis of social rights or of civil rights and general principles of law.

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

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

Zane Rasnača: ***"Finding CJEU" – Tracing the judicial influence on the European Pillar of Social Rights***

What does the European Pillar of Social Rights (Pillar) have to do with courts? Apparently, almost nothing. At least according to the European Commission's outline for this brand new project published in spring 2016. While so far it has been left partially unclear what exactly this "European Pillar of Social Rights" will be ("an expression of [...] principles", "a framework of principles", "a reference framework to screen [...] perfor-

mance", "a policy compass"), it is even less clear what will the role of the CJEU's case law be in this social rights' project. The two explicit references to the CJEU that we find in the initial working documents of the project are: first, a pledge that its case-law will serve as one of the starting points for the Pillar, and second, a visionary statement that the Pillar could be built upon the "common values and principles" featured in the reference documents, such as the case law of the CJEU. The rest of the preparatory documents, while they might be indirectly inspired by some aspects recognised in the Court's case law, do not reveal any direct judicial influence and references to the standards developed by the CJEU are suspiciously absent. This paper will explore the role of the CJEU in the Pillar project (the complete initiative of which is due in March 2017) and build a case for one. While at the moment both the final form and content of the Pillar are unclear, it seem reasonable to argue that it will likely serve as a sort of "social REFIT" for the EU social acquis. Also the Commission's Work Programme for 2017 seems to suggest that the Pillar will play such a role. I take the idea of the Pillar as some sort of a wetting framework (to an extent similar to the REFIT) and argue for a necessity of explicitly accommodating the role of the CJEU's case law in the construct of the Pillar. While it has been apparent for years that the policy developments at the EU level are often affected by the judicial outcomes, and indeed the 'social' area of EU law is an area whose development has to a large extent been facilitated and even triggered by the Court, so far the EU institutional framework fails 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***

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. Together with earlier pronouncements regarding the Stability and Growth Pact, these cases now offer a significant corpus of case-law regarding the stance of the Court towards economic decisions taken at the EU level. This paper asks whether there is an emerging pattern regarding the intense of judicial scrutiny of economic policies exercised by the CJEU. Has the Court devised a standard of review calibrated to the nascent European economic governance?

113 THE CHANGING NATURE OF THE PUBLIC ADMINISTRATION: WHAT ROLE FOR JUDICIAL REVIEW?

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

Participants	Cedric Jenart Sabrina Wirtz Steven Van Garsse and Yseult Marique Mariolina Eliantonio Javier Barnes and Alicia Isabel Saavedra-Bazaga Carlo Colombo
Moderator	Carlo Colombo and Mariolina Eliantonio
Room	8B-2-19

Cedric Jenart: ***The Legal Status of the World-Anti Doping Agency and the Implementation of its Norms in Flemish Law***

Sports have been famously described as 'the world's most significant insignificance'. However doping compromises the functions of sports because it threatens fair play, the spirit of the sport as well as the athlete's health. Anti-doping legislation has been receiving increasing attention in worldwide legal scholarship. Still, little scholarship has stretched beyond merely describing the World-Anti Doping Agency and the national implementation of its rules. At most anti-doping law is seen as an example of transnational or global law that is not tied by national boundaries. Furthermore, previous studies categorize anti-doping actors as private, public or hybrid actors. None of these denominations contributes to the debate on the function of these actors in an evolving global society. The paper therefore has a dual objective. First, it purports to unveil the most relevant typology for legal research on anti-doping actors. Second, it investigates the techniques that nation states apply to introduce norms of these actors into the national legal order. This second objective is elucidated by three viewpoints. In the first, the question arises as to which transnational norms bind nation states. Also the enforceability of these norms depends on the chosen techniques. Finally, the present study elaborates on how constitutional principles, such as democracy and legality, may influence the techniques that legislatures select to impose anti-doping rules. We extrapolate global findings by drawing on an extensive case study. Within the Flemish framework of anti-doping legislation and of anti-doping implementation, we assess a particular case in point. Flanders tends to hold the middle ground as opposed to more extreme approaches of other Belgian regions or neighboring countries. The study first shows that the traditional 'summa divisio' between public law actors and private law actors is to no avail in the field of anti-doping law with hybrid actors that combine both public and private features. Contrary to existing literature, this paper distinguishes between politically accountable actors (such as the legislature and the executive) and non-politically accountable actors (such as the majority of anti-doping actors). Second, this study has brought to light which instruments are most popular and effective in order to transpose transnational anti-doping norms. In Flanders, the balance between national sovereignty and international compliance is struck in particular by the method of dynamic referrals to transnational norms. The article concludes that even though various methods exist for complying with transnational anti-doping rules constitutional principles – as interpreted by national courts – limit the freedom to outsource powers to non-politically accountable actors.

Sabrina Wirtz: ***Independence under threat – the role of private actors in the setting of global pharmaceutical standards and resulting challenges for European public law***

The International Council for Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use (ICH) has established itself as the prime source of global standards in the field of pharmaceuticals regulation. The ICH is established as a Swiss association but essentially forms a hybrid public-private partnership consisting of representatives of regulatory authorities as well as representatives of pharmaceutical industry associations. This article examines the complex interactions between public regulators and private interest representatives in the regulation of pharmaceuticals, providing evidence of a blurred delimitation between public and private power in the setting of quality, safety, and efficacy standards. It closely analyses the setting of such standards on the global level in the International Council for Harmonisation (ICH). Therefore, it will examine the co-regulatory role of the pharmaceutical industry through analysing the ICH membership structure, funding, institutional structure and decision-making process. In this regard, the article shows that although the private power in the standard-setting process within the ICH has been subject to incisions in the recent past, the pharmaceutical industry still exercises significant influence on the standards set within the ICH. While the integration of private actors in regulatory bodies is often motivated by the know-how provided especially by the regulated industry, it raises concerns with regard to the legitimacy of the standards set. Therefore, in a second step the article highlights the challenges that can arise out of the involvement of the regulated industry in the standard-setting of the ICH for the EU as an implementing regulatory system which places a great emphasis on the independence of its administration. Thus, the article shows that the role of private actors in the setting of global standards becomes problematic when the standards are received in a regulatory framework that positions regulatory power firmly in the hands of independent public authorities.

Steven Van Garsse and Yseult Marique: ***Public contracts in European infrastructure projects – Revisiting administrative law values***

EU law is increasingly defining principles (competition equality transparency proportionality) applying on the ways in which public bodies may use their purchasing powers (2014 EU directives on public procurement and concessions) in the market to buy goods, create infrastructure and provide services for their citizens. Traditionally, administrative law in Member States provided a framework to this kind of relationships. For instance, France and Belgium developed an extensive "state-centered" administrative law framework to allocate define and control such a use of public power, where public interest prevail over private concerns. England and the Netherlands developed a more liberal tradition putting public and private powers on a relatively equal footing. The current European developments strongly challenge both kinds of national tradition: they mix techniques protecting domestic public interests with techniques encouraging economic interests without articulating clearly the relationships between the two. Yet, the recent economic crisis highlights a double need for any democratically elected government: 1) better coordination of economic and public powers and 2) organizing how citizens and service users have their say in how public power is exercised in economic matters. This paper will analyze how the conceptual and technical changes emerging from European major transport infrastructure projects in the UK, France and Belgium challenge the classic administrative law values and the role of the lawyers to ensure their compliance. The current disintegration of the law under the pressure of socio-economic and

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 will analyze 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 being 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 expertise of the regulatees themselves, private-party rule-making raises significant concerns in terms of its legitimacy. In particular, not only can the involvement of private parties in EU decision-making be questioned from the perspective of compliance with the Meroni doctrine, but also from that of the existence of an adequate set of control mechanisms to review the legality of the actions taken by private parties as administrative rule-makers. This contribution will address the question of the existence of a sufficient degree of control on the process of European standardization 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. Secondly, the contribution will consider to what extent the standards respect or ought to respect 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 Isabel Saavedra-Bazaga: ***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 principles, in that they 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 under private law (the "private life" of public administrations). 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 replacing hierarchical decision-making. 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 proliferating in regional and urban areas, due to the close proximity of all actors in the same area. In addition, contrary to the global and European levels, mechanisms of collaboration in public decision-making within urban and regional environments are embedded in a sub-layer of administrative law rules and procedures, which in turn inhibit or – even worse – do not take into consideration the quest for collaboration. This apparent contradiction between existing rules and the reality of the exercise of powers boils down to one main questions: how can administrative law transform its essence to foster effective public-private collaboration? The paper will therefore examine the role of administrative law in promoting effective collaboration between stakeholders in the exercise of public functions in two specific areas of subnational governance: urban planning policies and regional innovation policies. In both areas, practices such as participatory decision-making and triple helix collaboration have emerged; both areas also manifest the limits of administrative law and the problems thereof. The paper argues that, to cope with these institutional innovations, a new paradigm for administrative procedural rules that takes into consideration the quest for good collaborative governance is strongly needed.

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

The proposed panel will bring together scholars with specialisms in Public Law, EU Law, Public International Law and International Human Rights Law to deliver papers which will evaluate the themes of representative democracy, constitutional equality, accountability for State-sponsored wrongdoing in extra-territorial settings, and the adjudication of extra-territorial human rights violations. For this purpose, the proposed papers will 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' normative sources 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 the 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
	Satvinder Juss
Moderator	Violeta Moreno-Lax
Room	8B-2-33

Paul Gragl: ***Concealed Monism in the Supreme Court's Judgment in Miller: Externalizing Representative Democracy***

The constitutional law implications of the Supreme Court's judgment in the Miller case on the United Kingdom's planned withdrawal from the European Union are conspicuous and thus already under close scrutiny by constitutional lawyers. In contrast to these questions, this paper intends to look beyond the domestic legal ramifications of the judgment and to focus on its more 'exotic' aspects, namely the external or international law perspective of Miller and its impact on representative democracy. In accordance with the overall theme of this conference this paper will therefore examine the Supreme Court's power in (re-)considering the relationship between domestic and international/EU law, and how this (re-)consideration safeguarded Parliament as an institution of representative democracy. To begin with, the relationship of the UK's domestic legal system with international law in general and EU law in particular is of special interest. Traditionally, the UK system is seen as deeply dualist, which – at least prima facie – also appears to be confirmed by the Supreme Court in Miller. The main argument of this paper is, however, that even though the judges emphasize the UK's dualist legal nature throughout the judgment, their language belies this very nature, as it is covertly monist. While the European Communities Act 1972 (ECA) 'gives effect to EU law it is not itself the originating source of that law'. Rather, EU law is 'an independent and overriding source of domestic law' [para. 65]. Therewith, the Supreme Court seems to confirm its acceptance of the supremacy and direct effect of EU law. It is of course true that this state only lasts as long as Parliament wishes, but it makes one crucial point even clearer: repealing the ECA without concurrently withdrawing from the EU entails the UK's breach of obligations under EU law for which it can be held responsible (e.g. through infringement proceedings under Article 258 TFEU). This means, alternatively put, that it is the EU legal order which has the last say in the case of normative conflict, and that as long as the UK remains a member of the Union, it is part of a monist system with the EU on top in terms of normative hierarchy. On the other hand, withdrawing from the EU while retaining the ECA does not perpetuate or safeguard the currently existing rights under EU law for UK residents if there is no relevant agreement with the EU clarifying this aspect. Thus, an important consequence of this concealed monism is that a loss of this source of law would also remove some existing domestic rights of UK residents stemming from EU law, which makes it impermissible for the executive to withdraw from the EU Treaties without prior Parliamentary authority. This is the point where the real power of the Supreme Court comes to the fore, namely in its strengthening of representative democracy and by externalizing it: the executive's treaty-making power certainly remains unaffected and non-justiciable. Yet what Miller demonstrates is that if an international treaty bestows rights to individuals through the conduit of domestic law, the treaty-unmaking powers of the executive under the Royal Prerogative are severely restricted and consequently require prior action by Parliament. In this vein, individuals are regarded as subjects of international law and the fact that domestic implementation is required for giving effect to a certain treaty is only a technicality of UK constitutional law. What is more important is that representative democracy has been externalized to the international level and that only Parliament can take away rights which have been granted by international treaties. Accordingly, the same conditions will apply if the Government plans to withdraw from the European Convention on Human Rights, as then the Human Rights Act of 1998 – similarly giving rights to individuals – will have to be repealed.

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 certain provisions of the Vienna Convention on the Law of Treaties to the situation in Western Sahara in a highly selective manner and with scant regard for the facts on the ground. First, it ruled that 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 Sahrawi people because they had no consented to them in keeping with principle of pacta tertiis nec nocent nec prosunt (Art. 34). Finally, it held that the de facto application of the Agreements to products from Western Sahara was not legally relevant because the Council and Commission were under an erga omnes obligation to respect the Sahrawi people's right to self-determination as a matter of EU/International Law. To this end, it noted that such activities did not amount to a subsequent practice which revealed the agreement of the parties as to the correct interpretation of the EU/Morocco Agreements (under Art. 31(3)(b)). The Polisario decision does not augur well for the outstanding preliminary reference in R (Western Sahara Campaign UK) v HMRC/ Secretary of State for the Environment [2015] EWHC 2829 (Admin) which concerns the legality of fisheries activities carried out by EU vessels in waters adjacent to Western Sahara, which are claimed to be within Morocco's sovereignty or jurisdiction under the EU/Morocco Fisheries Partnership Agreement 2006 (and its 2013 Protocol). This paper will examine the resource rights of the Sahrawi inhabitants of this Non-Self-Governing Territory as part of their wider entitlement to self-determination before establishing the obligations imposed on the EU institutions and Member States, as a consequence. It will then consider the extent to which the EU institutions are under a duty to interpret the EU Charter on Fundamental Rights in ways that facilitate the application of peremptory norms, notwithstanding the ructions caused by the exceptional circumstances which prompted the Kadi decisions. The CJEU has been strongly criticized by leading academics for shortcomings in its human rights reasoning in a number of high profile cases. This paper will endeavour to contribute to this vein of scholarship. Given the constitutional principles upon which the EU is based and the privileged position enjoyed by the CJEU within the international legal order, it will argue that the CJEU should endorse interpretations of relevant legal sources that protect the fundamental human rights of not only those persons who come 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***

Satvinder Juss: ***The Royal Prerogative in Colonial Constitutional Law***

115 THE ROLE OF COURTS AND (IL)LIBERAL DEMOCRACY

Looking into various regional settings, the panel aims at expounding on the constitutional framework for a democratic rule. Yet, it is not limited to the legal perspective only. The liberal or illiberal shape of democracy is mostly a political choice. Moreover it calls for an inquiry into the social sciences or even social psychology. The comparative analysis will cover national and regional Hungarian and Polish (CEE) and Kenyan, Tanzanian and Uganda's (East African) experiences, where the liberal democratic principles are making progress and experiencing setbacks at the same time. This is a reason why the court decisions at any level: national (supreme courts of Kenya, Tanzania, and Uganda, Hungarian and Polish constitutional courts) regional (East African CJ) supranational (CJEU) and international (ECtHR) are worth examining. Taking a comparative and multidimensional approach will ensure that the panel findings will provide for insights not only into the constitutional reality, but also into its legal, political and social underpinnings. Scholars will address the fundamental questions (liberal/illiberal democracy, rule of law, and human rights) as well as some specific issues ,notably referendum and emergency powers.

Participants	Tímea Drinóczi Agnieszka Bień-Kacała Tomasz Milej Maciej Serowaniec Fabio Ratto Trabucco
Moderator	Tímea Drinóczi
Room	8B-2-43

Tímea Drinóczi: ***Recent systemic developments in Poland and Hungary***

In the paper, using the example of Poland and Hungary, we will depict 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 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 constitution and constitutionalism 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: Agnieszka

Agnieszka Bień-Kacała: ***Recent systemic developments in Poland and Hungary***

In the paper, using the example of Poland and Hungary, we will depict 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 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 constitution and constitutionalism 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:Tímea Drinóczi

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's Magufuli administration in Tanzania takes a harsh stance against the media, and it was not long time ago that the Ugandan legislator tried to dramatically increase the penal sanctions for homosexual contacts between consenting adults. However, where does the judiciary 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 judicial review and the 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 tainted by its past, neither in the colonial period nor after independence was it a check on the unfettered power of autocratic rulers. It is only since the nineties that the courtroom started witnessing the judges challenging the politicians. The paper analyses some examples of the East African judges' assertiveness. On the basis of the respective case-law it tries to at least partly unveil the judiciary's take on the liberal principles.

Maciej Serowaniec: ***The role of "controlled" referendums in Polish democracy***

Due to the introduction of the principle of nation sovereignty in the Constitution of the Republic of Poland, it seemed that a nationwide referendum was bound to become an important instrument allowing the expression of opinions and formulation of decisions by the sovereign. In fact, as a form of participation of those governing in determining public matters, it serves the immediate expression of the political will allocated to the citizen. The nation is a source of power and may assume the role of an arbitrator in conflict situations between constitutional state organs but also in disputes between the subjects of the political scene, which is reflected in the targeting of the activities of public authorities according to the will expressed via a referendum. The conclusions that can be drawn from the use of referendum in Poland are much less optimistic. From the very beginning of its implementation, it was accompanied by political horse-trading. A referendum has been and still is commonly treated by the Polish political classes as an element of political struggle between particular parliamentary and extra-parliamentary groups that take advantage of it for their ongoing purposes. Different political hubs attach different expectations to referenda. Some politicians treat them solely as a test of the popularity of their group. Referenda have become toys in the hands of politicians who use them as tools in electoral competition and an element of the 'power game'. Co-author: Zbigniew Witkowski zbywit@umk.pl

Fabio Ratto Trabucco: ***The migrant quota referendum experience in Hungary***

This paper explores the evolution of the participatory principle in the Hungarian constitutional texts concerning the use of a referendum. What is the importance of this particular Hungarian referendum? Why it merits discussion in a comparative or broader European perspective? These are things that may to some degree be self-evident but is important to be clear what the point of view and why it also matters outside Hungary. It was a questionable, distorted and ideological test of direct democracy (also called "Potemkin referendum"), endorsed arguably by Constitution Court. The are also some doubts about the State funds that were used to pay for referendum adverts in government-friendly media outlets or on hoardings owned by government allies. Hungarian quota referendum appears as a democratic negotiate with other EU Countries on migrant affairs: the direct democracy may be vulnerable if the political players ask the people incomprehensible or otherwise rigged questions. Just remember that in the last years there are some examples of manipulative referenda in Europe and USA on different topics (e.g. 2014's Crimea and 2015's Greece; 2016's Austin and Jacksonville).

116 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 Edoardo Stoppioni Lorenzo Gradoni Laurence Burgorgue Larsen Remy Jorritsma
Moderator	Andres 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 regime are weighed against those of other regimes. The balancing test is traditionally applied by national constitutional courts in order to deal with competing constitutional principles. As advocated by some observers, the same technique should be generally applied in international law to strike a balance among competing international norms having the same hierarchical status. However, in a legal space fragmented along functional lines, this would necessarily imply that judges must attribute a "weight" to external legal principles belonging to other legal regimes. While some international courts, such as the European Court of Human Rights (ECtHR), have normally resort to this technique, others, such as the International Court of Justice (ICJ), have so far avoided applying it. Analysing this technique may shed light on the way in which international courts reconstruct external values and principles in their own regime and attribute a weight to them.

Luca Pasquet: ***Horizontal Solange – An inter-systemic legality review?***

The second presentation discusses how international courts and tribunals directly or indirectly review the legality of acts belonging to other legal regimes following a modus operandi reminiscent of the Solange method employed by constitutional courts. Examples can be found in the 'equivalent protection' doctrine developed by the ECtHR, and in the Kadi jurisprudence of the Court of Justice of the European Union (CJEU). By its nature, this typology of legal review calls into 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 humanizer' of multi-level governance.

Edoardo 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 acquired polymorph functions in the burgeoning activity of international courts and tribunals. Alongside with general principles of law mentioned by article 38 of the ICJ Statute, international courts have elaborated diverse general principles of international law be they system-specific 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 reconstructing international norms in their own legal systems. With the jurisdictionalization of the international legal order, national courts are now sided by supranational jurisdictions in identifying the con-

tent of an international rule. When having to address a norm of customary international law, for instance, national courts often refer, not so much to State practice, but to international judicial practice(s). Studying the way in which these vertical links are established or rescinded may shed light on how national courts internally reconstruct the fragmented international law, i.e. on how they establish external points of reference in a polycentric legal space and arbitrate between conflicting normative claims coming from the different international legal regimes.

Laurence Burgorgue Larsen: *How international courts frame the role of national judges*

The presentation deals with the increasing attempt of international courts to frame the role of national judges under international law. This recent evolution is particularly evident in regional human rights protection systems. On the one hand, the Inter-American Court has crafted different obligations in order to frame the power of the national judge: the obligation of a 'conventionality control', imposing to the judge not to apply a norm that is deemed contrary to the Convention in the light of the case law of the San José Court (Almonacid Arellano v. Chili 26 September 2006) and the obligation of proprio motu invocation of the pertinent provisions of the Convention (Rosendo Radilla Pacheco v. Mexico 23 November 2009). On the other hand, the case law of the ECtHR, while refusing to define in abstracto the effects of the Convention in national law, has evolved towards the indication of necessary structural reforms through pilot judgments (Broniowski v. Poland 22 June 2004) or condemning the absence of ex officio use of the Convention when national law recognises its direct effect (Botten v. Norway 19 February 1996). This evolution of the jurisdictional systemic interactions can shed light on the evolving role of national courts in multilevel systems of adjudication.

Remy Jorritsma: *When national judges mount resistance against international norms*

The presentation deals with the resistance opposed by national judges to the penetration of international norms into their own legal systems, which may result in clear acts of defiance towards international jurisdictions. Recent practice offers interesting examples, such as the decision of the Italian Constitutional Court n. 238/2014. On the one hand, the Court declared the primacy of the fundamental constitutional right to jurisdictional protection over the international customary norms on State immunity. By doing so, the Constitutional Court openly defied the ICJ which, in Germany v. Italy, had defined the scope of sovereign immunity. Other clear examples include the Russian Constitutional Court debarring the execution of the decisions of the ECtHR, in case of incompatibility of the latter with the Russian constitution.

117 COURTS ADMINISTRATIVE DISCRETION AND REGULATORY AGENCIES

How much control should courts exercize over the executive branch? What is the scope and purpose of judicial control of administrative discretion? Should courts treat independent regulators differently? This panel will analyze these questions from a comparative perspective surveying different legal systems and their treatment of these matters. In addition to contrasting distinct legal arrangements, this panel also aims at comparing the distinct conceptual frameworks that may inform such arrangements, such as the role of courts and the role of administrators.

Participants	Mariana Mota Prado
	Joana Mendes
	Giulio Napolitano
Moderator	Mariana Mota Prado
Room	8A-3-17

Mariana Mota Prado: *Courts, Administrative Discretion and Regulartory Agencies*

Joana Mendes: *Courts, Administrative Discretion and Regulartory Agencies*

Giulio Napolitano: *Legislative mixed feeling about judicial review of administrative action*

118 THE QUEST FOR FREEDOM(S)

Participants	Jihye Kim
	Francesco Clementi
	Martin Kopa
	Jack Tsen-Ta Lee
	Eliska Pirkova
	Oleg Soldatov
Moderator	Francesco Clementi
Room	8A-3-27

Jihye Kim: *Harmful Speech by the Constitutional Court: Military Sodomy and National Defense*

In the Republic of Korea, divided under a ceasefire for over 60 years, the rhetoric of a threat to national security has often been triggered as a powerful, sometimes misused reason to legitimize restrictions on individuals' fundamental rights. In its decision on July 28, 2016, the Constitutional Court of Korea used the rhetoric to decide the criminalization of homosexual acts among the military members constitutional, regardless of whether such acts occur consensual or non-consensual, private or public, and inside or outside the military base. The Court declared same-sex sexual acts to be "abnormal", "a disgust to the general public", and "against the virtuous sexual morality" thus justifying the ban "to preserve combat power of the military." This article argues that the reasoning was flawed in that it was based on multiple layers of unquestioned prejudice against homosexuality and unfounded speculations, as well as unjustified diminishment of fundamental rights among military members. It further argues that more importantly, such judgment constitutes harmful speech in itself by the Court that calls for serious doubt on its role as a guardian of human dignity and equality under the Constitution.

Francesco Clementi: *The new challenging boundaries of the freedom of association*

In the history of constitutionalism, the freedom of association has had a fundamental role accompanying the birth, development and growth of the formal and substantive concept of political community as, at the same time, the birth, development and growth of the relational potential of the individuals in the societies. Then, this freedom over the time, has become a good parameter to understand the relationship between the political authority and the whole of the individual freedoms – from expression to assembly – which the freedom of association collectively in se includes. Doing so, this freedom has always more confirmed to be a cornerstone of the democracy. Now, the general crisis of the participation and representation, the relevant transformations of the power, the incisive judgements of the Courts, the digital age and the huge growing of the so called social networks are changing this freedom bringing it to an enlargement of its classical boundaries. Therefore, if for the Countries with a civil law legal system, this freedom is always more interrelated with that of expression for the Countries with a common law legal system, this freedom is always more interrelated with that of assembly in a sort of back to the past towards the 'old incubator'. The paper's aim is 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 where they are even required to speak up? Should they respond to the critique of their decision-making by members of the executive or legislative branches of government? Or should they only speak through their judgments? 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 case-studies of real controversies. But I will not 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 (Streitbare demokratie) protecting democratic state against its self-destruction. But how do they know when to trigger this concept? If they speak up too early the danger is that they might overstep the ethical and legal boundaries of their role. But is it possible to draw the line?

Jack Tsen-Ta Lee: *Patriotism and Belief: Judicial Approaches to Freedom of Thought Conscience and Religion in Japan and Singapore*

The courts in both Japan and Singapore have grappled with, and ultimately dismissed, assertions by claimants working in educational institutions that require them to participate in patriotic ceremonies involving a national anthem, flag or pledge infringes their constitutional rights. The cases share the characteristic of the courts giving scant weight to 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 have done so, as it is problematic for a court to purport to declare what practices should be regarded as not part of or not required by an individual's belief system, particularly if it is a religious one. It examines

whether, and if so how, judges have balanced the relevant rights – the freedom of thought and conscience guaranteed by Article 19 of the Japanese Constitution; and the right to profess 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.

Eliska Pirkova: ***Freedom of Expression and Internet Service providers: What future holds after Delfi.***

This research paper discusses the issue of third party Internet liability for dissemination of 'hate speech' comments and opinions, while strictly focusing on non-commercialized speech that lies outside the scope of copyright law. It provides an analysis of the ECtHR pioneer judgment Delfi v. Estonia, where for essentially the first time the Strasbourg Court had to rule on the liability of Internet platforms that allow for dissemination of offensive and often threatening comments to a wide range of audience. It then continues with examining the most recent ECtHR judgment concerning the same issue, MTE v. Hungary. It draws parallels between the current and previous approach of ECtHR to hate speech. Simultaneously, it critically assesses the pitfalls in the Court's rulings and its possible future implications. The following part of the paper compares the Strasbourg rulings to the approach adopted by the Court of Justice of the European Union (CJEU) to the Internet Service Providers' liability for third party content (ISPs). Further, it also sheds light on the newly developed human rights scrutiny test applied by the CJEU in cases such as Digital Rights Ireland or Maximillian Schrems v Data Protection Commissioner. Finally, the goal of this paper is to clarify ISP's liability struggle and to pin down the main obstacles imposed on the freedom of expression in digital age.

Oleg Soldatov: ***"Bloggers Law" and Online Freedom of Expression in Russia***

In May 2014 the Russian Parliament enacted the Federal Law No. 97-FZ (the so-called "Bloggers Law"). This piece of legislation, which was passed with the justification of curbing the terrorist threat, requires compulsory registration of all bloggers with more than 3 000 visits a day with the country's Internet watchdog, Roskomnadzor, leading to disclosure of their real identities to the State authorities. Moreover, according to this law the bloggers have to abide by the same rules as journalists, including, among other things, an obligation to verify information before publishing it. The Bloggers Law faced numerous criticisms: while the discussion as to whether there is indeed a legal right to online anonymity is still far from being concluded, the law makes anonymous blogging an impossible undertaking in Russia. In the paper the author attempts to: (a) analyse the reasoning behind the Federal Law No. 97-FZ; (b) disentangle and contextualise the most controversial provisions of the Bloggers Law point by point; (c) assess its effectiveness drawing conclusions from the events that happened in the Russian blogosphere in 2014-2016; (d) speculate whether other European countries might choose to follow Russia's example.

Participants	Britta Sjoestedt Jenna Sapiano Cindy Wittke Huub Spoormans and Irene Broekhuijse Radek Pisa
Moderator	Jenna Sapiano
Room	8A-3-45

Britta Sjoestedt: ***International actors in environmental peacebuilding: the local and the international in fragile states***

In this paper, I explore the practice of implementing international environmental law in institutionally weak states transitioning from peace to conflict to further analyse how foreign and international actors' practice fills an institutional and legal gap in post-conflict situations. This is of interest for two main reasons. First, it embodies the implementation of environmental treaties and international environmental norms such as 'international cooperation', 'sustainable development', 'common but differentiated responsibility' and 'rights of future generations'. Second, it also transfers the governance of the environment in these post-conflict states from a domestic to an international level. In post-conflict states actors of the international community are supposed to take on action to rebuild the society to make it robust state to be able to prevent the reoccurring 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 invoked to govern the environment that may keep post-conflict states under the dictates of international actors.

Jenna Sapiano: ***Constitutional Language and Peace Constitutions***

The language used to describe constitutions (often articulated by courts), such as the 'living tree' metaphor, does not precisely describe peace agreement constitutions. The belief that a constitution is permanent is built into the very concept of constitutionalism, but locating stability and endurance in a document that, in its moment of founding and design, is compromised by a greater need to create peace, has the possibility to entrench the divisions of the conflict. A compromised constitution cannot be understood as an end-point if it is to function in a deeply divided state emerging from high-level conflict. To understand the constitution as an activity breaks with the more accepted understanding of the constitution as an entrenched and lasting document. It is not the well-worn metaphor of the living tree, which grows yet is always rooted to its foundations, that best captures the meaning of the peace agreement constitution. A better symbol would be that of a cloud, existing in a bounded ecosystem, which finds its originating and sustaining source of existence (or authority) from the water below. In this meteorological image the constitution can only continue to exist if it can do so by that which sustains it, or by those over whom the constitution exists. The constitution continues to exist so long as it is believed to have the authority to do so, upholding the legitimate political and legal order. The constitution is at once connected and part of those over whom it holds authority, but separate and distinct from that authority.

Cindy Wittke: ***Building and Keeping Peace in the City***

21st century cities are objects, subjects, laboratories, and agents of emerging formal and informal modes of global, local, and transnational governance. Cities use the languages of inter-state relations and international law and mimic states' practiced forms of institutionalised 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, undergoes a re-conceptualisation as the search for 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 go hand in hand 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 people living in cities. 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 Spoormans and Irene Broekhuijse: ***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

parties on the state and the increasing regulation of parties by the state. In particular she has drawn attention to the remarkable judicialisation of political parties in post-war Europe. This judicialisation consists of the constitutive codification of political parties and the legal regulation of political parties. The Netherlands seems to deviate from the European pattern. Political parties are not even mentioned in the constitution and there exists no Party Law. Because of this particularity, this contribution aims provide insights in the Dutch legal framework. In this paper we describe the development of political parties in the Netherlands and the discussion on the legal regulation of parties. We argue that the developments of parties is quite similar to other European polities, but that legal regulation took a different route; i.e. not by the front door of constitutionalization and a Party Law, but by a backdoor through international law and via the Courts. We conclude our analysis by giving some reasons for this Dutch route to judicialisation.

Radek Pisa: ***On the Origins of Dictators***

Participants	Ori Aronson
	Paul Blokker
	Eoin Carolan
	Friederike Eggert
	Gert Jan Geertjes
Moderator	Paul Blokker
Room	8B-3-03

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

The study is an extensive empirical survey of Israeli trial court decisions that have cited the Basic Laws – Israel's constitutional texts – in the past twenty years, since the introduction of judicial review to the Israeli constitutional system. While the full results of the study are still being analyzed, initial results are available, aimed at identifying unique characteristics of trial court constitutional adjudication. Notable findings are the nearly complete lack of judicial review litigation in trial courts (i.e. litigation that concerns the validity of primary legislation) despite the availability of constitutional jurisdiction with these courts; and the parallel trends of constitutional citation that appear in both Supreme Court and trial court decision-making over the two decades. The results hint at the significant force institutional hierarchies hold over trial court discretion in the constitutional field; they imply that if trial courts are to be tapped as useful sources of a pluralist and participatory form of constitutionalism, then institutional adjustments, which would relieve some of the power apex courts exert on the constitutional system, ought to be considered.

Paul Blokker: ***The Imaginary Constitution of Constitutions***

The modern constitution is predominantly understood as a way 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 constitutionalism 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 significations 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 reversing a judicial decision in favour of marriage equality was regarded by activists as an example of the so-called 'backlash thesis': the idea that judicial acitivism 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, one 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 and 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 the existence of non-elected institutions of the constitution. It could therefore be argued that conventions in the UK constitution are embedded in a political culture of majoritarianism. In current literature, this seems to be the dominant objective of conventions. It is however often overlooked that conventions of other (continental) constitutions may also be animated by other values. In the Netherlands, for instance, various conventions aim to respect the representation of political minorities in Parliament. It could therefore be said that in the Netherlands conventions operate against the background of a culture of proportionality. The gist of this paper is that the role of conventions in the constitution can only be properly understood in relation to the political culture in which they are embedded. Using existing literature on political culture and constitutional conventions as a model, this paper investigates the role that conventions may play in both common law and continental constitutional systems.

121 CROSSING BORDERS: MIGRATION AND LAND-USE CONFLICTS

Participants	Pratyush Kumar Andreas Hofmann David Moya Satvinder Juss Mario Savino Ralph Wilde
Moderator	David Abraham
Room	8B-3-09

Pratyush Kumar: ***The land question from colonial to post-colonial times: Reading and re-reading the Apex Court today***

Land as a question of colonial and post-colonial India has affected its polity and public law ever since the 'permanent settlement' of 1793. The organized peasant movement starting in the 1920s gave a shot in the arm of India's struggle for independence on the one hand and abolition of zamindari (landlordism) unsettling the colonial 'permanent settlement' on the other. In this backdrop, the Supreme Court of India remained essentially a colonial creation and went against the tide of time in deciding in favour of the biggest landlord in the country in Sir Kameshwar Singh v. State of Bihar leading to the abolition of right to property as a fundamental right and taking away all the land reform legislations from the purview of the court by putting them in the Ninth Schedule of the Constitution. With the turn of the century in 2013 the central government came up with a proposed land acquisition act which was then taken up with changes by the land acquisition ordinance of 2015 to develop on the idea of 'development' where land was to be taken away from farmers and effectively passed on to private players exercising its right of eminent domain. This puts a question mark on what is our land policy today; what is the nature of our public sphere shaping our public law; and if such a law sees the light of day how will our courts, including our apex court, clinch the matter in twenty-first century.

Andreas Hofmann: ***Are Courts the Solution or Part of the Problem? Procedural Legitimacy in Land Use Conflicts***

Is deliberative democracy meaningless if its outcome can be challenged in court? Deliberation and participatory decision-making have frequently been advocated as a means to increase the legitimacy of decisions that create distinct losers such as land use and siting issues. Discussions about the merits of deliberation and participatory decision-making as a mechanism to produce better public policy however have seldom included considerations of how this method of problem solving fits in with the ongoing expansion of the role of courts and judicial review. Courts pose a challenge since they can replace a solution reached through deliberation with a solution based on other procedural and substantive standards. The possibility for the "losing" party in a participatory setting to "exit" this decision-making procedure and chose a court case as an alternative raises the question to what purpose time and effort is spent on deliberation in the first place. In addition exit options add an extra layer of conflict by making not only the outcome but also the procedure an issue of contention. Based on the example of a conflict over nature conservation in Sweden this paper explores the respective merits of deliberative fora vs. court rooms and discusses the prospects of solving deep seated conflicts when more than one procedure is available.

David Moya: ***Strategic litigation. Using multilevel protection of immigrant and refugees' rights to shape legislation and administrative practice by NGOs***

The proposed paper is the result of a funded research on the role of NGOs in the judicial arena when advocating for immigrant and refugees' rights. The paper explores the Spanish case-law in light of the EUCJ and ECtHR jurisprudence, and in particular the structure of opportunities that creates different judicial procedures. It is well known that NGOs as interest groups act in the political arena advocating for immigrants rights, but it is less known their litigation strategies and the limits they encounter to defend those rights. The paper explores the interaction between NGOs and the Judiciary, the role of NGOs coalition to ensure favourable judicial outcomes and some procedural limitations that diminish the impact of strategic litigation in this area.

Satvinder Juss: ***The Royal Prerogative in Colonial Constitutional Law***

The Chagos Islanders Case will be remembered for its abandonment of the common law's affirmation of a Subject's right to be free from exile, when more than a decade ago the British Government in the exercise of its imperial powers decided upon the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being. Paradoxically, freedom from exile is a right guaranteed in the folklore of the UK, as demonstrated only too vividly in the celebrations of the 800th Anniversary of Magna Carta in 2015. A judgment given by Laws LJ in the Divisional Court in 2000 when the matter first arose in challenge brought by Louis Oliver Bancoult, a Chagos Islander, against the actions of the British Goverment, and subsequently affirmed most resoundingly by Sedley LJ in the Court of Appeal in 2007, had upheld this historic right. They had held that government objectives could not lawfully be accomplished by the use of prerogative powers. The Crown has to exercise governance over the Colonies as a Crown function. The interests of these territories are not coterminous with interests of the UK state and its allies. The governance of each colonial territory is in constitutional principle a discrete function of the Crown. However, in 2008 the House of Lords (as it then was) overturned these decisions, only to revisit the question again in judgment delivered in 2016, thus demonstrating the particularly protracted and vexatious nature of the issues which the Government had sought to determine through the ill-judged mechanism of the Royal Prerogative.The Bancoult saga is the longest Supreme court case ever heard. The 2008 decision was not its last. In 2016 the Supreme Court gave a split decision, but which nonetheless still fully acknowledged that its earlier 2008 decision had moved the law forward and that, in the words of Lord Mance giving the majority decision (and who had also given judgment in 2008), the exercise of prerogative powers were "susceptible to judicial review on ordinary principles of legality, rationality and procedural impropriety." Yet, the plight of the Chagos Islanders remained unchanged in 2008 as it did in 2016 – such that further legal challenges remain likely. 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 a 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 to the rule of law. What makes immigration law special is its legality. Due to the exclusive nature of political rights, 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 constrained in the name of (national) public interests. This helps to explain why the fundamental rights of non-citizens (e.g. personal freedom) are often more severely constrained than the corresponding citizens' rights; or why due process guarantees are notoriously weak(er) in immigration law. Moving from this assumption, the paper aims to deal with the following general questions: What are the implication of this "specialty" for the role of courts in immigration law? How do courts (should) deal with the liberal-communitarian dilemma, which stems from the antagonism between "our" collective self-determination as a national community and "their" individual self-determination as human beings? How do domestic constitutional/supreme courts and supranational/international courts understand their respective role as non-majoritarian institutions? How do they manage the conflictual relations between the rule of law and the rule by law that is inherent in this politically asymmetric battlefield?

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

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 scope of non-entré 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? Have 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 law 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 blowback consequences for protection of the progressive legal developments that have taken place in relation to these activities. Might they drive states towards even more extreme non-entré 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.

Participants	Narissa Ramsundar Rosario Aitala Tamar Hostovsky Brandes and Dana Pugach Hendrik Lubbe Enyeribe Oguh Satwant Kaur
Moderator	Dana Pugach and Tamar Hostovsky Brandes
Room	8B-3-19

Narissa Ramsundar: ***Conquering the new frontiers of international criminality- responsibility for international crimes committed by transnational armed groups through transnational judicial and quasi legal cooperation"***

Unlike the atrocities committed during the Second World War, which were largely committed by organs of the State, international crimes committed in the latter half of the twentieth century, for the most part, have been perpetrated by members of non-State armed groups who do not form part of the regular armed forces of a State. Moreover, as in some cases, such as with the Janjaweed and the Islamic State, these groups are transnational in their operation and remain outside the pale of international criminal justice machinery. This paper explores new ideas towards addressing the criminality of these individuals who so far have been able to escape prosecution with impunity, through transnational judicial a cooperation with international peace and security mechanisms afforded under the Charter of the United Nations. This paper examines the undeniable role that non legal and quasi legal protections under international peace and security mechanisms can play in supporting international criminal justice machinery and identifies the ways in which these mechanisms can help create and supervise transnational judicial cooperation with these international peace and security mechanisms so as to stymie the rising tide of impunity for this almost new category of international criminal. In this way, the cross fertilization of different, between legal and non-legal or quasi legal mechanisms can better address some of the challenges facing international criminal justice today with the rise

Rosario Aitala: ***International criminal courts and the pursuit of peace and justice. The case of international terrorism***

By prosecuting and trying international offences international criminal courts deter atrocities being committed and promote peace and global stability. Since most offences of international terrorism that are being committed throughout the world are set to go unpunished and they are posing a serious harm to the international community it should be considered to include these offences as discrete crimes in the jurisdiction of the International Criminal Court (ICC). The paper intends to highlight that the ICC may progressively play a constructive role in the realm of international governance, if attributed political legitimacy by States and guaranteed appropriate cooperation in carrying out investigations and enforcing decisions. The paper argues that it should be considered to include international terrorism as a discrete crime within the jurisdiction of the ICC. At the time when the Rome Conference was held agreement lacked on whether to include terrorism in the court's jurisdiction, also due to the well-known lack of a sufficiently clear definition of terrorism (Trapp, State responsibility for international terrorism 2011). The paper intends to highlight technical legal reasons to demonstrate that the vast majority of terrorism offences being committed throughout the world are set to go unpunished and this could convert in serious harms to peace and international stability and propose a way to enhance the functions of the ICC by including in its jurisdiction terrorism.

Tamar Hostovsky Brandes and Dana Pugach: ***Victim's Rights in Prosecutions for International Crimes in International and Domestic Courts: Should a Universal Law Apply?***

The Rome Statue accords victims the right to take part in the proceedings, the right to be represented, and the right to claim reparations from perpetrators. The ICC prosecutor enjoys wide discretion with regard the conduction of investigations and with regard to prosecutions. While the Statute does not explicitly require the prosecutor to take into consideration specific victims' rights the "interests of the victims" are listed in the Statue as one of the factors to be considered by the Prosecutor when deciding that either launching an investigation or filing a prosecuting would not serve the interest of justice. This article argues that the "interest of victims" should be include the victims' rights recognized by the ICC regime. The article then argues that when the prosecutor determines that victims' rights in a particular case indeed warrant such case to be prosecuted, this recognition should affect the application of the principle of complementarity in that particular case, implying that, should a state wish to prosecute the same case domestically, it would be required to recognize victims' rights parallel to those recognized by the prosecutor as essential for the achievement of justice. The article argues that reading victims' rights into the principle of complementarity should lead to gradual domestic implementation of the ICC's victims' rights regime when crimes encompassed the Statue are prosecuted domestically.

Hendrik Lubbe: ***Regional and domestic responses to the ICC arrest warrants for President Al-Bashir: The ICC's future in (South) Africa***

This paper will critically analyse the judgments of the South African High Court and Appeal Court in which it was found that the government had breached its obligations under the Rome Statute and the Implementation Act by failing to arrest and detain for surrender to the ICC Sudanese President Al-Bashir. The primary issues that will be addressed relate to the existence of provision for 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 from 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.

Enyeribe Oguh: ***'Can regionalisation solve the ICC's legitimacy crisis?'***

The paper will scrutinise the Rome Statute to try to explain some of the current crisis around the 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 denounced in some circles 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 public officials. However, it will be submitted that staunching the looming crisis will require short term amendments to the said provisions and/or judicial audacity in taking up cases involving powerful states. But, in the long term the paper will recommend a restructuring of the ICC whereby regional courts serve as the trial and appellate divisions of the ICC.

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 emphasises 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. It has adapted its 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 falls short. This paper contributes to debates on the International Criminal Court and the role of the Office of the Prosecutor.

Participants	Ranieri Lima-Resende Mary Rogan Sofiya Kartalova Antoine Duval Mu Li Yu-Yin Tu
Moderator	Mary Rogan
Room	8B-3-33

Ranieri Lima-Resende: ***Inter-American Court of Human Rights' Decisions and Transitional Justice: Lack of Implementation the Inter-American System's Project of Reform (1999/2002) and Interinstitutional Dialogue***

Through the analysis of the four main precedents of the Inter-American Court of Human Rights about the legal invalidity of the Amnesty Laws, it is possible to identify the permanent lack of implementation of serious international obligations by the condemned States even after significant period of time. It is mandatory to say that the decisions adopted in the cases Barrios Altos (2001), Almonacid Arellano (2006, Gomes Lund (2010),and Gelman (2011) take a special position for evidencing the serious absence of full effectiveness according to the last Court's resolutions regarding their compliance monitoring. This permanent state of non-compliance generates the necessity for searching for solutions inside the Inter-American System of Protection, including through important dialogues between international and national institutions. In this sense, the Inter-American System's Project of Reform (1999/2002) has shown interesting proposals focused on the creation of an international mechanism of monitoring by the Organization of American States and the establishment of a permanent procedure inside national institutional structures that aimed at implementing the Inter-American decisions by the State itself. In sum, the feasible combination between those two kinds of monitoring scheme can demonstrate the potential capability for improving the fundamental standards of Transitional Justice against impunity in the light of the interinstitutional dialogue.

Mary Rogan: ***Oversight and inspection of prisons: What does European public law require?***

Principles of public law are of special importance and under particular strain in prisons. Inspection and monitoring by external bodies and complaints mechanisms for prisoners play an important role in upholding the rule of law in prison. While the importance of inspection and oversight as mechanisms of upholding rights in prison is clearly recognised by the Council of Europe, the precise requirements for how such mechanisms should operate are not clear. This paper examines the position of the European Court of Human Rights in this area. Drawing on decisions involving the exhaustion of domestic remedies requirement, and the right to an effective remedy, as well as materials from enforcement proceedings and cases from the Court of Justice of the European Union, the paper suggests there are minimum standards emerging for such mechanisms. The paper argues that the European Court of Human Rights in particular should clarify the expectations it has of states to establish inspection and oversight mechanisms, and the form these should take. The paper argues that, in so doing, the Court would have an opportunity to influence local administrative and judicial action which seeks to act as a restraint on the exercise of state power in prisons. Finally, the paper suggests that a clearer statement of expectations from the Court would also provide more guidance to states in the operation of inspection and oversight systems and prompt improved protection of rights in prison.

Sofiya Kartalova: ***The Strategic Value of Ambiguity for the Authority of EU Law in the Dialogue between the European Court of Justice and the National Courts***

The implementation of the authority of EU law through the dialogue between the ECJ and the national courts is conducted under enhanced indeterminacy due to multilingualism and constitutional pluralism. This study offers an unconventional interpretation of ambiguity in the EU legal order as a complement to legal certainty that promotes greater flexibility, efficiency (Piantadosi et. al: 2012), coherence, and acceptability (Paunio: 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: 2015) out of the official translations of these judgments (Bengoetxea 2011) to reveal relevant instances of ambiguity.

Antoine Duval: ***Democratizing the Supreme Court of World Sport: The Court of Arbitration for Sport after Pechstein***

The Court of Arbitration for Sport (CAS), created in 1984, reigns supreme over international sporting disputes. Formally it is an arbitral tribunal seated in Lausanne and subjected to Swiss private international law. Yet, if one goes beyond the formal consensual foundations of the CAS, in social practice its jurisdiction is imposed on athletes or clubs by the Sports Governing Bodies (SGBs) as a pre-condition to participate in their activities. Since the CAS is mostly active as a review instance for decisions taken by the SGBs, its function is in practice similar to a national or international court's role in reviewing the exercise of public power by national or international authorities. This hybrid public/private nature of the CAS raises questions related to its independence from the SGBs. The recent Pechstein case, which played out in front of the German courts, highlighted these 'constitutional' issues connected with the idea of separation of powers. The CAS is the only external body to exercise a systematic judicial check on the SGBs. In light of the lack of democratic basis for the decisions of the SGBs, the need for a strong judicial counter-power is even more pressing. This paper proposes to investigate the capacity of the CAS to embody a counter-power to the SGBs. In particular, it will critically assess the CAS' independence, its judicial practice in reviewing decisions of the SGBs and the publicity of its functioning.

Mu Li: ***Re-examine the scope of security exceptions: The evolving judicial review competence of international adjudicative bodies over security-related national trade-restrictive measures***

For decades security exception provisions in international treaties or agreements have been used as a "sacred" tool when a country want to exempt its unilateral actions from global governance especially judicial review. However, if the power of security exceptions can be taken for granted, such autonomy may become a risk to the world legal order as countries may abuse their sovereign power to impose unnecessary trade barriers far beyond its security need but to protect its national economic superiority. This paper aims to explore whether and to what extent national security trade restrictive measures can subject to judicial review at the international level. The paper chooses to study in all relevant cases and judgments of three major supranational (Quasi-) adjudicative bodies the ICJ, the WTO DSB and the CJEU. By exploring their attitudes on dealing with security-related trade issues, or the interpretation and application of security exception clause, this thesis reveals that during decades of judicial practice, security-related trade issues are not deemed non-justiciable. Moreover, with the growing recognition of international rule of law and the continuous institutional reforms, the rule setting of WTO and the EU has made their adjudicative bodies more capable of accommodating trade restrictive measures with political implications.

Yu-Yin Tu: ***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.

124 CRIMINAL LAW, INTERNATIONAL LAW AND HUMAN RIGHTS

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

Participants	Jakob Holtermann Ryan Liss Francesco Vigano Alain Zysset
Moderator	Vincent Chiao
Room	8B-3-39

Jakob Holtermann: ***Mapping the Modes of ICT-Scepticism : A Taxonomy of the Epistemic Critiques of International Criminal Tribunals***

In this paper I examine the widespread epistemic critique of international criminal tribunals (ICTs) as a legitimacy challenge. This with a view to framing the epistemic critique in the broader context of a general comprehensive taxonomy of legitimacy challenges that can plausibly be raised against ICTs. As a first step in this analysis I distinguish between two distinct but often confused legitimacy questions: First – the axiological question – having to do with whether truth-finding capacity is in fact a reasonable desideratum for an ICT. Is it at all reasonable to expect that ICTs can deliver truth about past atrocious events or should we simply stick to the traditional desiderata discussed in legitimacy debates like deterrence, reconciliation, retribution, peace, etc.? Secondly, there is the epistemological question proper. How good are ICTs in fact at finding the truth/producing reliable knowledge about past events such as genocide, crimes against humanity and war crimes? The first question constitutes a precondition for the meaningful investigation of the second since it is irrelevant to study how virtuous ICTs are as epistemic agents If everyone agrees that truth finding is not a desideratum for ICTs (no one expects ICTs to find a cure for cancer; it is not a reasonable desideratum, and it is for that reason alone irrelevant to examine further whether they are good at it). In this paper by way of introduction I therefore recap what I have shown in greater detail elsewhere: that in spite of widespread claims to the contrary, it is reasonable to expect that ICTs produce roughly accurate historical truths about atrocities. Truth in law is not merely a technical legal notion defined in strictly procedural terms (fair trial/equality 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 undertake a thorough examination and mapping of the various arguments that have gained currency in the attempts to challenge the epistemic competence of ICTs. I approach these different arguments through a loose analogy with Ancient Pyrrhonian Skepticism as a panoply of skeptical modes, i.e. of argumentative techniques ,forms of argument by which skeptics put appearances and thoughts into opposition in order to suspend judgment; to avoid affirming anything. Through a philosophical analysis I examine this panoply of "skeptical modes" focusing on the underlying concepts of truth, knowledge, proof, history, doubt, even of reasonable doubt applied in the epistemic critique. Is it one critique or are there many? If many, are they consistent or do they contradict each other? The aim of this examination is to get a better understanding of and hence, ultimately, a better ability to critically assess the kind of legitimacy challenge that is constituted by the epistemic critique.

Ryan Liss: ***Crime at the Limits of Sovereignty***

The jurisdictional framework governing the prosecution of international crimes is unique. While the prosecution of domestic crimes is ordinarily limited to the courts of a state with a connection to the offence or offender, such connections are not required in the context of international criminal prosecutions. Those accused of international crimes are often tried before the courts of foreign states unconnected to the offence and before international tribunals. This raises the question of whether such a framework is legitimate. I identify three leading justifications in the current literature for this unique jurisdiction to punish international crimes: (1) the "humanity" theory; (2) the "gravity" theory; (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. International crimes are those that challenge the conceptual possibility of an international order organized around a system of sovereign states. Criminal punishment has been justified by some scholars on the basis that state authority is necessary to secure a system of equal freedom within the domestic realm. Similarly, international criminal punishment can be justified on the basis that the existence of a system of states is necessary to secure the equal freedom of persons within each state. Acts that challenge that system can be rightfully be punished by any state or any group of states acting in concert through an international tribunal.

Francesco Vigano: ***The Ambivalent Role of Human Rights in Criminal Law Discourse***

Human rights recognized by international law, as well as or constitutional rights within the domestic legal orders, have been traditionally considered by criminal law scholars and courts as limits to the State's punitive power, aiming at the protection of suspects, defendants or convicts in respect of law enforcement measures, investigations, trials and sentences. In the last decades, however, human rights have increasingly been invoked – in the international criminal law discourse as well as in the jurisprudence of both the ECtHR and the ICHR – as reasons to expand the use of criminal law for the sake of the victims of the crime. The core argument is that the effective protection of the victim's human rights from State agents' or third parties' aggressions necessarily requires the intervention of criminal law. Under this logic, not only shall the aggression against the victim's human rights be criminalized in abstracto, but the punitive powers shall also be exercised in concreto – the investigations, the arrest of the suspect and his trial, as well as the conviction and sentence of the person eventually held liable for the crime becoming thereby the very object of a 'positive' obligation to protect the victim's human rights. This paper aims to critically discuss these developments, which are often accused of perverting the historic logic of human rights, originally thought as tools to protect the individual against the abuse of power by the State.

Alain Zysset: ***Right Crime and Courts: First Steps toward a Unitary Account of International Law***

It is widely acknowledged that human rights law (HRL) and international criminal law (ICL) share core conceptual and normative features. Yet, the literature has not yet reconstructed this underlying basis in a systematic way. In this contribution, I lay down the basis of such an account. Starting with theory, I first identify a similar tension between a "moral" and a "political" approach to articulate the foundations of HRL and ICL and explain where those approaches exactly clash. With a view to bring the debate forward, I then turn to the practices of HRL and ICL and examine which of those approaches best illuminates some salient aspects of the practice of international courts. I then argue that the political approach best unifies HRL and ICL. While preserving a distinct role both either consolidate the basic conditions for the primary subject of international law, namely the state, to legitimately govern its own subjects constructed as free and equal moral agents.

125 BANKING, INVESTMENT AND PROPERTY RIGHTS IN TIME OF CRISIS

Participants	Mario Barata Andres Delgado Casteleiro Yehonatan Givati Jose Gustavo Prieto Munoz Maksim Usynin
Moderator	Mario Barata
Room	8B-3-49

Mario Barata: ***The Investment Court System in the Comprehensive Economic and Trade Agreement (CETA) on Trial: German, Canadian, and European Judicial Hurdles***

Last October, Canada and the European Union (EU) signed the Comprehensive Economic and Trade Agreement (CETA). However, the agreement has generated legal challenges in Canada Germany, and may end up in the Court of Justice of the European Union (CJEU). The Federal German Constitutional Court has expressed in an injunction proceeding, serious doubts as to "whether the EU can lawfully transfer "sovereign rights in relation to 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 filed 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. Consequently, the full entry into force of CETA may be years away in light of the legal challenges that have already been or may be filed in the near future and this presentation seeks to address the concerns that have been expressed against the Investment Court System foreseen in the Agreement.

Andres Delgado Casteleiro: ***The Investment Court System as a public law adjudicator: An analysis from the perspective of its effects under EU law***

The Investment Court System (ICS) envisaged in the new generation of EU Free Trade Agreements and the proposal for a Multilateral Investment Court (MIC) have been heralded as part of a public law turn in International Investment Law aimed at providing safeguards to the State regulatory space. This paper argues that the limited effects that ICS decisions will have under EU law not only further restrict the ICS powers in relation to their encroachment on the State (and the EU's) regulatory powers, but also safeguard the autonomy of the EU legal order. The paper shows that ICS decisions will not be among the rules that can have direct effect or be used to assess the validity of EU law. The ICS creates a complete system of remedies at international level wherein its remedial powers are limited in scope both in terms of which remedies are available and their enforcement at domestic level.

Yehonatan Givati: ***Of Snitched and Riches: IRS and SEC Whistleblower Rewards***

The past decade has seen a dramatic shift in the enforcement of tax and securities laws, from an almost exclusive reliance on designated agents for the detection of violations of these laws to a great reliance on whistleblowers, driven by the desire to obtain a reward. This shift has led to the payment of hundreds of millions of dollars in whistleblower rewards by the IRS and the SEC in recent years. Although legal scholars have devoted much attention to this shift in law enforcement, this literature has failed to explore one central question relating to the use of whistleblower rewards: How much should the IRS and the SEC pay whistleblowers? This Article fills this gap in the literature by developing a new economic model to capture the deterrent effect of whistleblower rewards. Using this model, this Article highlights three major determinants of the minimal deterring whistleblower reward: the gain to the violator from violating the law, the personal cost to the whistleblower, and the likelihood of a successful report. Three counter-intuitive findings emerge from this analysis: first, reports of less severe violations of the law may deserve a greater whistleblower reward; second, different whistleblowers may receive different rewards for providing the same type of information; and third, a greater likelihood of a successful false report may require a greater whistleblower reward. Recently adopted regulations ignore the three above-mentioned factors and should be amended.

Jose Gustavo Prieto Munoz: ***When Constitutional Courts Meet Investment Arbitrators: Construction of Legitimacy in the International Legal Arena***

Investment arbitrators no longer solve disputes, but instead exercise a unique type of public authority in the global legal space. It is true that disputes arising from foreign investments are not new in international law; however, a new type of public authority emerged from within the investment regime itself 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 sociological and moral challenges to their legitimacy. 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, toleration, and resistance. Finally, the third section will develop a specific strategy of legitimation for investment arbitration for further cases.

Maksim Usynin: ***Investor-state arbitration and the evolutionary development of the treatment of investor misconduct***

Critics of investment law allege that its nature and structure are fundamentally biased towards investors and do not provide states and tribunals with effective means to address investors' misconduct. However, arbitral practice shows a line of evolutionary development, moving towards more balanced and proportionate application of the clean hands doctrine, in cases where both parties were observed behaving badly. Different approaches have emerged for the treatment of misconduct. Initially, tribunals concentrated on the legality requirements in IIAs; later this requirement was adopted as implied, in the absence of any treaty guidance. Misconduct at the post-establishment phase has been addressed under the admissibility criterion, rendering such claims inadmissible. Subsequent tribunals allowed states exercising bona fide regulatory rights to mitigate the misconduct, resulting in no treaty breach. Notably, claims for excessive mistreatment survived this threshold, suggesting a more balanced approach than simply dismissing the claim. Recent cases introduced the limitations on damages due to investors' contributory fault and allowed operational counterclaims. The role of tribunals is shifting: while originally they were reluctant to play any role in misconduct cases and dismissed them, now tribunals are increasingly involved. This change poses questions to the suitability of arbitral tribunals in evaluating matters of primarily domestic law and poses risks to tribunals' legitimacy

126 CONTEMPORARY PROBLEMS IN PUBLIC LAW

Participants	Monica Cappelletti and Lucia Scaffardi Anita Blagojevic and Melina Girardi Fachin Jubran Manal Totry Sofia Ranchordas Octaviano Padovese Mayu Terada
Moderator	Monica Cappelletti
Room	8B-3-52

Monica Cappelletti and Lucia Scaffardi: ***"Big Data" in the Courts: legal challenges for the fundamental right to protect personal data***

The recent explosion of the 'big data'ù phenomenon is opening a new phase of reflection on the fundamental right to protect personal data. Since the first theorisation of right to privacy in the US context and the constitutional recognition of this right even in the EU Charter of Fundamental Rights, different Courts (at national, European and international levels) has faced the protection of personal data in order to define legal safeguards and limits to an undetermined exploitation of these data for public or private interests without the consent of the data subject. This framework is recently under reform, since the European Union has just adopted a new common regulation and concurrently the European Court of Justice has set a ground-breaking decision (C-203/15 and C-698/15) lately, as well some Member States are debating on the introduction of different limits to data retention. After a clarification of the term 'big data'ù the paper aims to analyse the most recent decisions of European and national Courts on data protection in order to highlight common trends in delimiting new limits and safeguards to protect personal data.

Anita Blagojevic and Melina Girardi Fachin: ***International legal efforts to fight terrorism: Some constitutional implications***

It is well known that the nature of international legal efforts to fight terrorism has experienced a substantial change after 9/11. With the United Nations Security Council Resolution 1373, and other post-9/11 Security Council\'s resolutions as well, the Security Council has created international anti-terrorism standards that all member states are bound to follow. However, at the same time, states have received a wide range of discretion in the interpretation of the respective resolutions. Not suprisingly, this resulted with some constitutional questions and implications. The aim of this paper is to analyze respective constitutional implications and the starting thesis of our research is that, in general sense, new laws adopted in individual

states in order to comply with the anti-terrorism resolutions, 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 Organizations (hereafter: NGOs) whose central focus is to address spatial inequality and promote a "Spatial Rights Discourse". This discourse is derived from general human rights norms and seeks to insert values such as equality, democracy, community participation, and social and distributive justice into the fiscal planning procedure as well as other legal arenas. I concentrate of Advocacy Organizations who lead top-down policies and who challenge national spatial policies. National and translational NGOs became the watchdog in safeguarding human rights principles and use the legal system to execute their agenda. The courts are crucial players in creating changes in the spatial rights discourse and this presentation explores these changes in depth.

Sofia Ranchordas: *Social Welfare Spies: The Privatization of Public Decisionmaking*

This paper discusses the growing privatization of public law enforcement in the context of social welfare fraud prevention in the United States, Australia, United Kingdom, and the Netherlands. These practices are problematic in both civil law and common law jurisdictions 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 exercised by public bodies. Second, these privatization practices have further eroded traditional public tasks and the pursue of the public interest. Third, the outsourcing of anti-fraud enforcement tasks has been detrimental for due process rights of welfare recipients 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 discusses 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 admissibility of anonymous reports, and the contractual relationship between public bodies and private actors (e.g. "no cure, no pay" contracts).

Octaviano Padovese: *Paul de Man and Constitutional Rhetoric*

In a groundbreaking article, The Rise of World Constitutional Constitutionalism, Bruce Ackerman spares no effort to describe a new global constitutional's era. Jurists should pay more attention for what is going on in constitutional courts around the world in order to try to adequate the constitutional domestic decisions and, as far as possible, they should avoid to stay in the provinces. In this recent turning, which jumped-off in the second half of the last century, Constitutional and International courts are ignoring, now and then, the territorial bounds and grasping new informations and knowledges due to necessity to produce more solid decisions, and perhaps, sedimenting a new understanding on global constitutional order. Although global constitutionalism has flunked out so many times, a new machinery of ideas and terminologies rose up. We could point out that those new theories and methods are more persuasive. Nevertheless, the rhetorical aspect persists to show up over and over. The performative language ferrets out the meaning and texture of the technological language.

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 legislation of permanent law. Although the definition of special law 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 appropriate for the current situation that many special laws are made. In this paper, from looking at the laws concerning the regulation of drones and the establishment 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 and issues of drone restraints in general are examined. The regulation of drones is picked up because it shows one of the interesting situation 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 machine and the numbers of drone usage is increasing. Private companies use them for transporting monitoring surveying 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.

127 CONSTITUTIONALISM AND PLURALISM

Participants	Rehan Abeyratne Eugenie Merieau Marco Bocchi and Tommaso Soave Patricia Jeronimo Cormac Mac Amhlaigh Flavia Piovesan
Moderator	Rehan Abeyratne
Room	8A-4-17

Rehan Abeyratne: *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 negotiations 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 dominionhood, particularly as to Ceylonese sovereignty and the role of the judiciary in Ceylon's constitutional scheme. The constitutional jurisprudence in this period also sees litigants and courts grappling with the meaning of dominion status through comparative analysis. The regular citation to cases from the "settler dominions" of Australia, Canada, and South Africa, shows how the legal elite 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 having "the form of a constitution, but without fully articulated institutions of limited government" (Ginsburg and Simpser 2005). In Thailand, however, institutions of limited government lie at the very core of illiberal constitutionalism. Rather than empowering the executive, post-2007 semi-authoritarian constitutions have disempowered to the widest extent possible the executive and the legislature. Using modern constitutional techniques, they recreated a regime in which elected representatives are hemmed in by appointed bureaucrats in the well-known "bureaucratic polity" (Riggs 1966) or "Deep State" (Merieau 2016). This paper seeks to analyze how in the post-1992 context, post-coup contestation has led constitutional drafters to adopt postpolitical constitutions, under both civilian (1997) and military rule (2007, draft 2015). Elite bureaucrats, civilian and military, have preferred this type of constitution because it gives them the means for advanced bureaucratic cooperation against elected politicians. It therefore makes it possible to retain an illiberal status quo despite a seemingly democratic constitution.

Marco Bocchi and Tommaso Soave: *Judicial Balancing as a Situated Exercise. The Case of "Necessity" in WTO and ECHR Jurisprudence*

Through the proposed paper, we aim to problematize the argument whereby the balancing of competing principles by international courts and tribunals is a sign of the progressive constitutionalization of the international legal order. Instead of engaging in a purely theoretical discussion, we seek to illustrate our point by analyzing the necessity test as performed by the European Court of Human Rights (ECtHR) and the Appellate Body of the World Trade Organization (WTO AB). In particular, the ECtHR routinely adjudicates on whether a State's limitation on the rights enumerated in Articles 8 through 11 of the Convention is 'necessary in a democratic society' to pursue certain countervailing societal values such as health, public morals, or the economic wellbeing of the nation. In the same vein, the WTO AB is often tasked with assessing whether a trade-distortive measure is 'necessary to protect'ù one of the non-trade objectives listed in Article XX of the GATT. Our core idea is that, while both courts engage in a similar judicial exercise, they do so from a situated standpoint, and that this 'situatedness' has a profound impact on the outcomes of the necessity test.

Patricia Jeronimo: *Courts, Cultural Diversity and Legal Pluralism in Europe*

Domestic courts in Europe are increasingly asked to arbitrate legal and cultural conflicts between the law of the state and the norms and practices of minority groups in a growing context of legal pluralism. It is believed that the judiciary is often better suited than the legislator to find reasonable accommodations between the needs of minority groups and other competing interests, on a case-by-case basis. On the other hand, it is acknowledged that there is a need to raise the judges' awareness of potential cultural biases in their approach to minority claims and to improve their sensitivity to diversity through training. This presentation will address some of the many challenges faced by domestic court judges when dealing with cultural diversity and legal pluralism. It will take the case law of Portuguese higher courts as its case study and compare it with trends from other domestic jurisdictions in Europe.

Participants	Michael Pal Fritz Edward Siregar Michael Mohallem Deyana Marcheva and Ekaterina Mihaylova Paul Scherer
Moderator	Michael Pal
Room	8A-4-35

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 interrogate this assumption. Arguing that the issue is necessarily one of degree, it will shows 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. The contemporarily of 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 from the perspective of the integration of International Law of Human rights (here also comprised international Courts rulings) and the constitutional systems and Courts.

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 antiicpate 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 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 that we intend to achieve. In order to create a better election, many actors has been established in Indonesia. Election Commission had been created to organise the election. Election Supervisory Board will supervise and reporting violation of election criminal law in which Election Ethic Council will adjudicate ethical violation of election organiser. Indonesia Constitutional Court has the authority to settle election result dispute and Administration court will adjudicate administration law dispute among the political parties and election organiser. This paper is argue that there is great possibility to simplify the system. Regardless the context and the size of Indonesia as archipelago country, but through merger process, it will able to centralise election criminal violation and the idea to create an Election Court is a possibility.

Michael Mohallem: ***Constitutional design or apex courts? The gatekeepers of international human rights law in South American states***

International lawyers commonly claim that the most effective way of implementing international law is by internalising treaties and allowing domestic courts to enforce them. In line with this view, recent constitutional developments in South America produced remarkable permeability to international human rights law 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 analyse how ten South American apex courts consider 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. I propose to classify states as showing "moderate resistance to IHRL", "incipient openness to IHRL", and "advanced integration of IHRL into domestic law".

Deyana Marcheva and Ekaterina Mihaylova: ***The Lack of Public Law Concept of Authority in Bulgaria (Why Does Bulgarian Judicial System Reform Continues To Fail)***

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 participates in the decisions for 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 Bulgarian justice system in the last 25 years goes hand in hand with corruption practices and political pressure over judges that call into questioning the constitutional principles. We suggest that the very lack of an adequate public law concept of authority in post-communist Bulgarian law has led to systematic deficiencies in both public law and the justice system. The new democratic constitutional framework is insufficient in itself to produce an independent judiciary in Bulgaria without reforming the public law discourse by clearing up the communist legacy and substantiating the concepts of rule of law and law's authority.

Paul Scherer: ***The impact of the German Constitutional Court in the context of civil partnerships***

The impact of the German Constitutional Court in the context of civil partnerships Since the introduction of the legal institution of the registered civil partnership for same-sex couples in 2001 the German Federal Constitutional Court decided several cases in this field of law. Many unequal treatments of (same-sex) registered civil partnerships and marriage were declared unconstitutional. In applying the strict standard of the review in connection with discrimination based on sexual orientation, exclusions of registered 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 legitimize already existing social postulates, or both? In what way is the Court configured in the legal discourse and how does it (re)act in each specific actor field? What is the influence of transnational interactions between courts of different levels? To answer these research questions qualitative social research methods, such as discourse analysis, will be used.

129 ENVIRONMENTAL LAW IN LAW AND POLITICS

Participants	Helga Haflidadottir Fulvia Staiano Rowie Stolk Patricia Galvao Ferreira Anne Dienelt Veronika Tomoszkova
Moderator	Anne Dienelt
Room	8A-4-47

Helga Haflidadottir: ***Climate Change and Judicial Enforcement***

With 2016 having been the hottest year on record the actuality of Climate Change intensifies the need for global action. Simultaneously, the issue of Climate Change highlights the potentials and limitation of international law. This paper is concerned with the power of international law to mitigating climate change. It examines the impact that international judicial enforcement can have on state compliance with environmental obligations. In doing so, the study focuses on the ICJ and its rules on standing. In particular, it analyses the potential for individual states to bring a violation of environmental obligations before the court. The paper will demonstrate that in line with developments in international law environmental obligations can be classified as erga omnes obligations, which provides all States with the right to instigate proceedings before the ICJ. Furthermore based on State compliance with the ICJ judgements the paper suggests that the Court has considerable power to induce compliance with international obligations. However, the court's decisions (this being especially true of provisional measures and other interim orders) have not necessarily induced compliance with international obligations in the past. The paper argues that characterising environmental obligations as erga omnes obligations, however, enhances the likelihood of compliance with judicial enforcement.

Fulvia Staiano: ***The Judicial Construction of the Right to Water in the European Union***

In international and European law, water has been framed in a multiplicity of ways: economic good, common good, environmental resource and human right. However, the most common approach towards this essential element for human life is a mixed one. The majority of supranational and domestic legal sources consider water as both an economic good and an environmental resource, as well as to some extent a right to be guaranteed to everyone in conditions of equality and non-discrimination. While a human right to water appears to be progressively emerging as a norm of customary international law, environmental and economic consideration are also being seen as an essential part of the preservation of water supplies. In the context of the European Union, one of the main pieces of secondary legislation on this matter – the so-called Water Framework Directive (WFD) – adopts an equally mixed notion of water. The WFD states in its Preamble that "water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such". To fulfil the environmental objective of protecting and restoring all bodies of surface water and groundwater, Art. 9 of the WFD requires Member States to take into account the principle of recovery of costs of water services in accordance with the polluter pays principle. National water-pricing policies should then ensure a complete recovery of the costs associated with the extraction and provision of water.

Rowie Stolk: ***Global climate litigation as 21st century public law litigation***

In 2015 a group of Dutch citizens, united in the platform Urgenda, became the first in the world to win a lawsuit, arguing that the climate policy of the Dutch government failed to protect its citizens. The case of Urgenda paved the way for similar legal strategies throughout the world. This form of public law litigation, as Abram Chayes called it in a seminal article in the 1970's, poses considerable challenges to several legal systems that traditionally feature a clear constitutional preference for individual dispute settlement, typified by the absence of a constitutional court, limited judicial review 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 analyzes the role of international environmental law in overcoming some of the obstacles for American courts providing judicial review of executive and legislative 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 a great compromise by the group of developed countries and emerging economies with the largest shares of global greenhouse gas emissions. 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 prodding 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.

Anne Dienelt: ***Human Rights Courts and the Environment***

International human rights law has faced an unique evolution over the past decades, mainly based on the extensive jurisprudence produced by its courts. In this paper, I analyse human rights that protect the environment. I will first show that based on courts' case law the interpretation of some human rights has evolved to protect the environment. Second, despite the differences in legal bases, the courts have referred to each other's case law in this regard, thus demonstrating a dialogue of courts to provide for environmental protection. The starting point for both observations is case law regarding the protection of the environment as such and/or of components of the environment via human rights. While some human rights treaties contain an express human right to the environment, other treaties are silent on the issue. Nevertheless, under the auspices of almost all human rights treaties there exist a protection of the environment or its components. This paper aims at analyzing the various approaches of courts considering environmental protection via human rights. In addition, the dialogue of courts in this context will be assessed as well.

Veronika Tomoszkova: ***Substantive Content of the Individual Right to Healthy Environment***

Recent changes in climate and global environment show that the environmental protection is one of the most important positive obligations of the states. The constitutions can reflect this obligation in two ways – by making environmental protection one of the state 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 fulfil 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 substantive content of the right to healthy environment. This means that individuals do not know, when to complain about the violation of this right, and when they do the courts have difficulties to assess, whether the violation has really occurred. So far, most of the environmental litigation is based on procedural environmental rights or right to environmental information, but not on the substantive part. The goal of this paper is to present the structure

of the substantive right to healthy environment and to discuss possible approaches to defining its content. 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 health property privacy)?

130 CONSTITUTIONAL REVIEW I

Participants	Hannele Isola-Miettinen
	Leopoldo Gama
	Darinka Piqani
	Agnieszka Frąckowiak-Adamska
Moderator	Darinka Piqani
Room	8B-4-03

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 improveing the quality of legislation. The paper answers through the example to this question, the Courts' judicial review is effect and improving the quality.

Darinka Piqani: ***National Constitutional Review of EU Acts: Limits, Dilemmas and Constitutional Dialogue***

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 l

131 CONSTITUTIONAL COURTS I

Participants	Nasia Hadjigeorgiou
	Susana Ruiz-Tarrias
	Renata Deskoska
	Alina Cherviatsova
	Younsik Kim
Moderator	Nasia Hadjigeorgiou
Room	8B-4-09

Agnieszka Frąckowiak-Adamska: ***National Courts as Guardians of the Charter in the EU Area of Freedom Security and Justice? The Obligation to Assess whether other Member States Protect Fundamental Rights***

Recent case law of the Court of Justice of the EU – N.S. opinion 2/13 on the accession of the EU to the ECHR and Căldăraru – shows that the principle of mutual trust, even if of utmost importance for creating the 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.

Nasia Hadjigeorgiou: ***Conflict resolution in transitional societies: Some guidance for the judiciary***

The paper is concerned with a worldwide phenomenon that is particularly prevalent in transitional societies, whereby divisive conflicts that should have been resolved in the political arena, are in fact adjudicated by the judiciary. This tendency is encouraged by the political situation that prevails in transitional societies, the changing perceptions among the judiciary and the adoption of new constitutional documents that, either explicitly or implicitly, push courts to play a more active role in the resolution of political dilemmas. Further, the paper argues that when judges are faced with this task, they tend to exclusively base their reasoning on human rights arguments. While convenient, using human rights as proxies for more complex political arguments can undermine the quality of both the judgment and remedies provided by the court. Thus, when courts adjudicate such conflicts they should rely on constitutional guiding principles. The main advantage of these principles which should be used either instead of human rights or as complementary to them, is that they expressly acknowledge the political and controversial nature of the conflicts at hand, thus result in a more transparent reasoning. Additionally, their more flexible nature makes them applicable to a broader range of conflicts and can result in more appropriate remedies upon their adjudication.

Susana Ruiz-Tarrias: ***The Constitutional Court of Hungary's Position After the Last Constitutional Amendments***

The fall of the Berlin Wall and the collapse of the Iron Curtain, led to the reunification of Europe under the principles of democracy, rule of law and respect for human rights and fundamental freedoms. Proceedings for review of the constitutionality of laws are one of the primary strengthening instruments in support the rule of law and all the countries in Central and Eastern Europe have made provision for a Constitutional Court. In the Constitution of the Republic of Hungary adopted on 20 August 1949 and reformed by Act XXI of 23 October 1989, the central role of the Constitutional Court upholding the constitutionality of laws is a fundamental innovative element of the parliamentary system. Nevertheless, as a result of a

constitutional amendment in November 2010, a serious limitation of the competences of the Constitutional Court was introduced. The curtailment of the Court's powers was confirmed both by Act (CLI of 2011) on the Constitutional Court of Hungary and the new Constitution of Hungary enacted on January 2012. Since then, the Constitution has already been amended in four times. As the Venice Commission states in its Opinion CDL-AD (2013)012, the Fourth Amendment to the Fundamental Law seriously affects the role of the Constitutional Court of Hungary in a number of ways. This paper aims to analyze the constitutional position of the Constitutional Court of Hungary as a result of the latest constitutional amendments.

Renata Deskoska: ***The Constitutional Court And Political Power: Case Study of The Republic Of Macedonia***

The constitutional courts should be guardians of the "constitutional idealism" in contrast to the "pragmatism" of other state authorities and in particular to set limits to the abuses of the bodies representing political power. Defending the constitution from the powerful state branches is not easy task, especially in the "highly politicized" cases. The Constitutional Court of the Republic of Macedonia since 1991 has faced many challenges to limit legislative and executive power. Some compositions of the Constitutional Court showed courage to stand behind the Constitution and to defend it. But the "unpleasant experiences" of the political power with "judicialization of politics" leaded to the efforts for "politicization of the Court". This article will analyze the relations between the political power and the Constitutional courts with special emphasis on the situation in Macedonia. The article will argue that the political crisis in the Republic of Macedonia in the past two years emphasized politicized behavior of the Constitutional Court. The paper will analyze the cases in which the Constitutional Court refused to restrict political power through analysis of the argumentation in the Court's decisions, as well as the political circumstances in the time in which these decisions were issued. Also, the paper will analyze the factors that determine the success or failure of the Macedonian Constitutional court in performing its duties.

Alina Cherviatsova: ***(Un)Constitutional Justice: Case-Study from Ukraine***

Constitutional review can strength and protect democracy, but, at the same time, it presents some democratic risks. These risks are not connected with a danger of 'wrong decisions' (any political institute may be wrong); but rather, with the lack of independence and democratic control. This is the case when constitutional courts are so closely linked to the executive branch that they are unwilling or unable invalidate unconstitutional acts. Ukraine, which does not have a stable democratic tradition, seems to be an example of state with an ineffective constitution and constitutional review threatening democracy. In this context, the paper will analyze the roots and effects of the lack of independence of the Constitutional Court of Ukraine during its short history (from 1996). In order to advance this study the paper will consist of three parts: the first one will give a comprehensive analysis of some contentious decisions of the Constitutional Court of Ukraine, which were based on changeable political interests instead of constitutional principles; the second one will consider relations between the Constitutional Court and executive power focusing on the situations where executive power directly interfered in the sphere of constitutional justice; the last part will address the question of public power in Ukraine by answering the question of how and under what conditions the Constitutional Court of Ukraine could enjoy legitimacy and independence?

Younsik 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 by the legislature. The Constitutional Court of Korea played a pivotal role in managing the political crisis caused by two presidential impeachment cases. In both cases, this additional constitutional judicial review was and will avail in making a 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, this process can allow the people to have the benefit of a reasoned deliberation exactly in according 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.

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 more fragile segments of societies, as it is the case of people with disability, were the most severely hit. These crisis-driven legislation and policies generated high levels of 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 concrete implications through the analysis of the courts' legal reasoning. The paper focuses on the Italian case, as a paradigmatic example of a country dramatically affected by the crisis, where solidarity, equality, fundamental rights and human dignity are explicitly and strongly entrenched in the Constitution, and whose courts, especially the Constitutional Court, have been active in protecting and promoting social rights against austerity legislation. The analysis will be focused on litigation in the field of disability as the limitus test for the CC's attitude as regards the balancing between fundamental rights and fiscal containment.

Sanjay Jain: ***Appointing Persons with disability as Judges: critique of Abelist Judicial approaches in India***

Although India has signed and ratified UNCRPD as soon as it is adopted by United Nations, courts have not made any considerable progress in recognizing and enforcing right to access to justice of Persons with disability (PWDs) . This right is multidimensional, however, in this paper, Author would critique judicial approaches in respect of appointment of PWDs as judges from the lens of Abelism. He would demonstrate that Court is not open to diversified judiciary and instead of emphasizing on enabling environment to the PWDs to work efficiently as 'judges', it has constantly focused on the limitations of impairment in judging. Author would conclude that such an approach apart from being Anti-UNCRPD is overly influenced by Medical model of Disability thereby seriously deviating from International human rights standards of right to access to justice of PWDS.

Delia Ferri: ***The Italian Constitutional Court and the UN Convention on the Rights of Persons with Disabilities: Approach with Caution***

Italy was among the first countries to sign the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2007, and ratified it by Law 18/2009. So far, the Convention has displayed significant influence on case law. This paper focuses on how and to what extent the Italian Constitutional Court (ICC) has "used" the Convention to advance the protection of the rights of persons with disabilities. It identifies two main (somewhat contradictory) patterns within the ICC decisions. On the one hand, the ICC has appeared quite reluctant in granting the CRPD a groundbreaking value. It has affirmed that the CRPD is programmatic in nature and indicates goals to be achieved by State parties, while leaving to them the task to identify concrete ways to implement these objectives. On the other hand, the ICC has used the CRPD to substantially advance the protection of rights of people with disabilities, in particular the right to education. The CRPD has been cited a fortiori to support the view that a formal recognition of a right is not sufficient, if the right is not guaranteed in practice. The ICC has also clearly affirmed that the lack of financial resources cannot justify undermining the very essence of rights of disable people. All in all, the paper argues that the approach of the ICC has been progressive in terms of promoting the rights of persons with disabilities, but cautious with regards to the value of the CRPD in the Italian legal system.

Janine Silga: ***Emerging Similarities in the Recent Cases of the European Court of Justice and the European Court of Human Rights on the Right to Family Reunification: Convergence or Coincidence?***

In the EU, the right to family reunification stems from the right to family life as set out in article 7 of the Charter of Fundamental Rights, which itself restates article 8 of the ECHR. Besides this overarching human rights framework, the actual access to family reunification for Third-Country Nationals falls under different legal regimes depending on their level of "proximity" with EU law. While the common regime is provided by Directive 2003/86/EC, important exceptions exist. The most notable regard family members of EU citizens and the preferential treatment stemming from international agreements. Beyond the EU legal order stricto sensu, the European Court of Human Rights ultimately protects family life in accordance with article 8 of the ECHR. The coexistence of these different legal regimes reveals a fragmentation of the right to family reunification in the EU. However, the recent caselaw

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.

133 INTELLECTUAL FOUNDATIONS OF INTERNATIONAL ORGANIZATIONS LAW

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 réservé. This integration-friendly theory collided with critical approaches to the idea of a world organization and international institutions in general, such as the one developed by Carl Schmitt.

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*

134 THEORIES OF DISCRIMINATION

This panel looks at four forms of discrimination recognized by courts – disrespect for persons, indirect discrimination, pregnancy discrimination, and affirmative action – to engage the philosophical accounts of the conceptual features of discrimination and what makes discrimination wrong. Papers will also reflect on how theories of discrimination have been shaped transformed by courts' attempts to design enforcement frameworks compatible with the evolving demands of equality in a democratic polity.

Participants	Kasper Lippert-Rasmussen
	Tarunabh Khaitan
	Julie Suk
	Reva Siegel
Moderator	Ruth Rubio Marin
Room	8B-4-43

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

particular – that underpin indirect discrimination. In section II, we will provide a conceptual restatement of British indirect discrimination law and identify the general and particular dimensions of this liability. This section will outline how the particular duty in indirect discrimination diverges from traditional causation-demanding private law liability for the tort of negligence and how these divergences are justified given social realities and the general/distributive dimension of indirect discrimination liability. Section III will show that despite the indirect discrimination liability being technically strict it is to some degree avoidable and at any rate not unfair.

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 Pregancy 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 business 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. 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.

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 gap. We cover Hong Kong, Japan, and Taiwan. These papers offer general introductions to the constitutional status of the idea of human dignity and how it functions in constitutional jurisprudence of these jurisdictions. Specifically, we ask the following questions: 1) What is the legal and constitutional status of human dignity? Is it found in the constitutional text? If it is a legal concept transplanted from other jurisdictions, where is it transplanted from? 2) Is it used as a constitutional right, or only as a constitutional value that ground other rights? 3) If it is a right, is it absolutely protected, as in German Basic Law, or is it relative and subject to balancing? 4) What are its relations with other constitutional rights? 5) What are the important judicial decisions that features human dignity? What issues do they involve? The conference theme is "Courts, Power & Public Law". Understanding the workings of human dignity is an indispensable part of understanding judicial power. By investigating the constitutional roles and functions of human dignity in this region, this panel helps to understanding how judicial power function in East Asia.

Participants	Kelley Loper Keigo Obayashi Jimmy Chai-Shin Hsu
Moderator	Albert H.Y. Chen
Room	8B-4-49

Kelley Loper: ***The Concept of Dignity as a Constitutional Value in Hong Kong***

This paper considers the development of "dignity" as a constitutional value in Hong Kong, a special administrative region of the People's Republic of China that has maintained a separate legal system since its reversion to Chinese sovereignty in 1997. Although the term "dignity" does not appear anywhere in Hong Kong's constitutional document, the Basic Law, the courts have referred to and highlighted the concept's significance when interpreting a number of constitutional rights. Article 39 of the Basic Law guarantees the continued application and implementation of core international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The Hong Kong Bill of Rights Ordinance – domestic legislation duplicating most of the text of the ICCPR – has achieved constitutional status. Although Hong Kong is a dualist, common law system, these provisions have established a direct link between domestic law and international human rights law. This has allowed the courts to 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 explicitly articulated rights. This paper will examine how the courts have understood the meaning of dignity in cases involving the right to equality and non-discrimination (especially on the grounds of sexual orientation gender identity and disability), the right to work and other socio-economic rights, the rights of prisoners, and the rights of people who fear torture or other forms of serious human rights violations if returned to their countries of origin. Examining the development of the notion of dignity in Hong Kong constitutional jurisprudence provides a helpful comparative study. It sheds light on the potential impact of international human rights law – and the principle of dignity in particular – on the interpretation of constitutional rights.

Keigo Obayashi: ***Human Dignity in Japanese Constitutional Cases: The Hybrid Approach as "Individual Dignity"***

This paper concerns human dignity in Japan. Particularly, it examines how does judiciary consider human dignity in constitutional cases. Although the Constitution of Japan doesn't mention "human dignity", the courts sometimes refer to "individual dignity" which resembles to "human dignity". I think it as hybrid approach with considering both individual autonomy and intrinsic humanity. I will explore the meaning of the approach through outlining the constitutional case. There are two provisions which relate to human dignity in Japanese Constitution. The one is article 13 that protects individual life, liberty and the pursuit of happiness. Article 13 provides "All of the people shall be respected as individuals". The other is article 24 that protects right to marriage. Article 24 provides (marriage) "laws shall be enacted from the standpoint of individual dignity and the essential 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 discriminate inheritance against 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

child as individual with considering recent various situations. In this case the Court considers that the child can't choose the position of legitimate or illegitimate. It is important that the decision weighs both child's autonomy and human intrinsic of child. The other case is about married couple with the same family name (Fufubessei case). The article 750 of civil law provides "A husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage". Some women think it as unconstitutional because it compels many married couples to choose husband's family name. In fact, married couples of about 90% choose husband's family name. The plaintiffs sued the government as it against constitutional right not to compel the family name, right to marriage and equal protection. In 2015 the Supreme Court held that it was constitutional because it didn't violate personal right under article 13 and equal protection under article 14. However, when the Court judged the constitutionality about marriage system, it considered reasonableness in accordance with individual dignity and the essential equality of the sexes under article 24. The Court held that the system was reasonable because it didn't compel women to use husband's family name, while it might inflict slight disadvantage. This case was considered individual dignity because it examined individual choice about family name and discrimination based on the position of woman. There are other inferior court cases about individual dignity. For example, the first privacy case referred to individual dignity (Utagenoato case). In 1964 Tokyo district court approved right to privacy deduced from individual dignity which needed to respect each personal right and protect from improper invasion. The compensation case for the vaccine also referred to individual dignity (Vaccine case). In 1984, Tokyo district court held that the governmental decision not to compensate for the victims who were inflicted damage caused by vaccine was against constitutional principle which derived from individual dignity. There are some cases with relation to individual dignity without referring to "individual dignity" directly. For example, the euthanasia case in 1995 – physician assisted suicide case – concerns like human dignity (Tokai University Hospital case). When the Yokohama district court approved the euthanasia under certain conditions, the court indicated that it derived from self determination to stop medical treatment and to receive natural death with keeping human dignity. There are two approach about human dignity in the world. They are individual autonomy and intrinsic humanity. The former relates to self determination and the latter relates to moral right (duty). Although the Supreme Court of the United States tend to refer to the former, western countries courts toward to use the latter. The Japanese courts takes the third approach; hybrid approach. It weighs individual determination and moral right. Although the courts usually think individual dignity as the context of individual autonomy, it has potential to consider moral duty as the public interest. I survey individual dignity in constitutional cases in Japan and the meaning of hybrid approach. First, I confirm the constitutional text about individual dignity and examine the meaning. Second, I survey the constitutional cases which referred to human dignity. Then I consider the meaning of hybrid approach.

Jimmy Chai-Shin Hsu: *Human Dignity in Taiwan's Constitutional Jurisprudence*

The important role played by the Constitutional Court in Taiwan's democratization is widely acknowledged. Less documented is the rise to prominence of the idea of human dignity in Taiwan's constitutional jurisprudence. The concept of human dignity is not contained in the constitutional text. Still under the influence of German constitutional law and international human rights discourse this concept made its first entry into Taiwan Constitutional Court decision in the mid-90s. In the following decade its presence quickly proliferated in the Court's decisions. It has been recognized as a central constitutional value. There are mainly two functions of the Court's use of this concept. The first is to buttress the enumerated rights by adding weight to the infringed right in proportionality analysis. The Court has used it to strengthen protection of freedom of expression right to subsistence right to property and right of equality. The second is to use it as a foundation for un-enumerated rights such as right to privacy right to reputation and right of personality. These rights are deemed "closely related" to human dignity and hence enjoy the status of fundamental rights. Still another less-developed function is to treat human dignity as a constitutional inviolable right subject to no balancing. In an Interpretation involving freedom of thoughts the Court declared unconstitutional a statutory remnant from the authoritarian era which prescribed forced labor and "thought reeducation" of "communist spy". This paper analyzes how the Court understands the concept of human dignity and how the Court uses it to establish an increasingly intricate right analysis structure.

FRIDAY 7 JULY 2017 09:00 – 10:30

PANEL SESSION 5

136 COURTS & WEAK V STRONG JUDICIAL REVIEW

Constitutional scholars around the world now analyse systems of judicial review as more or less 'strong' or 'weak' in nature. The distinction, however, is clearly one of degree, and the actual strength of judicial review in various contexts depends on a range of contextual factors including the approach of constitutional courts. This panel will examine these questions about the classification of different models of judicial review as more or less strong or weak in nature, as well as the role of different judicial remedies – including the 'strike down' power, and delayed or suspended declarations of invalidity – in creating stronger versus weaker forms of review.

Participants	Stephen Gardbaum Aileen Kavanagh Rosalind Dixon
Moderator	Mark Tushnet
Room	4B-2-22

Stephen Gardbaum: *What makes for stronger and weaker constitutional courts?*

The distinction between "weak-form" and "strong-form" judicial review turns on whether or not legislatures are empowered to respond to particular constitutional court decisions by ordinary majority. This single-factor constitutional design issue does not purport to take into account the many other ways in which courts might more generally be thought of as strong or weak in an all-things-considered or Gestalt sense. This different and broader topic is the basis for a conception of judicial supremacy commonly employed by political scientists, albeit often to reject such a claim: courts are the most powerful branch of government on constitutional issues and are able to impose their will on other recalcitrant political actors and institutions. In attempting to address this broader question, this paper argues that the relative political power or overall "strength" or "weakness" of a given constitutional court is a function or mix of (1) legal powers, (2) institutional practices and culture, and (3) political context and contingency. In addition to raising and discussing these various factors, the paper illustrates their impact through a comparison of the Indian and Japanese supreme courts, among others.

Aileen Kavanagh: *Situating the Strike-Down Power*

The idea that constitutional judicial review is epitomised by the judicial power to strike down legislation is a common assumption underpinning both the theoretical and comparative law scholarship on rights review. Thus, leading theorists pose the question about the legitimacy of judicial review in terms of whether it is justified for unelected courts to strike down democratically enacted legislation. By the same token, influential comparative law taxonomies classify constitutional systems as 'strong-form' or 'weak-form', largely on the basis of whether courts have 'normative finality' on questions of rights and, in particula, 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 annihilating the will of the legislature, in fact the legislature often has considerable leeway on how to remedy rights-violations in future legislation. This contextual study of the strike-down has two significant implications. The first is that it complicates and challenges the tendency within the theoretical and comparative law scholarship to rivet on the strike-down as a key marker of 'strong-form review'. Second, it suggests that many accounts of constitutional review overstate the significance of the strike-down, whilst overlooking other crucial facets of the judicial power to review legislation for compliance with rights.

Rosalind Dixon: *Responsive Judicial Remedies*

A major focus of comparative constitutional scholars in recent years has been the development of a distinctly 'weakened' model of judicial review, according to which legislatures enjoy formal authority to override court decisions simply by way of ordinary majority vote. The aim of this model is also to address 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 effectiveness of judicial review. A key function of weak judicial review is the ability of courts to overcome blindspots and burdens of inertia in the legislative process: such a role does not depend on court decisions having any truly final status, and it yet responds to widespread blockages in modern legislative processes. For courts to play this role effectively, however, they will often need to have quite broad and strong powers ex ante- ie powers that allow them to overcome legislative inertia by disrupting an existing legal equilibrium. This paper explores this issue through a focus on judicial remedies. It considers both formally weak declaratory remedies, such as those in the HK, and de facto weakened remedies, such as delayed or suspended declarations of invalidity, and their track-record in countering various political blockages. It also suggests ways in which courts could adopt a more intermediate – or weak-strong – approach to constitutional remedies, which splits the difference between concerns about judicial legitimacy and effectiveness. The article makes these arguments by reference to case studies of LGBT rights in Colombia, Hong Kong, India, South Africa, the UK, New Zealand, and Australia.

137 REFERENDA, DEMOCRACY AND CONSTITUTIONAL LITIGATION: AVOIDING THE NEXT BREXIT THROUGH COURTS?

Last year has seen more than its share of constitutional referenda, or referenda with broad constitutional implications, preceded by public debates and arguments of disputable quality. Each legal system has its own discipline aimed at ensuring that these crucial procedures are fully compatible with the democratic principle: parliaments have a role in this, and courts may as well including supreme and constitutional courts; moreover, the relevant issues may find their way to the judiciary, even when there is no specific legal or constitutional provision to that effect. [...] In Italy, the constitutional referendum of 4.12.2016 has been accompanied by a fierce litigation on the wording of the electoral question and the heterogeneity of its object. Which quality requirements does democracy demand for the decision-making process through popular consultations? How should their outcomes and effects be legally weighed? Should some issues be exempt from such consultations? Are courts the right forum for discussing and answering these issues?

Participants	Michele Massa Justin Orlando Frosini Kriszta Kovács Maya Hertig Randall Sergio Gerotto Tomás de la Quadra-Salcedo Janini
Moderator	Sabino Cassese and Carlo Fusaro
Room	4B-2-34

Michele Massa: *Juridical Controversies on Constitutional Referenda: The Italian case of 2016*

See general description

Justin Orlando Frosini: *Parliamentary Sovereignty and Referendums: An Indigestible Cocktail? The Case of United Kingdom and Brexit*

See general description

Kriszta Kovács: *International Standards for National Referendums: The Hungarian case*

Both democratic elections and referendums are expressions of the sovereignty of the people. Election principles are enshrined in international human rights documents and international election observations are regularly conducted to ensure that the basic principles are fulfilled. Although the effects of a referendum might be as critical as the effects of a general election, there are no internationally recognised legal standards and mechanisms concerning national referendums. Recently, the use of referendums has

become increasingly common in Europe. Apparently the referendum is there for ensuring the participatory rights of the citizens. But in practice referendum not always serves democratic purposes, they are very often manipulative and populist. The 2016 Hungarian Referendum on rejection of asylum-seekers might be an example. In September 2015 an EU Council Decision 2015/1601 was adopted on the temporary relocation scheme for the distribution of asylum-seekers. This EU Council Decision was challenged by the Hungarian State before the CJEU. Soon afterwards, the European Commission opened an infringement procedure against Hungary concerning its asylum legislation. In response to that, the Hungarian Government called for a referendum that allowed the electorate to vote on the following question: "Do you want the European Union without the consent of Parliament to order the compulsory settlement of non-Hungarian citizens in Hungary?" Notwithstanding the constitutional concerns, the referendum was approved by the National Election Committee, the Supreme Court, and the Constitutional Court. The 2016 referendum has already had wide-ranging implications. The presentation addresses the following questions: Does international soft law, e.g. the Venice Commission's Code of Good Practice on Referendums, provide a sufficient legal basis for evaluating national referendums? How international guidelines might become standards of holding national referendums? Can domestic courts apply the newly emerged international standards or a novel international institutional mechanism is required?

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

Sergio Gerotto: ***Direct Democracy and Liberalism: Can illiberal elements be introduced via referendum?***

See general description

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

See general description

138 THE ROLE OF THE CJEU IN ARTICULATING SOCIAL JUSTICE

This panel tackles the different ways in which the Court of Justice of the European Union (CJEU) contributes towards the articulation of social justice in the EU. These range from the definition of what justice is, to the way these ideals of justice are applied (be it through private law public policies or the creation of new collective remedies at the national level). In addition, the panel looks into the institutional question of whether it should be the CJEU's responsibility to constitute justice within the EU. The panel is particularly relevant in times of economic struggles, rising equalities, and increasing concerns about the EU deciding on the redistribution of wealth and welfare.

Participants	Leticia Díez Sánchez Betül Kas Martijn van den Brink Irina Domurath
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. It argues that (a) the case law of the Court can be seen as a manifestation of the social conflicts at the core of EU law, and that (b) the manner in which the Court resolves such conflicts can be seen as an expression of different theories of distributive justice. The social conflicts generated by EU law – First, this paper unveils the redistributive nature of EU law from the very origins of the European project. Policies with a specifically redistributive aim (CAP Cohesion Policy) as well as internal market provisions generate clear winners and losers. The resulting cleavages are much richer than often assumed confronting not only Member States but also collectives like consumers taxpayers farmers or regions. The Court as a forum to challenge distributive schemes – Litigation is an instrument for policy change. The case law of the Court is not only a place where abstract legal concepts are elucidated, but also one where social groups fight for that they consider their due. These struggles, the 'demand side' of judicial decisions, help us better understand the development of EU law. 'Integration through law' aimed at unity, but it was born from social conflict. Case law as distributive justice – The third aim of this paper is to offer an alternative analysis of the impact of the Court's case law. Instead of focusing on the position of the Member State or the European citizen vis-á-vis European integration, it analyses what particular countries and social groups have been benefitted by the judicial interpretation of EU law. Since distribution is, in the end, a matter of value-choices, it is defended that the case law of the Court can be associated to different theories of distributive justice.

Betül Kas: ***The role of judge-made collective remedies for the enforcement of European social regulation***

The paper will demonstrate the role of collective remedies developed by the interaction between the European and the national level, particularly the national courts and the CJEU in the framework of the preliminary reference procedure, in order to enforce European socially-oriented regulation for the building of a more balanced European legal order, which is able to gradually counter its perceived internal market bias. Collective remedies are understood not in purely procedural or substantive terms, but as constituting a hybrid of procedural and substantive elements. The collective remedies examined in the paper stem from the fields of environmental law particularly air quality regulation, anti-discrimination law, particularly race equality regulation, and consumer law, particularly unfair terms regulation. In that regard, the shift from political discourse and legal regulation at national level to legal re-regulation at EU level will be illustrated. The EU is following its own objectives and logic in the three legal field, the internal market logic, which is distinct but complementary to the national ambitions. Although the CJEU is perceived as counterbalancing the EU internal market bias by relying increasingly on constitutional values and EU citizenship to further protection, the status-based notion of individual rights does not take into account the collective dimension of social conflicts. It will be argued that instead, national collective remedies, which aim to protect vulnerable societal interests, have the potential to gradually develop the European legal order from an internal market-driven legal order into a legal order with a social outlook. However, the substance of such a European legal order will not 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 that judge-made European legal order built via the preliminary reference procedure could 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.

Martijn van den Brink: ***EU Law and Justice: The Institutional Elephant in the Room***

EU lawyers are increasingly turning their focus to the ideals of justice. In recent years, several books have been published, exploring the EU from this perspective and arguing which political ends it should pursue. These studies are valuable and introduce an approach in EU legal scholarship that was long overdue. Yet, they all ignore or try to circumvent at least one essential question: by which institutions and processes of decision-making do we want to constitute justice among Member States and its citizens? This paper addresses this question drawing on the work of Waldron, Christiano, and Bellamy. The paper proceeds in three stages. In the first part, I explain that what Waldron coined the 'circumstances of politics' also affects EU governance. We need to agree on a common set of rules within the EU, but there is reasonable disagreement about which principles of justice the EU must implement and the conception of rights its policies must embody. Recent discussions of justice within the EU do not sufficiently acknowledge our conflicts and disagreements about justice. Problematically, the fact of disagreement is either circumvented or dismissed based on the assumption that we can converge around a shared understanding of what justice entails. Once we acknowledge that our visions are incommensurable, the need for collective decision-making procedures that allow us to resolve our debates and decide on a common course of action becomes evident. Part 2 focuses on the implication, which is that we need to complement our accounts of justice with a theory of legitimate decision-making. In other words, we must decide on which institution we want to establish justice within the EU. For this, we need an account of legitimate decision-making that does not depend on the substantive results we want to achieve. Part 3 returns to recent contributions to the debate on justice within the EU to highlight that they ignore the elephant in the room. Scholars tend to conflate their account of justice with an account of legitimate institutions and, implicitly or explicitly, favour the European Court of Justice (ECJ) as the institution responsible for establishing justice among the Member States and its citizens even if that means ignoring or overriding the authority of the EU legislature. I will question the assumption in favour of judicial decision-making and argue that it risks undermining the legitimacy of EU law. The literature of justice in the EU cannot remain silent on this institutional question.

Irina Domurath: ***The Social Function of Contract Law Before the CJEU***

The article analyses the role of contract law and adjudication embedded in a larger regulatory environment. Specifically it elicits the social function of contract law to provide welfare to individuals in the political economy of the credit-welfare trade-off. The field under study is mortgage law. First, it is described how contract law is taking on a social function through the retreat of the welfare state and the expansion of the marketization of public policies, such as access to housing. In order to enable consumers to participate in this 'market for personal welfare' in the field of housing access to mortgage credit is significantly eased (credit-welfare trade-off). Second, the article sheds light on the role of the CJEU in the adjudication of cases in which consumers were not able to

service their debt burdens any longer. It is shown how the CJEU uses the control of unfair contractual provisions to give guidance to the national courts and to formulate own rules for balanced contractual provisions. It highlights the role of the CJEU to act as the final arbitrator to remedy social deficiencies 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.

139 THE ECTHR'S CHANGING REMEDIAL PRACTICE – IMPLICATIONS FOR LEGITIMACY AND EFFECTIVENESS

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 a respondent State. In 2004, the ECtHR introduced the pilot judgment procedure, which sought to direct States in rectifying structural sources of human rights violations. Since then, the ECtHR has issued dozens of pilot judgments, and also started indicating general measures to be taken by States in the ordinary (non-pilot) cases. Although these shifts in the ECtHR's remedial practice have been analysed in the existing scholarship, their broader consequences, inter alia in terms of effectiveness and legitimacy of the ECtHR, still remain under-researched. In order to shed more light on these issues, this panel takes a closer look at the consequences of the ECtHR's changing remedial practice for the effectiveness and legitimacy of the ECtHR and of the entire ECHR system. The panel provides for an interdisciplinary dialogue and methodological diversity as it encompasses both theoretical and empirical papers authored by lawyers and political scientists.

Participants	Jan Petrov Øyvind Stiansen Jannika Jahn Anne-Katrin Speck Nino Tsereteli
Moderator	Andreas Føllesdal
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 ECtHR's ruling. I concentrate on particular features of the Strasbourg Court judgments and conceptualize how they can affect the course length and outcome of domestic implementation mechanism. More specifically I discuss the clarity, persuasiveness and the level of minimalism/maximalism of the ECtHR's reasoning, and the remedial strategy employed in a given case by the Strasbourg Court. A combination of these features implies the level of constraints imposed on the State party by the Strasbourg Court and sets the starting point for the domestic implementation mechanisms.

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

Øyvind Stiansen: ***Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments***

International and domestic courts that rule against state authorities face implementation problems. An important question is whether courts can design rulings in ways that facilitate timely compliance. This paper analyzes recent attempts by the European Court of Human Rights (ECtHR) to influence implementation by engaging more directly with expectations about implementation in its judgments. On the one hand, this strategy has the benefit of increasing the transparency of the implementation process and in this way increase the reputational costs of prolonged non-compliance. On the other hand, judicialization of the implementation process reduces the flexibility of the responding state in identifying efficient remedies that are acceptable to domestic veto-players. To assess empirically how the ECtHR's remedial approach influences compliance with its rulings, I use matching to adjust for differences on observable country- and judgment-level indicators of the compliance environment. Cox regression models estimated on the matched data suggest that indications of measures aimed towards remedying the situation of individual applicants have contributed to quicker compliance with the judgments where they have been offered. However, indications of broader policy changes have not been consequential for implementation.

Jannika Jahn: ***Playing the Two-Level Game Effectively: Enforcing Domestic Execution of European Court of Human Rights Judgments with Specific Individual Measures***

The ECtHR has developed new remedial powers that considerably change the architecture of the European Convention on Human Rights (ECHR) system regarding the implementation of the Court's judgments. While attention focused on the introduction of general measures since Broniowski v. Poland, it has nearly gone unnoticed that the Court developed further remedial powers: specific individual measures. In Volkov v. Ukraine (2013), the ECtHR for the first time ordered the respondent state to reinstate a dismissed Supreme Court judge at the earliest possible date in the operative part of its judgment, because the Ukrainian judicial disciplinary system suffered from such systemic deficiencies that the Court saw no other means to redeem the violation in fair trial terms. This case is the result of an incremental change in the Court's interpretation of Art. 46 ECHR since 2004 by which it has substantially reduced the Convention states' executory discretion. This development will be analyzed with reference to the Court's case law. Despite current setbacks by certain Convention states' unwillingness to follow the Court's individual measures (cf. Volkov and Salov), I suggest that the Court has embarked on the right path and managed to tread a fine line between judicial activism and restraint, whereby it also manages to 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-á-vis state power by enhancing the effectiveness and the efficiency of the domestic execution of its judgments. Concerns of democratic legitimacy are weakened by the fact that the Court has used stricter measures, not in opposition to domestic institutions, but instead to strengthen and reinforce their functioning, especially that of courts (e.g. in Volkov). Overall, the development should be seen within the wider context of the Court's endeavour 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 of 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.

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 of interdependence between domestic and supranational 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, 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 implementation of pilot 'quasi-pilot' and other ECtHR judgments requiring complex general measures concerned with inter alia the system of internment of high-risk individuals (Belgium), racial segregation in schools (Czech Republic), and compensation for Soviet-era repression (Georgia). It will discuss how the specificity of the remedies indicated impacted on the response to these judgments and notably on the process of supervision of their implementation. In so doing, focus will be set on the implications of the adoption, by the ECtHR, of a more directive approach to remedies for the interplay between the ECtHR, the Committee of Ministers, the Department for the Execution of Judgments, and national jurisdictions – and whether such an approach creates potential for mutual reinforcement or the risk of duplication of efforts and conflicting directions.

Nino Tsereteli: ***Evolution of Remedial Powers and Legitimacy Management by the ECtHR***

I apply the insights from organizational theory and social psychology to explain the evolution of remedial powers of the ECtHR and more specifically, its involvement in matters of implementation through indication of general measures. This development might have been necessary to reduce the backlog of repetitive applications resulting from the failure of states to solve systemic and structural problems. However, it exposed the ECtHR to the risk of backlash and loss of legitimacy in the eyes of its audiences – governments as well as actual and potential applicants. It is not surprising that in order to minimize resistance, the ECtHR developed its approach carefully. It engaged in what I label as legitimacy management. It means that the ECtHR sought to secure legitimacy through communication with its various audiences, 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 maintain or repair legitimacy. This can be discerned from the language used in the judgments as well as overall dynamic of evolution (namely, speed of development, timing and case selection both as regards selection of states and of issues). The types of legitimacy (legal, jurisdictional, procedural, consequential, etc) sought by the ECtHR also vary, inter alia, depending on the preferences of audiences, as anticipated by the ECtHR or expressly voiced by them.

140 EUROPEAN AND NATIONAL COURTS IN THE PROMOTION OF EU POLICIES: JUDICIAL REVIEW AND ITS SHORTCOMINGS

The aim of the panel is to explore the increasingly central role that courts play in the promotion of policies set by the European Union and, at the same time, to discuss the shortcomings and weaknesses that judicial intervention has nonetheless shown in some instances. European courts have proved to be crucial in ensuring not only the implementation of EU policies but also in expanding the scope of such policies and promote them even beyond the original objectives. This pivotal role has entailed the recognition of individual and collective rights, as well as of corresponding duties on national public administrations and private businesses. In several cases, however, this policy-promoting role of European courts is jeopardized when it comes to the implementation of EU legislation by national courts and administrations or when the implementation finds procedural obstacles at the national level. In order to explore the policy-promoting role of courts and the connected shortcomings, the panel choses a multi-sectoral approach which mirrors the variety of EU policies and objectives: democracy and the rule of law, human rights promotion, environmental protection, banking supervision. It also provides a view on the powers of EU institutions to pursue these policies.

Participants	Valentina Volpe Kostantin Peci Elisabetta Morlino Giulia Bertezzolo Maurizia De Bellis
Moderator	Elisabetta Morlino
Room	7C-2-14

Valentina Volpe: ***Judging Democracy The Role of European Courts in Protecting the Independence of the Hungarian Judiciary***

Is it possible for European Courts to play a role in case of systemic violations of the rule of law at the state level? How and by what means may the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) intervene in the event of domestic democratic backlashes? What is the impact of international adjudication on national illiberal developments? Over the past years, both the ECJ and the ECtHR have decided on cases related to the independence of the judiciary in Hungary. The paper investigates the transformative potential and the limits of "judging democracy" in the Hungarian experience. In the first part, the paper analyses the ECJ case C-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, forcing the country to take a step back and withdraw 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 Andrés Baka. Through such reforms the country violated both the right of access to a court (Art. 6.1 ECHR) and the freedom of expression (Art. 10 ECHR) of the applicant, who vocally criticized the government when he held the highest position in the judiciary. In investigating individual human rights violations, the ECtHR strengthens its judicial role and the process of 'constitutionalization' of the European Convention on Human Rights ,tying 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 state level. It suggests that a multi-level Pan-European system of dialogue and reaction, although imperfect and yet unformalized, is emerging on the continent. Multiple actors (domestic and European courts, regional organizations, civil society, the Venice Commission) increasingly have a voice 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. Accountability of corporations for violations of human rights questions the paradigm that judicial protection should be given to individuals only against violations of those rights by the State. The rationale behind this paradigm is a double-sided one: the State is the only accountable entity for use of force and (hence) the State has, also, the obligation to protect its citizens against the use of force by other entities. However, there is a constantly growing awareness that corporations rank among those entities that, at least, influence, if not contend the exercise of power and authority by the State. There are different ways in which the issue of corporation accountability for violation of human rights could be faced. From a decisional perspective, the violation of human rights could be the result of an autonomous decision of the corporation, or the corporate action that has violated human rights could have been imposed or influenced by the State. From a behaviour perspective, the violation could be caused either directly by the corporations or, by the State, with the cooperation of corporations or, in more extreme cases, because corporations impose the violations to the State. The paper will, first, analyse the role of courts in shaping accountability of corporations for violations human rights, by exploring the existing case law in United States and South America. Eventual obstacles, even of a procedural nature, on finding corporations accountable for violations of human rights will be identified. The analysis will, then, focus on Europe and, in particular, on the case law of the European Court of Human Rights. The final part of the paper will explore how judicial doctrines, developed in other branches of law, such as for example antitrust law and administrative law, could be used to find corporations liable for violations of human rights. An example in this direction could be the as if approach which is at the basis of the in house providing doctrine or of the Italian judicial doctrine, mainly developed by the Italian Court of Auditors, of service relationship between corporations and public administration. In both these examples the aim of the doctrine is establishing criteria in light of which the behaviour of the corporation could be considered as if it was part of the public administration and hence of the State. A last and more extreme example could be made if the level of capture of the State by corporations does not justify anymore the distinction between the State and the corporation. In this last and extreme, case a reverse reasoning to what is the State Action Defence doctrine in antitrust law could be used for holding corporates liable for violation of human rights, even by means of State action.

Elisabetta Morlino: ***Environmental Protection under Judicial Scrutiny: The difficult intersection between administrative procedures and criminal law enforcement***

The paper explores the issue of effectiveness of environmental protection with a special focus on the interaction between the administrative procedures set by European and national rules, and judicial review of environmental cases at the national level. The last forty years have witnessed the growth of the environmental protection through a variety of means: the rise of global and national rules on environmental protection; the development of appropriate administrative authorities with the mandate of implementing the rules; the multiplication of administrative procedures to compose and combine the various interests at stake; the emergence of complex civil, administrative, and criminal litigation. The interests that come into play with regard to the environment revolve around a core conflict: that between environmental protection and economic development and between those who bear the respective interests, being local communities and businesses, developed and developing countries, future and present generations. European environmental rules as well as their interpretation by the CJEU set ex ante the point of equilibrium between these interests. Yet national ad-

ministrative 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 collect the interests that the administrative decision will combine. 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 balance of interests set in the administrative decisions. 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 criminal 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 reparation 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 legislative and judicial framework setting 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 procedures and decisions have clashed with criminal courts rulings; the third will identify the main problems emerging from the interaction between administrative decisions and criminal courts' rulings and will assess their impact on the effectiveness of environmental protection.

Giulia Bertezzolo: ***Access to information and 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 bodies, offices or agencies set up by the Union. The article however does not specifically refer to the European Central Bank (ECB) or the Single Supervisory Mechanism (SSM). This is the case also for the information and data that entities under scrutiny should make available and on the basis of which the European Court of Auditors perform its assessment. Article 287 of the TFEU only prescribes that bodies and institutions shall forward to the European Court of Auditors any document or information relevant for discharging the tasks entrusted to the Court, without providing any additional clarification. The type and granularity of information to which the Court may or may not have access determines of course the deepness of the scrutiny that the European Court of Auditors can undertake and is intertwined with the scope of its auditing powers in relation to a certain body. With regards to the ECB or the SSM, the 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 delicate sector in which it operates. 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 necessity to ensure its independence, as well as its ability to manage sensitive and confidential information provided by the supervised banks in order to perform its supervisory tasks. The paper also reflects, more generally, on the impact that a more or less intrusive scrutiny of the European Court of Auditors may have on the banking sector and on financial stability.

Maurizia De Bellis: ***Administrative Inspections in EU Law and Judicial Control***

An increasing number of EU institutions and agencies conduct administrative inspections. This is not only the case of the Commission in antitrust proceeding, but also of the European Anti-Fraud Office (OLAF), investigating fraud against the EU budget, of the European Central Bank (ECB), inspecting credit institutions, and the European Securities and Markets Authority (ESMA), inspecting the premises of credit rating agencies. The fact that EU administrations do not simply requests national authorities to conduct investigations in a given field, but have the power to carry out inspections within the territory of the member States, breaks with the paradigm, dating back to Max Weber, according to which States retain the monopoly on the legitimate use of force. Do private parties enjoy the same level of protection of fundamental rights, vis á vis EU authorities, that are guaranteed in the 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, showing how the model at first elaborated in competition law has been adapted. Through the exam of recent cases that already emerged in the area of financial inspections, the paper challenges the existing model of judicial review in providing adequate legal safeguards against the exercise of authority by EU administrations, 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 a robust jurisprudence of gender equality, anchored in the EU's competence over the economic enlargement of the market. This body of EU law has changed the way national legal orders can approach gender roles in the workplace which inevitably puts transformative pressure on gender roles within the family. What are the tensions and convergences with the evolution of national constitutional traditions with regard to working mothers? This panel explores how the logic of free movement is disrupting the traditional family in Europe. The backlash against such disruption will also be discussed.

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 paper examines how war affected the constitutional treatment of women work, and family, 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 laws relating to ARTs 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) are indeed increasingly and successfully circumvented through the exercise of the free of movement of persons, even though explicit references to EU law-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 circulation triggers. In particular, it looks at the increasingly naturalist and principled approach of legal regulations of biomedicine that takes place in reaction to what is framed as excessive and uncontrolled commodification 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 governance often remain silent on the role family and family laws and policies are playing in the EU context. This paper considers the interplay between EU economic project – including its 'social' dimensions – and family laws and policies. It argues that EU legislation designed to bolster the common market and increase economic growth, has in fact also shaped the interactions within the family, have influenced family law and policies and social norms. In order to substantiate this claim, the paper looks at the EU legislation concerning gender equality and work/family balance. While these measures aim primarily at regulating the labour market in order to increase women's participation and foster gender equality (including in time of financial and political crisis) they also transform the family and its regulation in a way that embeds the family in the broader EU economic project.

142 THE EUROPEAN COURT OF HUMAN RIGHTS AT THE GRASSROOTS LEVEL: EXPLORING THE COURT'S ROLE IN GOVERNING RELIGIOUS PLURALISM ON THE GROUND

This panel speaks to the question of 'to what extent do courts succeed in achieving their goals and under what conditions?'. The European Court of Human Rights (ECtHR) is an arena where some of the most challenging questions around European religious pluralism are deliberated, and its case law has centrally contributed to European efforts to govern tensions between secular and religious worldviews. In light of scholarly debates questioning the direct effects of courts, this panel reflects research focused on developments 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. What do we learn about the relevance and mobilizing 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 religion-related case law at the grassroots level (Grassrootsmobilise).

Participants	Margarita Markoviti Pasquale Annicchino and Alberta Giorgi Mihai Popa Ceren Ozgul
Moderator	Effie Fokas
Room	7C-2-02

Margarita Markoviti: ***Religious pluralism and Grassroots Mobilizations in Greece: The different 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 structures" and the discursive frameworks within which citizens 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 Christian 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 usages and interpretations of ECtHR case law in national courts, exposing at the same time the ways in which developments in Strasbourg directly influence national actors' motivation 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 complicated relationship with the European Court of Human Rights. This is part the result of recent decision by the Italian Constitutional Court but also the outcome 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 technical 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 outcomes 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 religion-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 Strasburg Court in domestic proceedings. But in religion-related cases, additional dynamics must be taken into account for understanding the ECtHR's visibility. This paper investigates in-depth two of the most prominent domestic litigations on matters related to religion in Romania in the last decade: the display of religious symbols in public schools and the legal recognition of same-sex couples. Based on the analysis of court files (judgments written submissions) and on interviews with the main actors involved in these litigations, the analysis underlines the role played by activist jurists and lawyers in 'importing' ECtHR case-law in court proceedings. The paper highlights the increasing attention paid to the Court by activists from the religious sector of civil society and points out that social mobilizations are key to understanding the 'indirect effects' of the ECtHR in present-day Romania, both within and outside the courts of law.

Ceren Ozgul: ***"Genuine Belief" in the International and National Courts: The ECtHR and Grassroots Mobilization around Conscientious Objection to Military Service in Turkey***

One challenging question the European Court of Human Rights is facing regarding the Article 9 of the European Convention of Human Rights is its definition of belief in the area of conscientious objection to military service. The Court's Grand Chamber decision of Bayatyan v. Armenian (2011) recognized the right to conscientious objection to military service under Article 9 when based on a "person's conscience or his deeply and genuinely held religious or other beliefs", whilst in Ercep v. Turkey, only months later, the ECtHR extended the right only on grounds of religious belief. The definition(s) of the right by the ECtHR both contributed to and limited the struggle against compulsory military service among religious and non-religious actors in the field. This paper examines the relevance and mobilizing potential of the ECtHR's case law on conscientious objection to military service as well as the obstacles it presents for grassroots actors in Turkey. Specifically focusing on Court's decision Ercep v. Turkey in relation to Bayatyan, this paper follows legal mobilization on conscientious objection to compulsory military service in Turkish national courts on two tracks: pacifist anti militarist action and religiously based conscientious objection.

143 THE IMPACT OF INDIVIDUAL COMPLAINT MECHANISM IN TURKEY: RECENT FINDINGS ON THE CONSTITUTIONAL COURT

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 (TUBITAK). 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, systematic 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 Utku,) criminal law issues (Levent Emre Özgüç), and impact of rights-based approach of the Constitutional Court on Court of Cassation (Sümeyye Elif Biber).

Participants	Betül Durmuş
	Utku Öztürk
	Levent Emre Özgüç
	Sümeyye Elif Biber
Moderator	Bertil Emrah Oder
Room	8A-2-17

Betül Durmuş: ***Does the Turkish Constitutional Court Guard Freedom of the Press? An Assessment of the Individual Complaint Case Law***

Utku Öztürk: ***Critical Issues from the Individual Complaint Case Law of Turkish Constitutional Court Regarding Political Sphere***

Levent Emre Özgüç: ***The Turkish Constitutional Court's Individual Complaint Mechanism as a Pathway to the Right to Liberty in Cases of Detention and Arrest***

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

144 THE RELATIONSHIP BETWEEN THE EU COURTS AND OTHER ACTORS IN DATA PROTECTION GOVERNANCE

While substantive data protection law has attracted much attention in recent years, the institutional aspects of data protection governance remain largely overlooked. This panel examines the role of courts, in particular the CJEU, in data protection governance. More specifically, the three papers seek to shed light on the relationship between the CJEU and other entities. It shall therefore consider, firstly, the role of the Court vis-á-vis third countries in the context of so-called 'adequacy' assessments. It then analyses how the CJE's data protection jurisprudence, and the standard of review it has endorsed, influences the fragile balance of powers between Member States and the EU. Finally, it will consider the role litigation by collective actors has played in developing data protection law and the institutional implications of this private enforcement.

Participants	Christopher Kuner
	David Fennelly
	Orla Lynskey
Moderator	Michele Finck
Room	8A-2-27

Christopher Kuner: ***Third-country' legal regimes and the CJEU***

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

145 THE INSTITUTIONAL ENVIRONMENT AND THE COMMUNICATIVE TOOLS OF SUPREME COURT AS BENCHMARKS OF THEIR INDEPENDENCE

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 specific institutional context 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, et cetera. The hypothesis here is that those techniques are of special importance as they reveal which margin of autonomy Supreme Courts and Constitutional Courts have for portraying themselves and their interactions with the other powers.

Participants	Sophie Weerts
	Elaine Mak
	Céline Romainville
Moderator	Patricia Popelier
Room	8B-2-03

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

Dr. Sophie Weerts (University of Neuchâtel/Ucloulvain) 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.

Elaine Mak: ***The Independence of the Supreme Court of the Netherlands (Hoge Raad) a Changing Institutional and Communicative Context***

Prof. Elaine Mak (Utrecht University) will assess the Independence of the Supreme Court of the Netherlands (Hoge Raad) in a Changing Institutional and Communicative Context. She will focus on the Court's approach of recent reforms regarding case selection and external communication as indicative of its self-portrayal in the balance of powers.

Céline Romainville: ***The independence of the Cour de cassation and of the Constitutional Court of Belgium in context: Institutional environment and communication tools***

Prof. Céline Romainville (Uclouvain) will focus on the question of the independence of the Belgian Cour de cassation and Constitutional Court of Belgium. Her contribution analyses the institutional embedment of those two Courts and sketches the constraints that flow from this institutional embedment, among other a strong dependence to the executive and to the legislative regarding the administrative and budgetary questions, security, management, and nominations. The reports of the Belgian constitutional Court and of the Belgian Cour de cassation reveal complex interactions between powers and highlight the influence of Public Management principles on those interactions.

146 THE JUDICIARY: VIEWS FROM POLITICAL THEORY

The reservations that traditional legal perspectives have harboured about politics in the courtroom have also curbed the more general discussions about the functions of the judiciary in democracies. The judiciary's deferent submission to the elected branches is all too often seen as the only criterion considered. This may seem particularly relevant in civil law jurisdictions, but as recent confrontations between the executive branch and the judiciary in the US indicate, it has a broader appeal as a research question as well. The panel addresses these questions finding the traditional limited view both objectively untenable and theoretically weak. Not only do courts factually play a more proactive role in democracies than traditional accounts would suggest, but this role can also be theoretically defended. Drawing on these presuppositions, the panel will explore the democratic dimensions of the judiciary with special reference to insights provided by contemporary political theory which, we claim, remains an 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.

Participants	Søren Stig Andersen Julen Etxabe Massimo Fichera Panu Minkkinen
Moderator	Panu Minkkinen
Room	8B-2-09

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 no less important question of the courts' legitimizing role 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?

Julen Etxabe: ***Courts and the Authority of the Dialogical***

The twofold challenges of the countermajoritarian difficulty and the judicialization of politics worldwide make the legitimation 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 borrowin, 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 opens itself up to the other 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 idea 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, endurance 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 critique, 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, and by extension rights more generally, are an integral element in the 'savage 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. A strong executive as the engine of legislative initiatives supported by a weak 'rubber-stamp' legislature has highlighted the democratic functions of the judiciary that go beyond the 'deferential' role of standard accounts. The paper will try to provide a theoretical framework for this more political role through Lefort's understanding of human rights.

147 THE LIMITS OF CONSTITUTIONAL CHANGE

Limitations on constitutional amendment powers have become a growing trend in global constitutionalism and with it judicial review of constitutional amendments. This panel will focus on some of the most burning dilemmas of limits of constitutional change. Can a normative justification be offered to justify some types of limitations on constitutional amendments? Should the framework of interpretation offered by doctrines of unconstitutional constitutional amendments include a contextual element? Can a constitutional change through courts be considered "unconstitutional"? And in which manner should we regulate constitutional changes during emergencies? These issues will be examined from both theoretical and comparative perspectives.

Participants	Tarik Olcay Zoltán Pozsár-Szentmiklósy Mikolaj Barczentewicz Yaniv Roznai Rehan Abeyratne
Moderator	Ioanna Tourkochoriti
Room	8B-2-19

Tarik Olcay: ***The 'Constitutional' Constitution: Towards a Normative Justification for Constitutional Unamendability***

The debates as to the relationship between the constituent power and the constituted powers and to what extent the former contains the latter have been reignited by the proliferation of the constitutional trend of the judicially enforced limitations to the constitutional amendment power over the past few decades. This tension between the constituent and constituted has manifested itself as crises of constitutional amendment before courts across several jurisdictions. Courts have managed to strike down constitutional amendments they regarded to have violated the fundamentals of the constitution. Yet, while there are numerous countries in which this doctrine of unconstitutional constitutional amendments is now established it remains a controversial subject for constitutional theorists: how can courts be justified to have the final say in a question apparently for the constituent power? The most common justification offered both in constitutional theory and judicial practice for the judicial oversight of constitutional amendments is the organic justification. The organic justification asserts that every constitution has an unamendable core, through which it protects its spirit and identity regardless of whether it contains explicit limitations on the constitutional amendment power in its text. Unless these intrinsic limits on constitutional amendments are acknowledged, the argument goes, there is the risk of the constitutional amendment power, a constituted power overriding the constituent power that is the author of the 'spirit of the constitution'. Through Carl Schmitt's distinction of the constitution and constitutional laws, and the French distinction of pouvoir constituant originaire and pouvoir constituant dérivé, this paper explains 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 the higher democratic decision from the contingent and temporary democratic majorities. By definition, the organic justification focusses on the underlying principles of constitutions, yet 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 aimed at limiting 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 there are normative requirements for the justification of constitutional unamendability. The normative justification does not seek to protect the identity of the constitution, but the very characteristic that makes a polity constitutional. It therefore rejects the arguments coming from democratic decisionism and rests on liberal constitutionalism offering a justification for a minimal set of values limited to the securing of the 'constitutionality' of a constitution.

Zoltán Pozsár-Szentmiklósy: ***Contextual elements in the judicial review of constitutional amendments***

The possibility of reviewing constitutional amendments by judicial organs has a considerable practice worldwide and it is also well theorized. The substantive standards used by courts when examining the conformity of constitutional amendments with the original text of the constitution can be considered as frameworks of interpretation and reasoning. One can also note that these methods of examination have no such generalized and clarified structure as the principle of proportionality; however, the functions of these seem to be rather similar. Regardless of the content of the amendment to the constitution in question and the substantive standard taken, in some cases courts face similar challenges which are related to the circumstances of the case. Alongside other elements, (a) the time that passed since the enactment of the amendment and the time of the examination by the court, (b) the fact that people previously have expressed their opinion on the amendment by means of direct democracy, or (c) the repeated modification of the challenged provision by the constitution-amending power are all contextual elements which should be taken into consideration by the courts. However, the substantive standards of examination in most of the cases are not sensitive to these questions. The paper aims at theorizing the problem of contextual elements in the judicial review process of constitutional amendments. For that purpose I will test the idea of including the examination of contextual elements in the classic frameworks of interpretation offered by doctrines of unconstitutionality of constitutional amendments. Alongside analysing the supporting theoretical arguments and counterarguments, I will also restructure the reasoning of selected court decisions to test in practice the compatibility of this new approach with the classic doctrines.

Mikolaj Barczentewicz: ***Constitutional change through courts: when is it really unconstitutional?***

From the perspective of social science, there is nothing surprising in a statement that courts are among the major agents of constitutional change and that, in some circumstances, they are the main agent. However, this conflicts with widely held intuitions among lawyers of many jurisdictions that their courts either lack legal power to make law in general or, at least, that they lack legal power to make law of such great significance as constitutional law. And when some courts clearly take part in constitutional change, those intuitions held by lawyers give rise to claims of 'unlawfulness' or 'unconstitutionality' of the courts' actions. There is considerable conceptual confusion over when constitutional change through courts is unconstitutional (or unlawful) and when it is not. Fortunately, this confusion may be dispelled by extending the jurisprudential framework of HLA Hart, aided by modern social scientific approach to the study of normative change. I argue that social practices that are at the foundation of every legal system may make the courts a constitutional (lawful) agent of constitutional change even when no deliberately designed constitutional rule grants the courts such legal power.

Yaniv Roznai: ***Limitations on Constitutional Amendment in Emergencies***

Various constitutions limit the power to amend the constitution during times of emergency, such as times of war, application of martial law, state of siege or extra-ordinary measures. Actually, this is the most common temporal limitation on constitutional amendment powers. At first look, one would expect that constitutional amendments could be a useful tool for overcoming various crises. On the other hand, there is a fear that during emergency times, amendments would be used for suspending constitutional rights and freedoms or in other ways which might lead to desolation of the entire democratic regime. Indeed, the amalgamation of the two extraordinary powers (amendment and emergency), has proved to be a common instrument of ostensible 'legal revolutions'. Therefore, this temporal unamendability concerns the delicate balance between constitutional preservation and constitutional adaptation, tilling it towards the former. This limitation raises fascinating theoretical, practical and institutional questions, which are conspicuously absent from the literature. In particular, this limitation might be considered dangerous as it may lead to the use of extra-constitutional means. This research would review the historical origins of this prohibition, its philosophical-theoretical foundations and practical challenges, in order to propose a more suitable constitutional design for constitutional amendments in emergencies.

Rehan Abeyratne: ***Discussant***

148 TRANSITIONAL JUSTICE AND DEMOCRATIZATION: DOES INTERNATIONAL LAW MAKE A DIFFERENCE?

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 overruling 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 IAmCtHR case law. Papers presented in the panel address both normative issues and empirical evidence of their impact, discussing different aims pursued within the TJ framework. Then we move the attention to other international actors, such as the EU and the role of TJ in the accession process and accession conditionality. Panelists address also the current problem of reversed transitions: democratic backsliding of unconsolidated young democracies, the reactions of different international actors and their ability to stay these processes. We ask what framework these actors use and what options they have to stay the democratic backsliding.

Participants	David Kosar Ximena Soley Katarína Šipulová Antoine Buyse Martin Krygier
Moderator	David Kosar
Room	8B-2-33

David Kosar: ***Transitional Justice in Regional Human Rights Courts and the Paradoxes of International Justice***

This paper explores the ways in which transitional justice (TJ) has been articulated and adjudicated by two regional human rights courts: the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). Both courts have extensive case law dealing with the matter, but seem to approach the goals of TJ justice quite differently. On the one hand, the TJ cases are the very core of IACtHR's jurisprudence. The IACtHR seems to be very much focused on transitional justice as a triad: investigate-prosecute-punish. This push for more accountability, and for TJ as criminalization, is part of what Karen Engle calls "the turn to criminal law in international human rights". This approach has successfully led to a reduction of impunity across Latin America, but an unintended consequence of this focus is to preclude other approaches to TJ that may highlight harmony over retribution. On the other hand, the ECtHR has focused on a much broader set of measures, including for instance lustrations, memorials, and property rights, among others. As such it has seen TJ as a much more nuanced spectrum, of which prosecutions are just one fairly small part. An unintended consequence of this approach is to look at TJ as disruptive of the achievements of democracy and rule of law rather than conducive to them. Therefore, across the Atlantic, different understandings of TJ inform different visions of "international justice" as part of the mandate of these courts. It oscillates between international justice as a stabilizing force (ECtHR), to international justice as transformative (IACtHR). TJ can thus be perceived either as a proxy for the rule of law, or an obstacle to it, depending on which court one relies upon. This paper attempts to reconcile these two conceptions by exploring the 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 Transitional Justice as Identity-Forging Moment in the Inter-American System***

This paper offers an alternative narrative of the Inter-American Court of Human Rights (IACtHR) and transitional justice. Instead of describing how the IACtHR shaped domestic transitional processes the focus shall be on the influence of transitions in the workings of the Inter-American human rights system. First this paper will show why the return to democracy set off a virtuous cycle that is key to understand the dynamics between the IACtHR State organs and civil society. In this virtuous cycle States made human rights and their protection by the IACtHR an important pillar of the transition substantially changing the relationship between domestic and international human rights law. Often these changes were cemented in the constitution. For their part civil society organizations made extensive use of the regional mechanisms of human rights protection. These organizations kept the human rights agenda front and center and made international human rights law become more tightly enmeshed with the domestic order. In a second step this paper will shed light on the factors that converged for this 'constitutional moment' to take place. The accent will be set on the 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.

Katarína Šipulová: ***Externalities in Transitional Justice Decisions: The European Union and Transitional Justice Processes in Post-Communist Countries***

The 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 democracy, the rule of law and human rights in a number of European countries puts the assumption of these regimes as anchors against backsliding into authoritarian rule to the test. Reverse transitions (or the threat thereof) affect the middle ground between the state and citizens. The paper will focus on this shrinking civic space by looking at how state authorities regulate and sometimes truly endanger the position of the media of civil society organisations (e.g. through anti-NGO laws) and the freedom of public assembly and protest. 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 the addressing of structural issues in other ways, are useful and salient in this context. Can human rights watchdogs play any role in turning the tide of reverse transitions?

Martin Krygier: ***Transitional Justice International Law and Reverse Transitions***

The last discussion paper addresses previous participants' presentations and sums up current challenges posed by the international law for the concept of transitional justice and transitional rule of law. Discussant challenges the actual problem of reverse transitions and institutional problems of young democracies (both in democracies transited from communist regimes and Latin America non-democratic regimes) in the light of transitional rule of law and asks what role international law and selected form of transitional justice play in emerging reverse transitions. The discussion paper concludes with a question how to re-design a new framework of transitional justice in order to prevent the emergence of current crises?

149 THE COURT OF JUSTICE OF THE EUROPEAN UNION: HISTORY AND EVOLUTION I

Participants	Magdalena Jozwiak Judit Glavanits Stefano Osella Thomas Streinz
Moderator	Thomas Streinz
Room	8B-2-43

Magdalena Jozwiak: ***Balancing according to Google: on the rise of private actors as adjudicators in conflicts between the speech and privacy in the EU***

The aim of this paper is to discuss how the technology development brings to the fore the role of private actors in shaping and adjudicating on the appropriate privacy-speech balance. The example on which the paper is drawing derives from the CJEU case law and the forthcoming reform of the EU data protection law. The EU's data privacy system has been undergoing some tectonic shifts. On the one hand, the proposed reform aims at strengthening the internet users' control of their data by providing for so called right to be forgotten and the very broad scope of the right to data protection in general. On the other hand, the power to make decisions on how the right to data protection is to be interpreted and executed is attributed to private actors, most notably search engines. Although such developments seem purely functional in their effort to enhance the efficacy of the data protection system, their impact is much more pronounced as it marks the shift from the judicial decision making on the scope of the privacy right to the decision making by private actors. Thus it is the latter that becomes a norm entrepreneur and enters the normative loop of intermediating between social and legal norms when assessing what privacy and speech limits are deemed acceptable. The paper scrutinizes the EU data protection reform from this perspective of power attribution to the private actors and their role and legitimacy in shaping the balance between the privacy and speech.

Judit Glavanits: ***Effect of the CJEU on public procurement regulation***

The case law and jurisdiction of the CJEU has significant effect on the new directives of the EU on public procurement. During the last two years hundreds of new national rules appeared on public procurement harmonizing national law with 24/2014/EU directive (and two other connected directives). The paper presented at the Conference is collecting the most significant parts of the new national – basically Hungarian – and EU regulation that has been the direct consequences of the CJEU's decisions and precedential cases. We will see how great impact the CJEU has had on the new rules on fields of choosing the winner, the modification of the contract and on the procedural regulations. The study also examines the new rules based on environmentally sustainability, socially responsibility and innovative goods, services and works.

Stefano Osella: ***The gendered subject: governance and fundamental rights before the Court of Justice of the European Union***

The paper presents the jurisprudence of the Court of Justice of the European Union (CJEU) on trans individuals. Firstly, it singles out the narrative of the "gendered subject" and its functional role to EU law and governance. Since the mid 1990s, the CJEU had to define the gender status (male/female) of trans individuals. This assignment is necessary for many legal purposes, for instance in administrative or equality law, where the legal positions of male and female individuals differ. The CJEU performed this task by relying objective physical and psychological characteristics of femaleness and maleness to be acquired as a necessary precondition for legal (re)assignment. In so doing, the Court developed a narrative which shaped a "gendered subject", designed to fit within the legal and administrative framework of EU governance, ultimately affecting the very body of trans individuals. Secondly, the paper discusses how the evolving understanding of the right to gender identity may impact the gendered narrative of the CJEU. Indeed, the medical preconditions required by national legislations and relied on by the CJEU have increasingly been deemed at odds with individual fundamental rights, and ruled out as illegitimate by an increasing number of constitutional courts. This will ultimately push the CJEU to rethink a new subject of governance. The paper explores a topic of utmost relevance given its fundamental rights and philosophical – feminist and Foucauldian – implications.

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 distinct yet interrelated claims. The first is institutional: While it is true that the AGs were modeled after their French counterparts at the Conseil d'Etat, 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".

150 THE ROLE OF FACTS IN CONSTITUTIONAL ADJUDICATION

Apex courts are increasingly grappling with questions about the proper approach to fact-finding in constitutional cases. The assessment of social or legislative facts raises particular theoretical and practical challenges, since these types of facts cannot easily be evaluated using ordinary fact-finding methods. Litigation involving social or legislative facts can draw courts into complex policy debates and render them vulnerable to the criticism that their decisions are more political than legal in nature. There is therefore some urgency to the project of theorizing about how judges should approach facts in constitutional cases and understanding the practical implications of these approaches. Comparative law has much to contribute to this endeavour. This panel delves into some of the issues raised by the evolving methods courts employ to compile, investigate, and adjudicate facts in constitutional cases. Drawing on the experiences of courts in Mexico, Brazil, the United States and Canada, the panellists will discuss a range of topics, including the role of social facts in proportionality determinations, the rise of "faux facts" or "alternative facts" and the role of historical narratives in constitutional litigation.

Participants	Vanessa MacDonnell Jamal Greene Allison Orr Larsen Francisca Pou Giménez Thomaz Pereira
Moderator	Vanessa MacDonnell and Jamal Greene
Room	8B-2-49

Vanessa MacDonnell: ***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

the context of the Supreme Court of Canada's recent decisions in Canada (Attorney General) v Bedford and Carter v Canada (Attorney General), which involved constitutional challenges to the criminal prohibitions on aspects of sex work and physician assisted death respectively.

Jamal Greene: ***A Private Law Court in a Public Law System***

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. And yet assessments of such facts regularly form the basis for constitutional rulings in the United States and elsewhere. Drawing 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"ù and Americans are now familiar with the phrases "fake news"ù and "alternative facts."ù Some combination of technological speed infinite access to information, and a diluted notion of expertise has led to a very central role in our political discourse for factual claims about the way the world works. But – as we are learning – facts are not always what they appear to be. And we are naïve to think this will not affect the judiciary. Modern constitutional cases in the United States often turn on questions of fact: Do violent video games harm child brain development? Does money corrupt politics? Is voter fraud a common occurrence? The factual narrative that accompanies American constitutional law is not inevitable and is not costless. Legal systems outside the United States often answer tough questions about human rights and governmental power without citing secondary sources or purporting to be an authority on complex questions of fact. There are virtues, certainly, to anchoring legal rules in concrete observations about the way the world works. Less obviously, however, there is also a price to 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. The analysis will provide then a first description of what 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***

151 TENSIONS BETWEEN THE THEORY AND PRACTICE OF GLOBAL PROPORTIONALITY ANALYSIS

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	Mattias Kumm Janneke Gerards Alain Zysset Matthew Saul
Moderator	Matthew Saul and Alain Zysset
Room	8A-3-17

Mattias Kumm: ***Legitimate and illegitimate ways of avoiding proportionality in rights***

Even though it has been claimed 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.

Janneke Gerards: ***The specificities of proportionality review by the European Court of Human Rights***

The test of justification applied by the European Court of Human Rights (ECtHR) is often mentioned as one of the most significant and representative examples of proportionality review. It is far from clear, however, what the ECtHR's balancing and proportionality rhetoric really entails. Not only does the ECtHR 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 ECtHR's reasoning, arguments of proportionality often appear to play a limited role. Equally important may be arguments related to the quality of the process of decision-making underlying an interference with a Convention right, or the ECtHR 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 that in reality 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 theory to show that the Court's conception reveals 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 review of P1-3. While the Court proclaims the complementarity between expression and vote, under P1-3, 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 legislators?***

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 ECtHR against Norway: Folgero, TV Vest, and Lindheim. To the extent that the ECtHR is influencing the intensity of legislative processes, it is potentially spreading its model of proportionality across the legislators of Europe. Norway's centripetal, 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 reflection on the need for theorists of proportionality to turn attention to legislators and whether this should be as part of a general global theory of proportionality or a legislative theory of proportionality.

152 YOU, THE PEOPLE: THE POLITICAL DIMENSION OF CONSTITUTIONAL ADJUDICATION ON ELECTORAL SYSTEMS

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	Francesca Rosa
	Jens Woelk
	Ines Ciolli
	Graziella Romeo
	Francesco Palermo
Moderator	Gabor Halmai
Room	8A-3-27

Francesca Rosa: ***The right to vote according to the European Court on Human Rights***

Jens Woelk: ***No Political Question? The Bundesverfassungsgericht and the German (and European) Electoral System***

Ines Ciolli: ***The constitutional adjudication on equal vote: Italy as a case study***

Graziella Romeo: ***Intruding kindly? The US Supreme Court and electoral laws***

Francesco Palermo: ***When the Constitutional Court writes electoral laws***

153 THE SEPARATION OF CIVIL AND RELIGIOUS POWERS

Participants	Hans-Martien ten Napel
	Mathew John
	Elena Griglio
	Toon Moonen
	Paolo Bonini
Moderator	Elena Griglio
Room	8A-3-45

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 faith 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 considerably less tolerant state 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 appears to be most conducive to safeguarding the position of religious minorities in public life in the increasingly secular, majoritarian contexts of Western liberal democracies.

Mathew John: ***Framing Religion in Constitutional Power: A View from Indian 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 Indian Constitution grants 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 results in 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 framed 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 judgement 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 public policy-making; the question rests 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 criteria defining 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 intrinsically 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 major question 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.

Toon Moonen: ***Ordering the executive what to do and how to do it: separation of powers in foreign policy***

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 explore a complication of this phenomenon 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 enjoins the executive to refrain or stop – think of criminal procedure (Makwanyane 1995). On the other, the judge orders the executive to act in a particular way, the obligation being one of result like a release (Mhlongo and Nkosi 2015), or close to it – think of the antiretroviral drug case (Treatment Action Campaign 2002). In extreme cases, she even acts herself – think of substitution orders (Trencon 2015). In between, there is a grey area. A court may order the executive to act, leaving discretion about what exactly has to happen or how – think of housing rights (Grootboom 2001). In some cases, an order may look like an obligation to obtain a result, but in reality be more of an obligation to make an effort. In SAPS v SALC (2015), the Constitutional Court forced the police to investigate alleged human rights abuses in Zimbabwe. How should future courts enforce such an order? How detailed should such an order be for it to be enforceable at all? Does separation of powers doctrine impose limits? And how do enforceability issues impact court authority?

Paolo Bonini: ***A case about the connection between the legislation by omission and the judicial decision in Italy***

The paper will observe what happens when the Parliament choose intentionally to not establish something about an issue, because of a huge political debate, and then the Court has the opportunity to decide a case about the same matter. Observing how the judge decides the case on the subject and about the method, it could be recognized an institutional (and political) dynamic in advantage of the Judges. In Italy, as a civil-law system, the law making process is split in two separated periods. The first, needed and sufficient to set the political will of the People: the legislative one. The other, eventual and however residual: the judicial one. Within the statute about the "civil unions", the Parliament chose to delete the disposition that gave the right to set the stepchild adoption, after a huge debate. Four days after, the Court of Cassation decide a case giving the right to adopt. What happened? During the debate, the president of the Senate recognized that the statute was a declination of the constitutional principles of the article 2 of the Constitution. This paper will analyze the case, the parliamentary period, the method used by the Court and the impact of the decision on the institutional framework of a kelsenian-civil-law system as Italian one. Maybe the judges' interpretation could stop itself in front of an omission of the Legislator about a politically and constitutionally essential matter for the Parliament, alone delegate of the sovereign People.

154 INTERNATIONAL LAW AND INTERNATIONAL COURTS

Participants	Juan A. Mayoral Natalia Caicedo and Andrea Romano Cecilia Bailliet Marlene Wind
Moderator	Marlene Wind
Room	8B-3-09

Juan A. Mayoral: ***Mapping the scholarship in International Courts: An exploration of networks created in journals***

The paper explores the development of the interdisciplinary communities of knowledge devoted to the study of International Courts. For that purpose, and following previous contributions in other social science fields, we have collected information about co-authorships up to 2016 from the core journals in law, political science, history and international relations. The papers aims 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 IACtHR 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 or persons with disabilities. Both the IACtHR and the ECtHR have taken into account vulnerability with the aim of identifying positive obligations for national institutions. However, whilst the ICtHR 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 fructuous category or – on the contrary – it may entail counterproductive effects 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 children, 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 examines whether the Court practices strategic prudence by rejecting certain requests for advisory opinions. In particular, it discusses four cases involving political issues: alleged incompatibility of national legislation with the American Convention, the prohibition of corporal punishment of children, the availability of judicial remedies for persons sentenced to death penalty, and due process rights relating to the impeachment of the president of Brazil. The article highlights 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 conventi

Marlene Wind: ***Who cares about international law?***

Although Scandinavians are often celebrated as the vanguards of human rights and international law, we know little about whether courts and judges in 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 much more reticent approach to international case law than would normally be expected from this region in the world.

155 CHALLENGES UNDER THE ISRAELI'S CONSTITUTION

Participants	Tamar Hostovsky-Brandes Adam Shinar Guy Lurie Masri Mazen
Moderator	Adam Shinar
Room	8B-3-19

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 international law of occupation 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 thing, by Israeli constitutional law. The article suggests that this shift can be partially explained by changes in the Court's self-perception. The article argues that under former Chief Justice Barak's leadership, the Court perceived itself to be part of the "Global Community of Courts" and thus sought legitimacy among the international community and, in particular, the international legal community. The current Court, on the other hand, perceives itself first and foremost as a domestic institution, serving and addressing the Israeli public, and is concerned much less about how its decisions are accepted abroad. This difference translates, among other things, to weaker reliance on international law both in practice and rhetorically.

Adam Shinar: ***Israel's External Constitution: Friends Enemies and the Constitutional/Administrative Law Distinction***

I examine the Israeli Supreme Court's jurisprudence regarding the application of constitutional law to the Occupied Palestinian Territories. The central puzzle the paper seeks to solve is what accounts for the Court's willingness to apply Israeli administrative law to the Territories, whereas it remains ambivalent about the application of constitutional law. The answer, I argue, does not lie with legal doctrine, but with unarticulated sentiments about the nature of constitutional law. Constitutional law demarcates the political community. Those within its scope are a part of the polity. Those outside it are viewed as potential threats. Thus the operative distinction when it comes to Israeli extraterritorial constitutional application is the Schmittian "friend/enemy" distinction, which is the only distinction relevant to establishing political authority. I extend his theoretical framework to explain the doctrinal reality of Israeli constitutional law outside the borders of Israel, which views the Palestinian collective as threatening Israel\'s Jewish nature.This also explains the constitutional/administrative law divergence. Constitutional law sends a message of inclusivity to bearers of constitutional rights. Administrative law lacks the constitutive nature of constitutional law. Wherever there is bureaucracy there is administrative law, which takes care that things administer themselves and is concerned more with the machineryof the state than with individual rights.

Guy Lurie: ***Diversity in the Israeli Judiciary and Prosecution: The Case of the Arab Minority***

This paper inspects 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 diversity at a pace that has surpassed the Judiciary. 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 Arab judges. Then, within two years, between 1968 and 1969, Israel 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 make diversity a top priority. The Judiciary should seek to adopt the relevant active employment policies of the Prosecution.

Masri Mazen: ***The Effectiveness of Litigating Rights – 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 legal system -and the Supreme Court in particular- as 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 paint a less rosy picture and highlight the judiciary's complicity and its role in providing the stamp of approval for discriminatory laws and policies and other human rights violations. This paper will explore to

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.

Participants	Zdenek Cervinek
	Caroline Henckels
	Jimmy Chai-Shin Hsu
	Anne van Aaken
Moderator	Anne van Aaken
Room	8B-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 reluctance of the Court to apply proportionality in proceedings on constitutional complaints. And it compares them to the developments of the proportionality in Germany, which seems to be reverse.

Caroline Henckels: ***An exotic jurisprudential pest? Building a path to proportionality review in Australian constitutional law***

The Australian High Court's tentative moves toward adopting a European-style proportionality test as a method of constitutional review have been hampered by concerns the strict separation of judicial power under the Australian Constitution may prevent judges from engaging in the evaluative tasks that proportionality requires. The prospect of judges substituting their views for those of legislators in 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 thus far undertheorised role in Australian constitutional law. Deference refers not to judicial submission or surrender to the legislature, but to giving weight to the judgment or opinion of government in circumstances of normative or empirical uncertainty. Many other jurisdictions take such an approach, whether for separation of powers reasons or for reasons of subsidiarity or the right to regulate at international law. An increased understanding of the rationales underpinning deference in the context of constitutional review would diminish concerns about the Court straying outside the domain of judicial power, thereby supporting the continuing development of proportionality analysis as a method of constitutional review.

Jimmy Chai-Shin Hsu: ***Dignity Proportionality and Capital Punishment: An Analysis of Comparative Constitutional Jurisprudence***

The abolition of capital punishment has gathered steam globally over the past three decades. However, the controversy remains active in many countries. Where effective judicial review is available, the death penalty has often been one of the major constitutional issues faced by the judiciary. The fundamental issue in these cases is whether capital punishment violates human dignity and right to life. In this paper, I cast spotlight on the relatively neglected engagement dialogue, or debate in this body of comparative constitutional jurisprudence. I will focus on the approaches of rights analysis with which the courts review the constitutionality of capital punishment in general. I will identify major approaches or patterns of rights analysis on this issue in prominent comparative judicial decisions, among which proportionality review features prominently in recent decisions. Jurisdictions featured most prominently will be Japan, the US Hungary, South Africa, and South Korea. The dialogue to be represented in this paper is not always self-consciously conducted by the courts. I critically reconstruct 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?

Anne van Aaken: ***Framing Proportionality: Rationality and Cognitive Biases***

Proportionality analysis (PA) is ever more widely used by national and international courts to balance public goals and private rights or rights against rights. Proportionality itself is a frame within which we often think as lawyers. Hitherto, it mostly seen as a rational process of decision-making. But is it? How far does the frame of the PA itself frame the decision-making of (judicial) actors? Do biases and heuristics influence the decision qua the way PA is set up? The paper aims to shed light on certain features of PA which might depending how the analysis is conducted, influence the outcome of the decision due to biases and heuristics of the relevant decision-makers.

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 Faraguna, 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 I-CONnect in discussion on the latest 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 Pietro Faraguna
Room	8B-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***

158 INTERNATIONAL INTERACTION BETWEEN COURTS: A SWEDISH PERSPECTIVE

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 to a large extent of a more general character.

Participants	Henrik Wenander
	Tormod Otter Johansen
	Vilhelm Persson
	Joachim Åhman
Moderator	Joachim Åhman
Room	8B-3-49

Henrik Wenander: ***Endorsing the European Convention on Human Rights? Attitudes in Swedish Law and Politics***

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 system and the role of the ECtHR as such. Concerning politics on a European level, Sweden has engaged in the reform of the ECtHR in various ways. The presentation discusses the limited criticism of the ECtHR in the light of the development of constitutional protection of fundamental rights, the status of the convention, and aspects of Swedish legal culture.

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. In the Swedish legal order a very restricted formal approach has prevailed concerning the definition of what constitutes a court. Even though this discrepancy does not directly affect the protection under Article 6.1 ECHR or the preliminary rulings procedure by the CJEU, it still raises question about the limits of diverging definitions, views and concepts between European legal orders. The Swedish example indicates that even on basic issues, important for any legal order and the rule of law in general, large discrepancies can prevail. The paper will attempt to frame the questions for the purposes of future comparative studies implicated by this.

Vilhelm Persson: ***The Arlewin Case: Freedom of the Press v. Right to a Fair Trial in Sweden***

Swedish law has a unique constitutional protection of the freedom of the press. One part of this is significant restrictions on liability for expressions in certain media types. A consequence of this is the situation of the European Court of Human Rights (ECtHR) case Arlewin v. Sweden (Application no. 22302/10). There, a man that considered himself a victim of defamation because of allegations in a TV show, could not press charges in Sweden. In 2016 the ECtHR held that his right to a fair trial had been violated. This case illustrates the potential conflict between the freedom of the press and the right to a fair trial. In Sweden, this conflict has for the most part been resolved to the satisfaction of the press, in accordance with constitutional traditions with roots in the 1766 Freedom of the Press Act. The legacy of this act is even considered one of the basic principles by which Sweden is governed. Thus, the Arlewin case also illustrates a clash between the European Convention and the Swedish protection of fundamental rights, potentially touching upon core values of the constitution. This is also a clash between different approaches to the protection of the freedom of the press. The European Court often considers proportionality and reasonableness of the end result. In Sweden, the printed press and some other selected media types enjoy a special constitutional protection, determined solely by technical criteria, not by the content of an expression or by the result.

Joachim Åhman: ***A New Chapter in the Swedish Data Retention Saga***

In its judgement of April 8, 2014 (Joined Cases C-293/12 and C-594/12), the Court of Justice (the Court) invalidated the Data Retention Directive 2006/24/EC. According to the Court, the obligations in the directive violated the Charter of Fundamental Rights of the European Union. In spite of this, the Swedish law implementing the directive has remained in force. The view of the Swedish government has been that the law is consistent with EU law. However, Swedish telecom companies have not shared this view. Directly after the above judgement, several companies – among them Tele2 – stopped retaining data. In June 2014, the Swedish Post and Telecom Authority ordered Tele2 to resume data retention. The company appealed to the Administrative Court of Stockholm, which rejected the appeal. Tele2 appealed again, this time to the Administrative Court of Appeal of Stockholm, which requested a preliminary ruling from the Court. In its judgement of December 21, 2016 (Joined Cases C-203/15 and C-698/15) the Court stated that EU law precludes national legislation that prescribes general and indiscriminate retention of data. However, targeted retention of data for the purpose of fighting serious crime may be imposed under certain circumstances. This paper analyses how the different courts have balanced the important societal interests involved in the above cases. The paper also examines the future of Swedish data retention legislation in light of the December 21, 2016 judgement of the Court.

159 CONSTITUTIONAL INTERPRETATION I

Participants	Emilia Justyna Powell
	Christina Lienen
	Stefan Schlegel
	Michelle Miao
	Fulvio Costantino
	Daniella Lock
Moderator	Christina Lienen
Room	8A-4-17

Emilia Justyna Powell: ***Constitutions, Legal Practice, and the Measurement of Sharia-Based Institutions in the Islamic World***

The Islamic legal tradition is more diverse than other legal traditions because the balance between religious and secular laws within domestic jurisdictions is frequently renegotiated. However, many scholarly analyses of legal systems in the Muslim world rely on constitutional instruments to detect sharia-based institutions. Constitutions are, at best, first steps in creating a legal apparatus, and the legal system as a whole – beyond constitutions – determines the size of the gaps between constitutional aspirations and actual practice. An empirical shift towards Islamic legal practice, defined as the sharia-based regulations and procedures that routinely affect actors within a legal system, can remedy the existing scholarship's limitations by assessing the degree to which actors within a state are actually governed by distinctively Islamic institutions. Using factor analysis techniques on new data covering Muslim-majority countries' constitutions and legal practices, we demonstrate that constitutional and practical variables fall along two distinct measurement dimensions that often produce different conclusions regarding the implementation of sharia-based norms within a country. The main insight of this paper is that only measures that couple constitutional language with measures of sub-constitutional legal practice are likely to yield accurate conclusions regarding levels of sharia implementation throughout the Muslim world.

Christina Lienen: ***Two Waves: The Contemporary Development of Common Law Constitutional Rights***

This paper focuses on the contemporary development of common law constitutional rights, with a particular emphasis on three main phases. The first wave, which peaked in the 1990s, occurred in the context of the run-up to the Human Rights Act 1998 and against the backdrop of the liberalisation of judicial review in the 1960s. The succeeding 'trough' is roughly represented by the first ten or so years the Human Rights Act 1998 was in force. During that time human rights protection at English common law developed

in the shadow of the Convention. The second wave, the current resurgence of common law constitutional rights, commenced roughly around the same time UK Supreme Court was created, and its aftermath still produces powerful judgments today. I identify the contributing factors for each of these phases and discuss their respective constitutional implications.

Stefan Schlegel: ***The fluidity of constitutions as a function for the rank that courts appoint to international treaties: A comparison of Germany, Austria, and Switzerland***

This paper looks at the interrelation between courts, the fluidity or reformability of constitutions and the rank of international law relative to constitutional law. It states the hypothesis that courts have to assign a higher rank to international law the more often a constitution is amended, the more details it contains, and the more their own possibilities of constitutional review are restricted. This is substantiated by a comparison of the relevant jurisprudence of the highest courts of Germany, Austria, and Switzerland. It demonstrates how the Constitutional Court of Germany due to the comparatively erratic character of the Grundgesetz (and due to its own strong role) is able to maintain that the Grundgesetz ranks higher than international treaties, higher even than the ECHR. Its own jurisprudence mitigates conflicts between the two sets of rules in all but theoretical cases. The Swiss Federal Court in contrast, not authorized to assess the constitutionality of treaties and dealing with a constitution that is amended almost on a yearly basis, had no other choice than to state that (some) treaties rank higher than even younger constitutional law. Austria, where, after a long struggle, the ECHR was granted constitutional rank, is an interesting case to further substantiate that it is the reformability of the constitution and the role of constitutional review rather than a specific legal tradition that shapes the relation of a constitution and international law.

Michelle Miao: ***The empowerment of courts in an authoritarian context: A decade of death penalty review in China as a case study***

The power of courts is central to the understanding of political and legal life in democratic as well as non-democratic settings. This article explains that, contrary to the conventional wisdom that authoritarian regimes normally curtail or even eradicate judicial power to strengthen their exclusive control over the society, the expansion of judicial autonomy and power 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 strengthened hierarchical judicial control, China's Supreme People's Court (the SPC) has been able to expand its power and strengthen its authority by 1) consolidating previously dispersed and fragmented judicial power. 2) through this process of enhancing due process and consistency, unshackling local courts from the chain of corruption and political interests. 3) placing meaningful checks on the exercise of power by the police and procuratorates through its supervision of lower courts' performance. Thus Chinese courts seized an opportunity of judicial empowerment without contravening the core interests of the authoritarian Party-state. The arguments in this article, admittedly, is subject to an important qualification: they need to be understood against the central tension at the heart of the authoritarian governance – the need to maintain tight control of the society and the sought of legitimacy.

Fulvio Costantino: ***Venom, crisis and legal traditions. Lessons from Italian court cases***

A growing concern about the economic situation is having a huge impact on the behaviour of institutions, including national courts. Traditional principles such as retroactivity or recent ones such as the protection of legitimate expectations, seem to face difficulties in being protected. The examination of some cases can be useful to verify if, with the crisis, there are real risks of undermining the foundation of the rule of law.

Daniella Lock: ***Judicial Decision-Making on Issues of National Security: Where UK Judges Depart from the Executive***

When it comes to decision-making on national security issues, no consensus has yet been reached 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 analyse closely how UK judges have approached decision-making in national security cases. Particularly as the debate on what role judges should play with regards to security matters can often turn on assumptions regarding their competency to make decisions in this area. This paper provides an analysis of the legal reasoning in those cases where judges 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 ICON conference as it will shed light on what 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 urgent to engage with as more and more controversial laws are passed globally in the name of security: the recent U.S travel ban being just one example of many.

Participants	Sajeda Hedaraly Katalin Kelemen Ladislav Vyhnánek Joshua Segev and Ariel Bendor Max Steuer and Erik Lastic Inger-Johanne Sand Ulas Karan
Moderator	Katalin Kelemen
Room	8A-4-35

Sajeda Hedaraly: ***For a Bilingual Supreme Court of Canada***

In Canada, the constitutional status of official languages is currently paradoxical. While the country prides itself on bilingualism, the judges of its highest court are not expected to understand both French and English. This paper argues that Supreme Court of Canada (SCC) judges should be required to be bilingual and examines various legal and normative paths that could ground this requirement. Parts I and II examine unwritten sources of constitutional law' underlying principles and constitutional conventions, respectively – to support a criteria of bilingualism for SCC judges. While these sources of law may not be sufficient to ground this requirement today, they evolve over time and could eventually be used as a foundation for judicial bilingualism. Parts III and IV concern the relationship between law and language. Part III argues that decision-makers who interpret bilingual laws should understand both French and English because of their equal normative force. Part IV contends that the law-making function of judges requires them to be bilingual, given the importance of language in the common law tradition. In sum, despite objections to bilingualism at the SCC, this requirement can rest on many legal foundations.

Katalin Kelemen: ***Judicial dissent in constitutional courts***

Dissent in courts has always existed. It is natural and healthy that judges disagree on legal issues of a certain importance and difficulty. The question is if it is reasonable to conceal dissent. Judges undoubtedly discuss the cases among each other and influence one another's opinion. These discussions are fundamental for reaching the right solution (if one right solution exists). Even so, not every legal system allows judges to explain their disagreement to the public in a separate opinion attached to the judgment of the court. Most constitutional courts do. Still, European constitutional judges are much more reluctant to write separately than common law judges. Even when they have the possibility to do so, they show considerable loyalty towards their colleagues and the court as an institution. My presentation will focus on the perspective of the civil tradition and address the following questions: Why is the publication of dissenting opinions prevalently allowed in constitutional courts, while it is banned in most ordinary courts? How do separate opinions affect a court's legitimacy? How do they contribute to a dialogue between courts in different jurisdictions in particular between national and international courts? These questions are discussed in my forthcoming book Judicial dissent in European constitutional courts: A comparative and legal perspective (Routledge 2017) which aims to offer a background for a larger debate on the issue in the European context.

Ladislav Vyhnánek: ***Politics and ideology at the Czech Constitutional Court: Methodological problems***

This paper reflects the author's research of extralegal influences (in this case ideology and politics) on judicial decision-making at the Czech Constitutional Court. While this kind of research has gradually become an important part of the American scholarship on courts European (especially CEE) courts are much less studied in this regard. This paper discusses the substance of the problem, but perhaps even more importantly it analyzes the methodological problems surrounding the research of extralegal influences in the Czech Republic (and more generally in CEE countries). Specifically, the paper explores the possibility of employing qualitative and quantitative empirical methods and possibility of "replicating" some American studies in the Czech context. It comes to a conclusion that while some inspiration is certainly possible, a researcher has to be extremely cautious and taek into account the vastly different cultural and constitutional context.

Joshua Segev and Ariel Bendor: ***The Judicial Babysitter***

In recent years, the constitutional discourse regarding the judicial role of the United States Supreme Court was shaped around the minimalist versus the maximalist decision-making paradigms. While the precepts of these two paradigms are put in opposition to one another (wide and deep as opposed to narrow and shallow legal reasoning), they share a common dominator. Both the paradigms are decision-oriented: they are focused on the features, elements and qualities of the Courts' decisions in constitutional cases i.e. the Justices' use of reasons, rules, principles, precedents and analogies.

Max Steuer and Erik Lastic: ***The Third Legislator? The Relationship between the Slovak Constitutional Court and the Slovak Parliament***

The Slovak Constitutional Court (SCC) is commonly known as one of the Central European 'guardians of

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 accession of Slovakia to the European Union, and the differences between the 'three CCs' divided based on its three presidents so far. This paper uses the analytical framework of the 'negative' and 'positive' legislator to answer whether and why the SCC acted as a legislator during the three court terms. For this purpose, it uses a new dataset (generated within the JUDICON project) that allows to identify how the SCC has positioned itself vis-á-vis changing legislative majorities between 1993-2015 and whether there has been a period in which it used its legislating capacities beyond the average standard. The analysis offers new findings about each of the 'three CCs'. During the latter, the SCC's decisions gradually shifted towards ones favorable to the parliamentary majority (2006-2010) and the head of state, with a few exceptions. Moreover, the recent emptying out of the bench due to the conflict on the president's competences in the appointment procedures further exacerbated the resignation of the majority on the legislating function of the SCC, and gave rise to some arguably unconstitutional decision-making practices.

Inger-Johanne Sand: ***Constitutionalism and Nordic Exceptionalism: The Function of the Norwegian Supreme Court when negotiating public policies and constitutional rights***

Constitutions in an international context: The Function of the Norwegian Supreme Court when negotiating public policies and constitutional rights

Ulas Karan: ***Constitutional Complaint Procedure in Turkey: An Empirical Research on Success 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. Considering 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 attorneys, the approach of the relevant bodies, such as administrative bodies, courts of first instances or appeal courts in relation to judgments will be dwelled upon. Lastly issues regarding the execution of the judgments will put forth and propose a new policy and legal framework. The overall objective of the paper is to set forth the compliance concerning the judgments of TCC and propose an improvement for the existing framework. After conducting a research on judgments and an assessment of the current organizational structure 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 Ayelet Berman Fred Felix Zaumseil Zhai Xiaobo Tania Atilano
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 system? Unlike Kelsenian emphasis on the rupture in rules, and Dwokrinian 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 system 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-legality. 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 property from corrupt officials and crony capitalists that were associated with the regime or ruling families. In all these cases, I argue, the assumption of a dichotomy between rupture and continuity is misleading and hinders 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 performance and perception in international adjudication. 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 representations of those practices, as well as the constitutive possibilities opened up by the confrontation between exercises of authority representations of those exercises and reactions against either or both. Hegemonic strategies here include aims to consolidate legal regimes around particular values or in line with particular value systems, often by recourse to universalistic or naturalistic legal vocabularies. Constitutive possibilities 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 organizations and of global governance are based on an idea of authority that follows an image of domestic 'government' but can hardly capture the particularities and complexity of authority in the global sphere. This paper reconstructs 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 informality and a multiplicity of actors in the authority structure on a given issue, can help us to better understand the specific challenges for accountability, legitimacy, and the construction of legality we face in the global order.

Ayelet Berman: ***Participation in Internationalm 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 examples. The idea that the democratic legitimacy of international governance can be improved through stakeholder participation derives from ideas of national democracy, where participation – be it through elections or administrative processes such as consultations or notice and comment-is of a central role. The idea of participation in international governance has not remained a theoretical exercise; rather, in practice the evidence is compelling that in the past two decades international governance has undergone a tremendous transformation, and non-state actors now

participate alongside governments in most international 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 therewith are largely being ignored: Participation by non-state actors introduces risks, such as imbalanced representation of interests and capture to special interests, potentially undermining the public interest in the regulation of global public goods. Unregulated openness, I argue, has the potential to undermine the integrity of international governance, 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 attention 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 justification of authoritative demands made between free and equals who reasonably disagree about what is good, just or right? Kant famously argued that individuals who are free and rational have a duty to enter a rightful condition by subjecting themselves to a public legal order. Kant thought that in this rightful condition individuals are bound to obey legal demands under (almost) all circumstances, even if, what the law demands is unjust, wrong or imprudent. There is, thus, according to Kant, a general obligation to obey the law. I will call this the authority of legality. Most contemporary legal philosophers reject the Kantian argument of the authority of legality. For them, there is no general obligation to obey the law. Those who consider themselves philosophical anarchist even claim that the legal order can never have the authority it claims to have. Others argue that the existence of an obligation to obey the law exists only if further conditions are fulfilled. My paper will revisit Kant´s basic argument and see how far it will carry.

Zhai Xiaobo: ***Bentham and Legally Limited Government***

Bentham and Legally Limited Government: An Examination of Hart's Interpretation and Criticism Hart takes American Judicial Review as the archetype of 'legally limited supreme legislature' [LLSL] and he claims, first, that Bentham's theory of law is a command theory; and, second, that Bentham's command theory cannot explain the phenomenon of LLSL. His second claim assumes that American judicial review is the archetype of LLSL. In this paper, I attempt a threefold task. First, I will present Bentham's explanation of American judicial review, and argue that for Bentham American judicial review is not a case of LLSL but only an example of conjunctive sovereignty. Second, I agree with Hart that Bentham's command theory cannot adequately explain the phenomenon of LLSL, but I disagree with Hart's concrete analysis and arguments. I will demonstrate that Bentham's command theory can sufficiently and even better explain the power-conferring constitutional provisions, and that Bentham's idea that legality determines validity, on principle, is correct. Third, I will argue that Bentham fully realizes that his command theory cannot explain LLSL. Bentham then developed a theory of leges in principem to explain LLSL and international law. I will offer a detailed account of Bentham's theory of leges in principem, and argue that this theory is a better explanation of LLSL than Hart's theory of authoritative reason.

Tania Atilano: ***The notion of Sovereignty in Mexico after Donald Trump's election***

Since President Donald Trump made announcements about building a wall between the United States and Mexico President Peña Nieto as well as numerous authorities of the executive branch have appealed to the defense of national sovereignty and national interest. After signing the NAFTA and after Mexican foreign policy pursued to leave aside it's "no intervention" principle reclaiming national sovereignty seemed to be outdated. Nevertheless traditional notions of sovereignty persisted in other constitutional and political realms. For example defending "national sovereignty" was the core argument in the Senate against the International Criminal Court (ICC) jurisdiction by arguing that the ICC was a threat to sovereignty. Therefore appeals to national sovereignty are not a new phenomenon but might indeed jeopardize the efforts of absolute recognition of the ICC\'s jurisdiction as well as the demands of civil society of excluding the military from combating organized crime. Appeals to Sovereignty might also lead to military control of the Mexican borders not only in a symbolical sense against Trump but foremost against the migration influx from Central America.The term sovereignty is therefore in constant reinterpretation and contrary to assumptions made in the early 90s about the disappearance of Sovereign Statehood Trump's policies might transform the notion of Mexican sovereignty into a much more rigid and nationalistic approach in the political and legal sense.

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

Tom Hickey: ***A republican alternative to 'public reason' as justification for a more limited form judicial review***

The 'public reason' related defenses of judicial review claim that the democratic ideals of reason-giving reciprocity and consensus flourish in court settings, and that judicial review is therefore legitimate. This scholarship has come up against various legitimacy or democracy-based objections, but the ones that have really gained traction are those centering on the fact of disagreement (among judges, and indeed generally) on the meaning and application of rights. In this paper I turn to the idea of 'commonly avowable norms' particularly as it has been developed in Philip Pettit's recent work as analogous to, but as critically distinctive from, that of 'public reason'. The distinctive feature is that, unlike public reason, it recognizes and even thrives upon disagreement. In this paper, I probe further than Pettit (and indeed disagree with him insofar as he considers it) in applying this thinking to judicial review specifically. I argue that the idea suggests these disagreement-on-rights based judicial review sceptics have good grounds (based on republican theory) for their scepticism. But I also argue that, in railing against judicial power and lauding legislative supremacy, they generally take their opposition too far: that they miss the democratic values of judicial review, when it is understood in light of this republican idea. The paper considers the theoretical question in light of the Charter of Fundamental Rights, specifically.

Guilherme Pena de Moraes: ***Trends of Contemporary Judicial Review of Legislation***

This study aims to address the trends of judicial review of legislation, in view of contemporary issues of Constitutional Law. The scientifical investigation is geared to detect the shared practices by the constitutional courts, meanwhile it establishes the points of divergence between those courts. In fact, the work focuses on the area of concentration of the judicial review in democratic legal systems and, more particularly, in the line of research on the globalization of the constitutional decision-making process. The research is organized into five chapters, each of them discussing the mentioned trends, such as the rational justification for the internationalization of the decision fundamentals. The most important results will undoubtedly be related to the role of contemporary judicial review of legislation in safeguarding democracy protecting and promoting civil rights.

Eduardo Moreira: ***Unconstitutional State fo Affairs***

The so-called Unconstitutional State of Affairs is a new model of judicial review with an increasing importance in South America, which can be transplanted to different constitututional issues. The lecture will highlight the main aspects of judcial power to recognize unconstituttional situational facts and affairs not fixed by the executive and legislative brenches. The omission in this matter is long and continuosly and in violation of fundamental rights. Colombian reconstruction in affected areas by the Farcs (forced displacement of people landmark case) and brazilian prisional system (daily tragedy of prisions main debate) are two good exemples of unconstitutional state of affairs. The requirements, objective goals and overall judicial dialogue with the others state fields in a long conversation betweeen constitutional brenches and federal structure will be discused in details. The developments of all phases of judicial dialogue and it's consequences to put an end to state omission will be explained as such hard cases that demonstrate the difficult and necessity to reach this new step in the judicial review powers.

Paula Pereira: ***Deliberation and voting in judicial review.***

Constitutional Jurisdiction is seen as a countermajoritarian mechanism for taking decisions on matters in which citizens consider it to be of utmost importance for justice and fundamental rights. Our practice of delegating certain issues to the Constitutional Courts to make the final decision (at least at procedural level) reflects a mistrust in democratic decision-making in the political arena. But this mistrust that we have well seen things, is in the people and not in the majority rule, since we have adopted this rule in the procedural field to solve the disagreements that have arisen in the constitutional interpretation. In this way, how can we justify the practice of majority rule in collegial judicial deliberation? Of course, the lack of debate about the internal rules and the practical variables of deliberation of the courts, can promote or strongly hamper the legitimacy of a court. In this context, the form of the deliberation on the constitutional interpretation in the courts appears as decisive. And this is where the object of this research resides. We mean by this that the objective of this article is to investigate the institutional design of the collegiate body in order to verify if it is capable of providing the constitutional normative function attributed to the Federal Supreme Court, that is, to define the constitutional interpretation.

Daniel Bogéa: ***Women in robes: gender diversity and deliberative performance in constitutional courts***

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 that calls attention to the importance of women in socially valued positions as part of an empowerment process, or a material argument that seeks to establish an empirical correlation between the presence of women and a positive decision-making agenda. I aim to present a third hypothesis, based on a deliberative or procedural argument. I bring forward the case for women in constitutional courts as a tool for the improvement of the deliberative quality of these institutions. I make use of the concept of social perspective, coined by Iris Young in the debate about electoral representation. One of the merits of the account is to dislocate the focus from the presence of different interests to the idea of increasing the starting points in the deliberative process. Gender diversity promises to enrich the decision-making process itself, instead of the results of the court's deliberations per se. The argument also prevents an essentialist answer and tackles the particularities associated with a constitutional court vis-á-vis the other political branches.

Yen-tu Su: ***Judicial Review as Constitutional Engineering: A Structural Minimalist Approach***

When adjudicating cases concerning the separation of powers and the law of democracy, a constitutional court is bound to assume the role of a constitutional engineer. As intensified by the judicial constitutionalization of democratic politics, this function of judicial review has generated great uneasiness among students of constitutional democracy, because it is widely held that judicial review is not an ideal forum for democratic institutional design. While being sympathetic to the age-old plea for judicial self-restraint in so far as constitutional engineering is concerned, this paper criticizes the conventional judicial minimalism for its theory averse and its reliance on judicial craftsmanship, a source for judicial over-confidence. This paper proposes a structural minimalist approach that seeks to integrate the insights of structuralism in the law of democracy and the moral teachings of judicial minimalism. The constitutional court is further advised to create safe harbors for appropriate democratic engineering, and practice minimalism while applying structural theories.

163 THE EUROPEAN COURT OF HUMAN RIGHTS: HISTORY AND EVOLUTION I

Participants	Merris Amos Ed Bates Jaclyn Paterson Sergey Khorunzhiy
Moderator	Barbara Guastaferro and Ed Bates
Room	8B-4-09

Merris Amos: ***The Value of the European Court of Human Rights to the United Kingdom***

National debates concerning the appropriate role of the European Court of Human Rights (ECtHR) in the United Kingdom (UK) recently intensified with the suggestion by the current Government that the UK might leave the European Convention on Human Rights (ECHR) system. It has been argued that a British Bill of Rights, to replace the current system of national human rights protection provided by the Human Rights Act 1998, would provide better protection than the ECtHR making its role in the national system redundant. Claiming that the ECtHR is legitimate and has an impact usually illustrated by the transformative power of judgments more than ten years' old has not provided a convincing answer to this claim. In this paper, rather than legitimacy or impact, the value of the ECtHR to the objective of protecting human rights through law is assessed. Three different levels of value are identified from the relevant literature and then applied to the judgments of the Court concerning the UK from 2011-2015 to determine what happens in practice. It is concluded that given the UK Government's objective remains to protect human rights through law, whilst some types of value are now more relevant than others, overall the potential value of the Court to the UK in achieving this objective is still clearly evident.

Ed Bates: ***The ECHR's status as a "constitutional instrument of European public order": implications for the Court's legitimacy and its mediation with national authorities.***

Nearly a quarter of a century ago (1994) the European Court of Human Rights labelled the Convention a 'constitutional instrument of European public order'. Since then the description has been employed on a select number of high profile occasions. It evokes the ambitious claim that the Convention is a form of higher order, European constitutional law. But is that what the Court actually means when it employs the phrase?

Jaclyn Paterson: ***The European Court of Human Rights' influence on the institutional relationships of the UK Supreme Court: an empirical examination.***

The UK Supreme Court occupies a unique constitutional position in the UK, acting as a hub between sub-national, national, and international judicial, and governmental bodies. The constitutional position of the court is such that its relationship and dialogue with certain European courts directly influences its relationship with judicial and governmental bodies domestically. This paper presents original empirical research that examines the influence of the jurisprudence of the European Court of Human Rights ('ECtHR') on the institutional relationships of the UK's highest court in the transitional period from the Appellate Committee of the House of Lords to the Supreme Court. The influence of the ECtHR on (i) the administrative efficiency of the UK Supreme Court and the judgment style selected (ii) the UK Supreme Court's relationship with the other branches of state and (iii) the Supreme Court's relationship with lower courts will be analysed. The paper concludes with an assessment of the significance of the constitutional change from the Appellate Committee of the House of Lords to the Supreme Court in the UK, from the perspective of the court's institutional relationships, and proposes that the influence and statistical significance of the ECtHR jurisprudence is such that perhaps the most significant constitutional power change in the UK would be the repeal of the Human Rights Act 1998.

Sergey Khorunzhiy: ***Evolutive interpretation of acts of the ECHR and law enforcement of the Constitutional Court of the Russian Federation***

Modern legal instruments are undergoing constant change. The reason for this is the objective need to maintain the balance in the law, which provide effective protection of the legitimate interests of human and civil, and as a field of public and private law at the same time. As one of the methods to solve the problem of ensuring and protecting the rights, subject to the balance of public and private interests is considered "evolutive interpretation" of the ECHR. This interpretation is a manifestation of "judicial activism" which "deconstructs" the norms established earlier giving them a new life. The article also analyzes the use of evolutive interpretation in the field of private law public law, as well as in the activities of the specialized international organizations (for example International Organization of Supreme Audit Institutions). In the study, the author demonstrates the need to take into account unusual for individual public sovereignty of the state, which is a must in the national legislation. This quality allows us to identify the boundaries of the "evolutive interpretation", as well as to formulate its principles on the example of the practice of the Constitutional Court of the Russian Federation. The practical significance of the issues addressed is to define the balance between conventional and national legislation, search options for harmonization in order to flawless execution of the ECHR judgments, as a guarantee of its credibility.

164 THE ROLE OF COURTS

Participants	Martin Kayser, Rahel Altmann and Ardian Nikolla Amnon Reichman Pau Bossacoma Eszter Bodnar
Moderator	Rahel Altmann
Room	8B-4-19

Martin Kayser, Rahel Altmann and Ardian Nikolla: ***Judges must be politically incorrect***

In an age of rising popularism, judges must be bolder than ever. It is their task to insist on fair procedures, no matter what politicians say. By performing judicial review of administrative action, their main task is to exercise concrete and often invisible power. Politicians, on the other hand, make laws, therefore exercising abstract and visible power. The constant struggle over the definition of the use of power amounts to checks and balances. As the very notion of the separation of powers is contested by the many politicians, judges must be even firmer than before. By counterbalancing politics, they must be politically incorrect.

Amnon Reichman: ***Judicial Institutional Capital – Preliminary Considerations***

If judges are bound only by law, do they violate their oath if they are influenced by concerns that include the potential reaction to their decision? Does judicial independence imply unlimited power to exercise judicial discretion under the law? Students of the judicial craft have long realized the tension between the logic of doctrine and the judicial application (or misapplication) thereof. We realize that judges navigate between applying established concepts, developing new ones, and creatively weaving old and new. As of the rise of legal realism in the US and the Free Law movement in the Continent, analysis of judicial performance has been sensitive not only to the internal coherency of doctrine but also to the relationship between law and neighboring social domains. These include the dialectic interaction between doctrine and political power, between professional knowledge and legal knowledge, between the economy and legal ideology, between religion and legal culture and between legal rhetoric and the gaze of the media – to name a few. This paper will present a structure within which to situate judicial craft and judicial power: the institutional capital available to courts, and to individual judges. This paradigm conceptualizes – relying on the aforementioned relationships between law and the neighboring systems – the increase and decrease of the credit and capital at the judicial disposal as a function of judicial strategies and available moves in particular cases.

Pau Bossacoma: ***Is the Judicial Branch a Good Branch to Deal with Secession Cases?***

In Spain, the political branches have pushed the judicial branch, mainly the Constitutional Court, to deal with many self-determination and secession issues regarding the Basque and Catalan peoples. Against the criticism that those issues and disputes are basically of political nature and they ought not to be addressed by Courts, the Spanish legislative and executive branches, arguing that they are legal as much as a political, have responded judicializing even more and increasing the enforcement powers of the Constitutional Court. In Canada, neither the Political branches nor the Judicial refused to take a substantial role in the Quebec secession challenge. Whereas the Supreme Court found a balance in principle between unionist and secessionist claims, the Federal and the Quebec legislatures walked in opposite directions. The paper offers some theoretical and practical reasons to defend that the judicial branch might be positioned and equipped to respond secession claims in more reasonable and balanced way than the more democratically accountable branches. Yet, the paper also draw attention to several experiences where Courts have not showed understanding or capacity to deal with those cases and some experiences where the political branches have been capable of reaching sound and pragmatic solutions regarding secession and self-determination claims.

Eszter Bodnar: ***Good administration of justice from a constitutional law perspective***

While the notion 'good governance' is a broadly researched topic 'good administration of justice' is rarely used in the legal scholarship and usually with different meanings. Every component of the notion sets a new question: What is justice? What is administration of justice? What makes the administration of justice 'good'? The paper aims to answer these questions by collecting and analysing the different ideas of good administration of justice. Although examining the aspects of legal philosophy and legal dogmatic is inevitable, the paper focuses on the constitutional law perspective by comparing national constitutions, international human rights documents, and legal scholarship. The paper makes an attempt to create a general definition for good administration of justice, and also to clarify its relation with good governance, good administration, rule of law, and fair trial. Finally, the paper tries to identify the possible elements of the good administration of justice and to identify the factors that can be used in measuring how 'good' administration of justice is.

165 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-ECRP-02 International Law through the National Prism: the Impact of Judicial Dialogue. The contributions build on the project results to identifiy 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. We examine the place, which is accorded to international law in domestic legal systems of these Central and Eastern European States and seek to understand which are the factors that facilitate and incentivise or deter the participation of the CEE courts in the global international law shaping enterprise.

Participants	Anna Wyrozumska Izabela Skomerska-Muchowska and Anna Czaplińska Magda Matusiak-Frącczak Karolina Podstawa
Moderator	Anna Wyrozumska and Tímea Drinóczi
Room	8B-4-33

Anna Wyrozumska: ***The CEE Courts' shaping of international law -the missed and lost opportunities of the transnational judicial dialogue***

Traditionally one thinks of international law as of 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 legal norms. It is on the state level where the most important developments occur, where the courts in their adjudication receive the doctrines of international sister institutions, and respond to such dicta grounding the argumentation in specific national legal traditions and needs of the society. This is where the role of CEE courts comes to the forefront. The presented contribution focuses on the areas of international law that have been thoroughly addressed by the practice of the CEE courts evoking examples from Polish, Russian and other examined jurisdictions (for instance the Natoniewski case). The positive bias of the contribution will be balanced through evoking the cases where the CEE courts (for political, legal or even technical) reasons missed out on the opportunity to take the stance and thus shape international legal norms.

Izabela Skomerska-Muchowska and Anna Czaplińska: ***The exchanges of CEE Constitutional Courts with the CJEU in the Era of Constitutional Pluralism***

The Constitutional Courts on the one hand play a special role as guardians of national constitutions (based in all these countries on principles of democracy and the rule of law). On the other hand they are continuously confronted with other constitutional orders, and in particular that of the EU. The Constitutional Courts often draw inspirations from the case law of foreign constitutional or other highest courts, especially while adjudicating on human rights or EU law. The practice of the Constitutional Courts will be analysed in the light of the concept of constitutional pluralism to explore how the Courts percept themselves in the global community of judges, whether they exchange legal arguments with other international and national courts and what are limits of comparative arguments in constitutional issues. The particular position of the CEE constitutional court will be specifically examined pointing to the areas of EU law under scrutiny and the reactions of the courts mirroring their relatively recent engagement in the European Union legal order. In particular, we shall examine their capacity and willingness to take the CJEU's indications and put them into question and under examination.

Magda Matusiak-Frącczak: ***The Dialogue between Selected CEE Courts and the ECtHR***

The protection of human rights and the interactions with the ECtHR is the most important area of judicial dialogue. In the presentation the broad concept of dialogue 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 classifiable. The author provides a general assessment of the practice, explains reasons of occasional failures and suggests the instruments for improvement.

Karolina Podstawa: ***The legislative procedural frameworks shaping transnational judicial dialogue on international law***

The final contribution to the panel focuses on the adjudication legislative, procedural and executive setting, which is conducive or destructive for the judicial engagement in the shaping of international legal order. The examples will be drawn from the jurisdictions examined in the course of the project: Polish, Czech, Lithuanian, Ukrainian, and Russian. The contribution will present the comparative legislative setting, organisation of the courts and the court systems (including the best and worst practices identified), as well as the role of the executive in the implementation of the international courts' or national courts' judgments on international legal issues. The comparative findings will be set against the theoretical background of the international law implementation measures, which differ across the traditional division of powers and frequently are defined as worlds apart.

166 DATA PROTECTION AND JUDICIAL ACTIVISM IN EUROPE: MIND THE GAP

Some recent judgments of the Court of Justice have marked a point of no return with respect to the constitutional protection of the right to privacy in Europe. 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 different views behind the respective legal orders; on the other one the judgments have proved to be influential even in the law-making process. However, the efforts by the Court of Justice have made it critical 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 Court of Justice over the time, is it reasonable to expect that this judicial saga is a never ending process and ultimately beneficial from a global perspective?

Participants	Andrej Savin Joan Barata Mir Thomas Wischmeyer Bilyana Petkova Giulio Enea Vigevani Marco Bassini
Moderator	Oreste Pollicino
Room	8B-4-43

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 respectively. While there are many points that connect the cases, not least their CJEU-activist pro-fundamental rights stance, what makes them particularly stand out more than anything 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 CJEU is saying is that mass surveillance, corporate activities and transatlantic agreements on data flows all must be subject to fundamental rights. While this line of cases is internally consistent and in line with the new General Data Protection Regulation, in this paper we highlight the fundamental flaws that underline two of the three cases. The first relates to the Schrems case which, by invalidating a workable albeit a flawed agreement, disregards the political reality of reaching political compromises on data transfers which are the backbone of both regions' economies. The second relates to Google Spain case which is based on the misguided idea of a hierarchy of fundamental rights. We claim that, while the Court has valid and important points in both, its activist approach second-guesses the Parliament and the Council, which now have the task of preventing the political crisis of the kind that the judgments have engineered.

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 Proteccion de Datos and Mario Costejo". This right was not previously established nor recognized as such by international, European or national standards, yet it has been included in the provisions of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data as the "right to erasure". This notion has been at the centre of several controversies among legal scholars, practitioners, activists and digital intermediaries. Most of the debates were triggered by the vague references made by the European Court of Justice to the right to information as a legal element to be taken into account in the context of the application of the right to be forgotten, which seem not to properly consider, at least in an explicit way, the vast implications of the former within a democratic society. Moreover the decision imposes search engines, usually global private corporations – the duty to abandon their purported content-neutral role to monitor content and make assessments with very serious implications for freedom of information and freedom of the media. This being said, the ruling also raised important territorial issues. Right after the ruling the EU Article 29 Data Protection Working Party – an independent European advisory body on data protection and privacy set up under Article 29 of Directive 95/46/EC – issued a series of guidelines on the implementation of the ruling by the data protection authorities within the EU. Among others one interesting element in this document – and probably the most contentious one – advices that in order for EU law not to be circumvented, delisting should be applicable not only to EU domains but also to .com domains accessible from the European territory. A 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 a European-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 suggest that the Court has hit a nerve. However, 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 the Court in Schrems have relied on an outdated 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. strengthening the level of protection for personal data. The paper proposes to drop the idea of "safe data spaces" and to strengthen instead the principle of organizational responsibility that is underlying 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 lawmaker to level up privacy protection. 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 interaction of the European Union with 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.

Giulio 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 Sverige 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, significant implications may occur even with respect to freedom of expression when it comes to protecting privacy in the context of the information society. It should therefore be questioned whether the right to 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 even the relationship between these rights may be revisited 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 there is room for courts (most notably for the Court of Justice) to reduce the gap between Europe and the United States and to facilitate a dialogue between the two sides of the Atlantic Ocean.

Participants	Stefanie Egidy
	Miroslaw Granat
	Jakob Hohnerlein
	Roxan Venter
Moderator	Stefanie Egidy
Room	8B-4-49

Stefanie Egidy: *Beyond Judicial Control: Who Safeguards Democracy in Financial Crises?*

The global financial crisis 2007-2009 prompted states to rescue systemically relevant banks. Most states decided to enact legislative programs determining a general framework for bailing out troubled financial institutions. The legislatures provided large budgets and tasked the executive with implementing these programs granting a wide margin of discretion. However executive power often remained unchecked as legislative majorities voted against effective safeguards that could ensure accountability and transparency using emergency rhetoric to justify these sweeping delegations of authority. This dynamic left the courts in charge of responding to this threat to democracy, most prominently voiced by civil society's Occupy Wall Street movement. Cases brought by investors and shareholders of financial institutions as well as news organizations raised fundamental issues regarding the democratic nature of financial crisis management. However, despite historic examples of judicial intervention, courts decided not to engage with these questions, setting a dangerous precedent. Their decisions stand in stark contrast to the increasing role of courts and cannot be explained by the complexities of financial crises. This presentation argues that a society has to either provide the conditions necessary to activate meaningful judicial engagement or establish and enforce alternative means of control to avoid a permanent shift of power within the democratic system of checks and balances.

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 the principle of the democratic rule of law and the principle of separation of powers has been undermined. Some point out that Tribunal has 'communist' origins. The shape of democracy in Poland is changing. The system of constitutional democracy (in which the Constitution is the supreme law and the Tribunal its guardian) is turning into parliamentary democracy (the decisive vote belongs to the parliamentary majority).

Jakob Hohnerlein: *Preserving democracy as a standard for judicial review of legislation*

A crucial point about the legitimacy of constitutional and international courts reviewing legislation is that it depends on substantive standards, i.e. whether there are good reasons to restrict majorities. This may be true for individual rights as values conflicting with democracy. Another question is whether democracy itself justifies certain restraints. Majority decisions are the best way to realize equal chances of citizens in a given time and place to influence politics. However, they restrict the options of future citizens to realize their political preferences. Many policies have factually irreversible consequences. And present majorities can make change more difficult by unfair election laws, restrictions of political speech or legal entrenchment of policies (i.e. constitutionalizing them or requiring super-laws to be reversed only by supermajorities). Moreover, democratic decisions in one polity affect those in others. Though not legally binding abroad, they may disable policy options there (e.g. tax havens). Now influence of democratic decisions over others is ubiquitous and often inevitable. So should normative theory be more modest, accepting that democracy is just about equal chances to influence politics under the given conditions? However, the power-questioning promise of political freedom should not be given up too quickly. This said, the issue is about identifying constraints on majorities that prevent illegitimate domination over future and foreign people.

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

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

FRIDAY
7 JULY 2017
10:45 – 12:15

PANEL
SESSION
6

168 STRUCTURE OF DYNAMICS OF CONSTITUTIONAL COURTS

Participants	Niels Petersen
	Max Steuer
	Maxim Tomoszek
	Ángel Aday Jiménez Alemán
	Dana Burchardt
	Chien-Chih Lin
Moderator	Niels Petersen
Room	4B-2-22

Niels Petersen: ***Equal Protection Guarantees and Judicial Self-Restraint***

The principle of equality before the law seems to be one of the fundamental demands of justice. Consequently, most human and fundamental rights catalogues contain some sort of equal protection guarantee. However, spelling out what equality means in concrete cases is not straightforward. Laws distinguish necessarily. For this reason, courts usually adopt a two-step test when they operationalize equal protection guarantees. In a first step, they ask whether there has been a distinction between two social groups. In a second step, they look for a justification for this distinction. When implementing this test, courts can exercise more or less self-restraint. Most courts try to make a difference between more and less problematical distinctions. The proposed contribution 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 the jurisprudence of the respective courts. Can we find patterns, i.e. situations in which equal protection guarantees are typically applied and in which they are not applied? In a second step, it tries to explain differences in the jurisprudence of the three different courts. Are such differences due to a difference in the applied, or are there other factors that contribute to the observed case law?

Max Steuer: ***Determinants of the Guardians' Success or Failure: Identifying Influences of Constitutional Courts on Democracy***

Are constitutional courts conductive to democratic regimes? Answers to this puzzle mostly work with concepts such as non-majoritarian institutions or counter-majoritarian difficulty as well as juristocracy (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 Alemán: ***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

the National Government to implement any measure needed in "epecially relevant constitutional situations". 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. In spite of that fact, most constitutional courts do not exercise direct enforcement powers, and they are influential political actors that achieve the general acceptance of their decisions. The objective of this contribution is trying to advance in this debate about the convenience of granting enforcement powers to constitutional courts a traditional minor topic but extremely relevant for the practical development of the principle of separation of powers. Firstly, I will study several experiences from the Comparative Constitutional Law. Then, I will revise the evolution of the Spanish model of constitutional justice, analyzing how the configuration of the Court after this last reform departs from the original model and could risk its legitimacy and its effectivity

Dana Burchardt: ***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 fulfil its coordinative function sufficiently. Courts had to step in to fulfil 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 fulfil 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 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.

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 legal 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.

169 THE PEOPLE AND DYNAMICS OF CONSTITUTIONAL COURTS

Participants	Jerfi Uzman David Kenny Catherine Warin Brian Christopher Jones Ana Cannilla
Moderator	David Kenny
Room	4B-2-34

Jerfi 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 thus accompanied by increased litigation before the courts. The (in)famous ruling of the UK Supreme Court on the Brexit-referendum serves as an exmple. 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 courts or by democratic means. It examines the power of courts and the people and when each should prevail. When the US Supreme Court invalidated State bans on same-sex marriage, some criticised this court-led change, driven by a judicial elite, as anti-democratic and potentially creating negative backlash. However, democratic referendums are under fire in the 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 show that fear and 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.

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 case law in these three areas and asks the following question: how far does the contribution of EU citizens to the exercice of public power reach? Or, how is the balance struck between the political participation rights of individual citizens and the discretion traditionally 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. correlatives 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 characterisation is that newly implemented constitutions 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

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 Cannilla: ***The Constitutional Paradox in the Populist Crisis: An Answer from Popular Constitutionalism***

In the judicial review of legislation arena, Popular Constitutionalism has strongly criticized judicial supremacy and has defended instead the idea of recovering the place of 'the people themselves' in constitutional decision-making processes. Although Popular Constitutionalism has been widely debated, the question of what model of democracy better fits its principles has not been addressed. In this paper I place Popular Constitutionalism within democratic theory, with special attention to agonistic models of democracy that – in contrast to deliberative models of democracy – reject the ideal of achieving rational and universal consensus over our basic values and principles. I will draw on the work of Mouffe to explain the problems derived from the depoliticization of Constitutional law, the demonization of popular majorities and the sacralisation of counter-majoritarian institutions. I will argue that Popular Constitutionalism is not a danger to democracy but that it actually reinforces democracy from an agonistic approach, which becomes particularly important once technocratic and moral readings of the Constitutional order have proven unsuccessful for the safeguarding of rights and social cohesion. At times when popular sovereignty seems to be defended mainly by reactionaries it is vital that critical scholars offer alternative progressive options for the resolution of constitutional conflicts based on the goods of popular sovereignty and popular participation for democracy.

170 INTERNATIONAL LAW AND CONFLICT

Participants	Matthias Goldmann Hent Kalmo Amarilla Kiss Aeyal Gross Marina Aksenova
Moderator	Matthias Goldmann
Room	4B-2-58

Matthias Goldmann: ***Taking Hermeneutics Seriously: Strategic and Non-Strategic Uses of International Soft Law by Domestic Courts***

This paper analyzes the use of international soft law by domestic courts. Based on an analysis of 70 cases from 25 jurisdictions it argues that domestic courts follow certain patterns in their approach to soft law. In contrast to much of the prevailing literature about the behavior of courts, we find that these patterns cannot be conclusively explained by the power interests of courts, or power struggles within courts. Rather, factors influencing this pattern include the resilience of domestic democracy, the particular position of the court within the separation of powers, as well as the subject matter of the decision and the communicative practices of the field. These factors lead to strategic and non-strategic uses of soft law. We therefore claim that hermeneutics might matter more than much of the empirical research about courts recognizes. Legal reasoning seems to have an independent influence on the outcome of a case.

Hent 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 less 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 rearrange the international order by creating new and proposing transformative interpretations of existing rules, it may well conclude that its values are not best carried into practice by loosening constraints on other actors.

Amarilla Kiss: ***International courts and tribunals in post-conflict situations: new trend in international law?***

In public international law there are different fields when it comes to international courts and tribunals: traditionally, the ICJ is in charge of the settlement of international disputes, there are forums of international criminal law, regional and specific courts, cases for arbitration and administrative courts. The question of individual responsibility is not new in international law, still, it is a relatively young area where we just start to collect experiences from the operation of the different courts and tribunals. This area is shaping dynamically concerning the number and the expanding role of these forums. 'Judicialization' became a trend in international law. This poses questions, if it leads to a certain fragmentation in international law, as this area is forming faster than how fast we get the results and could control this process. Though they are important in rebuilding the state, in the accountability of individuals, and generally, in processing the past and strengthening the trust in justice institutions. However, they are criticized upon ignoring cultural diversity, and most of them has already experienced legitimacy crisis. The attitude of states towards these forums is mixed as the national implementation of the decisions reveal. The paper attempts to discover how international courts and tribunals contribute to peace in a post-conflict situation,and it also tries to reveal how the phenomenon of 'judicialization' affects public international law in general

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

approach are complementary, and both are needed. 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 Aksenova: *Reinventing or Rediscovering? Alternative Approaches to International Law*

On 25 June 2016 Russia and China issued a joint declaration reiterating their commitment to the principles of international law as they reflected in the UN Charter and 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. The two states underlined the principles of sovereign equality, non-intervention and peaceful resolution of disputes as a 'cornerstone for just and equitable international relations' (cit). The paper scrutinizes the recent trends in an attempt to assess whether new approaches to international law is a mere restatement of the principles enshrined in the UN founding documents or whether we are observing a re-invention of international law by certain groups states. The latter supposition would support the idea of fragmentation of international law not only from a strictly legal perspective – as a plethora of conflicting 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 repudiatory of the foundational character of a constitution that they should not be considered amendments but as a form of dismemberment or a revolution. This panel examines the processes, meanings, legality, and legitimacy of amending the constitutional text. It identifies factors that influence changes to the constitution and locate them within the broader political contexts. For instance, a particular amendment may have different outcomes depending on whether it is produced as part of a liberal democratic regime, an authoritarian regime, or a transitionary one. In this regard, the papers will also reflect upon the institutional interactions between the courts and legislature in determining the meaning and impact of constitutional amendments.

Participants	Richard Albert Yaniv Roznai and Gary Jacobsohn Jaclyn L. Neo Tom Ginsburg Marco Goldoni and Michael A. Wilkinson
Moderator	Jaclyn L. Neo
Room	7C-2-24

Richard Albert: *Constitutional Dismemberment*

Some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of a constitution and to destroy its foundations. And yet we commonly identify transformative changes like these as constitutional amendments no different from others. A radically transformative change of this sort is not a constitutional amendment. It is a constitutional dismemberment. A constitutional dismemberment is a deliberate effort to disassemble one or more of the constitution's constituent parts, whether codified or uncodified, without breaking the legal continuity that is necessary if not useful for maintaining a stable polity. Dismemberment seeks to transform the identity, the fundamental values or the architecture of the constitution. Importantly, a dismemberment need not necessarily weaken the democratic foundations of liberal constitutionalism; it can also strengthen them. In this paper, I introduce and theorize the phenomenon and concept of constitutional dismemberment with reference to jurisdictions around the world including Brazil, Canada, Colombia, Honduras, India, Ireland, Jamaica, Japan, New Zealand, Saint Lucia, Taiwan, Turkey, the United Kingdom, the United States, the Caribbean, and the European Union.

Yaniv Roznai and Gary Jacobsohn: *Constitutional Revolution*

This paper will introduce an argument which is forthcoming as a book with Gary Jacobsohn, focusing on Constitutional Revolutions. The purpose of the book is to provide and invite theoretical and comparative reflection on the concept of the constitutional revolution, an idea for which no canonical meaning exists. Are the characteristics of a constitutional revolution distinguished from the features commonly associated with the revolutions? Suppose a constitution was amended in some paradigm shifting way, either formally or informally through far-reaching judicial interpretation or political behavior. Can the concept of the constitutional revolution be made to accommodate the consequences of these and other essentially non-revolutionary developments? This, of course, would be contrary to Hans Kelsens famous formulation that a revolution occurs – whenever the legal order of a community is nullified and replaced by a new order in an illegitimate 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 polity.' This constitutional revolution will be accompanied by critical changes in constitutional identity (although not every mutation in identity will entail a shift of sufficient magnitude to be considered revolutionary). Additionally, the distinction between legal and illegal transformations is not determinative in establishing the existence of a constitutional revolution. Finally, a "constitutional moment" may or may not accompany the onset of a constitutional revolution. Those instances in which a polity experiences a substantial reorientation in constitutional practice and understanding absent such 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 argue that such transformations often respond to legislative dysfunction. In this article, I will discuss two scenarios that I argue represent legislative dysfunction: first, when the legislature is unable to agree on crucial matters involving moral (or religious) judgment and implicitly defer to the courts the power to transform the constitution; 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 argument of Melton and Ginsburg (2015) this paper elaborates on how regime type (democracy or authoritarian) interacts with the measures of difficulty, and affects the observed pattern of constitutional amendment in a given system.

Marco Goldoni and Michael A. Wilkinson: *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 read apart from societal dynamics: actually, the 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 takes on constitutional transformation; then, in the second section, we draw a distinction between the types of conflict which might have an impact on its core ordering factors. This allows us to introduce a criterion to detect cases where constituent power is exercised and cases where the material constitution itself is strengthened by constitutional change. Finally, in the third section we capitalise on these insights by offering a view of the material reading of constitutional changes as part and parcel of 'juristic knowledge'. Given its relevance for understanding thorny issues around constitutional transformation, we conclude that such a material reading ought to be adopted by constitutional lawyers and practitioners as well.

172 INTER-LEGALITY: BEYOND CONFLICTING LEGAL ORDERS

The fragmentation of international law long gave rise to discussions about norm hierarchy and conflict rules. Increasingly, however, it is realised that solving conflicts with such devices comes at a cost and, what is more, that the legal landscape is undergoing simultaneous change. Normative conflicts tend to have ramifications for our understandings of key concepts such as 'jurisdiction' or 'responsibility'. Inter-legality is a book project (editors Klabbers and Palombella) aiming to take stock of such changes and think about possible ways to help overcome some of the resulting normative stalemates; this panel focuses on the latter part.

Participants	Mikael Rask Madsen Jan Klabbers Gianluigi Palombella
Moderator	Sanne Taekema
Room	7C-2-14

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***

173 JUDICIAL POLITICS IN COMPARATIVE PERSPECTIVE

The recent resurgence of right wing populism in Europe and the United States makes an old puzzle – that of judicial legitimacy – come to the fore. Whereas the offensive on courts in the U.S. poses the question of defending rights against democracy as a real exigency, courts also face the dilemma of having to protect democracy itself against what could be perceived as abuse of rights. Further, often based on history and context, the judiciary gets to calibrate the centrality of universal principles such as dignity, free speech and privacy across different constitutional orders. Ultimately, when delivering important but controversial decisions across that spectrum, the judges have to think of protecting the authority of their courts. Common criticisms of 'judicial activism' stretch from the somewhat out-dated but nonetheless repeatedly re-emerging argument of (quasi)-constitutional courts' "counter-majoritarian difficulty" to the prevalence of disagreement in plural societies concerning the substance and scope of human rights. However, beyond conceptual attacks on (quasi)-constitutonal adjudication, it is increasingly common to find politicians across the world that attack courts for decisions with which they simply disagree.

Participants	Michaela Hailbronner Christoph Bezemek Bilyana Petkova Scott Stephenson
Moderator	Stephen Gardbaum
Room	7C-2-12

Michaela Hailbronner: ***Courts and Institutional Failure***

It is a recurring argument in judicial decisions and academic writing in the Global South that when other institutions fail to fulfill 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 perhaps most importantly on what qualifies as institutional failure in the sense relevant to courts. As a tentative definition, I suggest that institutional failure requires 1. a legitimate expectation of specific institutional behaviour that is not fulfilled in spite of 2. that behaviour being (part of) a key function of the institution charged with its fulfilment. Yet this rough definition leaves many questions open. Work on institutional economics and sociology provides an important resource for better understanding institutional failure and what courts might or might not be able to contribute when it happens. How best to measure institutional dysfunction or indeed even to provide an appropriate conceptual definition of that term is a subject of some methodological debate in these disciplines. Suggestions range from measuring institutional performance in terms of the state's overall goal of helping citizens to lead good lives (Sunstein 2015) to more institution-specific standards (Lewallen Theriault & Jones 2015). Social science work can also be valuable in identifying categories of institutional failure such as design failures, institutional mismatch and obsolescence, adaptation failures or capture (Prakash & Potoski 2015), that can inform a legal conceptualization of that concept.

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

When a collection of essays by Joseph Goebbels was published in the mid 1930s, the introduction to the chapter on democracy infamously stated that: "[f]orever it will be among the best jokes about democracy that it provided the means to its own destruction to its mortal enemies." Against the backdrop of this sardonic conclusion, 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". The ECtHR, 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 structure of abuse clauses, 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 naturally spring to mind. In turn, courts have recently become one of the most prominent institutional actors in promoting the rights to privacy and data protection in the European Union. Landmark judgments like Digital Rights Ireland, Google Spain, and Schrems have had a reinforcing effect on one another. These rulings have also generated havoc, most notably in the U.S., which differs substantially in its understanding of privacy as being balanced against other rights and values. Yet European constitutionalism itself is still grappling with the different values and purposes that data privacy rights serve across multiple contexts of EU law. Without clear distinction, under the rubric of privacy, European judges are bundling together dignity, self-realisation, autonomy, protections from the "chilling effect" on the exercise of other freedoms, and data protection has also been successfully evoked before the Court of Justice of the European Union (CJEU) to justify executive power secrecy. Further, the strong stance taken by the CJEU in this field contrasts with its recent restraint in areas like EU anti-discrimination 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.

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 miscalculations exceeding the 'tolerance interval' that politicians grant courts before they challenge their decisions. The second is predominantly normative and approaches the matter as one of constitutional law, denouncing political backlash as a threat to the rule of law because it has the potential to erode the independence and impartiality of the judiciary. This paper will argue for a third approach that conceptualises political backlash as the meeting point of constitutional politics and constitutional law. It will suggest that it is not possible to provide an accurate account of political backlash that strips away one side of the law/politics divide because the phenomenon is the pursuit of legal contestation

through political means. It occurs where politicians attempt to challenge judicial decisions using mechanisms that are recognised in politics, but not in law, such as court packing, budget stripping, jurisdiction removal and public denouncements. The law-meets-politics approach demonstrates, first, that normative assessments of political backlash are not straightforward exercises in denouncement and, second, that descriptive accounts cannot be reduced to assessments of tolerance intervals.

174 SOCIAL WELFARE

Participants	Stefano Civitarese and Simon Halliday Dragica Vujadinovic Walter F. Carnota Matteo De Nes
Moderator	Matteo De Nes
Room	7C-2-02

Stefano Civitarese and Simon Halliday: *Constitutional Law and Social Welfare after the Economic Crisis*

This paper concerns developments in social welfare policies within Europe following the great financial crisis that began in 2008. This focus on the new "age of austerity" as it is often termed requires little justification. The combined impact of economic recession and the fiscal austerity that followed in its wake have had profound impacts across many aspects of many societies. In turn of course such deep and wide impacts prompt academic attention. The implications of the great financial crisis have already been subject to a vast amount of scholarly analysis. Our ambition however is to examine the topic from a distinctly legal perspective. Thus we not only seek to deepen our understanding of the impact of the economic crisis on social welfare programmes but also to explore the capacity of constitutional law rights and legal values to shape or even inhibit policy developments. We adopt a case study approach to the pursuit of our research aims by analysing and discussing five national case studies – France, Germany, Italy, Spain, and the UK – and focusing on the attempts to use fundamental public law rights to challenge the content of such policy developments and the responses of the courts to these test cases. Our understanding is that irrespective of differing legal traditions regarding the constitutional status of social rights and differing social welfare regimes the courts have been restricting their capacity to rule on the merits of social welfare policy.

Dragica Vujadinovic: *Causes of the Current EU Crisis and Ways Out – Viewed upon the Welfare Lenses*

The main idea of this presentation is that the neoliberal turn in the development of liberal capitalism did cause the current global and Euro zone crisis, that austerity measures represent the neoliberal mechanism which cannot solve the 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.

175 THE JUDGE AND POWER: EMPIRICAL REVELATIONS OF JUDICIAL PRACTICE

This panel seeks to deepen understanding of the exercise of public power by the courts and judges by bringing together scholars who have undertaken empirical research into different facets of judicial practice. The panel will explore questions around the interplay of judicial philosophies, personalities, dynamics and relationships as influences upon the decision-making process. In turn, what is the influence of process on the outcomes of judicial decision-making? At a more fundamental level, how does institutional design – including for example, the design of appointments processes, disciplinary processes, the use of acting judges – affect the judges' capacity to fulfill their functions? This panel thus seeks to address the question of the conditions under which courts succeed in achieving the exercise of public power with independence, impartiality and integrity.

Participants	Mathilde Cohen Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin Hugh Corder and Cora Hoexter Jula Hughes and Philip Bryden QC Alan Paterson Limor Zer-Gutman and Karni Perlman
Moderator	H. P. Lee
Room	8A-2-17

Mathilde Cohen: *Qualitative Research Methods and Judicial Practice – Notes from a French Field Study*

How can one study and make sense of invisible – or less immediately visible – aspects of judicial work, such as a court's decision-making processes, its internal organizational culture, or some of its hiring practices? Qualitative research methods, including observing hearings and behind-the-scene judicial work as well as interviewing judges and their support staff is an emerging method in the field of legal studies, raising the question of its value and adequacy to the field. Which research questions lend themselves to a qualitative approach? What methodological considerations should be taken into account? I will elaborate on these issues based on my own research projects, in particular a field study on judicial diversity in France – a country that prohibits the collection of racial and ethnic data, ruling out any quantitative analysis. I will discuss the questions of access (which recruitment strategies can a researcher use to interview judges given that random sampling is usually out

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 challenges. The structures that regulate and support judges tend to emphasise the traditional judicial values of independence impartiality and rule of law. 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 reports on a survey of Australian judicial officers (n=142) from across the different Australian jurisdictions. Participants were asked what they considered to be the most pressing challenges that face the various levels of the Australian judiciary and whether the current regulatory and support environment achieves international best practice. The data provide a nuanced picture of the state of the Modern Australian judiciary as it appears to those within it. They facilitate an understanding of the degree to which judicial officers are satisfied with the current regulatory framework, and, where they are dissatisfied, the nature of their disquiet. This work has the potential to illuminate the extent to which reform of the judiciary is both desirable and desired.

Hugh Corder and Cora Hoexter: *Navigating the Straits of Deference: 'Lawfare' in South Africa and its Implications for the Judiciary*

Lawfare' is not a new phenomenon in South Africa, for judicial review has always been a prominent method of holding the government to account even in disputes of a distinctly political nature. Before the introduction of constitutional democracy in 1994, there were barely any political safeguards against oppressive legislative and executive action, and the courts generally presented the citizen's only hope (though often a feeble one) of having individual rights protected or constitutional obligations upheld. That is no longer the position, at least in theory, since the Constitution of the Republic of South Africa, 1996, includes a wide range of safeguards against unconstitutional conduct on the part of the legislature and executive. In particular, the Chapter 9 institutions supporting constitutional democracy may be regarded as the core of a growing integrity system. However, contrary to expectations, lawfare has not diminished as a result but has actually been increasing in recent years. This paper discusses the increasing resort to litigation in contentious political matters with reference to several examples, explaining the factors that have encouraged the trend in this country. It goes on to show how lawfare compromises the courts, threatens the separation of powers, and places strain on the relationship between the judiciary and the other branches.

Jula Hughes and Philip Bryden QC: *What does empirical research on the Canadian judiciary tell us about the judicial exercise of power?*

Our empirical study of the views of Canadian Provincial Court judges shows a surprising diversity of opinion on reasonably common, but analytically marginal, scenarios 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 the judicial selection process. 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 improving 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 social context education.

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 the composition of judgments, orality 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 judges striving to achieve settlements 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 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 Vaypan
	Olga Podoplelova
	Natalia Sekretaryeva
	Dimitriy Mednikov
Moderator	Aleksander Blankenagel
Room	8B-2-03

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

Since 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 into case files, soliciting 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 amicus 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 RCC that constitutes the most effective forum for advancing human rights through strategic litigation by civil society groups. This paper reflects on opportunities, restrictions, and risks that applicants, lawyers,

and NGOs are faced with when engaging in strategic constitutional litigation and when being confronted with litigation outcomes. Particular attention is given to assessing developments in admissibility criteria for filing a strategic complaint, to factors influencing the decision-making process, and to patterns of using the judgments of the RCC for human rights protection.

Natalia Sekretaryeva: ***Russian Constitutional Court's role in the implementation of the European Court of Human Rights judgments: some lessons of the judgment in the N.V. Korolev and V.V. Koroleva v. Russia case***

This paper looks at some recent Russian Constitutional Court judgments, particularly, the 2016 Korolev and Koroleva case based on the European Court of Human Right's (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 in the latter's implementation process. Moreover, the paper will also reflect upon whether and to what extent the Russian Constitutional Court judgment in question contributes to the possibility of re-establishing a constructive dialogue between the two judicial bodies in the future. Particularly, it will be argued that the adoption of a Constitutional Court judgment declaring a law earlier found by the ECtHR to be in violation of the European Convention on Human Rights (ECHR) unconstitutional does not necessarily mean that such a judgment represents a successful and effective implementation of the 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.

Dimitriy 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 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 already made 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.

177 THE TRANSFORMATION OF JUDICIAL IDENTITY: MECHANISMS AND IMPACTS OF TRANSNATIONAL 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 top-down and bottom-up incentives for judicial engagement in transnational exchanges. The third paper critically assesses the appropriateness of the judicial dialogue metaphor in the context of references to foreign law.

Participants	Elaine Mak, Niels Graaf and Erin Jackson Klodian Rado Oran Doyle
Moderator	Vicente Fabian Benitez-Rojas
Room	8B-2-09

Elaine Mak, Niels Graaf and Erin Jackson: ***Old, New, Borrowed and Blue: A Comparative Analysis of European Judicial Culture(s)***

The Lisbon Treaty (2009) has set new goals for judicial cooperation between member states of the European Union (EU) with an eye to providing effective legal remedies and fundamental rights protection. This cooperation is stimulated by the European Commission's agenda (e.g. judicial training) and practices of 'transnational borrowing' between courts in the EU. However it remains unclear to what extent national judicial cultures, i.e. ideas and practices regarding judging and judicial organisation which have developed over time, can and should converge into a shared 'European judicial culture'. This project, which will run between 2016-2021, analyses the possibilities and constraints regarding further alignment of judicial cultures in the EU. Comparative-legal and empirical studies describe and explain the content and development of three aspects of judicial culture: 1) professional values for judges (moral dimension) (Mak); 2) judicial ideologies in the interpretation of legal rules and concepts for European cases (legal dimension) (Graaf); and 3) leadership in judging EU law cases (institutional dimension) (Jackson). The papers for this panel elaborate the concept of 'judicial culture' for each of these three dimension, in this way setting the scene for the project's study of the development of the judicial role and judicial practices in the evolving European legal context.

Klodian Rado: ***Transnational Judicial Communication and the Supreme Court of Canada***

Since 1997 when the notion of "dialogue" between the Supreme Court of Canada (SCC) and the other branches of government on interpreting the Canadian Charter of Rights and Freedoms and generally the Constitution, entered the Canadian constitutional law mainstream, it has remained central. The "dialogue" metaphor occupied not just the academic arena but also the Canadian judiciary legislature, and even the realm of politics. In this paper, I will address the transnational judicial dialogue with foreign courts and judges. Many foreign and Canadian scholars judges, and even the media, consider the SCC one of the most important actors in the global community of courts. Particularly after the implementation of the Charter, SCC has been an active participator in the global conversation on human rights and other important constitutional issues, by using both juridical and social tools. The aim of this paper is twofold. On the one hand, it seeks to shed light on the dialogue of the SCC and its judges with other foreign and international courts and judges; and on the other its goal is to identify some of the main constitutional impacts of such a dialogue. In order to do this, the paper first introduces the concept of "transnational judicial dialogue" in the era of globalisation; second, the main mechanisms or means of this dialogue used by the SCC are explored; and finally, the paper exposes some of the main impacts of transnational judicial dialogue of the SCC in particular its impact on judicial identity within the Court. Besides the transformation of the SCC's and its judges' judicial identity, other notable effects are: it causes constitutional changes by driving Canada towards a monist system contributes to harmonized international legal standards, advances consistent transnational jurisprudence, shapes the outcome of national judgments, and impacts other important actors, such as national politics, 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 worldwide social relations that link distant localities, is a phenomenon that affects and includes judiciaries. This occurs through formal and informal judicial networks but also through the decision-making processes that lie at the heart of the judicial function. One aspect of this concerns the citation of foreign law in constitutional cases. The metaphor of judicial dialogue has been employed to understand and guide this practice. However, as a concept, judicial dialogue fails to capture the most salient features of judicial practice. 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.

178 TRANSFORMATIVE CONSTITUTIONALISM OR DEAD LETTER? THE CURIOUS CASE OF THE CONSTITUTIONAL COURT OF COLOMBIA

What makes a "peripheral" Constitutional Court enough to be considered one of the most powerful and proactive in the world? Analogous with the case of "Benjamin Button" in the story of F. Scott Fitzgerald, this young but mature Court has developed a wide-ranging and remarkable case law, thus attracting the attention of global scholars, policy makers, along with business and social actors. In doing so, it has not hesitated in confronting public authorities and strong external powers. Reformulating the ancient division of powers, it has created interesting and innovative approaches to face the challenges of contemporary judicial review and the protection of human rights. For instance, blocking presidential reelection under the doctrine of unconstitutional constitutional amendments, restructuring the healthcare system or protecting historic discriminated groups such as indigenous peoples, afro-descendants, women, LGBTI, internally displaced people, amongst others. Naturally, such eruption in the judicial tradition has raised interesting critiques and challenges that we would like to share.

Participants	David Landau Andrés Gutiérrez Juan C. Herrera César Vallejo
Moderator	Víctor 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 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 purpose of social rights. Put simply, the empirical literature shows that courts are often less interested (or less able) in using social rights to promote social transformation than is commonly assumed in theoretical work. This transformative assumption runs deep, affecting debates for example about the framing of these rights in international instruments and in constitutions, their interpretation, and remedies for their violation. But a growing literature shows that courts often enforce socioeconomic rights in a robust way without focusing exclusively or even primarily on the marginalized. Across a number of different contexts, courts instead often seem to use socioeconomic rights to defend the status of higher-income groups that are not extremely poor. This emerging empirical literature points towards a theoretical gap. Very little literature explores the question of when and why courts engage in these patterns of enforcement or how we should conceptualize them from a normative perspective. This chapter surveys three possible (and non-exclusive) explanations for the emergence of social rights jurisprudence on behalf of higher income groups.

Andrés Gutiérrez: ***Against the Tide: is it Possible to Obtain Social Changes Through the Judiciary when there is no Political Will? The Case of Forced Displacement and the Colombian Constitutional Court***

The Colombian Constitutional Court is well known in comparative studies because of its progressist case law and especially for its determination in pursuing the satisfaction of social rights. Due to its strong commitment in the consecution of social change for the people in need and because of the transformations it has accomplished in the field of Constitutional Law, most of academics argue the Court has become a powerful institution able to perform deep and lasting changes in the Colombian society. The most paradigmatic decision of this kind is the judgment T-025-04. Through this decision the Court ordered a profound and ambitious transformation of public policies addressed to solve the violations of human rights suffered by displaced people. In such a way it pretended to guarantee the rights – especially social rights – of more than 3 million people who found themselves in appealing conditions as a result of the internal conflict. In this paper I affirm that besides the symbolic changes that seemed to have appeared in public opinion and the growth of Budget and bureaucracy, little change has been achieved from the victim's perspective. This case reveals the strong limitations that face the 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 Ius Constitutionale Commune en América Latina.

César Vallejo: ***"I am the State": The Distortive effect of the Colombian Constitutional Court on the Rule of Law***

Most scholars of judicial activism recognize the Colombian Constitutional Court as a world reference. As it is well known, many of its rulings have advanced in the protection of individual freedoms and social rights; however, such decisions have not been handed down without criticism. The Court is accused, among other things, of assuming functions that correspond exclusively to other public authorities, or, what is worse, to offer apparent solutions to problems that require urgent and real actions. The position I intend to defend starts by acknowledging that much of the progress made in protecting individual and social rights in Colombia would not have been achieved – or would have taken much longer – without the Court's rulings. However, I claim that the preponderant role assumed by the Court in these issues (e.g. LGTBI rights or euthanasia) has generated a kind of perverse logic in the functioning of the State. In other words, facing the ineffectiveness of other branches of power, the Court has assumed the place and functions that correspond to the legislator or the executive. This serious imbalance has ended up distorting the basic elements of the rule of law.

179 RETHINKING THE MATIÉRE PÉNALE – CANCELLED

The ECtHR jurisprudence has been developing since Engel an autonomous notion of matiére pénale, which allows the Court to freely appreciate 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 unclea 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 or 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 ECtHR 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 which do serve punitive purposes, but do not carry the degree of stigma which is usually associated to that traditional hard core.

Participants	Marta Cartabia Paulo Pinto de Albuquerque Francesco Viganò 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 justice defines "la matiére penale" according to 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? Do article 6 and 7 CEDU be interpreted as a minimum standard guarantee? Examples of tensions caused by the different approaches to "la matiére penale" will be taken from the case law of the Italian constitutional case law concerning the principle of "ne bis in dem", the ban of retroactive application of criminal penalties, the opposite rule governing the "lex mitior", the notion of "base legale", the authority of "res iudicata".

Paulo Pinto de Albuquerque: ***The ECHr standpoint: challenges and perspectives***

The ECHR has not yet provided a clear conceptual framework for the definition of the dividing line between administrative and criminal offences. Until now it sought to distinguish hard-core criminal cases which carry a significant degree of stigma and those which do not, limiting the applicability of the criminal head guarantees in the case of the latter group. But case-law clarified neither the substantive criterion of significant degree of stigma nor the distinction between the disposable and non-disposable procedural guarantees. This case law impacts hugely In the field of tax, stock-exchange, customs and other business and corporate related offences. Reaction by Constitutional and Supreme Courts raises the issue of constitutional limits to such European case law. The question now is not only how to define the matiére penale in Europe, but also who defines it.

Francesco Viganò: ***Are Confiscation Measures Penalties for the Purposes of the EHCR?***

Confiscation measures are becoming more and more popular in modern criminal systems as effective tools to fight against economic offences and organized crime. Their constitutional and human rights law status is, however, still largely unclear. While certain forms of confiscation have been considered as "punitive" measures by some ECtHR judgments, other kinds of confiscation have been held to be merely 'preventive' measures, which only attract, as such, the guarantees provided for the right to property and the fair process rights in their civil limb. And this in spite of their being conceived as consequence of the commission of criminal offences, and of their huge impact on the interests of the individual concerned. The question is especially critical in respect of non-conviction based confiscations, which are already intensively applied in some legal systems, among which Italy, but which have been more and more 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 confiscation 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 courts (both Constitutional courts and the European courts) can address the existing challenges through dialogue. The Taricco case will be brought as an example of how cooperation can be reached in a way that ensures that the growing complexity of EU competence is nevertheless consistent with the respect of the fundamental principles of domestic constitutional orders.

180 VARIETIES OF CONSTITUTIONALISM

This panel explores the understanding of constitutionalism that is dominant within the US, Canada, the UK, Germany and France. How does the historical context affect the way the various branches of government lato sensu, the executive, the judiciary 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 trust or distrust towards the legislative branch affect the balance between the legislative and the judiciary branch in France and in the USA? How have some elements of authoritarian constitutionalism that Germany has experienced affected its current understanding of 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 was paid to vertical issues of governance, namely federalism and the division of powers. The Constitution Act, 1982, which included the Charter of Right, introduced robust US-style judicial review. The new framework was decried as impinging on "Parliamentary sovereignty", a charge that continues to this day. Parliamentary sovereignty is not necessarily associated with the separation of powers. But in Canada the link was clear because of the perceived threat posed by a newly empowered judiciary. At the same time the courts themselves began to acknowledge the doctrine: asserting the judiciary's independence and crafting distinct norms under which they have aggressively scrutinized the other branches. Recent opinions demonstrate that the separation of powers is now entrenched in the Canadian conception of judicial review. But its more tenuous position in the larger constitutional order is a continuing source of tension and uncertainty.

Nick Barber: ***The Principle of Separation of Powers in the UK***

The principle of the separation of powers is commonly thought not to apply to parliamentary systems such as the United Kingdom. I argue that this objection turns on a mistaken understanding of the principle and, also, a mistaken understanding of the structure of parliamentary systems. Once these misunderstandings are cleared away, not only can the parliamentary model be seen as embodying a form the separation of powers, it is arguable that, in some respects, it more closely allies with the principle than presidential models.

Ioanna Tourkochoriti: ***"Apology" of the Law or distrust 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 distrust towards the legislative that is characteristic of US constitutionalism. Is the "paternalism 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 distrust 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 as implying an aristocratic form of government. The presentation explores the differences in the kind of rights and liberties that are protected in the context of these variations of constitutionalism. It traces the emergence of these different conceptions to the French and the American Revolutions and the different sociopolitical needs to which they responded. 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 1848/1849 a popular assembly drafted a progressive constitution, this fundamental law was never adopted and the German States were not united until twenty-two years later. United under the dictate of Prussia in 1871, the regime institutionalized was not a democracy or a liberal monarchy but an absolutist 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 peoples' chamber in the 1860s and 1870s. A democratic constitution was enacted in Germany only after the Revolution of 1918. But the Weimar Republic did not last for long: Again, an all too powerful executive exhausting the power bestowed upon it paved the way to Hitler's fascist dictatorship. A power separating democratic state was only institutionalized under occupation in Western Germany after 1949. 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 1848-1989. To give a few examples: the federal state structure foreseen by the German constitution of 1949 has its roots in the federalism of the 1848 constitution. Family resemblances between the two are also visible when we compare the bicameralism of the constitutions of 1848 and 1949. On the other hand, with view on gender equality we find strong similarities (even in the wording) between the concept adopted in the Weimar Constitution of 1918 and different socialist Constitutions adopted in the GDR after 1949. Similarities can be also 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 relation, we can reconstruct key elements that characterize both democratic and autocratic footholds that shaped the state in modern Germany. Thus, we 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***

181 ECONOMIC AND MARKET REGULATION

Participants	Anna Tsiftsoglou and Stylianos-Ioannis Koutnatzis Eugene Schofield-Georgeson Biancamaria Raganelli Sofia Ranchordas
Moderator	Sofia Ranchordas
Room	8B-2-49

Anna Tsiftsoglou and Stylianos-Ioannis Koutnatzis: ***Financial 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 reversing the initial pattern of 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 a series of show trials (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 members, particularly those in 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 retrospectivity 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 therule 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 a European transparent 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 though 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).

182 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? The purpose is to provide a contribution to the International Society of Public Law for further use in examination 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, the rule is an administrative act 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

rulemaking proceedings. Moreover, by looking at the Italian administrative jurisprudence of the Council of State, who does annul rules for non-compliance with procedural standards, a general willingness to expand participatory rights to a growing number of rulemaking proceedings can be perceived. Why is it so? Are differences only a matter of dissimilar legal traditions? How much room do modern democracies leave for public participation in administrative rulemaking processes? And what is the role of the Courts towards the rulemaker, is it deferential or does it translate into a deep control of administrative action? Can judicial review foster participation in administrative rulemaking?

Andy C. M. Chen: *Judicial Review of Economic Evidence in Competition Cases by Administrative Courts in Taiwan: An Effect-Based Proposal*

Years of reviewing experience by the administrative courts in Taiwan have shown a tendency towards over-formalistic understanding of its major competition legislation, the Taiwan Fair Trade Act. In particular, the courts' interpretation of economic evidence in competition cases have demonstrated a rigid reliance on certain time-honored general principles of administrative law, and has rendered the reviewing results irresponsive to genuine competitive effects from market interactions. We first introduce the enforcement structure of the Act in Part I of this paper. Part II illustrates how the administrative courts determined the quality and probative value of economic evidence in cartel and merger cases because these are the two types of litigation that sophisticated economic evidence and theories are mostly likely to be raised. We argue in Part III that disputes over the persuasiveness of those decisions are usually attributable to an inflexible application of the following three principles of administrative law: the principles of legal certainty judicial deferral and proportionality. We then offer in Part IV an effect-based proposal to adjust the manners those principles are to be applied to avoid oversimplified reviewing process inappropriate qualification of reviewable issues on appeal and arbitrary determination of penalties meeting the proportionality requirement. Part V describes the policy implications for other jurisdictions from our study and concludes this paper.

Giulia Mannucci: *Due Process Administrative Powers and Judicial Review*

Public authorities are required to ensure respect for due administrative procedure in the exercise of their powers. How strict is this requirement vis-á-vis competing administrative needs? How courts ensure administrative compliance with the participatory rights of affected subjects, and with the duty to state the reasons for administrative decisions? The answer to these questions depends on the understanding of due process guarantees in respect of public decisions: the "formalist" logic assigns to those forms of protection an independent relevance, which directly affects to the validity of the relevant act; the "substantialist" logic, on the contrary, emphasizes the substantial correctness of decisions and denies formal and procedural defects a direct impact on the validity of the measures. This antagonism reflects the tension between conflicting public law values: on the one hand, the efficiency and expediency of the administrative action; on the other hand, the protection of private positions vis-á-vis the administrative power. The paper aims to examine this tension by comparing the approaches to the issue that have been developed by a national court (the Italian Council of State), a supranational court (the EU Court of Justice) and an international court (the European Court of Human Rights).

Sharath Chandran: *Judicial Review of Administrative Action- Perspectives from the Indian Experience*

Over the last fifty years, the growth of judicial review in India has seen few parallels. Traditional models of certiorari grounded on jurisdictional errors and errors of law have given way to a rights based model where the legitimacy of State action is subject to exacting scrutiny on the touchstone of fundamental rights. The central premise of this paper is that while there is clear evidence to show that the scope and depth of review has dramatically increased, there is no clear evidence to show that the administrative authorities, on whose processes review is carried out, have absorbed the core values that the Court seeks to protect. In other words, it is argued that the frequency of intervention and the increasing volume of litigation is a sign of a weakening administrative machinery that has become irresponsive to constitutional values. In enforcing fundamental rights the Court, in many cases, is invited to step aside from its traditional role as a Court of correction into assuming a pro-active role that involves making value based choices. The Court's power is, however, limited to evolving a norm on a case to case basis. It is argued that in the long run sensitizing administrative authorities with the core values of a fair efficient and transparent administration could achieve results that are consistent with values that judicial review recognizes and seeks to implement.

Rebecca Ananian-Welsh: *Due Process without Rights*

Due process in court proceedings is universally recognised as fundamental to achieving justice fairness, the legitimacy of the state and its institutions, the rule of law, and individual liberty and dignity. This importance is heightened by the expanding role of courts in the lives of citizens and in providing a check on state power. Thus, due process finds protection in human rights documents the world over. But can due process be effectively protected without engaging the framework of individual rights?

183 CORRUPTION AND OFFICIAL DISOBEDIENCE

Participants	Elizabeth Acorn Franco Peirone Yoav Dotan David Fagelson Johannes Buchheim and Gilad Abiri
Moderator	Elizabeth Acorn
Room	8A-3-27

Elizabeth Acorn: *In the Shadow of the Court: the American Innovation and Export of Negotiated Resolutions for Bribery in International Business*

The influence of the 1997 OECD Anti-Bribery Convention, a prominent example of international efforts to combat corruption globally by stifling its supply, has extended well past the Convention's core legal obligation for states to establish domestic criminal prohibitions against foreign bribery. Since implementation of the Convention, many OECD states have continued to modify domestic laws and enforcement practice which, this paper argues, is in response to ongoing international socialization. In particular, the paper points to the OECD Working Group on International Business, which has not only championed the increased enforcement of anti-foreign bribery laws, but also has provided a forum where a particular approach to the enforcement of foreign bribery law -- that pioneered in the U.S. -- has served as a continual reference point. The distinctive U.S. enforcement model, characterized by negotiated resolutions, with very few allegations of foreign bribery proceeding to criminal trials, high-levels of prosecutorial discretion and strong incentives for corporations to self-monitor and self-report, has come to inform the shared standards and best practices that the OECD promotes and that many states are beginning to adopt. Together, this research highlights not only the continuing influence of the U.S. on the international anti-bribery regime, but also provides a nuanced depiction of the reception of international law into domestic legal orders and their ongoing interaction.

Franco Peirone: *Corruption in Member States and the EU Rule of Law: Which anti-corruption tools are enforceable?*

In the late January 2017, the Romanian government intended to adopt a decree that would have decriminalized certain abuse of power offences. On February 1st, the EU Commission President Juncker warned Romania not to backtrack on fighting corruption. At last, on February 4th, the government scrapped the controversial decree. This series of events raises significant questions about the existence of a EU-law notion of rule of law as well as which tools EU institutions and citizens could utilize towards dealing with rule of law crisis. The EU rule of law requires a legal framework, both at the EU and MS level, which prevents and tackles corruption since corruption hampers every substantial and formal requirements of the rule of law. Particularly, the reception of the UNCAC obliges the EU legal framework to particular constraints and MS' non-compliance with them may allow a EU anti-corruption enforcement action. The traditional infringement procedure represents a tailored mechanism for addressing a lack of anti-corruption legislation in a MS. In more serious cases, in which the whole member state legal framework is simply ineffective in fighting corruption, it is possible for the EU Commission to start an Art. 7 TEU procedure. Meanwhile, a grassroots approach could constitute a third and interesting option, by holding the MS liable for failing to ensure an adequate anti-corruption framework under the Francovich regime, relying on the citizens' commitment against corruption.

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

Can judicial decisions affect electoral behavior? Can they enhance electoral accountability by signaling to voters that integrity considerations are important? Shortly before the 2013 municipal elections in Israel, the Israeli Supreme Court ordered the immediate removal from office of three city mayors, following their indictments for charges of corruption. We take advantage of this unique political-legal situation to estimate the effect of anti-corruption judicial 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-corruption activity on the vote-share of low-integrity incumbents is negative and substantively significant. This effect on electoral sanctioning of corruption is the largest recorded, suggesting that judicial bodies carry the capacity to influence electoral behavior by signally the importance of integrity considerations in electoral choices.

David Fagelson: *Official Disobedience and Legal Integrity*

Johannes Buchheim and Gilad Abiri: *Official Disobedience and the Competition over Legitimacy*

This paper develops the notion of official disobedience which we define as fierce mutual opposition between 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

assumed is not the ordinary power conveyed by the constitutional framework. Instead, the overstepping public official claims the (extra-ordinary) legitimacy of shifting the balance of powers of changing the rules of recognition. Official disobedience thus is the act of playing the "legal game" while not quite following its rules. Prevalent in times of Trump's America, competing courts in Europe and constitutional restructuring in Poland, Hungary, and Turkey official disobedience is cut from the same cloth as revolutions and constitutional moments. In all three times of upheaval and drama create the possibility of a shift in the constitutional structure and its legitimizing basis in politics and culture. However, in focusing on official action that stays within the overall shapes and forms of the existing constitutional framework, the notion of official disobedience provides a prism for many struggles within a constitutional/legal system that fall short of constitutional moments and revolutions.

Participants	Eli Bukspan and Asa Kasher Kevin Crow Nancy Marder Dwight Newman
Moderator	Nancy Marder
Room	8A-3-45

Eli Bukspan and Asa Kasher: *Public Rights for Private Persons: Direct Application of Constitutional Human Rights*

Our paper deals with the possibility of, and the need for, applying human rights directly in the realm of private law. This approach contrasts with the prevalent view of constitutional human rights as part of public law, to be applied in private law through an indirect application model that is limited, implicit and unsystematic. We hold that this indirect model is incompatible with a democratic world view that recognizes not only a basic right to the free and undisturbed realization of individual liberties, but also a need for protecting the undisrupted exercise of human rights. In a democratic regime, therefore, the identity of the infringing agency – the various branches of government as opposed to individuals or other private entities – should not serve as the litmus test for determining the legal protection granted to human rights. Indeed, our comparative examination demonstrates how, in recent years, the approach acknowledging indirect application of human rights in private law has drawn closer and almost blended with the one acknowledging direct application. In the paper, we also challenge the suspicion which has been raised, according to which adopting the direct application model in private law will actually lead to the violation of human rights, given that private law lacks the tools for deciding on priorities in their regard. Our approach enables profound justifications as well as applications of the direct application model of human rights in private law.

Kevin Crow: *Private Power Public Law Revisited: Intellectual Property at the ICSID through the Vienna Convention: Implications of Eli Lilly v. Canada*

Through the vehicle of international courts, private power has the potential to shape public international law and to force revisions to the domestic law of non-hegemonic states. This explores this theme through a study of Eli Lilly v. Canada – a pending (fully argued) case brought by a U.S. investor against Canada before an ICSID tribunal. Initiated under NAFTA's Investment Chapter after two Canadian Supreme Court decisions on the definition of Canada's intellectual property law invalidated the investor's patents Eli Lilly v. Canada is the first case in international investment law's history to address the allegation that a state's interpretation of its own law is inconsistent with international interpretations and therefore incorrect. The arguments Lilly set forth in part depend upon the international trade system's TRIPS Agreement, which binds all WTO Members and falls under the auspices of public international law (PIL). However, both the VCLT and the PIL on which the case is based were shaped by U.S. and U.K.-dominated conceptions of property and legal interpretation. This paper will present the thesis that at least in this instance international 'judgment' as an exercise of power leads to two dead end results one undermining the international economic legal system and the other undermining domestic courts. It will then investigate the broader implications of this 'lose-lose' scenario for the role of judicial power in public international law.

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

Courts are essential to a democracy because they resolve disputes in public proceedings that reassure citizens that justice has been done. However, as members of the public read less and watch more, and as technology provides unobtrusive cameras and live-streaming, the pressure is greater than ever to allow cameras in the courtroom to educate citizens about the workings of their courts. But on the other side, judges and some legal scholars worry that in the name of transparency trials involving difficult issues will be turned into reality shows for everyone's entertainment. They worry that neither justice nor citizens' rights will be served by potentially self-serving media outlets that focus on increasing their viewership and bottom line. With these critical and diametrically opposed views in mind, this paper presents findings from the first empirical study of how cameras are used in the UK Supreme Court. The UK Supreme Court is one of a number of courts to permit cameras in the courtroom. Such courts have begun to experiment with changes to tradition that they hope will allow them to maintain public trust. They want the public to learn about what takes place in the courtroom and 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 constitutionalized Indigenous rights. In adjudicating constitutional and administrative law issues associated with these rights, courts simultaenously affect private law entitlements and rules in relatively significant ways. This paper, building in a theoretical direction on my recent Nebraska Law Review article on Canadian adjudication on Aboriginal title will explore challenges courts may face in adjudicating public law issues on Indigenous rights while in an inevitable interface with private law. Public law reasoning methodologies may fall to take into account certain private law concerns, so the paper is in part about how (or if) courts can try to successfully transcend boundaries between constitutional law 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.

185 CONTROVERSIES IN SOCIAL RIGHTS

Participants	Irene Sobrino Guijarro Alba Nogueira Karen Kong Johanna del Pilar Cortes-Nieto Elena Pribytkova
Moderator	Johanna del Pilar Cortes-Nieto
Room	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 judiciable nature of 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 Court 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 regional Acts that protect the housing rights to support the vulnerable groups needs. However the Constitutional case law seems to step aside of social considerations adopting an expansive scope of the powers of the State Administration linked to economic areas ruling out most of those provisions. Also, the restrictive Supreme Court rulings over mortgage conditions was contested giving place to the leading role of the European case law balancing the protection of this right in front of the extensive construction of other interests (abusive clauses in mortgages). This paper will try to analise the main judicial decisions relating housing rights in Spain and try to find the rationale to Constitutional and Supreme Court limited protection of housing rights. A recentralization process under way might be one of the explanations as social protection is one of the main Autonomous Communitites domain of action while economic competences fall on the State part. Also, an increasing politization of the designation of both courts might point out towards 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, contributing to the development of norms and standards, and filling in the gap in international economic and social rights adjudication. This paper is a preliminary assessment based on the initial jurisprudence of the CESCR. It will examine the working method, the standard of review, the factors considered and the margin of discretion applied by the CESCR in considering individual complaints. This will be compared with the approaches adopted by the United Nations Human Rights Committee on similar socio-economic issues. What added-value does the CESCR offer in light of its overlapping jurisdictions in some areas with the Human Rights Committee? How is the review standard of the CESCR compared to domestic courts in adjudicating social rights cases? This paper will discuss some challenges of the CESCR in creating constructive dialogues with domestic courts on the progressive realization of social rights.

Johanna del Pilar Cortes-Nieto: ***Redefining Social Rights in Times of Austerity. The Case of the Constitutional Court of Colombia***

In 2011 the Congress of Colombia passed a constitutional amendment that introduced fiscal sustainability 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 social rights. The amendment introduced a judicial mechanism which could be activated by the Controller General of the Republic or any Minister in order to discuss the fiscal consequences of a judicial decision adopted by a High Court and eventually modulate the remedies or agree on a plan for future fulfilment. This paper is concerned with how fiscal sustainability has been instrumental in the normalisation of precarity as part of a governmental project aimed at governing through insecurity and inequality. Fiscal sustainability participates in this project by means of, on the one hand, isolating budgetary discussion from democratic control and restricting the means by which contestation can be exercised in this particular case by redefining rights and curtailing the possibilities of seeking social justice before courts. On the other hand, it redefines citizenship and increases individual responsibilities through a moral demand for shared but individual sacrifice, reinforced by the stigmatisation of those who refuse to give up the entitlements promised by previous welfare arrangements.

186 COMPARING COURTS AND THEIR CONSTITUTIONAL ROLE

Participants	Allison Geduld Kálmán Pócza, Gabor Dobos and Attila Gyulai Yuichiro Tsuji Shucheng Wang Michael Hein
Moderator	Allison Geduld
Room	8B-3-09

Elena Pribytkova: ***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 herself 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.

Allison Geduld: ***South African courts and constitutional values***

Prior to the constitutional dispensation in South Africa the nature of adjudication was formalistic and devoid of considerations of value. The work of the judiciary has since become a value-laden exercise. Section 39 of the Constitution of the Republic of South Africa mandates courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, when interpreting the Bill of Rights. Courts similarly have to promote these values when interpreting legislation. Constitutional values do not come with a ready-made meaning. It is thus incumbent on the judiciary to give content to constitutional values. In doing so the judiciary often have to rely on extra-judicial sources such as philosophical concepts. The judiciary has a broad discretion in determining the content of constitutional values. Although the courts use constitutional values often the theoretical underpinnings of the nature of constitutional values have not been discussed by the courts. This raises the question what the bounds are of the court's discretion to determine the content of constitutional values. In an attempt to answer this question various judgments will be appraised where courts have utilised constitutional values. Various theories of judicial interpretation will also be evaluated to determine which one is best suited to the application of constitutional values.

Kálmán Pócza, Gabor Dobos and Attila Gyulai: ***Judicial Constraints on Legislations in Central Europe: A Time-Series Cross-National Analysis***

The main deficiency of the systematic empirical research on constitutional adjudication consists in an unsophisticated dichotomous approach that separates the merely positive and negative decisions of constitutional courts, i.e. decisions that concluded in declaring the constitutionality or unconstitutionality of a given legislative act. A more sophisticated methodology has been elaborated by the JUDICON research group (www.judicon.tk.mta.hu). This methodology seems to be an appropriate tool to answer the question: To what extent have decisions of constitutional courts constrained the legislative's room for manoeuvre? Based on a dataset produced by the

JUDICON project we started to evaluate all relevant decisions of the constitutional courts of selected Central European countries by applying the external strategic model of judicial behavior on the relevant court decisions which concerned legislative acts from 1990 to 2015. According to the literature, public trust in courts and political fragmentation are the two most important factors which help explain the behavior of the judges of the constitutional courts. Beyond that, we have tested additional factors, such as political polarization, judicial independence, and constitutional flexibility for every single cabinet in the selected seven countries from 1990 to 2015. Though large studies have certainly several virtues, we started to evaluate the database also qualitatively with country experts.

Yuichiro Tsuji: ***Judicial Administration in Japan***

The Japanese Supreme Court apologized for establishing special tribunals for leprosy patients outside standard courtrooms. The Supreme Court initially admitted that it was unconstitutional because the unfair procedure and trials discriminated against leprosy patients. The Supreme Court's move to hold special courts at that time was not based on scientific research on the medical condition of leprosy patients. These patients were isolated in sanatoriums until 1996, when the Leprosy Prevention Law was abolished in the Parliament. Then, in 2001, the Kumamoto District Court admitted governmental responsibility for legislative inaction for its compulsory isolation policy from 1996. Judicial administration is the public office of keeping the human and the material structures of the courts, and maintaining rational and efficient operation of the judicial system in order to exercise judicial power. It includes internal control, administration of personnel budget negotiation, and design of the judicial system. Because of this nascent period of the judiciary under the Japanese Constitution, the Supreme Court's power of administration was too much enhanced in terms of the individual judge's independence and some cases emerged.

Shucheng Wang: ***Guiding Case System and the Expansion of Supreme Court's Legislative Authority in China***

Given the absence of case law in China, the Supreme People's Court (SPC) has recently established the guiding case system in 2011. In comparison, the guiding case mechanism operates in a different way from that of other jurisdictions as only the SPC can select guiding cases which have a guiding force in the sense that the lower courts should refer to them when deciding similar cases. Contrary to the general assumption that guiding cases can be taken by judges as useful guidance, this article reveals that, although the guiding case system intends to treat like cases alike, the judges seldom refer to them in practice due to the limited number of the guiding cases selected by the SPC. Moreover, the guiding case system allows the SPC to expand its legislative authority, apart from the one delegated by the National People's Congress Standing Committee – the highest legislative body in China. The SPC is able to interpret the law directly through adding the "Main Points of the Adjudication" – a part finalizing each guiding case by the SPC.

Michael Hein: ***Discussant***

187 MAKING AND BREAKING CONSTITUTION

Participants	José M. Díaz ed Valdés Neliana Rodean Poonthep Sirinupong
Moderator	Neliana Rodean
Room	8B-3-19

José M. Díaz ed Valdés: ***The Weaknesses of the Chilean Constitution-Making Process***

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 underlying the whole process there is a constant lack of agreement, particularly among its supporters, that may explain most of the difficulties and oddities showed so far. This disagreement covers an array of fundamental issues such as who should draft the new Constitution, what its basic contents should be, and the role that should be assigned to the people. As a consequence of this continuous disagreement and the lack of effective leadership to negotiate it, the success of the constitution-making process may be compromised. So far, the scarce literature about the Chilean constitutional-making process has focused on a critic to the current constitution and its origins, or on the possible contents of a new constitution. Thus there is a gap regarding the process itself, and how its weakness may affect its viability. The Chilean case may be of interest insomuch as it would be one of the rare occasions where a Latin-American country enacts a new Constitution under a fully-fledged democratic rule. Moreover, Chile'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.

Neliana Rodean: ***People Amendments' Power within unconstitutional amendment processes***

John Locke's idea that a constitution should be sacred and unalterable form and rule of government did not find followers in the modern time. Constitutions usually contain rules about constitutional amendments and sometimes people could be called to approve any constitutional change. But as demonstrated, democratic constitutions undermine people involvement in the constitutional amendment processes. The paper aims to analyze the role of the people within the theory of unamendability. On the one side, it seeks to answer whether the constitutional procedure enable people to entrench good or bad rules and institutions, as well as the features of unamendability clauses which limit the people participation in those processes. On the other side, the paper, the serious constitutional law problem behind the judicial review of constitutional amendments when people have the last word in such processes.

Poonthep Sirinupong: ***Coup d'Etat to secure unamendability?: Thailand's controversies on unconstitutional constitutional amendment***

Thailand's recent political crisis came to a temporary halt when the military led a coup on 22 May 2014. Like always, coup maker abolished the old Constitution and promulgated the interim Constitution, which arranges the new constitution-making process. Unlike its precedent that solely the formal procedure was laid down, the 2014 interim Constitution has established some fundamental principles that have to be employed in the draft Constitution. Vitally important 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 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 controversial issue in Thailand. This paper 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 critical analyse them.

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

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 framework, 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, ranging from EU constitutional law to criminal legal theory. They take into account various sources, including CJEU case-law on how competences have been interpreted.

Participants	Jannemieke Ouwerkerk
	Irene Wieczorek
	Samuli Miettinen
	Leandro Mancano
	Ester Herlin-Karnell
	Maria Fletcher
Moderator	Ester Herlin-Karnell
Room	8B-3-39

Jannemieke Ouwerkerk: ***Rethinking EU criminal law competence: Is the internal market-rationale still valid?***

As from their very coming into existence in the 1992 Maastricht Treaty, the European Union's criminal law competences closely relate to the EU's original aim of establishing a common market in which the freedoms 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-rationale is still a convincing one for EU action in the field of criminal law, or whether the 2017 European Union demands for alternative foundations to underpin a legitimate EU criminal law.

Irene Wieczorek: ***The legitimacy of EU criminalisation: the rise of a normative values-based rationale***

The aim of this paper is to analyse the EU approach to the question of the legitimacy of criminal law. More specifically, by resorting to a criminal legal theory framework, it enquires into the theoretical justifications the EU legal order has acknowledged as legitimating the resort to harmonised definitions of crimes as a legislative strategy. It challenges the idea that only an effectiveness rationale (i.e. an enforcement-based rationale) has guided institutional and legislative developments in the context of EU criminal law. It takes an historical perspective looking at the evolution of competence definitions from Maastricht to Lisbon, and at policy documents (multi-annual programs, and ad hoc criminalisation policy documents), which interpreted them. It tests the weight given to the enforcement rationale (EU criminalisation used to ensure the enforcement of EU law, or of national criminal law in cross border cases) and the normative rationale (EU criminal law as an expression of a values-based criminal policy). It concludes that the latter normative, values-based rationale has progressively gained more importance over time, and it positively evaluates this trend as being more consistent with the identity the EU has set for itself as a 'fundamental rights sensitive' kind of supranational organization (see Article 2 TEU).

Samuli Miettinen: ***Choice of legal bases and EU criminal law: Is criminal law special?***

Conferral is at the heart of EU constitutional law. It is expressed in EU legal instruments by a specific reference to a Treaty article or other formal legal basis for the relevant instrument. As the CJEU puts in its case-law, 'the choice of legal basis is of constitutional significance'. But often this decision involves a choice between several plausible alternatives. This is illustrated by the various different express legal bases relevant to EU criminal law. The choice matters. Some allow only directives, thus precluding directly applicable criminal law as a matter of EU institutional law. Others allow Member States to in practice opt out, either because of Protocol 21 and 22 arrangements, or because they could invoke an 'emergency brake'. It has even been argued by some that criminal law could continue to remain an ancillary element of proposals based entirely outside the AFSJ, such as Article 33 on customs cooperation or Article 325 on fraud against the EU 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***

189 LEGAL PROBLEMS IN EUROPE

Participants	Piotr Mikuli
	Arianna Angeli
	Adam Czarnota, Michaic
	Padziora and Michaic Stambulski
	Kirsty Hughes
	Micaela Vitaletti
Moderator	Arianna Angeli
Room	8B-3-49

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 in this field, seriously impairing 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

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 Stambulski: ***Constitutionalism and the Politics of Conflict. The Case of Poland***

In 2015, a constitutional crisis broke in Poland. Official reason was conflict between former and newly elected parties about procedure of electing judges of the Constitutional Tribunal. Events quickly escalated, resolving in government refusing the publication of judgments of the Tribunal, the opposition accusing the government of a coup, law faculties calling for respect for the rule of law, citizens protesting and gathering in public to read Polish Constitution. Constitution ceased to be the domain of experts and become a pressing public issue. It was a subject of many news comments and pub discussions. Symbolically it was the ending of the post-communist transformation, during which the authority of the Tribunal was not questioned, and it played a leading role in establishing 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 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 Vitaletti: ***Anti-discrimination principles and European Court of Justice***

Hannah Harendt once wrote that only the principle of equality protects the people from discrimination. The anti-discrimination law is a key-area to achieve social 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 phases (entering into the employment; execution of the employment; rupture of the emplyment). 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 cultural rights, culture-related issues and human rights has invited debates over their scope and enforcement. Despite developments at universal and regional level, there is still ambiguity as to how to source culture within human rights law and how to guarantee the universality, interdependence and indivisibility of human rights while acknowledging that a variety of cultural issues come into play in relation to their scope of protection. Moreover, cultural rights themselves are often conceptualised as too resource-intensive and too vague to be justiciable. The aim of the panel is to take an in depth look at the various challenges and perspectives of the direct/indirect enforcement of cultural rights.

Participants	Kalliopi Chainoglou Mateusz M. Bieczyński Charlotte Woodhead Andrzej Jakubowski
Moderator	Kalliopi Chainoglou
Room	8B-3-52

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

International human rights law does not define 'cultural rights'. In a number of international human rights instruments the conservative conceptualisation of 'cultural rights' encompasses the right to education and the right to participate in cultural life, to enjoy the arts and to share in scientific advancement and its benefits. In recent years, the transformative impact of the international human rights standards and the increasing awareness raised by international organisations and international instruments concerning cultural diversity and cultural identity has contributed to shedding light onto the cultural dimensions of human rights, effectively thus cementing the connection between culture and other human rights. International jurisprudence coming from various judicial or quasi judicial bodies stands 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. Bieczyński: ***The Right to Cultural Heritage. Its Enforcement by European International Human Rights Courts (ECJ and ECtHR)***

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). Despite this fact, both European Courts – the European Court of Justice in Luxemburg (ECJ) and the European Court of Human Rights in Strasbourg (ECtHR) respectively – mention in their case-law cultural heritage in the context of human rights. Usually, but not singularly, it is invoked by the ECtHR as a collective empowerment – limited to the 'cultural property right' of an individual (cases: Beyeler v. Italy, Ruspoli Morenes v. Spain, 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 ECtHR tends to shape cultural heritage rights as a 'community privilege'. At the same time the ECJ does not give a strong priority to cultural heritage as an object of state control. The Court rather limits the Member State's national interest in keeping the cultural good(s) within its own territory, treating this interest as an obstacle for free trade within the EU. In a similar vein, the Luxembourg Court only seems to recognize the preservation of cultural heritage within its borders in the case of 'national treasures' – cultural objects of the highest value. Different definitions of the 'right to cultural heritage' in the case-law of both courts raise at least three questions which will be analysed in this paper: 1.) is the meaning of the 'right to cultural heritage' equal in both legal regimes? (objective range) 2.) are the courts congruent in their legal application of the scope of protection of the law on cultural property rights? (subjective range) 3.) who is the subject of that law according to each court, and what interests are coming to the fore in their decision-making? (axiological aspect). While dealing with these dilemmas, the paper will also refer to another aspect of the problem: the formal 'normative one'. It refers to the legal framework for the coexistence of both courts, which partly influences the scope of the right to cultural heritage in both regimes. On the margin of this investigation another problem will also be addressed: is there – according to the jurisdiction of both European courts – any recognized form of a 'collective European cultural heritage'?

Charlotte Woodhead: ***Redressing Past Cultural Injustices and Wrongs: the UK's Spoliation Advisory Panel***

This paper analyses the work of the UK's Spoliation Advisory Panel and places it within the broader framework of cultural rights discourse. The Panel was

established in 2000 by the UK government to hear claims from those who lost possession of cultural objects during the Nazi Era (or from their heirs). The justification for establishing the panel was the sui generis nature of the Nazi Era dispossessions of cultural objects from Jewish populations across Europe and the need to repair past wrongs and injustices. The broad rationale for the panel can be situated within the framework of recognising cultural rights and the systematic attempt to eradicate the culture of a group, connected as it was with breaches of human rights 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 lost possession. No similar panels exist in the UK to deal with claims for other disputed cultural heritage objects. If the work of the Panel can be construed as providing a place where attempts are made to redress past injustices of both human rights and more widely cultural rights, it has the potential to act as a model for future claims processes. Both structurally and procedurally, the work of the Panel has the potential to hear more broadly framed collective claims whose substantive basis is the enforcement of cultural rights.

Andrzej Jakubowski: ***Enforcing the Access to Cultural Heritage through Participation and Co-Management in Cultural Matters***

This paper deals with the enforcement of cultural rights, analysed through the prism of the concept of procedural justice, defined as fairness and promotion of organizational and institutional changes built on the principles of participation, voice, and transparency. Accordingly, it refers to the concept of participation as one inherently linked to both culture and procedural justice. The right of everyone to participate in cultural life, as provided in Article 27 UDHR 1948 and Article 15a ICESR, is fundamental for the realisation of all cultural rights that enable the exercise of other human rights. In fact, it is enshrined in the vast human rights instrumentarium. According to the UN Committee on Economic, Social and Cultural Rights, as expressed in its General Comment No. 21, this right may be exercised both individually and collectively. Yet it may be subject to various societal contexts and cultural practices. It is widely recognized that this right presupposes equal and free access for all to a variety of cultural resources. Moreover, it also refers to distinct participatory forms of cultural manifestations, including inter alia, different means of accessing cultural goods and products. Arguably, it also involves the right to participate in the decision-making processes with reference to the cultural life of a given community. In fact such an interpretation of the content of the right to participate in cultural life has been enshrined in recent international cultural heritage legal instruments in terms of consultation governance and information sharing perhaps most explicitly in the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society and the UN Declaration on the Rights of Indigenous Peoples. In this regard the paper will analyse the existing models of participation in cultural matters available under various international regimes and discuss the practice of their realisation including possible challenges and shortcomings. The paper will also refer to the theory of Global Administrative Law (GAL) in order to better explain and substantiate these observations from the point of view of governance rather than the more orthodox definitions of justiciability or judicial enforceability of rights.

Participants	Ligia Fabris Campos Jan Kratochvil Fernanda Farina Chun-Yuan Lin Danielle Rached
Moderator	Chun-Yuan Lin
Room	8A-4-17

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

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 understand 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 recognition of transgenders' rights in this country. These points will lead me to conclude that the reinterpretation of the meaning of the surgery between harm and beneficence was essential to its transformations.

Jan Kratochvil: ***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. The paper chooses the Czech Republic 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 confirms a hypothesis that if primary level courts 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 São Paulo's health budget has been compromised with drugs/treatment granted via judicial decision – outside 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, globalization 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 Courts tend to ignore the rights of PLWHA, wrongly interpret the approaches and risk of AIDS infection, and therefor exaggerate the threat of HIV/AIDS to public health. The courts didn't follow

WHO's standard despite noted. The article concludes that courts exclude PLWHA form "normal" society in the name of public health, yet may unconsciously inherit the legacy of stigma against AIDS and consistently cause discrimination against PLWHA.

Danielle Rached: ***World Health Organization and the search for accountability: a critical analysis of the new framework of engagement with non-state actors***

The article probes the origins and content of the Framework of Engagement with Non-State Actors (FENSA) of the World Health Organization (WHO), approved on May 28, 2016, at the 69th World Health Assembly, which established different rules of collaboration to four categories of actors: nongovernmental organizations (NGOs), private sector entities, philanthropic foundations, and academic institutions. Applying the findings of International Legal Theory and based on extensive documentary research, we sought to determine whether FENSA is an appropriate accountability mechanism according to four functions of accountability: constitutional, democratic, epistemic, and populist. The article concludes that there is a risk of the prevalence of the populist function at the expense of the accountability potential that could result from the better use of the other three accountability functions.

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 by 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) in a set amount of time; 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 fails in overcoming an enhanced justification burden brought by the Court's initial reproof. Once again, there will be no dialogue.The ex-ante dialogical intervention seems to be the most effective solution, since the inherent rationale of the Judiciary 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.

Participants	Roman Zinigrad Jędrzej Maśnicki Matthias Klatt
Moderator	Matthias Klatt
Room	8A-4-47

Karen J. Alter: ***National Perspectives on International Constitutional Review: Two Optics***

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 practioners 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.

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 renationalisation tendencies within the EU. Moreover, the autonomous interpretation as the CJEU's concept can be compared to the analogous concepts, developed by the Member States' constitutional courts. Here, the question remains: who has the authority to deliver the final legal interpretation of the disputed terms and which court (the CJEU or the Constitutional Court of a Member State) has more interpretative power to persuade other courts and tribunals, in particular the administrative courts?

Participants	Margit Cohn
	Eva Maria Belser
	Daniel Bogea
	Franciska Coleman
	Dean Knight
	João Archegas
Moderator	Dean Knigt
Room	8B-4-03

Matthias Klatt: ***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 can be justified. It discusses three different lines of argument for the legal-theoretical basis of constitution-conform interpretation (the assumption of constitutionality, the unity of the legal system, and the principle favor legis) and analyses the merits of the three most important counter-arguments against 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 (updates forthcoming). Both affairs seem to be expressions of bold judicial decision-making in areas traditionally directed by executive unilateral power: the British conduct of foreign affairs under the Royal prerogative, and the issuing of executive orders by US presidents. Whether these judicial decisions have changed the balance between executive autonomy and its restraint by courts and whether such a change is to be welcomed are matters for debate. The analysis, addressing the future impact of those decisions as possible accelerators of judicial aggrandizement, is linked with two bodies of research: constitutional history and dialogue theory as networked decision-making.

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 of courts and examine how the judicial protection of human rights evolves under increasing popular pressure not 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 communalities 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 effectivity of human rights protection.

Daniel Bogea: ***Judicial review of executive decrees in Brazil: coordinate construction of the constitution in coalitional presidentialism***

The article argues that the role of the Brazilian Supreme Court in reviewing executive decrees is part of a coordinate construction, in which each branch takes part in a complex dialogue that is vital for the relative stability of the coalitional 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 deepening of the deliberative role of Congress. Nevertheless, the court is continuously constrained by the political environment, retreating strategically when it does not perceive sufficient political support. Drawing evidence from five case-studies that encompass decisive moments for the shaping of executive decree power, the descriptive claim is at odds with previous scholarship which either (i) describes the court's role as minor, due to a resistance to defy the executive power, in a slightly redefined version of the dahlsian 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 coalitional 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 interpretation 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 racial 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 a majority-minority US democracy is a tipping point at which judicial review must promote the realization of minority political autonomy or become a source of further diminution in minority rights. It uses the empowerment and capability theories of Paulo Friere and Amartya Sen to propose an 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 Grounds Intensity Context***

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. This paper explores the different meta-structure 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 (multifarious formalistic categories), grounds of review (simplified and generalised set of grounds), intensity of review (explicit calibration of the depth of scrutiny), and contextual review (unstructured or instinctive overall judgement). Drawn from the changing language and format of de 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 also 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-contradictio, non-impossibility, stability and congruence – are proposed as a useful way to assess the efficacy of the 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 juristocracy***

Following Hirschl's study in Towards Juristocracy, this paper discusses the role of the Brazilian Supreme Court in the judicialization of politics. In order to analyze 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.

195 THE EUROPEAN COURT OF HUMAN RIGHTS: HISTORY AND EVOLUTION II

Participants	Marta Maroni Marija Milenkovska Marco Bocchi Monika Florczak-Wator Chris Wiersma
Moderator	Marta Maroni
Room	8B-4-09

Marta Maroni: ***A Court gotta do what a Court gotta do? A critical analysis of the European Court of Human Rights and the liability of Internet intermediaries***

Much of the current debate on Internet governance focuses on how to regulate Internet intermediaries. The topic is very complex because a wide range of fundamental rights may be affected by the activity of these actors. Choosing what type of regulation should be adopted is related to which kind of Internet the law should contribute to design. In other words, the main questions are the following: a) should the law safeguard the idea of an open-ended Internet or should it create a more disciplined but less free environment? b) Should Internet intermediaries play a more active role in dealing with wrongful activities disseminated through their infrastructure? Or should they still be treated as passive and neutral? The recent case law of the European Court of Human Rights on the liability of internet intermediaries for (unlawful) user generated content helps to shed light on the delicate relation between law and information and communication infrastructures. This presentation shows how the answer to these issues is inherently connected to the performativity of law as such.

Marija Milenkovska: ***European Court of Human Rights and National Courts in the New Democracies: The Macedonian experience***

The paper discusses the relationship between the European Court of Human Rights (ECtHR) and national courts in the new democracies through analysis of the Macedonian experience in this regard. The 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 lies and which it promotes. However, does the Court interpret them in the light of the Convention? Does it refer to the case law of the ECtHR in its decisions? How the case law of the Strasbourg Court is integrated in its decisions? These questions are the main concern of the paper. In order to answer them, the paper analyses the Constitutional Court's decisions reached in the period 1998-2015. The analysis revels that it is questionable whether the Court seriously considers the case law of the ECtHR. It explicitly refers to the ECHR and/or to the case law of the ECtHR in a very small number of cases and when the Court does refer, quite often, it does that in a mechanical and superficial way. The paper provides certain explanations for such Court's position, thus contributing to the debate in the literature about the dialogue between domestic and international courts. Its results are relevant not only to Macedonia but also to the European system for human rights protection in general because they concern a country which has been insufficiently studied.

Marco Bocchi: ***Judicial Creativity and Binding Precedents: the European Court of Human Rights as a Common Law Court***

The international legal system introduced by the European Convention on Human Rights (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 (ECtHR) 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 ECtHR to act like a common law court, building the analysis on the creation and evolution of the PJP. Since this single decided pilot case recalls the need to insert general measures, it becomes a wide precedent for similar applications, as it happens for the common law courts' judgments, under the principle of stare decisis. Far from being advisory the PJP creates law and new obligations on the respondent State in the Convention system. Likewise, in common law systems, courts have the authority to make law where no legislative statute exists, and statutes mean what courts interpret them to mean. Nevertheless, legitimacy is not absolute and depend upon States' acceptance of new obligations stemming from this trend.

Monika Florczak-Wator: ***The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State***

During the last fourty 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

Participants	Eugene Schofield-Georgeson Dominik Rennert Catherine Powell Oliver Fuo Maxim Sorokin
Moderator	Eugene Schofield-Georgeson
Room	8B-4-19

Eugene Schofield-Georgeson: ***Federal Constitutional Strategies for the Localisation of Political Power***

This paper explores strategies for localising governance within the Australian federal constitutional legal system in an age of increasing centralisation of legal power. In the last quarter of the twentieth century centralisation of power has made federalist governments vulnerable to the anti-democratic influence of global monetary institutions and markets. Accordingly, 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 wealthiest members of a global elite. The resulting social inequalities have seen financial shocks and crashes and have led, most recently, to domestic political extremism and international isolationism (i.e. Trumpism, Brexit and 'Hansonism' 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 arrangements between various 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 Systems in Times of Change***

The paper tracks how courts in (quasi-)federal rights systems deal, and should deal, with social change. It does so from a comparative perspective. It first tries to conceptualize how US courts have approached the issue of homosexuality and same-sex marriage in the past two decades or so. Following Heather Gerken and borrowing from Cass Sunstein, the paper will explain why the way the courts proceeded 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 a pluralist transnational system. And provided that we actually come to the conclusion that in 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 'sanctuary jurisdictions'.ù 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 building trust between local law enforcement and communities to more effectively reduce crime and improve public safety. Using this debate over federalism as a touchstone, my project explores evolving notions of who are 'We the People'ù, not only with regard to the idea of national sovereignty, but also related notions of popular sovereignty, self-sovereignty, as well as the rethinking of sovereignty prompted by the expansion of international law norms and institutions. Constitutional law scholars have overlooked how international law norms have revolutionized the notion of sovereignty – for example, through the 1648 Treaty of Westphalia, end of colonial rule, and rise of trade immigration, and human rights. My project will examine ways sanctuary jurisdictions are responded to the national anti-immigrant agenda, by re-asserting human rights locally. Rather than assert 'states' rights'ù to undermine civil rights, today's state and local governments are embracing localism to protect human rights. This project raises novel concerns, examining a new phenomenon that has emerged not only with 'America First' policies, but also in Europe with Brexit.

Oliver Fuo: ***The Constitutional Court as a custodian of constitutional federalism in South Africa: A Local Government Law Perspective***

This paper examines the role of the Constitutional Court in defining and defending the reach of local government's autonomy in South Africa. It argues that, as a custodian of South Africa's constitutional federalism, the Court has been successful in defending the the autonomy of local government in respect of its original fiscal and planning powers, thereby preventing intrusive attempts by national and provincial government to

Participants	Danielle Ireland-Piper Anat Scolnicov Han Liu Luis Claudio Martins de Araujo Luke Beck
Moderator	Danielle Ireland-Piper
Room	8B-4-33

usurp the powers of municipalities through regulation. Finally, while indicating some grey areas this paper reflects on why the Court has been successful in its custodianship role. The relevance of this paper is that it fits into several areas of focus of the Conference as it highlights the role of the apex Court in South Africa in defining the relationship between different organs of state. It shows how domestic courts interpret and enforce constitutional provisions guaranteeing separation of powers between three spheres of government. It also addresses sub-national aspects of Public Law.

Maxim Sorokin: ***Should the sub-federal constitutional justice to check the Constitutional Court of Russia?***

In the Russian Federation, according to the 1993 Constitution, the constitutional adjudication is exercised by the Constitutional court of Russia (FCC), and by constitutional jurisdictions of the sub-federal entities within the scope of regional legislation. As the FCC was always trying to expand enormously the scope of its constitutional review (as previously in regards to the federal courts and now in respect to the ECHR's judgments), the Court has been more and more supported the centralized and authoritarian approach towards the post-soviet Russian public law. However, there are still 16 functioning constitutional courts in the Russian regions. And if the perspective of the open conflict seems hardly possible (for example, in 2013 the FCC confirmed the constitutionality of Chelyabinsk region's law declared to be void by the Chelyabinsk region's constitutional court following which the regional CC was abolished), the case-law made by the regional constitutional court contains the multiple examples when the courts by referencing to the FCC case law or even international agreements bring forward the innovative approaches to the constitutional or statutory interpretation in the – ´non-political' – cases.

Danielle Ireland-Piper: ***The Act of State and Abuse of Rights Doctrines: Transplanting Lgal Controls on State Power***

In international law, the abuse of rights doctrine prohibits States from making use of their rights if to do so impedes the enjoyment by other States of their own rights. It is a control on the exercise of State power. 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 Australian law of what civil lawyers call an "abuse of right".' Further, the High Court of Australia has also drawn upon notions of 'abuse of process' in considering the propriety of an extraterritorial criminal prosecution. In the United Kingdom, courts have engaged with the 'abuse of discretion' doctrine in administrative law, and the notion of malicious prosecutions in criminal law are also somewhat analogous. In that context, this paper considers whether the abuse of rights doctrine is capable of "transplantation" into public law and whether it is useful to courts in controlling exercises of government power. In so doing, the act of state doctrine, which normally precludes courts from considering the legality of the actions of foreign states, is also considered in a comparative context. This is done with a view to identifying a relationship between exceptions to the act of state doctrine and the abuse of rights doctrine.

Anat Scolnicov: ***Fertile soil: legitimacy rationality and constitutional transplantations***

I will submit a full abstract tomorrow. I am submitting this now so as not to miss the deadline. The pape I will submit a full abstract tomorrow. I am submitting this now so as not to miss the deadline. The paper asks what role should constitutional courts play in transposing constitutional ideas between states.

Han Liu: ***From Regime to Law: American Constitutionalism In Contemporary China***

American constitutional law haunts the constitutional imagination in contemporary China. China's reception of American constitutional law occurred in two major phases. The first, which spanned from the 1980s to the early 1990s, understood American constitutionalism as a particular political regime to be politically criticized or objectively appraised, with the tripartite separation of powers overwhelmingly highlighted as a core feature of the American constitutional-political system. In the second, which began in the late 1990s, a paradigmatic shift from a political, regime-centered perspective to a legalized, court-centered approach occurred in China's introductions to and studies on American constitutionalism. The U.S. Supreme Court and the concept of judicial review now primarily preoccupy most Chinese constitutional minds; these features of the American system have formed the focal points of reference for Chinese constitutional reform. This shift from the first phase to the second reflects both ideological and social changes since the Reform in China: the development of legal professionalism and the disciplinary specialization of constitutional law.

Luis Claudio Martins de Araujo: ***The impact of cross-border constitutionalism in the legal systems: The rational of judicial rights review based on the transnational dialogue***

In the structure of a judicial decision within the current globalized society, it is clear that the decisions of domestic and transnational jurisdiction are made in a dialogue among courts around the globe. Thus, it is undeniable that every day judges form different courts look abroad, looking for new arguments to justify their own cases. Therefore, the judicial decisions are not any longer an isolated process of deliberation of local courts. On the contrary, they are part of a transnational process of dialogue among courts around the globe. Consequently, the use of transnational decisions brings a new standpoint to the Judiciary branch in which the reference to other courts provides an additional and useful instrument to deal with related cases. Thus, it is undeniable the influence of this transnational courts as an important theoretical reference in the different levels of judicial understanding in a cross-fertilization process of ideas and approaches, that helps the courts to examine issues from a different perspective, in an interaction that increases the recognition of decisions taken by local and transnational courts. Furthermore, in this transnational process judicial decisions are developed in light of the international and foreign paradigm, allowing new references for judicial interpreters, in a process that contributes for a mutual respect in the transnational community, with the oxygenation of ideas and paradigms used by courts.

Luke Beck: ***Unconscious Comparativism: American Establishment Clause Jurisprudence in Papua New Guinea***

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.

Participants	Giacomo Tagiuri Sébastien Platon Maarten Stremler Marko Turudic
Moderator	Marko Turudic
Room	8B-4-43

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

A persistent set of arguments rejects EU integration not only because of its adverse economic social or political consequences, but also because of its cultural ones. As markets grow more homogenous and limitless, the argument goes, everyday life looses its national character and citizens are left with a weakened sense of community and identity. In legal scholarship, this argument takes the shape of a denunciation of the free movement decisions of the CJEU and the Commission's competition interventions as they destroy 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 permissive 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 tries to voice? Or in other words what do member states really protect through these rules that the EU supposedly destroys?

Sébastien Platon: ***Do public entities have fundamental rights under EU Law?***

The issue of whether or not public entities actually have fundamental rights may seem absurd. The doctrine of fundamental rights was designed to protect individuals from public entities, not to protect public entities themselves. The European Court of Human Rights, for example, declares any application brought before it by a public entity to be inadmissible. However this issue is not clear under EU Law and there is even some evidence to suggest that public entities might 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? Which rights? Against whom? Could we go as far as to imagine that in some cases public entities could be protected against private entities such as multinational corporations? Other issues are more theoretical. It is a principle of EU Law that the European Union is not supposed to interfere with the national organisation of powers and in particular in the relationship between the central government and regional or local authorities/governments. The national Government is supposed to be an impenetrable middle man between these authorities and the European Union. However, if EU Law grants fundamental rights to these 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.

Maarten Stremler: ***Fundamental Value Conflicts in the European Union: What Role for Law?***

This paper critically analyses the legal and political regime that regulates conflicts over fundamental values between the supranational EU and individual Member States. Whereas most academic literature focuses on enforcement of compliance with EU values by recalcitrant Member States, this paper takes a more reflective stance and explores and evaluates three distinct and competing approaches to such conflicts. According to the first approach, the EU like the federal level of a federal state, possesses both the competence and the legitimacy for intervening in the Member States when they deviate from the supranational 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 case of conflict, there is no neutral point of view from which the differences between the Member States and the EU can be reconciled. After having set out the three approaches in more detail, the paper tests the explanatory power of these approaches 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 paper analyses the regulation of over-the-top services in European Union law. It starts by defining over-the-top services and analysing their position within the regulatory framework for electronic communications of the European Union. Furthermore, the paper tries to ascertain the influence of over-the-top service providers in the electronic communications sector and the difficulties in the relationship between over-the-top service and electronic communications

network providers. The paper further analyses the regulatory requirements of electronic communications service providers under the current regulatory framework for electronic communications of the European Union, and tries to determine what obligations do not apply to over-the-top services providers. It continues with determining possibilities for the application of some of these obligations to the over-the-top service providers. The paper concludes with an analysis of the proposal for a new regulatory framework for electronic communications of the European Union and tries to establish whether there is a different intention to regulate over-the-top services and their providers.

199 THE COURT OF JUSTICE OF EUROPEAN UNION: HISTORY AND EVOLUTION II

Participants	Szalbot Balazs
	Graham Butler
	Ebrahim Afsah
Moderator	Ebrahim Afsah
Room	8B-4-49

Szalbot Balazs: ***The analysis of the CJEU's jurisprudence pertaining to the standing of the annulment procedure with special regard to the acts regulating private relations***

The paper aims to scrutinize the most current improvements in the interpretation of the Court of Justice of the European Union pertaining to the standing of the annulment procedure. The latest jurisprudence of the CJEU generated widespread criticism from the academia because of depriving 'non-privileged' applicants from effective judicial protection. The Lisbon Treaty elevated the status of the Charter of Fundamental Rights of the EU – that also contains the right to effective judicial protection – to the status of the Treaties themselves. Although, in case of annulment procedure the applicants still contest basically the rules of an economic union (as opposed to the constitutional complaints procedure, which is directly linked to the fundamental rights of the individuals), this change highlights the importance of drawing a comparison between the CJEU's and the constitutional courts' practice with regard to the individual concern criteria. In this regard, the paper particularly examines the differences between the individual concerns required by the CJEU and by the constitutional courts and how the different roles of the courts influenced their interpretation. In addition, it also underlines the necessity of analysing whether the criteria are the same in case of acts regulating private relations.

Graham Butler: ***Palpable Choices in Judicial Jurisdiction: Foreign Affairs the Court of Justice and European Union law***

The Court of Justice of the European Union plays a pivotal role in the development of Union law. Yet there is an explicit derogation on the Court's jurisdiction when it comes to the formulation decision-making, and ultimate execution of the EU's foreign affairs acts, done through the legal regime that has been specially crafted, known as the Common Foreign and Security Policy. The position of the Court in CFSP is in direct contrast to other non-CFSP actions of the Union through other external relations instruments, in which the Court has general jurisdiction, like other normal policy fields. Despite foreign affairs being held as an exceptional field in which the High Contracting Parties to the Treaties had wished to perverse 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-á-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.

V ICON • S INAUGURAL GOVERNANCE

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VII SERVICE

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 wll 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.

VIII MAP OF CONFERENCE VENUES

1 **Radisson Blu Scandinavia Hotel**
Amager Blvd. 70
DK – 2300 Copenhagen S

R Registration during the opening ceremony

2 **Faculty of Law, University of Copenhagen**
Njalsgade 76
DK – 2300 Copenhagen S

R Registration after the opening ceremony

i Info Point

Catering / Atrium

L Legal Knowledge Centre (ground floor)

C Law Canteen

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

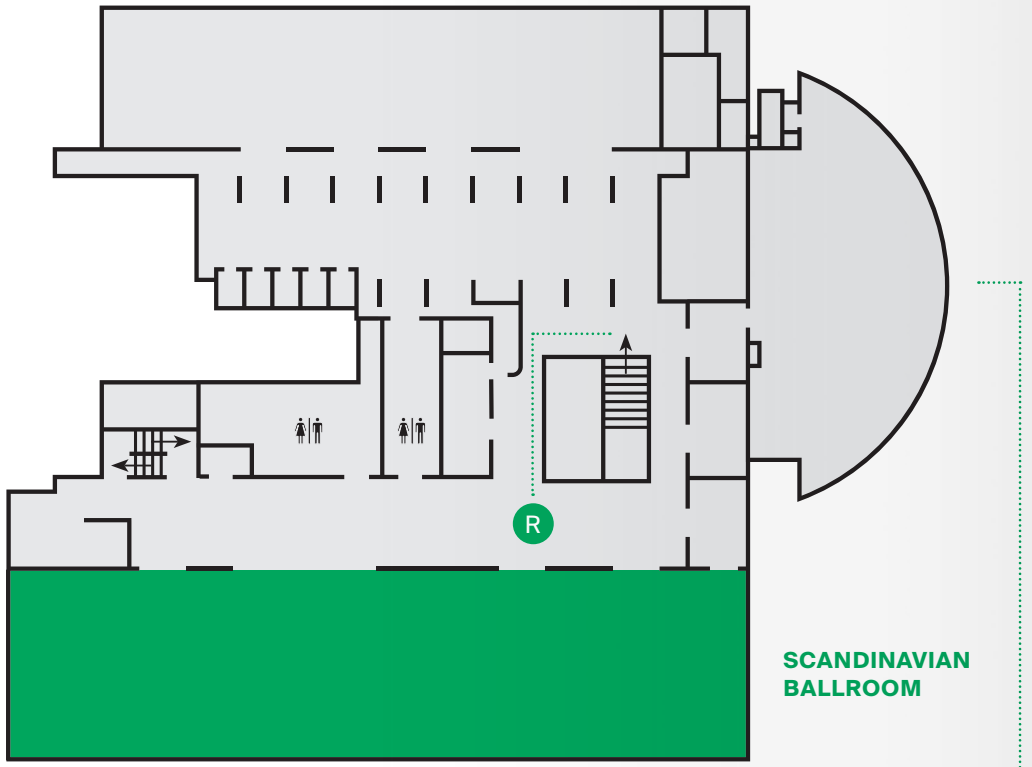
C Humanities Canteen

M Metro / Islands Brygge

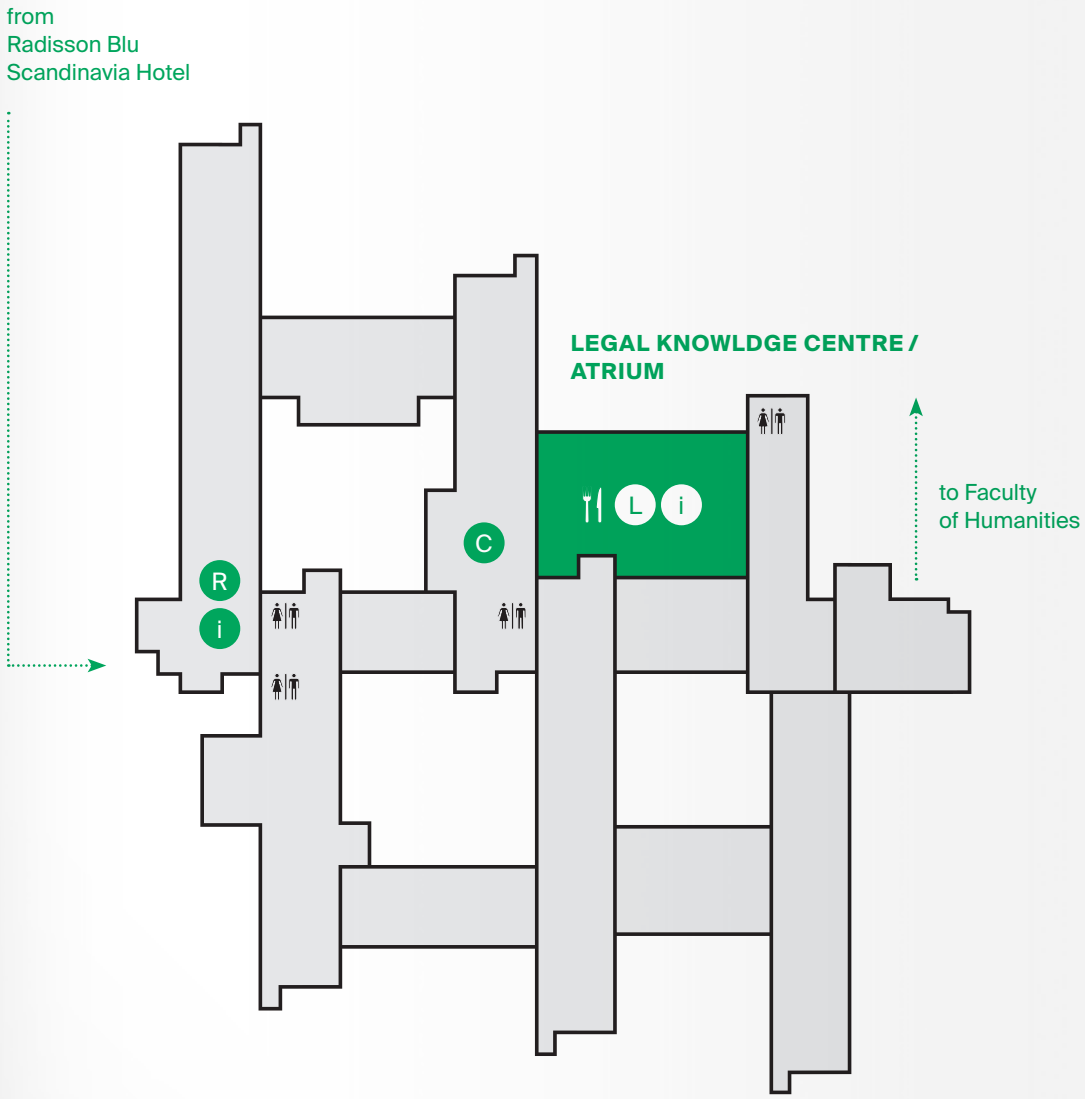
P Parking

MAP OF CONFERENCE VENUES & FLOOR PLANS

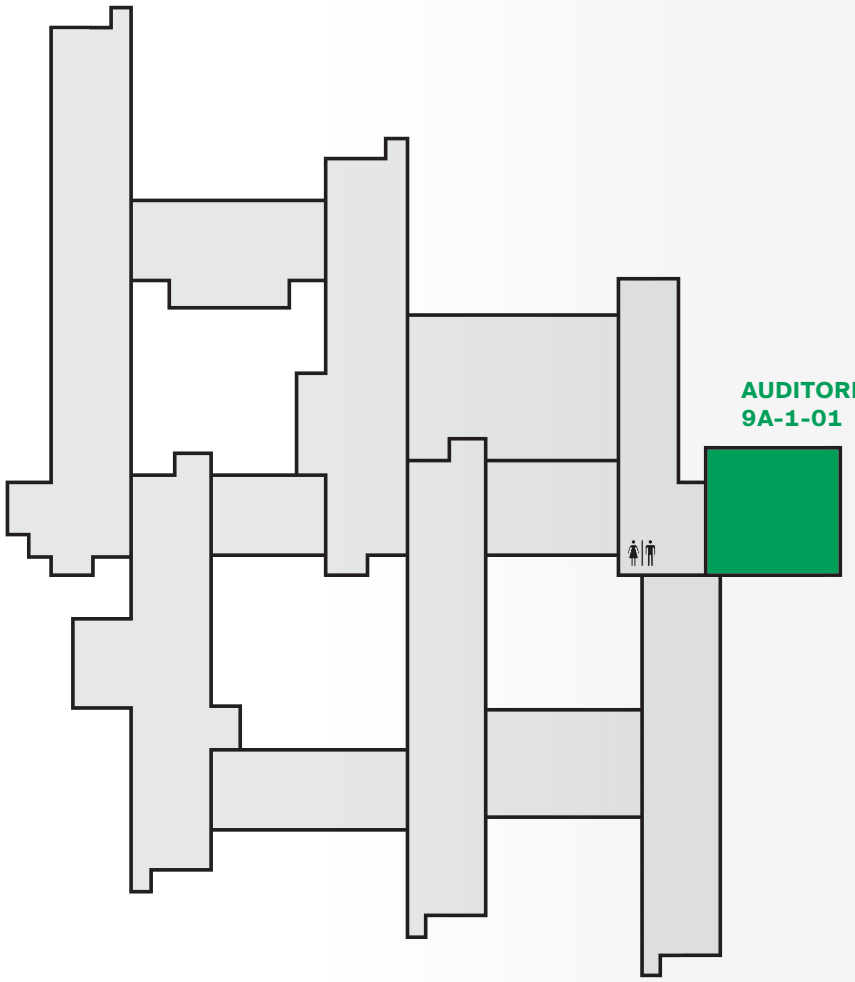
RADISSON BLU SCANDINAVIA HOTEL 1ST FLOOR



FACULTY OF LAW, UNIVERSITY OF COPENHAGEN GROUND FLOOR



1ST FLOOR



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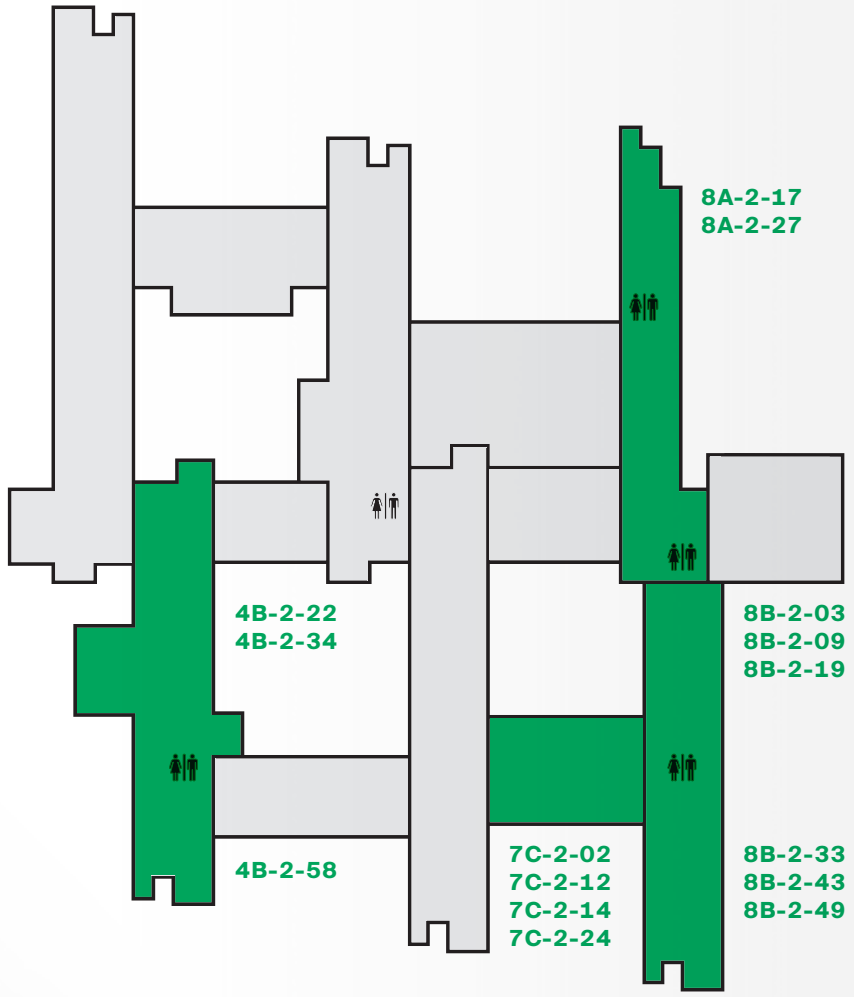

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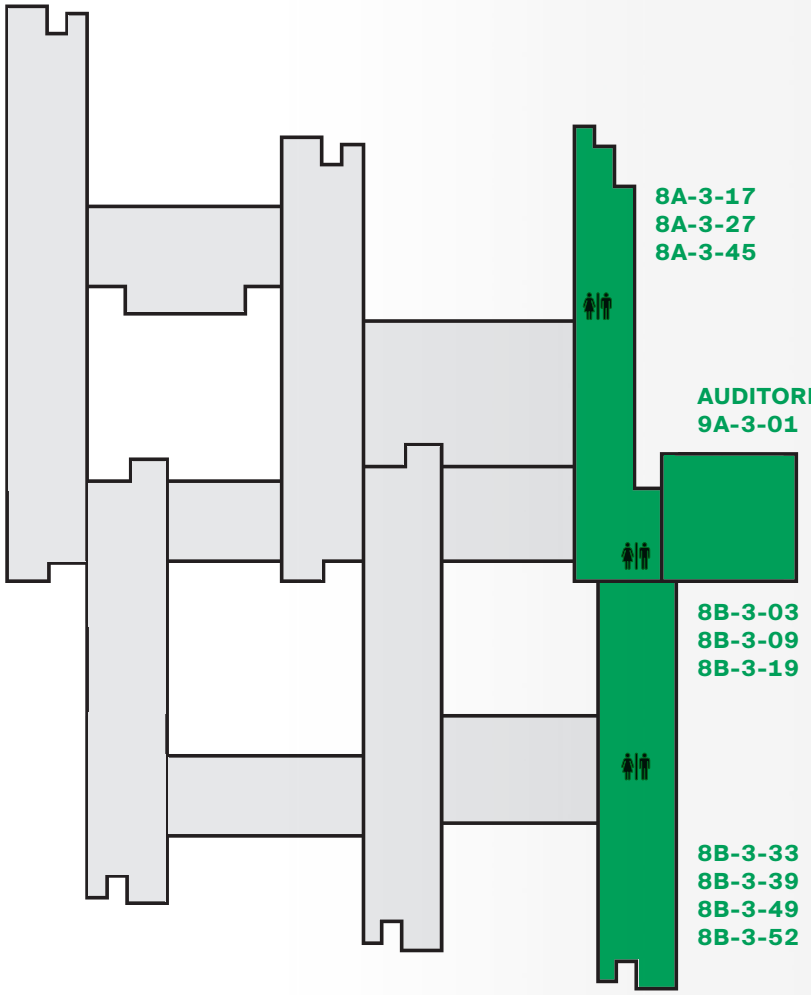

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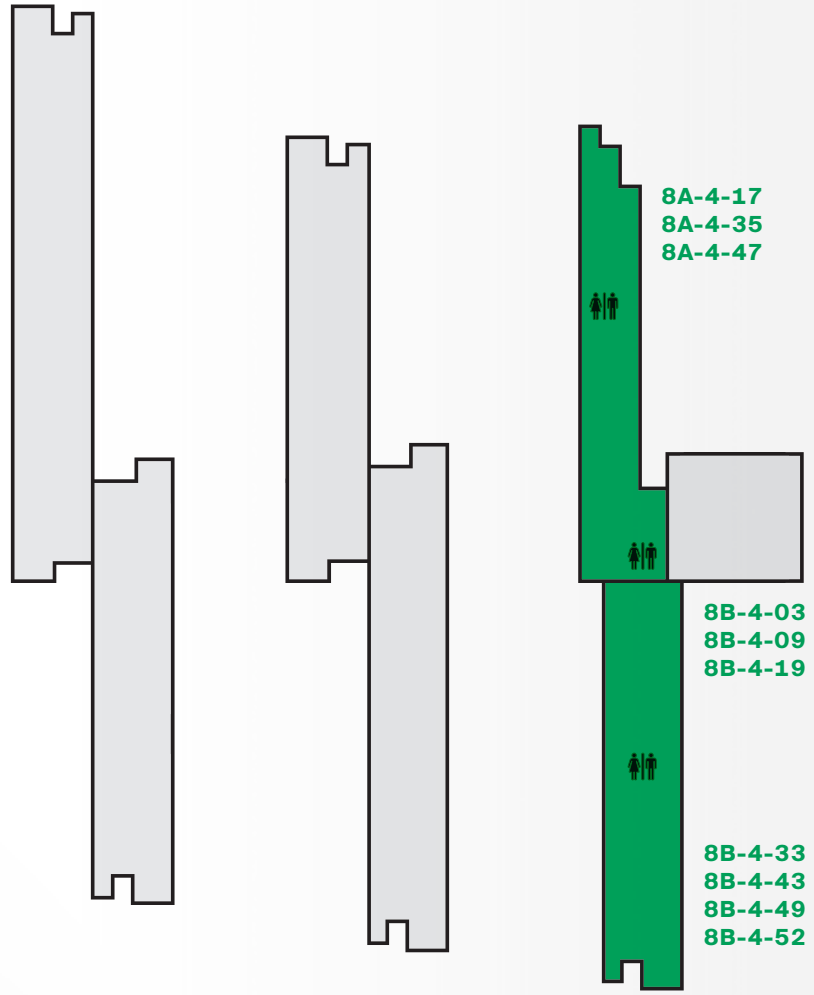
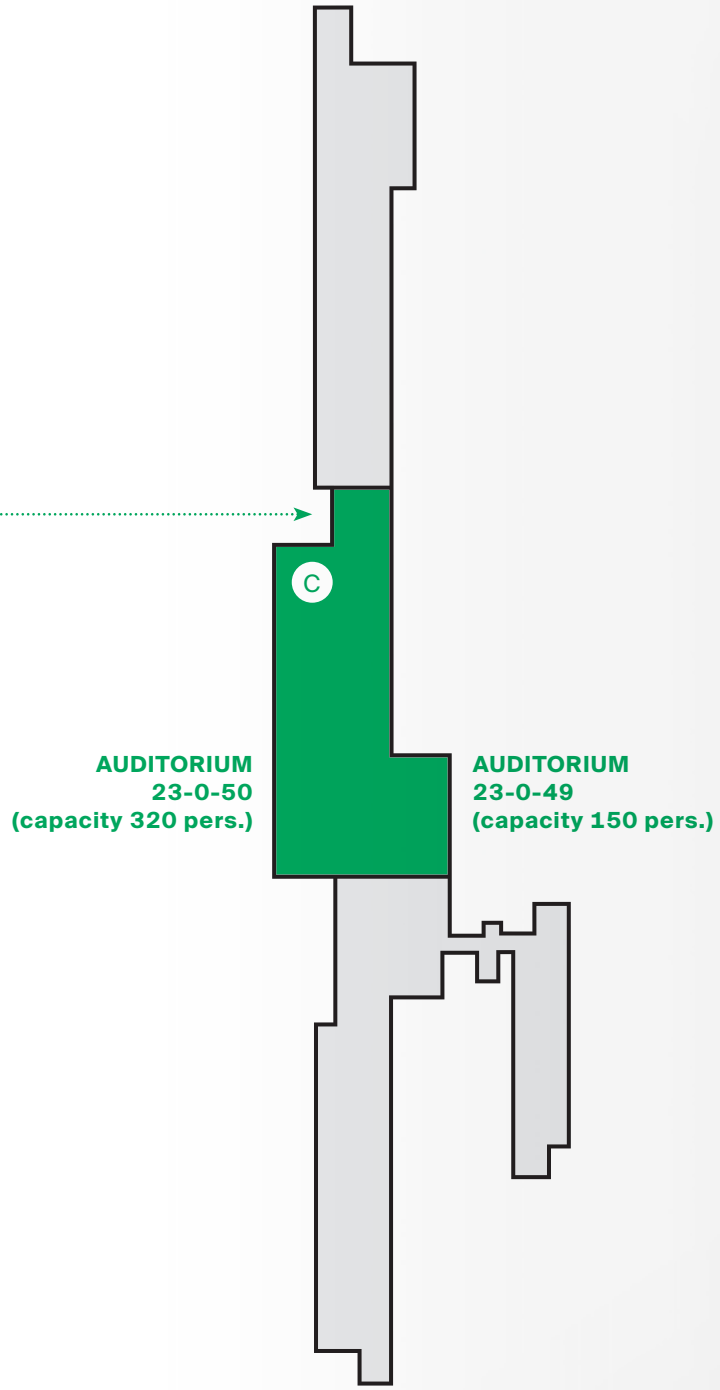


FACULTY OF HUMANITIES, UNIVERSITY OF COPENHAGEN GROUND FLOOR



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5–7 JULY 2017

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