ICON·S INTERNATIONAL SOCIETY OF PUBLIC LAW

DERS, NESS & LAW

Center for Global Constitutionalism
WZB

HUMBOLDT-UNIVERSITÄT ZU BERLIN

ICON • S CONFERENCE 17 – 19 JUNE 2016 HUMBOLDT UNIVERSITY BERLIN

We extend a warm welcome to all participants in the 2016 Annual Meeting of ICON • S, the International Society of Public Law. This 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 "Borders, Otherness and Public Law" and other topics at the heart of contemporary public law inquiry. We are grateful to our Berlin hosts for their relentless hard work and creativity in putting together such a 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 is a first-rate, intellectually appealing program featuring scholars, jurists and policy makers from various disciplines and from literally four corners of the world. We hope that you enjoy it thoroughly!

Gráinne de Búrca (New York University) and
Ran Hirschl (University of Toronto)
Co-Presidents, ICON • S, the International Society of Public Law

It is not only a pleasure and honor to organize this year's ICON • S Conference. It also seems deeply historically appropriate to have it take place in Berlin. In a time of great challenges that deeply implicate public law, there is hardly a better city for one to become aware of the deep connections between law and politics and the complexities and frailties of constitutional progress.

Berlin was a relatively liberal Prussian rule of law oriented place, where Voltaire sought refuge as a guest of Frederick the Great in the 18th century. It is also the place where the idea of a liberal constitutional democracy in a unified Germany was buried after the failed constitutional revolution of 1848. When German unity was finally achieved in 1871 and Berlin became the capital of the new German nation-state, this was brought about by conservative, industrialist and nationalist political forces that had little connection to the constitutionalist tradition, even though it was a time of innovative development for public law as a discipline.

After the disaster of World War I, Berlin became the center of avant-garde art, theatre, cinema and literature in the Weimar Republic – the vibrant capital of a frail liberal constitutional democracy, whose mainstream parties would be derided as "system-parties" by the radical right and the radical left and no longer commanded a majority by the early 1930s. Even though the Nazis never won electoral majorities in Berlin, the city became the heart of darkness for twelve years, the center of an evil empire that orchestrated a global war and moved genocidal annihilation to an unprecedented industrial scale. After that nightmare which also led to the destruction of significant parts of the city, Berlin started a new troubled life as ground zero in the Cold War – the nation divided between East and West, with a wall eventually running right through the city.

Today Berlin combines a sophisticated culture of commemoration with youthful appeal. It provides a distinctively German interpretation of what it means to be a cosmopolitan European. It remains uncouth and unfinished, so very unlike Paris. And unlike London, New York, Singapore or Hong Kong, it lacks the presence of a globalized bourgeoisie. But it provides Germans, Europeans and other citizens of the world with an unrivalled context for reflections on depravity, tragedy, redemption and the possibility of progress.

Mattias Kumm
(WZB Berlin Social Science Center /
Humboldt University Berlin /
New York University)
Local host

The Inaugural Executive Committee

De Búrca, Gráinne (Co-President)
Hirschl, Ran (Co-President)
Casini, Lorenzo (Secretary General)
Cassese, Sabino (Honorary President)
Golden, Claudia (Treasurer)
Choudhry, Sujit
Jia, Bing Bing
Mancini, Susanna
Okowa, Phoebe
Rosenfeld, Michel
Rubio-Marín, Ruth
Ruiz Fabri, Hélène
van Aaken, Anne
Weiler, Joseph H. H.

The Inaugural Society's Council

Albert, Richard
Amato, Giuliano
Auby, Jean-Bernard
Baer, Susanne
Barnes, Javier
Benvenisti, Eyal
Boisson de Chazournes, Laurence
Bonilla Maldonado, Daniel Eduardo
Cameron, David
Cartabia, Marta
Chang, Wen-Chen
Cohen-Eliya, Moshe
Craig, Paul
D'Alberti, Marco
Davies, Anne
De Wet, Erika
Díez-Picazo, Luis
Elkins, Zachary
Ferreres Comella, Víctor
Gaeta, Paola
Ginsburg, Tom
Gonod, Pascale
Jacobsohn, Gary J.
Kingsbury, Benedict
Koenig, Matthias
Krisch, Nico
Kumm, Mattias
Loughlin, Martin
Lübbe-Wolff, Gertrude
Maduro, Miguel Poiares
Malaret i Garcia, Elisenda
Mehta, Pratap Bhanu
Micklitz, Hans-Wolfgang
Möllers, Christoph
Napolitano, Giulio
Peters, Anne
Ponthoreau, Marie-Claire
Ruffert, Matthias
Sadurski, Wojciech
Shany, Yuval
Sieder, Rachel
Siegel, Reva
Smith, Rogers
Stewart, Richard B.
Tomkins, Adam
Torchia, Luisa
Uitz, Renáta
von Bogdandy, Armin

SCHEDULE

FRIDAY 17 JUNE 2016

REGISTRATION & COFFEE
11:30 am – 1:00 pm
→ UL6 Audimax

OPENING REMARKS 1:00 – 1:15 pm
→ UL6 Audimax

KEYNOTE 1:15 – 2:30 pm
→ UL6 Audimax

Coffee Break 30 min → Foyer Audimax

PLENARY SESSION I
MIGRATION AND MOVEMENT
3:00 – 4:30 pm

→ UL6 Audimax

Coffee Break 45 min → Foyer Audimax

PANELS SESSION I **1 – 15**
5:15 – 7:00 pm

→ UL6: 2070A, 2103, 2249a, 3071, 3119, 2093 + UL9: E25, 210, 213, E14, E42 + BE2: E44/46, 140/142, 144

Cocktail Reception 90 min → BE2 Foyer

SATURDAY 18 JUNE 2016

PANELS SESSION II **16 – 42**
9:00 – 10:45 am

→ all rooms BE2, UL9, UL6, DOR24

Coffee Break 45 min → BE2 Foyer
→ DOR24 Foyer

PANELS SESSION III **43 – 69**
11:30 am – 1:15 pm

→ all rooms BE2, UL9, UL6, DOR24

Lunch Break 90 min → Law Faculty
BE2 Foyer + UL9 E25

PLENARY SESSION II
INEQUALITIES
2:45 – 4:15 pm

→ UL6 Audimax

Coffee Break 45 min → BE2 Foyer
→ DOR24 Foyer

PANELS SESSION IV **70 – 97**
5:00 – 6:45 pm

→ all rooms BE2, UL9, UL6, DOR24

SUNDAY 19 JUNE 2016

PANELS SESSION V **98 – 126**
9:00 – 10:45 am

→ all rooms BE2, UL9, UL6, DOR24

Coffee Break 45 min → Foyer Audimax

PLENARY SESSION III
JUDICIAL INTERVIEW AND DIALOGUE
11:30 am – 1:00 pm

→ UL6 Audimax

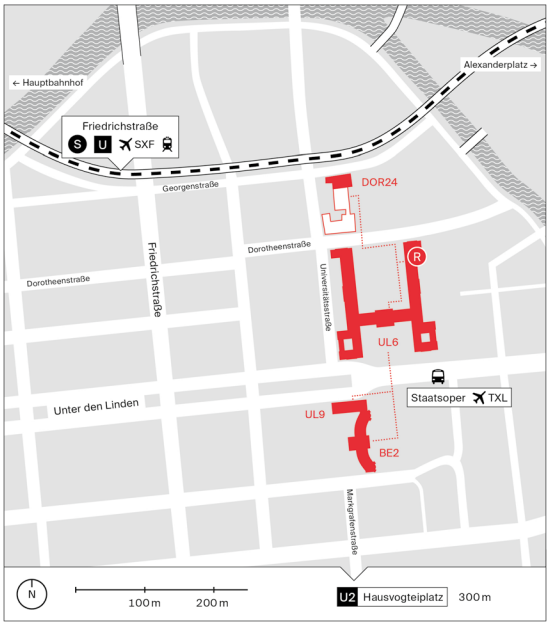
AWARD CEREMONY AND FAREWELL
1:00 – 1:15 pm

→ UL6 Audimax

MAP

VENUES

Main Building	Unter den Linden 6	UL6
Law Faculty	Unter den Linden 9	UL9
	Bebelplatz 2	BE2
Seminar Building	Dorotheenstraße 24	DOR24
Registration		Ⓡ




PLENARY
EVENTS

1:00 pm OPENING REMARKS

Ran Hirschl
University of Toronto

Ran Hirschl is the Co-President of the International Society of Public Law (ICON•S) and Professor of Political Science and Law at the University of Toronto, where he holds the Canada Research Chair in Constitutionalism, Democracy and Development. His research focuses on comparative public law, constitutional and judicial politics, and comparative legal traditions and institutions more generally. He is the author of *Towards Juristocracy* (Harvard), *Constitutional Theocracy* (Harvard) and *Comparative Matters* (Oxford), as well as over eighty articles and book chapter on comparative constitutional law and politics. In 2014, Ran Hirschl was elected a Fellow of the Royal Society of Canada. In 2016, he was awarded a prestigious Alexander von Humboldt Professorship by the Alexander von Humboldt Foundation, Germany.

Mattias Kumm
WZB Berlin
Social Science Center,
Humboldt University Berlin,
New York University

Mattias Kumm is Professor for "Global Public Law" at the WZB Berlin Social Science Center, where he directs the WZB Center for Global Constitutionalism, as well as Professor for "Rule of Law in the Age of Globalization" at Humboldt University Berlin. He is also the Inge Rennert Professor of Law at the New York University School of Law, where he teaches every fall.

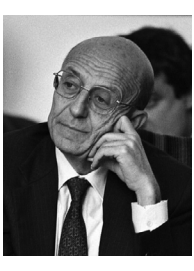
1:15 – 2:30 pm KEYNOTE SPEECH

ASYLUM AND MIGRATION TODAY: AN INDISPENSABLE REFLECTION ON THE NOTION OF BORDER

Migration is not a "challenge", it is a social fact – a reality – and, historically, a richness. Europe is barricading itself in the belief that walls will protect it, it is closing itself in its own shell, it is isolating itself. As if isolation had a future. Furthermore, political asylum is not a matter of values but a right, a fundamental right. The outrage at the indignity of the situation of women, men and children, walking on the roads and dying in the sea, requires us to reimagine the notion of borders, an evolving historical construction, a changing object. Opening up borders is perhaps the "realistic utopia" of human rights.

Françoise Tulkens
Former Judge and Vice-President of the European Court of Human Rights

Françoise Tulkens is Emeritus Professor of Law at the Catholic University of Louvain. She was a Judge on the European Court of Human Rights between 1998 and 2012 and served as one of the two Vice-Presidents of the Court in 2011 and 2012. She is a member of the Human Rights Advisory Panel of the United Nations Mission in Kosovo and the Vice-Chairperson of the Scientific Committee of the European Union Agency for Fundamental Rights. Tulkens served as the Chair of Board of Governors of the King Baudouin Foundation between 2011 and 2015 and has been an Associate Member of the Belgian Royal Academy since 2011. She holds honorary doctorates from the Universities of Geneva, Limoges, Ottawa, Ghent, Liège and Brighton. Her work is particularly focused on criminal law and human rights.



CHAIR

Sabino Cassese
Scuola Normale Superiore Pisa

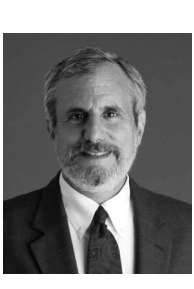
Sabino Cassese is an Emeritus Justice of the Italian Constitutional Court and an Emeritus Professor at Scuola Normale Superiore of Pisa. He is one of the Founders and a Fellow of the Institute for Research in Public Administration (IRPA), a non-profit organization that aims to promote advanced studies and research in the fields of public law and public administration. Cassese is also Professor at the LUISS School of Government in Rome. From 1987 to 1991 he was the President of the European Group for Public Administration. He was a member of the Italian government from 1993-1994 and served on several ministerial committees. Sabino Cassese is a member of the Executive Committee and Honorary President of the International Society of Public Law.

3:00 – 4:30 pm PLENARY SESSION I

MIGRATION AND MOVEMENT

REVITALIZING THE INTERNATIONAL RESPONSE TO FORCED MIGRATION: PRINCIPLES AND POLICIES FOR THE "NEW NORMAL"

The paper identifies the core elements of the international forced migration system as it has developed over the past six decades and details the range and depth of the current challenges to effective protection of refugees. It will suggest a number of policy and institutional reforms to respond to the present situation as well as to the "new normal" of persistent flows of forced migrants and the existence of protracted refugee situations.



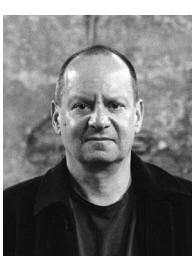
T. Alexander Aleinikoff

Columbia University

T. Alexander Aleinikoff is Visiting Professor of Law at Columbia Law School and Huo Global Policy Initiative Research Fellow, Columbia Global Policy Initiative. He is also Senior Fellow at the Migration Policy Institute in Washington, D.C. He served as the United Nations Deputy High Commissioner for Refugees in Geneva from 2010 to 2015. Aleinikoff has been a Law Professor at the Georgetown University Law Center (where he served as Dean from 2005 to 2010), and at the University of Michigan Law School. He served as General Counsel and Executive Associate Commissioner for Programs at the Immigration and Naturalization Service (INS) from 1994 to 1997. Professor Aleinikoff is a leading expert in immigration and refugee law, and was elected to the American Academy of Arts and Sciences in 2013.

A MOMENT IN 1935

Drawing on the research for his new book "East West Street", which covers the ideas of Hersch Lauterpacht and Rafael Lemkin, Sand uses the contact between Lauterpacht and historian Oscar Janowsky – a backstory to the letter of 1935 by which James G. MacDonald resigned as High Commissioner for Refugees coming from Germany – to explore lessons for Europe's current challenges with migration and movement.



Philippe Sands
University College London

Philippe Sands QC is Professor of Law and Director of the Centre on International Courts and Tribunals at University College London. He is a practicing barrister and founding member of Matrix Chambers, London, litigating cases before international courts and sitting as an Arbitrator in investment and sports disputes. He was a Member of the UK government's Commission on a Bill of Rights. His latest book is *East West Street: On the Origins of Genocide and Crimes against Humanity* (May 2016), which inspired the BBC Storyville film *My Nazi Legacy.*

COMMENTATOR

Ayelet Shachar
Max Planck Institute for the Study of Religious and Ethnic Diversity Göttingen

Ayelet Shachar is Director at the Max Planck Institute for the Study of Religious and Ethnic Diversity, where she heads the Ethics, Law, and Politics Department. Previously, she held the Canada Research Chair in Citizenship and Multiculturalism at the University of Toronto Faculty Law. Her research focuses on citizenship theory, immigration law, cultural diversity, and new regimes of human mobility and inequality. Shachar is the author of *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge); *The Birthright Lottery: Citizenship and Global Inequality* (Harvard); and *Olympic Citizenship: International Migration and the Global Race for Talent*, to be published by Oxford. In 2014, she was elected a Fellow of the Royal Society of Canada. She joined the Max Planck Society in 2015.

CHAIR

Hélène Ruiz Fabri
Max Planck Institute Luxembourg for Procedural Law

Hélène Ruiz Fabri is Director of the Max Planck Institute Luxembourg for Procedural Law. Prior to joining the Max Planck Society, she was Professor of Public International Law and later Dean of Sorbonne Law School (University of Paris I – Panthéon-Sorbonne). She also served as President of the European Society of International Law between 2006 and 2010. Her research interests include dispute resolution under public law, focusing notably on procedural law of international courts and tribunals, as well as international economic law. Hélène Ruiz Fabri is a member of the Executive Committee of the International Society of Public Law (ICON•S).

2:45 – 4:15 pm PLENARY SESSION II

INEQUALITIES

INEQUALITIES THAT MATTER

Where are we when it comes to a proper legal response to inequalities? There is by now a plethora of constitutional and human rights guarantees of equality – national law, the EU Charter of Fundamental Rights, UN Law from ICCPR to CERD, CEDAW and the CRD. Obviously, the attention we pay to problems, or people, is contingent, with a struggle against the racist trade of "the other" in slavery and the racist and sexist trafficking in women today, against democracy of the few ("women´s vote"), against criminalization of sex ("sodomy") or sexual identity ("transgender bathrooms"), against disrespect for the love of some ("gay marriage"), against barriers ("the disabled"), against a cultural hegemony of particular religions ("veil", "minaret", "state-church-relations"), and so forth. Some suggest that this is an inflation, and many are still stuck with a symmetrical concept to target exceptions, or with a groupist idea of categorical distinctions. There is also immense pressure to sell a universal insistence on equal treatment to a dangerous vision of pluralism, be it religious or cultural or national. It is, thus, time to act.

Today, there is not too much equality out there, but a striking lack of clarity and consensus in the field. Taking the harm of perpetuated inequalities seriously, there is a pressing need to better understand equality as a fundamental human right today, to help undo inequalities that matter. A focus not on comparisons but on harm shifts doctrine towards a liberty type analysis, and avoids the pitfalls of categorization and groupism. It is the basis of post-categorical law against discrimination. Then, equality is, just like liberty, a positive promise, which requires a focus on violations, thus: inequalities. This forces us, first, to honestly discuss which inequalities matter, to distinguish harm from differences we may eventually accept. Does harassment hurt? Is profiling harmful? Is privilege a fact, or a harmful perpetuation of discrimination? Secondly, if we understand equality as the right against inequalities, we are compelled to properly understand sex, race, creed etc. Those who struggled for the lists of inequalities that matter did not focus on identities, but named key drivers of inequality. Sex/gender is, then, a driver of sexism, as is race the driver of racism. Third, such a focus forces us to properly address discrimination, as a specific social setting, no matter whether intended or not, which may render the traditional distinction between direct and indirect or disparate impact discrimination void. Overall, I suggest this to be a promising path for constitutional and human rights law to take.

Susanne Baer
Justice of the Federal Constitutional Court of Germany, Humboldt University Berlin

Susanne Baer is a Justice of the Federal Constitutional Court of Germany in the Court's First Senate. She is Professor of Public Law and Gender Studies at Humboldt University Berlin and William W. Cook Global Law Professor at the University of Michigan Law School and taught at CEU Budapest regularly until 2010. Susanne Baer is the Founder of the Law and Society Institute (LSI), Humboldt University's center for interdisciplinary socio-legal studies. Between 2003 and 2010, she was the Director of the GenderCompetenceCenter, a research project at Humboldt University Berlin advising the government. She has served as Speaker of the Centre for Transdisciplinary Gender Studies and Vice-President of Humboldt University. Her research focuses on interdisciplinary studies of law and gender studies, law against discrimination and comparative constitutionalism.

SUBSTANTIVE EQUALITY: HIERARCHY IN CANADA AND THE WORLD

Substantive equality has been pioneered by the Supreme Court of Canada, which became the first court to reject Aristotle's sameness/difference approach, embodying the Charter's "disadvantage" language in a constitutional equality theory. Over the next 30 years, while many strides forward were made, the failure to realize the promise fully can be explained by its failure to explicitly embrace hierarchy, the core dynamic principle of substantive inequality. This also explains its former adoption of a "dignity" standard and the adjudication of certain substantive equality issues, notably gender crimes including rape, pornography, and prostitution, in the absence of explicit or sustained gender inequality recognition. The international community has gone further in some respects, recognizing the gender dimensions of violence against women. Doctrinal embrace of "hierarchy" as the core of the inequality rejected by the substantive equality standard would clarify its direction and extend its reach toward realizing its growth potential.

Catharine A. MacKinnon
University of Michigan, Harvard University

Catharine A. MacKinnon is the Elizabeth A. Long Professor of Law at the University of Michigan Law School and the long-term James Barr Ames Visiting Professor of Law at Harvard Law School. She specializes in equality law and human rights, initiated the theory of substantive equality, and has theorized race, sex, and class as intersecting inequalities. She originated the legal claim for sexual harassment and has proposed sex equality as an approach to pornography and rape, pioneering "gender crimes" domestically and internationally to advance awareness and social change. She served as the first special gender adviser to the Prosecutor of the International Criminal Court in The Hague from 2008 to 2012 and is a member of the American Law Institute. In 2014, Professor MacKinnon received the Ruth Bader Ginsburg Lifetime Achievement Award from the Association of American Law Schools Women's Division. She is the most highly cited woman writing in law in English.

COMMENTATOR

Pratap Bhanu Mehta
Center for Policy Research New Delhi

Pratap Bhanu Mehta is the President and Chief Executive of the Centre of Policy Research, New Delhi. His work spans widely and is focused both on issues of public policy as well as the underlying theoretical questions, in the areas of political theory, constitutional law, global governance and international relations. Pratap Bhanu Mehta has served on several government committees, including the Prime Minister of India's National Knowledge Commission. His books include *The Burden of Democracy*, and most recently *The Oxford Handbook of the Indian Constitution* (co-edited). He is a winner of the Infosys Prize.

CHAIR

Rosalind Dixon
University of New South Wales

Rosalind Dixon is Professor of Law at the University of New South Wales (UNSW Australia) in Sydney. Her main research interests are in comparative constitutional law, constitutional design, socio-economic rights as well as law and gender. She has published in leading journals in the US, Canada, the UK and Australia, is Co-Editor, with Tom Ginsburg, of a leading handbook on comparative constitutional law, *Comparative Constitutional Law* (Edward Elgar, 2011), and a related volume, *Comparative Constitutional Law in Asia* (Edward Elgar, 2014), Co-Editor (with Mark Tushnet and Susan Rose-Ackermann) of the Edward Elgar series on Constitutional and Administrative Law, on the Editorial Board of the *Public Law Review*, and Associate-Editor of the *Constitutions of the World* series for Hart publishing. She previously served as an Assistant Professor at the University of Chicago Law School.

11:30 am – 1:00 pm PLENARY SESSION III

JUDICIAL INTERVIEW AND DIALOGUE

Koen Lenaerts
President of the Court of Justice of the European Union

Koen Lenaerts is the President of the Court of Justice of the European Union. From 1989 to 2003, he has been a Judge of the European Court of the First Instance. Since 2003, he has been a Judge of the European Court of Justice and became its Vice-President in 2012 and its President in 2015. Koen Lenaerts is a Professor of European Law at the University of Leuven and the Founder and Director of the university's Institute of European Law. He is also an Honorary Master of the Bench of the Inner Temple in London.

Guido Raimondi
President of the European Court of Human Rights

Guido Raimondi is the President of the European Court of Human Rights (ECHR) since 2015. He was a Vice-President of the ECHR from 2012 until 2015 and has served as a Judge on the ECHR since 2010. One of the main focuses of his professional life both on the bench and beyond has been rights issues. He has been a member of the judiciary since 1977. From 1989 to 1997, he was a Co-Agent of the Italian Government before the European Court of Human Rights. While serving on the Italian Court of Cassation, he has occasionally been an ad hoc Judge in cases before the ECHR. Guido Raimondi was Deputy Legal Adviser and Legal Adviser of the International Labour Organization (ILO) between 2003 and 2010.

INTERVIEWED BY

Joseph H. H. Weiler
European University Institute

J. H. H. Weiler is President of the European University Institute and University Professor, New York University School of Law (on leave). He is Editor-in-Chief of the *European Journal of International Law* and Co-Editor-in-Chief of the *International Journal of Constitutional Law* (ICON•S).

Gráinne de Búrca
New York University

Gráinne de Búrca is the Co-President of the International Society of Public Law (ICON•S) and Florence Ellinwood Allen Professor of Law at New York University School of Law. She is the Co-Director of the Jean Monnet Center for International and Regional Economic Law and Justice and the Faculty Director of the Hauser Global Law School at NYU Law. From 1998 to 2006, she was the Co-Director of the Academy of European Law at the European University Institute in Florence. Gráinne de Búrca is the Co-Author of the leading OUP textbook on EU Law and the Co-Editor-in-Chief of the *International Journal of Constitutional Law* (I•CON). Her main field of research is European Union law, and she is also interested in questions of European constitutional law and governance, human rights and discrimination and international relations.


CONCURRING
PANELS

OVERVIEW

PANELS SESSION I
FRIDAY, 17 JUNE 2016
5:15 – 7:00 pm

PANELS SESSION II
SATURDAY, 18 JUNE 2016
9:00 – 10:45 am

PANELS SESSION III
SATURDAY, 18 JUNE 2016
11:30 am – 1:15 pm

PANELS SESSION IV
SATURDAY, 18 JUNE 2016
5:00 – 6:45 pm

PANELS SESSION V
SUNDAY, 19 JUNE 2016
9:00 – 10:45 am

FRIDAY
17 JUNE 2016
5:15 – 7:00 pm

PANELS
SESSION I

1 CONSTITUTIONALISM AND CONSTITUTIONAL INTERPRETATION

Panel formed with individual proposals.

Participants	Or Bassok Mark A. Graber James Grant Scott Stephenson
Name of Chair	Scott Stephenson
Room	UL6 2070A

Or Bassok: *Beyond the Horizons of American Constitutional Thinking*

American constitutional debate is controlled by certain paradigms that block the ability to think beyond them. In this paper, I expose two of these paradigms and examine the way in which they control and limit American constitutional thinking.

Mark A. Graber: *Race and American Constitutional Exceptionalism*

American exceptionalism in American political development and in comparative constitutional law suffer from a similar blind spot. Just as Rogers Smith pointed out that the classical works in American political development tended to confine race in ways that discounted the substantial influence of race on American constitutional development, so the classical works on American constitutional exceptionalism tend to confine race to the margins of the American constitutional experience, overlooking the powerful impact race has had over almost all doctrines of American constitutional law. This paper notes one difference between the United States and many constitutional democracies is that while much constitutionalism in Europe has been forged by struggles over the meaning of an anti-fascist imperative, much constitutional development in the United States is informed by racist and anti-racist imperatives.

James Grant: *Constitutional Foundations, Law and Interpretation*

This paper contributes to the debate over whether judges should appeal to foreign decisions and moral reasoning to change their constitutions through the guise of interpretation. First, I defend HLA Hart's argument that the constitutional foundations of legal systems consist of extra-legal customary rules, which exist because they are practiced by officials and 'accepted' by them (in Hart's special meaning of acceptance). Secondly, I argue, consistently with Hart's account, that when judges interpret the constitution in creative ways, they do not necessarily act in a way that is unjustified. Moreover, their action may even be considered constitutional, if their interpretation, though novel, is nonetheless generally accepted by officials. The paper also responds to a number of objections to my argument, including that it allows too much power for judges to change the constitution, and that it does not sufficiently allow for variations among countries in the scope of judicial power.

Scott Stephenson: *The Rise and Recognition of Quasi-Constitutional Law*

The common law world of constitutionalism is often viewed through the lens of 'regular constitutional law', distinguishing those countries that have entrenched constitutions enforced by judicial review from those that do not. In this paper, I study the influence 'quasi-constitutional law', statutes that purport to alter a fundamental feature of the system of government and that are enacted through the ordinary lawmaking process, has on this distinction. In this paper, I argue, first, that legislators across the common law world increasingly turned to quasi-constitutional law to pursue changes to their systems of government in the second half of the twentieth century and, second, however the appearance of commonality and convergence is potentially misleading because the absence or presence of regular constitutional law affects the way in which and the extent to which the judiciary recognizes quasi-constitutional law.

2 BETWEEN ETHNIC IDENTITIES AND NATIONAL IDENTIFICATION: REVISITING CHINA'S REGIONAL NATIONAL AUTONOMY

Many societies are multi-national in composition. As the fundamental mechanism of nation building, modern constitutions provide both constitutional arrangements to govern over territory and the constitutional narrative to forge a common identity for its people. However, a constitutional institution does not automatically achieve these two goals.

China's case of Regional National Autonomy can well illustrate the institutional tension between the regional autonomy and the national unification. If considering China as a one party state, RNA functions both as a special institution with autonomous powers authorized to all three-tied legislative bodies and governments and as a "basic policy" of the Chinese Communist Party (CCP) in dealing with China's multi-ethnicity to forge a modern state as well. In the panel presentation, we will analyze RNA through a constitutional realism approach, with a special contribution from the story of Quebec as compared.

Participants	Han Zhai Chasidy Alexis Zhang Jian
Name of Chair	Yang Guodong
Room	UL6 2103

Han Zhai: ***RNA interlaced with the unitary system RNA and its legislative powers***

RNA is entrenched in Article 30 in the 1982 Constitution of the PRC, and it is interlaced with the Unitary System through all three tiers of national administration division. The autonomous power is vested with the governments in the areas to exercise. Still under both Article 4.3 and Article 30 of the 1982 Constitution, the RNA Law will further be interpreted in a systematic way. A state teleology become more significant when considering the RNA Law the State shoulders the legal obligation to realise the substantial equality between ethnic minorities and Han Chinese. The central control over the autonomous powers, which has been institutionalised into the constitutional framework.

A feasible angle to assess the RNA is the exercise of legislative power of autonomous areas. A general observation is that the autonomous legislation has made remarkable improvements since 1978, the reform era does not see any significant expansion of autonomous legislation in number.

Chasidy Alexis: ***The Quebec Secession Movement in the Eyes of Indigenous People***

In Canada, Indigenous peoples are governed under the legal paradigm of Aboriginal Law, which contains many boundaries and layers that govern the rights and duties of Aboriginal peoples and Aboriginal Lands. This is seen in the legal terminology of Treaty Status, Non-Treaty Status, Aboriginal Title and Aboriginal Rights. Both, the common and civil law, create several delineating binaries of distinguishing what is permissible and what is not for Indigenous peoples residing in Canada. As a result of this, several tensions are created between groups, mainly those seeking to exercise such rights and duties. Finding cultural legal spaces to exercise such rights is not only pervasive but limited in the Canadian Law context. In particular in Quebec, which claims to have historical roots in France and governs its citizens as a sub-national entity of both Canada and France. Placing Indigenous peoples in this construct presents several cultural pluralities in terms of succession.

Zhang Jian: ***National Context Matters: Reconsidering the Comparative Methodology in Constitutional Law research***

Different cases of ethnic autonomy reveal a sharp contrast in constitutional arrangements, ethnic policy, historic tradition, etc. These elements, in fact, formulate the national context of constitutional issues that should be identified by comparative constitutional lawyers. According to the classic functionalism methodology, comparative study is supposed to start from the 'same question', trying to find various solutions in different countries. However, behind similar institutional designs, the value-orientations are in high diversity, which weakens the feasibility of 'same question' when doing comparison. Therefore, we argue that national context matters in comparative constitutional study, not only because of the national constitutional uniqueness, but also subject to multiple modernity and its display in different national histories. This position requires a historical and sociological approach into comparative constitutional law research beyond the doctrinal study.

3 FIGHT OVER THE TURKISH CONSTITUTION: DIMENSIONS OF INCLUSION AND EXCLUSION

The proposed panel looks at different societal and political divisions deriving from and reflected in the constitution from different perspectives: Concentrating on the last failed constitution-making attempt in Turkey (2011-2013), which was unique in its claim to bring together a variety of stakeholders and break away from the previous experiences that lacked popular input and support, Zeynep Yanaşmayan (HU Berlin) will try to find some answers why Turkey has not managed to write a constitution negotiated amongst the constitutive segments of the society at large. Approaching the constitution as a border and framework between normality and the state of emergency as well as a source of conflict between the state and its citizens' rights, particularly focusing on the current conflict in the Southeast of Turkey, Ece Göztepe (Bilkent University, Ankara) will take a closer look at the state of emergency regulation.

Participants	Ece Göztepe Maria Haimerl Dilek Kurban Zeynep Yanasmayan
Name of Chair	Silvia von Steinsdorff
Room	UL6 2249a

Ece Göztepe: ***Interim Measures in the AYM's Jurisdiction during the State of Emergency in Southeast Turkey***

Approaching the constitution as a border and framework between normality and the state of emergency as well as a source of conflict between the state and its citizen's rights, thereby focusing on the current conflict in the Southeast of Turkey, I will take a closer look at the state of emergency regulations of the Turkish Constitution. Through a historical retrospection on the decisions of the Turkish Constitutional Court in the 1990s in terms of concrete norm control I will ask whether the conception has been changed with the introduction of the constitutional complaint procedure. With regard to recent decisions by the Turkish Constitutional Court, I will ask for the role of interim measures in the Court's jurisdiction during the sui generis state of emergency regime in Southeastern of Turkey. My core thesis will be the de facto de-constitutionalisation of the state of emergency regime in the current situation.

Maria Haimerl: ***Decision-Making at the Turkish Constitutional Court***

The US Supreme Court and the German Constitutional Court are considered to represent countermodels of collegial decision-making: The former puts emphasis on the justices' individual opinions; face-to-face deliberations play a minor role. The latter conducts extensive deliberations and consensual decisions are preferred. The interview-based paper presents the Turkish Constitutional Court (AYM) as a case showing features of both of types: The AYM's organizational structure is very individualized and the possibility to dissent is an essential part of the justices' professional identity. Both reinforce the conception of the AYM less as a cohesive whole but as a collection of individuals. These features are often hard to reconcile with the extensive deliberations, the AYM conducts, as they require consensus orientation to some extent. In the particularly difficult Turkish political context, this can be regarded as one explanation for inconsistencies and delays in decision-making at the AYM.

Dilek Kurban: ***A Desirable Partner for the ECtHR? The Turkish Constitutional Court's Inclusiveness in the Kurdish cases***

Recent debates on the constitutionalization of the European Convention on Human Rights (ECHR) system reignited an old discussion as to the true function of the European Court of Human Rights (ECtHR). The advocates of the ECtHR's evolution into a quasi-constitutional entity call for a greater role for national judicial systems in the protection of fundamental rights. This is promoted both on the basis of the principle of subsidiarity and to enhance the efficiency of the ECHR system. Those who propose the ECtHR to provide constitutional rather than individual justice rest their arguments on the presumption that national constitutional courts are reliable 'partners' in upholding European human rights and freedoms and providing effective remedies to victims of rights abuses. This paper tests this assumption on the basis of the Turkish Constitutional Court's (AYM) jurisdiction in the Kurdish cases filed through the recently introduced individual complaint mechanism.

Zeynep Yanasmayan: ***The Failure of Popular Constitution Making in Turkey***

Despite the resurgence of the field of constitution writing in recent decades, little systematic knowledge is available on the constitutional design processes and its consequences. This paper aims to bring under spotlight the recent failed constitution making attempt in Turkey (2011-2013), which is in and of itself an understudied case and to offer an account of the mechanisms that led to its failure. The endeavor of bringing together representatives from the four parties represented in the parliament alongside the engagements of the civil society broke away from the previous constitutional experiences in Turkey that lacked popular input. In order to comprehend the complex relationship between the process, the failure, and the public involvement, this paper scrutinizes the proceedings of the Constitutional Conciliation Commission established in the parliament and seeks to uncover the deal breakers.

4 COPING WITH DIVERSITY – PUBLIC POLICIES AND THE INTEGRATION OF INDIVIDUALS IN PLURALISTIC SOCIETIES

The panel aims to illustrate the problems that face rule of law in pluralistic societies. Integration policies and the (moving) line defining the boundary between refugees and migrants must find their way through education for democracy and citizenship identity. Furthermore, the limits of state intervention must somehow admit autonomy of individuals and question the legitimacy of the protection of the individual from himself. Topics to be discussed: i) Faraway so close – cross-border migration in the Euro-region Galicia-North of Portugal and the unmet expectations of an easy socio-cultural integration ii) Refugees In, Migrants Out? iii) Democratic Standards for Education iv) Religious symbols, paternalism and protection of the individual from himself.

Participants	Patrícia P. Mendes Jerónimo Andreia Sofia Pinto Oliveira Benedita F. da Silva Mac Crorie Maria Luísa Alves da Silva Neto Teixeira Botelho Anabela de Fátima da Costa Leão
Name of Chair	Patrícia P. Mendes Jerónimo
Room	UL6 3071

Patrícia Penélope Mendes Jerónimo: *Faraway so close – cross-border migration in the euro-region galicia-north of Portugal and the unmet expectations of an easy socio-cultural integration*

Discussion of the cross-border migration in the Euro-region Galicia-North of Portugal against the background provided by a strong narrative of historical, cultural and linguistic ties, on the one hand, and the increasing reports of discrimination against Portuguese workers in Galicia, of their disenfranchisement in the political field and their exposition to a range of negative stereotypes that hinder their chances for integration.

Andreia Sofia Pinto Oliveira and Benedita Ferreira da Silva Mac Crorie: *Refugees In Migrants Out?*

The present refugee crisis has a reflex in migratory management policies. Given the high number of asylum seekers trying to access Europe, deportation policies regarding other migrants tend to be more severe. This is a good opportunity to re-think the concept of refugee of the Geneva Convention – with multiple interpretations – and the (moving) line defining the boundary between refugees and migrants.

Maria Luísa Alves da Silva Neto Teixeira Botelho: *Democratic Standards For Education*

The article discusses the nowadays importance of education for democracy and citizenship as a way of building or reinforcing a sense of belonging in a democratic and pluralist society. Legitimacy and constitutional identity are also addressed issues.

Anabela de Fátima da Costa Leão and Benedita Ferreira da Silva Mac Crorie: *Religious Symbols, Paternalism And Protection Of The Individual From Himself*

Although aiming to safeguard the autonomy of individuals, many of the bans imposed on the use of religious symbols in public spaces are based on paternalistic grounds, since the use of these symbols may reflect, many times, a deliberate choice. These bans seem, therefore, hardly compatible with autonomy itself, since autonomy should include the possibility of adopting a behavior that appears in the eyes of others as an option (a free exercise of choice) for inequality or exclusion. Thus, from an autonomy's point of view, we intend to discuss the limits of state intervention and the legitimacy of the protection of the individual from himself, concerning the use of religious symbols.

5 REGIONAL AND CONSTITUTIONAL STRUCTURES IN TENSION

The aim of this panel is to interrogate possible tensions and interactions between regional organizations and constitutional law. Here, particular attention is paid to the increased prominence of constitutional language at the regional level. The project intends to unravel the power dimensions behind the dynamics of such constitutional discourses, including asking questions about its productive and representational qualities. A comparative approach is adopted where different regional organizations will be considered. Participants will be asked to reflect on the constitutional dynamics within different regions from a comparative and theoretical perspective. The key point of discussion will be the extent that constitutional frameworks of regional organizations reflect the existing power dimensions in the region. This articulation should be analyzed looking not only at the constitutional discourse at the regional level, but also at its interferences with the national constitutional level.

Participants	Micha Wiebusch Pola Cebulak Christopher May Maksim Karliuk Tom Daly
Name of Chair	Damjan Kukovec
Room	UL6 3119

Micha Wiebusch and Pola Cebulak: ***Regional and Constitutional Structures in Tension – Framing Paper***

Regional constitutionalism is a concept used to reflect upon tensions within the constitutional structures of regional organizations as well as upon interactions between the regional and national constitutional structures. The paper is aimed at providing a theoretical framework for addressing the following research questions in the context of regional integration: What role does the law perform in the establishment and development of regional constitutionalism? What are the mechanisms through which "constitutionalism" is discursively and materially produced at the regional level? To what extent are the power structures reflected in the emerging constitutionalization of regional organizations? The framework adopts a balanced approach, which pays attention to the particularities of regional integration in different parts of the world and explores possibilities of an epistemological break with the globalized Western-centric conceptual frameworks of constitutionalism.

Christopher May: ***What we mean when we talk about the rule of law: The rule of law, regional organisations and constitutional politics***

In contemporary global politics there can be few more popular norms than the rule of law. Appeals are frequently made to democracy and human rights by global leaders and political activists: alongside these appeals, the rule of law has become almost universal in its invocation, despite much less agreement about what it might entail and its effective implementation. As I will argue in this paper, we cannot understand the political efficacy and appeal of regional constitutional organisation without also understanding the underlying role of the rule of law norm as a (potentially) universal common-sense. Indeed, across the political spectrum the rule of law has become an important touchstone for contemporary global politics. My question here is: what political processes have established the normativity of law (the rule of law) as a legitimate and authoritative underpinning for regional organisational constitutions especially when such organisations are focused on economic development?

Maksim Karliuk: ***The Constitutional Framework of Power Distribution within the Eurasian Integration Process***

After the fall of the Soviet Union, most post-Soviet countries pursued integration among themselves, which was fast in creating new institutions, but was slow and ineffective in making them work. The Eurasian Economic Union (EAEU) is a new international organization of regional economic integration with proactive ambitions to follow best EU practices, including introduction of supranational elements. However, the existence of a hegemon in the region brings about a power balance challenge, which makes all relevant stakeholders protective of constitutional legal orders on different levels, albeit for dissimilar reasons and via different means. This research unpacks the legal changes that accompany the creation of the new organization in order to understand the relation of the EAEU's constitutional framework and power distribution within the post-Soviet region in the framework of a clash of legal and political structures.

Tom Daly: ***The Democratic Recession and the "New" Public Law: Toward Systematic Analysis***

This paper will discuss the development of a 'new' public law in response to the worldwide democratic recession of the past 15-20 years (and ongoing in e.g. Hungary, Poland, India, South Africa, Brazil) by briefly examining three questions: (i) What is the democratic recession and what is new about contemporary democratic breakdowns and constitutional crises? (ii) How have public law mechanisms evolved to address the democratic recession in regional and transregional international organizations? (e.g. Commonwealth, Organization of American States, Council of Europe, European Union, and African Union); and (iii) What are our existing conceptual and theoretical frameworks for understanding this new reality, and are they adequate? Overall, the paper will argue that systematic analysis is sorely needed if we are to make sense of this democratic recession, its impact on the evolution of public law, and the adequacy of the public law response to democratic backsliding.

6 TRANSNATIONAL ADMINISTRATIVE PROCEDURE

The panel focuses on the transnational dimension of administrative procedure. Such dimension, in contrast with the traditional belief that administration is a sort of national enclave, is a consequence of two main developments. First, a body of transnational standards of conduct for public authorities emerged in a variety of areas. Second, EU law set out procedures that are no longer in the hands of either the EU administration, or its MS, but of both. Hence, interest balancing takes place in new, trans-national patterns of public action. Such patterns of action are under-theorized, but raise complex issues not only from the viewpoint of transparency and accountability, but also of efficiency and effectiveness. Panelists will consider administrative procedure in the context of both EU integration and globalization.

Participants	Luca De Lucia Stephan Schill Martina Conticelli Herwig C.H. Hofmann Matthias Ruffert Edoardo Chiti
Name of Chair	Giacinto della Cananea
Room	UL6 2093

Luca De Lucia: ***From mutual recognition to authorization: EU new procedures***

The paper has two goals. First it seeks to examine the main features of transnational administrative decisions in the EU legal system (i.e. acts of one Member State which, according to a European secondary legal norm, produce juridical effects in one or more of the other Member States). Second it discusses the tendency towards centralisation in recent legislation and the consequences of the abandonment of the model of transnational administrative decisions in some important economic areas. Finally, some brief conclusions on the perspective of horizontal administrative cooperation will be drawn.

Stephan Schill: ***Transnational Law of Public Contracts***

Introducing the recent book 'Transnational Law of Public Contracts' (M. Audit & S. Schill, eds.), the presentation discusses how recourse to the concept and methods of transnational law provides a useful tool to conceptualize the changes administrative law is undergoing in the process of globalization. Using the example of public contracts law, it shows how a transnational legal approach allows to understand the normative pressure administrative law is facing from both binding international legal obligations and demands by non-state actors, both private and public, which are not binding but no less transformative in delinking administrative law and the nation state, such as the development of models for public contracts by industry organizations, the transborder migration of model instruments, or the impact of financiers or guarantors on the law governing public contracts.

Martina Conticelli: ***Foreign investments protection. The transnational and global regime of indirect expropriation***

The paper takes into consideration the protection of foreign investments as a case study in transnational regulation.

By focusing on the regime of expropriation, the paper discusses how procedural requirements, affirmed through multiple mechanisms and different standards of review, play a unifying role in transnational procedures, and highlights the main features of foreign investments' regime.

Herwig C.H. Hofmann: ***Transnational regulation***

This brief contribution will discuss how the reality of executive rule-making procedures with trans-territorial effect, with other words, the creation of non-legislative rules which have an effect outside the territorial limits of the jurisdiction of origin. It maps the phenomenon, discusses some of its central challenges for the realization of general principles of law and considers possible legal approaches addressing these. At the same time, the contribution looks at how there is much more domestic regulatory activity that is touched by transnational regulatory activity – formal and informal – than generally meets the eye. The contribution discusses some consequences arising from this interplay.

Matthias Ruffert: ***Discussant***

Edoardo Chiti: ***Discussant***

7 COMPARATIVE PERSPECTIVES ON THE LEGAL AND/OR EXTRA-LEGAL CONSTRAINTS ON EQUALITY LAW

This panel will examine a variety of legal and extra-legal constraints on the formation, articulation, and enforcement of equality law in a number of different regions. These regions include Brazil, France, Germany, South Africa and the United States. The panelists will address Equality Law focused on gender, sexual orientation, ethnicity and race. By considering Equality Law from a comparative perspective across categories of exclusion as well as geographic regions, the panel seeks to identify the factors that limit its efficacy in creating a more inclusive and just society.

Participants	Thiago Amparo Mathilde Cohen Tanya K. Hernández Audrey McFarlane Terry Smith
Name of Chair	Tanya K. Hernández
Room	UL9 E25

Thiago Amparo: ***Is there a right to discriminate? A Harm-Based Critique of Private Discrimination in the U.S. and South Africa***

The objective of the paper is to scrutinize the reasons for exemptions from discrimination law for private actors, by comparing South African and United States approach to religious objections to same-sex marriage. First, the paper will review scholarly and jurisprudential reasons for allowing private exemptions from discrimination law, including associational rights, free speech, freedom of religion. Second, the paper will present recent discrimination theories of harm, in particular Calhoun's concept of 'losing twice' and Eidelson's view on the role of 'disrespect' in discrimination law. Finally, it will conclude by comparing exemptions to same-sex marriage to exemptions to civil rights laws – arguing that no version of a private "right to discriminate" – term coined in South Africa – is legally defensible.

Mathilde Cohen: ***Geographic Dislocation and Judicial Discourses of Diversity in France***

To uncover the structure of racial discrimination as well as other forms of intersectional oppression, I analyze judges' discourse about diversity, examining the strategies by which they dodge or downplay the relevance of race, gender, and sexual orientation. These avoidance strategies coexist with a willing acknowledgement of the social reality of race in the overseas departments and collectivities (such as the French Guyana, Réunion, or New Caledonia). It is when white members of the judiciary feel themselves racialized in overseas courts than they suddenly acknowledge the relevance of race. This excursion outside of the mainland thus reveals, if need be, that the official façade of color-blind universalism is but a sham.

Tanya K. Hernández: ***The Limits of US Racial Equality Without a Constitutional "Right to Work" The Latin American Comparison***

A comparative assessment of Latin American constitutional frameworks suggests that the lack of a constitutional "Right to Work" as exists in many Latin American contexts, adversely impacts U.S. race jurisprudence. This paper submits that without a constitutional Right to Work in the U.S., courts are not adequately focused on the realities of the workplace context with its prevalent racial bias. Indeed, substantive racial equality is not possible without fully considering the vulnerabilities of workers that both exacerbate racial discrimination and impede the ability to make claims of discrimination. The workplace is thus pivotal in actualizing racial equality.

Audrey McFarlane: ***Dissolving Boundaries: The U.S. Perspective on Integration through Mixed Income Housing***

This paper examines inclusionary housing in the context of entrenched racial segregation in the United States and the dual realities of concentration of affluence and concentration of poverty. Within this context, inclusionary housing as a method of affordable housing production and a racial integration strategy is in tension with itself. As presently designed, inclusionary housing is based on exaggerated fears of replicating concentration of poverty that works to the disadvantage of its intended beneficiaries. Thus, too often it serves as a form of discrimination management rather than as a method of significant access to decent affordable housing for the poor. The paper recommends ways in which to think about affordable housing with a more appropriate accounting of the complexities of race and class integration.

Terry Smith: ***U.S. White Backlash in a Brown Country***

Discourse on "white backlash" implicitly references whites' reaction to some perceived civil rights excess but fails to identify a more systemic etiology. In this article, Professor Terry Smith employs clinical psychology to analyze white backlash as symptomatic of whites' addiction to privilege. Noting that the United State Supreme Court has only once even invoked the term "white backlash" despite its recurrence throughout American history, Professor Smith argues that this judicial reticence is due in part to the Court's participation in reactionary resistance to civil rights progress. Using the diminished electoral fortunes of Democrats during the Obama presidency as a foundation, Smith argues that a new white backlash is occurring just as the nation is accelerating its transition from a white to a brown population. The article explores how this demographic shift differentiates current white backlash from past eras, as evidenced by, among other indicia, the emergence of a "new white nationalism" that has formed an imbricate relationship with modern political conservatism.

8 SPACING INTERNATIONAL LEGAL REGIMES: THE INTERACTION OF ABSTRACT AND GEOGRAPHICAL SPACES

Boundaries and spaces are defined by each other – this is certainly true geographically, but it is also true in a more malleable, epistemological sense where "boundaries," "limits," "gaps" and "fields," "cores" and "peripheries" are applied to rules, events, systems and belonging, among other abstract concepts. The use of quasi-geographical language seems to be a central part of legal and political analysis. It is also easy to mix and even conflate geographical and abstract territoriality, resulting in regimes that expand their power or restrict their responsibility beyond the "limits" that they otherwise profess. Our proposed panel investigates the relationship and interaction between abstract and geographical space, in four different settings.

Participants	Péter Daniel Szigeti Anna Elizabeth Chadwick Jed Odermatt Ida Ilmatar Koivisto
Name of Chair	Maria Adele Carrai
Room	UL9 210

Péter Daniel Szigeti: *The Illusion of Territorial Jurisdiction*

Common accounts of the development of territorial jurisdiction follow a "rise and fall" narrative. Territorial jurisdiction began in the mid-seventeenth century, and declined due to technological revolutions in communications and transportation, in the mid-twentieth century. In its place, today, we have effects jurisdiction ubiquitously. I claim that the "fall" in fact never happened. There is in fact little difference between "strict" territorial jurisdiction; the doctrine of continuing acts (according to which an illegal action lasts as long as its intended effects last); and effects jurisdiction (which is also known as passive territoriality). The three doctrines use the same methods, and are easy to convert into one another, calling into question the entire territorial/extraterritorial divide. The reason for this ambiguity is that the law deals mostly with abstract concepts that cannot be unambiguously located, such as events, actions, intent, motivations, agency, responsibility.

Anna Elizabeth Chadwick: *Overwhelming a Financial Regulatory Black Hole with Legislative Sunlight: Over-the-Counter Derivative Markets and Limits to the Regulatory Imagination*

Post-financial crisis, regulations are being developed to respond to problematic trends in over-the-counter (OTC) derivative markets. Underpinning the new regulatory frameworks, however, is a pervasive conception of these markets as a regulatory vacuum, or a legal void. Taking issue with this presentation, I will demonstrate that OTC derivative markets are, in fact, 'filled to the brim with legal expertise, scrutiny, and analysis'. Taking a closer look at some of this law, with a particular focus on legal regimes that facilitate speculative trading in commodity derivatives, I will draw call into question legal 'boundries' between regulated and unregulated; between public and private. I will demonstrate that is not just that borders drawn by laws that are problematic: line-drawing within the legal discipline creates problems as well.

Jed Odermatt: *Defining European Legal Space*

The issue of jurisdiction continues to be a much-debated topic in international law. This issue is arguably made more complex with regard to the European Union, which, unlike a state, does not itself possess territory. In a number of cases the Court of Justice of the European Union (CJEU) has been called upon to determine the 'legal space' of the Union and to set out the legal limits that international law imposes on the EU's jurisdiction. Global phenomena such as climate change and the internet have challenged traditional understandings of jurisdiction. This paper discusses how the CJEU has approached the question of EU 'legal space'. How do principles of jurisdiction apply differently in relation to a regional organization? How have these questions been informed by principles of public international law? It argues that EU judicial practice also contributes to our understanding about how the concept of jurisdiction is applied in the context of regional integration organizations.

Ida Ilmatar Koivisto: *Transparency in and of Global Administrative Space*

The space in which global governance operates is transnational. Global Administrative Law (GAL), as many other normative accounts too, sees this emerged state of affairs as a problem of overall 'knowability' and legitimacy of governance. As a solution, it seeks to formulate and harness global governance with vocabulary administrative law, traditionally peculiar to states. In territorial terms, global administrative space is argued to exist. This presentation delves into the meaning of transparency in understanding the nature of that space. I argue that unlike other GAL principles, transparency has a dual role both as a cognitive precondition for the space itself to be detected (constitutive function) and as a procedural principle for the regimes functioning in the space (legitimating function). Due to this double-edged importance and, debatably, discursive overuse, transparency needs to be taken seriously and approached critically.

9 REALM OF BORDERS OR PROMISED LAND FOR GLOBAL LAWYERS? QUESTIONS AND ISSUES OF COMPARATIVE LEGAL STUDIES IN PUBLIC LAW

The panel will discuss the most relevant methodological challenges in comparative legal studies from the public lawyer's perspective. The panelists will discuss, among other issues, the relationship between comparative law and legal nationalism; the relevance of legal families' theories; the impact of macro-regional integration and globalization; the usefulness of a separation between constitutional law and administrative law (if any); the different role played by legislators, bureaucrats, judges, and private actors; the importance of global indicators and of competition between governments; the perspective of a methodological renewal and its main recipes.

Participants	Marta Cartabia Christoph Möllers Giulio Napolitano Guy Seidman Javier Barnes
Name of Chair	Sabino Cassese
Room	UL9 213

Marta Cartabia: ***Legal comparison in fundamental rights***

Christoph Möllers: ***Legal comparison in constitutional law***

There is no methodological state of the art in comparative constitutional law (CCL). The reason for that is that legal research even if it claims to be "critical" tries to participate in the political authority of a legal order. Comparative constitutionalism does not have this kind of authority: Neither does it belong to a political community nor can it claim the rational authority of the Roman law tradition that supports private law. Yet, comparative constitutional studies yearn for such an authority. This explains the persistence of stale (and not really comparative) debates like that one on the relevance of foreign materials in domestic law. But CCL should get rid of such claims. It should become radically conceptual, developing conceptual schemes as a basis of comparison that are independent from a given legal order. And it should become radically empirical, pursuing the development of legal concepts with quantitative means. Only by working conceptually CCL can define a disciplinary identity beyond the political sciences.

Giulio Napolitano: ***The future of comparative administrative law: towards a plurality of methods?***

Legal comparison in the field of administrative law is traditionally less developed than in other sectors. In my contribution to the panel, I will try to show why, at the beginning of the 21st century, the landscape is completely different from the past, revealing the need for a much deeper and sophisticated comparison in administrative law, both for private (through strategic evaluation of the ease of doing business in different countries) and public (by competing governments in the global arena) use. In addition, I will argue that administrative law is particularly fitted to experience the application and integration of new methods based on critical comparative law, comparative law and economics, and numerical comparative law. The approach based on national positivism, on the contrary, must be overcome, because the idea of separate legal orders is false. All jurisdictions face similar problem and challenges (e.g. delegation and accountability, procedural fairness, access to justice). In so doing, they must comply with international regulations and standards and with common constitutional traditions.

Guy Seidman: ***Legal comparison in public law***

Javier Barnes: ***Legal comparison in administrative law***

10 CONDITIONALITY IN THE EUROZONE CRISIS

After the eruption of the Eurozone crisis, conditionality has become a leitmotiv of the different instruments adopted to face the debt crisis of EU Member States. However, much on this novel instrument remains unclear and highly contested. Our panel aims at shedding light on different challenges posed by the introduction of conditionality into the EU legal framework. Michael Ioannidis's paper addresses conditionality in systemic terms, linking conditionality to the normative, empirical and doctrinal foundations of the EU. Poulou's paper assesses financial assistance conditionality from a human rights perspective. Hinarejos' paper will focus on some of the effects that the crisis and the imposition of conditionality has had on social policy. Baraggia's paper will focus on the CJEU case law involving conditionality. Vita will engage in a comprehensive mapping exercise of current spending conditionality. Finally, Antpöhler's paper assesses the democratic legitimacy of conditionalities.

Participants	Michael Ioannidis Anastasia Poulou Antonia Baraggia Viorica Vita Carlino Antpöhler Alicia Hinarejos
Name of Chair	Anastasia Poulou
Room	UL9 E14

Michael Ioannidis: ***Conditionality and the Transformation of the European Constitution***

Conditionality came lately at the center of much attention, both scholarly and political. Since 2008, eight EU Member States had to comply with strict conditions in order to gain access to EU financial assistance. Very often, these conditions were connected to controversial reforms of pension systems or the labor market, sparking political tensions. Although the individual repercussions of concrete conditions have already been the subject of significant research, I would argue that conditionality deserves attention also in systemic terms: it is at the same time a response to the failure of the EU and the cause of further significant challenges for the European project. My paper argues that during the Eurozone crisis, conditionality was used as the main instrument to transform the European Economic Constitution.

Anastasia Poulou: ***Financial Assistance Conditionality And Human Rights Protection: What Potential for the EU Charter of Fundamental Rights?***

National laws implementing EU financial assistance conditionality were challenged for violating human rights. Nevertheless, the making of financial assistance conditionality is still driven only by economic considerations. My contribution assesses financial assistance conditionality from a human rights perspective. Firstly, I address the relative responsibility of domestic actors and European institutions under the Charter of Fundamental Rights (CFR). To what extent are the major European actors bound by the social rights of the CFR when preparing macroeconomic adjustment programmes? As a second step, I identify the specific provisions of the Charter affected and provide examples of financial assistance conditions that infringe these rights. Thirdly, following the approach of the ECSR concerning pension schemes in Greece, I suggest that austerity measures are assessed as a package, since the accumulation of restrictions is a qualitative new element regarding the scrutiny under the CFR.

Antonia Baraggia: ***Conditionality through the lens of the CJEU: a blurry view***

Conditionality has become sort of leitmotiv of the different instruments adopted by Member States, the European Commission and the IMF to face the debt crisis and to safeguard the financial stability of the euro area. However, the legitimacy and legality of such measures, and of the procedures through which they have been adopted, are highly contested. The paper focuses on the CJEU response to conditionality. In particular, CJEU case law will be divided into two categories: case law regarding the legality of the assistance mechanisms (European Stability Mechanism and Outright Monetary Transactions) and jurisprudence concerning the compatibility of national measures taken under the conditionality of the EU Charter of Fundamental Rights. This overview highlights the court's ambiguous attitude: on the one hand it consider conditionality as a necessary element for the legitimacy of assistance mechanisms and on the other hand it avoided to judge the compatibility of the bailout measures with the Charter of fundamental rights.

Viorica Vita: ***The rise of spending conditionality in the EU***

During the very recent years, the EU spending architecture has witnessed a constant rise in conditionality arrangements. There is a rise in the tools' quantity, typology, substantive reach, complexity and, most importantly, functional use. Despite its widely varying applications spending conditionality is defined by a well individualised trait: the policy coercion function. The present paper intends to stir debate on this curious phenomenon in EU law, which poses many complex avenues for legal scholarly research. In doing so, the paper shall firstly briefly conceptualise the notion of conditionality and further engage in a comprehensive mapping exercise of current spending conditionality reach as compared to prior conditionality arrangements. Onwards, the paper shall qualitatively explain the various types of 'rise' the tool experienced and finally try to put forwards some of the most pressing issues posed by the spending conditionality appraisal.

Carlino Antpöhler: ***Legitimate Transnational Intervention into National Redistribution? Judicial Means to Enhance the Democratic Legitimacy of Financial Conditionalities***

The troika has sparked the fierce controversies in post-crisis Europe. It has allegedly caused despair by implementing financial conditionality. Enhancing the democratic legitimacy of financial conditionalities is a central challenge for supranational democracy. Yet, legal scholarship has limited its analysis to fundamental rights. The democratic principle offers a meaningful complement to assess the conditionalities' legitimacy. The institutions argue that the measures lie outside the ambit of EU law. My paper shows that it is not convincing to argue that the crisis measures are autonomous national decisions. Instead the European democratic principle of Articles 9-12 TEU can be used to assess the conditionality procedures. It can enhance the procedures of conditionalities in three ways. First, the troika's decision making process violates the democratic principle's core. Second, the mandate of the ECB ought to be interpreted in line with the democratic principle. The ECB has crossed the limits of its monetary policy mandate when participating in the troika. Third, the crisis measures' legitimacy would enhance if the European Parliament was involved.

Alicia Hinarejos: ***The changing nature of EMU and its effects on social policy***

The euro area crisis has had vast effects on all members of the euro area and of the EU, and it has changed the constitutional underpinnings of the European Union's Economic and Monetary Union. But the effects of the crisis and its aftermath are not limited to EMU; rather, they extend directly or indirectly to all areas of EU activity and to the project of European integration itself. This paper will focus on some of the effects that the crisis has had on social policy.

More specifically, the paper will show that the way in which fiscal and economic integration is pursued has changed since the crisis, and that these changes result in a higher degree of interference with national social policy choices, leading to a resurgence of the so-called social deficit. While attempts have been made to tackle this deficit, the paper will argue that such attempts are so far insufficient, and that ensuring a satisfactory fit between economic and fiscal integration and social policy remains one of the greatest challenges that the EU faces. Ensuring such correct fit is essential to make EMU sustainable, as well as to ensure the legitimacy of, and support for, the European project itself.

11 BOOK PANEL: THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS

Domestic courts are increasingly faced with the need to apply and interpret international law. This has been greeted by many as progress for the international rule of law, as domestic courts might step in to fill the lacunae of an underdeveloped institutional structure at the international level. At the same time, this development risks to undermine the unity and uniformity of international law. This is especially so when domestic courts interpret rules of international law in a divergent manner. The panel discussion departs from the findings of a recently published volume on "The Interpretation of International Law by Domestic Courts" (OUP 2016). Judge Andreas Paulus will discuss the findings of the book in the light of the practice of the German Federal Constitutional Court.

Participants	Helmut Philipp Aust Andreas Paulus Georg Nolte
Name of Chair	Helmut Philipp Aust
Room	UL9 E23

Helmut Philipp Aust: ***The Interpretation of International Law by Domestic Courts: Introduction to the Volume and General Themes***

Andreas Paulus: ***Interpreting International Law in Domestic Courts – The Perspective of the German Federal Constitutional Court***

Georg Nolte: ***Interpretation of International Law by Domestic Courts and the International Rule of Law: The Way Forward***

12 SUBSIDIARITY IN GLOBAL GOVERNANCE

Subsidiarity has become increasingly prominent in the theory and practice of global governance and international law. It responds to a need for a principled distribution of tasks between different layers of governance and expresses a general commitment to lower-level decision-making. This panel interrogates the prospect and limits of the subsidiarity principle in the global context, focusing on different issue areas – trade, human rights, and international security – as well as cross-cutting empirical and normative aspects. It asks how strong subsidiarity discourse is in the different fields, to what extent it helps (and can help) to influence decision-making practice, and how much normative appeal it holds across issue areas. Should we think of subsidiarity as a guiding idea throughout global governance? And what alternatives are there for organizing the distribution of powers in a way that reflects the frequent need for global decisions as well as respect for local self-government?

Participants	Nico Krisch Isobel Roele Tomer Broude Andreas Føllesdal
Name of Chair	Gráinne de Búrca
Room	BE2 E42

Nico Krisch: ***Subsidiarity in Global Governance***

Subsidiarity has become increasingly prominent in the theory and practice of global governance and international law. It responds to a need for a principled distribution of tasks between different layers of governance and expresses a general commitment to lower-level decision-making. This framing paper situates subsidiarity among competing principles, evaluates its appeal from a normative perspective and develops a number of conjectures about its prevalence, potential and limitations. The picture that emerges from this inquiry is not a homogeneous one. Subsidiarity is not present or desirable in all contexts, and empirically we find significant variation across issue areas and institutional settings. The landscape of subsidiarity is bound to remain variegated, but the concept is gaining ground and for many actors holds much appeal as a principled way of balancing the need for strong global cooperation with a continuing emphasis on the value of local self-government.

Isobel Roele: ***Side-Lining Subsidiarity in Collective Security***

Subsidiarity is not an effective way of managing the tension between local emancipation and global effectiveness in the field of collective security. Inspired by the work of Michel Foucault, this paper uses the notion of infra-law to analyse a subset of non-coercive mechanisms and practices of surveillance and correction of states and their functionaries. These technologies have developed to address transboundary threats and challenges that seem to demand a preventive response, e.g. international terrorism or pandemic disease. Positive legal instruments used to address these threats are often open-textured, hortatory and non-coercive. The principle of subsidiarity seems to give control to national and local actors. Infra-law belies this impression; the underside of law reveals a morass of micro-norms and training tools at work in the detail of everyday lives. Justified by subsidiarity's concern for effective implementation, infra-law nullifies the principle's emancipatory potential.

Tomer Broude: ***Selective Subsidiarity and Dialectic Deference in the World Trade Organization***

This article, part of a special issue of Law and Contemporary Problems on subsidiarity in international law and governance (edited by Markus Jachtenfuchs and Nico Krisch), examines from positive and descriptive perspectives the actual extent of subsidiarity-like provisions and processes in the WTO; and in so doing explores the nature and distribution of their operation. In a nutshell, the critical argument is that the (surprisingly abundant) expressions of subsidiarity (or deference) in the WTO are selective and strategic, not systemic; and that they more often than not serve to counteract the anxieties of the multilateral decision-making machinery, providing it with sources of enhanced legitimacy in its give-and-take with other actors, the Membership (writ large) in particular, over influence and governance. Simultaneously, this selective subsidiarity does not clearly work to either empower, or disempower, national (or regional) systems, and it is in this respect that the deference becomes dialectical. This is how subsidiarity in action, in the WTO, should be understood – not as a technical authority allocation rule, but as range of instruments and vocabularies through which the apportionment of authority is negotiated and adjusted.

Andreas Føllesdal: ***Subsidiarity and International Human Rights Courts: Respecting Self-Governance and Protecting Human Rights – or Neither?***

This article argues that states have subsidiarity-based rationales for binding themselves to international human rights courts (ICs) and that the ICs should grant states a certain conditional margin of discretion with respect to certain human rights. A historical and empirical backdrop helps explain how these ICs can protect human rights while being duly deferential to state sovereignty, even for states with minimal democratic credentials. Subsidiarity considerations help identify the authority a human rights court or treaty body should enjoy as well as limits it should face. In particular, subsidiarity arguments help delineate the margin of appreciation that the European Court of Human Rights (ECtHR) grants states to determine whether certain human rights violations have occurred.

13 THE RULE OF LAW IN EUROPE I: STRUCTURAL WEAKNESSES IN THE EUROPEAN LEGAL ORDER

Among Europe's many crises, the "rule of law" crisis is perhaps the most destructive of Europe's common values. Some Member States that met the Copenhagen criteria to enter the EU would now not be admitted to the EU under those same criteria. What can European institutions do to renew commitments on the part of the Member States to these values? Across two panels, we will consider the alternatives. Panel I examines the competencies and willingness of EU institutions to deal with these issues.

Participants	Mattias Kumm Kim Lane Scheppele Rui Tavares Lanceiro Gábor Halmai
Name of Chair	Kim Lane Scheppele
Room	BE2 E44/46

Mattias Kumm: ***The structure of constitutional decay in Europe and a hypothesis about its causes***

Constitutional decay in Europe takes many forms and has many causes. The paper provides an account constitutional decay in the context of the financial and refugee crisis and relates it to the rise of right-wing populism and the decay of constitutionalism in countries where right-wing populist parties have come to power.

Kim Lane Scheppele: ***Mutual Respect***

The EU was built on the foundation of mutual respect among Member States, as elaborated in Article 4(3) TEU. In fact, the entire treaty structure stands as tribute to the principle that like-minded states, equally committed to democracy, the rule of law, human rights and a common market, can govern together in a structure in which the Member States themselves are the key enforcers of their mutual agreements. But what can be done if a Member State is no longer sincere in cooperating to carry out the European project? This paper proposes using Article 4(3) TEU as the basis for the European Commission a) to establish a review mechanism through which the sincere cooperation of Member States can be assessed and b) to bring systemic infringement actions against Member States that fail this evaluation mechanism.

Rui Tavares Lanceiro: ***Writing the "Tavares Report"***

In 2013, the European Parliament passed a sweeping resolution on the situation in Hungary, documenting a long series of worrisome practices and arguing that there was a real risk of a breach of the values of Article 2 TEU that guarantee that Member States honor democracy, the rule of law and human rights. As the rapporteur of the report, I worked with my colleagues in the European Parliament to draft a resolution that would generate multi-party support across the political spectrum and would outline a series of measures that could encourage Hungary to recommit itself to EU values. In this paper, I will explain the process of writing the Tavares Report and will assess the success of the mechanisms that the report developed to bring backsliding member states back into line with European values.

Gábor Halmai: ***The Core of Rule of Law in the Member States of the EU***

The paper aims to detect and define the core of rule of law requirements defined in Article 2 TEU for the Member States of the European Union, using Poland and Hungary as key examples because they represent a special threat to core European values. The paper explores which elements of rule of law are essential in order to determine that a country is still a functioning constitutional democracy and considers the use of Article 7 TEU and the precursor Rule of Law Framework of the European Commission as potential solutions to the problem of backsliding EU Member States.

14 TTIP – HOW TO RECLAIM DEMOCRACY AND HUMAN RIGHTS?

International trade agreements have come under fire for their impact on democracy and human rights. They appear to circumvent domestic democratic processes and human rights standards by transferring regulatory power to the international level or by allowing tribunals to second-guess domestic decisions. Also, they might have distributive effects within participating states that favor the rich over the poor. However, non-participation in trade agreements does not necessarily seem to be the better option for many states. It might threaten their economic position and ultimately force them to adopt standards created elsewhere. This panel explores the challenges and discusses potential solutions.

Participants	Robert Howse Hélène Ruiz-Fabri Alberto Alemanno Matthias Goldmann
Name of Chair	Ardevan Yaghoubi
Room	BE2 140/142

Robert Howse: ***The Democratic Legitimacy of ISDS***

This paper will explore the impact of different models of Investor-State Dispute Settlement on domestic democracy. While an inter-state tribunal might enjoy greater direct legitimacy, it needs to be seen whether it would not open the gate for greater judicial autonomy that would be detached from any effective international legislature.

Hélène Ruiz-Fabri: ***ISDS and the Problem of Forum Shopping***

This paper will explore the potential for forum shopping created by ISDS in trade agreements. Investors might have a choice between domestic and international means of judicial review. This constitutes a risk to the legitimacy of such agreements as well as to the systemic coherence of trade law.

Alberto Alemanno: ***Regulatory Cooperation: Effectiveness and Legitimacy***

This paper discusses the legitimacy of TTIP's institutional design, by focusing in particular on the operation of the horizontal regulatory cooperation chapter and its sectoral annexes.

Matthias Goldmann: ***Human Rights and TTIP***

While it is well understood in theory that increased trade is likely to generate aggregate welfare benefits, in practice, the allocation of these benefits has been highly unequal. In developed economies, international trade agreements usually benefit companies and tend to eliminate the jobs of low-skilled workers. They might therefore endanger the latter's enjoyment of economic and social rights, which heavily depends on the income and social benefits of work. As a matter of human rights law, states should therefore enter into international trade agreements only if they have a strategy against the negative effects. One avenue is taxation. The paper discusses whether the international tax policies advocated by the OECD are fit for the purpose.

15 THE PROCESSES AND IMPLICATIONS OF CONSTITUTIONAL CHANGE

This panel will explore the processes and implications of constitutional change. First of all, Professor Dixon will examine the significance of formal constitutional amendment as a means by which legislatures can override court decisions. Second, Professor Albert will explain and evaluate how constitutional actors have informally amended formal amendment rules in constitutional democracies. Third, Professor Roznai will further develop the distinction that is commonly made between the constitution-making power and the constitution-amending power. And fourth, Professor Benvindo will examine how courts, congresses and individual agendas of political and constitutional actors influence the timing of constitutional change. Exploring these issues may help us to better understand how processes of constitutional amendment work and how constitutional amendments can be evaluated as a normative matter.

Participants	Rosalind Dixon Yaniv Roznai Richard Albert Juliano Zaiden Benvindo
Name of Chair	Reijer Passchier
Room	BE2 144

Rosalind Dixon: ***Responsive Judicial Review***

Debates on the legitimacy of judicial review now recognize an important distinction between models of review that are "weak" and "strong" in nature – i.e. constitutional systems in which court decisions are, or are not, subject to formal legislative override. This distinction, however, often overlooks the importance of formal constitutional amendment as a means by which legislatures can override court decisions. At the same time, the article suggests, neither formal powers of legislative override nor amendment will ultimately be sufficient to create judicial review that is truly weak-form in nature. For this to occur, courts themselves must adopt an approach to judicial review that is democratically 'responsive' in nature. The article explores this idea of responsive judicial review, and what it means for the relationship between judicial review and background political conditions in a country.

Yaniv Roznai: ***The Spectrum of Amendment Powers***

The theory of unamendability identifies a simple yet fundamental distinction between primary constituent (constitution-making) power and secondary constituent (constitution-amending) power. The latter is limited by unamendability and the former – perceived as the people's democratic constitution-making power – is unlimited by unamendability. This article develops the distinction by supplementing it with a further one, between various shades of secondary constituent powers along a 'spectrum'; a theoretical construct that links constitutional amendment procedures and limitations which ought to be imposed upon constitutional amendment powers. According to this spectrum theory, constitutional systems are polymorphic: the more similar the democratic characteristics of the amendment powers are to those of the primary constituent power, the less it should be bound by limitations; and vice versa: the closer it is to a regular legislative power, the more it should be fully bound by limitations. This examination is an important step towards a theory of unamendability.

Richard Albert: ***The Informal Amendment of Formal Amendment Rules***

In constitutional democracies, the entrenchment of formal amendment rules is intended to reflect the necessary and sufficient conditions to alter the constitutional text. Yet in many constitutional democracies, formal amendment rules have been informally amended by judicial interpretation, legislative and executive action, as well as by constitutional convention to require constitutional actors to satisfy conditions altogether different from what the text of the formal amendment rules expressly requires. In this paper, I explain and evaluate how constitutional actors have informally amended formal amendment rules in constitutional democracies.

Juliano Zaiden Benvindo: ***Playing with the 'Timing' of Constitutional Change: Of Courts, Congresses and Individual Agendas***

This paper examines how Congressmen and Justices, sometimes in a symbiotic manner, negotiate the pace of the constitutional agenda and the timing of the constitutional change. It delves into some individual strategies such as: a) a Justice asking for more time to study further a case, adjourning the Court's final decision while Congress reacts by passing a new legislation which will directly impair that ongoing decision b) Congressmen not deliberating in the expectation that the Supreme Court takes the first step in a matter of strong political disagreement c) a Justice granting an injunction in order to affect the pace of the legislative process, among others. By focusing on systemic and strategic behavioral analyses, this paper will comparatively delve into examples as such in the United States and Brazil. It aims to provide a relevant discussion of how institutional design can nudge, and sometimes fail to foster behaviors that may strengthen constitutionalism at large.

SATURDAY
18 JUNE 2016
9:00 – 10:45 am

PANELS
SESSION II

16 TERRITORY AND ITS LEGAL IMPLICATIONS I

Panel formed with individual proposals.

Participants	Ricardo Pereira Erika Arban Manal Totry-Jubran Karin Loevy Michael William Dowdle
Name of Chair	Karin Loevy
Room	UL6 2070A

Ricardo Pereira: ***Maritime boundary delimitation as a security concern of coastal states: challenges for natural resource governance in the Artic and East China Sea***

The ongoing interstate disputes surrounding maritime boundary delimitation in the Arctic and East China Sea pose considerable challenges for natural resource governance in those regions, not least because of the geopolitical tensions arising from those disputes. The conflicting claims by the Arctic coastal states over an extended continental shelf in the Arctic may be settled in the pending cases before the Commission on the Outer Limits of the Continental Shelf created by the 1982 UNCLOS. Likewise, the dispute over the sovereignty of islands in the East China Sea attests to the great significance of that dispute not only in geopolitical terms but also from a legal perspective. This paper aims to assess the extent to which the principles of maritime boundary delimitation developed by the jurisprudence of international courts and tribunals could contribute to the settlement of the ongoing interstate maritime disputes in the Arctic and East China Sea.

Erika Arban: ***Re-drawing the boundaries of local and territorial governance: the implementation of metropolitan cities in Italy and the accommodation of strong distinct communities in vast areas***

After the constitutional reform of 2001, Italian regionalism is again under transformation: law 56/2014 created ten metropolitan cities (MCs), while a constitutional bill under discussion will eliminate provinces from the list of constituent units of the Republic. These interventions are re-shaping the boundaries of local government in Italy and strengthening the asymmetrical nature of the regional paradigm. The implementation of MCs addresses the need to better respond to the pressures of densely populated areas, also, the raise of MCs testifies to a return to the bottom, to the local dimension. What are the prospective legal consequences? This presentation takes Italian MCs as the point of departure to explore whether MCs have the potential to become the new strategic level of governance to accommodate strong communities in vast areas displaying specific socio-economic and political traits, and the legal stratagems through which this could be achieved.

Manal Totry-Jubran: ***The Impact of Gated Communities on Gating Communities: Israeli Mixed Cities as a Test Case***

This presentation explores the physical seclusion of urban spaces in Israel; referred to in the academic literature as “Gated Communities”. This phenomena highlights and intensifies the already existing segregation between groups because it creates exclusivist, elitist communities that exclude non-members and delineates subdivisions within the city. All of which have an enduring effect on both those that reside within and outside of these spaces. Based on national inventories of gated communities in Israel, the presentation explores some of the articulations and functions of the enclosure have on Arab citizens – non members of gated communities as conceptualized in legal procedures. It focuses on what is defined as “mixed cities”; cities in which Arab and Jewish residents reside side by side in the same urban space and illustrates the relations of power between the majority and the minority. Accordingly, socio-legal reading of gated communities reveals a complex understanding of the phenomenon that draws heavily on the sub-discipline of spatial geography.

Karin Loevy: ***The Sykes Picot Agreement: Drawing Lines of Development in a New and Open Space***

This paper is a part of a book project in history of international law in the Middle East in the period leading to the Palestine Mandate (1915-1922). Revisiting major legal and diplomatic documents from the period it traces a set of regional visions that were actively at work in the minds of the various officials negotiating a new world order for post- Ottoman Middle East. These visions were readily obscured by the later nationalistic-centered conflicts that still plague the region today. But at that transitional period the Middle East was not yet imagined as jurisdictionally divided but as a new territory opening up for different types of political possibilities. The chapter about the Sykes Picot Agreement (May 2016) uncovers one such vision. Negotiating in secret, imperial agents did not imagine a jurisdictionally divided space. Instead, they saw a broad region opening up for a variety of development activities and administrative creations.

Michael William Dowdle: ***The Geographies of Public Law***

This paper explores how the distinct spatial aspects of the state – economic geographies, cultural geographies, political geographies – impose unique regulatory needs upon the state and how the state addresses these needs.

Panel formed with individual proposals.

Participants	Simon Hedlin Elena Ervas and Tania Pagotto Shazia Choudhry Neus Torbisco-Casals
Name of Chair	Simon Hedlin
Room	UL6 2103

Simon Hedlin: ***The Relationship between Prostitution Laws and Sex Trafficking: Theory and Evidence on Scale, Substitution, and Replacement Effects***

This study investigates the relationship between prostitution laws and the prevalence of sex trafficking across European countries. Two main contributions are reported. First, it creates a simple ordinal measure of prostitution laws. The measure is called the Prostitution Law Index and is based on a very rudimentary framework that analyzes forms of scale, substitution, and replacement effects in the market for prostitution. The index ranks prostitution laws across countries on a four-point scale (from 1 to 4) based on expected effectiveness (from least to most effective) in terms of reducing the prevalence of sex trafficking. Second, the study uses a new dataset provided by the European Union to study the relationship between Prostitution Law Index scores and prevalence of sex trafficking. Cross-country analyses suggest that there generally appears to be a negative relationship between a country's Prostitution Law Index score and the prevalence of trafficking, in line with theory.

Elena Ervas and Tania Pagotto: ***The Muslim veil: should we tolerate ignore or ban this religious garment?***

The room the society should leave to religious manifestations is a constant endurance test for European States. It raises the peak when dealing with the wearing of religious garments. In Italy the very concise but neat legal framework has been essential to solve controversies: Muslim women enjoy the right to wear the veil in public unless their face is not identifiable. While other European States shape the religious symbols' regulation providing specific grounds for limitation (i.e. public security, or health), the general French ban for Muslim women is problematic. To this extent, the recent developments of the ECtHR jurisprudence seem to accept broader justifications, such as the argument of "living together" or the principle of laicité. Our aim is to investigate the approach of the ECHR towards the Muslim veil, critically analyze which arguments the court relies upon and verify whether it has come closer to a new conception of neutrality or laicité.

Shazia Choudhry: ***Towards a Substantive/Transformative Conceptualisation of Violence against Women – A Critical Frame Analysis of Council of Europe Discourse***

Much academic attention has been devoted to violence against women (VAW) in Europe and research has focused on the mounting policy reform initiatives and capacity building strategies in the EU. Council of Europe initiatives in this area have, surprisingly, by contrast, remained under-researched. This paper seeks to fill the gap in the literature by engaging in an examination and critique of the ways in which the Council of Europe has incorporated and framed VAW within various legal and policy initiatives. It will employ a methodology of critical frame analysis as theorized by the literature on social movements, and anti-essentialist critiques within feminist literature to ask: how VAW is problematized, what solutions are offered, where they are located, to what extent they are gendered, and who has a voice in these policy and legal texts.

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

The underrepresentation of women and ethnic minorities in judicial office across Western democracies and in international courts is increasingly depicted as a failure. Some countries have started to address this challenge and to devise measures to promote diversity in the bench. The debate is recognizably part of a broader discussion over the participation of women and minorities into mainstream political bodies and public organizations. Critics argue that a male dominated judiciary undermines the democratic legitimacy of their decisions, and that, in itself, expresses the denial of equal opportunities to underrepresented groups. But there is more than equality based reasons at the core of judicial diversity arguments, often the assumption is that the underrepresentation of women and minorities also weakens the quality of judging. This suggestion points to an under explored topic, which the paper addresses by proposing a trust-based argument that complements equality-based reasons.

18 HUMAN DIGNITY AS A CONSTITUTIONAL CATEGORY AND ITS IMPACT ON ASYLUM LAW

Human dignity has evolved as a basic value in modern constitutionalism. Granting asylum in case of political persecution means to protect human dignity. The right of asylum is closely connected with the constitutional obligation of a State to respect and to protect this value. This obligation significantly impacts on the substance, the exercise and the judicial enforceability of the right of asylum. The constitutional orders of three countries will be taken into particular consideration by the panelists: Turkey, Italy and Czech Republic, all of them confronted with the current refugee situation. It seems important to analyze and evaluate in a comparative view their approaches on asylum law. The German constitutional situation shall be included in the debate.

Participants	Selin Esen Arnwine Luca Mezzetti Jiří Zemánek
Name of Chair	Rainer Arnold
Room	UL6 2249a

Selin Esen Arnwine: *Constitutional Rights of Refugees in Turkey*

The various aspects of human dignity imply the existence of certain Rights: these include the physical and psychological integrity of an individual and the absence of repression, torture and ill treatment, education, health, and work. Refugees are in a vulnerable position when the concept of human dignity is considered. This raises the question of refugees' constitutional rights. Turkey is one of the countries that are facing with a severe refugee crisis. Indeed, Turkey alone hosts a far greater number of refugees than all other Council of Europe signatories combined. Accordingly, the constitutional rights of refugees in Turkey are a prescient matter. I explore the rights of refugees in Turkey within a constitutional law perspective. I discuss the rights of refugees in the 1982 Constitution, present and interpret the Constitutional Court's relevant rulings and consider their conformity with the European human rights standards.

Luca Mezzetti: *The Interconnection of Human Dignity and Asylum – The Perspective of Italian Constitutional Law*

The right to asylum is one of the fundamental human rights recognized in the Italian Constitution. The constitutional provisions on the right of asylum were not implemented lacking even an organic law that determines the conditions of exercise even if case law of the Supreme Court has established the possibility of recognizing the right of asylum to foreigners. The recognition of the refugee is however entered in our system with the accession to the 1951 Geneva Convention which defines refugee status and to the 1990 Dublin Convention determining the State responsible for examining an asylum application lodged in one of the States of the European Community. The strong impact of migration flows in Italy has renewed the legal and jurisprudential debate on asylum legislation and actions that the Italian legal system should take in order to ensure the dignity of asylum seekers.

Jiří Zemánek: *Constitutional remedies in asylum matters*

Constitutional complaints of asylum seekers against decisions of administrative justice rejecting international protection claim a violation of the right to a fair trial guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 6), which enjoys the constitutional status in the Czech Republic. The consolidated line of case law of the Czech Constitutional Court would be challenged, when asylum seekers will refer to their rights under the Charter of Fundamental Rights of the European Union (Article 47), granting an equivalent protection. However, the EU Charter does not enjoy a similar status, corresponding to the Convention's one (yet). The judicial review of decisions of the Czech administrative authorities on applications of asylum-seekers in EU law-based matters by ordinary courts is to be discussed.

19 WHO DRAWS THE BOUNDARIES?

The Israeli public is sharply divided over a wide range of public policy issues. It is also sharply divided on matters of definition and over the authority to establish and enforce the core definitions: what are the boundaries between the public and private? Should appointments to public offices be representational or professional? Should they be subjected to a rigorous judicial review? Should appointment processes in the public sector be similar to the ones in the private sector? Israeli public law is central in deciding these public policy issues, giving it a unique vibrancy, which this panel aims to explore.

Participants	Guy Seidman Adam Shinar Shuki Segev Assaf Porat Karin Diamant Meital Pinto
Name of Chair	Guy Seidman
Room	UL6 3071

Guy Seidman: ***Is Professionalism the last refuge of a scoundrel?***

In the ongoing power struggles that take place within societies one of the ways for current elites to maintain their position and defy challenges to their authority is the professionalism argument. It suggests that their decisions should not be interfered with and their discretion respected because they have acquired a skill set and attained a level of expertise that is of a very high standard. Even the courts, one of those elites themselves – who review almost every order of society – are careful in passing review of such professionals as medical doctors, businessmen, academia etc. Guy Seidman's talk will take a close look at how arguments of professionalism are used to ward off challenges against the power and authority of such entities, and to block demands that such entities reflect – in their composition and in the substantive content of their decisions – the popular structure and political will of their polity.

Adam Shinar: ***The Private Market of Public Work***

My article focuses on recent public sector reforms in Israel. It identifies a trend which I term "reverse privatization" or "marketized bureaucracy". Neo liberal reforms in the 1980s and 1990s have privatized much of government work, either through the hiring of temporary workers or contract work, thus denying civil service protections to persons employed by the government, or through the outsourcing of government functions to private entities. Reverse privatization, which is the flagship of major civil service reforms in Israel, is different. Unable to privatize certain functions, the government has turned to making government bureaucracy itself run like a business by adopting private sector legal doctrines and management tools. The article examines this move, arguing that essential tenets of an independent, professional civil service are likely to be affected with the blurring of the public-private divide, which is likely to generate increased politicization and dependency by the bureaucracy on elected and appointed officials.

Shuki Segev: ***Judges and Sausages: The Judicial Appointment Process in Israel***

Judges are like sausages, the less you know about the process of them being made the more you respect the result. This article examines the judicial appointment process and selection of judges to the Israeli Supreme Court and the proposals to reform it.

Assaf Porat and Karin Diamant: ***The proper mechanism for judicial review on public appointments***

The Israeli Supreme Court's power to judicially review appointments made in the public arena has been almost unlimited ever since the 1980's. Indeed, many Petitions against public appointments brought in front of Israel's Supreme Court are being denied, leaving the appointment in the subject of the petition in place, however, the problematic possibility of lawful appointments being disqualified by the Supreme Court still exists. Moreover, in many cases in which the Supreme Court found to reject the petition and honor the appointment, the judgments were still featured with rhetoric review regarding the appointment, not to mention the existence of too many cases in which lawful appointments were disqualified by the Supreme Court. In light of this complexity, our talk suggests to distinguish between public appointments that are the result of deliberative and direct democratic processes, such as public elections to municipal councils or mayors, and public appointments that are not. The latter should be subjected to a rigorous judicial review, whereas the former should not.

Meital Pinto: ***Are Political Appointments Good for Gender Parity in the Religious Sphere?***

I aim to explore the tension between professional and political appointment processes through the prism of gender parity in the Israeli religious sphere. Gender parity emphasizes women's exclusion from significant levels of political power, and suggests practical reforms and strategies, such as gender quotas, to improve women's share of political power and increase their access to political decision-making.

Unfortunately, Israel has not followed the same route of states such as France, Belgium and Spain, which successfully implemented gender parity. In the absence of gender parity in the Israeli political sphere, I examine whether and to what extent gender parity manifests itself in the sphere of religion, which is a venue that is usually not observed in this context. I concentrate on women representation in key official positions such as rabbis, chief administrator of the rabbinical courts and arbitrators in the Shari'a court, in order to examine the influence political appointments have on gender parity within the religious sphere.

20 WHAT ARE THE LIMITS OF CONSTITUTIONAL REVIEW?: THE CASE OF THE POLISH CONSTITUTIONAL TRIBUNAL

The Panel debates the challenges faced by the Polish Constitutional Tribunal in light of the globalization of constitutional law and the constitutional crisis in Poland, which has led to the EU Commission's scrutiny procedure and the opinion of the Venice Commission requiring respect for and publication of the PCT's judgments. These developments have brought to the fore key normative queries regarding the limits of constitutional review in Poland. In order to analyze them, the papers appraise the case-law and position of the PCT in the context of both, the external transnational rules of EU/international law and the internal pressures of political control. The papers are complementary. The first two explore the PCT's approach to EU law and the standards of international human rights law. The next ones assess the PCT's status and its adopted models of constitutional review against the executive and legislative powers, constitutional amendments, and the current political reality.

Participants	Krystyna Kowalik-Bańczyk Aleksandra Gliszczyńska-Grabias Arkadiusz Radwan Bartosz Marciniak Anna Śledzińska-Simon
Name of Chair	Patrycja Dąbrowska-Kłosińska
Room	UL6 3119

Krystyna Kowalik-Bańczyk: ***The Polish Constitutional Tribunal and European Law: A Poker Face Relationship?***

This paper presents the "European" jurisprudence of the Polish Constitutional Tribunal (PCT) from the moment of Poland's accession to the European Union until the present. It analyses the evolution of the attitude of the PCT Tribunal towards the European Union both from the point of view of the sovereignty dilemma and the principle of loyalty to the EU. The PCT has departed from an initial "neophyte's zeal" to a more critical reading of the impact of EU law on the Polish legal system, in particular articulating some areas where the principle of primacy should not play a role. These limits to integration should be examined carefully. The paper also addresses the recent changes in the functioning of the PCT and speculates whether the attitude of this court might further evolve due to the changes in its composition and procedural framework.

Aleksandra Gliszczyńska-Grabias: ***International Law in the Polish Constitutional Tribunal's Human Rights-based Case-law***

The experience of transitional democracies reflects a recurring tendency to consider international law, and international human rights law in particular, as a kind of "foreign invention" or "arbitrarily enforced concept". Thus, it seems desirable that the constitutional courts, when faced with such attitudes, should serve as an "avant-garde" in making the standards of international human rights law a legitimate, indispensable part of domestic legal systems. In this paper I discuss the issue of how the PCT invokes, understands, and implements the standards of international human rights law. The analytical framework used is the "triad of freedoms": freedom of speech, freedom of assembly, and of association. Also the issue of the PCT's attitude towards international human rights law is more generally discussed. I try to show an emerging positive trend in this regard, at the same time reflecting upon still-existing deficits.

Arkadiusz Radwan: ***Serious but not hopeless or hopeless but not serious? – ways in and out of the 2015/16 Constitutional Crisis in Poland***

In this paper we present the facts of the 2015/16 Constitutional Crisis in Poland and seek to explain its logic by means of public-choice analysis. We sketch the evolutionary path of judicial interference with the social and economic policies of the government in various phases of recent Polish history: from decadent communism through the economic transformation of the 1990s up to the present day. We then turn to critically assessing the powers of the Court with regard to constitutional review: the ill-tuned balance between abstract and concrete review, as well as the institutional weakness of the constitutional complaint. While rejecting the claims of undue political entanglement of the judges, we point to the institutional design features of the Court that make it apt to being politicized. A proper understanding of the logic determining the behavior of the parties in this conflict, as well as making an identification of flaws in the past and present setting of the Court, allow us to suggest proposals for reform.

Bartosz Marciniak: ***Declaring the (Un)constitutionality of Constitutional Amendments: It's Poland's Turn***

In this paper I argue that the Polish Constitutional Tribunal is constitutionally authorized to determine the (un)constitutionality of constitutional amendments (CAs) and to strike them down when appropriate. I deploy a theoretical-comparative methodology, divided into three consecutive steps, each presented in a separate part of the paper. First, I argue that nationalistic claims and claims to omnipotent sovereignty ought to be disentangled. In order to do this, I reconstruct the normative residue of the sovereignty principle. Secondly, I analyze the jurisprudence of the Czech Constitutional Court, which engages in the practice of examining the constitutionality of CAs. Thirdly, in reliance on the conclusions reached in the two preceding parts, I indicate how, under what conditions, and in what way the Polish Constitutional Tribunal can (and should) engage in the review of the constitutionality of CAs.

Anna Śledzińska-Simon: ***A Wise Man or a Warrior: Is the Polish Constitutional Tribunal the Least Dangerous Branch?***

Drawing on the recent case-law of the Polish Constitutional Tribunal (PCT) the paper explores the concepts of judicial restraint and activism. It argues that PCT's decision to defer to decisions of other branches of the government is the expression of restraint, while a decision to intervene in the legislative process or divert from decisions of other courts is the sign of courage and power. As a wise man the Tribunal, in addition to balancing the benefits and detriments of impugned legislation within the proportionality analysis, engages in institutional balancing between the benefits and costs of declaring a law under review unconstitutional. It includes the prognosis for future enforceability of PCT's rulings and the risk of political marginalization and neglect. In contrast, as a warrior, the Tribunal asserts its power against other branches of government and other courts, choosing various "martial arts" – striking either with the ruling, the justification, or the remedies.

21 BETWEEN COOPERATION AND RESISTANCE: CONSTITUTIONAL COURTS AND THE DOMESTIC IMPLEMENTATION OF THE ECtHR'S DECISIONS

The panel deals with the role of constitutional courts (CC) in the implementation of the ECtHR's decisions and aims at giving a comprehensive overview on the current impact of CC on the Convention's domestic enforcement. Potentials and limits of their contribution are discussed in a comparative perspective that encompasses several CC that differ in functions, proceedings and attitude toward international law. To put the panel's subject in context, David Kosař & Jan Petrov stress that the effectiveness of the ECHR system relies essentially on the cooperation of domestic institutions. Ausra Padskocimaite and Davide Paris then offer two comparative accounts on CC' attitude toward the ECHR, focusing on post-Soviet countries and Western European countries respectively. Two case studies make the panel complete. Ladislav Vyhnánek focuses on the treatment of ECtHR's case-law by the Czech CC and Aida Torres examines the influence of the ECtHR as well as of the CJEU on the Spanish CC.

Participants	David Kosař Jan Petrov Ausra Padskocimaite Davide Paris Ladislav Vyhnánek Aida Torres Pérez
Name of Chair	Víctor Ferreres Comella
Room	UL6 2093

David Kosař and Jan Petrov: ***European Human Rights Architecture: The Crucial Role of the Domestic Level***

The impact of the ECtHR on national policies is one of the causes of the effectiveness of the ECHR regime. However, the recent examples of domestic backlash against the ECtHR's judgments show that compliance with its case-law is not obvious. This paper explains how the Strasbourg system depends on domestic actors. First, domestic institutions act as the "diffusers" of the Strasbourg case-law by establishing a general domestic rule respecting the demands of the ECtHR. Second, they further shape this rule by its enforcement in the day-to-day practice and thus fulfil the "filtering" role vis-à-vis the ECtHR. But this is an ideal scenario. Implementation of the ECtHR case-law is a multi-faceted process in which various actors with various interests are engaged. This paper unpacks this domestic dynamics and argues the attitudes of domestic actors and composition and relative strength of the domestic forces engaged in the compliance mechanisms matter for the outcome of compliance processes.

Ausra Padskocimaite: ***The European Court of Human Rights and Domestic Courts: Allies or Rivals?***

The European human rights protection system is one of the most successful human rights regimes in the world. Since 1959, the European Court of Human Rights (ECtHR) has delivered around 18 000 judgments against members of the CoE. Whereas the rulings of the ECtHR have led to many changes in domestic legal systems, today the system is facing several challenges. Article 46(1) of the ECHR establishes a legal obligation of the states to abide by the final judgments of the ECtHR. Traditionally, countries' executive and legislative branches are perceived as bearing the main responsibility for the execution of judgments. The main role of national courts, however, is to enforce the ECHR domestically, that is during the pre-ECtHR judgment phase. Yet, with a recent ruling of the Russian Constitutional Court directly empowering itself to decide whether Russia should comply with ECtHR's judgments, the role of national judiciaries in execution of international courts judgments should be reevaluated.

Davide Paris: ***Constitutional courts' specific contribution to the implementation of the ECHR***

Legal scholarship has paid much attention to the conflicts between constitutional courts (CC) and the European Court of Human Rights. Less investigated, however, is the contribution that CC can offer to the domestic implementation of the ECtHR jurisprudence. This paper examines in a comparative perspective whether and how CC currently review domestic legislation and judicial decisions in the light of the ECtHR's case law. It shows that CC currently follow different patterns of coordination between the constitutional and the convention legal orders. These range from absolute separation (CC do not take at all into account the ECHR and ECtHR jurisprudence) to full integration (the ECHR enjoys the same rank as constitutional provisions). Finally, it discusses limits and potentials of the mentioned approaches, stressing the peculiar role and position of CC in national legal orders. The CC of the following States are taken into account: Spain, France, Belgium, Germany, Austria and Italy.

Ladislav Vyhnánek: ***How does the Czech Constitutional Court treat the ECtHR's case-law? A holistic view***

This paper analyzes the Czech Constitutional Court's treatment of the ECtHR's case-law. The introductory first (normative) part focuses on the position of ECHR and ECtHR's decisions in the Czech Constitution. The second (quantitative) part contains some basic data concerning the frequency of use of ECtHR's decisions in the judgments of the CCC. Afterwards, based on a sample of cases, the paper assesses the formal quality of the CCC's references. At the same time, it traces the processes by which the ECtHR's case-law enters the CCC's decisions. In the final and most extensive part, again based on a sample of decisions, the author evaluates the qualitative aspects of the CCC's treatment of ECtHR's case-law. This part also aims to answer an important underlying question: Is the quotation of ECtHR's case-law a sign of acceptance of international law or does it serve as a fig leave to boost the decision's legitimacy?

Aida Torres Pérez: ***The right to family life as a bar to the expulsion of immigrants: the Spanish Constitutional Court under the pressure of Strasbourg and Luxembourg***

To what extent is the right to family life a bar against the expulsion of immigrants? The ECtHR has interpreted that Article 8 ECHR provides protection against expulsion in certain circumstances (Rodrigues Da Silva). At the same time, the CJEU has set limits to the expulsion of third country nationals who are the caregivers of minor EU citizens (Ruiz Zambrano). This paper examines the case law of the Spanish Constitutional Court (CC) in light of the framework provided by Strasbourg and Luxembourg to reveal the existing divergences that might result in a lower standard of protection in Spain. While the CC tends to use the ECHR and the Charter as hermeneutical tools for the interpretation of constitutional rights, in this field the CC has distinguished the right to family life enshrined in Articles 8 ECHR and 7 Charter from the right to family privacy under Article 18 Constitution. In addition, the recent AG Opinion in Rendón Marín highlights the deficits of protection in Spain.

22 QUESTIONING HIERARCHICAL BOUNDARIES IN REGIONAL INTEGRATION THEORY

Regional integration is constantly reshaping and recreating the boundaries around us and thereby also existing hierarchies. The redrawing of boundaries between insiders and outsiders, the center and the periphery, and the national and the regional have all contributed to the rearrangement of existing and creation of new hierarchies. This panel examines, questions, and sheds new light upon certain of the hierarchical boundaries that have been widely ignored in the literature.

Participants	Damjan Kukovec Marija Bartl Martijn van den Brink Elaine Fahey Alina Tryfonidou
Name of Chair	Martijn van den Brink
Room	DOR24 1.402

Damjan Kukovec: ***Borders, Otherness and Hierarchical Construction of Reality***

Borders, border measures and measures with equivalent effect are an imperfect signifier for the hierarchical reality of the EU and of the world in general. This point is missed by integration theory, by the discussion about Brexit as well as by daily legal and economic thinking.

Otherness and exclusion of the other are constantly and ineradicably reproduced in a constant hierarchical struggle. In order to address exclusion, what needs to be questioned, contested and resisted is not one or the other order, theory, concept or worldview, but the (hierarchical) reality that needs constant (re)construction. Lawyers should articulate targeted resistance to particular hierarchies and injuries using antitrust and trade law as updated tools. I describe a privilege to harm, enjoyed by companies from the structural center of Europe against firms on the periphery. This analysis provides one explanation for the increasing wealth and power in the center of the European Union.

Marija Bartl: ***Discussant***

Martijn van den Brink: ***EU Citizenship and Fundamental Rights: Empirical, Normative and Conceptual Problems***

An idea, which gained traction in recent years, is that fundamental rights protection within the EU should be linked to EU citizenship. EU citizenship, however, does not provide us with the right tool; it is problematic, empirically, theoretically, and conceptually speaking to link EU citizenship to fundamental rights.

Empirically speaking, the notion that EU citizenship implies fundamental rights goes against the empirically discernible trends in liberal democracies to disentangle citizenship and fundamental rights. Secondly, this disentanglement is also normatively desirable. Fundamental rights' presumption of universality is diametrically opposed to the bounded and exclusionary nature of citizenship. Finally, the idea also needs to be questioned on conceptual grounds, for it rests upon a misconceptualisation of EU citizenship. The latter conceptualisation disrespects legitimate diversity within the EU and undermines local self-determination.

Elaine Fahey: ***Boundaries in the EU Contitutional Order: The Benefits of the Internal/External Nexus***

This paper examines understandings of boundaries in the EU constitutional order and its internal/external nexus. It considers 'outwards-in' effects of recent EU external relations negotiations upon the EU constitutional order. It argues that the external increasingly democratises day to day practice more so than internal practices.

Alina Tryfonidou: ***The Federal Implications of the Transformation of the Market Freedoms into Sources of Fundamental Rights for the Union Citizen***

Since the end of the 1960s the market freedoms have begun to be viewed not merely as instrumental freedoms aiming to contribute to the construction of the internal market but also as sources of fundamental (economic) rights for anyone falling within their (broadly delimited) personal scope. The aim of this paper is to examine what the federal implications of this are. In particular, the Court's approach in a number of areas will be examined to illustrate how the vertical division of powers between the EU and its Member States has been affected as a result of this transformation in the nature of the market freedoms. The focus will be on demonstrating the dilemmas that the Court is facing when attempting to reconcile the nature of these provisions as the source of autonomous and meaningful rights for the Union citizen, with the need to ensure that the limits placed on the EU's power to intervene with the exercise of Member State competence are respected.

23 BEYOND THE INDIVIDUAL: EXPLORING COLLECTIVITIES WITHIN THE FRAMEWORK OF HUMAN RIGHTS

Emerging from the liberal tradition, human rights law has been crafted to reflect an individualistic focus. Over the years a growing awareness to the problems of disadvantaged social groups and minorities brought about changes in theory as well as in social and legal practice. These changes include a re-interpretation of what constitute discrimination and the acknowledgment of minority rights. Despite these changes, the individualistic focus still prevails, and doubts about the compatibility of the existing framework continue to occupy scholarly attention. This panel will explore new perspectives that might contribute to accommodating human rights law and practice with social realities. Four different examples of how a collective dimension has been or can be incorporated into human rights theory and practice will be presented. Panelists will present works dealing with human and collective rights, analyzed in its socio-economic and political implications.

Participants	Tamar Hofnung Bruck Teshome Limor Yehuda Gabriele D'amico
Name of Chair	Tomer Broude
Room	DOR24 1.403

Tamar Hofnung: ***Translating inequality: Affirmative Action Policy as a collective project***

The question of how public policy is consolidated has long fascinated political science inquiry. While scholars agree that the way problems are constituted determines the type of state intervention, how people come to conceptualize social issues as problems that deserve a particular state response remains a puzzle. This paper shows how translation within the initial phase of issues rising to public awareness can play a key role in determining policy directions and outcomes. Through examining the implicit role of metaphors and heuristic procedures, the paper sheds light on the subconscious manner through which heuristic processes shape concrete understandings. Utilizing the case of affirmative action in the United States, the paper examines how the issue of inequality has been translated to define statistical discrimination, through the notion of disparate impact, as the problem of the gap between black and white employment rates. This definition then transformed policy focus from the initial focus of equality of opportunity to that of equality of results. The paper illuminates the social conditioning that led to this understanding of the issue, and how, once translated in this manner, these ideas gained ideological prominence, leading to the continuous crafting of affirmative action policy.

Bruck Teshome: ***"Development" as the Common Good: Towards a deeper understanding of the collective aspects of the Right to Development***

Ever since the Declaration on the Right to Development came about 30 years ago, the concept of the right to development has attracted criticism as much as willful disregard in academic circles. The self-determination component of the right, which alludes to the collective aspect of the right, has been put aside to make way for an interpretation of the right through a "value addition of human rights" that emphasize the individual aspects of the right. There is room to argue that the current understanding of the right could be further enriched through a broader interpretation and application of the right to self-determination, encompassing cultural, political and economic self-determination. Could viewing development as a common-good lead to a better understanding of the various components of the right and towards a better balance of the individual and collective aspects of the right?

Limor Yehuda: ***Beyond Anti-discrimination and Minority Rights: "Collective Equality" in Ethno-National Conflict Resolution***

Since the end of the cold war, ethnonational conflicts have been acknowledged as one of the dominant causes of political violence. Many such conflicts are settled by peace agreements most of which incorporate new constitutional arrangements. Despite growing recognition of the applicability of International Human Rights Law (IHRL) to such peace agreements, the individualist orientation of IHRL and its inadequate treatment of the group dimension make existing IHRL norms insufficient in the context of the special circumstances of ethnonational conflicts. My central argument is that this problem can be addressed by adding a concept of "collective equality" between rival groups to the normative framework applicable to the transformation of such conflicts. Building on the practice of ethnonational peacemaking and contemporary ideas in political philosophy, the presentation will outline the components of such "collective equality" and suggest what might justify it as a normative obligation.

Gabriele D'amico: ***Human rights integration: Olivetti's model for blending communitarianism and human rights***

This paper will showcase the significance of the Olivetti model in understanding the relationship between human rights fragmentation and charities' sub-efficient (aggregate) performance in facing socio-cultural externalities. Many charities and private foundations invest their money with the exclusive goal of maximizing return on investment; paradoxically this often worsens the problems their charitable activities seek to relieve. I argue that this results in part from attempting to implement human rights without taking into consideration their indivisibility and interrelatedness. The paper strives to present the potential of the Olivetti model to assist in achieving this goal. The Olivetti model provides an example of how to transform a for-profit structure to a non-profit structure at the same time internalizing negative externalities. This paper explores the ways it might be implemented through the US system of public charities and private foundations.

24 BORDERS, OTHERNESS AND CONSTITUTIONAL IDENTITY: EXPERIENCES OF POLAND, CROATIA AND HUNGARY

Identity means a subjective sense of selfness vis-à-vis others. In theories constitutional identity (Jacobsohn, Rodenfeld) appears as a shared identity which is a necessary condition for any constitutional legal system. It seems to have a different meaning when we are discussing European integration and trying to reveal the legal meaning of Article 4.2. TEU. The panel invites a Polish, a Hungarian and a Croatian scholar who can discuss their national approaches towards constitutional identity in the light of EU integration and respective theories. Poland has already expressed views on "Borders", Hungary has never been so explicit in this regard and Croatia has only recently had a chance to establish her standpoint. During the panel discussion, we will have the opportunity to discover where the legal and theoretical "Borders" are between our national states and the EU and to what extent we are "Others", in terms of identity, than other member states.

Participants	Izabela Skomerska-Muchowska Anita Blagojević Tímea Drinóczi Eszter Polgári
Name of Chair	Erzsébet Sándor-Szalay
Room	DOR24 1.405

Izabela Skomerska-Muchowska: ***European Solidarity v. Constitutional Identity: the case of Polish position***

The aim of the paper is to check how constitutional identity is understood in the light of the principle of sincere cooperation and mutual trust which is the basis for Schengen construction including policies towards third countries nationals and governance of external borders. In this context the Polish position will be analysed. The main question is as follows: Could constitutional values of the particular member state (art. 4 para 2 TFEU) may prevail over sincere cooperation (Article 4 para 3 TFEU) in the field of common European value (security in that case)? The paper aims at exploring whether it is justified in constitutional terms and how constitutional identity and European commitments concerning borders and migration should be balanced in conformity with the rule of law.

Anita Blagojević: ***Searching for the constitutional identity of Croatia in the European Union***

This paper will discuss the search for the constitutional identity of Croatia, the newest member of the European Union, one among the smaller states and one among former communist states. Altough there is no agreement over what "constitutional identity" means or refers to, in this paper we consider it in the sense of "a remnant sovereignty" of Croatia within the European Union. In our view, the foundation for the Croatian constitutional identity can be found in the Constitution: firstly, in a concretization of the highest values of the Constitution (Art. 3) which represent the ground for interpretation of the Constitution; secondly, in its Art. 17 paragraph 3, which states that "Not even in the case of an immediate threat to the existence of the State may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition of torture, cruel or degrading treatment or punishment, on the legal definitions of penal offenses and punishments, or on freedom of thought, conscience and religion", and thirdly, in its Historical Foundations. On the other side, in the case law of the Constitutional Court of the Republic of Croatia reference to constitutional identity has appeared and discussed only recently and it seems that some sort of constitutional identity of Croatia is emerging.

Tímea Drinóczi: ***Searching for the constitutional identity of Hungary in the European Union***

The paper intends to grasp the main elements of the constitutional identity of Hungary despite the fact that there is no case law and the literature has just started to discover the topic. The Fundamental Law causes controversies if we try to reveal the new constitutional identity it gave us. Scholarly interpretations do not seem to be integration-friendly or in line with the mainstream ideas of constitutional democracies. The Constitutional Court has only recently referred to constitutional identity these were connected with the extent of the constitutional review of the constituent power and an ECHR ruling. The recent request of the ombudsman for constitutional interpretation may give the Court a chance to delineate its approach towards constitutional identity even in the light of Art 4.2 TEU. Discussions set forth in the paper could raise awareness to the need for finding a legal understanding of the constitutional identity of Hungary which would be more in line with current theories.

Eszter Polgári: ***The Hungarian Constitutional Court's case with the ECHR: an ambivalent relationship***

The 2010/2011 constitutional reform triggered an important shift in the Hungarian Constitutional Court's (CCt) attitude towards the ECHR: the eroding system of guarantees and the arbitrariness of legislative power turned the justices towards standards and safeguards outside Hungary. The paper seeks to map how the CCt relies on or makes reference to the standards and principles established by the EurCtHR. In 2011 the CCt established for the first time that in case of similarly formulated rights-provisions the legal protection offered may not go below than that of guaranteed under the ECHR. By today there are dozens of decisions where the majority opinion refers to this principle, but it calls for further examination how the case-law of the EurCtHR impacts the CCt's conclusions in these cases. The paper analyzes whether recalling the ECHR jurisprudence only serves as a complementary tool or framework for interpretation or the CCt accepts the primacy of the ECtHR's standards. It summarizes the justifications for and the arguments against direct incorporation, and through case-studies illustrates the theoretical and practical inconsistencies and difficulties.

25 BORDERS & POPULATION DESIGN: TESTING CONSTITUTIONAL LIMITS TO ARBITRARINESS

The authority to define the demos in terms of citizenship and migration policy is often understood as the "sovereign power to exclude". The use of this power to exclude defines the constitutional identity of a political regime. The number kind and procedures of those admitted into the "personal sphere of validity" of the legal order is relevant for understanding the nature of a polity. Designing the mechanisms for inclusion and exclusion is a key challenge of public law.

Participants	Giulio Itzcovich Rebecca Stern Enrica Rigo Enrico Gargiulo Guilherme Marques Pedro
Name of Chair	Patricia Mindus
Room	DOR24 1.501

Giulio Itzcovich: ***Principles and practices of refugee law***

The developments and improvements concerning the legal treatment of refugees go along with states' practices aimed at preventing the application of refugee law – the so-called deterrence (or non-entry) policies, which can be considered as a form of institutionalized avoidance of states' obligations under international and European law. These practices raise the question of the relationship between law and politics in refugee law, or to put it differently, the question of the relationship between refugee law "in theory" and refugee law "in practice". The paper will investigate that relationship by drawing insights from some legal-theoretical perspectives. It maintains that no adequate description of the current developments of refugee law can neglect the distinction, as well as the interplay, between the dimension of principles and the dimension of practices.

Rebecca Stern: ***A Swedish Tale of International Law: From Humanitarian Super-Power to Flouter of Asylum?***

The refugee flows to Europe in 2015, and the inadequate response to the situation by European countries and institutions, placed 'the refugee crisis' firmly on Europe's political agenda. It also challenged the way countries saw their obligations according to international and EU law, and initiated severe and sometimes unforeseen changes in domestic legislation, policy and rhetoric. Such changes have been particularly prominent in Sweden, a country known for its generous asylum policy and high human rights profile. The aim here is to analyze asylum policy and legislation in Sweden during 2015/early 2016 in order to understand which changes were initiated and carried out, why they were deemed necessary, and how they were explained and rationalized against the backdrop of Sweden's reputation as "a humanitarian superpower". It is suggested that 'the crisis' is not primarily a 'refugee crisis' but rather a case of humanitarian ideals and self-images having been put to the test, and failed.

Enrica Rigo: ***Deciding to detain: an empirical study of judicial decisions regarding migrants' and asylum seekers' detention in Italy***

The paper is based on the findings of a systematic monitoring of decisions regarding the detention of migrants and asylum seekers in Italy that was conducted from October 2013 to December 2015. The study raises a range of critical issues, from the consistency of judgments with the European legal framework and the constitutional limits as defined by national higher jurisdictions, to migrants' and asylum seekers' access to justice.

The paper will focus on a specific case study of the decisions on the detention of asylum seekers taken by the Court of Rome ('tribunale ordinario'). Due to the increasing number of female asylum seekers arriving in Italy from Nigeria, the Court has found itself dealing with a large number of cases related to potential vulnerable subjects. The analysis will focus, on the one hand, on the degree of arbitrariness in asylum seekers' detention and, on the other, it will consider whether, and to what extent, a specific conception of justice emerges when the rights "of others" are at stake.

Enrico Gargiulo: ***Arbitrariness and Administrative Borders: Exploring Mechanisms of Exclusion and Forms of Civic Stratification in Municipalities***

This paper focuses on the exclusionary practices of Italian municipalities, analyzing how they try to narrow national requirements for obtaining enrollment at the registry office. These municipalities, it will be argued, discriminate in denying the legal status of residency, which, pursuant to national laws, legal migrants should be entitled to. The actions of local authorities shape complex mechanisms of migrants' control (Brochmann 1998) at the local level. These mechanisms work like administrative borders that strengthen the system of civic stratification (Lockwood 1996, Morris 2003). The paper looks at the legal mechanisms as well as the institutional discourses through which the exclusion from residency is achieved, employing for this purpose a wide and varied set of data: quantitative data collected from the single municipalities, legal documents and provisions (administrative decrees, bureaucratic orders, etc.), interviews, and political discourses.

Guilherme Marques Pedro: ***Twin Rights: The flying dutchman asymmetry in question***

Contemporary debates about whether the right of emigration entails a corresponding right of immigration often address this question in terms of a rights asymmetry. They focus on three interrelated aspects of rights theories which are at stake in international migration: (1) how rights relate to duties; (2) how the concept of a right depends upon its exercise; and (3) if certain rights entail other rights. This paper problematises the asymmetry and argues that one of the pioneering instantiations of individual rights in international law – the ius emigrandi, enshrined in the treaties of Westphalia of 1648 – indeed suggests a correlation between the right to emigrate and a right to stay that has been forgotten. Although unexplored, this historical case seems to point to a practical, and hence theoretical, co-dependency between what I refer to as 'twin rights'. Hence, I ask if this is a case of rights symmetry that has withered away with time.

26 BUILDING BRIDGES: TOWARDS COHESION THROUGH A EUROPEAN UNIVERSITY SYSTEM

University suggests the idea of an oasis of intellectual discovery or of learning laboratories that are welcoming and inclusive without borders. In U.S. there is a great debate about the role of University in forming a common identity: the panel will develop those suggestions in the European context. How much the administration and the law are allowed to intervene in the functioning of Universities to reach those goals of cohesion and international orientation?

Participants	Monica Delsignore Luca Galli Beatrice Rabai Antonia Baraggia Silvia Mirate
Name of Chair	Auretta Benedetti
Room	DOR24 1.502

Monica Delsignore: ***At the borders of Universities: is there a global community?***

Universities have only begun to base admission on "merit" during the last 50 years. For most of their histories, they were exclusive, based on race, class and ethnicity. The exclusionary of the past left space to the inclusionary of the present, ensuring that each individual will have equal standing as a member of the University community. Nowadays Universities are international: they are linked across borders through a knowledge network, communicating worldwide. In the global framework, Universities should be in such a condition to develop their international orientation in a way that goes beyond the specificities of the State where they have been established. Indeed, each educational system is conceived in ideal connection to a presumed collectivity's identity, which the public authority may wish to enhance or even to forge. This paper will reason on the role played by European and National law in the University system in building or demolishing borders.

Luca Galli: ***The Erasmus Programme***

Border crossing, mobility, equality (but also diversity as a positive factor) are fundamental aspects of Erasmus Programme. Crafted by the EEC Council in 1987, it has allowed more than 3 million students to spend an exchange period abroad, obtaining full recognition of the credits earned there, but also shaping a new kind of international mentality. The success of Erasmus is showed by the subsequent broader Erasmus Plus Programme, started in 2014, addressed not only to University students and not only to European countries. Public law plays a primary role for the mentioned success. How may Erasmus encourage States to adopt all the appropriate measures to remove legal obstacles to the Programme? Which is the role played by Universities? Who are the national authorities appointed to implement the Programme? Answering all these questions means understanding how public law can transform boundaries and national diversity from a limit into a starting point for the international development.

Beatrice Rabai: ***Universities without borders?***

As already clarified in the joint declaration on harmonization of the architecture of the European higher education system (Paris, the Sorbonne, May 25 1998), "Europe is not only that of the Euro, of the banks and the economy: it must be a Europe of knowledge as well". The aim of harmonization of the higher education systems has been realized through freedom of establishment and recognition of diplomas and courses of study. It represents certainly a determining factor in the creation of a European area of democratic and competitive knowledge, able to attract resources and economic investments from all around the world. Self-reference, defensive barriers, protectionist policies are all factors of division in the unit, rather than cohesion of diversity. This paper aims to analyze, through the internal regulatory framework regarding the recognition of foreign qualifications and the work of national courts, the delicate process in Europe, with a special glance to the Italian system.

Antonia Baraggia: ***Overstepping the boundaries of national higher education systems: the role of the CJEU case law***

The allocation of competences between the EU and Member States in the field of higher education has been since the origin of the European Community a debated issue. Even if the Treaty of Rome did not provide an explicit reference to higher education and even if the provisions of the Maastricht Treaty remained vague on this point the CJEU played a fundamental role in expanding the influence of the EU in higher education matters and it contributed to establish a sort of 'education public law'. IThe paper will give an overview of the role played by the CJEU in education issues and it will attempt to shed light on the intersection between education and internal market issues and education and EU citizenship. Finally the paper will reason on whether the CJEU case law has overstepped the boundaries of EU competences or whether it has interpreted correctly – even extensively – the Treaty provisions in pushing educational integration.

Silvia Mirate: ***The Internationalization of the Italian University System***

The paper will explore the Italian recent regulations and public policies aiming to the so called Internationalization of University and the effective impacts of public law in major cohesiveness through academics. In particular it will deal with the different aspects of Internationalisation concerning the system of teachers and researchers' mobility and the development of international academic programs which are related to the course of university studies and to the achievement of binational degrees. The study will analyse the different procedures to evaluate the quality of the research produced in Italy and other relevant factors including the capacity to attract resources to the degree of internationalisation.

27 PROPORTIONALITY AND PARTICIPATION IN PUBLIC LAW

Panel formed with individual proposals.

Participants	Eszter Bodnár Eduardo Ribeiro Moreira Cora Sau Wai Chan Fabiana Di Porto Nicoletta Rangone
Name of Chair	Eszter Bodnár
Room	DOR24 1.601

Eszter Bodnár: ***The Role of Public Hearings in the Constitutional Review Procedure***

Hungary's Constitutional Court was often considered to be an "ivory tower" and was criticized because the lack of public hearings. In 2013, the Hungarian Parliament prescribed that, in certain cases, Constitutional Court shall hold oral hearings that should be public but since then no oral hearing has taken place. Oral hearings are not an unusual element of the constitutional review procedure. The US Supreme Court, the German Constitutional Court or the Constitutional Council in France can hold oral hearings, which are usually open to the public. What are the functions of oral hearings? Are they necessary elements of a constitutional court's procedures? What are the advantages, disadvantages and risks of holding an oral argument? Should oral hearings be public? If yes, how broad should the openness be? To answer these questions, the paper uses a comparative perspective. Finally, it aims to explain the causes of the Hungarian situation and seek possible solutions for its improvement.

Eduardo Ribeiro Moreira: ***People's participation in the constitution amendment process***

An almost forgotten point, though it has been studied by nations that do not share the same theoretical referential, is precisely the people's participation in the process of constitutional reform. The issue is not new, nevertheless, the arrays of countries that adopt those practices have different goals: such as the treaty of Lisbon for Europe, the Constitutions of Bolivia and Venezuela, Spain or Ireland. This paper examines the different results in each experience. We will examine the protection of all forms of direct political participation that cannot be abolished, which includes referendums, plebiscites, and popular initiatives to propose bills and any other form of manifestation of the people constitutionally foreseen that, cannot be withdrawn from the constitution. One of the solutions lies in popular support with the possibility of a regular constitution reform by people's initiative.

Cora Sau Wai Chan: ***Rights, Proportionality and Deference: An Empirical Study of Judgments in Post-Handover Hong Kong***

The paper presents the findings of a study of judicial deference in human rights cases handed down by courts in Hong Kong since its return to Chinese sovereignty. The study uses a combination of qualitative analysis and quantitative methods structured around the two-stage approach to rights adjudication (definition first, limitation second) and a multi-part proportionality test to ascertain the degree of deference that courts exhibit in reasoning about rights. The findings reveal what factors affected the degree of judicial deference and how courts exercised deference. These findings furnish an empirical basis for testing various assumptions about the courts' deferential behaviour. Although the study focuses on Hong Kong, its methods of analysis are (within limits) transposable to other jurisdictions, and its findings will make for interesting comparisons with judicial attitudes in the UK, Canada and ECHR – jurisdictions that inspired Hong Kong courts' approaches to deference.

Fabiana Di Porto and Nicoletta Rangone: ***Proportionality of Regulation: What Role for Cognitive Sciences***

The paper addresses the question of what hampers many regulators from using cognitive sciences' insights in rule-making, dealing specifically with the critique that it expands the length and costs of regulatory procedures excessively. Quite to the contrary, we contend that cognitive sciences may help to enhance the proportionality of regulation.

28 COLLECTIVE MEMORY AND PUBLIC LAW

The study of collective memory as a determinant of the development of societies, culture, and law has become a central focus of research. This panel aims to address the ideas implicit in the concept and considers collective memory in different arenas of public law – domestic and international. The concept of collective memory starts from the premise that people normally acquire their memories not only through individual means, but also through social processes, including law. Collective memory interacts in diverse ways with public law (both domestic and international). The papers in the panel explore the roles of legal mechanisms as agents of memory who participate in the construction of collective memory on these various levels, the strategic uses of collective memory by legal institutions both judicial and legislative, and the relationships between collective memories formed on the local, domestic level and their employment by transnational organizations in the international arena.

Participants	Renana Keydar Margit Cohn Moshe Hirsch
Name of Chair	Sungjoon Cho
Room	DOR24 1.604

Renana Keydar: ***Plurality of Testimonies and the Formation of Global Collective Memory***

The paper analyzes the role of witness testimonies in the formation of collective memory through the work of transitional justice institutions dealing with mass atrocity and human rights violations. It suggests that an under-appreciated aspect of contemporary engagement with testimonies is its condition of plurality. The paper examines how quantitative and qualitative plurality of voices participating in transitional processes affects the creation of collective narratives about the past. Looking comparatively at the Eichmann trial (1961) and the South African Truth and Reconciliation Commission (1995), the paper argues that while storytelling served as the main component in understanding the crimes of the past, the strategies for employing and using storytelling in each of the mechanisms were strikingly different. Modeling these two approaches for designing collective memory, the paper explores the ethical implications and the legal ramifications of plurality in transitional processes.

Margit Cohn: ***When and Where Does History Begin? The Treatment Of Asylum Seekers In Israel***

In this paper I consider the strategic use of collective memories in the legislative process, and analyze, as a case- study, the treatment of the State of Israel of the recent surge of illegal entrants into Israel, mainly from Africa. Against a government policy of adopting a stricter regime, I discuss a series of four legislative amendments, enacted between 2012 and 2016 in response to three Supreme Court decisions that found the first three amendments unconstitutional, and assess lawmakers' reliance on the State's collective memory of the Holocaust and other mnemonic narratives of oppression. A quantitative analysis of oral presentations by members of Israel's parliament in the process of the legislation, compared with some presentations regarding the removal of international sanctions against Iran, offers proof that collective memories are used strategically by policy- and law-makers.

Moshe Hirsch: ***The Role of International Tribunals in the Construction of Collective Memories***

The paper aims to discuss the interactions between collective memories and international tribunals, and particularly the social role of tribunals in the development of international collective memories. The concept of collective memory starts from the premise that people normally acquire their memories not only through individual means, but through social processes as well. Group membership often provides materials for memory, and prods individuals into recalling particular events. The paper addresses the question whether it is desirable to use international judicial proceedings to form or affect collective memories? The paper explores this question from three major sociological perspectives (structural functional, symbolic-interactionist and social conflict approaches). These three theoretical approaches suggest different answers to the above question, and offer different guidelines concerning the historical narratives to be presented by international tribunals.

29 MIGRATION, LABOUR MOBILITY AND THE LAW

Panel formed with individual proposals.

Participants	Tanja Cerruti Jihye Kim Christiano d'Orsi Erik Longo Micaela Vitaletti David Abraham
Name of Chair	Erik Longo
Room	DOR24 1.606

Tanja Cerruti: ***The Issue of the Internal Borders of the European Union between the Need to Preserve Security and That of Ensuring the Freedom of Movement***

During the last few months, due to the increasing pressure of migration flow at the doors of the European Union, several EU Member States decided to reinforce their borders, reintroducing controls or even building more or less symbolic walls along them. This happened not only on the borders between EU Member and non-Member States but also on those shared by the EU Member States themselves. The Old Continent is actually considering the opportunity of temporarily suspending the Schengen Agreements. On one side this measure would aim to preserve the security of European citizens but on the other side it would significantly impact on their rights, undermining the freedom of movement on which the EU itself is founded. In light of the above, this paper will focus on the role that borders can assume in seeking a balance between freedom and security. Could their closure really manage to grant national security and, more generally, could it be the best tool to front the migration crisis?

Jihye Kim: ***The Right Against Forced Labor: Reconsidering the Korean Constitutional Court Decision on the Restriction of Migrant Worker's Right to Change Employers***

Migrant workers who entered the Republic of Korea through the Employment Permit System are not permitted to change employers at their free will. They may be allowed to do so only in exceptional cases primarily when the situations prevent employers from maintaining the employment, with the limit of three times during their three-year contract period. The restriction on migrant worker's right to change employers has raised serious criticisms being claimed as a case of forced labor. The Constitutional Court of Korea had a chance to review its constitutionality in 2011, however, it treated the issue merely as a restriction on the migrant workers' right to get a new job, failing to review its effect on their labor conditions. This paper argues that the Court should re-evaluate the nature of the issue and consider applying the prohibition of forced labor as a constitutional principle under the Korean Constitution.

Christiano d'Orsi: ***Freedom of Movement of Persons in Africa and the Idea of a Common Passport for the Entire Continent: Where Are We Now?***

The paper examines the freedom of movement in the African context. This freedom is intended as the right of individuals to travel within the territory of a country to leave a country and return to it.

Erik Longo: ***No Visa No Tenancy: The Deputization of Immigration Control in the UK after the Immigration Act 2014***

In the last five years the British government has adopted a number of measures to make the strategies of irregular immigrants more visible in order to exclude, apprehend and expel them more effectively. The Immigration Act 2014 represents the culmination of this period of policy change. It includes measures that limited the scope of irregular immigrants to manoeuvre in legitimate institutions of society. Against this backdrop, this article critically examines the deputization to landlords of the duty to check the immigration status of their tenants. The idea beneath these dispositions is that people who provide goods and services to migrants, even if private citizens, should be conscripted in immigration controls on behalf of the state. By discussing the issue of these unprecedented strategies, the reader is given a deeper and contextualized analysis of the goals these policy measures are meant to serve.

Micaela Vitaletti: ***Labour Mobility in Europe***

A recent American study focused on the number of manufacturing companies, highlights how labor mobility constitutes a determining factor in the search for new employment in an economy what has been called the "great divergence", not among urban districts, but between town and between regions, if not between States (E. Moretti, The New Geography of Jobs, Houghton Mifflin Harcourt, 2012). Although this research regards the US labor market, the considerations contained can constitute elements for understanding the unemployment rates also within the Eurozone. The paper, therefore, taken into account the different Eurozone unemployment rates, aims at verifying whether and how EU can change its strategy in order to allow and encourage workers' mobility within the European market to create new jobs.

David Abraham: ***From Migration Crisis to Immigration and Integration Regime***

This paper examines the breakdown of the categories with which the post-1945 international regime has worked: migrant, immigrant, asylum seeker, overseas/quota/UNHCR refugee, etc. and looks at how those distinctions might now be more of an impediment to crisis management than a solution. It then turns to examine Germany's citizenship policies and the ersatz mechanisms it has used since 1945 in lieu of immigration laws: the massive ingathering of ethnic Germans from the East, large guest worker programs, EU free-mobility, and various forms of German and EU asylum and subsidiary protection. These have served to mystify the actual process of immigration while also vitiating the meaning of asylum. The paper then argues for a "real" immigration law that both serves Germany's mercantilist interests and shows decent respect for humanitarian and family needs. Accompanying that would be a policy of social integration into the welfare state that would protect standards.

30 RACIAL OTHERNESS IN EUROPEAN PUBLIC LAW

By using a Critical Race Theory and intersectional lens, this panel intends to explore and highlight racial otherness and the racialized borders and spaces created inter alia by public law of many European countries. Anti-semitism, anti-Black racism, anti-Roma racism, and Islamophobia. These are the terms which describe how various minorities are racialized, discriminated against and othered through legislation, case law and policies throughout Europe. However, (continental) European colorblindness often prevents framing these processes in terms of race. The discussion will focus on the implications of race and colorblindness for law and policymaking linked to race-based institutional discrimination and human rights violations in the European context.

Participants	Cengiz Barskanmaz Eddie Bruce-Jones Mathias Möschel Emilia Roig
Name of Chair	Sumi Cho
Room	DOR24 1.607

Cengiz Barskanmaz: ***The Holocaust as a legal argument***

This paper will discuss the ideological repercussions of the Holocaust in European and German legal thought through an analysis of the PETA v. Germany decision of the European Court of Human Rights and the Wunsiedel decision of the German Federal Constitutional Court. The aim is, on the one hand, to identify how the post-Holocaust context is framing the colorblindness doctrine in the area of human rights and, on the other hand, to examine the prevailing ideology of "German Exceptionalism" in German and European case law and legal scholarship. The claim is that instead of advancing an inclusive concept of human rights, the Holocaust argument, due to its historical and moralistic perception, rather reinforces new racial and ethnic boundaries and introduces various standards of protection in human rights discourses.

Eddie Bruce-Jones: ***The racial haunting of human rights***

Europe can be a dangerous place, for certain people and at particular times. Safety, articulated in the language of human rights and the accompanying discourse of security is, for some, swallowed up by the shadow of danger created by those discourses. Racism characterizes this gauntlet in Europe and profoundly foregrounds and sometimes forecloses the assertion of subsequent rights claims. This paper will analyze rights claims in the policing and immigration-enforcement contexts in the UK and Germany where racism has been alleged, advancing a point taken from Frantz Fanon, Etienne Balibar, Ramon Grosfoguel and others-that one can conceive of zones in Europe that are, in the service of legitimizing human rights for some, haunted by perpetual violence to others.

Mathias Möschel: ***Gens du voyage: Roma and public law in France***

This contribution will analyze the ways in which public French law has contributed to othering, racializing and discriminating against travelling/nomadic populations in a context which is known for being the colorblind Republican reality par excellence. Two different sets of legal situations will be analyzed: the first concerning the legislation and case law on "internal" French travelling communities also known as gens du voyage. The second one will look at the ways Roma people, mainly from Bulgaria and Romania, have been treated both under French administrative practices and at the EU law level. What will come out clearly is that in spite of the legal differentiations, there are uncanny parallels of legalized racialisation taking place.

Emilia Roig: ***Street harassment in colorblind Europe***

This contribution attempts to analyze the racialization of the emerging discourse on street harassment from an intersectional perspective. Following the events that took place in Cologne early this year, where the media reported that hordes of men of North-African appearance massively assaulted women in public, women's rights were instrumentalized by right-wing and anti-Muslim groups in the anti-immigration discourse. In light of these events, I will discuss the processes of othering around the introduction of laws against street harassment in France and Germany through an intersectional lens. The analysis will focus on the political and legal implications for racial profiling, discrimination and the perpetuation of hegemonic feminist rhetoric on the one hand, and on the instrumentalization and usurpation of feminist issues by conservative voices on the other. The salience of certain feminist issues over others in mainstream political debates will be at the forefront of the analysis.

31 CIRCULATION OF PERSONS AND OTHERNESS IN THE EU: A PROBLEM OF IDENTITY?

In the European Union framework, the circulation of persons is currently exacerbating the problem of otherness. The panel will address this complex and important topic, firstly highlighting two examples of such an exacerbation: the recent developments in the circulation and recognition of legal and civil status within the EU and between EU Member States and third countries, and the main challenges to the free movement of persons arising from the current migration crisis. In these realms, the problem of otherness has amplified the question of European identity: can the building of a common European identity play a pivotal role in this controversial framework? Can EU citizenship help to shape this common identity? The panel will also discuss a possible tool to foster European identity, namely educational policies.

Participants	Arianna Vettorel Marta Legnaioli Matteo De Nes Giovanni Zaccaroni
Name of Chair	Antónia Maria Martin Barradas
Room	DOR24 1.608

Arianna Vettorel: ***EU Citizenship and Personal Civil Status: The Challenges Arising from European Cross-Border Mobility***

One of the aspects most affected by mobility of persons across borders is the recognition, in the destination State, of the civil status acquired in the State of origin. This problem pertains to the movement of adults and children between non-EU and EU countries as well as mobility between different EU Member States. The difficulties in recognition of civil status within the European Union is often considered as an obstacle to the freedom of movement granted by the TFEU and a potential detriment to the integration process, in evident contrast with the symbolic value of EU citizenship. These risks have been clearly stated by the EU Commission. To date, however, the efforts to facilitate the movement of EU citizens between EU Member States have led only to a minimal proposal for an EU Regulation.

Marta Legnaioli: ***European Citizenship, Aquis and the Challenges Arising from the Current Migration Crisis***

More than 20 years ago, after the fall of the Berlin Wall and the beginning of a new phase in EU integration, the Treaty of Maastricht, following a long discussion, established the "citizenship of the Union" (Article 9(1) TEU). The limits of the Union citizenship and the fact that it only complements and does not replace national citizenship are well known, but nevertheless, the introduction of this concept carried a symbolic value as well as relevant legal consequences for the evolution of the Union competences. Having acknowledged the development of the concept of European Union citizenship, the aim of this study is to analyze and assess the legal framework and policies on EU migration and the new relevance of the role of borders in the Schengen area under the lens of the jurisprudence of the Court of Justice in the field of third-country nationals.

Matteo De Nes: ***European Identity and Educational Policies***

A possible path towards a common European identity could be found in the educational systems, whose strategies seem crucial in facing the main problems related to otherness in a multicultural framework. Education, however, is one of the most challenging fields for Europe's integration process. The preamble of the TFEU indicates the will of the Member States to "promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating." Nevertheless, except a few limited actions to support, coordinate or supplement the activities of the Member States, the European Union has no strong competencies in this field. This analysis is then aimed at showing the status quo of current EU strategy in educational policies, tackling the question about whether and how such strategies could contribute to the building of a European identity.

Giovanni Zaccaroni: ***How long will (European) borders last? Global, supranational and national problems in the management of migrations***

The paper aims to address the issue of the border management from a national, supranational and global dimension, taking the EU situation as a case study. The national dimension will examine the shortfall of the Schengen system (with particular reference to the introduction of controls at the internal borders), and try to speculate on the fate of one of the most important European common goods: apparently the EU is not able nor with pure infringement procedure or with article 7 TUE procedure to defend its common interest. The supranational dimension will deal with the role of the current Common European Asylum System in order to understand if and how it can be sustainable, also in light of ECHR and UNHCR obligations. From a global perspective, will be examined the role of the EU as a key regional player and the need for the implementation of an external policy which goes well beyond the actual menace of the Islamic State.

32 STOP-AND-FRISK POLICING AND OTHERNESS IN THE MULTI-LEVEL SYSTEM OF EUROPEAN PUBLIC LAW

Originally designed as a compensation for open borders, stop-and-frisk police powers in national law often aim at "Others" different from the majority group. Hence, they have been much contested on the grounds of national constitutional law and EU law alike. Critics claim that police stops resemble forbidden border controls, that they infringe upon constitutional freedoms and administrative principles, that they result in racial profiling and reinforce presumptions of "otherness". This contestation activated different constitutional logics, ranging from individual liberties to a more equality-based approach. Emerging principles of EU administrative law readjust the notion of administrative discretion. These legal developments will become more salient in a European Union where internal borders re-emerge and calls for enhanced stop-and-frisk-practices are among the first reactions after the Paris attacks and a number of sexual assaults in Cologne.

Participants	Alexander Tischbirek Nahed Samour Michael Riegner Christopher Unseld
Name of Chair	Christoph Möllers
Room	UL9 E25

Alexander Tischbirek: *"Stop-and-Frisk" before German Courts*

By giving an overview of recent case law, I will show how courts in Germany have grown skeptical towards "stop-and-frisk"-laws, that allow police authorities to stop, question and search a person without a well-founded suspicion. However, legal arguments concerning an infringement of freedom rights have until lately been much more likely to be heard than complaints regarding discriminatory conduct of public authorities. This empirical observation is at any rate mirrored in German legal doctrine, which – at least in public law – seems less differentiated in matters of equality jurisdiction than in other European constitutional orders.

Nahed Samour and Michael Riegner: *The Schengen Codex as Spearhead against Othering?*

This contribution addresses stop-and-frisk police practices in their multi-level context of European and international law. German courts have largely avoided addressing racial discrimination and focused on individual fundamental rights at the expense of equality provisions in the German constitution. In this strategy of avoidance, courts have also started to use EU free movement law, namely the Schengen Codex. Yet, we argue that to the extent that EU law increasingly governs policing by member states, it brings a forceful transnational logic of non-discrimination to national practices of "Othering". Non-discrimination has traditionally been ingrained in EU law, and its institutions have developed a significant body of secondary law and case law regarding discrimination on the basis of nationality, race, gender, age and other statuses. This constitutional equality dimension will become more salient as the influx of refugees and migrants into the EU transforms European societies.

Christopher Unseld: *The CJEU's Approach towards Administrative Discretion within the Schengen System*

This presentation concentrates on administrative discretion as an emerging principle of EU administrative law. Generally, the enforcement of Schengen rules grants national authorities – when they apply EU law – procedural autonomy only limited by the principle of equivalence and effectiveness. But in the last couple of years the CJEU changed its attitude towards some of these procedures and started to differentiate between the discretion of national authorities and the discretion of national courts. I will argue that this represents a crucial step towards the creation of a set of general administrative rules in EU law. This will shape the work of national police authorities and also might change the relationship between lower national courts and the CJEU. The problem of discriminatory policing practices within Schengen challenges national approaches to administrative discretion and raises questions about the overlap of idea of the common market and fundamental rights values.

33 THE BOUNDARIES OF DATA PROTECTION

Panel formed with individual proposals.

Participants	David Fennelly Magdalena Jóźwiak Orla Lynskey Neliana Ramona Rodean Erin Ferguson Bilyana Petkova
Name of Chair	Neliana Ramona Rodean
Room	UL9 210

David Fennelly: ***Managing Data's Borders: Towards a Global Framework for Data Protection?***

Technology's ever-increasing presence in society presents a complex challenge for public law's traditional conception of borders. This paper examines this challenge in the specific context of the protection of privacy and personal data. The free movement of data across borders has increasingly come into tension with the right to privacy and the protection of personal data, as dramatically illustrated by the Schrems case before the CJEU. Data flows are not only increasing across borders, in many cases they defy traditional conceptions of borders, as the Microsoft Warrant case in the US makes clear. As these controversies unfold, this paper argues that the specific short-term responses to date highlight the need for a global framework on data protection which would offer clear and effective standards to manage the flow of data across borders. It will conclude by considering how such an agreement might evolve and what form it should take.

Magdalena Jóźwiak: ***Information sharing, data protection and vulnerability of rights on the Internet in the assessment of the CJEU***

The main legislative instrument for the protection of personal data in the EU is the Data Protection Directive. It has an extremely wide scope because most data that is shared can be classed as personal data and most activities concerning data can be seen as the processing of it. It also covers a large amount of modern communication methods that fall under the protection of the right to freedom of expression and information under Article 11 of the EU Charter. To address the tension between the rights, the Data Protection Directive provides for different mechanisms to balance them. This article departs from the premise that European courts prioritize certain interests in a given social context through this balancing exercise. The purpose of this article is to verify how the Court of Justice of the European Union sets those priorities where the rights to data protection and freedom of expression and information conflict, especially in the context of developing communication technologies.

Orla Lynskey: ***The free movement of personal data: inclusion and exclusion through data protection law***

The free flow of personal data is a central objective of the EU data protection regime. This paper considers how citizens are included or excluded from the protection offered by this regime, and considers whether the unhindered flow of personal data has the potential to exacerbate inequalities between citizens. It examines the claim that the high standard of personal data protection offered by countries with data protection law will lead to a race to the bottom for those without. It suggests that even for those falling within the scope of the data protection regime, this model will have a disparate impact. The increased emphasis on the rights and responsibilities of individuals pursuant to data protection rules is evident. This focus on the savvy, informed individual, who is in a position to exercise rights to ensure some self-serving friction in data flows, does not easily correspond to the reality of disenfranchised citizens who feel they have lost control of their data.

Neliana Ramona Rodean: ***Data protection challenges and the bridge between EU and US after Schrems judgment***

In recent time data protection law is the most challenging field that provokes lawmakers and the courts. The aim of this paper is to stress the differences among US and EU privacy law making. First, it will be highlighted how, on the one hand, by the time of the EC Data Protection Directive of 1995 until the recent EU data protection reform, privacy was increasingly understood across the EU as a fundamental right that protects self-determination but which should be proportionally balanced with other rights, and on the other, how little debate has progressed over the years and data privacy law is still in flux in the United States. Second, it will be presented the gradual development of privacy law at national level, both in US and EU. Finally, the correlation among legislators and judges will be analyzed through the Schrems judgment.

Erin Ferguson: ***Freedom of Information and Private Contractors: A Comparative Approach***

Freedom of information (FOI) legislation confers on the public a general right to access information held by public bodies. The use of private contractors or voluntary organizations to deliver public services in the United Kingdom has led to concern that information rights are being eroded as a result as its FOI laws only apply to designated public bodies. Many organizations now responsible for service delivery are beyond the scope of FOI, and debate is currently taking place on how to extend FOI responsibilities to additional bodies. The Scottish government appears to be making the strongest commitment to legislative amendment. The aims of this paper are two-fold. First, it considers the challenges that arise when services are delivered by organizations not subject to FOI legislation. Second, it examines whether comparative analysis is a useful tool for identifying potential approaches towards addressing the challenges posed by privatization and outsourcing.

Bilyana Petkova: ***Towards an Internal Hierarchy of Values in the EU Legal Order: Balancing the Freedom of Speech and Data Privacy***

This article compares American constitutional law on the First Amendment freedom of speech vis-à-vis data privacy in the US to the right to freedom of expression vis-à-vis data privacy under EU law. Whereas in the US commercial interests seem to have taken precedence in the balance between freedom of speech and data privacy, the EU is at a crossroads. The Court of Justice of the EU (CJEU) has started to show preference for data privacy rights over commercial interests through the cases Google Spain, Digital Rights Ireland and Schrems.

The idea that both freedom of expression and data privacy have a political and an autonomy aspect is developed. The main task of the CJEU in the balancing exercise is not to prioritize one right over the other. Following this notion, when the right to access to documents is at stake, the autonomy aspect of data privacy rights needs to give way to political values such as accountability and self-government protected by the right to access to documents.

34 ON RIGHTFUL RELATIONS WITH DISTANT STRANGERS: KANTIAN APPROACHES TO REFUGEES, NATURAL RESOURCES AND GLOBAL PUBLIC GOODS

The papers examine broadly Kantian or 'choice'-based perspectives on the subjects relating to themes relevant to the conference: refugee law, sovereignty over natural resources, and extraterritorial jurisdiction to provide global public goods. The panel is intended to provide a contrast to theories of the same that are based on 'interest' theories of rights. Fox-Decent examines refugee law from a conception of sovereignty as fiduciary obligation. Herlin-Karnell considers EU law and policy responses to the present refugee crisis in the light of Kant's notion of cosmopolitan right. Banai compares Lockean and Kantian theories of sovereign rights over territory and resources, with a view to setting out the rights and obligations of rainforest-rich states as against the rest of humanity. Finally, from a premise of dignity as autonomy rather than well-being, Ganesh argues that sovereign states have the absolute right to do anything necessary to provide global public goods.

Participants	Evan Fox-Decent Ester Herlin-Karnell Ayelet Banai Aravind Ganesh
Name of Chair	Mattias Kumm
Room	UL9 213

Evan Fox-Decent: *The Right to Refuge*

I will present chapter 7 – "The Right to Refuge" – from my forthcoming monograph with Evan Criddle, Fiduciaries of Humanity (OUP, 2016 in press). The book addresses an enduring puzzle at the heart of contemporary international law: the apparent tension between state sovereignty and state responsibility. We offer a new and relational theory of sovereignty that resolves this tension, a theory based on the idea that states serve as fiduciaries of the people amenable to their jurisdiction, including foreign nationals. In this chapter, we discuss the fiduciary theory's implications for the protection of refugees under international law. A state's obligation to provide refuge to foreign nationals fleeing persecution abroad flows from the intersection of the state's position as a joint fiduciary of the earth's surface on behalf of humanity, on the one hand, and its position as a local fiduciary that international law entrusts with sovereignty over the people within a certain territory, on the other.

Ester Herlin-Karnell: *EU security regulation, the migration crisis and the question of constitutionalism*

The Kantian idea of a 'cosmopolitan right' requires those who arrive on the territory of a foreign state to be received without hostility. What can we make of the cosmopolitan axiom today when trying to understand the EU's responses to the current refugee and migration crisis? In this paper I will a) discuss the constitutional question of exclusion/inclusion in the context of security regulation and what it tells us about the EU mission of establishing justice within the Area of Freedom, Security and Justice b) look at the consequences and legitimacy of EU extraterritoriality when the EU seeks to regulate the flow of people by establishing EU border controls and other measures outside the shores of Europe and c) ask what kind of justification and what kind of European 'solidarity' this implies for the construction of an 'Area of Freedom, Security and Justice'.

Ayelet Banai: *Sovereignty over Natural Resources and its Implications for Climate Justice*

What justifies the extensive rights sovereign states wield over the natural resources in their territories? What are their implications for climate justice? This article reviews five theories of territorial rights in contemporary political and legal philosophy, and the justifications they provide for territorial jurisdiction over natural resources. It is argued that insofar as the philosophical-normative perspectives justify sovereigns' jurisdiction over natural resources within their borders, they also give rise to limits on the legitimate and permissible exercise of the jurisdictional prerogative. This theoretical proposition is then illustrated in the case of international climate-justice obligations of rainforest-rich countries.

Aravind Ganesh: *Autonomy, Human Rights and Global Public Goods*

This paper argues that sovereigns may do anything necessary to provide global public goods. It begins by conceiving of dignity as autonomy, or not being subject to the will of another. A number of propositions follow. First, governments are fiduciaries of their subjects, because dignity cannot be realized without political authority. Second, 'public goods' may be understood not in usual welfare-based terms as things generally desired but for various reasons privately underproduced, but as things that must be provided publicly because necessary to ensure the autonomy of all members of the political community. Third, from the fiduciary obligation to provide public goods for subjects, sovereigns derive rights against other persons, including other sovereigns. They may be asserted unilaterally, and without demonstrating harm. Such assertions must be necessary, and for a public purpose. Finally, they give rise to constructive fiduciary or human rights obligations towards distant strangers.

35 CONSTITUTIONALISM IN RUSSIA: COMPARATIVE PERSPECTIVES

This panel will explore issues that are much discussed recently such as international law's possibly changing place in the Russian constitutional system, the specific understanding of human rights, the recent legislative amendments that enable the Constitutional Court to check the constitutionality of judgments of the ECtHR in Russia, and constitutionalism in Russia's federal subjects. A starting point of the panel is the insight that considering the country's weight and uniquely troubled history of constitutionalism, Russia could be much more visible in academic projects of comparative constitutional and international law.

Participants	Lauri Mälksoo Jane Henderson Bill Bowring Vladislav Starzhenetskiy
Name of Chair	Lauri Mälksoo
Room	UL9 E14

Lauri Mälksoo: ***International Law in the Russian Constitutional Hierarchy: A Comparative Perspective***

The place of international law in the Russian constitutional system is currently much debated. Politicians have made suggestions to amend Article 15 paragraph 4 of the Russian Constitution of 1993 that recognizes the supremacy of international treaties vis-à-vis the Russian law (except for the Constitution itself). On 14 July 2015, the Russian CC decided that it might in the future check the constitutionality of judgments of the ECtHR made vis-à-vis Russia. This paper will look at the problem of international law's place in the Russian Constitution both from historical and comparative viewpoints. In the past, influential Soviet jurists like Vyshinksy claimed that Soviet law always superseded international law. With the democratic constitution of 1993, Russia attempted a change and became more 'international law friendly'. However, this paper argues that the pendulum is currently swinging back because in Russia, international law is increasingly seen as foreign, especially Western law.

Jane Henderson: ***Comparative Treatment of Human Rights in Republican Constitutions/ Regional Charters***

Much attention is rightly given to the Constitutional Court RF's role in interpreting and applying the 1993 Constitution, and in particular, its impact on the realization of human rights in Russia. However, in 17 out of the 85 subjects of the RF, there are bodies of constitutional justice applying the constitution (if a republic) or charter (if one of the other types of subject RF). Currently, 14 republics have a constitutional court, and charter courts exist in two regions and one city of federal significance. In two other regions attempts to maintain or establish a charter court have been thwarted by the regional governor. This paper examines the activity of some of these courts, and seeks to show that, whilst having a comparatively limited role, they help bring the realization of rights to the population within their area. In the author's view, the fact that in some instances there is resistance to the existence of such a court emphasizes rather than diminishes their importance.

Bill Bowring: ***The Interrelationship between the European Court of Human Rights and the Russian Constitutional Court: How Unique is it?***

The Resolution of the Constitutional Court of 14 July 2015 laid the basis for the Law of December 2015, amending the Federal Law on the CC. This gave the CC, on application by a government body, the power to declare that implementation of a judgment of the European Court of Human Rights (ECtHR) would be "impossible". This was criticized by the Venice Commission of the Council of Europe (CoE) on 11 March 2015. On 19 April 2016 the CC gave judgment on the implementation of the ECtHR ruling in the case of Anchugov and Gladkov v. Russia on the rights of prisoners to vote. The Secretary General of the CoE, Thorbjørn Jagland, commented that "Today's judgment... suggests that there is a way to resolve the issue through a change of legislation which would alleviate the existing restrictions on the right to vote." Is his optimism justified? Many commentators think not. While the UK's refusal to obey Hirst v UK was a political challenge, does the CC in Anchugov pose more existential threat?

Vladislav Starzhenetskiy: ***Human Rights as Legal Transplants: Russian Constitutional Court, ECtHR and Socialist Legal Tradition***

In 1998, Russia ratified European Convention on Human Rights (ECHR) and subjected itself to jurisdiction of the European Court of Human Rights (ECtHR). However, rather quickly it became evident that human rights and ECHR norms represented something conceptually alien for the Russian legal system and they had to face rejection, constant resistance, incomprehension from the Russian judges, law-enforcement agencies, legal academics and general public, they simply did not function the way they were supposed to and may be regarded as "legal transplants" for the Russian legal system. The distinct features of the Socialist legal tradition (ultra-formalism, domination of public (state) interest, narrow scope of the most human rights terms), to which Russia belongs to, made it particularly difficult and challenging to apply and enforce human rights norms. In this regard, the Russian Constitutional Court has played and is still playing crucial role in assimilation of human rights in Russia.

36 CONSTRUCTING BORDERS AND OTHERNESS THROUGH FOOD REGULATION

Food has the power to bring people together, but also to set them apart. This panel will explore how different legal systems conceptualize "us" and "them" through laws and court decisions concerning the production, consumption, and sale of food products, elucidating the ways in which legal actors use food regulation to think about "otherness." Anthropologists have long shown that food is symbolic of social relationships, reflecting the various gender, race, and socio-economic hierarchies found in a given culture. As panelists will argue, more often than not, the regulation of food is a mirror image of a society's otherness anxieties, whether the problematic "other" are people eating different foods (immigrants, racial and religious minorities, low income populations), non-human animals (eaten by some, revered by others), or substances found in foods which do not belong there (e.g. pesticides in crops, silicon in milk).

Participants	Mathilde Cohen Lara Fornabaio Margherita Poto Yofi Tirosh Diana R.H. Winters Aeyal Gross
Name of Chair	Alberto Alemanno
Room	BE2 E34

Mathilde Cohen: *The Comparative Constitutional Law of Cows and Milk: India and the United States*

India and the US appear to have dramatically different constitutional regimes related to cows. The US Constitution does not mention cows, but the Supreme Court has developed an elaborate case law on milk. Yet, none of these cases exhibits concern for cows' welfare. By contrast, the Indian Constitution declares: "the State shall take steps for prohibiting the slaughter of cows and other milk and draught cattle." This paper makes two contributions. First, despite seemingly opposed constitutional regimes, similarities can be found in the ways in which India and the US negotiate cows' status. Both are interested in cows qua milk producers rather than non-human animals whose welfare is of independent value. Second, the constitutional predilection for cows and milk has failed to meet its promise to benefit humans. In both countries, milk and cows feature as components of an exclusionary politics used to oppress "others" reinforcing inequities between racial, social, and religious groups.

Lara Fornabaio and Margherita Poto: *The New Frontiers of Food Identification: Shaping a Better World Through Food Choices*

Food identifies us, as it is interlaced with social fabric and lifestyle. We have been experiencing an evolution from a model based on an almost perfect overlap between food production and food culture, to a new one, in which food is more related than ever to economics, technology and science. While in the past, people were able to personally ascertain whether their food was safe, nowadays, we are no longer able to judge our food. We need governments to ensure the safety of the food supply, as the less we know about what we eat, the more our food becomes "other". The presentation discusses the needs for a shift from consumer-oriented marketing strategies and top-down regulations toward a new paradigm, focused on effective sustainability. The role of public law in this new model will be examined: on the one hand it supports grass-roots initiatives, on the other hand it fosters information labeling, which enables consumers to identify environmentally detrimental foods.

Yofi Tirosh: *The Law and Disgust Debate Revisited: A Case Study of Contaminated Milk*

Disgust is a complex emotion. It repeatedly moves between the universal essentialist and bodily on the one hand and the culturally specific and value-laden on the other hand. These movements blur the distinctions between nature and culture mind and body and universal and relative. These qualities of disgust challenge the law whose modus operandi is based on clear-cut analytical categorization. Whether disgust should be part of legal discourse and doctrine has been a subject of heated debates by legal philosophers. Even those who like Martha Nussbaum strongly object allotting disgust a place in law concede that disgust should be legally recognized as long as it is carefully restricted to its core universal and value-free formation. This paper contributes to the disgust debate by conducting an extensive analysis of one Israeli case which concerned the selling of milk that turned out to be tainted with silicon.

Diana R.H. Winters: *The Fragmentation of Food Policy*

The regulation of food in the United States is exceedingly complex. Local, state, and federal regulation all coexist, and common law remedies supplement positive law. Strata of regulation are necessary because patterns of production and consumption vary by region and demographic, while federal regulation provides regulatory uniformity.

Local bodies struggle to sustain autonomy in response to local preference while working within a centralized system, federal agencies struggle to maintain regulatory uniformity to foster a national marketplace, and the result is often friction between regulatory spheres. This is because these spheres of authority are viewed as "other" by one another, each invested with its own social, cultural, and political content. These differences may be reflected in the means used to reach the purported desired end – a healthy, safe, and accessible food supply – and this difference may be a source of conflict. This friction, however, can also be a space of foment for policy change and democratic engagement. In this Paper, I explore the perception that these regulatory spheres are opposed, and examine the source and implications of this view.

Aeyal Gross: *Food Security. A Supply or Demand Problem?*

The social protests in Israel in summer of 2011 started with food prices protests, before the focus shifted to housing. Nonetheless the issue of the right to food was almost completely excluded from the social reforms suggested by the think tank which came out of the protests. Instead, most of the discussion of food took place in discourses of government bodies which focused on the price of food. As a result, various reforms were proposed and began to be implemented, so as to increase competition in the food market. The assumption was that this would cause a decrease in food prices. The National Council on Food Security suggested another reform, focusing on the institutionalization and the financing of food hand outs to poor families.

This paper argues that reforms or food security often deal with supply, whereas major causes of food insecurity lie with demand, i.e. the reduced buying power of poor families. It points to how general economic policies including cuts in welfare are at the root of the increase in food insecurity, and that reforms on the supply side are limited in what, if at all, they can achieve.

37 FEDERALISM ALONG AND BEYOND BORDERS. A NEO-FEDERALIST PERSPECTIVE

In the last twenty years federalism seemed to be a crucial concept to establish democracy and rule of law. If we understood federalism as oneside of the coin, secession and disintegration seem to be the other side. Federalism enables cooperation along borders and strengthens external borders. When borders are collapsing, federalism is challenged. New internal borders might be set up. The panel will address these issues of federalism & secession within domestic states (comparative perspective) and beyond (European and international perspective). The role of sub-national entities in the 21st century is crucial to solve global problems on the ground (like migration, integration, environmental issues etc). The identity of sub-national entities is changing and constitutional law is often not providing sufficient solutions to these developments. The panel will analyse these challenges from different perspectives, including methodological considerations, institution-based analysis, the democratic dimension and core ideas of federalism. Altogether, the panel develops a bigger picture of a neo-federalist perspective, which addresses federalism along and beyond borders.

Participants	Barbara Guastaferro Lucía Payero López Dirk Hanschel Konrad Lachmayer
Name of Chair	Konrad Lachmayer
Room	BE2 E42

Barbara Guastaferro: ***Institutional Responses to Territorial Differentiation: Comparing Italy and the UK***

Important reforms of constitutional significance are currently affecting national legislatures in Italy and the United Kingdom, where the composition of one of the Houses of Parliament is going to be modified responding to a call for territorial differentiation. On the one hand, the reformed Italian Senate will represent "territorial institutions" – and no longer "the Nation" – as it happens in some of the second Chambers of fully-fledged federal States. On the other hand, the "English Votes for English Laws" procedure introduced into the House of Commons, will allow legislation affecting England to be enacted only with the consent of Members of Parliament for constituencies in England, thus excluding MPs representing devolved legislatures. Against this backdrop, the paper will analyze the constitutional and political significance of territorial representation for unitary – rather than federal States – and explore the causes of the emerging "territorialisation" of national legislatures.

Lucía Payero López: ***Federalism in Multinational States: An Alternative to Secession? The Case of Spain***

This paper will explore the possibilities of the federal idea for becoming an attractive alternative to secession in multinational states. Given that federalism is a polysemic concept, since many definitions of it –some of them even conflicting– can be found in the specialized literature, the context in which federalism is applied plays a leading role. The present analysis will be focused on Spain, a plural state where territorial tensions have been a protracted problem. Therefore, any federal proposal should be compatible with national plurality in order to be accepted by peripheral nationalists. The paper will suggest a federal evolution of the State of the Autonomies, which, at the same time, may avoid the disintegration of the state.

Dirk Hanschel: ***Discussant***

Konrad Lachmayer: ***Comparative Law in Changing Structures of Multi-Level Federalism***

The paper addresses the methodological questions of how comparative constitutional law can address the changes of the states. Unitarian states might develop to federal states (like Nepal). Domestic states integrate in supra-national forms of federal units (like the EU). Other states broke apart (like ex-Yugoslavia) and create left-overs (like Kosovo). From a methodological perspective, the point of reference (constitutional law) is changing and has to address in the whole process of transition from one condition of a state to another. Constitutional law can be identified along and beyond state borders. A Neo-Federalist Perspective enables comparative constitutional law to restructure questions of statehood and the role of changing borders.

38 EUROPEAN CONSTITUTIONALISM: A NEW ERA OR THE END OF THE ERA?

The latest mixed migration movements have questioned the hard core of the so-called European constitutional order. The foundational perception of liberal cosmopolitanism, at the same time is under severe critique of being inadequate and/or even obsolete. Within this context, the current panel purports to address this post-ontological phase of European constitutionalism via a critical analysis of the EU as a self righteous human rights actor; provide a historiographical anagnosis of central/eastern Europe's hostile position; reassess the nature of EU constitutionalism through the paradoxical lenses of migration of ideas v. migration of people and finally explore a daring re-conception of cosmopolitanism that challenges the mindset of borders, territoriality and recognition of rights.

Participants	Maria Varaki Daniel H. Augenstein Matej Avbelj Jernej Letnar Černič
Name of Chair	Mark Dawson
Room	BE2 E44/46

Maria Varaki: ***Re-reading 1943 Hannah Arendt for a "new" cosmopolitan order in 2016***

The latest mixed migration movements have triggered an unprecedented challenge of the European Union project as whole. The fundamental idea of a cosmopolitan liberal order is under severe contestation by populist and nationalist voices in some European countries, whereas in other moderate advocates unsuccessfully balance between security and humanitarian concerns. Within this context, the traditional Kantian right to hospitality will be examined towards the right to have rights, as supported by Hannah Arendt. The question to be addressed is whether the proposed legal and policy measures to be undertaken not only contradict the foundational understanding of the European constitutional order but additionally unveil the need for a revolutionary re-conception of cosmopolitanism.

Daniel H. Augenstein: ***Parochial Cosmopolitanism: The European Union as a Global Human Rights Actor in the European Refugee "Crisis"***

The paper discusses some of the ways in which the EU manages the transnational economic and political interdependencies involved in Europe's so-called refugee crisis. This serves as a background for scrutinizing the EU's (self-) perception as a global human rights actor.

Matej Avbelj: ***On the Nature of EU Constitutionalism: Migration of Constitutional Ideas v. Migration of People with Different Ideas***

Today even the EU's unwritten constitution is put to a severe test. Its underlying cosmopolitan ethos and its constitutive migration of constitutional ideas seem not to be well adapt to actual cosmopolitanism, which has been introduced in the European constitutional space by way of massive migration of people with different ideas. Again, and to a great surprise for many, the European Union has resorted back to borders. This raises the following question: is ring-fencing the EU from the regions of humanitarian crisis a constitutional solution, is it even a constitutional necessity – part and parcel of EU constitutional ethos – or is it, on the other hand, an unconstitutional and illegal step that ought to be resisted and prevented. It is expected that the answer to this question will shed some light on the true nature of the EU constitutionalism.

Jernej Letnar Černič: ***Exploring Fear of the Other in Central and Eastern European Countries***

The on-going European refugee crisis has illustrated that the Central and Eastern European countries have in past months become extremely resentful towards incoming applicants for refugee status. Such developments came as a surprise to many observers given that those countries witnessed only twenty-five years ago regime change from totalitarian systems to states based on democracy and rule of law. A brief excursion in the past and recent history of Central and Eastern Europe countries shows that latest developments are not at all so surprising given their historical experience towards foreigners. This article therefore analyses the historical reasons for the fear of the other in the eastern part of Europe and thereafter draws lessons and conclusions for the understanding of current functioning of democracy rule of law and asylum policies in selected Central and Eastern European Countries.

39 FORMS OF CONSTITUTIONALISM

This panel will explore the evolving forms of constitutionalism. Drawing on both quantitative and qualitative expertise, the panelists will challenge prevailing constitutional models and show that the majority of democratic constitutions today are un-entrenched documents subject to frequent revision; analyze avenues for curbing the abuses associated with unlimited conceptions of the constituent power; and explore how entire constitutions can be unconstitutional.

Participants	Mila Versteeg Yaniv Roznai Richard Albert
Name of Chair	Ozan Varol
Room	BE2 139a

Mila Versteeg: ***Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design***

This Article highlights a gap between a great deal of constitutional theory and a great deal of the practice of democratic constitution-making. Drawing on data from democratic national and state constitutions, we challenge the consensus among constitutional theorists that a central purpose of constitutionalism is the entrenchment (the fortification against future change) of broad principles. The empirical reality is that the majority of democratic constitutions today are subject to frequent revision, and are therefore ill-equipped to facilitate the entrenchment of their contents. To explore the logic of these un-entrenched documents, we identify the historical periods in which different geographic regions moved away from highly entrenched constitutions, and we examine the political contexts of these transformations. We find that, in each context, constitution-makers were attempting to limit the discretion of constitutional interpreters and implementers by drafting highly specific texts and by updating them in response to continually changing circumstances.

Yaniv Roznai: ***We the Limited People? Four Routes of Limiting Constitution-Making Powers***

From a democratic theory, the absoluteness of the people to shape and reshape their constitutional world is what grants the constitutional order its legitimacy. The unlimited constituent power is the manifestation of the people's basic freedom versus the government, and the people are free to change their form of government at will. From a constitutionalism theory, this unlimited power to break any constitutional bounds at will and at any time is dangerous and open to abuse, as indeed history proves. In contrast with the classical view of constituent power as an unconstrained and unrestrained power, this paper proposes four routes of restricting constitution-making processes: pre-agreed principles; international law commitments; basic principles of constitutionalism; and limitations derived inherent from the very concept of constituent power.

Richard Albert: ***Four Unconstitutional Constitutions and their Democratic Foundations***

The present fascination with the global phenomenon of unconstitutional constitutional amendment has left open the question whether a constitution can be unconstitutional. Invalidating a single amendment for violating the architectural core of a constitution is an extraordinary action, but it is occurring with increasing frequency around the world. Striking down an entire constitution, however, seems different in both kind and degree. In this paper, I illustrate and explore four different conceptions of an unconstitutional constitution. Each conception draws from the lived experience of four different constitutional traditions, specifically in Canada, Mexico, South Africa and the United States. What unites all four conceptions is that each instantiation, despite its unconstitutionality in different senses of the concept, nonetheless traces its roots to democratic foundations. The strength of these foundations, however, varies as to each.

40 LEGAL THEORY AND LEGITIMACY BEYOND THE STATE: WHAT'S LAW GOT TO DO WITH IT?

If global governance is justified by the fact that states can no longer 'go it alone' to deliver the public goods expected of them in contemporary society, then the financial crisis, the refugee crisis as well as the various global security threats emerging in the past number of years would seem to provide robust justification for more powerful governance beyond the state. Yet, at the same time as these global challenges are emerging, attempts at post-state governance to address other global challenges from global security law to address transnational terrorism, the expansion of global trade and the creation of suprastate rules on banking and currency such as in the EU, have themselves been subject to a backlash against forms of governance beyond the state. In this panel, we will attempt to contribute to this question of the nature and form of legitimacy beyond the state from a particularly legal and normative perspective. In addressing questions of legitimacy in global governance, the papers will focus on legitimacy questions raised by particular legal practices as well as conceptual and normative questions of legitimacy in global order more generally.

Participants	Cormac MacAmhlaigh Christopher Alexander Thomas Aoife O'Donoghue Ming-Sung Kuo Claudio Corradetti
Name of Chair	Joseph Marko
Room	BE2 140/142

Cormac MacAmhlaigh: ***In Defence of suprastate Constitutionalism as Legitimacy***

Of the various functions of constitutionalism in the suprastate context, its role as a legitimating device is one of the most prominent. At the same time, it is this precise claim to legitimacy implicit in constitutionalism beyond the state which attracts the majority of scepticism surrounding its use in the suprastate context. The basis of this form of suprastate constitutional scepticism is that it bears false witness to legitimacy in the context of global governance. The power disequilibrium and moral pluralism in contemporary global order make the concept of constitutionalism as a form of legitimacy both irrelevant and illegitimate in a global setting.

This paper will provide a defence of the use of constitutionalism beyond the state. It will argue that the debate about suprastate constitutionalism as a form of legitimacy can be recast as a debate about the role and use of ideal theory. Drawing on debates about ideal theory in political philosophy, it will argue that suprastate constitutionalism can be defended as a useful way of understanding legitimacy in a global context.

Christopher Alexander Thomas: ***Avoiding World Domination through International Investment Law***

The legitimacy of the international economic order has recently been shaken by, among other things, the collapsed Doha Round and alarm over mega-regional trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP). This has been accompanied by a backlash against the prevailing (neo)liberal accounts of the international economic order's foundations. As such a rethinking of the basis for its legitimacy is warranted. Recent attempts to extend neo-republican theory to the international order by Philip Pettit and James Bohman are worth exploring in this respect. This paper thus focuses on the implications of these neo-republican accounts for the relationship between law and the global economy by specific reference to the substance, procedure and structure of the international investment regime. In turn, it also considers the challenges posed to such accounts by the investment regime itself.

Aoife O'Donoghue: ***Who is welcome within Global Constitutionalism?***

The existence of a global community has been critical to global constitutionalism, but how a community may be global without providing the necessary 'other' that defines community itself is unanswered. For constitutionalism, the identification of constituent and constituted power holders underpins its legitimacy. Yet, within global constitutionalism, this issue remains a peripheral debate. This paper questions the collective identification of constituent power holders within constitutionalism and global constitutionalism's reliance on community. Arguably, if the holders of constituent power remain unidentified and thus cannot exercise their warrant, the exercise of constituted power is inevitably constitutionally illegitimate. Examining the use of international community from the Stoics through Suarez to more contemporary invocations within international law such as Franck this paper questions the reliance of global constitutionalism on community.

Ming-Sung Kuo: ***Beyond: Constitutionalism: Thinking Hard about Multilevel Constitutional Ordering in the Shadow of the State of Emergency***

This paper aims to test the limits of multilevel constitutionalism by taking up the question of the state of emergency in the transnational context. Multilevel constitutionalism has been hailed as providing an innovative framework of analysis for constitutional issues in the globalizing world, suggesting a new paradigm of constitutionalism in the post-Westphalian political landscape. I argue that this view of multilevel constitutional ordering is partial as it leaves the state of emergency out of its conceived constitutionalism beyond the state. I suggest that pace the conventional view of the sovereign invocation of emergency power, the state of emergency in the globalizing world is decentred, setting its administration apart from the holders of (residual) sovereignty in a multilevel constitutional order. As a result, a multilevel constitutional order complicates the legitimacy of the state of emergency. Leaving this core political issue unaddressed, multilevel constitutionalism falls short of a political project.

Claudio Corradetti: ***Citizens of the earth, cosmopolitan citizenship and the "right to visit"***

In the following essay, I address the question of the relation between Kant's cosmopolitan right, the right to visit or more in general a communicative right and the generation of a global rule of law – what Kant calls in Theory and Practice and Perpetual Peace, respectively, a "cosmopolitan constitution" (Weltbürgerliche Verfassung) and a "cosmopolitan commonwealth" (Weltbürgerliches gemeines Wesen); or even in the Critique of the Power of Judgment "a cosmopolitan whole" (Weltbürgerliches Ganzes). The claim I defend is that it holds constructivist role for the cosmopolitan "right to visit" and the consolidation of constitutional wholes. This role seems to emerge clearly in the Perpetual Peace as well as in Doctrine of Right where a connection is drawn between the right to visit, the idea of an original community and, ultimately, the formation of a transnational constitutional order. I argue that there holds a progressive level of constitutionalization of international law.

41 CONSTITUTIONAL GUARDIANS: COMPARING SUPREME COURTS

Panel formed with individual proposals.

Participants	Sanjay Jain Pratyush Kumar Tamar Hostovsky Brandes Angela Schwerdtfeger Fritz Siregar Luca Martino Levi Alex Schwartz
Name of Chair	Angela Schwerdtfeger
Room	BE2 144

Sanjay Jain and Pratyush Kumar: ***Is Supreme Court the Guardian of Indian Constitution? Reflections on Constitutionalism in India through the Philosophical lenses of Kelsen and Schmitt***

In this paper we want to grapple with an engaging question, who should be the most effective guardian of the Constitution; judiciary (Kelsen) or the President (Schmitt). In the light of this dialectic, enquiry of this paper is which of the three branches assumes guardianship of Constitution in India? We argue that there is no basis to establish that the role of the Supreme Court as the guardian of the constitution is exemplary. Nor there is any rationale to contain that, had parliament and president been empowered to have the final word on the constitutionality of the amendments – the constitutionalism would have been much more progressive. Section one is excursion on both these philosophers and establishes that the issue of guardianship of Constitution is neither juridical nor political. Section two, by discussing Kesavanada Bharati and S.R. Bommai, enunciates that court lacks the competence to unilaterally decide the core of the Constitution. Section three demonstrates with the analysis of Indira Nehru Gandhi and Shivkant Shukla of how Parliament and executive have failed to be the protector of the Constitution. To conclude, the paper calls for the adoption of Collaborative Constitutionalism to harness the endurance of the Constitution.

Tamar Hostovsky Brandes: ***Identity and Social Solidarity: the Supreme Court of Israel and the Denied Israeli Nation***

In October 2013 Israel's High Court of Justice issued its ruling in the case of Ornan v the Ministry of the Interior. A nation explained the Court is characterized primarily by solidarity between its members. Recognition of an Israeli nation, the Court argued would imply that there are those among the Jewish nation who have no "special feelings of solidarity" (as opposed to general human solidarity) towards Jews in the diaspora as they have transferred their solidarity to such Israeli nation. The literature in the field of transitional justice emphasizes the role courts may play in creating and fostering social solidarity in divided societies.

Angela Schwerdtfeger: ***Courts as Guardians of Constitutional Identity within the EU: The German Approach***

The German Federal Constitutional Court (BVerfG) has developed three types of review with respect to EU law that constitute an exception to the supremacy of EU law: fundamental rights, ultra vires and identity review. This constitutionally grounded review potentially threatens the uniform application of EU law and conflicts with the jurisdiction of the Court of Justice of the European Union (CJEU). In the recent past, the BVerfG has increasingly referred to identity review. The latest example is a decision of 15 December 2015. The Court's comprehensive deliberations on identity review and the fact that it avoided the significant inter-court dialogue with the CJEU in this case exemplify the confident role that the BVerfG intends to go on playing in the multilevel cooperation of courts. Beyond that, the jurisprudence reveals a tension between European integration on the one hand and constitutional identity on the other.

Fritz Siregar: ***Indonesian Constitutional Court: Weak Court Strong Court or Pretend to be Strong Court?***

This theorization argued whether there is further action once the Court declared constitutionality of a law. If no action required upon the Court invalidates laws is unconstitutional, it adopts a strong form of judicial review. If the court possess the power to determine whether the law is consistent with the constitution but it does not have the authority to invalidate the law, it adopts weak form of judicial review.

Strong form judicial review that has embodied with Indonesia Constitutional Court silently has been transformed to weak-form judicial review. Since issuing conditionally constitutional decision became the majority of granted judicial review decision, Court had ignored its judicial restraint. When 'negative and positive legislator' collide, it created uncertainty for Parliament and Government how to respond towards Court decision. It does increase potential attack because "legislative power" that has been exercised massively by the Court.

Luca Martino Levi: ***Labor-Market Outsiders, Italian Justices and the Right to Social Assistance***

From Carneades' shipwreck who saves herself by thrusting someone from a plank, to H.L.A.Hart's park, where no vehicles are allowed, fictional cases have allowed generations of legal philosophers to show the particulars and the implications of their theories. Looking back at this tradition, this paper aims to reflect upon the process of constitutional adjudication concerning social rights generally, and social assistance in particular. The starting point of the analysis is an imaginary suit brought by an indigent against the Italian Republic, on allegation that her constitutional right to social assistance has been violated. The Court can decide the case in various ways, each of which is analyzed from the perspective of one of the Justices on the bench. By so doing, the article attempts to provide an insight into the dynamics of judicial decision-making and constitutional interpretation, without renouncing to express a normative claim against manipulation and absolutism in adjudication.

Alex Schwartz: ***Hybrid Constitutional Courts: International Judges in Divided Societies'***

One of the challenges that arises in divided societies is the danger that one group may capture an institution to use its powers to the detriment of other groups. Constitutional courts are not immune to this danger. One remedy is to reserve a fixed number of places on the court for members of certain groups. Some courts go a step further and also include a fixed proportion of non-domestic "international" judges to serve, at least ostensibly, as neutral swing voters. With a particular focus on the Constitutional Court of Bosnia, this papers takes an empirical look at the role that international judges have played on constitutional courts in divided societies. In light of the evidence, the paper argues that the case for these "hybrid constitutional courts" needs to be radically reassessed.

42 RECONFIGURING LEGAL SUBJECTIVITY

This panel analyses legal subjectivity. The panel is organized by a multidisciplinary research group aiming to bring together public lawyers, civil lawyers, legal philosophers and social theorists for in-depth analysis on current problems of legal subjectivity and personhood.

Participants	Susanna Lindroos-Hovinheimo Merima Bruncevic Jannice Käll Ukri Soirila
Name of Chair	Susanna Lindroos-Hovinheimo
Room	BE2 326

Susanna Lindroos-Hovinheimo: ***Private selves: An analysis of legal personhood in the European Union***

The paper analyses the legal subject in European law. The overall rationale of the project is an awareness of the often invisible workings of law in relation to human beings. The law builds on some understanding of what it means to be a person, but it also influences definitions of personhood. As the human being is taking centre stage in EU law, there is an increasing need for an inquiry into the foundations of our shared being in law. The legal subject can be conceptualized in individualistic terms or intrinsically tied to community. Both alternatives will be studied in the context of selected examples of case law from the ECJ. Drawing on the work of contemporary political philosophers Jacques Rancière and Roberto Esposito, this research tries to rethink the legal subject without a necessary connection to individuality. By accepting the singular plural nature of the legal subject, the concept can be opened up and put to use in egalitarian ways.

Merima Bruncevic: ***The artistic inforgs and the nomadic legal subject***

The paper analyses a portrait series based on Instagram images. Issues concerning the notion of the author, legal subjectivity and rights to information that emerge within the infosphere are discussed. The argument that the individual notion of the "author" as legal subject must be challenged and understood as a process of continuous oscillations between civil and public law is advanced. Reading the concept of the author through Barthes' "Death of the author" and Foucault's "What is an author?", I argue that the private and individual author-genius as the legal subject has been dissolved. It is argued that the many strata of authorship in the case at hand all form part of the creator-user, an information-carrying organism (inforg). The legal subject is approached critically and the paper discusses the constructions and reconstructions of subjectivity, claiming that what seems to be escaping law is the nomadic legal subject a borderland between shared information and privacy.

Jannice Käll: ***Becoming posthuman through human(ist) rights? The right to be forgotten and beyond***

In 2010, a Spanish citizen lodged a complaint against a Spanish newspaper with the national Data Protection Agency and against Google Spain and Google Inc. His complaint concerned an appearance of what he claimed to be private information in the Google search results. He therefore requested that Google Spain or Google Inc. was required to remove the personal data related to him so that it no longer were to appear in the search results. Following the settlement in May 2014, a debate arose with regards to the entitlement of privacy as opposed to which interests the public as well as internet companies should have in internet-based information. In this paper, I argue that questions regarding the entanglement between humans and technology that center on privacy versus freedom of speech miss out on important implications of how subjectivity is formed and power reinstituted in a "posthuman" setting. The posthuman has been suggested as a concept for capturing emerging bodies beyond the human.

Ukri Soirila: ***Law of Humanity? Biolegitimacy and the reconfiguring the global legal subject***

In this paper, I approach shifts in legal subjectivity at the global level through one very particular vision of what international law is or should be developing into, namely a vision of a (global) law of humanity. At the heart of this vision is the aim to replace states with the human person as the primary subject of global law. Rather than advocating for a change in this direction, or aiming to prove that such a shift has already occurred, however, I focus on the changes this vision would entail in relations of power, were it to actualize. In other words, I explore what new forms of power and subjectivities the vision enables, and what are the links between the vision and social change. What I suggest is that while the change pursued at the theoretical level seems to aim to empowerment of the human person, the humanity discourse may in practice be employed mainly by different regimes and actors in order to re-distribute legitimacy at the international sphere.

SATURDAY
18 JUNE 2016
11:30 am – 1:15 pm

PANELS
SESSION III

43 TERRITORY AND ITS LEGAL IMPLICATIONS II

Panel formed with individual proposals.

Participants	Oran Doyle Ntina Tzouvala Michèle Finck Almut Peters Ralph Wilde
Name of Chair	Michèle Finck
Room	UL6 2070A

Oran Doyle: *The Constitution of Territory*

Based on a comparison of territory clauses from all world constitutions, this paper traces patterns of influence and constitutional migration. Is territorial construction an issue where constitution-drafters look to their neighbours? Do countries that shared a colonial master take similar approaches? Apart from these patterns of influence, the paper explores whether there is support for a fundamental theory of territory. I argue in another work-in-progress that constitutional texts cannot determine the territorial scope of a constitutional order. Rather, conventional ultimate rules of recognition contain territorial referents that in turn delineate the territorial scope of constitutional orders. This being so, territorial references in constitutional texts cannot fundamentally determine the territory of a constitutional order, but they can serve three limited purposes: to clarify fuzzy borders, to assert contested territorial claims, and to retrench from previously controlled territory.

Ntina Tzouvala: *Manufacturing Territoriality: 19th-century International Law and the Emergence of Borders in Siam*

This paper revisits the 'unequal treaties' and more specifically their extraterritoriality provisions as the standard method of engagement with the semi-periphery of international law. Challenging the view that territorialised political power constitutes a bare fact simply 'registered' by international law (see the Montevideo Convention criteria for statehood), my paper revisits the imposition and abolition of extraterritoriality in Siam. My principal argument is that extraterritoriality was not simply a system of Western exceptionalism, but much more fundamentally, an attempt to draw borders, create a centralised, bureaucratic system of political power with legal and de facto monopoly of violence over a specific territory and, more broadly, set the stage for the emergence of the modern state as a subject of international law. Therefore, my contribution challenges the 'naturalness' of borders and highlights the role of international law in the creation of territorially-bound authority.

Michèle Finck: *Towards a Polycentric Legal Order: Subnational Authorities in EU Law*

This paper examines the status and role of local and regional authorities ('SNAs') in EU substantive law and reveals the existence of two parallel yet opposed constitutional imaginaries of EU law. The structure of the European legal order was long understood to be bi-centric; composed of the Member States and the EU only. In this picture, SNAs are a domestic phenomenon that entertains only indirect interactions with EU law. Relying on manifold areas of EU substantive law the paper pinpoints that next to this commonplace account of SNAs as outsiders of EU law, a different narrative of the structure of the European legal order can be made out according to which SNAs are, just as the Member States, insiders thereof.

Almut Peters: *Borders within a federal state*

Can the number and territory of the component states within a federal state be altered? And if so, how exactly should this change come about? Or, to put it differently: How firm or how flexible are the borders within a federal state? These are the questions that public lawyer Hugo Preuß (1860–1925) asked when he drafted the Weimar Constitution for Germany after World War I (1919). His most prominent – and also most widely refuted – proposal was to dissolve Prussia into several smaller states in order to eliminate Prussian hegemony in Germany. Preuß' idea was that borders within a federal state should be fairly flexible. In this paper, I suggest an interpretation of his ideas as a functional and non-historical theory of federalism. I argue that Hugo Preuß' functional theory of federalism is still a relevant category when analyzing federal structures today.

Ralph Wilde: *Queering (extra-)territoriality*

Whether and to what extent states owe obligations in international human rights law to people outside their sovereign territories is a topic where the subject-matter is prominent and controversial, and knowledge about the substantive law contested and selective. The legal significance for human rights law of the territorial/extraterritorial distinction is illuminated by a consideration of underlying conceptions involving distinctions between what is normal, on the one hand, and what is abnormal/exceptional/deviant/unusual, on the other hand. This paper will consider extraterritoriality as 'queer', investigating how ideas from queer theory might help us better understand these debates and the tensions implicated in them, including, fundamentally, problems with the assumption that the territorial/extraterritorial distinction itself is stable and correlated.

44 CONSTITUTIONAL JURISDICTION, DIALOGUES AND HUMAN RIGHTS

The panel focuses on the role played nowadays by constitutional jurisdiction in theoretical and comparative terms. It discusses a more dialogical model for judicial review – internally and externally considered- especially in face of human rights demands. A more or less strong judicial review, new designs for constitutional courts, democratic legitimation and dialogues among national and international courts are some of the themes of the panel. The comparative perspective is also considered from the approximation of civil law to common law by means of the appropriation of some substantial and procedural features from one system to another and vice-versa. Supreme Courts have ensured rights such as abortion and same-sex marriage, which have provoked strong conservative reaction. The panel brings also a comparative analysis of two Supreme Court decisions concerning private autonomy and religious.

Participants	Vera Karam de Chueiri Estefânia M. de Queiroz Barboza Melina Girardi Fachin Katya Kozicki Gabriele Polewka
Name of Chair	Vera Karam de Chueiri and Katya Kozicki
Room	UL6 2103

Vera Karam de Chueiri: *Constitutional jurisdiction in times of radicalization (of democracy)*

To what extent the idea of a radical constitution affects constitutional jurisdiction calling for new arrangements based on a kind of experimentalism towards institutions? Can one think of a design for constitutional courts from a perspective other than the one given by the so-called positive social sciences? Based on the idea of a radical constitution this paper sketches some normative possibilities for constitutional courts taking progressive constitutionalism and the politics of radical democracy as its starting point. Progressive constitutionalism and radical political theory are different but share a critical attitude towards liberal democracy and a commitment to certain elements of the liberal tradition. Radical democracy favors participation and enhanced opportunities for popular power. Progressive constitutionalism highlights the benefit of reason over power by means of dialogue and deliberation, according to normatively grounded procedures and principles.

Estefânia Maria de Queiroz Barboza: *Common Law and Civil Law dialogues in human rights: the Brazilian experience*

From the second half of the 20th century on, because of the human rights revolution, the Judiciary has played a new interpretative role. This fact has brought many difficulties for the civil law tradition and the dominant positivist doctrine, as one could not decide any more cases of human rights solely based on the text of the law. This also raised the problem of legal uncertainty considering that there were no pre-established limits to the interpretative activity of judges. Given this context of legal uncertainty, this paper advocates for the use of the doctrine of stare decisis, which in turn, is consistent with Dworkin's law as integrity, for granting legal certainty, predictability and stability to legal systems such as the Brazilian one. So, it proposes a dialogue between the civil and common law systems in the realm of constitutional jurisdiction adopting the doctrine of stare decisis and the notion of integrity in order to ensure consistency, stability and predictability.

Melina Girardi Fachin: *The Enforcement of Social and Economic Rights through jurisdictions' legitimation and justification*

The present paper aims to defend the democratic legitimacy of the Judiciary in the implementation of social and economic rights. Nowadays, there is a plausible strong aversion to judicial protagonism, in both national and international scenarios, moreover in issues that are at the borders of law and politics. However, this distaste position cannot serve as an excuse to the absence of the implementation of human rights, especially economic and social ones. A more active role for the Judiciary arises out of the reduced effectiveness that social, economic and cultural rights have when compared to civil and political ones. In this sense, the enforcement of such rights through internal and external jurisdiction does not constitute a violation of the democratic model and its legitimation, on the contrary: it ensures Courts action since the only real democracy arises from the effective guarantee of all rights and their implementation.

Katya Kozicki and Gabriele Polewka: *Religious Freedom X Private Autonomy: (Judicial) Protection Of Rights In Constitutional Democracies*

The paradox of constitutional democracy found no solution so far, especially concerning basic rights issues. One argues that these issues are of a juridical kind and should be decided by the Courts or that they are of a political kind and should be faced by the legislative or by the people themselves. A third argument denies judicial review as a logical consequence of constitutionalism yet recognize some situations where it is necessary to guarantee democracy itself such as the case of protecting private autonomy. Supreme Courts have been acting to ensure rights such as abortion and same-sex marriage. There has been, however, strong conservative reaction against these decisions. Freedom of religion's legislative protection has increased as well as the so-called complicity-based conscience claims. The paper put into question the special protection granted to religious freedom and advocates that the accommodation of this broader kind of conscience claims inflicts harms to those affected.

45 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	Diego Werneck Arguelhes Michaela Hailbronner James Fowkes Thomaz Pereira Jaclyn Ling Chien Neo
Name of Chair	Diego Werneck Arguelhes
Room	UL6 2249a

Diego Werneck Arguelhes: *The first, the last and everything? The Supreme Court's role in the legalization of same-sex marriage in Brazil*

This paper examines the institutional conditions in which the judiciary in Brazil has played a legislative role, by means of a case study of the Supreme Court's decision on the constitutionality of same-sex marriage and its implications. The court's role as a first legislative chamber will appear as the outcome of a set of different variables: the political strategies by actors outside the court the institutional configuration of the court's powers and the specific ways by which a generation of Justices currently in the Supreme Court has been interpreting their own powers. Our discussion of the conditions under which judges have been acting as first and last legislators will reveal certain understudied possibilities of constitutional court's role in the political decision-making process in other countries as well.

Michaela Hailbronner: *Acting when others aren't – institutional failure as a basis for judicial action*

Courts in modern welfare states both in the Global South and North are increasingly involved in policy-making. Whether it concerns the management of forests, the administration of health care or access to education, courts around the globe take part in the administration of many multi-faceted tasks. One important justification for this kind of judicial expansionism – most familiar in the standard defenses of the Indian Supreme Court's activism such as in S.P. Sathe – is that other institutions have failed in fulfilling their functions and courts therefore must take-over vital tasks where no one else does. A similar kind of rationale is reflected in the European "Solange"-jurisprudence, where it serves as a basis to withhold judicial scrutiny 'as long as' other courts are acting. This presentation sets out to examine the frequently used, but never fully developed argument of 'institutional failure' (of other institutions) as a basis for judicial intervention in greater depth.

James Fowkes: *Everyone knows what a court is no-one knows what a court is: The institutional nature of the South African Court in comparative perspective*

The question of what a court is can be deceptively simple. It is especially important to ask it in light of the many tasks modern courts are being asked to fulfil, in their different contexts, which can significantly affect their institutional nature. I take up this issue in relation to the South African Court, the one I know best, in broader comparative perspective. The South African case is instructive as a court unusually poised between traditional ideas of a court in the legal culture in which it operates, and calls for it to be a novel, Southern, poverty- and injustice-fighting, dominant democracy-checking court and to change its institutional nature radically to these ends. (It has also undergone an under-noted conversion to a US-style supreme court of general jurisdiction). Drawing on other global courts as touchstones, I seek to use the South African case to raise and address questions about what modern courts are, or are becoming.

Thomaz Pereira: *Between Reason and Politics: The Indian Constitutional Court's Struggle to Protect the Constitution from Parliamentary Sovereignty*

The most famous element of Indian constitutional law is its Supreme Court an institution at times referred to as the most powerful one of its kind in the world. Should India be understood as a prime example of courts exercising judicial review in their function of guardians of reason (or elite interests or formal legality or democracy or the rule of law, against the irrationality of the popular will? Through an analysis of the "four judges cases" in which the Court has determined the process for the appointment of its own members I will endeavor to construct an alternative narrative. An in-depth discussion of the Indian constitutional jurisprudence should serve to illuminate the broader research question of how variations in institutional design can be linked to different understandings on the source of legitimacy and functions of constitutional courts and constitutional law in different political communities.

Jaclyn Ling Chien Neo: *Secular Constitutionalism in Singapore: Between Equality and Hierarchy*

The Singapore constitution has often been described and analyzed as secular but in a qualified manner. This, I argue, is because commentators have applied the dominant paradigm of secular constitutionalism as (institutional) separation in examining Singapore's constitutional practice. Singapore defies this constitutional model because of its close entanglement with religion. In this article, I apply two different analytical models to better capture and evaluate Singapore's secular constitution. Specifically, I argue that the political discourse in Singapore has centered upon the ideal of neutrality and equal treatment of all religions. This conforms to a model that I call secular constitutionalism as equality. However, the legal jurisprudence shows a divergent approach whereby secular law, norms, and authority are prioritized, often lexically, over religious ones. The implications of this divergence is further examined in the paper.

This panel considers the legal construction of motherhood. In many European constitutions, mothers are entitled to the special protection of the state. At the same time, it is almost universal that the constitutional guarantee of equality encompasses the norm against sex discrimination. This panel considers how the regulation of abortion, surrogacy, parental leave, breastfeeding and childcare constructs what motherhood is and why the status of mothers is a subject for constitutional lawmaking.

Participants	Julie Suk Stéphanie Hennette-Vauchez Rosalind Dixon Jade Bond Mathilde Cohen Laurie Marguet
Name of Chair	Gráinne de Búrca and Ruth Rubio-Marín
Room	UL6 3071

Julie Suk: ***The Comparative Constitutional Law of Protecting Mothers***

Many constitutions around the world have provisions guaranteeing mothers the special protection of the state. These constitutions also prohibit sex discrimination, and/or guarantee the equality of men and women. In the United States, legal feminism and the constitutional sex equality law have long regarded special protections for mothers to be dangerous, if not antithetical to the very idea of women's equal citizenship. This paper explores the reconciliation of constitutional maternity protection with constitutional sex equality clauses in European constitutional orders. In the United States, the protection of women as potential mothers has led law to restrict abortion, work, and choices in childbirth. How might the constitutional tradition of protecting mothers and promoting sex equality in Europe inform U.S. law's approach to protecting mothers?

Stéphanie Hennette-Vauchez: ***Motherhood / Parenthood in EU law: surrogacy exceptionalism as the developer of the uneasy place of sex in anti-discrimination law***

Since the 1970s, the legal construction of motherhood under EU law has been marked with its increased conciliation with the parallel rising of the principle of non-discrimination based on sex. As a consequence, several of the rights and benefits associated with motherhood were extended to parents – regardless of their sex. Iconic in this respect js the 2010 Pedro Alvarez case of 2010, in which the Court ruled that a breastfeeding leave could not be denied to a father on the sole basis of his sex. Recently however, the CJEU seems to have shifted directions in contexts where it decided to deny legal commissioning mothers the right to benefits associated with maternity, on the grounds that "maternity" under EU law only applies to women who have been pregnant or gave birth. Beyond surrogacy exceptionalism, this mode of reasoning raises questions on the profoundly gendered and sexed nature of "motherhood" as a legal category that lead to questioning the legal (can sex-based discrimination truly be totally outlawed?) and political (if commissioning mothers aren't mothers, what about the surrogates) dimensions of EU law's construction of motherhood.

Rosalind Dixon and Jade Bond: ***Constitutions & Reproductive Rights: Convergence & Non-Convergence***

Constitutional abortion decisions occupy a large amount of attention in comparative constitutional law scholarship. Yet they represent a relatively small fraction of the actual constitutional 'universe' when it comes to reproductive rights. In most countries, access to abortion is either practically or legally significantly more permissive or restrictive than in countries such as the US, Germany and Colombia, where have delivered some of the best-known abortion law decisions. Access to abortion is also regulated by statute, common law or executive action in ways that have little direct connection to capital 'C' constitutional norms. While a close reading of abortion decisions in these countries, or Canada, might suggest significant divergence in courts' approach to pregnant women's rights, and the rights of the fetus, from a broader perspective there is thus important convergence in the degree to which these cases constitutionalize, and impose bounds on, questions of reproductive rights access. The question this poses for scholars is what explains this turn to constitutional argument in some countries, and not others, within a similar legal and social domain; and the article begins to sketch some preliminary thoughts about the kind of supply- and demand-side factors that might play a role in this process.

Mathilde Cohen: ***Constructing Mothering Through Breast Milk: A Comparative Approach***

The intersection of laws and social practices surrounding breastfeeding have long been the site of a Kulturkampf for the definition of motherhood. Historically, women have tailored their infant feeding practices to fit their culture's dominant mothering ideology, which ranged from the 18th century French rejection of breastfeeding for all women who could afford it to the contemporary North American intensive mothering expectations of long-term nursing. Today breastfeeding is no longer merely a sign of "good mothering," it has become a contentious site for the definition of motherhood and the state's involvement in its construction.

Does breastfeeding make one a mother? An analysis of recent legal developments in the United States, France, and European Union law reveals that law is in flux, with different courts and jurisdictions adopting conflicting principles. Lactation blurs the line between biological and social motherhood, revealing law's embedded biases in favor of one or the other. In the United States, standard surrogacy contracts contain a "lactation clause" whereby prospective parents can secure breast milk for their babies from their surrogate. At the same time, foster mothers who seek to induce lactation to breastfeed their foster child need to go through a series of steps to obtain the required approval from the foster agency. In the European Union, according to the Court of Justice, men who apply for a parental leave to "breastfeed" their infant should obtain it, but women who induce lactation so as to breastfeed the baby they had through surrogacy are not entitled a "maternity" leave. Based on these examples as well as the law and history of milk banking, this paper will argue that breast milk has become a central aspect of discourses on what constitutes mothering and who should and should not mother.

Laurie Marguet: ***The legal construction of motherhood in French and German Law: A Comparative Analysis***

In French law, "filiation is established, with respect to the mother, by the designation of the latter in the act of birth". In contrast, in German law, "the mother of a child is the woman who gave birth". This paper seeks to explore the theoretical stakes of these differing legal constructions of motherhood. Essentially, it examines two possible readings of the French and German regimes of motherhood. On the one hand, they can be read as essentially convergent in that neither considers motherhood as a choice or a social function but rather, as a natural fact. To the extent that they are/were once pregnant, women become mothers: both legal regimes are thus based on a stereotypical association of the female sex and motherhood. On the other hand however, the difference between the French declaratory model (the mother is the woman who is designated in the birth act) and the German bodily model (the mother is the woman who gave birth) is one that has allowed the differential development of significant institutions in both legal orders. Whereas the German model seems to rely more heavily on biological/corporeal elements (genes and pregnancy) than the French one (the French model has been coined "pseudo procreative"), the legal answers to surrogacy as well as the legal regulation of anonymous birth make the picture more complex. As far as surrogacy, for instance, it is striking that regardless of comparable legal regimes, the interpretation of the rules in both legal orders varies greatly as German judicial authorities seem much more concerned with children's interests than with the preservation of institutional artifacts. The paper seeks to expose the complexities and intricacies.

47 COMPARING LAW(S) AND INSTITUTIONS

Panel formed with individual proposals.

Participants	Yoav Dotan Lorne Neudorf Elona Saliaj Alberto Febbrajo
Name of Chair	Lorne Neudorf
Room	UL6 3119

Yoav Dotan: ***Introducing: The McDonald's Index for Comparative Administrative Law and Regulation***

The field of comparative law in general, and administrative comparative law in particular, is notorious for suffering from severe conceptual, practical, epistemological, and methodological difficulties. Comparativists usually lack information about the intricacies of foreign legal systems and are epistemologically constrained by their system of origin. Even more troubling is the gap between the 'law in the books' and the 'law in action' that seems to be particularly wide in the field of comparative administrative law. In the current paper I present a new conceptual and practical tool for the study of comparative administrative law. This suggested methodology is based on using a common real-life reference point such as McDonald's branches, and testing the ways in which various legal regimes apply to them in each and every different legal system. By using a bottom-up empirical methodology of that kind, I argue, we shall be able to overcome most difficulties in current CAL research and move on towards more systematic and analytical methods of comparison.

Lorne Neudorf: ***Taking Comparative Law Seriously: Rethinking the Supreme Court of Canada's Modern Approach to Statutory Interpretation***

In 1998, the Supreme Court of Canada (SCC) adopted the 'modern approach' to statutory interpretation. By separating the Court's interpretive analysis into three stages focused on text, context, and purpose, the modern approach sought to provide greater legal certainty and clear guidance for judges in interpreting legislation. By examining the SCC's jurisprudence over the past decade, it is clear that one important aspect of interpretation has been neglected as part of the modern approach: the use of foreign law. The approach of the SCC to foreign law in applying the modern approach appears to have been mostly unprincipled to date. In some cases, the SCC looks elsewhere for guidance or to learn important lessons that can be applied to the interpretive problem at hand. In other cases, the consideration of foreign law appears to be absent despite highly relevant developments in similarly situated countries. This paper argues that a re-evaluation of the 'modern approach' is necessary to fulfil the goals of the modern approach by making explicit the circumstances in which courts will draw upon and examine foreign law.

Elona Saliaj: ***Comparative analysis of the institution of registration of immovable property in Albania compared with Germany***

This presentation presents comparative overview of the institution of registration of immovable property comprising each country, as an important institute legal publication of the right of ownership and other real rights related to them. Comparative analysis of the institution of registration English with German, seeks to identify the characteristics contained in this institution in terms of legislation, the registration of real estate and real rights related to them, the management of the institution of real estate, practical and legal problems comprising each system, etc. Thereby, the comparative analysis focuses more on presenting characteristics similar and distinctive to each of them to highlights and to reflect the advantages and disadvantages of having each system in order to improve the Albanian system of registration of real estate through the incorporation of legal reforms.

Alberto Febbrajo: ***Quo Vadis Public Law?***

The fundamental concept of the constitution is changing rapidly. On the basis of the general formula one state one constitution the constitution used to be seen as the sole and indisputable mother of the legal order as the "norm of the norms" on which the individual legal decisions could ultimately be grounded as the benchmark for sustainable and coherent solutions to the problems of a differentiated society and as a safe harbour where the certainty of law could be protected successfully. Due to its privileged relations with civil society on the one side and with political power on the other the constitution was consequently used in many convergent ways: by judges as the main tool for granting identity to their legal decisions by political actors as the main criterion for defining the limits of legal interventions and by the public as the main institutionalised norm for defending the abstract recognition of new rights or the elimination of previous constraints.

48 FROM MIGRATION CRISIS TO THE END OF SCHENGEN?

The focus of the panel is the relationship between the EU migration crisis and the future of the Schengen area. The survival of Schengen crucially depends on the capacity to manage the flows of migrants coming from Syria and other Middle East and African countries. The four papers – discussed by Sabino Cassese and Jürgen Bast – will deal each with a specific aspect of that broader issue: the inadequacy of the Dublin system (Favilli), the absence of a common asylum policy (Torricelli), the failures in the control of internal and external borders (Gautier and Savino). The following crosscutting questions will be addressed in the discussion: What are the weaknesses of the EU Commission's Agenda on Migration? Is there any (realistic) perspective for a common asylum policy? How the end of Schengen would affect member states' ability to manage immigration? Is there any future of the EU beyond Schengen?

Participants	Chiara Favilli Simone Torricelli Mario Savino Marie Gautier-Melleray
Name of Chair	Sabino Cassese and Jürgen Bast
Room	UL6 2093

Chiara Favilli: *Will Relocation Save the Dublin System?*

The Dublin system is currently experiencing great difficulties. Lack of cooperation circumvention of its application ECtHR judgements are the main reasons of a crisis that could be overcome only with a new strategy. Within the framework of the 2015 Agenda for migration this new strategy is labelled "relocation" eventually giving to the principle of solidarity a practical dimension besides the traditional financial and technical ones. However, relocation seems to suffer from many of the same weaknesses of the Dublin system in particular the lack of cooperation by EU Governments and circumvention of its application by asylum seekers who pretend to choose the State where to stay notwithstanding they don't have such a right to choose. Within this framework the paper will explore alternative ways to cope with the migrants crisis focusing on what there is (relocation) what lacks (a proper humanitarian operation) and on what should be (free movement) in the EU's Agenda for migration.

Simone Torricelli: *Mutual trust or mutual distrust in EU asylum law?*

In this last decade, the application of the EU Asylum Law has shown the weakness of the European approach to the problem of refugees. The Dublin Regulation has been able to provide a quick and fair management of the migratory flow and to guarantee the respect of human rights, according to the standards required by the ECHR, Criticisms focus on ambiguities and internal contradictions of the EU regulatory choices: the paper aims at showing these inconsistencies and exploring how they affect the effectiveness of EU regulation. The possibility of a change of direction will be discussed and it will be emphasized how the implementation of the principle of mutual trust between Member States, in all its juridical consequences, can play a key role in a reform process and can contribute to guarantee the rights of persons, the effectiveness of administrative action and the harmonious development of the common market.

Mario Savino: *Beyond Schengen? Europe's Search for a Model of Border Control*

The migration crisis has induced a complex process of de-bordering and re-bordering in Europe. The increase in migration flows has exacerbated the administrative deficiencies of Greece and Italy in the management of the most exposed part of the Schengen external border. Several Member States have responded with the reintroduction of internal border controls: a "temporary" suspension of Schengen that might become permanent. The EU Commission, by contrast, has re-launched the idea of a European border and coast guard, and has advanced a "hotspot" approach to strengthen border controls along the Greek and Italian shores. As these contradictory trends show, in an era in which the prospects of a "borderless world" (Ohmae 1990) appear completely outdated, Europe is in search of its own model of border control, at the crossroads between re-nationalisation and de-nationalisation.

Marie Gautier-Melleray: *Is the Abolition of Internal Borders a Realistic Goal? About Life and Death of the Schengen Agreement*

The Schengen Area was supposed to be one of the greatest achievements of the EU. But Schengen is now moribund. This situation is of course due to recent and temporary events. But it has also structural and systemic Causes. The transfer of power has never been complete in this field and the achievement in the field of borders' control is not enough to build a EU immigration policy. The Schengen Agreement never fully reached its goal: establishing for individuals an Area with no border checks as the EU established for goods with the Single Market. This failure raises questions about the possibility of conceiving, concretely and theoretically, an Organization composed of States with no borders.

49 SUSTAINABLE URBAN DEVELOPMENT AND NEW FRONTIERS FOR LOCAL GOVERNANCE

The quest for sustainable urban development has put subnational institutions at the forefront of the process of change that public law is undergoing. Participatory decision-making is proliferating to co-determine urban plans and the use of public spaces. The pluralistic character of the cities has led administration, society and business to create new structures to take decisions outside representative institutions. In the energy sector, sub-state authorities have developed new legal tools and become powerful actors of the global arena. In light of these changes, one question emerges: how is the evolution towards sustainable urban development affecting the classic categories of public law? This panel aims to respond to this question by focusing on diverse practices of innovative local governance. This effort will serve to understand whether the legal instruments developed at subnational level provides effective solutions to the wicked problems that other levels of government are facing.

Participants	Chen Hung Yi Andrea Averardi Pier Marco Rosa Salva Valerio Lubello Carlo Maria Colombo
Name of Chair	Carlo Maria Colombo
Room	DOR24 1.403

Chen Hung Yi: ***Crowdfunding and its interaction with urban development***

While crowdfunding and its financial regulation have been extensively discussed, the interaction between crowdfunding and urban development is relatively unexplored, which includes (1) public participation, and (2) municipal finance. This paper studies crowdfunding campaigns in Taiwan, which provides citizens an innovative way to participate public affair. Additionally, this article will introduce how government can use crowdfunding to raise funding for certain public project from citizens by introducing the mechanism in Japan, the United States and the United Kingdom. Two general observations will be derived. One relates to the difficulties of municipal finance, which are universal issue in some cities. Another observation, relating to efficiency of public affair, shows the crowdfunding may improve an unnecessary and time-consuming procedure.

Andrea Averardi: ***Beyond sub-national territorial borders: infrastructure siting conflicts as a matter of national interest***

Infrastructures siting policies continue to be the target of frequent oppositions from local communities. Adopting an empirical approach, the paper aims to provide a critical legal analysis of the decision-making processes for siting local-unwanted facilities. The first part of the paper examines cases which turn up to be significant as examples of 'conflict on the decision' and ,'conflict on participation'. In the second part, additional cases are considered to show the relationship between participation, decision and consensus-building. The conclusion provides an interpretative grid for the deconstruction of the causes of siting conflicts, pointing out the potential role of local communities participation and sub-national authorities governance. Furthermore, it designs a decision-making model characterized by an incremental approach, in which the inclusion of the voice of private subjects in the public action grants a procedural accountability of public administrations.

Pier Marco Rosa Salva: ***Sustainable development and local governments: how the energy transition is influencing public law, changing its borders and enhancing its evolution***

The energy challenge that the world is facing requires energy transition processes to be implemented everywhere. In spite of their proximity to the territory and their potential role to locally develop energy policies, cities are still disregarded by higher government levels and result ill-equipped to respond to this issue. Nonetheless, local authorities have decided to take the lead in implementing the energy transition, by the adoption of innovative regulations, the creation of networks and the stipulation of European-scale agreements. Cities are increasingly developing new governance models and are using resources and urban planning as tools to enhance sustainability. By focusing on the solutions implemented and on the public actions taken in and by different cities, the paper argues that local governments are influencing the architecture and the methods of public law, changing the dialectic among its actors, extending its traditional boundaries and enhancing its evolution.

Valerio Lubello: ***The law of the sharing mobility. A comparative perspective***

The essay wants to provide a global and comparative overview of the main issues related to the s. c. sharing mobility. The analysis will cover the multilevel governance of the current legislative framework, trying to define a better standard of legislation in several but connected fields, such as: car pooling, car sharing, Uber business model, driverless cars, bike sharing etc. The paper wants to explore the role and the perspective of such alternative mobility instruments in the multimodal transportation system. The aim of the essay is to fix the main legal issues of the emerging mobility paradigm: a definition of shared mobility; the role of a new concept of urbanism driven by massive data shared by public and private subjects; the role of the new technology in the s.c. sharing mobility and the role of legislations; the different models of sharing mobility.

Carlo Maria Colombo: ***Hybrid local governance and the crumbling public/private divide: the renaissance of administrative law beyond the forms***

In many areas, public and private powers are experimenting new ways of interaction. I name them hybrid governance to stress the mix of logics and tools. While these interactions have been triggered by globalization, privatization and the need to gain from citizens' representation, they come at a price. Since hybrid governance allows private powers to expand beyond their heartland, the perimeter of public law becomes uncertain. Representative democracy and the classic legitimacy paradigm are constrained. All these issues come down to one question: how is public law changing to ensure that hybrid governance does not endanger public values? In this paper, I examine the challenges of hybrid governance at local level. Local governance provides many fertile examples of public/private interaction and is embedded in a sub-layer of public law values. I argue that the enlarged application of public law principles ensures that decisions taken by forms of hybrid governance respect public values.

50 WHY IS MIGRATION TREATED SO DIFFERENTLY? – ON THE EXCEPTIONALISM OF IMMIGRATION LAW COMPARED TO OTHER FIELDS OF PUBLIC LAW

The panel addresses the exceptionalism of migration as compared to other subjects of regulation in public law. We hope to point at ways to better use the full toolkit of public law in the regulation of migration. Dr. Marion Panizzon focuses on the uniqueness of migration as a subject of regulation in international law and makes use of the paradigm of multilevel governance to substantiate this observation. Jaana Palander shows the exceptionalism of immigration law on the example of the proportionality principle in family reunification and points to ways how to overcome this exceptionalism. Dr. Johannes Eichenhofer and Dr. Carsten Hörich will turn to the case of German immigration law. They present an alternative German immigration act that treats migration more like other activities. Dr. Stefan Schlegel shows how the theory of property rights applied to immigration law can help to highlight the various ways in which immigration law differs from other fields of public law.

Participants	Marion Panizzon Johannes Eichenhofer Jaana Palander Stefan Schlegel Carsten Hörich
Name of Chair	Stefan Schlegel
Room	DOR24 1.404

Marion Panizzon: ***Escapism and the promise of multilayered governance for international migration law***

International migration law (IML), coming out of the "triangular relationship" among host/home states and migrants, cannot expect to display the same degree of reciprocity and collective action as in other public international law. And yet, should migrants be protected from discrimination, less fragmentation within the body of IML is necessary. This paper conducts a neofunctionalist analysis of IML to better understand why there is a "dynamism and diversity of its sources of law" into self-contained sub-regimes (refugees, labor, environment). Combining legal scholarship on "cumulative relationships" with regime theory we explore why IML could benefit from multilayered governance as a structural and quasi-constitutional principle. We acknowledge that "layering", defined as the need to scale up or down, may correct skill or other bias, but runs the risk of „escapism". Such attempts to bypass human rights or anti-immigrant sentiment may increase the efficiency, but not necessarily the legitimacy of IML.

Johannes Eichenhofer: ***An alternative draft to the german residence act: how everything changes if exceptionalism of immigration law can be overcome***

German immigration laws have traditionally banned immigration with a permit reservation. This principle can be challenged from an EU-law, a human rights and an integration policy perspective. Sharing these critique on the current German Immigration Act, a group of young migration law scholars and lawyers have unified to draw an alternative draft for a new Immigration act. This presentation aims to demonstrate the first thoughts being exchanged within the group. The key of this draft is the idea, that a new Immigration act should acknowledge a fundamental right to immigration. Accorindgly, it would not be the migrants who would have to justify their stay in Germany, but the German state who had to jusitify a potential denial of immigration. This would not only change the political debate about migration, but the character of immigration law: It would no longer be a domain of discretion, but an instrument of human rights protection.

Jaana Palander: ***Interlaced European standards on family reunification law: reducing exceptionality of the proportionality assessment?***

European countries are tightening family reunification rules to curb the number of migrants. A topical theme therefore is to clarify the European constitutional and administrative law restraints on restrictions to family reunification. However, defining EU law and human rights law obligations on treatment of migrants' families is challenging, especially when both legal regimes are simultaneously relevant, as is the case with refugees and third-country national sponsors.

This study compares the approach and especially the proportionality assessment between the ECtHR and the CJEU. In the context of family reunification of third-country nationals it is actually EU law that has better protection since it recognizes a right to family reunification, which should also be reflected in the proportionality assessment. Currently the European standards are thus interlaced. I argue that in EU migration law, the exceptional logic familiar to European human rights law should be reversed and thus normalized.

Stefan Schlegel: ***Migration as a property right: A law and economics way to show exceptionalism in immigration law***

The Theory of property rights describes the law as a system that allocates property rights over goods. For each good in a society, the law has to take two fundamental decisions. 1.) Which person should have control over this good? 2.) by what rule should it be allowed to transfer this property right from one agent to another?

The right to decide over somebody's migration is a good and a factor of production because the possibility to migrate is a precondition for a host of economically useful activities. Therefore, the law has to allocate a property right over this resource (usually allocated receiving states) and a transaction rule. If immigration law is understood as the sum of rules that allocate the property rights on migration and that define the rules to transfer this right, immigration law becomes comparable to other fields of public law and its exceptionalism becomes visible.

Carsten Hörich: ***Discussant***

51 BORDERS AND BOUNDARIES IN INTERNATIONAL, TRANSNATIONAL AND EU LAW

Panel formed with individual proposals.

Participants	Andreas Kulick Lorenzo Saltari Mayu Terada Gabriella Margherita Racca Stephanie Law Federico Suárez Ricaurte
Name of Chair	Gabriella Margherita Racca
Room	DOR24 1.405

Andreas Kulick: ***Neither here nor there – Horizontal Effect and the Challenges of Trans-nationalization***

Are fundamental rights restricted to the individual-state relation or do they – in one way or another – apply also among individuals? There is a lack of approaches that tackle current and future challenges posed by phenomena in private relations such as de-territorialization, ubiquity and increased mobility. The internet is the prime paradigm for such changes, but also beyond the realm of the cyberspace, issues of horizontal effect transgress borders: Do fundamental rights apply (and which fundamental rights apply) if I chat online and get insulted by a Filipino living in Switzerland and seek civil redress before national courts? My presentation will flesh out the challenges such transnationalized horizontal effect constellations pose from the perspective of constitutional theory and will seek to identify six issues that are particularly pertinent for reconstructing a horizontal effects doctrine responsive to the said challenges.

Lorenzo Saltari: ***National implementation of supranational functions. The grey zone across the borders: why common and unitary regulation of administrative procedure in EU it is necessary***

The execution of common administrative functions in Europe remains largely in the hands of national administrations. Not often, European law puts in the hands of national administrations whole execution of the common function. After some time, they are no more effective unless the state decided to make them definitive. This power of European Commission, concerns the interests both of all European consumers and of the food or fodder productive sector, ablative measures potentially damaged. European legislation, however, gives a power without specifying how to use it. It says that there must be legal protection. Nothing, however, it is said about how protect different interests before the decision is taken. To fill this gap would be helpful a common and unitary procedure that rules cooperation in European supranational system between the several member states. This paper tries to think over organization and results of a possible European regulation of administrative proceedings.

Mayu Terada: ***Borders, Network and Regulations: Functions of Regulatory Bodies in the Telecommunication Field in EU and Japan***

Information flows all over the world especially through the internet across borders. But regulations are different from countries to countries. This paper focuses on the functions and actual regulations of the regulatory bodies of EU and Japan. How should public agencies deal with the problems that arise from the internet and the basic network system is a difficult question. This paper deals with EU and Japan's functions of regulatory bodies in the telecommunication field because comparative law is actually functioning in creating the regulation especially on network system because of its borderless nature. There have been several regulations that are announced by the EU rulemaking sectors regarding data portability and data protection etc. Japan is also trying to update its regulatory sector and regulations and this paper analyses the communications and cooperation of public agencies of EU and Japan.

Gabriella Margherita Racca: ***Trans-border Cooperation for Integrity, Equality and Trust in Public Institutions***

Corruption – widely defined as abuse of power for private gain – causes inequalities and undermines trust in public powers. The paper highlights to what extent corruption erodes the pillars of democracy, the solidarity principle and fundamental rights. Corruption overcomes any border and its transnational relevance has been recently highlighted in the opinion of the European Economic and Social Committee on "fighting corruption in the EU: meeting business and civil society concerns" (2016). The strategy for integrity requires a "enhanced and inclusive transnational anti-corruption cooperation" improving coordination among the relevant bodies (OLAF, Eurojust, Europol, Ombudsman, Court of Auditors) and coordination and cooperation among national public entities (e.g. exchange of information and of civil servants as well as supporting training schemes). The pillars of trans-border anti-corruption strategies should be the values of solidarity and social cohesion. Systemic corruption exasperates inequalities and often stakeholders are kept unaware of such distortions due to a lack of transparency, information asymmetries, or undeveloped competences. Wider transparency, the oversight of civil society, of the media and the administrative cross-border cooperation to enforce accountability of politicians and civil servants is needed. A concrete risk of loss of reputation might become an effective deterrent to improper conduct for the pursue of public good.

Stephanie Law: ***The Constitutionalisation of Consumer Protection Law: An Analysis of the CJEU's Boundary-breaking Jurisprudence***

Engaging the example of consumer protection law, existing within national legal systems, as well as at the EU and indeed international levels, I will firstly illustrate the foundations of its establishment as a distinct category of law, and explain the way in which – via the breaking down of rigid legal categories – it has come to encompass part of the interlegality of EU law. The CJEU, in a line of preliminary references made from the national courts, has interpreted – albeit not necessarily in an explicit manner – Union law and its foundational principles of equivalence and effectiveness in such a way as to provide for the deconstruction of the boundaries between private law and fundamental rights protection (particularly in terms of Art.47 CFR) and substantive and procedural legal protection. Consumer protection is particularly interesting as it reflects a rather distinct area in terms of the CJEU's exercise of its jurisdiction and expansion of the scope of Union law beyond that initially or expressly set out by the Union legislature, that is, the shift from legislative intervention to judicialisation. To conclude, I will draw some conclusions as to the impact of this jurisprudence on the constitutionalisation of consumer protection – and more broadly, private – law.

Federico Suárez Ricaurte: ***Foreign direct investment against Sovereignty of the Third World Countries as an organization in the international legal order***

The argument that I will develop is that private property rights of the foreign investor prevailed over sovereignty of Third World Countries in the international legal order. Since the last three decades, in the economic and political field, the institutional order has increased the protection of the foreign investor from an ideological and institutional realm. The institutional framework compound by international economic institutions, free trade agreements or bilateral investment treaties, and leading rulings of arbitral tribunals, among other international and national tools are mainly designed to encourage the assets of the foreign investor, rather than self-determination of the countries, human rights, welfare of the population, and protection of the environment. This set of institutions, treaties and theories has the power to delineate the political economy of the countries, depriving them in several cases of the basic policies that a country can adopt to achieve welfare.

Panel formed with individual proposals.

Participants	Ligia Fabris Campos Joseph Corkin Fernando Muñoz León
Name of Chair	Ligia Fabris Campos
Room	DOR24 1.501

Ligia Fabris Campos: *Trans*' rights in Brazil and Germany: Legal interpretations of Harm to self?*

The objective of my proposal is to analyse transgenders rights in Brazil and Germany in light of the concept of 'harm to self'. I believe that the use of this concept combined with the perspective from gender studies could be a mechanism to understand the contradictions, setbacks and advancements as well as the questions upon state intervention in the private sphere of trans* people in both countries. In Brazil, until 1997, the sex reassignment surgery used to be considered a crime. Although there has been no change in criminal rules, today this surgery is allowed and performed free of charge in public hospitals. Germany has also a vivid debate on the theme. In 2011 the German Constitutional Court has declared unconstitutional the requirement of the surgery and sterilisation as prerequisites for changing the registered gender. I maintain that in both countries those changes were based on legal interpretations of the concept of 'harm to self'.

Joseph Corkin: *Who, then, in [transnational constitutional] law, is my neighbour? Limiting the argument from external effects*

Constitutional pluralism, conflicts-law-constitutionalism and integration as demoicracy are all used to justify the EU as ensuring states consider their external effect on neighbours, but also that there are limits to this duty to maintain the idea of the state as a self-governing political community. Determining our duties to non-constituents raises moral philosophy because the ethical ideal of pure impartiality (that everyone has an equal claim to our attention and the ultimate relevant constituency is infinite) encounters a reality in which we only seem capable of transcending pursuit of self-interest within communities whose members share our (constructed) histories/cultures; their boundedness essential to developing bonds of mutual trust and respect. This makes a degree of partiality neither a human weakness nor a psychological limitation, but a morally justifiable part of living among those with whom we share special connections and through which we fulfil our social potential.

Fernando Muñoz León: *Social Infrastructure and legal knowledge: On The Difficult Reception of Antidiscrimination Law in Chile*

In Latin America, legal professionals tend to consider the object of their attention, the law, as a form of knowledge. This results in an abstract view of the law that obliterates the role that concrete subjects, with their personal stories and collective aspirations play in shaping the law. Most of the time, both, they and the political authorities issuing norms remain oblivious to the fact that, for its success, the rule of law requires the existence of what I would describe as an adequate social infrastructure, which comprises ordinary citizens and social movements engaged in struggles for the legal recognition of their needs and interests, legal professionals with an expertise in the relevant areas of law, various kinds of state officials that participate in the enforcing of norms, and political authorities endowed with the power to draft the letter of the law and to assign various resources to its enforcement. In this essay, I will elaborate on the role played by these social forces.

53 RITUAL MALE CIRCUMCISION AND RITUAL ANIMAL SLAUGHTER: LEGAL, MORAL AND CULTURAL PERSPECTIVES

There exists considerable controversy with regard to the Jewish and Islamic practices of ritual male circumcision and ritual animal slaughter. While those that engage in them claim that their behaviour is protected by religious freedom (and, in the case of circumcision, parental rights), critics argue that there are legitimate state interests in the protection of animals and children that justify their regulation or prohibition. The panel will approach these and related issues from different angles which include constitutional law and culture, moral philosophy, and human rights.

Participants	Iddo Porat Shai Lavi Kai Möller Abhayraj Naik Rachel Priyanka Chenchiah
Name of Chair	Kai Möller
Room	DOR24 1.502

Iddo Porat: ***Proportionality and the Constitutionality of Ritual Animal Slaughter and Male Circumcision***

Ritual animal slaughter and male circumcision are two religious practices of Jews and Muslims that, since the 19th century, have conflicted with the interests, the morals and the laws of modern Christian societies. In the past few decades both practices were challenged in European courts; two recent examples are the Cologne Regional Court's decision regarding the legality of male circumcision (2012) and the Polish Constitutional Tribunal's decision regarding the legality of ritual Jewish slaughter (2014). The counter claims in all such cases were that a restriction on these practices conflicts with the right to religious freedom. In Europe, as well as in many other countries, interpreting the scope of this right inevitably boils down to the test of proportionality, which has become the locus of constitutional review in most European jurisdictions as well as many other countries. The aim of my presentation will be to analyze and criticize the use of the test of proportionality in the context of these two religious practices, and also to place the use of proportionality in the context of the European constitutional culture more generally.

Shai Lavi: ***Unequal Rites: Jews, Muslims and Religious Freedom in Germany***

Religious practices of animal slaughter and male circumcision, shared by Jews and Muslims, have become a source of legal and public debate in contemporary Europe. Some European jurisdictions restrict (and even ban) these practices, while other jurisdictions offer an expansive protection of religious rights. Given the similarities between the practices and the liberal commitment to equality under the law, it would seem unlikely to find differences between the legal regulation of Jewish and Muslim practices. The paper will suggest, quite to the contrary, that the practices are, in fact, treated differently. Furthermore, I will suggest that the regulation of these practices is best understood not as a two way relationship between the secular state and a religious minority, but a three-way relationship between the (post-Christian) state, its Jewish, and Muslim members.

Kai Möller: ***What's Wrong About Ritual Male Circumcision?***

A recent judgment by a lower court in Germany brought the problem of ritual male circumcision to the consciousness of the wider public. My presentation argues that ritual male circumcision is not covered by parental authority. It first considers the best interest test of parental authority and argues that this test fails to take the boy's human rights sufficiently seriously. Instead, I propose the autonomy conception of parental authority, according to which parental authority must be exercised such as to ensure that the child will become an autonomous adult. While parents may raise their child in line with their religious convictions, respect for his autonomy requires that this be done in a way that allows the child to later distance himself from these values, this implies that irreversible physical changes are impermissible. Thus, ritual male circumcision is wrong because it usurps the child's right and responsibility to become the author of his own life.

Abhayraj Naik and Rachel Priyanka Chenchiah: ***Law, Violence and the Animal***

In this paper, we attempt to map out the complex, paradoxical relationship between law and violence in and through the figure of the animal. We anchor our musings in the terrain of the legal archive in India – a multicultural, federal, pluralistic, and democratic polity where a number of religions, traditions, and cultures articulate competing and conflicting conceptualizations of the human-animal relationship – and thus imagine and engage with the limits and possibilities of a truly post-colonial and post-human justice. Our enquiry addresses both the systemic violence that the body of the animal encounters in the contemporary socio-economic order, and the epistemological and ontological violence uncovered and/or generated through a philosophical engagement with the notion of the animal vis-à-vis the human.

54 CONSTITUTIONALISM FOR PEACE IN COLOMBIA I – LEGAL AND POLITICAL CHALLENGES

The Colombian armed conflict has conditions that make it unique which generates a set of new and distinct challenges faced in other transition processes crossed by other states. Specifically, there is a need to think about the answers that can be offered to the legal system in order to consolidate the success of a process of transition from armed conflict to peace. In response to these challenges, we present this panel related to the topic "Constitutionalism for peace in Colombia", which focuses on the legal and political aspects of transitional constitutionalism. The panel reflects a transition process that takes place under the rule of law but with some unusual features. It will cover the transformation of constitutionalism in order to ensure that legal and political institutions are tailored to the needs involved in ending the armed conflict. Ultimately, this panel will be about the way in which constitutionalism is adapted to achieve the overall goals of a political transition.

Participants	Gonzalo Andrés Ramírez-Cleves Paola Andrea Acosta Alvarado Diego González-Medina Alexandra Castro Franco
Name of Chair	David E. Landau
Room	DOR24 1.601

Gonzalo Andrés Ramírez-Cleves: *Constitutional amendments and the peace process in Colombia*

The paper will discuss the constitutional judgments that have been given by the Constitutional Court in the analysis of so-called "Legal Framework for Peace". It also analyzes the "Legislative Act for peace" which proposes an expedited amendment process to reach agreements with the partial participation of Congress and the strengthening of the powers of the President in order to develop these agreements through statutory laws. The paper will focus on problems related to the judicial review of these proposed or completed constitutional amendments, taking into account that the Colombian Constitutional Court has developed the power to declare the unconstitutionality of constitutional amendments through the substitution of the constitution doctrine. This review is based on the inherent principles of the Constitution and those arising from international human rights treaties, in this case especially those related with the rights of the victims to truth, justice, comprehensive reparations.

Paola Andrea Acosta Alvarado: *Constitutionalism for Peace and International Law*

International law has become an essential tool for achieving constitutional objectives, including peace. However, the close relationship between international law and constitutional law during peace processes and transitions to democracy has some drawbacks. In this paper we intend to address two fundamental issues. First, we want to emphasize the fundamental role of international law within the so-called "constitutionalism for peace" and, from this point of view, the advantages of having international support during peace processes. Second, we want to further draw attention to the challenges of this close relationship, as well as possible solutions to the dilemmas it poses.

Diego González-Medina: *Public Participation in the Constitution Building Process: a paradoxical matter*

This paper will examine the role of public participation in constitution-building processes, particularly within post-conflict societies. This paper analyzes the pros and cons of public participation and public referenda in constitution-building processes through studying lessons learned from various experiences around the world. Additionally, this paper analyses the current Colombian debate concerning public participation and public referenda in the aftermath of the current Colombian peace process.

Alexandra Castro Franco: *Welcoming migrants back home: the lessons from Colombia in post conflict scenarios*

One of the most dramatic consequences of armed conflicts all over the world is the flow of refugees and internal displacement. This situation presents an important challenge, not only for the international community, but also for the countries of origin whenever peace is achieved and the time comes to encourage these people to come back home. The Colombian internal conflict has forced more than 5 million people to leave their homes and flee to other regions of the country. In addition, Colombia is an emigration country with more than 4 million people, including 400.000 people with the refugee status, living abroad. This leads us to say that the country has more or less 10% of its population immersed in a population movement. Within this panorama, we intend to analyze the root causes, consequences and responses to the mass migration in Colombia. We will try to point out, first, the structural changes needed to make possible the return of Colombians.

55 THE ROMANIAN CONSTITUTION AT 25: A CRITICAL EXAMINATION OF ROMANIAN CONSTITUTIONALISM THROUGH ITS OTHERS

This panel critically examines the evolution of Romania's Constitution in the 25 years since its adoption. It does so through the lens of three of its 'others': national minorities, women, and citizens as empowered actors in the constitutional reform process. The papers discuss the exclusionary nature of part of the Constitution's eternity clause, gender equality guarantees, and the rise of citizen participation as three axes along which to trace the maturing of one of the most understudied post-Communist constitutions.

Participants	Silvia Suteu Elena Brodeala Paul Blokker Bianca Selejan-Guțan
Name of Chair	Silvia Suteu
Room	DOR24 1.604

Silvia Suteu: ***The Multinational State That Wasn't: Romania as a "Unitary and Indivisible National State"***

This paper critically examines the Romanian Constitution's unamendable commitments to the "national" and "unitary and indivisible" character of the State (Articles 1 and 153). The paper analyses the origins of these provisions, their interpretation in case law and their significance in Romanian constitutional discourse today. The paper traces the genealogy of the idea of the "national State" and explains the links between an ethnic-based definition of the constituent people and the exclusion of alternative, multinational, foundational narratives. Comparisons are drawn to other Eastern European countries seeking to enshrine, including via unamendable provisions, ethnic-majoritarian visions of the State in their constitutions. The paper argues that the 1991 drafters' swift adoption of this "national State" model haunts Romania's constitutional development to this day, including recognition of minorities, administrative territorial reorganization, and aspects of European integration.

Elena Brodeala: ***Women as Others: The Changing Status of Women in the Romanian Constitution***

This paper investigates to which extent the Romanian Constitution provided for adequate means to enhance women's equal citizenship in the last twenty-five years. By starting from Simone de Beauvoir's thought encompassed in the idea that gender inequality derives from defining women as "the Others", or as the totally opposite to men, the paper shows that since its adoption, the Romanian Constitution started to depart from the stereotypical and antagonist understanding of women and men's roles in society that Romania had inherited from its Socialist past. Yet, this paper argues that the developments that took place in the last twenty-five years are not progressive enough and that further improvements are still needed.

Paul Blokker: ***The Romanian Constitution and Civic Engagement***

The paper engages with the status of citizens and civil society in the Romanian Constitution of 1991 as well as their role in on-going constitutional politics and reform. First, the paper will engage with a brief theoretical discussion of the relation between citizens and constitutional change. Second, formal constitutional institutions and instruments of participation in Romania will be discussed in terms of available democratic instruments, related to representative and direct democracy, and in particular to possibilities of civic engagement in constitutional reform. Third, the usage of participatory instruments in the 1990-2015 period will be briefly discussed, with a particular focus on direct democracy and constitutional revision. Fourth, the paper will study the process of constitution-making and constitutional reform from the perspective of civic influence.

Bianca Selejan-Guțan: ***25 Years After: The Constitutional Court and Others in the Romanian Constitutionalism***

The Romanian current constitutional system has undergone numerous developments since its establishment in 1991. The Constitutional Court appeared as one of the central elements of the rule of law guarantee in Romania. The paper intends to present a critical overview of the actual role of the Constitutional Court in the Romanian constitutionalism, in the different contexts that link the Court with "others": with the state powers as well as with the individuals. The emphasis will be placed on the relationship between the Constitutional Court and the political powers, as well as on the relationship with the judicial system. A presentation in context will be envisaged: sources of inspiration; how the Court itself was seen as 'the Other' in its early years; the boundaries of constitutional review and the changing relationship with the legislature; the intriguing relationship with the executive, especially with the President; the sinuous relationship with highest court of the judiciary.

56 «LIBERTÉ, ÉGALITÉ, FRATERNITÉ» SOCIAL CHANGE BY UNCONVENTIONAL LEGAL MEANS

The panel will present three models of social change by means of unexpected redesigning constitutional structure and institutions. The first paper (on liberty) will show how an international religious court may help women to gain their freedom from religious marriage. The second paper (on equality) will suggest civic education and naturalization should be designed on equal ideological grounds and hence claim civic education exceeds its liberal mandate. The third paper (on fraternity) will demonstrate why socio-economic rights should be regulated via values of fraternity rather than the market exchange. Thus, the panel will deal with the challenges of public life and governance, combining elements in the very heart of public and comparative law, as well as social sciences and political theory.

Participants	Mohsin Bhat Felix Petersen Roman Zinigrad
Name of Chair	Roman Zinigrad
Room	DOR24 1.606

Mohsin Bhat: ***Fraternity and Regulation: Socio-economic Rights as a Social Practice***

Socio-economic rights have strained the classical picture of rights, property and the State. A controversial area is their impact on private rights and the regulation of property to make it accessible to the public. This paper contends that balancing – predominantly adopted by the courts and scholars – is inadequate to deal with such cases. By only stressing on rights, this method fails to focus on what values are at stake in such cases and identify the intellectual resources for resolving such conflicts. I argue that we should pay attention to the values democratic politics inscribes to social practices that are recognized as socio-economic rights. Focusing on the right to education cases in India and South Africa, I will show that social practices that come to be regarded as socio-economic rights are better understood as governed by the values of fraternity rather than market exchange. Fraternity provides a stronger and more appealing normative basis of resolving such conflicts.

Felix Petersen: ***Judicial Review and Social Construction: The Case of the Turkish Constitutional Court***

The Turkish Constitutional Court, Anayasa Mahkemesi (AYM), is often described as an agent of the regime. In this study critical appraisals of the AYM will not be refuted. Quite contrary, the aim is to make explicit what it means that a judicial review body becomes political by promoting problematic social constructions. The article focuses on judgments that deal with subjects relevant for understanding the relation of individual and society, and it shows how the AYM, as one constitutive element of the Turkish state, contributes to social construction. However, the study inquires a less piquant, yet illustrative topic – constitutional review of surname legislation. In this endeavor I go beyond the fixation on judgments as results of a judicial decision-making process, and, instead, investigate the reasoning. Drawing on social constructionist literature I will show that in the opposing reasoning of majority and minority opinion we can see competing constructions of Turkish society at work.

Roman Zinigrad: ***Parallels between Civil Education and Citizenship***

The number of citizens in a state may grow in two ways: birth and immigration. The process of acquiring citizenship in both cases is usually presented in very different manners: Birthright citizenship is thought to be technical while the naturalization of immigrants is understood to be of a more substantive nature. Questioning the above axioms my paper will present two interdependent arguments, both stemming from liberal theory and applicable to (more or less) liberal-democratic regimes. I will claim that the above viewpoint is in fact reverse. Not only that children are also subjected to substantive requirements as a precondition to de facto citizenship, but these substantive requirements are much more profound and intrusive than in the case of naturalization. Given the validity of the first argument the normative claim of the article will then be that these substantive requirements for "birthright citizenship" cannot be imposed on children of parents who object to this policy.

57 IRREGULAR IMMIGRANTS ACROSS BORDERS AND WITHIN: POLICED, MANAGED, IMAGINED

This panel examines the treatment of irregular migrants, and addresses questions of borders, movement and displacement. We take immigration control as a series of institutions, each with certain "nature" and "functions" that affects the identity of both the individual migrant and the host state. Often, we show, they lead to unintended consequences. Together, the different papers illuminate underlying racialized perceptions of different modes of irregular migration, in both, Germany and the United States.

Participants	Linda S. Bosniak Emily Ryo Leti Volpp Moria Paz
Name of Chair	Moria Paz
Room	DOR24 1.607

Linda S. Bosniak: *Wrongs, Rights and Regularization*

Assuming one supports programs of legalization or regularization for irregular immigrants in some circumstances, how is such support to be justified? There are a variety of normative rationales out there on behalf immigrant regularization which I will identify and analyze. My particular focus – the idea I want to follow throughout the discussion – is that of immigrant wrongdoing. Wrongdoing or wrongfulness is a normative premise that is addressed, one way or another, in all of the pro-regularization arguments. I look at how this presumption of wrongdoing is constructed, understood, managed, processed, overlooked, minimized, and even challenged en route to a regularization outcome. Why is the idea of immigrant wrongdoing so central? Because – in brief – it is a concept that captures the normative force of the border once interiorized in the liberal democratic state. The very existence of irregular migrants presupposes both exclusionary border rules and also their incompleteness or failure. In keeping with liberalism's often individualist and moralized approach to social outcomes, immigrant wrongdoing becomes the default organizing frame for addressing this failure. Border fundamentalists view this wrongdoing as preclusively barring regularization. Those who support regularization find themselves having to contend with the wrongdoing issue, but seek by various means to get beyond it. In this paper, I analyze the nature and significance of these efforts.

Emily Ryo: *Developing Legal Cynicism through Immigration Detention*

Every year, tens of thousands of noncitizens are held and processed through an expanding web of immigration detention facilities across the United States. I argue that this system serves a critical socio-legal function that has escaped the attention of policymakers, scholars, and the public alike. Using extensive original data on long-term immigrant detainees, I show that immigration detention is an important site of legal socialization that produces widespread legal cynicism among detainees. This legal cynicism is characterized by the belief that the legal system is punitive despite its purported administrative function, legal rules are inscrutable by design, and legal outcomes are arbitrary. These findings have significant policy implications because detainees, as individuals embedded in family and transnational networks, have the potential to widely disseminate deference and trust, or cynicism and delegitimizing beliefs, about the U.S. legal system and authorities.

Leti Volpp: *Welcome Refugees?*

This paper will examine the transnational migration of a particular sign, originally posted in 1990 along freeways in Southern California, depicting a man, woman, and child in flight, and warning: CAUTION. This sign, in the U.S. context, has long been associated with the idea of illegal immigration. But the same image of "running immigrants" has surfaced in Germany, albeit with a different message, namely "Refugees Welcome." This paper will discuss how we should read this sign and its movements. The migration and transfiguration of this sign illuminates how border regimes both rely upon and create racialization, in simultaneously identifying a bounded community for legal recognition, while excluding others from protection.

Moria Paz: *The Law of Walls*

Recently, Western democracies have turned to building border walls as a strategy of immigration control. This paper makes two claims. First, human rights courts and quasi-judicial bodies are deeply implicated in this move. Drawing on an analysis of case law, I show that they have worked out a system in which walls have become a predictable strategic solution for states that seek to retain control over immigration. Second, the way human rights enforcement bodies have treated border walls has made them legally permitted and even encouraged their construction. Immigration walls raise a jurisdictional challenge. Human rights law and the national law of many democratic states guarantee individuals that have established territorial presence access to basic human rights. A porous border is thus required by the very concept of universal human rights. In one view, because a wall is concrete in a way that the jurisdictional border is not, erecting a wall closes the porous border and is thus a matter of human rights. In another view, the construction of a wall is an administrative technique for controlling immigration and is, from a human rights perspective, a non-event. Neither view, however, can be wholly supported. The first is politically unsustainable, while the second is morally indefensible. Human rights enforcement bodies avoid taking a stand by regulating the physical structure of the wall. The result is the redrawing of borders that is politically unstable and is normatively unjustifiable.

58 FAMILY REGULATION AND SEXUAL FREEDOM: COMPARATIVE PERSPECTIVES ON MARRIAGE EQUALITY, MONOGAMY, AND ADULT INTIMACY

Our panel examines progress toward the legal recognition of same-sex marriage and considers which other reforms may or should follow from it. We consider the arguments advanced for and against same-sex marriage and ask whether civil marriage equality for gay and lesbian couples is an unstable stopping point on the road to more radical reform. If marriage is no longer "one man and one woman" united in a union oriented to procreation, what is the status of monogamy after same-sex marriage? While polygamy has generally been patriarchal in the past – as polygyny, or one husband with multiple wives – is there good reason to suppose this is likely to be true in the future? Should marriage itself be abolished in favor of the legal recognition of a wider variety of caring relationships. Don't principles of sexual freedom and diversity require the acceptance of a wider variety of partnership types? And if adult siblings wish to have sexual relations – and they take care not to have children – how can we continue to justify criminal prohibitions? The format of our panel invites audience participation.

Participants	Imer Flores Stephen Macedo Mattias Kumm Isabella Litke
Name of Chair	Imer Flores
Room	DOR24 1.608

Imer Flores: ***The Constitutionalization of Family Law and the Recognition of Same-Sex Marriage in Mexico and Elsewhere: A Comparative Overview***

Although the past 50 years have been characterized by the struggle for the recognition of the rights of and for the LGBTTT community it is beyond discussion that the year 2015 was decisive in this process. Actually, the Mexican Supreme Court, in early June – and a couple of weeks before of the United States Supreme Court analogous ruling – declared the unconstitutionality of any general norm, including local constitutions, that DOMA like, define civil marriages as the "union of one man and one woman" and that reduced its end to the "procreation and perpetuation of the human species". Hence, I intend not only to revise the debate regarding the recognition of same-sex marriage as a civil institution or as another form of contractual relationship but also to revisit its recognition in the Mexican case and elsewhere to provide a comparative overview.

Stephen Macedo: ***What's Next?: Sexual Freedom and Diversity After Same-Sex Marriage, Holding Line on Incest and Polygamy***

New challenges to monogamous marriage and legal limits on sexual freedom have also arisen in many jurisdictions. Is there a principled case for confining marriage to two adults after the acceptance of same-sex marriage? And what about consensual sexual relations among adult siblings: can age-old legal prohibitions on adult incest be justified when there is no intent to procreate? These challenges revive old controversies concerning polygamy and new (or apparently new) questions in the form of "polyamory" or "polyfidelity": egalitarian forms of group intimate relations.

I argue that legal recognition of plural marriage is not currently warranted and general criminalization of adult incest should be preserved (recognizing the need for exceptions in extremely unusual cases). I draw on court decisions concerning polygamy in Canada and the US and controversies about the criminalization of adult incest in Germany and elsewhere. Monogamous marriage and prohibitions on incest help secure the foundations of equal liberty and fair opportunity, and so reflect (rather than limit) the core values of liberal democratic constitutionalism properly conceived.

Mattias Kumm: ***Commentator***

Isabella Litke: ***Commentator***

This panel will explore how the concept of human dignity can inform the debates on the refugee crisis that Europe is facing. Erin Daly will focus on the dignity interests that are impaired when people become refugees and can no longer engage in community activities including participating in decision-making and shaping community values. Catherine Dupre will consider what lies behind the inviolability of human dignity making it the strongest normative basis for protecting 'otherness'. Daniel Bedford will explore the ways in which human dignity is used to include the experiences of persons who might otherwise not be protected in law because of their 'Otherness'. Tarunabh Khaitan will discuss how the 'expressive' element in dignity can be instructive in the understanding of the concept. Ioanna Tourkochoriti will analyze various philosophical conceptions of human dignity to propose an understanding of the concept as unconditional respect, which dictates positive obligations to the states.

Participants	Erin Daly Catherine Dupré Daniel Bedford Tarunabh Khaitan Ioanna Tourkochoriti
Name of Chair	Ioanna Tourkochoriti
Room	DOR24 1.402

Erin Daly: ***Refugees: Loss of Community Loss of Dignity***

When refugees are forced to leave their homes – whether due to political instability or environmental changes – they leave behind not only their belongings, but also their communities. But belonging to a political, cultural, or social community is an aspect of human dignity that is threatened or diminished when people who once shared their lives, scatter to distant parts. This presentation will examine the dignity interests that are impaired when people become refugees and can no longer engage in community activities including participating in decision-making, claiming rights, and reflecting, shaping, and perpetuating community values.

Catherine Dupré: ***The inviolability of dignity***

'Human dignity is inviolable': while one of the first philosophical formulations of human dignity as 'the right to have rights' was famously made in the post-war years with regards to citizenship, the concept has lost none of its significance in today's Europe, particularly in relation to the current refugee crisis. Since the coming into force of the Lisbon Treaty in 2009, human dignity has acquired exceptional normative strength as being 'inviolable' (Article 1 EU Charter). The paper examines what lies behind the inviolability of human dignity and brings to the fore the core rights that give human dignity a clear substantive definition and make it the strongest normative basis for protecting 'otherness' in European constitutionalism.

Daniel Bedford: ***Including the Other and Challenging the Norm: The Role of Human Dignity in UK Law***

Drawing on examples from UK law, this paper explores the ways in which human dignity is used to protect the interests of the Other. The first part of the paper examines the role of law in (re)producing a particular sense of Otherness. It highlights how the privileging of the sovereign legal subject has been central to the establishment of the Other as a category of exclusion. The paper then discusses how dignity has become associated with the protection of various marginalized subjectivities in UK law. It argues that dignity has been used to expand the law's field of vision through the protection of a wider range of human dimensions. It claims that these developments can be understood as affirming the dignity of the vulnerable subject. The final part of this paper will consider the potential implications of displacing the sovereign legal subject from its privileged position, treating instead the dignity of the vulnerable subject as the paradigm.

Tarunabh Khaitan: ***Dignity as an expressive norm***

Proponents of dignity see it as a useful tool, which solves the most important of the practical and theoretical problems in human rights law. Arguing against this sympathetic position are the sceptics, who have raised troubling questions about dignity's alleged indeterminacy, as well as about the illiberal role that it has allegedly played in certain contexts. In this article, I argue that designing a defensible and useful conception of dignity which is distinguishable from other values such as equality and autonomy may be possible, but not without addressing some genuine infirmities that the critics have pointed out. If there is indeed such a defensible conception of dignity, it is likely to be 'expressive' in character. I therefore argue that the legal ideal of dignity is best understood as an expressive norm: whether an act disrespects someone's dignity depends on the meaning that such act expresses, rather than its consequences or any other attribute of that act.

Ioanna Tourkochoriti: ***Dignity as Unconditional Respect***

Human dignity is one of the most controversial and elusive concepts. It is at the same time one of the most important and concepts-matrix that forms our key ideas on moral and political questions which find embodiment and consecration by the law. The variety of meanings attributed to the concept in the course of the history of ideas render its understanding all the more vague, but at the same time, the reference to the concept seems indispensable to denote the unconditional respect that humanity is worthy of and what forms and kinds of respect should be attributed by the law. What kind of use of the mechanism of state constraint promotes this respect? This presentation will discuss various understandings of the concept of human dignity in the course of the history of ideas in order to propose an understanding of the concept that can inform the contemporary debates on the refugee crisis and what are the positive obligations of the states around the world in reference to the crisis.

60 THE "LIMES" OF EUROPE: PROTECTION AND BURDEN-SHARING IN THE LIGHT OF THE "SCHENGEN CRISIS"

The surveillance of the European Union's external borders has been considered to be one of the core tools of "compensatory" measures for the removal of the internal border controls between the Members States within the Schengen Area. Since then, issues have arisen regarding the sharing of responsibility between the Member States and the EU in regard to the task of border surveillance, the principle of sincere cooperation and solidarity, and the "effectiveness" of border surveillance and have become even more viral in the wake of the recent "Schengen crisis". The panel will present challenges regarding the border surveillance of the external borders of the EU, addressing, in particular, the coordination of the EU external border surveillance, the deployment of technology, such as drones, and burden-sharing in the light of recent and future developments, while also taking the criminal law perspective into account.

Participants	Anna Mrozek Luisa Marin Anna Śledzińska-Simon Nicola Selvaggi
Name of Chair	Anna Mrozek
Room	UL9 210

Anna Mrozek: ***Joint Border Surveillance of the External Borders of the EU: Between European Ambition and Sovereignity Reservation of the Member States***

Operational cooperation of the Member States at the External Borders of the EU, coordinated by the European Agency FRONTEX, has been one of the core tools of "compensatory" measures for the removal of internal border controls within the Schengen-Area. The legal framework of this cooperation is composed of EU law and national law of the Member States. Since 2006 there has been an increasing number of such operations at the external borders, even shaping an image of "Fortress Europe". However, border surveillance remains under a strong reservation of sovereignty of the Member States. The call for "effective" joint protection at the external borders of the EU finds itself stuck between the ambition of European integration and the reality of the sovereignty's realm. The paper will discuss the perspectives of joint border surveillance with reference to the recent proposal for setting up a European Border and Coastal Guard, pointing out however, that the scope of development remains limited under the current legal framework due to the strong sovereignty reservation of the Member States.

Luisa Marin: ***Technology at the Borders: toward a techno-securitization?***

The paper focuses on the deployment of drone technology (DT) in border surveillance, in order to explore the relation between security and privacy and data protection. Having introduced the theory of techno-securitization (1), the paper then presents and analyses the impact of drone technology on the techno-securitization of borders (2). It starts by examining how the metamorphosis of the drone from a battlefield tool to a civilian asset is taking place (2.1), and then it focuses on the border surveillance network EUROSUR (2.2) and on actual cases of deployment of drones in border surveillance operations (2.3). The analysis of the current practices aims at providing information on the deployment of drones and, secondly, at elaborating on the impact of DT on privacy and data protection obligations (3). What challenges for privacy arise from the current regulation on surveillance at the borders (3.1)? Is the legal framework equipped for those challenges (3.2.)? The paper concludes by recalling the challenges posed by the techno-securitization of its borders for privacy and data protection (4).

Anna Śledzińska-Simon: ***Borders and Refugee Protection Burden-Sharing – the Response of New Member States***

The response of new Member States to the refugee crisis, as well as to the recent proposals concerning EU border controls put into question the principle of loyal cooperation and solidarity underlying the European integration project. Questioning not only legitimacy, but also legality of EU measures, new Member States seem unwiling to accept responsibility and burden-sharing in the area of borders and refugee protection. The presentation seeks to analyse the causes and consequences of such reactions threatening a deeper division in the EU into the core and periphery. Yet, while the future may revert this tendency, the current situation begs the question why new Member States are not even perceived by incoming migrants and refugees as a safe haven, or the core of Europe, but merely a transit zone.

Nicola Selvaggi: ***Beyond Schengen? Migration and Criminal Law***

Even after the signature of the Lisbon Treaty the problem of criminal law in Europe (be it a European criminal law or a harmonized law or a system based on mutual recognition) is still a crucial and unsolved problem in the EU.

At the same time new and major challenges emerged that the EU will have to cope with: terrorism and migrants. Both of these challenges do require to be deepened.

Given this, the paper will deal with these two main issues: 1. Do terrorism and migrants/trafficking require the setting up of common rules and provisions, beyond the police and judiciary cooperation? 2. and before it, do these two challenges need to be coped with by means of criminal law, including both substantive and procedural criminal law?

61 LIBERAL ECONOMIC ORDERING THROUGH MEGAREGIONAL AGREEMENTS: THE TRANS-PACIFIC PARTNERSHIP (TPP)

Panel formed with individual proposals.

Participants	Richard B. Stewart Paul Mertenskötter Klaas Hendrik Eller Helen Churchman Thomas Streinz
Name of Chair	Richard B. Stewart
Room	UL9 213

Richard B. Stewart: ***Liberal Economic Ordering through Megaregional Agreements: The Trans-Pacific Partnership (TPP)***

TPP aims to promote liberal economic ordering while addressing nontariff regulatory trade impediments and responding to the growing importance of trade in services, global value chains (GVCs), and the digital economy. It expands the space in which corporations can conduct business through market exchange and compete on a level-playing field while constraining the role of states as market actors. It also includes wide-ranging obligations to reform, reorient and constrain the Parties' internal regulatory processes. A naked economic agreement, TPP largely disregards ensuing distributional effects and the wider set of standard liberal concerns such as economic security for citizens, human rights or democracy. TPP will likely have important impacts (both positive and negative) on third-parties, including on non-member states, existing international and regional institutions, and weakly organized groups. The governance arrangements for TPP have significance commensurate with its ambition.

Paul Mertenskötter: ***Strategic Uses of Administrative Law in the Trans-Pacific Partnership***

TPP's administrative law obligations for Parties' domestic regulatory processes vary significantly in intensity, scope, legal accountability and enforcement potential across different issue areas. They tend to be stronger where focused multi-national economic interests dominate (i.e. pharmaceutical regulations, government procurement) and weaker where more diffuse social interests are concerned (i.e. environment, labor). This variation is partly explained by considering treaty-based obligations for domestic administrative procedures as instruments of political control. The procedures empower certain interests in the regulatory process more than others. Negotiating treaties with decision-making procedures for regulators in other countries can be a tool for political actors to satisfy interest group demands where other instruments of political influence over foreign regulators such as monitoring, oversight and appointment are much more limited.

Klaas Hendrik Eller: ***The Transpacific Partnership Agreement Through the Lens of Global Value Chains***

The TPP shifts the conventional paradigm of inter-state trade to a growing focus on Global Value Chains (GVC) as organizational form of contemporary production. The regional differentiation of trade and investment regimes is both a reaction to the existing fragmentation of production networks and a vital factor in expanding this trend. While GVCs remain highly sensitive to their regulatory environment, they are also a proper source of governance patterns which reflect the systemic nature of chain-wide coordination. This paper discusses how the novel administrative law architecture created by the TPP interacts with the private and hybrid infrastructure of contracts, standards and certification. Providing for mutual recognition of national standards, the TPP further blurs regulatory boundaries to create a space that is eminently preconfigured by chain governance instruments. Their justification becomes increasingly pressing, from the perspective of chain actors and third parties alike.

Helen Churchman: ***The Limitations of Regulatory Convergence within Free-Trade Agreements***

This paper explores whether megaregional free trade agreements (FTAs) are a legitimate vehicle to achieve regulatory convergence or whether targeted multilateral negotiations would result in a more balanced outcome. I argue that this mechanism prevents substantive participation in the negotiation of new standards and regulations that will have a significant impact on countries and people across the globe, not just on TPP parties; that power dynamics and imbalances are more pronounced within smaller plurilateral negotiations, which can have a dramatic effect on the outcomes; and that trade offs that are made in other areas of the FTA negotiations may also affect the quality of the standards and regulations that form part of the final agreement. I also outline some of the practical limitations of regulatory convergence within FTAs, arguing that from a technical perspective, effective regulatory convergence can be hard to achieve within this framework.

Thomas Streinz: ***The Trans-Pacific Partnership's Innovative Framework for the Digital Economy***

The Trans-Pacific Partnership (TPP) reacts to the digital revolution and its implications for the global economy in the 21st century. Across the chapters on telecommunications, electronic commerce, and intellectual property, the TPP features innovative provisions on important and controversial issues such as Internet access, free data flows, data privacy, server location requirements, source code protection, domain-name dispute settlement, and the liability of intermediaries. Taken together, these provisions provide the basic framework for the TPP-area's digital economy and beyond. Spill-over effects seem likely due to the economies of scale generated by interoperability in the digital ream. The United States are likely to push for similar rules in the Transatlantic Trade and Investment Partnership (TTIP) with the EU to combat what it perceives as the current state of digital protectionism.

62 THE NEXT LEGAL FRONTIERS IN EUROPE

Panel formed with individual proposals.

Participants	Hent Kalmo Siina Raskulla Reuven Ziegler Charlotte Steinorth Matthew C. Turk
Name of Chair	Reuven Ziegler
Room	UL9 E14

Hent Kalmo: ***Nostalgia for the Future: Eurocrisis and the End of Self-fulfilling Europe***

Much of the criticism leveled against European policymakers in the wake of the Eurocrisis has centered around two claims: that the adoption of a common currency was premature and that the project courted disaster by decoupling financial from political integration. I will argue that, contrary to what is often claimed, both of the decried features were rooted in the idea of the primacy of economics. The integration process has been guided by what might be called the assumption of self-fulfilling Europe: the idea that economic integration, once set in motion, can sidestep political barriers by creating its own pre-conditions. The Eurocrisis has been so intellectually devastating because it has discredited the notion that closer economic ties necessarily lead to factual solidarity, which can then be channeled into constitutional unification. The effects of economic interdependence are much more ambivalent than has been assumed.

Siina Raskulla: ***The Constitutional Law of the European Union – a cross-cutting legal dogma of societal governance or a policy tool for a pragmatic management?***

While studying the impact of the economic and financial crisis on the EU-legislation a pattern of pragmatism seemed to emerge. The latest emerging crises related to immigration and terrorism seems to have initiated similar response a swift adoption of measures taken to respond to challenges deviating from previous patterns of legislative coordination and management of relevant issues. This research papers studies the measures taken to respond to challenges of security and immigration in order to find out if these measures deviate from the constitutional and legal dogma of the EU.

Reuven Ziegler: ***The "Brexit" referendum franchise: delinking membership right of residence and eligibility for participation?***

The paper critically reflects on the franchise for the 23rd June 2016 referendum on the United Kingdom's EU membership. The franchise invites us to consider the perceived link between membership in a polity, right of residence therein, and eligibility for participation in its electoral processes.

Charlotte Steinorth: ***What We Owe to Not So Distant Strangers?: The ECtHR and the Removal of Foreigners to Countries without Sufficient Medical Care***

The ECtHR has firmly established that the expulsion of a non-citizen to a country where the individual runs a risk of being subject to ill treatment may engage a State Party's Convention responsibility. Given the absolute nature of Article 3 even terrorist activities of the individual do not alter a State's Convention obligation. The Court's approach in expulsion cases where there is no access to medical care in the destination country, however, suggests a more limited scope of protection. In N v UK the Court made reference to the idea of a fair balance between the interests of the host community and the protection of the individual's rights. The paper aims to critically engage with the Court's policy concerns and proposes a human dignity threshold to identify those aliens whose removal would be in breach of the Convention.

Matthew C. Turk: ***The Two Waves of European Disintegration: A Club Theoretic Analysis with Lessons for the Design of International Agreements***

This Article argues that – despite differences in legal form, policy domain, and historical development – the Eurozone and Schengen Area can both be understood as legal-political clubs through the lens of the economic theory of clubs. Moreover, the two waves of disintegration that those regimes are experiencing have common foundations. Both are a result of the fact that, as structured, the two institutions violate constraints on membership size and composition that are specified by the theory of clubs. Club theory also provides tools for identifying the feasible set of policy options for reversing the waves of disintegration. Namely, the Eurozone and Schengen Area must either shrink in size or establish robust internal redistributive mechanisms, such as a workable banking union or increased burden-sharing for the administration of border controls. This Article examines the considerable legal and political obstacles presented by each alternative, and charts the likely path forward.

Panel formed with individual proposals.

Participants	Jerfi Uzman Guy Lurie Amnon Reichman Yair Sagy Guilherme Peña de Moraes Talya Steiner Raanan Sulitzeanu-Kenan Marina Motsinok Joshua Segev
Name of Chair	Joshua Segev
Room	BE2 E34

Jerfi Uzman: ***Diverging forms of justification – The deliberative model of the Rule of Law and the gap between legal and political reasoning***

Conventional wisdom holds that courts should not judge the legislative process. Although they review legislation, their focus is on outcomes rather than on the political process. Gradually however, constitutional courts and the ECtHR have adopted a procedural approach. This approach is based on the idea that the Rule of Law requires justification for legislative action. Some even advocate this as a tool of judicial restraint. Courts, in this 'deliberative model', are only enforcement mechanisms for justification. But what counts as sufficient justification? Lawyers often tend to dismiss political ways of decision-making as falling short compared to the standards imposed on judicial justification. This approach mistakenly imposes court-centered principles of justification on political decision-making, It takes insufficient account of the differences between legal and political forms of justification. This gap can be bridged by drawing on political science.

Guy Lurie, Amnon Reichman and Yair Sagy: ***The Regulation of Judges: Institutional Realism and the Hidden Importance of Agencification***

Public law and its standard academic analysis rarely look at the institutional reality within which doctrines operate. While attention is paid to incentives faced by regulators and courts, the capacities of these institutions is usually assumed. We argue that institutional capacity matters, and that processes of increased/decreased capacities cannot be ignored. In empirically demonstrating this claim, we focus on a body that attracts little attention: the regulator of the working conditions of judges. This body is interesting because regulating the production of justice is understudied, and because it raises considerations of judicial non-dependence. We examine the Administration of Courts in Israel, by applying and developing the concept of agencification. We introduce novel indicators to the concept, and offer an in-depth description of the course taken by the Israeli regulator (and of the overall institutional setting within which justice is produced and judges regulated in Israel).

Guilherme Peña de Moraes: ***Multinational Constitutionalism: persuasive use of foreign jurisprudence by constitutional courts***

This study aims to address the use of foreign law by national courts, with views to the persuasion of the interlocutors of the constitutional debate. The scientifical investigation is geared to establish the assumptions of the persuasive activity of constitutional justice in order to assert its possibility, without, however, fail to impose limits. Indeed, the work focuses on the area of concentration of the judicial review in contemporary legal systems and, more particularly, in the line of research on the globalization of the constitutional decision-making process. The research is organized into three chapters in which it discusses, for example, the rational justification for the internationalization of the decision fundamentals, prefaced by a prologue and succeeded by an epilogue. The most important results will undoubtedly revolve around the presentation of criteria of legitimacy or justification, as well as the delineation of usage standards of foreign jurisprudence.

Talya Steiner, Raanan Sulitzeanu-Kenan and Marina Motsinok: ***Expertise and Motivated Reasoning in Predicting Judicial Decisions***

We examined the ability of legal experts and non-experts to predict the outcomes of three landmark Israeli Supreme Court constitutional cases, decided in September 2014. In the survey respondents were asked to predict the outcome of the cases a few days prior to the decisions being handed down. All three cases were constitutional petitions, in which the plaintiffs requested judicial nullification of legislation, based on the grounds of limitation of rights in contradiction to the Basic Laws. The initial findings reveal that legal experts are indeed better predictors than non-experts. Moreover, legal experts were found to generally be less susceptible to the effects of motivated reasoning in their predictions. We discuss one significant exception to this rule, in which experts were equally affected by motivated reasoning: Eitan v. The Israeli Government, a leading and unprecedented immigration-policy case in which a previous ruling on the same policy was recently given. We offer a possible explanation for the motivational effects on experts in this type of a case.

Joshua Segev: ***The (Unified?) Fiduciary Theory Of Judging: On Hedgehogs, Foxes And Chameleons***

In recent years there has been a resurgence of interest in theories about the role of the judge in western democracies. Another recurrent theme in contemporary legal writing is the construction of fiduciary theories of government to limit and guide public officials' discretion. Hence, the emergence of a unified fiduciary theory of judging – able to account for the responsibilities judges possess and the nature of the judicial office itself – was almost inevitable. This article examines the most developed Judge-as-Fiduciary-Model presented by Ethan J. Leib, David L. Ponet & Michael Serota, and explores the ways by which it resolves disagreements about the role of the judge in western democracies. This article argues that, notwithstanding shedding light by the fiduciary principle on some important features of judging in western democracies (i.e., discretion, public trust and vulnerability), the judge-as-fiduciary model fails to provide a convincing unified theory of the judicial role, which puts into question its attractiveness in resolving current disagreements.

64 THE RULE OF LAW IN EUROPE II: GUARANTEEING CONSTITUTIONAL DEMOCRACY IN THE MEMBER STATES

Among Europe's many crises, the "rule of law" crisis is perhaps the most destructive of Europe's common values. Some Member States that met the Copenhagen criteria to enter the EU would now not be admitted to the EU under those same criteria. What can European institutions do to renew commitments on the part of the Member States to these values? Across two panels, we will consider the alternatives. Panel II examines the interaction of EU institutions with the problematic Member States and assesses whether these interactions are likely to resolve the rule of law crisis.

Participants	Christoph Möllers Dániel Hegedüs Christian Boulanger
Name of Chair	Kim Lane Scheppele
Room	BE2 E42

Christoph Möllers: ***Democratic Guarantees in Heterogeneous Federations – Some Systematic and Comparative Observations***

The phenomenon of politically heterogenous federations is more than a "problem" that can be solved by institutional engineering. It was at the core of the foundational civil wars that defined the political structure of many federations, e.g. the Swiss, the US-American and the German. These experiences shed doubt on the assumption that institutions like the CJEU or the Commission will be able do anything meaningful on a macro-level against the rise of right-wing populist governments within the EU. If such interventions are not concrete and well defined, if they do not take care only of particular gravamina, they will likely confirm the impression of a EU-heteronomy. This is the more the case at a moment in which we do not observe singular deviators, but the rise of an anti-European coalition within the member state governments. At this point, only debate within the political organs and the Europeanization of the party systems may help (and if, only in the long run).

Dániel Hegedüs: ***An Arbitrary Guardian of the Treaties? Political Discretion and the Protection of the Rule of Law in the Praxis of the European Commission***

To respond to the rule of law crisis, the European Commission adopted the new Rule of Law Framework. But so far, the use of this framework has been plagued by a high level of political discretion. Although political discretion affords some flexibility and other benefits, it contradicts the basic principles of normativity and neutrality of law. This paper examines the reaction of the European Commission in the Hungarian and Polish cases, and analyzes the scale and dynamic of political discretion determining the Commission's actions. Instead of facilitating tailor-made, flexible responses, political discretion offers the Commission the opportunity not to act in various cases and contributes therefore to a fragmented and unequal response to rule of law challenges, which has a detrimental effect on the quality of the rule of law protection in the EU.

Christian Boulanger: ***Discursive Struggles over Judicial Review and Democracy: The Cases of Judicial Disempowerment in Hungary and Poland***

How do we make sense of the recent constitutional „coups" in Hungary (2010-2011) and Poland (2015) in which the governments and parliaments stripped the Constitutional Courts of essential powers in order to get rid of their constitutional supervision of the political process? This talk argues that an analysis that interprets the weakening of courts as part and parcel of a return to authoritarianism might miss the point. My argument is that in both countries, we see a national conservative political elite with a plan to convert a constitutional democracy to a majoritarian democracy incompatible with the European norms and values that the countries have signed up for, and a population that, in its majority, does not defend constitutional democracy. In this context, it is helpful to look at the sociological underpinnings of these two forms of democracy. But while the main discursive battle ground is still on the national level, the European dimension does have an impact – both for the supporters and the detractors of a strong constitutional court, and for the struggle over the meaning of democracy.

65 THE INTERNATIONALISATION AND THE LEGALISATION OF PARLIAMENTARY DECISIONS TO GO TO WAR

Decisions to go to war have traditionally and constitutionally been entrusted to the Executive. Recently, however, Presidents and governments have sought to involve national legislatures in decisions on use of force to increase their legitimacy and address the democratic deficit. In the UK, although decisions to go to war are part of the Royal Prerogative, Westminster Parliament has been consulted and has voted on deployment of troops since Iraq 2003. Ever since, and especially after 2013 when MPs rejected to support action in Syria, Parliament's role in decisions to go to war has been hailed as desirable and as ensuring democratic accountability of the Executive. Yet, little has been written of the dangers of such parliamentary involvement and of the strategic use in which Parliament (as well as legislatures in other jurisdictions) have been engaged. The panel seeks to address recent developments from a constitutional and international legal perspective.

Participants	Gavin Phillipson Colin Murray Aoife O'Donoghue Jochen von Bernstorff
Name of Chair	Veronika Fikfak
Room	BE2 E44/46

Gavin Phillipson: *The New War Powers Convention in the UK*

Professor Gavin Phillipson sets out the new War Powers Convention in the UK, using exegesis, analysis and normative argument for the importance of this new role for the UK Parliament. It sketches the constitutional significance of this development and argues the case for further entrenching and clarifying the conventional role of Parliament in conflict decisions. It also takes issue with the arguments that such involvement poses risks for the role of the UN and international law in determining the legality of use of force decisions, arguing that legality and democratic legitimacy are concepts that have been, and should continue to be, kept distinct.

Colin Murray and Aoife O'Donoghue: *Towards Unilateralism? House of Commons Oversight of the Use of Force*

The second paper (Colin Murray and Dr Aoife O'Donoghue) reveals the limits of parliamentary involvement, in particular the strategic use with which government seizes MPs for support and the international and legal language in which it frames its case for war. The paper uncovers how the involvement of parliament and the manner in which the government engages parliamentarians has implications for international institutions and the international law of war.

Jochen von Bernstorff: *Ironic Constitutionalism*

The third paper (Professor Jochen von Bernstorff) then maps out how the developments seen in the UK are part of a more global narrative governments in different jurisdictions are using to persuade their legislatures regarding the use of force. Specifically, it shows how increasingly these creative arguments about the content of international law on war are often unilaterally expanding the law on use of force in the context of targeted killings and use of drones.

66 THE NORMATIVE FOUNDATIONS OF DEFERENCE IN EUROPEAN CONSTITUTIONALISM

Deference has become a central feature of European judicial review. Courts across the continent – in the EU, ECHR, and national legal orders – have started to emphasize the need to exercise deferential scrutiny, mainly through the margin of appreciation doctrine. Is this a welcome development? The literature is torn. Among human rights scholars, the margin of appreciation has attracted harsh criticism. It has been called a 'Trojan horse', which 'jeopardizes' the rights and freedoms guaranteed by the ECHR. Among EU legal scholars, in contrast, it has been almost unanimously praised as a tool that ensures respect for national values and remedies the problems of legal pluralism. What explains these contradicting views? Are doctrines like the margin of appreciation normatively desirable? Under which circumstances, if at all, is it appropriate for courts to defer to other actors? These are the questions that will be tackled in this panel.

Participants	Matthias Klatt François-Xavier Millet Jan Zgliński Bosko Tripkovic
Name of Chair	Bosko Tripkovic
Room	BE2 139a

Matthias Klatt: ***How to Escape from the Bermuda Triangle of Courts***

Among the various normative problems of European Constitutionalism, the relationship between the competences of national constitutional courts, the ECJ, and the ECtHR is vital. It has been described as a 'Bermuda Triangle' in which an effective and transparent protection of fundamental rights is bound to disappear. This paper provides taxonomy of the various conflicts arising in this field, thus clarifying the different sources and the character of conflicts. It then discusses several means of solving them, including deference, and their respective advantages and drawbacks. Lastly, a new theory of solving the competence conflicts is developed in detail, drawing to recent case law from the ECJ and the German FCC.

François-Xavier Millet: ***From Sovereignty to Constitutional Identity(ies)***

Over the past ten years, there has been an emergence of the narrative of 'constitutional identity' in Europe. While scholars have used constitutional identity in order to assert a certain European identity, the constitutional courts have used it as a shield against further integration. How do these competing discourses relate to one another? The contribution asks whether the meaning of constitutional identity is derived from these divergent uses or whether it present an ontological change: does the narrative of constitutional identity mark a shift in the legal consciousness that finds its roots in the evolution of European societies? Although sovereignty still matters, the discourse of constitutional identity better captures the current core values of the European legal culture than the traditional language of sovereignty. I will try to determine whether constitutional identity and sovereignty are essentially different or whether the former is 'only' the new avatar of the latter.

Jan Zgliński: ***Discovering Passive Virtues: The Court of Justice and the Margin of Appreciation***

The Court of Justice an institution erstwhile notorious for its activism increasingly shows signs of self-restraint. Not only does it grant Member State legislators more and more regulatory freedom through the margin of appreciation doctrine it passes a growing number of review responsibilities onto national courts. Normatively this raises some important questions: is this development defensible from a constitutional standpoint? Is it perhaps even desirable? The paper will drawing from free movement case-law inquire into what is at stake when the Court decides on its review approach. It will explain that this decision is very challenging as EU constitutional law has come to embrace a series of irreconcilable desires: we want democratic governance and judicial review a powerful Union and strong Member States uniform application of EU law and a meaningful role for national courts. The paper will propose a way out of this dilemma based on the ideas of representation and expertise.

Bosko Tripkovic: ***Deference and Diffidence in Human Rights Adjudication***

The paper develops an ethical framework that justifies deference in human rights adjudication. The opponents of deference claim that it gives up on the universality of human rights, leaves them without normative foundation, and results in diffidence that merely reaffirms the existing consensus. The background idea is that human rights cannot gain normative traction lest they are supported by an external, metaphysical account of value. In contrast, the paper defends deference from an internal, practical perspective, and argues that the normativity of human rights does not follow from the metaphysics of value but from an appropriate self-understanding of each system of human rights protection. The paper elucidates the central parameters of this self-understanding, argues that it is able to sustain the boundary between deference and diffidence, and demonstrates how it can both heed the importance of human rights and allow for an attractive degree of variation in human rights adjudication.

Panel formed with individual proposals.

Participants	Jennifer Bond Helene Heuser Isabelle Sauriol Tamar Megiddo Tiago Monteiro
Name of Chair	Tamar Megiddo
Room	BE2 140/142

Jennifer Bond: ***Predictable & Preventable: Mass Refugee Influxes & Threats to Human Rights & Global Stability***

This paper argues that global instability resulting from situations of mass refugee influx is both predictable and preventable. Drawing on a combination of my academic research and my experience as Special Advisor to the Minister of Immigration, Refugees and Citizenship on Canada's recent Syrian refugee initiative, I will explore tensions between the normative value of the international asylum system and the responses of individual state actors to the mass movement of people across international borders. My conclusion is that international commitments to non-refoulement are simultaneously providing an infrastructure for protection in individual cases and being used to circumvent other critically necessary responses to situations of mass migration. The ultimate result is both an unnecessary failure of our collective commitment to basic human rights and an unnecessary exacerbation of the risk of massive global instability.

Helene Heuser: ***Refuge Cities***

The national, supranational and international responses of states to refugees are failing. Sanctuary Cities in the US, Canada and Great Britain, Solidarity Cities in South America, the International Cities of Refuge Network at the Council of Europe, and refugee protest movements in cities like Hamburg and Berlin are just some examples for a local, transnational approach to migration. The notion of refuge-cities by the philosopher Jacques Derrida provides a theoretical concept that helps to integrate these practices in a long history from the Greek polis over biblical asylum cities up to the villes franches of the middle Ages. He sees the city as a most promising space to cultivate the right to hospitality. This paper will explore how decentralized networks of local governments or civil-society initiatives are showing a more adequate and humane tendency towards migration.

Isabelle Sauriol: ***Women and Children First: Canadian Policies on Syrian Refugees Selection***

On November 22, 2015, the Canadian government followed on their electrical promise to resettle 25 000 Syrian refugees, and announced that they would be restricted to women, children and families only, and that it intended to rely on private sponsorship efforts to make it happen. The author first presents Canadian policies on refugee selection from abroad, and then conducts a case study of the Syrian refugees selection process and of the use of private sponsorship by Canadians. The Canadian resettlement effort appears to be a success so far, and especially the private sponsorship program, a rather unique creation on the international scene. The author then engages in a brief comparative analysis of other selection processes of fellow Western countries accepting Syrian refugees since fall 2015. The ultimate goal of this paper is to find which system of resettlement appears to be the most successful at targeting genuine refugees and helping facilitate integration upon arrival.

Tamar Megiddo: ***Pushing at the Border: Individuals, International Law and Israel's Refugee Admittance Policy***

Many states' immigration policies are under significant strain from a global refugee crisis. Actors seize the opportunity to mobilize to influence new state policies. International law serves as the language in which the debate is cast and with which national policy is deliberated and negotiated. This paper presents original empirical research into Israel's 2007 "hot return" policy whereby individuals who crossed Israel's Egyptian border were promptly returned to Egypt. This now forsaken policy sparked public engagement around Israel's appropriate treatment of the migrants and asylum seekers. The participants in the Israeli policymaking process included not only Israeli state officials, but also a multitude of non-officials and non-Israelis: asylum seekers, soldiers and officers, military and government legal advisors, activist lawyers and UN officials. International law served as a common language through which the issue was framed, analyzed and debated.

Tiago Monteiro: ***Refugees in Brazil: crossing frontiers and territories in the olympic city***

The number of refugees arriving in Brazil has been increasing over the years, and many more applicants are expected meanwhile the 2016 Olympic games. It is proposed to think Law as guardian of the will and needs of people to move and relocate, but in a broad and inclusive way, overcoming borders of pen and paper. The migrant adaptation process depends on variables of origin and outcome. Migrating is rupture with territory and with a community, and social, moral and cultural orders. To the migrant, who already shares the same social spaces with the citizen, the abstention of the State in promoting serious local inclusion policies sponsors uncontrolled reconstruction of territories – seen as processes. And if those people are not included in the minimum development standards and in the values of the dominant society, these territories may present fertile to growth and stabilization of disorder, as well as to the non-realization and promotion of self-esteem and (re)creation of identity.

68 WOMEN AND RELIGION – BEYOND THE HEADSCARF CONTROVERSY

This panel examines and challenges existing models for solving the tension between religious freedom and women's rights, both from theoretical perspectives and with regard to specific test cases arising in different countries.

Participants	Gila Stopler Tamar Hostovsky Brandes Meital Pinto Anne Köhler Tehila Sagy
Name of Chair	Yofi Tirosh
Room	BE2 144

Gila Stopler: ***Religion, State Relations and their effects on Women's Rights: Privatization, Nationalization and Authorization***

The increased importance of religion in the lives of many, together with the de-privatization of religion have given rise to the strengthening of the status and role of religion in the public and governmental spheres, as well as the strengthening of the power and authority of private religious communities over their members. Both these phenomena stand in tension with the classic liberal understanding of religion-state relations and with liberal perceptions of human rights, and create the need to protect the rights of vulnerable women. This presentation will offer a new typology of religion-state relations – the nationalization of religion, the authorization of religion and the privatization of religion – that can facilitate our understanding of the effects of the strengthening role of religion on the rights of women. It will then use this typology to discuss two cases – the NY Get Laws, and the enforcement of decisions of private Sharia tribunals as arbitration decisions.

Tamar Hostovsky Brandes: ***Equality for Whom? Reconciling the Rights of Religious Women with Public Interest***

This paper argues that, after two and a half decades of legal and political debates on the question of gender equality and religious freedom, we have failed to develop legal models that ensure substantive equality for religious women. This failure can be attributed, in part, to the application of a general concept of quality, which assumed that certain practices are either compatible with equality or incompatible with it. This paper challenges this assumption, arguing that practices that appear to violate the general principle of equality may nonetheless promote equality for some, in specific contexts. When examining the compatibility of certain practices with the principle of equality, we thus should first ask whose rights are at stake, and then examine what equality for each of the different parties involved would look like. As opposed to models that are based on balancing equality with other rights or interests, the proposed model places equality on both sides of the scale.

Meital Pinto: ***The Absence of the Right to Culture of Minorities within Minorities in Israel: A Tale of a Cultural Dissent Case***

Meital Pinto's talk is titled 'The Absence of the Right to Culture of Minorities within Minorities in Israel: A Tale of a Cultural Dissent Case'. It focuses on the Israeli Plonit case concerning a Muslim woman who wished to be represented by a female arbitrator in a Shari'a Court. The Shari'a Court of Appeals denied her request and decided that Shari'a Law permits only men to serve as arbitrators. Plonit petitioned the Israeli Supreme Court, which accepted her petition and decided that the Shari'a Court of Appeals' decision infringed her right to equality.

The paper sheds a light on a crucial matter that is absent in the decision; namely, the right to culture of Muslim women, who are a vulnerable members of a minority group in Israel, and therefore constitute a 'minority within minority'. Analysing the case in terms of Plonit's right to culture, in addition to her right to equality stresses the main issues at the heart of the legal debate, which are the minority culture's norms and practices, and the right of the minority within minority to influence and shape them as much as the majority within the minority.

Anne Köhler: ***Public Interest, Gender Equality and Freedom of Religion***

Considerations of gender equality play a more and more important role in case law on freedom of religion. In well known cases of the European Court of Human Rights and of German and Swiss Courts regarding school exemptions or the burqa, niqab and headscarf, considerations of gender equality are woven into considerations of classic public interest. In several, but not all cases, they serve as an argument in order to restrict freedom of religion. But how are gender-arguments connected with the realm of public interest, considering that they do not fit easily in the traditional dichotomy of public and private? The paper explores the uneasy relationship between gender equality as a public interest restricting religious liberty and the emancipatory dimension of the argument of gender equality.

Tehila Sagy: ***Theorizing the Arbitration and Mediation Services (Equality) Bill***

This presentation would theorize an English legislative initiative. The Arbitration and Mediatio Services (Equality) Bill in relation to the values of the liberal state. The Bill is an attempt to resolve the tension between the rights of cultural and religious groups to accommodations in the form of private dispute resolution and between the rights of women who belong to these minority groups. More specifically, the lecture would provide a UK-specific and contemporary lens through which to explore the tension between women's rights and accommodations of religions by way of judicial autonomy.

69 YOU'RE NOT WELCOME HERE! CONFLICTING CONSTITUTIONAL PERSPECTIVES ON BANISHING SUSPECTED JIHADISTS IN THE EUROPEAN UNION

The panel explores issues surrounding deprivation of citizenship from a number of different perspectives. In particular, we seek to understand the legal, institutional and theoretical problems associated with deprivation of citizenship that fall at the interface between EU law, national law and fundamental rights. Each of the paper elaborates a different problematique associated with depriving individuals of their Union citizenship with the ultimate aim of reconciling these different perspectives into a coherent perspective of what having European Union citizenship means in a variety of contexts.

Participants	Alastair MacIver Juha Tuovinen Zane Rasnaca
Name of Chair	Juha Tuovinen
Room	BE2 326

Alastair MacIver: ***Constitutional Disagreement about Citizen Terror Suspects: Chauvinism or Pluralism?***

In Pham it was argued that depriving a UK citizen suspected of terrorism of his nationality was unlawful since it made him stateless and contravened EU proportionality. The UKSC dismissed the appeal and hinted that a broad reading of Rottmann subjecting denationalization to EU review without a cross-border element might be ruled inapplicable for intruding on citizenship powers integral to the identity of the nation State. This potential ultra vires review of CJEU case law has been called judicial chauvinism repudiating legal pluralism. Rejecting this view it is claimed the elevation of Hart's rule of recognition to principle of the UK constitution is not insular monism but grounds constitutional disagreement between equal legal orders with divergent conceptions of constitutionalism and final authority. This idea of constitutional conflict inspires a spirit of caution and cooperation in the UKSC's use of EU law expressed in procedural and substantive concessions that embrace heterarchy.

Juha Tuovinen: ***Feast or Pham-ine? – Substantive Reasoning in Deprivation of Citizenship Cases***

The paper critically evaluates the understanding of the principle of proportionality in the Pham v Minister of Home Affairs judgment by the UK Supreme Court. The case concerned the question whether an order depriving a British citizen of his citizenship was lawful. This paper critiques the understanding of proportionality put forward by the court from three different angles. The first part of the paper takes issue with the way in which the court characterizes proportionality through-out the judgment. The second part critiques some of the views expressed regarding the relationship between proportionality and the intensity of review. It builds on the previous section to propose a way in which to construct proportionality in an institutionally sensitive manner. The final third part builds on the previous two sections, Pham in order to construct a general framework for balancing in citizenship deprivation cases that could, among other things, accommodate questions about the role of European citizenship beyond the question of competences.

Zane Rasnaca: ***Who decides who is welcome here? The issue of competence when banishing EU citizens***

In the EU the CJEU, lawmakers, and member states engage in an interplay, which to a large extent is structured by the division of competences. The area of citizenship is no exception, from a matter solely for national law it has become subject to active multi-level coordination. The paper looks at the issues arising from the division of competences both horizontally and vertically between the CJEU, national courts, and EU lawmakers concerning the deprivation of citizenship and the regulatory imbalance that arises. A closer look at EU law and case law (for example Rottman, and Pham v Secretary of State for the Home Department) illustrates the extremely important role played by 'competence' in structuring the relationship between the CJEU, from one side, and the EU lawmakers and member states, from the other. While in the vertical plane (EU vs. national level) this is an old story, the horizontal (CJEU vs. EU lawmakers) coordination potential of 'competence' has remained less explored.

SATURDAY
18 JUNE 2016
5:00 – 6:45 pm

PANELS
SESSION IV

70 CONSTITUTIONAL IDENTITY IN TIMES OF GLOBAL MIGRATION

This panel seeks to address under what conditions, if any, could policies like public marking of immigrants, the seizure of their assets, closing of state borders, be justified? What sort of political demography would be in line with liberal-democratic understanding of constitutional identity? Is a nascent EU constitutional identity dissolving in the absence of a common politics towards the immigration crisis?

Participants	Miodrag Jovanović Vito Breda David Marrani
Name of Chair	Luis Ignacio Gordillo Pérez
Room	UL6 2070A

Miodrag Jovanović: ***Handling Massive Immigration Inflows: Between Liberal-Democratic Constitutional Identity and Illiberal Demographic Politics***

Rosenfeld's liberal-democratic account of constitutional identity is premised on the idea of a more-less stable, even if heterogeneous, societal subject which is to be politically constituted. On this view, even the constitutional norms regarding citizenship, immigration and demographic politics count with predictable and manageable flows of people across the borders. However, how does this view of constitutional identity fare in times of massive global migrations, which has triggered across old and new liberal-democracies some highly challenging policies, such closing of state borders.

Vito Breda: ***A Shrinking Vision for European Constitutional Identities: the Mass Exodus of Refugees, the Ginevra Convention, and a legitimation crisis***

In this paper, I will argue that some of the European constitutional ideals are obfuscated by what Habermas calls a legitimation crisis (1973). The European states' shared aspiration of being a model of a reasonably liberal democracy has been grinded away by a combination of fiscal policies which underpin an implausible welfare state, the rising of ethnocentric nationalism, and the lack of a communal European vision.

David Marrani: ***The French Constitution "Post Terror" Attacks: The Return of the Old Ghost of de jure exclusion***

Exclusion may be a door between two spaces that opens from one space into the other in both directions. If we consider movement of population from one place to another, when the door is opened the event takes place. When it is closed the event is blocked and cannot happen. Exclusion forbids the entering and prevents the event from happening. Those who are outside cannot come in: the door is shut. It removes something or someone. Exclusion is a door that we close after sending people out. We remove someone we do not want to stay in the space. What condition the relationship between the two spaces is based on history and politics and regulated by law including constitution. The theme of exclusion in France is articulated around nationality citizenship and immigration. I will argue that the most effective exclusion is de facto exclusion and that using de jure exclusion is only a gimmick to satisfy the need of political control from an executive in end of reign.

71 THE OUTSIDER – REMARKS ON COMMUNITY AND JUSTICE

"Un récit? Non, pas de récit, plus jamais" (Maurice Blanchot). In a 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 information and knowledge due to necessity to produce more solid decisions, and perhaps, sedimenting a new understanding on global constitutional order. Although every single effort performed by jurist to produce a space undergo to solidarity and freedom at the same time, the project of a community ruled by human and fundamental rights has flunked out. This panel seeks (I) to demonstrate how solidarity should be making out, (II) how the legal reasoning should changes its criteria to deal with the Other " (III) finally, how the transnational legal order and political aspects plays a relevant rule to intermediate this dilemma."

Participants	Hauke Brunkhorst Octaviano Padovese de Arruda Johan Horst Kolja Möller
Name of Chair	Pipitsa Kousoula and Annalisa Morticelli
Room	UL6 2103

Hauke Brunkhorst: *Democracy claim for solidarity to reach justice*

Since the successful global disembedment of markets we are facing a dilemma. For national states, still at the center of democratic solidarity, there is only the alternative left, either to submit under global market imperatives of neoliberal politics, or to transfer ever more real state power to continental and even global levels, combined with the hope that this can be done together with the transnational 'expansion of democracy' (John Dewey), which is a small but the only real hope. To illuminate this small chance, the paper considers the existing alternatives. For preserving the present state of globally disembedded market economy, the political project of neoliberalism must go authoritarian, and the only alternative is a political program of economic and social regime change that is a green version of global democratic socialism.

Octaviano Padovese de Arruda: *The other to come – thought on neutrality*

"A science? No. No more science, never again?" This sentence is inspired in the ground-breaking text from Maurice Blanchot, The Madness of the Day, which sums up with the following statement, "Un récit? Non, pas de récit, plus jamais" ("A story? No. No stories, never again"). Whatever you mean or point out, you can prove it. Submitting every sentence and state to a trial of performative language, which jurist enjoys to call it descriptive or prescriptive language, until it reaches an aberrant conclusion. From this state of affairs, my hunch is to share some considerations in respect of the condition of modern's law: it situates everyone as a being without being worried with the other. Modern law and its neutral and privileged position still reproduce the same condition of Western though: ontology following metaphysician's perspective. So to speak, my intention is to address how modern law has also a negative side and does not have a properly language to turn the reality.

Johan Horst and Kolja Möller: *Distortive effects: Re-Situating the political in transnational legal regimes*

Our hypothesis is that in all three empirical fields the evolution of legal rules and social contradictions is interdependent in the sense that the legal rules are not only a result or expression of social contradictions but also shape them. WTO law as well as the transnational financial markets shaped by the ISDA and transnational Investment law each are as much a result of a specific historical context as they themselves bring about and transform new social conflicts. Against this backdrop, our contribution attempts to re-situate the political in transnational constitutionalism. We will argue that it would be misguided to portray it as an unpolitical evolutionary device. Rather, a sound reframing of the political has to address the question how legal regimes actually work as sites of power relations, without falling back to a reductionist understanding of the law as a hegemonic device.

72 DIFFERENCE DISAGREEMENT AND THE PROBLEM OF LEGITIMACY IN CRIMINAL LAW

Through the criminal justice system, the state wields an enormous amount of power to interfere with people's lives with force and to stigmatize individuals with its stamp of blameworthiness. In order for the state to maintain its exclusive status as the holder of this power, it has to be legitimated. This perennial problem of political legitimacy of criminal law is especially salient when one considers the phenomenon of persistent disagreement in a world of cultural and moral pluralism. This panel examines the question of difference, disagreement and legitimacy in criminal law by considering: 1) the strategy of legitimation through democratic control over prosecutors and judges (as well as the limits of alternatives to such a strategy); 2) defensibility of state suppression of certain modes of criticism of judicial authority; 3) the proof beyond a reasonable doubt requirement and what it does or does not imply about the significance of disagreement amongst jurors in criminal trials; 4) pitfalls of overemphasizing transnational consensus when evaluating the validity of a state power to convict and punish; and 5) the status of non-citizens as subjects of the criminal law and members of the political community.

Participants	Vincent Chiao Antje du Bois-Pedain Youngjae Lee Natasa Mavronicola Emmanuel Melissaris
Name of Chair	Youngjae Lee
Room	UL6 2249a

Vincent Chiao: ***Disagreeing about Punishment***

One way of thinking about political legitimacy is in terms of control: ensuring that the subjects of coercive state power have an appropriate degree of control over how that power is exercised. Another way of thinking about political legitimacy is in terms of disagreement: how social cooperation is possible under conditions of persistent and reasonable disagreement. Many American criminal justice institutions are designed to promote political legitimacy in the first sense, by ensuring popular control over crime and punishment, notably in the form of electoral control over prosecutors and judges. In this paper, I consider avenues for making criminal justice institutions responsive to disagreement that go beyond forms of electoral control, and the degree to which such avenues are consistent with the political ideal of anti-deference.

Antje du Bois-Pedain: ***In Criminal Disagreement with the Court: Suppressing Criticism of Trial practices and Outcomes through the Criminal Law***

Different jurisdictions have laws, which limit the open expression of criticism of judicial behavior and disagreement with a trial outcome by observers and affected parties. English law of contempt of court will stamp on those who criticize a judge's conduct in the courtroom. German law criminalizes anyone who claims in respect of an acquitted person "But he did it!" This paper engages with the justifications offered by legal systems for what are arguably direct and indirect ways of suppressing criticism of the court, arguing that laws that shield public officials, including judicial officers, from public exposure of potential failings in the administration of justice undermine the democratic legitimacy of the courts.

Youngjae Lee: ***Reasonable Doubt and Disagreement***

The right to trial by jury and the proof beyond a reasonable doubt requirement are two of the most fundamental commitments of American criminal law. This Paper addresses how the two are related and whether disagreement among jurors implies anything about whether the beyond a reasonable doubt standard has been satisfied. In other words, does the requirement of the proof beyond a reasonable doubt standard also require jury unanimity in criminal cases? In recent years, there has been an explosion of interest among philosophers about the epistemological significance of disagreement. Drawing on this literature, this Article considers the "equal weight view" and its implications for the unanimity rule. The equal weight view says that, roughly speaking, when people disagree on a topic, each view should be given equal weight. This Article concludes that the equal weight view implies that the unanimity rule is required as a way of enforcing the beyond a reasonable doubt requirement.

Natasa Mavronicola: ***Human Dignity and Conditional (In)Humanity in Penal Contexts and on Europe's Borders***

In this paper, I focus the right to human dignity, enshrined prominently in Article 3 of the European Convention on Human Rights, with particular attention on its prohibition on inhumanity at Europe's borders. I zoom in on the challenges raised by two aspects of European Court of Human Rights (ECtHR) doctrine: consensus-dependent (in)humanity and relative (in) humanity, and the way they come into sharp focus in the context of the proposed extradition of (suspected) criminal offenders. I critique problematic paths for the ECtHR and other norm-appliers in this context, but also take the opportunity to reflect on how contemplating (in)humanity and othering in these contexts epitomizes some of the perennial challenges faced by human rights. This leads me to suggest that striking too optimistic and self-congratulatory a note on Europe's safeguarding of human dignity, as is done for instance in Dupré's The Age of Dignity (2015), can be misguided and even dangerous.

Emmanuel Melissaris: ***Punishing Non-Citizens***

In the paper, I look closely at the implications of non-citizens being treated as the subjects of the criminal law. Focusing on third-country nationals with no leave to remain, I will ask in which capacity of theirs it might be permissible to punish them. I will defend the thesis that no sooner does a non-citizen become the subject of the criminal law that she is also accepted as a member of the political community, albeit in a qualified manner in some, less significant, respects. This opens up the more difficult question of why (international law commitments aside) a state ought to treat non-citizens as proper subjects of the criminal law and therefore members of the political community. I will suggest that the reason lies not in the recognition of non-citizens as members of a universal moral community (which I consider to be too metaphysically laden), but rather in the recognition of existing members of the political community as such.

Panel formed with individual proposals.

Participants	Han-Ru Zhou Pietro Faraguna Joachim Åhman Lisa L. Miller Maxim Tomoszek
Name of Chair	Lisa L. Miller
Room	UL6 3071

Han-Ru Zhou: ***Constitutional Principles***

Principles cut across modern legal traditions, they are one of the most fundamental notions in law, they base our legal reasoning, and they pervade our legal discourse. However, with a few notable exceptions, most dating back several decades, there have been surprisingly few legal studies in English devoted to this notion. This paper seeks to develop a general account of constitutional principles in common law-based systems with a "written" constitution. Knowing what constitutional principles are, what they do and how they do it will provide a deeper understanding of the general workings of our constitutional systems as well as of the practical operation of specific sections of our Constitutions. Of the variegated uses of constitutional principles, perhaps their most immediate and controversial application is in the exercise of judicial review. The paper offers an explanation and a defense of the exercise of judicial review based on principles.

Pietro Faraguna: ***Constitutions as legal borders before EU and international law: Germany and Italy compared***

The main claim of the article is the reinterpretation of the constitutional-identity-making process as a three-step process. First, explicit limits to constitutional amendments lead to discover a bundle of principles shaping the constitutional identity of the State. Second, these principles are held as the immutable genetic code of the Constitution. Third, they are reinterpreted as ultimate limits of the constitutional principle of openness to supranational and international law. The paper analyzes this interpretative process, focusing on Germany and Italy. Although constitutional provisions in this field are worded differently in the Italian and German Constitutions, in both legal orders constitutional Courts played a pivotal role in the reinterpretation of constitutional identities. Drawing from this comparison, the paper argues that constitutional provisions play a minor role in balancing the principle of openness and the constitutional identity of a given State.

Joachim Åhman: ***International Delegation in the Swedish Constitution***

It has become common for States to enter into international agreements where decision-making power is delegated to international and foreign institutions. The most important example is the European union (EU). In the EU the Member States are under an obligation to follow decisions made by international institutions, which are outside the full control of each individual State. How decision-making power can be delegated in this way is often regulated in a State's constitution. In Sweden, rules concerning international delegation can be found in Chapter 10 of the Instrument of Government. Needless to say, this type of regulation is of great importance, inter alia because it may allow deviations from other constitutional rules. This paper analyses – from a national and an international law perspective – how international delegation is regulated in the Swedish constitution, in an attempt to draw some general conclusions concerning the construction of this type of regulation.

Lisa L. Miller: ***Back to Basics: Constitutions for Ordinary People***

This paper argues for more robust scholarly attention to how constitutional structures shape ordinary political dynamics. We are especially interested in how constitutional rules and institutions enable or disable mass popular control over political decision-making. We begin by highlighting the degree to which constitutional scholarship has focused on legal rules, legal institutions and democratic constraint, with far less attention to how legal structures can increase the capacity of ordinary people to challenge prevailing power. We then ask what key provisions constitutions would need in order for regular citizens to mount sustained political pressure for the creation and maintenance of public goods. We emphasize the need to understand the manner in which different constitutional structures facilitate broad collective action in the public interest and limit the number of opportunities for small groups to veto the interests of the many. We illustrate the intersection of constitutional structure and the political capacity of ordinary people through a brief exploration of the U.S. case.

Maxim Tomoszek: ***Accountability in Constitution: Purpose Alternatives and Efficiency***

This paper will address three questions: Through which tools do constitutions achieve accountability? How efficient are these tools in ensuring public control of power? How universal or country-specific are answers to these questions? First, the paper will overview the tools of accountability in comparative perspective, dividing them in three categories – legal (for example judicial review), political (for example parliamentary debate) and social (for example investigative journalism or public debate). Then, using the context of Visegrad countries (Czech Republic, Hungary, Poland and Slovakia) the efficiency of particular tools of accountability will be compared with the aim to explain latest constitutional developments in analyzed countries, especially interferences of governments with judiciary (in particular constitutional courts) and freedom of media. The presentation will conclude by discussing possible constitutional measures available for strengthening accountability.

74 EQUALITY, VULNERABILITY AND MIGRANT MEMBERSHIP

This panel explores how the increasing use of the concepts of equality and vulnerability in international human rights law affects the rights of migrants in immigrant receiving states. The papers in this workshop analyze and compare the way these concepts are used in legal reasoning and relate them to theoretical debates on citizenship and migrant membership.

Participants	Karin de Vries Lieneke Slingenberg Bas Schotel Sylvie Da Lomba Corina Heri
Name of Chair	Karin de Vries and Lieneke Slingenberg
Room	UL6 3119

Karin de Vries and Lieneke Slingenberg: ***Citizens' or residents' rights? Territoriality, Membership and legal status in the Article 14 case law of the ECtHR***

In her work on the rights of immigrants, Bosniak discerns two ways of obtaining rights: rights can derive from formal immigration status under law or from territorial presence. Under the 'status-based approach' rights are based on legal qualifications and political consent, whereas under the territorial conception of rights, are based on a fact of social reality by stressing the significance of physical presence in the national territory. While she acknowledges that the territorial model begs its own questions and has its own hang-ups, she stresses that ethical territoriality still represents the best argument for immigrants' rights that we have. In this paper, we would like to examine to what extent this idea of 'ethical territoriality' is reflected in the ECtHR's case law on discrimination on the ground of nationality and immigration status in the field of immigrant's material rights.

Bas Schotel: ***Refugee Protection beyond Human Rights. Asylum as a negative duty***

Today asylum and international protection are primarily understood as positive duties: receiving states are supposed to actively do stuff (eg provide for shelter and housing, food, health care, safety, education, etc.). By contrast, this paper explores the idea that asylum should be construed as primarily a twofold negative duty for the target state: duty not to prevent refugees from accessing the territory and duty not to expel from the territory. Understanding asylum as a negative duty makes clear that not offering asylum often involves many active coercive measures. From a practical legal perspective it is easier to apply the proportionality test to active coercive measures (eg detention, construction of a border fence), than to the non-performance of a positive duty (eg how to test the proportionality of not providing social and basic services?). Understanding asylum as a negative duty allows for legal checks on refugee policy without the need to establish the infringement of individual human rights.

Sylvie Da Lomba: ***Developing A Vulnerability Analysis In Immigration Cases: A Challenge To The European Court Of Human Rights' Immigration Control Paradigm***

This paper investigates the immigration control paradigm in the case law of the European Court of Human Rights. I posit that the significance that the Court affords to the state's right to control immigration in migrant cases frustrates inquiries into the exercise of the government immigration power and produces narratives that are shaped by state migration policy discourse and detached from the realities and complexities of global migration.

As a challenge to this paradigm, I explore the deployment of a vulnerability analysis in the Court's case law. I posit that a vulnerability analysis can prompt an inquiry into migrants' social, economic and institutional relationships as well as greater scrutiny into the exercise of the Government immigration power in the light of ECHR obligations.

Corina Heri: ***The Utility of Equality and Vulnerability Reasoning for Migrants under the ECHR***

The contribution will examine whether and how reasoning based on the vulnerability and equality of migrants – a term understood here in a broad sense – in the case-law of the European Court of Human Rights affects the status of these individuals within the host polity. More concretely, it will examine whether the vulnerability heuristic can revolutionize traditional accounts of citizenship and provide non-nationals with access to rights – if not the right to remain in the host country, then the right to be treated in a certain manner or have access to certain benefits while there. This question will be assessed in particular under Art. 3 ECHR, the prohibition of torture and inhuman and degrading treatment, which is absolute and provides protection of human dignity. For all migrants, including those not considered vulnerable, access to rights may further be possible in reliance on the principle of equality under Art. 14 ECHR, which enshrines an accessory prohibition of discrimination.

75 THE NEW BORDERS OF INTERNATIONAL (PUBLIC) LAW

Panel formed with individual proposals.

Participants	Biancamaria Raganelli Ilenia Mauro Helga Hafliðadóttir Philipp Kastner Elisabeth Roy Trudel Niamh Kinchin
Name of Chair	Niamh Kinchin
Room	UL6 2093

Biancamaria Raganelli and Ilenia Mauro: *New borders and boundaries in International Public Law: Corruption, Human Rights and Extra-territorial legislation on public procurement*

The lack of integrity and corruption affects human rights and erodes the pillars of democracy. This allows the creation of a kind of barriers that builds new borders and constrains within the economy. That is a particular evident issue in public procurement. One increasingly popular way for States to prevent some violations of human rights committed overseas is adopting measures with extraterritorial implications or to assert direct extraterritorial jurisdiction in specific instances. How to ensure integrity, accountability and transparency of public authorities and economic operators across Countries? Do we need a European model supporting integrity in public procurement? The paper investigates two different profiles linked to the same phenomena: the legal boundaries of lobbying as joint to conflicts of interest and corruption, on one side, the effects of some extraterritorial legislation, such as the US and the UK anti-bribery models, on the other.

Helga Hafliðadóttir: *International Enforcement and the progressive development of International Law*

With the adoption of the International Law's Articles on the Responsibility of States for Internationally Wrongful Acts the issue of countermeasures of general interest became subject to controversy. This controversy centered around the general development of international law and differences regarding collective countermeasures. In particular, there are questions regarding the entitlement of third states to take countermeasures in response to breaches of obligations owned to the international community as a whole. The purpose of this article is to examine the progressive development of international law within the context of international enforcement. The analysis proceeds on the assumption that the notions of obligations erga omnes and peremptory norms have influenced the development of unilateral action to enforce community interests. This article places emphasis on the content of third states' duties to take countermeasures which includes the position of the victim state.

Philipp Kastner and Elisabeth Roy Trudel: *Beyond the Other: Challenging Categories in International Law*

Identities form groups, draw borders and construct "others". This paper deconstructs the enduring influence of such categories in international law. For instance, while so-called non-state actors have gained much attention and legitimacy over the past decades, the dichotomy between state and non-state actors is ever-present, with the nation-state and its well-defined borders remaining the dominant and largely unchallenged model. Drawing on insights from queer theory, the paper questions the usefulness of some of the dominant categories within international law and argues that recognizing the relational legal agency – without predetermined categorizations – could facilitate the peaceful resolution of armed conflicts and, more generally, enhance the emancipatory potential of international law. It concludes that a more radical emphasis by international law on uncertainty and instability, as opposed to a presumed order embodied by the concept of the rule of law, is needed.

Niamh Kinchin: *Locating Administrative Justice In International Organisations*

How are procedural rights to be protected in the evolving and fragmented sphere of global governance? What should administrative justice mean within IOs? This paper argues that administrative justice in global decision-making should be based upon the principles of legality (according to law) and justice (according to what society sees as just). Within IOs, legality requires procedures and decisions to be carried out rationally and according to law. Justice requires that the values the 'community' accepts as just are taken into account. These values are argued to be fairness, transparency and participation. What an IO requires in order for it to achieve administrative justice will differ according to its character, the nature of its relationships and the form of its administrative processes. The creation of tailored procedural standards is essential to ensure that an IO's decisions and actions ensure administrative justice. That is, that they are fair, transparent and participatory.

Panel formed with individual proposals.

Participants	Markus González Beilfuss Leora Dahan-Katz Joshua Segev Michal Tamir Dana Pugach
Name of Chair	Michal Tamir
Room	DOR24 1.402

Markus González Beilfuss: ***Detention of third-country nationals for the purpose of removal: implementation analysis in the province of Barcelona (Spain)***

Detention of irregular migrants for the purpose of removal is a burning issue. In all countries, legal rules try to find a balance between opposite interests and values using discretional powers and vague concepts that rise important concerns about the quality of the law. Furthermore, the implementation of those rules remains to a great extent unknown and shows important discrepancies between theory and practice. As a result, in almost all countries detention of irregular migrants for the purpose of removal is passionately debated as a rule of law issue.

Leora Dahan-Katz: ***Relational Retributivism***

This paper revisits the question of the justification of punishment. It defends a broadly retributive view while insisting on the significance of the role of the punisher and the relations between the punisher and the punished party in the justification of punishment. Following this line of thought, the paper proposes that punishment should be understood as a form of appropriate response to wrongdoing and is justifiable as such. The paper further argues that retributivism properly understood requires the mitigation of our punitive practices. The final section of the paper draws parallels between the phenomena of state and non-state punishment, and suggests that that while political and moral justifications of punishment have for years proceeded in isolation from one another, the two have complementary roles to play in the justification of punishment.

Joshua Segev: ***Detaining Unlawful Enemy Combatant In Israel: A Matter Of Misinterpretation?***

Since the terrorist attacks of September 11, 2001 legal experts have been debating the constitutionality of detaining "unlawful enemy combatant" not entitled to lawful combatant's rights, immunities and privileges, in the so-called "war on terror". The detention of unlawful enemy combatants is a challenge that Israel has been confronting for almost three decades. Thus, the Israeli experience can provide insights into the difficulties, shared-principles and institutional arrangements in confronting this challenge. The article analyzes the nature and essence of the constitutional claims against the detention of unlawful enemy combatant in Israel. Based on this analysis, the article identifies three constitutional key elements used by Israel in confronting the challenge of detaining unlawful enemy combatant. The article argues against the over-individualized interpretation to the Unlawful Combatant Law.

Michal Tamir and Dana Pugach: ***Nudging the Criminal Justice System into listening to Crime Victims in Plea Agreements***

Most criminal cases end with a plea agreement. However, the issue of crime victims' place in plea agreements has gained little notice. The federal Crime Victims Rights Act of 2004 law as provided victims some meaningful and potentially revolutionary rights, including the right to be heard in the proceeding and a right to appeal against a decision made while ignoring the victim's rights. References to this provision in the general literature about plea agreements are sparse and there are only few cases mentioning this right. This article purports to bridge between these two bodies of legal thinking – the vast literature concerning plea agreements and victims' rights research – by using behavioral economics.

The article will, firstly, trace the possible structural reasons for the failure of this right to be materialized. Relevant incentives of all actors involved will be identified as well as their inherent consequential processes that lead to the victims' rights malfunction. Secondly, the article will use nudge theory in order to suggest solutions that will enhance incentives for the repeat players in the system (prosecution, judges, defense attorneys) and lead to the strengthening of weaker group's interests – the crime victims.

77 THE RIGHT TO THE CITY

In our panel, we plan to explore the "right to the city", a concept well-known in other social sciences, from a legal perspective. The panel will unite a number of legal scholars that attempt to make sense of the concept from different perspectives.

Participants	Helmut Philipp Aust Cindy Wittke Michèle Finck Tilman Reinhardt Michael Denga Anél du Plessis
Name of Chair	Janne E. Nijman
Room	DOR24 1.403

Helmut Philipp Aust: *The Good Urban Citizen*

The paper discusses the emergence of international normative expectations about what it means to be a good urban citizen in the beginning 21st century. It connects local expressions of such expectations with global normative discourses. The departure point is a poster campaign run by Atlanta's Midtown district, calling on everyone to "be a neighbour, start a business, commute by foot, etc.". The underlying values of this campaign are, even if internally conflicted, related to current leitmotifs of urban governance, such as ideas pertaining to the sustainable and secure city. These notions are the result of both top-down and bottom-up processes: international organizations contribute to a shaping of the available policy spaces of urban actors today. At the same time, cities and their governments become increasingly active on the global level.

Cindy Wittke: *Building and Keeping Peace in the City*

21st century cities are objects, subjects, laboratories, and agents of emerging forms of global, local, and transnational governance. So-called global or mega city regions for instance operate not only within but also parallel to and beyond States' institutions on the local, regional, as well as global stages. They use the language of inter-state relations and international law, and mimic States' practiced forms of institutionalised and legalised interaction. Yet, cities are also sites of (violent) conflict between different intra-city groups as well as between city governments and different groups. The paper will address legal and political analytical challenges that arise when addressing intra-city violent conflict and peace making. How do the described cities govern intra-city (violent) conflict situations? How are new political settlements negotiated, by whom, and according to which norms for building and keeping the peace in the city?

Michèle Finck: *The Right to the City From a Legal Perspective*

My paper engages with the so-called 'right to the city', a concept that has recently gained in popularity in urban studies and urban social movements. In its essence, it refers to the fact that the inhabitants of a city should have the right to actively shape their city, and hence minimize the power of politics and markets in this regard. The paper briefly introduces the concept and then sets out to examine it from a legal perspective, taking into account a number of different legal orders. I analyze whether the law can actually recognize any such thing as a 'right to the city' or whether any precise legal rights may flow from the concept, such as for instance the right to political participation or housing at local level. In this context, I will examine, for instance, the right to the city as it exists in Brazil as well as elements of direct democracy at local level in Germany, in particular in Berlin. The paper will conclude that despite the existence of these tools most legal orders, as they currently stand, are incapable of recognizing 'the right to the city' for a number of reasons, including the conflict that would arise between this right and a number of established rights, especially the right to private property.

Tilman Reinhardt and Michael Denga: *From Dupnitsa to Inner London – Exploring the legal dimension of Lefebvre's "Right to the City"*

Two major trends are changing the face of Europe's capitals: Migration and Privatization. Whilst they are turning them into vibrant, cosmopolitan centers of our civilization, they are also associated with increasing segregation and social stratification. Be it at the limits, as in Paris' sprawling Banlieues, or right in the center, as in London's Borough of Tower Hamlets, migrant communities are often clustered together in socio-economically marginalized quarters. As more and more public goods are left to the private sector, this clustered distribution may result in material differences in living conditions (insurance costs, access to health and education, "food deserts", etc.).

States and municipalities, when trying to counter spatial inequalities, are typically relying on top-down approaches, such as urban planning, housing schemes, and regulation. A recent ECJ-judgement C-83/14, CHEZ however, draws attention to the potential of addressing spatial inequalities "bottom-up" through European Antidiscrimination Law. Various legal questions arise in this context: Which subject matters are covered by Art. 21 CFR? Could the unequal treatment of residents from multiethnic quarters be considered a "racial or ethnic" discrimination? How could one define appropriate spatial reference frames? Does Art. 21 CFR imply positive duties to prevent unequal results?

Our presentation seeks to answer these questions and put the results into the larger context of Antidiscrimination Law, European Social Law and Urban Governance.

Anél du Plessis: *Commentator*

78 HOW CAN THE ABSENT SPEAK? PRESUMPTIONS AND PARADOXES OF PRESENCE IN PUBLIC LAW

As states exercise power outside of their territory and against nonmembers, public law is made to step out of its national and territorial context to negotiate its place within and beyond its own borders. As boundaries of state power become less fixed, the boundaries between national, transnational, and international principles and domains are also being redefined. Where public law is so intimately dependent on democratic legitimacy for its authority, the transgression of borders and the exercise of state power over 'others' raises questions of how public law deals with the absent. This panel tackles the conference themes by considering the relationship between presence, absence and legitimacy. How does public law negotiate legitimacy of authority over the 'other' who is physically absent, as in the case of migrants? What role does the 'reasonable person' play in creating legitimacy through absence? And how does the mere presence of the state complicate how we think about legitimacy?

Participants	Dana Schmalz Valentin Jeutner Nino Guruli
Name of Chair	Michaela Hailbronner
Room	DOR24 1.404

Dana Schmalz: ***The part of the absent – or: physical boundaries and democracy***

Every notion of democracy operates with an idea of the respective people (or demos). My focus here is on those notions, which have abandoned any essentialist conception of the people, notably different approaches of radical democracy. Whereas the demos in these approaches is generally understood as open, the possibility to participate in actions identified as democratic typically hinges on the physical (co-)presence of persons. This gains significance for the question whether and how rules, which condition or hinder physical presence, can become subject to democratic contestation. We find numerous examples of such rules in the area of border and migration policies. In analyzing how these rules become contested, several scholars have drawn on a Rancièrian account of democratic struggle as the "climbing of a stage" (Rancière 1999, 81). It is my suggestion that this Rancièrian account can be misleading when thinking about the position of persons, who are physically distanced by the rules from the polities and publics that decide about these very rules. Against this background, I would like to discuss the significance of physical presence for democratic processes and possible consequences for conceptualizing rules of physical deterrence.

Valentin Jeutner: ***The reasonable person in public law***

As part of the conference panel "How can the absent speak? Presumptions and paradoxes of presence in public law" my paper aims to investigate the meaning and role of the concept of the reasonable person in public law reasoning. Specifically, I want to focus on three aspects of the concept. First, I seek to show how the invocation of the reasonable person can be understood as an (potentially unsuccessful) attempt to bestow judicial decisions with a degree of democratic legitimacy in the sense that courts make normative judgements supposedly with reference to standards shared by most – "reasonable" – persons. Second, I seek to consider the significance of the concept of the reasonable person with reference to the rule of law. In many cases the reasonable person concept is seen as a safeguard of the rule of law, but given the fictional nature and the intentional absence of the reasonable person itself from the court room the rule of law might at times be at odds with the reasonable person concept. Drawing on the findings of the previous two sections the paper finally intends to identify and to consider the specific nature of the absence of the reasonable person. While the kinds of absence considered by the other panel speakers trigger questions of legitimacy because the respectively absent persons could in principle be present, in the case of the reasonable person the concept's legitimacy might be inherently linked to the reasonable person's absence. In this sense my paper questions the binary divide between absence/presence showing that both absence and presence can, depending on the circumstances, be beneficial from the perspective of democratic legitimacy and the rule of law.

Nino Guruli: ***Public law abroad: democracy, legitimacy, and the rule of law***

The democratic process is a central principle of constitutional law; it is the most basic requirement for legitimate exercise of power. But it is not the only principle. This paper seeks to untangle doctrines rooted in democratic legitimacy from those constitutional principles that derive their authority from values of good governance and substantive conceptions of the rule of law in order to evaluate when and how 'absence' of the impacted individual is made irrelevant by the 'presence' of the State. Constitutional principles contain distinct (though connected) limits on exercises of public power. Charters of individual rights draw their authority from normative principles of human rights, as well as from the democratic processes that enact those values into positive law and ultimately from rule of law principles. By considering the role of these principles in the state's exercise of extra-territorial authority, my aim is to develop a principled means of relating these sources of legitimacy. What can we learn about legitimacy of public law by analyzing the role of democracy, authority and the rule of law abroad?

Panel formed with individual proposals.

Participants	Miluše Kindlová Věra Honusková Michael B. Krakat Manav Kapur Jhuma Sen
Name of Chair	Jhuma Sen
Room	DOR24 1.405

Miluše Kindlová and Věra Honusková: *Citizenship and Denationalization – Current Theoretical and Legal Perspectives*

Citizenship theories have again become one of the most debated areas of political/constitutional studies. With (re)emergence or revival of legal regulations providing for the possibility of citizenship deprivation, theories of the nature of citizenship have received another impetus, struggling with questions such as: Should the lack (loss) of loyalty to the state be a reason for the deprivation of citizenship, considering that its existence is a usual precondition for naturalization? Should we differentiate between citizenship acquired by birth and citizenship acquired by naturalization in this regard and why? Should we conceive of various limitations on citizenship rights and is this a better option than direct deprivation of citizenship? The paper reflects upon these and related questions against the background of current (inter)national law and practice in the sphere of citizenship.

Michael B. Krakat: *Economic Citizenship Laws: Commodification to Cosmopolitanism*

An emerging area within the law of citizenship relates to direct citizenship by investment or 'economic citizenship' allowing for free trade 'flag-of-convenience' cash-for-passport-programs (for instance by St. Kitts & Nevis or Malta) to directly assign citizenship to elite bidders without need for residence- or other requirements. 'Cosmopolitan citizenship' on the other hand may be understood as a minimum number of rights and duties held individually, directly under international law, as a global 'right-to-have rights' based on formative principles including Human Rights, equality, access to justice. This research is to contextualize both areas of law: Basic tenets of cosmopolitanism may inform and guide the process of marketization of citizenship. Economic citizenship laws on the other hand may trigger- and pose as practical, functioning drivers and foundations for the idea of a mobile, flexible rights-based cosmopolitan approach to citizenship.

Manav Kapur: *'refugees' or 'citizens': Pakistani Hindus and the Indian State*

In this paper, I examine the relationship between Pakistani Hindus and the Indian state. I argue that the small number of Pakistani belies their immense symbolic importance, which allows them to be granted Indian citizenship relatively easily. Recent amendments to the Citizenship Act have allowed India's government to make citizenship procedures much easier for minority communities when compared to the majority, a worrying trend in a secular republic. Here, I shall make three inter-related claims first, that India's weak legal protections for refugees may owe a great deal to India's partition where so-called 'refugees' saw themselves primarily as citizens of the state they migrated to. Second, I claim that this continues to play out in how India considers minority Hindus its responsibility, as opposed to all minorities. Finally, I argue that creating a strong refugee law instead of the 'citizenship' model could be a more useful and fair way of dealing with deprivileged minorities.

Jhuma Sen: *From Subjects to Citizens: Legislating and Adjudicating Citizenship in India*

The paper interrogates the legal construction of citizenship in the Indian republic between 1950 and 1955 and thereafter when claims to citizenship was primarily regulated, contested, negotiated and accommodated within the constitutional framework of 'domicile' and a deadline bound 'migration' in Articles 5, 6 and 7 of the Indian Constitution. The paper shall review the judicial narrative on citizenship and place it in the larger context of a colonial state's transition into postcoloniality.

Panel formed with individual proposals.

Participants	Ofra Bloch Benedetta Barbisan Walter Carnota Kathleen Jäger
Name of Chair	Walter Carnota
Room	DOR24 1.501

Ofra Bloch: *Diversity: a Renegotiated Compromise*

This paper offers a sociohistorical account of diversity discourse in America. Drawing on judicial and non-judicial sources from the civil rights era to today, I explore the evolving meaning of diversity. I show how, through ongoing conflict over affirmative action, popular and professional understandings of diversity have drifted away from notions of equality and racial justice towards neoliberal and utilitarian ideals. In turn, these notions, I argue, guided officials and courts in interpreting and determining the constitutional limitations on affirmative action, and shaped the way it is practiced. Adopting the diversity framework, proponents of affirmative action prevailed (for now), but its meaning got divorced from the history of state-enforced hierarchies that affirmative action was set to dismantle and the salience of contemporary racial inequality was obscured.

Benedetta Barbisan: *The Otherness in Comparative Constitutional Law*

Some constitutional scholars lately lamented that the paradigm of Comparative Constitutional Law (CCL) basically comprises experiences, problems and models from the Global North, with those of the Global South (a definition aspiring to pin down far more than a mere geographic connotation) generally overlooked.

The recurrence to a concept like the global South points at how CCL is circulated by European and North American constitutional scholars, who may entertain the conviction that the crib where constitutionalism was born still offers a comprehensive variety of patterns and prototypes to decode the complexities of modern constitutionalism.

This paper will explore the concept of otherness as addressed by CCL mainstream literature, and tackle the issue of which methodology should be applied in our branch of study and which borders should be taken into account in order to keep up with CCL's true reason of being – i.e. finding what may be similar in what is actually different.

Walter Carnota: *"Otherness" in the Catalonian Context*

"Otherness" evokes absolutes. On one ring side, national citizens, members of the same political party, colleagues of a given profession. On the other end the rest of a country, or the rest of the political spectrum. Federalism, by contrast, tends to downplay differences and minimize conflict. Regions, states, provinces, länder, urban and rural areas, are dissimilar by nature. Some are economic powerhouses (e.g. Catalonia), other are basket cases. Even all American states are quite different each one from the other. Federalism strives to merge centralist trends with decentralization. Not only devolution will be involved in the process the exact composition of each federal recipe will be contingent on history, politics, economics and society. The federal formula is usually complex, but it could be a legitimate way out for intra-state conflict. The current situation of Catalonia is a perfect example. Leading political forces are vying for outright secession from Madrid ("Junts pel si").

Kathleen Jäger: *Otherness and Discrimination in the Courtroom: Implicit Bias as a Challenge to Judicial Impartiality*

When a judiciary that is seemingly homogenous faces the "other" in the courtroom issues of possible discrimination arise. Can judges remain truly impartial and not let stereotypes influence their decisions? The science of implicit bias suggests that they cannot. Implicit bias describes the widely studied phenomenon in social psychology of attitudes, cognitions and stereotypes that may influence decision-making and behavior on an unconscious level. Judicial decision-making may be especially vulnerable to the influence of implicit bias due to the presence of certain risk factors such as a strong belief in one's own objectivity. After exploring ways in which implicit bias may play a role in judicial decision-making and the court as a whole it will be argued that international and national guarantees of impartiality and prohibitions of discrimination require states to take steps to mitigate the influence of implicit bias in the courtroom and briefly lay out what those steps may be.

81 JEWS, OTHERNESS AND INTERNATIONAL LAW: A HISTORICAL PERSPECTIVE

This panel uses the lens of Jews operating between 1920 and the 1990s to inform an understanding of the mechanisms and limits of contemporary public international law. In particular, we focus on the way in which these individuals and networks dealt with questions of movement, statelessness, displacement and belonging, and loss across three different moments in time: the inter-war era, the aftermath of the Holocaust, and the Cold War era (including both with the "human rights revolution" of the 1970s and the transitional justice networks of the post-Cold War era).

Participants	Annette Weinke Leora Bilsky Mira Siegelberg Moria Paz
Name of Chair	Moria Paz
Room	DOR24 1.502

Annette Weinke: ***From International Relations to Transitional Justice networks: Passages of the German-American Émigré lawyer John H. Herz***

John H. Herz belonged to a group of US scholars whose contribution to the disciplines of International Law and International Relations was bound up with their personal trajectories of persecution, exile, and late encounters with American patterns of thought. As a former student of Hans Kelsen, Herz became one of the most influential voices in the infant school of American International Relations. In 1984, he published his memoirs where he depicted his life-long interest for international politics, international law and human rights as an outgrowth of his experiences as a Jew and an emigrant. By discussing this and other ego-documents in the context of the human rights "revolution" and the evolving Holocaust consciousness of the 1970s and 1980s, the paper will ask for their functions as a medium of intellectual and moral self-reflection that became part of a general strategy pursued by Jewish émigré lawyers.

Leora Bilsky: ***Cultural Heritage and Jewish Restitution: A Challenge for International Law***

Cultural restitution in international law is based on the principle of return of cultural property to the state of origin. The experience of WWII confronted the world with the need to adapt this framework to deal with a state persecuting cultural groups within its own borders. In this paper I present an alternative approach developed by Jewish jurists and scholars in the late 1940s, an approach that led to the return of heirless cultural property to Jewish organizations as trustees for the Jewish people during the 1950s. This struggle has largely been forgotten and did not leave its mark in the annals of international law, partly because it was narrowly understood as a sui generis form of restitution linked to the special political constellation of the time. This paper suggests to the contrary that the Jewish cultural restitution of the 1940s and 1950s offers a promising juridical model of collective cultural restitution. The struggle was transnational in form and succeeded in overcoming the statist-territorial bias of international law to allow recognition of a cultural community as proper claimant in International Law.

Mira Siegelberg: ***New Subjects of Public Law: International Legal Personality in Interwar Jewish Legal Thought***

Statelessness, or the condition of being without a legally recognized nationality, first became a category of international legal analysis and an object of humanitarian action after the First World War. This paper examines the role of statelessness in political and legal arguments in the interwar period, especially among Jewish international legal scholars. It argues that the problem of statelessness was fundamental to their theoretical reconceptualization of law and political order and that it was particularly important for the argument that individuals- rather than states – could be the direct subjects of international law.

Moria Paz: ***A Most Inglorious Right: René Cassin, Freedom of Movement, Jews and Palestinians***

This paper is concerned with institutional myopia regarding what I call the problem of exit rights without entry rights. When it comes to rights that involve cross border mobility, human rights law only guarantees a universal right to exit a state. The right to enter a new state is limited. But the ability to exit is a very narrow right if there is no place to enter. For most people, it adds nothing at all. Curiously, this myopia has a history. It can be traced directly back to the French-Jewish jurist René Cassin, the "Father of the Declaration of Human Rights." I recount two separate stories: that of the problem of exit rights without entry rights, and that of Cassin. Both focus on the right to freedom of movement, because it is the human right that most explicitly involves cross-border mobility. Put side-by-side, these two stories demonstrate the intractability of the problem of exit rights without entry rights.

82 CONSTITUTIONALISM FOR PEACE IN COLOMBIA II – SOCIAL AND ECONOMIC CHALLENGES

In order to consolidate the success of a process of transition from armed conflict to peace, there is several questions that must be answered since an economic analysis of law, questions that has been asked in all developing and developed societies throughout the world: Which is the best way to satisfy the rights of victims? How to achieve the social reconstruction? How to improve economic policies to enhance social inclusion? What state structure is capable of satisfying the large demands of reparations for victims and rebalancing of public burdens? Which principles should guide the exercise of economic freedoms? Which are the advantages and challenges of peace, in strictly economic terms? How to finance peace to make of it stable and lasting? The experiences of correcting these socioeconomic differences in a context of transitional justice offer useful tools for all states in building a democratic economy.

Participants	Maria Carolina Olarte Magdalena Inés Correa Henao Mauricio Pérez
Name of Chair	Aida Torres Pérez
Room	DOR24 1.601

Maria Carolina Olarte: ***Economic justice as constitutional justice in transitional scenarios: at the crossroads***

In recent years the question of the socio-economic dimensions of both transitional justice and conflict has emerged as an increasingly relevant issue. The present paper examines the challenges this 'new' question posits to constitutionalism in transitional scenarios. For this purpose, it problematizes the responses of constitutionalism to the continuities of conflict-related forms of economic violence. In particular, it argues that constitutional design for post-conflict societies and the framing of what could be called transitional constitutionalism within a narrow version of the rule of law are obliterating the economic aspects of democracy while treating inequality as a background issue that does not make part of what allegedly constitutes a proper political change in transitional contexts. While valuable, those approaches are shown to have significant political limitations.

Magdalena Inés Correa Henao: ***Three non-revolutionary ways to achieve transformative justice.***

Within the context of scarce resources, transitional justice can be transformative on constitutional law in three ways: the participation of armed groups in the reparation of victims, links between the private sector and peace building, and the making of redistributive and sustainable economic policies. Transitional justice is economically fair when reparations for victims come from the assets of illegal armed groups. This attributes due responsibility, reduces imbalances on public charges, and the value of property rights is reaffirmed but based on fair title. Increasingly it recognized the social responsibility of companies during a transition and post-conflict period. It is important to conceptualize business formulas that favor the participation of victims, based on criteria of profitability and remuneration. And of course the state must adopt varied and consistent measures of economic intervention in order to deal with the causes of violence and to contribute to redistribution.

Mauricio Pérez: ***The economic challenges of the peace in Colombia***

The progressive spirit of Colombia's 1991 Constitution has been often belied in practice, in part because of the ravages of the internal conflict. Can the results of the peace negotiations be more than an empty promise? Ideally they should close the gap between law and reality. In some cases, this implies the reestablishment of an effective rule of law in others it will require legal and policy innovation. Does it make sense to speak of a "peace dividend"? The answer may be found in the comparative economics of peace and war. Both are expensive and it is not evident that public spending on security can fall if peace requires that illegal groups do not challenge the State's monopoly of violence. To assume the restoration of victims' rights can be financed with the ill-gotten assets of perpetrators is optimistic. Each case involves fundamental principles of transitional justice. Anyway, in spite of the "buts" it can be argued that peace is justified from a narrow economic perspective.

83 THEORETICAL AND PRACTICAL PROBLEMS IN PUBLIC LAW

Panel formed with individual proposals.

Participants	Zlatan Begić Katharina Isabel Schmidt Ittai Bar-Siman-Tov Quirin Weinzierl Dejan Pavlović David A. Vitale
Name of Chair	David A. Vitale
Room	DOR24 1.604

Zlatan Begić: ***Rule of Law Principle in the Dayton Constitutional Order***

The constitutional order of Bosnia and Herzegovina (hereinafter: BH) is the result of the Washington and Dayton Peace Agreement. Today when sustainable peace is undoubtedly established BH faces many problems that are connected with a dysfunctional system of government. Besides, disregard of the principle of rule of law have emerged as a particular problem for last ten years. Thus, today in BH there are more than 100 judgments of the Constitutional Courts that have not been implemented ever. It is very interesting that the inner institutions as well as High Representative fail to ensure the implementation of these judgments, even though these judgments have been enacted by the Constitutional Court for the reason of violation of the Dayton Constitution in most cases. This paper contains considerations related to the position of the High Representative and inner institutions in regard to ensuring of the rule of law principle in the constitutional system of BH.

Katharina Isabel Schmidt: ***Between "Life" and "Experience": German Free Lawyers, American Legal Realists and the Transatlantic Turn to Jurisprudential Naturalism 1903-1945***

Scholars have long recognized American jurists' idiosyncratic commitment to a prudent pragmatic and political style of legal reasoning. Its origins have been linked to the legacy of the most American legal movement of all: the Legal Realist movement. While the Legal Realists transformed the consciousness of a whole generation of American jurists the Free Lawyers never amounted to more than a "conscience-sharpening". How to account for the seemingly inverse fate of naturalist jurisprudential reform projects on both sides of the Atlantic? I propose to answer this question by focusing on diverging German and American conceptions of juristically relevant reality.

Ittai Bar-Siman-Tov: ***Temporary Legislation, Judicial Review and Experimental Governance***

Temporary (or sunset) legislation – statutes that are enacted for a limited time and are set to expire unless their validity is actively extended – is gaining increasing attention in the constitutional legisprudence and regulation scholarship. The constitutional scholarship is mainly interested in the constitutionality of temporary legislation and in judicial review of such legislation (particularly, whether and how the temporary nature of the law should impact the proper level of judicial deference in exercising judicial review). The legisprudence scholarship is mainly interested in the relationship between temporary of legislation and evidence-based lawmaking and "quality of legislation." The regulation scholarship is mainly interested in the relationship between temporary legislation and "experimentalist governance" and "smart regulation" approaches. This study – the first empirical study on temporary legislation in Israel – will try to integrate the three perspectives.

Quirin Weinzierl: ***Böckenförde and the EU – can the EU guarantee the prerequisites it lives by?***

Facing situations such as in Hungary and Poland the pressing question is whether the EU is by itself able to guarantee the prerequisites it lives by (The Böckenförde dilemma). However, Art. 7 TEU which was established in order to address such situations seems weak due to its high threshold for application. The European Commission's "New EU Framework to strengthen the Rule of Law" only provides for an informal framework of dialogue to solve (potential) violations of the rule of law. Although the relevant terms of a systemic deficit and the principle of the rule of law are well established enough to form the basis of a legal analysis Art. 7 TEU and the Framework are political not legal in nature. The outcome of the Commissions actions towards Poland and Hungary shows that the infringement procedure is the only legal tool at hand. Options proposed such as a "Copenhagen Commission" will not add any value at the legal level. The Böckenförde dilemma thus lives on within the EU.

Dejan Pavlović: ***Constitutional aspects of the ban on the far right political organizations in Serbia***

The paper aims at providing the analysis of the Serbian constitutional framework and the recent jurisprudence of the Constitutional Court on banning several registered and unregistered political organizations and formations. The common ground for the assessed organizations and formations was that their platforms and activities were directed against constitutional order, as well as on incitement to racial or ethnical hatred and discrimination.

Banning of a political organization in a democratic state is an old controversy. Modern constitutions have strong human rights foundations, but a democracy should also have a right to protect itself as a system of governance. The never ending dilemma – how much freedom should we provide for the enemies of freedom – has come again into focus of constitutional scholars and practitioners worldwide. The activism of the constitutional courts in Spain and Turkey, as well as the jurisprudence of the ECtHR, are being carefully monitored, commented and often replicated.

David A. Vitale: ***Defining Trust in Public Law***

Trust is a concept often referred to by public law scholars but rarely examined in detail. Despite this oversight, its importance to public law is apparent. Social scientists have long recognized the significance of public trust in government to well-functioning democracies. Legal scholars in other disciplines (including contract, trusts, medical and fiduciary law) have stressed the importance of understanding, and have sought to examine the relationship between trust and their respective areas of law. As a first step towards better understanding the relationship between public law and trust, this paper seeks to define trust in a way that may be of use to public law scholars. It does so in a particular sub-context of public law: the public administration of social goods and services (e.g. housing, health care, education and welfare benefits) in a contemporary democracy with a welfare state.

84 THE OTHER'S PUBLIC VALUES AND INTERESTS IN THE HANDS OF PRIVATE ACTORS

This panel consists of four scholars working on public-private law perspectives at the Centre for Enterprise Liability (CEVIA), the Faculty of Law, University of Copenhagen, Denmark. At the ICON•S Conference in Berlin, the panel wishes to address the expanding interconnection between public and private law, and the increasing role of private actors in public tasks at all levels: law-making, implementation and enforcement. The panel will discuss the borders and otherness of public law through an analysis of these interphases in four different areas, namely: European Union common market, outsourcing of public health services in Scandinavia, comparative anticorruption enforcement and climate change international governance.

Participants	Vibe Garf Ulfbeck Ole Hansen Beatriz Martínez Romera Alexandra Horváthová
Name of Chair	Vibe Garf Ulfbeck
Room	DOR24 1.606

Vibe Garf Ulfbeck: ***Public Law Values and Private Governance – Transgressing the Public-Private Divide***

The distinction between public law and private law is well known and basic in many legal systems. However, the distinction is being challenged in several ways. One way is by an increased use of private actors to perform public tasks. Taking a constitutional approach, the tendency can be seen with regard to all three branches of lawmaking, implementation and enforcement. The use of private actors in these roles imports "otherness" into the public sector, since private actors are usually driven by an incentive to maximize profit rather than take public law values into account. This paper argues that when private actors undertake public tasks, there may be a need to transcend borders and incorporate public law values into private law. It explores the extent to which tort law liability can incorporate such values and be used as a tool for creating accountability of private actors performing public tasks.

Ole Hansen: ***Public Law by Contract; the Reluctant Creation of a Private Market for Welfare Services***

Privatization and outsourcing of public activities has in Nordic welfare systems become one answer to demographic changes and economic recession. Social services, previously provided by public entities, are now to a large extent performed by private companies on the basis of long term outsourcing contracts. The overall political aim has been to reduce public budgets and to increase efficiency, while continuing to implement detailed public law rules and values into the outsourcing contracts to protect the often marginalized groups of citizens, who receive social service. Communities reserve themselves the right to vary the level of service provided on an almost day-to-day basis. As a result the outsourcing of welfare services has met considerable challenges, and private contractors have in many cases shown unable to complete the contracts. This paper demonstrates that the fundamental principles of private law are to a large extend contradicted by public law demands for e.g. transparency, equality and legality (the rule of law), and that the project of outsourcing by the creation of private markets for social services thus still faces considerable challenges.

Beatriz Martínez Romera: ***The Regulation of International Aviation's Greenhouse Gas Emissions: from public to private regulation in climate change governance***

Greenhouse gas emissions from international aviation are projected to grow steeply in the 21st century due to increasing demand for air transport. The forecasted marginal fuel efficiency improvements are unlikely to offset the sector's expanding contribution to climate change. Consequently, there is a pressing need for regulation of sector's emissions, i.e., mitigation measures in line with the internalization of the climate related environmental externalities. However, the regulation of international aviation emissions under the climate change regime and the International Civil Aviation Organization has proven difficult. As a result, and in spite of the European Union's attempt to include international aviation emissions in the EU Emissions Trading Scheme, the sector's emissions have remained largely unregulated. This void leaves room for private actors to take voluntary initiatives. This article provides an examination of the aviation industry climate-related actions to date and an analysis of the divergence from public to private regulation, both in terms of the actors regulating and the instruments used for regulation, in this issue-area.

Alexandra Horváthová: ***Private Actors: The Need for Private Enforcement Mechanisms in the Fight Against Corruption***

This article explores the question of international law's means and ends in the area of anti-corruption regulations. The fight against corruption has been the subject of more than fifteen multilateral conventions and numerous national laws, adopted by those states wishing to combat and eradicate corrupt practices from their public and private sector. Corruption presents a threat to social stability, economic competition and development, as well as to the values of democracy and human rights. Given the trend of an increasing involvement of private actors in traditionally public services, this article addresses the necessity of private enforcement mechanisms in corruption deterrence. This article first analyzes the historical and functional development of private enforcement in the EU. Secondly it explores the challenges of evidence acquisition and provisional remedies from practical perspective, taking the recent EU competition law directive as an example. Private litigation serves as a crucial complement to public enforcement, while in case of anti-corruption it has in addition also greater efficiency and deterrence effect.

85 OTHERNESS IN PUBLIC LAW JUDICIAL SCENES

This panel proposes a multidisciplinary study of the figure of the "extraneous body" in Public Law judiciary scenes and of the handling of foreignness by the power structures in charge of judging those bodies. By taking both comparative (French Conseil d'Etat, International Criminal Court, World Anti-Doping Agency, Supreme Court of Israel) and multidisciplinary approaches (Procedural Law, Theater Studies, Philosophy and Political Theory and national and int'l Public Law), the objective is to try to understand how bodies that are extraneous to the public legal systems and their power dispositives are "managed" and perceived in those scenes. The proposal aims to try to systematize a reflexion on the paradox to which all public judicial or quasi-judicial bodies have been confronted with: how to judge bodies that do not belong – or refuse to consider themselves part of – the community they are being judged by?

Participants	Pieter Bonte Alphonse Clarou Omer Shatz Juan Branco
Name of Chair	Juan Branco
Room	DOR24 1.607

Pieter Bonte: ***The Fremdkärper of the 'doping sinner' in Sports Tribunal***

Behind the facade of global consensus, a rising tide of criticism is calling into question the legitimacy of the zero-tolerance policy and the often draconic procedures by which athletes are being forced to "stay natural" and "stay normal". For instance, legal scholar Maxwell Mehlman has suggested that zero-tolerance anti-doping norms involve a kind of undue protectionism, namely a protectionism of the birth privilege of the well-born. The argument goes that zero-tolerance anti-doping rules keep the playing field unleveled, ensuring that the talented keep their edge over those who try to overcome their lesser luck at birth through doping. In this session, Pieter Bonte will develop the lead by Mehlman and others further, asking whether the denunciation of all doping, even healthy doping, might indicate that modern sports are still being organized in the hereditarian, social Darwinist spirit of Baron Pierre de Coubertin, founder of the Modern Olympics.

Alphonse Clarou: ***Le conseil d'Etat and its extraneous bodies***

The proposal will rely on the analysis of two works that respectively focus on the fabrication of the French Public Law at the French Conseil d'Etat and on its handling of an extraneous body: La fabrique du droit by Bruno Latour and Le Chemin des morts by François Sureau. The first work proposes an "insider" sociological study of the functioning of the institution, whilst the second was authored by one of the administrative judges of the Conseil d'Etat and depicts the trial of a basque terrorist he had to deal with during his service. Starting from these sources, Alphonse Clarou will try to present a theoretical approach nourished by Gilles Deleuze propositions in his book The Logic of Sense, and the relationship between the both theatrical and philosophical notions of catastrophe and event, through which he'll try to understand not only how public law is fabricated over the body of "strangers", but also how this fabrication creates in turn "reality".

Omer Shatz: ***Asylum seekers and the Israeli Supreme Court***

Omer Shatz will focus on the handling by the Israeli Supreme Court of the fate of twenty-one Eritrean asylum seekers he represented in one of the most famous cases handled by the institution in the last decade. He will theorize the case in order to better understand the nature of the physical and legal encounter between the rule – the pure sovereign, able to decide who is authorized to enter its territory and who isn't – and its exception – the asylum demand – and the violent provocation manifested by both the polity and the stranger in such encounter. He will suggest that the dissonance between the imposed presentation of the physical body which is governed by natural law ('human rights'), and the subsequent representation of the legal person which is governed by positive law, introduces us with a new political entity – the Janus face of the asylum seeker being neither a friend nor a foe, but a third political species that is a mutant form of both.

Juan Branco: ***The International Criminal Court and the Katanga case***

Relying on his interviews with the main actors of the case, including with the convict, Juan Branco will show how the ICC was incapable to seize itself of a body that was too extraneous to its social, legal and cultural codes, therefore revealing the limits of the cosmopolitanism the institution pretends to rely on. Describing the kafkaïan life course of a former okapi hunter that became an army General at 25, he will try to explain why a Court of this importance invested so much time and efforts in "policing" a body that should have never crossed its path.

86 VIOLATED BORDERS: LAND GRABBING AND GLOBAL GOVERNANCE

Land grabbing is a well-known phenomenon in global economy and global politics. It consists of purchase or long-term leasing of foreign lands for food and biofuel production by state-owned and private corporations, as well as private investors. Among the top investor countries, we find Malaysia, Singapore, Arab Emirates, India, Brazil, Saudi Arabia. The targeted countries are mainly African, although many cases have also been registered in Central and South America and in South-East Asia. Land grabbing raises issues at the crossroads of public law and private/commercial law, e.g. the wide range of contract types; the complex and varied powers and structures of companies; the weaknesses and the heterogeneity of administrative procedures and land registry practice and procedures. The panel aims at suggesting supranational and national legal remedies, both in public law and in investment and commercial law, and to stress the connections between national and supranational institutions.

Participants	Alessandra Paolini Federico Caporale Lorenzo Casini
Name of Chair	Sabino Cassese, Marco D'Alberti and Lorenzo Casini
Room	DOR24 1.608

Alessandra Paolini: ***From a Debate about Water Market to Water as a Speculative Commodity: The Australian Case***

Water grabbing is becoming a phenomenon which interests not only developing countries: the gradual "commodification" of water is quickly turning water into a big global business.

An interesting observation point is provided by Australia, one of the world's driest continent. Neoliberal economists claim that a water market will automatically balance supply and demand, through the price mechanism, turning into the best mean of allocating water for increased efficiency and profit; on the other hand, others argue that water should be allocated on a more equitable basis, through the public intervention.

Australia has gone further along the path of water markets than almost any other country, and its water market was tested during the great Australian drought of the first decade of the 21st century, with results subject to divergent assessments.

However, some data are clearly emerging: Australia set up a market-based water trading system; a "futures" market is developing (thus transforming water from a free and common property, to a money-denominated commodity); an increasing amount of water is owned purely for "investment purposes".

Federico Caporale: ***Water Grabbing: Administrative Law, Weaknesses and Possible Remedies***

This paper offers an administrative law perspective on water grabbing. In the first section, I will classify the behaviors which can be considered as water grabbing, stressing the variety of their characteristics. Their study is necessary to understand the legal implications and possible remedies of water grabbing. In the second section, I will discuss the different legal area of intervention, as bilateral or multilateral international treaties and domestic administrative law related to public goods. In the third and concluding section, through a case study, I will focus my attention on the weaknesses of domestic administrative law, which make easier water grabbing and I will discuss, if and how the declaration of the human right to water and the principle of integrated water resource management can make stronger domestic law contrasting water grabbing.

Lorenzo Casini: ***Discussant***

87 THE ITALIAN STYLE IN CONSTITUTIONAL ADJUDICATION. HOW THE ITALIAN CONSTITUTIONAL COURT FITS WITHIN THE NEW GLOBAL SCENARIO AND HOW IT CONTRIBUTES TO GLOBAL CONSTITUTIONAL DISCOURSE

It is by now a commonplace that the world is in a dynamic age of constitutional exchange, with a rich network among constitutional systems. Whatever one might conclude about the causes and consequences of global constitutionalism, as an observable fact it is undeniably a prominent feature of our transnational juridical and political environment. Given the pervasiveness of this phenomenon, it is remarkable how much the principal sources of constitutional borrowing and comparative dialogue remain dominated by a relatively narrow group of constitutional systems and courts. It is important to add new elements to the contemporary constitutional discourse, and the voice of the Italian Constitutional court can be one of the new voices. Against this context, the panel will discuss where the Italian Court fits and how does it reflect and contribute to global constitutional adjudication. Starting point for the discussion will be "Italian Constitutional Justice in Global Context" (OUP '16).

Participants	Patricia Popelier Oreste Pollicino Marta Cartabia Andrea Simoncini Vittoria Barsotti
Name of Chair	Luís Miguel Poiares Pessoa Maduro
Room	UL9 E25

Patricia Popelier: ***A new model of judicial review?***

In their book on 'Italian Constitutional Justice in Global Context', Barsotti et al. claim that the Italian Constitutional Court has developed a new model of judicial review. This Italian style, defined as 'institutional relationality', refers to the ICC's 'ability to establish sound and vital two-ways relations with other institutional actors, both, political and judicial, national and supranational'. This is manifested in the ICC's relation-building capacity and in its review methods. Here it is claimed that this style of constitutional adjudication, far from country-specific, characterizes a broader European continental style. It distinguishes constitutional courts from diffuse types of constitutional review. Embeddedness in the European legal space, then, distinguishes the European from other constitutional courts. Lastly, more intense and methodically more developed comparative work is called for to define the European style and explain commonalities and differences.

Oreste Pollicino: ***Is there an Italian Style in Constitutional Adjudication?***

The presentation will try to answer to the question at the heart of the paper's title taking as starting point of discussion the (successful) attempt of the Authors' Book "Italian Constitutional Justice in Global Context" (OUP, 2016), to identify the DNA which makes "special" and very difficult to duplicate the Italian Constitutional Court (ICC) judicial style. More precisely, the paper will try to demonstrate as the ICC was in a way forced to develop a judicial style based on a cooperative and "relational" approach, in order to face the several challenges existing since the beginning of its activity. "Thanks" to the above mentioned challenges, which favored the rise and the consolidation in the ICC case law of a judicial style which explains as declares the law, the ICC found itself well trained and prepared to play a protagonist role in the actual season of cooperative constitutionalism in Europe and, more generally, in the present global constitutional scene.

Marta Cartabia: ***National constitutional adjudication in the European space***

Andrea Simoncini: ***"Relationality" as a feature of the Italian style in constitutional adjudication***

"Relationality" means that despite the Italian Constitutional Court belongs to a potentially strong model of constitutional review, it prefers to use its power softly, aiming to find a dialogue with the other constitutional actors (Parliament and Judiciary). This peculiar "style" derives from an adaptive capacity developed by the ICC during its life to survive in a complex and hostile constitutional context. Complexity derives by the peculiar European path to constitutionalization after the World War II, ended with different levels of Constitutional Charters and Jurisdictions. Hostility derives by the constitutional mindset in which the ICC was born, linked to the British idea of the "sovereignty of the Parliament" and to a French-like weak judiciary. "Relationality" has been the institutional resilient skill to overcome hostility and complexity. This skill can be decisive for other constitutional systems, facing the new challenges of constitutional adjudication in global context.

Vittoria Barsotti: ***European common patterns of judicial reasoning***

Opposed forces are at work in Europe. The search for cultural cohesion clashes with the desire of protecting constitutional identities. The ideal of an inclusive society is at odds with an evolving multiculturalism. Tension between global and local is evident. Adjudicatory authorities must face unprecedented challenges. The ways cases are decided is an important viewpoint for understanding the conflicts connected to the new cultural environment. When values are involved, the outcome and the reasoning -which serves the parties and at the same time contributes to the court's legitimating process – are equally important. Starting from the Italian case, it is interesting to ascertain whether, in pluralistic societies, when there can be tension between fundamental rights/values, particular hermeneutic approaches prevail – e.g. balancing, and the correlated notions of proportionality and reasonableness. Are common patterns of judicial reasoning emerging in Europe?

88 THE INCLUSION OF "THE OTHER": THE PROTECTION OF THE SOCIAL RIGHTS OF MIGRANTS IN NATIONAL AND EUROPEAN COURTS

Welfare benefits provided to migrants are an essential way to guarantee their fundamental rights enshrined in national constitution and supranational Charters. They are also a vital tool for their inclusion in European society. However, social policies towards migrants have been deeply affected by the financial crisis. The cuts to welfare expenditure combined with the ever-increasing influx of migrants coming to Europe has had a noticeable impact on social cohesion and acceptance of migrants, making the role of the courts in protecting migrants social rights very crucial. The panel analyses such a role by looking at different perspectives that local and European courts assume: the use of the principle of equality as an overall justification for welfare entitlements, the concept of social citizenship in its interaction with the exclusionary meaning of political citizenship, the interaction between national and supranational legal systems in migrants' rights protection and its effectiveness.

Participants	Alessandra Serenella Albanese Ulrike Lembke María D. U. Fernández-Bermejo Eva Hilbrink
Name of Chair	Stefano Civitarese Matteucci and Jeff King
Room	UL9 210

Alessandra Serenella Albanese: ***The principle of equality and its different functions in protecting migrants' social rights***

The paper examines the European and Italian court's case law on the protection of migrants' social rights, regarded from the point of view of the application of the principle of equality. The principle of equality can play different roles in judicial reasoning. It not only assumes the meaning of a pure non-discriminatory principle, but it can also be used as the basis to assess the reasonableness of the legislative measures introducing different welfare regimes (on grounds of nationality, duration of stay, type of permit of stay, etc.). It can finally be related to dignity and to fundamental human needs and regarded as "substantive equality", according to art. 3 § 2 of Italian Constitution. The different facets of the principle are variously stressed or combined in court's decisions. How the equality "tool" is used in legal reasoning, may produce different consequences on the effectiveness of migrants' social rights protection and may indeed have a significant impact on social cohesion.

Ulrike Lembke: ***Social citizenship and the inclusion of 'the other': migrants' benefits before European and German courts***

For some years, the ECJ has developed a social dimension of Union citizenship counterbalancing a sole market approach. But in its recent decisions on national competences to refuse the granting of social non-contributory benefits to economically inactive Union citizens, the court put a sharp stop to the ideas of social Union citizenship and social inclusion. At the same time, German courts held that economically inactive Union citizens are entitled to basic social benefits under certain circumstances. These rulings are owed to the fundamental right to minimum subsistence following from human dignity as stated by the Federal Constitutional Court, for the unemployed and their families (2010) and for asylum seekers and refugees (2013). The paper examines European and German case law on migrants, benefits in the light of concepts of social citizenship and approaches to the social inclusion of migrants as the paradigmatic others of national social security systems.

María Dolores Utrilla Fernández-Bermejo: ***Migrants' legal protection under the European multilevel system of fundamental rights***

The purpose of this contribution is to analyze the legal regime of the protection of migrants in Europe both under supranational law – namely the European Convention on Human Rights and EU law – and national law of the EU Member States. The stress will be on the positive obligations deriving from national constitutional law and translated primarily into rights to social protection and into the delivery of social benefits (by public administrations). Moreover, the interaction of such a level of protection with supranational human rights law will be scrutinized as to check the effectiveness of this multi-layered system when projected over the figure of migrants in Europe. The subsidiary role of safeguard with which the European Convention is endowed as well as the potential constraints for human rights arising from EU internal market law will be critically assessed.

Eva Hilbrink: ***Immigration Control as an Obstacle for Balancing in Strasbourg Legal Reasoning***

Strasbourg balancing in Article 8 ECHR immigration-cases has a reputation of being intransparent and unpredictable. On the basis of an empirical analysis of 147 cases, this paper argues that the ECtHR follows a consistent pattern of scrutiny: it consistently refrains from scrutinising the merits or the relative importance of 'immigration-specific' aspects. These are aspects that only in the context of immigration may result in the physical exclusion of a person from society, such as irregular residence, severed family ties, or a lack of resources. If national immigration-specific rules are applied correctly and consistently, and if there is no good excuse for non-compliance with these rules, the Court concludes that denying residence does not violate Article 8 ECHR. A violation in this type of cases, always coincides with an incorrect or inconsistent application of national rules or a good excuse for non-compliance. These particular factors being of decisive importance, inevitably renders the individual interests that are at stake without self-standing significance.

89 GLOBAL CONSTITUTIONALISM AND HUMAN RIGHTS

Recent years have witnessed a dramatic move towards the globalization of constitutional law. Once considered inherently local, constitutional law is now increasingly conceived of in global and transnational terms. It is perceived as a framework that is shared by different nations and different constitutional courts and as manifesting a universal conception of constitutionalism: Global Constitutionalism. The study of Global Constitutionalism has at least two interrelated focal points. The first, as mentioned above is the study of the phenomenon of constitutional law beyond the borders of the state. This includes the study of the migration of constitutional ideas, of practices of foreign law citation, and of the prevalence and spread of particular constitutional constructs, such as proportionality. The other focal point is the study of the features and history of a particular model of constitutional law, which has developed in Europe after WWII, and of which Germany, the European Court of Human Rights, Canada, and South Africa are leading examples. This second focal point also inevitably engages in a comparison with the one leading model that is at odds with the Global Model – the American model. What are the effects of Global Constitutionalism on Human Rights? What are the particular conceptions of human rights that are embedded in the Global Model? How does the global model of rights affect particular state models? Does it have different effects on different rights? These questions will be at the center of the panel on "Global Constitutionalism and Human Rights".

Participants	Rosalind Dixon Ran Hirschl Moshe Cohen-Eliya Gila Stopler Mattias Kumm
Name of Chair	Iddo Porat
Room	UL9 213

Rosalind Dixon: *Proportionality & Comparative Constitutional Practice*

Concepts of proportionality have been developed in most countries in a deeply comparative way, routinely drawing on ideas developed across constitutional borders. The application of doctrines of proportionality, however, has often been far less comparative. The article also proposes at least two ways in which courts may usefully draw on comparative constitutional experience to inform the application of proportionality doctrines: first, by using comparative experience to test the practical plausibility of alternative, less restrictive legislative alternatives; and second, by providing courts with a form of 'transnational' anchor, or check against the dangers of both over- and under-enforcement, in making judgments about the legitimacy of a government's purpose in enacting particular legislation. The article also considers the potential methodological challenges and requirements for a doctrine of proportionality to be comparatively grounded in this way.

Ran Hirschl: *Economic and Social Rights in National Constitutions*

Much has been written about the global convergence on constitutional supremacy, and the corresponding rise of an apparently universal constitutional discourse, primarily visible in the context of rights. In this paper, we examine the global constitutional homogeneity claim with respect to economic and social rights. Based on a new and unique dataset that identifies the status of seventeen distinct economic and social rights in the world's constitutions (195 in total), we make four arguments. First, although economic and social rights have grown increasingly common in national constitutions, not all ESRs are equally widespread. Whereas a right to education is so common as to be practically universal, rights to food or water are still very rare. Second, constitutions accord ESRs different statuses, or strengths. Roughly one third of countries identify all economic and social rights as justiciable, another third identify all ESRs as aspirational, and the last third identify some ESRs as aspirational and some as justiciable. Third, legal tradition – whether a country has a tradition of civil, common, Islamic or customary law – is a strong predictor of whether a constitution will have economic and social rights and whether those rights will be justiciable. Fourth, whereas regional differences partly confound the explanatory power of legal traditions, region and legal tradition retain an independent effect on constitutional entrenchment of ESR. We conclude by suggesting that despite the prevalence of economic and social rights in national constitutions, as of 2013 there is still considerable variance with respect to the formal status, scope and nature of such rights. Because the divergence reflects lasting determinants such as legal tradition and region, it is likely to persist.

Moshe Cohen-Eliya and Gila Stopler: *Probability Requirements as Deontological Constraints in Global Constitutionalism*

Critics of proportionality (especially its third subtest, that of balancing), have argued that its application does not follow the principles of rationality and legitimacy. Hence especially in times of emergency it is not right-protecting and undermines the deontological conception of rights (as trumps or as shields). This paper suggests one method to secure the (moderate) deontological conception of rights by setting a probability threshold prior to the ad-hoc balancing. We base our argument by drawing on the literature of cognitive psychology and on examples from courts that have used probability requirements in the past, such as the American clear and present danger test or the Israeli high probability test.

Mattias Kumm: *Rights-based proportionality review, public reason and legitimate authority*

The paper will argue that rights based proportionality review ultimately connects the legal validity of a norm to its justifiability in terms of public reason. It structures a legal practice the point of which is to ascertain whether law actually has the authority it claims to have. In this way rights based proportionality review is connected to a reflexive, critical conception of legality.

90 THE CONCEPTUAL BOUNDARIES OF THE STATE

The panel brings together four papers revolving around the transformation of public law brought about by the process of European integration. In particular the aim of the panel is investigating the legal and constitutional implications of the shift from nation-statehood to member statehood. Transformation is examined and critically assessed from a range of different perspectives concerning executive law-making constitutional adjudication the state-society relation and the structure of legal authority within the EU.

Participants	Michael Wilkinson Marco Dani Marco Goldoni Jan Komárek
Name of Chair	Floris de Witte
Room	UL9 E14

Michael Wilkinson: *Constitutional Pluralism?*

What remains of constitutional pluralism in the wake of the reconfiguration of political and legal authority since the Euro-crisis? According to the new anti-pluralists the recent OMT ruling signals its demise, calling to an end the stalemate between the ECJ and the German Constitutional Court on the question of ultimate authority and representing a new stage in the constitutionalisation of the European Union, towards a fully monist order. It is argued here that such celebrations are misguided in attending to the juridical at the expense of the political dimension of constitutional development. Putting these dimensions together reveals the dysfunctional constitution of Europe, reflecting conflict between the telos and nomos of integration, between political authority and technocratic power, and among the Member States themselves. Constitutional pluralism, in conclusion, is worth defending, but as the normative recognition of a horizontal plurality of constitutional orders.

Marco Dani: *The rise of the supranational executive and the post-political drift of European public law*

The paper offers a synthetic overview on the evolution of European public law arrangements by examining the relationship between the executive-based structure of the EU and national constitutional democracies. It argues that, owing to the predominance achieved by the supranational executive and the corresponding displacement of constitutional democracies, European public law has acquired an increasingly post-political character.

Marco Goldoni: *The Study of the Material Constitution*

The study of the material constitution focuses on how a society is built politically and then reproduced though the organisation of its material aspects. It integrates the political dimension of society's artificial construction and the political economy of modern societies as the material basis of their development. This type of study benefits from a synthesis of the concrete order-type of legal thinking and the materialist tradition of modern political economy. The key point here is that this is already juristic knowledge, without whom nothing analytic could be said about the form and content of the State constitution. Constitutional lawyers should therefore engage with it in order to make their research more accurate. This paper will suggest that the study of the material constitution ought to be extended to at least four components: subjects, objects, aims, spatial and temporal coordinates.

Jan Komárek: *Judicial Legitimacy without Borders*

The paper examines how the idea of freedom (as self-determination) informs judicial legitimacy in the world where the borders between the internal and international have gained a different meaning from that in which our conceptualization of judicial legitimacy originates.

91 THE INTERNATIONAL RULE OF LAW – RISE OR DECLINE?

The panel introduces the Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" Certain developments in recent years give rise to the question how international law currently develops and performs its function. Whether we are seeing symptoms for a more significant "rise or decline" of international law is a question that underlies the research agenda of the group. Panelists will address select issues within this framework.

Participants	Pierre d'Argent Jutta Brunnée Heike Krieger Georg Nolte
Name of Chair	Heike Krieger
Room	BE2 E34

Pierre d'Argent: ***Domestic democracy and normative differentiation as challenges for the international rule of law***

Two challenges – one external, one internal – to the international rule of law will be explored. The external challenge relates to domestic democracy: while international law was largely seen and used after World War II as a way to strengthen and promote domestic democracy through external control mechanisms, it is increasingly seen today as an impediment to popular choices expressed through democratic means. The internal challenge relates to international democracy: while the principle of equal sovereignty of States is essential to the legitimacy of the international legal order, the need to accommodate differences in capacities through normative differentiation tends to erode such legitimacy.

Jutta Brunnée: ***Up to the Task? The International Rule of Law and Complex Problems***

International law is routinely called upon to grapple with environmental problems that are polycentric and multi-dimensional in nature, and resistant to permanent resolution. The rise of such complex environmental problems has coincided with a growing emphasis in international environmental law, both customary and treaty-based, on procedural rather than substantive requirements. Does this turn to procedure signal a decline in the global rule of law? Using climate change as an example, I argue that strong procedural requirements are crucial elements of the rule of law. In the context of complex problems like climate change, procedural requirements help provide a resilient and predictable framework for the long-term interaction that is inevitably needed in dealing with policy challenges that may not be amenable to solution on the basis of formally fixed substantive commitments.

Heike Krieger: ***Consitutionalization in Crisis?***

Numerous developments and symptoms suggest that international law is currently undergoing a significant crisis. Here, the thesis on constitutionalization of international law could offer an answer as to how law might face and channel significant changes within the international order. However, this thesis is closely linked to the period of juridification in the 1990s which fostered an optimistic perception of international legal developments. Can constitutionalism prevail as a dominant interpretative model under current circumstances? The paper analyses opposite trends which question the appropriateness of a constitutional reading of international law.

Georg Nolte: ***The International Rule of Law – Rise or Decline?***

Certain developments in recent years give rise to the question how international law currently develops and performs its function. Whether we are seeing symptoms for a more significant "rise or decline" of international law is a question that underlies the agenda of the Berlin Potsdam Research Group on "The International Rule of Law – Rise or Decline?" The pursuit of this question requires to clarify how "rise or decline" can be identified and assessed.

Panel formed with individual proposals.

Participants	Seyed Reza Eftekhari Aleta Sprague Chao-Chun Lin Wellington Migliari Giulia Francesca Marina Tiberi Marilena Gennusa
Name of Chair	Aleta Sprague
Room	BE2 E42

Seyed Reza Eftekhari: ***Procedural Rules, Substantial Law and the Debate of Migrants' Rights in the European Union Constitution***

EU Constitution comprises a comprehensive body of substantial rules and procedural policies that identify the jurisdiction of the EU bodies. The focal concern of this paper is the amalgam that may be caused by that duality. The EU documents are substantially rich but suffer weaknesses regarding procedural mechanisms for guaranteeing migrants' rights. My paper suggests that the successfulness of the process of institutionalization of substantial rules is a matter of procedural affiliation.

Aleta Sprague: ***The Role of Religion in 193 National Constitutions: Assessing Rights and Protections in an Era of Mass Migration and Religious Pluralism***

Assessing Rights and Protections in an Era of Mass Migration and Religious Pluralism In an era of mass migration, many countries are becoming more religiously diverse. According to the Pew Research Center, between 2010 and 2050, the Muslim population of Europe is expected to increase from 5.9% to 8.4% without migration; with migration, the projection increases to 10.2%. As 2015 made clear, the challenges of mass migration and corresponding demographic shifts, combined with violence related to religious extremism, can trigger backlash against religious minorities. Given these trends, protections against religious discrimination and guarantees of freedom of religion are increasingly consequential. This article will examine the extent to which the constitutions of 193 U.N. Member States explicitly prohibit religious discrimination and guarantee freedom of religion, as well as how constitutions define the status of religious law. In addition, this article will assess how constitutional provisions relating to religion have evolved over time and across regions.

Chao-Chun Lin: ***Challenges in the Details: Taiwan's Extending Judicial Review to Immigration Detention***

To strengthen the protection of detained immigrants through judicial review is a modern trend in the world. Taiwan is no exception to this. For example, referring to international human rights law, the Grand Justices of the Judicial Yuan, the Constitutional Court in Taiwan, asserted that immigrants have rights to be access to judicial review in reviewing their detention in the J.Y. Interpretation No. 708. Furthermore, based on this decision, not only the immigration laws but also the habeas corpus law have been modified, which ushered in a new era of protecting personal liberty in Taiwan in terms of having a much stronger role of judicial review in this area. Despite this significant development for immigration detainees, some formidable challenges still lie ahead. Overall, the challenges consist in how to construct an overall due process structure that can implement the protection of immigration detainees more thoroughly. According to the situation in Taiwan, three levels of issues await to be resolved: the administrative due process prior to judicial review, the immigration detention due process per se, and the overall deportation due process.

Wellington Migliari: ***Policies for immigration or a political supranational paradigm on city borders?***

Policies for immigration are currently objects of national competences and far from local realities. However, during the past years, cities have initiated practices through political agendas to confront realpolitik paradigms on immigration. Syrian refugees, black African street vendors of beach blankets and Pakistanis selling beer in public spaces are some of the hot topics in the Catalonian public opinion. Since 2014 Barcelona Declaration, there is an attempt of local governments in changing the anti-immigrant symbology into a humanized integrated individual. Catalan grassroots movements have been some of the Barcelona City Council's cornerstones to demand more coherent policies in European Union and Spain. The aim of the present article is to present cities as potential leaders for innovative politics pro-immigrants from non-European Union countries to face the inertia of State policies for national borders.

Giulia Francesca Marina Tiberi and Marilena Gennusa: ***European Integration and the Challenge of Massive Migration: The Case of Integration Tests***

A growing number of EU Member States have introduced integration tests for migrants, based on knowledge of the language of the host country, but also sometimes on "citizenship" issues, including history, political institutions, society and democratic values. Although there is no doubt that an ability to master a language can contribute to successful integration, there are serious concerns that some of these tests may in fact be hindering integration and leading to exclusion. The paper investigates, following the recent relevant CJEU case law, the dilemma regarding the balance of fundamental rights, specifically the conflict between the right to non-discrimination and family life for non-EU residents on the one hand, and the right of States to decide who enters their national territory on the other.

93 JUDICIAL DIVERSITY: A COMPARATIVE APPROACH

While in theory the judicial role is constructed as depersonalized, implicating an erasure of the subjective persona of the judge in practice national and international judiciaries tend to reproduce racial gender socio-economic cultural and linguistic hierarchies. This panel will discuss judicial diversity from a comparative law perspective, reflecting on the various forms of "otherness" needed on the bench in Africa, Europe, the United States, as well as on multinational courts.

Participants	Mathilde Cohen Iyiola Solanke Leigh Swigart
Name of Chair	Thiago Amparo
Room	BE2 E44/46

Mathilde Cohen: *White and Female: Paradoxes of the French Judiciary*

Though it is presently impossible to measure racial and ethnic diversity quantitatively in France, it appears from my fieldwork that French judges are overwhelmingly female, white, upper middle class, and of Christian backgrounds – while the majority of the accused are Maghrebi, black, or Eastern European males from working-class backgrounds. To uncover the structure of racial discrimination as well as other forms of intersectional oppression, I analyze judges' discourse about diversity, examining the strategies by which they dodge or downplay the relevance of race, gender, and sexual orientation.

Iyiola Solanke: *A Diversity Agenda for the Court of Justice of the European Union*

Although the Court of Justice of the European Union (CJEU) has always been an international court, it has been limited in its pursuit of diversity. The reasons to be concerned with diversity apply to the CJEU as much as any other court. Diversity as an input and output contributes to the quality of judicial decision-making, justice and democracy – diversity in the CJEU strengthens democracy in the European Union as a whole. The paper begins with an explanation of the task and organization of the CJEU, and explores the current diversity agenda in the EU before considering the specific diversity challenge for the CJEU and sketching a strategy to address it.

Leigh Swigart: *Diversity on the International Bench: The Case for Considering Language and Culture*

In the international sphere, certain attributes of persons nominated for judicial positions receive a great deal of scrutiny and oversight. Central among these is nationality, with gender becoming an attribute of increasing importance. As an identifier, nationality can suggest, however, more than the nominee's citizenship or allegiance to a particular state. By extension, this category may imply other characteristics that are pertinent to the work of an international judge, including linguistic knowledge and preferences, as well as culturally embedded worldviews and behaviors, some of which a judge may be largely unaware. This paper will explore how language and culture are largely absent in discussions around diversity in the international judiciary and argue for increased awareness of these attributes and their potential for important impacts on the work of international courts. Such impacts may be both internal and external, that is found within the institutions themselves as well.

94 HOW TECHNOLOGICAL CHANGES HAVE AFFECTED EUROPEAN REGIONAL COURTS' AND SUPREME COURTS' STRIVE FOR LEGITIMACY

The discussion on courts' legitimacy treats it as an uninterrupted story of relationship between the states or governmental branches, the public and courts. In this panel the speakers will demonstrate how technological shifts have brought substantial changes in this relationship. Shai Dothan examines the influence of a virtual shaming wall where Non-Governmental Organizations (NGOs) publish reports, accusing states of noncompliance with ECtHR judgments. Or Bassok examines how the invention of public opinion polling affected the concept of judicial legitimacy in the understanding of the CJEU and the ECtHR and the American Supreme Court. Diego Arguelhes employ quantitative methods to show how TV broadcasting of the Brazilian Supreme Court's deliberations affected individual practices of opinion writing.

Participants	Shai Dothan Or Bassok Diego Werneck Arguelhes
Name of Chair	Or Bassok
Room	BE2 139a

Shai Dothan: ***A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States***

What happens after an international court finds a state violated international law? Unfortunately, states often fail to comply with such judgments. International courts like the European Court of Human Rights (ECHR) have to rely on the help of NGOs to shame states into compliance. In 2011, the body charged with enforcing judgments of the ECHR launched a new website dedicated to publishing reports by NGOs that criticize states for noncompliance with ECHR judgments. The paper analyzes all the reports published in the first four years since the website was created. This analysis, together with interviews with many of the NGO lawyers involved, sheds light on the way reputational sanctions work in international law. It reveals that NGOs focus most of their attention on legally important cases and on cases that address severe violations. It also shows that NGOs focus on states that usually comply with ECHR judgments rather than states that usually fail to comply.

Or Bassok: ***The Legitimation Theories of the ECtHR and the CJEU***

Based on quantitative and qualitative analysis the adjudication of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), I show that while the CJEU views its legitimacy as emanating mainly from its expertise, the ECtHR views its source of legitimacy mainly in enduring public support as manifested in the different member states. Though these courts' different sources of legitimacy were never exposed or conceptualized in this manner, in my paper, I argue that this difference has a great explanatory value in understanding each of these courts' jurisprudence in general and in particular with regards to several prominent doctrinal differences between the courts.

Diego Werneck Arguelhes: ***Judicial profiles and the influence of TV broadcasting on the length of Brazilian Supreme Court opinions 2000-2014***

In this paper we try to test such anedcotes by using a complete database of all Supreme Court decisions on TV Broadcasting (Supremo em Numeros a project maintained by FGV Direito Rio). We analyzed over 180 000 collegiate decisions utilizing Optical Character Recognition (OCR) to extract text layers from all PDF documents. These comprise a span of over ten years of collegiate decisions from the year 2000 (two years prior to the birth of TV Justica) to 2013. Although the paper focuses on the influence on the specific broadcasting and decision-making arrangement found in the Brazilian Supreme Court we believe that our results allow for useful dialogues with the broader literature on judicial behavior public opinion and judicial audiences more generally.

Panel formed with individual proposals.

Participants	Sieglinde E. Pommer Reuven Ziegler Mirjam Streng Tally Kritzman-Amir Marie Walter
Name of Chair	Reuven Ziegler
Room	BE2 140/142

Sieglinde E. Pommer: ***The Refugee Crisis: International and Comparative Legal Aspects***

With thousands of migrants fleeing from war, persecution, and oppression, all of a sudden the EU finds itself in the middle of an escalating refugee crisis which captures the world's attention. Governments struggle to meet their international obligations and uphold the human rights guarantees despite a deeply controversial public opinion. Conceptualizing the international legal response to this global crisis, we discuss the limits of national sovereignty, the new relevance of borders and international cooperation and the challenges it presents to comparative public law.

Reuven Ziegler: ***Condoning permanent transience? "Prevention of settlement" of asylum seekers***

In three subsequent judgments, HCJ 7146/12, HCJ 8425/13, and HCJ 8665/14, the Israelis Supreme Court held legislation authorising lengthy detention of non-deportable 'infiltrators' (as defined by Israeli law notwithstanding oft-pending asylum applications), to be unconstitutional, violating the constitutional rights to human dignity and to liberty, The state's explicit legislative aim for detaining such persons away from population centres was to 'prevent' their 'settlement' in Israel, notwithstanding the passage of time and their established ties. The paper critically appraises the permissibility of such aims under International Refugee Law.

Mirjam Streng: ***Normative perspectives on the right to education of asylum seekers***

This paper examines whether an Asylum State may morally distinguish between citizens and asylum seekers in the realm of education once asylum seekers are territorially present and if so on what basis. In the first part, I examine the rich literature on the aims of education in the field of education philosophy. I then examine to what extent these aims of individual human flourishing and the creation of 'good' members or citizens of society are relevant for an Asylum State's asylum seeker population. I suggest that their relevance partly depends on conceptions of alienage, societal membership and citizenship, which I explore in the second part. In the third part, I conclude to what extent these moral perspectives on membership can support the aims of education and the International Human Rights Law principles of equality and non-discrimination in education, which have come under pressure in our era of greater movement across borders.

Tally Kritzman-Amir: ***Mass Influx***

International forced migration in 2015-16 is a concern of massive dimensions. Persecution, conflict, generalized violence, or human rights violations have caused the forced displacement of dozens of millions of persons worldwide. It was frequently referred to as a "mass influx", though there is no formal definition of "mass influx", and term absent from legal documents. It is frequently used as a catchphrase to explain their reluctance to provide responses to the crisis – when rejecting migrants at the borders; refraining from determining status; failing to provide economic assistance etc.

The paper deconstructs the concept of mass influx. To the extent the quantity and density of forced migration matters, an agreed-upon definition for mass influx should be made, and clear, transparent procedures for its application should be formed. The consequences of a mass influx on the rights of asylum seekers and duties of states should be determined and monitored. Without these measures, "mass influx" arguments should merely be treated as evasion techniques, used by states reluctant to shoulder the burden of the growing international problem of refugees.

Marie Walter: ***The Europeanisation of Asylum law: A rights-enhancing process? National Detention Practices under the Multilayered Governance of Asylum***

Ongoing civil wars have spurred a new wave of forced migration towards the EU Member States. Is the human right to asylum effectively protected under the EU asylum legal framework? What is the impact of European integration on the rights of asylum-seekers? The prevalent discourse in academia has been to consider European asylum policy as a set of legal principles which provide the necessary instruments to secure the primacy of State interests over the human rights of asylum-seekers and refugees. My research confronts the existing literature with new data in order to provide a more accurate account of European integration in asylum law. In this paper, I compare how EU Member States have implemented into their national regulation the new provisions of EU law concerning administrative detention. The paper compares the domestic reform processes and resulting degree of compliance with EU law to account for varieties of implementation.

Panel formed with individual proposals.

Participants	Jorge Contesse Marc De Leeuw Erika De Wet Andrej Lang Ingrid Leijten Melina Girardi Fachin
Name of Chair	Erika De Wet
Room	BE2 144

Jorge Contesse: ***Supraconstitutional authority and the judicialization of international human rights law***

International human rights courts hold States accountable for their human rights violations. In so doing, they redraw the borders of state and international law, creating new dynamics of interaction between States and regional courts. My paper looks into some of the doctrines that both the European Court of Human Rights and its sister Inter-American Court have developed and tests them against the background of changing political landscapes in both regions. For instance, for some, the accession of Central and Eastern European countries into the European Convention has resulted in a more activist Court. In the context of states' resistance to some judgments, we must examine the Court's tools to counter such resistance. The same with the Inter-American Court of Human Rights: it is necessary to assess whether the doctrinal tools that the Court utilizes are fit to address the human rights claims that petitioners put forward as well as the member States' resistance to those claims.

Marc De Leeuw: ***The Pragmatics of Law in Humanitarian Government***

Our paper focuses on Australia's refugee policies and in particular the recent introduction of the "Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014" (hereafter, the Bill). This Bill was introduced by the Coalition Government to focus on asylum seekers who – between August 2012 and December 2013 – had arrived by boat and who were not relocated to offshore processing centers on Nauru or Manus Island. It proposed a number of significant changes to the existing organization of asylum in Australia – in particular in its determination of legal refugee hood. The Bill paves a way to what we call the act of "unsigning" with respect to Australia's humanitarian obligations as set out by the non-refoulement (non-return) principles in international law, and more generally to the well-established doctrines of the 1951 Geneva convention relating to the status of the refugee. In the paper we unpack some of the proposals of this Bill emphasizing the juridification of the refugee body and the self-referentiality of humanitarian law. Western humanitarianism, then, as it is inscribed in international law, operates, we argue, as an effect of legality.

Erika De Wet: ***The Evolution of the Concepts of Property and Peoples in the Jurisprudence of Regional Human Rights Bodies***

This paper examines the evolution of the right to property in regional human rights instruments from an individual right to a right that includes also the collective land rights of indigenous peoples. The analysis distinguishes between the recognition of a collective property right of indigenous peoples as such, their collective right to restitution or compensation in the face of involuntary displacement as well as the collective right to share in economic benefits resulting from economic exploitation of indigenous property. In doing so, the analysis exposes conceptual differences between the approaches of the Inter-American and African judicial bodies on the one hand and that of the European judicial bodies on the other hand in addressing historical inequalities resulting from dispossession marginalization and forced displacement. In addition, the analysis assesses the extent to which the recognition of collective property rights implies expansion of international legal personality.

Andrej Lang: ***Alternative Rights Protection: From judicial to non-judicial institutions***

A widely held assumption in legal scholarship is that government pursues public interests whereas courts protect individual rights against governmental intrusions. Accordingly, rights protection is often equated with judicial review. I propose to shift the focus of scholarly attention from the judicial realm to the policy process. Parliaments and bureaucracies have the capacity to protect rights concerns in a much more multifaceted manner than courts. In my paper, I analyze from a comparative perspective how a policy that potentially infringes upon rights comes into being and what mechanisms exist to identify and to prevent rights infringements before they reach a court. In particular, I assess how rights affect the legislative process and whether the consideration of the Court's jurisprudence has a positive or negative effect on the quality of lawmaking.

Ingrid Leijten: ***Administrative Discretion and Human Rights Inflation***

Human rights have an impact on administrative authorities' exercise of public power. Often, courts decide whether a human right has been violated, which brings up the question of how judicial review relates to the discretion of administration in making individual determinations. Recently, the highest Dutch administrative court decided that when human rights are at stake, administrative courts should depart from their traditionally 'marginal' mode of review and opt for stricter scrutiny. Based on the information provided to the authorities, they may 're-do' the decisions made. The paper analyzes the tension between human rights review and administrative discretion. It is argued that stricter scrutiny is sometimes defendable, as long as it has an individual focus and concerns truly fundamental rights. Thus in times in which the scope of human rights is understood very broadly not every individual interest that is covered by these rights should trigger a more activist judicial role.

Melina Girardi Fachin: ***The New International Public Order And Human Rights: The Necessary Dialogue In The Judicial Decision-Making Process***

The new paradigm of public order arises from the intersection of constitutional law and international human rights law. It is with the impact of the international law of human rights that this new theme arises in the border of the until then consolidated spaces of international and local jurisdictions, resizing its barriers. Therefore, as a direct consequence of this movement, stands up the duty to dialogue among the various actors involved in the decision-making process of human rights enforcement. The responsibility for human rights calls this obligation up, since this matter is no longer internal-only or international-only and has effects globally. To think how to function this dialogue is almost as important as the duty to dialogue itself. With this, opens up new debates about the democratization of the jurisdictions – internally and internationally – consolidating the rule of law through the pro persona principle with contemporary examples of this interchange.

97 INCLUSION AND EXCLUSION UNDER FRENCH REPUBLICANISM

This panel brings together scholars of French law and politics whose research on nationality, race, secularism, and gender equality looks at the contemporary outcomes of mechanisms and policies that are purportedly based on a "Republican tradition". While French republicanism is often presented as universal and inclusionary, the papers presented challenge that assumption from a variety of perspectives. Historically, the principle of equality was always accommodated to exclusionary regimes both in 1789 and in 1946 (Fondimare). The avoidance of this fact can be related to the profound ambivalence of contemporary projects articulated around an ideal of color-blindness (Lepinard), as well to the reluctance and timidity of contemporary French legal actors vis-à-vis the concept of gender stereotypes (Fercot): these appear as two expressions of a difficulty for the republican project to reflect on the structural dimension of hierarchies and domination. Nationality and Citizenship are also terrains on which the contribution of French republicanism to the production and exclusion of an "Other" is increasingly conspicuous. Contemporary shifts in the legal scope and meaning of the principle of laicité (Bourdier) are very congruent with current practices of naturalization (Mazouz).

Participants	Elsa Fondimare Céline Fercot Eléonore Lépinard Sarah Mazouz Elsa Bourdier
Name of Chair	Stéphanie Hennette-Vauchez and Mathias Möschel
Room	BE2 326

Elsa Fondimare: ***The legal principle of Equality and the construction of French republican universalism: between inclusion and exclusion***

Contemporary legal (scholarly) and political (institutional) discourses in France commonly associate the principle of equality with republican universalism, as a legal principle, "Equality" is presented as a contemporary heritage of the French Revolution's ideals. However, it seems that this rhetoric is based upon an ideal of equality that is misleading, because the political projects of French Revolution and French Republic never considered this principle only as a way to include all people in the sphere of citizenship. As it confronts contemporary French legal and political thought in the field of equality with the ways in which it was articulated in 1789 (elevation of the principle in the Declaration of the Rights of Man and the Citizen), the proposed paper examines how French conceptions of equality and universalism have been historically and systematically constructed, in Republican law, to exclude some categories of people of the entitlement of rights, such as women.

Céline Fercot: ***Gender stereotypes discriminations and equality***

This paper looks at the reform of parental leave the was introduced in 2015. The reform was presented as a was to unsettle the breadwinner/housekeeper stereotypes and rebalance the share of parental roles. It is however expected to have only a limited effect in terms of real gender equality. Not only is the reform essentially incentive in nature it also does not go far enough in its apprehension of the countless stereotypes that affect not only women but also men both in the workplace and in the domestic sphere. Stereotypes are generally analyzed and combated only from the perspective of female stereotypes. Yet even if the position of men can not be analyzed in the same terms as that of women it is important for policy reform to conceive of stereotypes as a whole.

Eléonore Lépinard: ***The invention of color-blindness: the constitutional politics of race in France (1946-2012)***

This paper investigates the genealogy and the interpretation of an important constitutional provision, the first one of the French Constitution, which states that the Republic ensures equality of treatment of all its citizens "without distinction based on origins, race or religion". This anti-discrimination clause has been used several times since the 1990s by the Constitutional Council to promote a color-blind interpretation of the Constitution that has fueled what can be termed a "republican" turn in French constitutional politics. Indeed, since the 1990s any recognition of any group difference (especially those based on sex and race/ethnicity) has been closely scrutinized, and often rejected, by the French Constitutional Council (CC), thereby preventing the implementation of affirmative action policies or the measure of ethnic discrimination. While the CC has invoked in its decisions the first article of the Constitution and a French "tradition" of blindness to differences, a historical perspective on how this article made its way into the Constitution, its conceptual and political premises, reveals quite another story. Looking at the recent constitutional politics of race promoted by the CC in this broader perspective reveals the extent of the CC's interpretative strategies and its central role in the crafting of an exclusive form of republicanism.

Sarah Mazouz: ***Favor as a Frame: Logics of Belonging and Exclusion in French Practices of citizenship***

The notion of favor is initially limited to the naturalization procedure. Indeed unlike the other ways of acquiring French citizenship naturalization is defined as a 'favor' made by the state to deserving foreigner applicants. It means that even if the applicant fulfills all the requirements the state may refuse to grant him or her French citizenship. In other words the procedure distinguishes among foreigner applicants those deemed worthy of joining the national community while granting citizenship through naturalization differentiates within the nation those who came from elsewhere. However the current debate about the deprivation of nationality has shown an extended use of the notion of favor. Indeed it seems to concern henceforth those among French nationals who are conceived as other even if they are born French. This paper aims to address the way in which the notion of favor is used to define French citizenship in the case of racialized others, also in comparison with Germany.

Elsa Bourdier: ***French laicité from freedom to repression***

The paper uses a distinction first offered by A. Ferrari between legal laïcité and narrative laïcité to differentiate between two levels of discourse relating to laïcité. Narrative laicité is a discourse that refers to a republican ideal Legal laicité is made of positive law. The crucial steps of this evolution of laïcité from an inclusionary to an exclusionary tool (such as, for instance, the 2010 ban on face-concealment) have not, however, been based on legal laïcité but rather on grounds such as safety. While narrative laïcité justifies the banning of face-covering veils, legal laïcité could not –lest legal regimes risk being deemed discriminatory. By studying the decisions of the French Constitutional Court (2010) and the European Court of Human Rights (2014) which controlled the law banning face covering veils in public spaces, the paper aims to demonstrate that narrative laicité impacts the interpretation of the law despite its neutral and general aspect.

SUNDAY
19 JUNE 2016
9:00 – 10:45 am

PANELS
SESSION V

98 PUBLIC LAW SCHOLARSHIP BEYOND BORDERS: PUBLISHING AS AND FOR OTHERS

The Berlin conference gives us the unique chance to reflect on the role of transnational legal publishing for the spread of public law scholarship beyond borders. German legal scholarship is the site of a distinct, but representative, struggle between legal scholarship's parochialism and cosmopolitanism. The call to transnationalize legal scholarship has been clarion, in Germany and elsewhere. Such considerations motivated the establishment of various outlets for transnational legal scholarship, such as ICON, Global Constitutionalism, the German Law Journal, the Italian Journal of Public Law, or Verfassungsblog. But the response to these summonses has been halting. Most scholars continue to write for mostly domestic audiences. The panel anticipates a novel format. An opening paper will document the appeal for the transnationalization of public law scholarship and assess the success of such efforts. Interview style rounds of questions and reflections with experienced editors will follow.

Participants	Joseph H. H. Weiler Mattias Kumm Russell A. Miller Marta Cartabia Maximilian Steinbeis Fernando Muñoz León
Name of Chair	Matthias Goldmann
Room	UL6 Audimax

Joseph H. H. Weiler: ***ICON's Story***

Mattias Kumm: ***The Story of Global Constitutionalism***

Russell A. Miller: ***The Story of the German Law Journal***

Marta Cartabia: ***The Experience of a Constitutional Judge and the Story of the Italian Public Law Journal***

Maximilian Steinbeis: ***The Story behind Verfassungsblog***

Fernando Muñoz León: ***The Story of the Derecho y Crítica Social***

Panel formed with individual proposals.

Participants	Stephen Gardbaum Nicola Lupo Maria Romaniello Zsuzsanna Gedeon Mariana Velasco Rivera Zoltán Pozsár-Szentmiklósy
Name of Chair	Stephen Gardbaum
Room	UL6 2070A

Stephen Gardbaum: *Political Parties, Voting Systems and the Separation of Powers*

This article aims to show that whatever the formal institutional arrangements on the separation or "fusion" of executive and legislative powers – whether presidential, parliamentary or semi-presidential – the way any constitution operates is significantly a function of both the party and electoral systems in place. They can not only fuse what a constitution's executive-legislative relations provisions separate, but also separate what they fuse. Accordingly, the same set of institutional relations can operate quite differently in terms of the concentration or dispersal of political power depending on party and electoral system contexts. In so doing, the article seeks to counter the tendency of constitutional lawyers to focus too closely on inter-branch relations alone in thinking about separation of powers and constitutional design more generally and also to enrichen our understanding of "separation of parties, not powers."

Nicola Lupo and Maria Romaniello: *(Legal) borders within Parliaments? The role of the rules of procedure in designing cleavages within Upper Houses*

Parliaments are normally called upon to play a unifying function of a certain political community. This function is far more evident in Federal/Regional States, whose Upper Houses are entrusted with the task of representing the different territorial autonomies. The aim of the paper is to investigate how Upper Houses are organised and how internal borders among MPs tend to be designed/encouraged by legal norms. Each MP is usually called to play multiple representative roles, depending on more than one cleavage. It is up to constitutional norms and parliamentary rules of procedures to provide the respective legal relevance and thus the balance among the multiple representative roles. The paper argues that parliamentary rules of procedure play a greater influence than constitutional and even electoral norms in designing the representative features of Upper Houses and therefore guaranteeing the accomplishment of their unifying function. To check this hypothesis a comparative analysis is conducted on the US Senate, the Spanish Senate, the Austrian and the German Bundesrat. The analysis will also help to figure out the potential evolution of the Italian Senate, after its reform.

Zsuzsanna Gedeon: *Constitutional constraints on the governing majority in a comparative perspective*

Today's constitutions are based on the traditional theoretical framework of legislative-executive relations, presuming that there are two different (rivaling) interests. This traditional approach does not take into account today's political reality: the competition of modern political parties for governmental office and the party discipline, which defines the actions of these parties. When the same party forms the executive power, which has the majority in the legislature, the governing majority -consisting of the legislative majority and executive power- follow the same interest in many cases. This paper proposes a reading of constitutions that takes into account the political reality of political parties. It aims to explore the available constitutional constraints on this governing majority. It analyzes the institutions of supreme/constitutional courts and second chambers/expert bodies, how they work under the context of political parties; and it shows how effectively they can constrain the governing majority. The paper uses cases from different jurisdictions. There are examples from the US, France and the UK, since these countries represent different models of executive-legislative relations.

Mariana Velasco Rivera: *The Broken Bridge between Constitutional Reform and Implementation*

From politically broken systems to more or less well functioning democracies constitutional reform and replacement have become recurring answers to address a wide range of public needs around the world. However, reform and replacement sometimes pose unexplored challenges. What happens after a new constitution or reform is adopted? Are political actors well aware of the implications of reforming a constitution? Mexico presents an interesting case study in which political actors are not always aware of the fact that constitutional reforms have to be implemented. Constitutional reforms are easily adopted, but implementation processes are either blocked or overlooked. This requires further research because incomplete implementation risks creating even more problematic situations than the issues the reforms were intended to address and solve in the first place. Besides describing the Mexican case, the paper will discuss constitutional reform as an effective means to address public issues.

Zoltán Pozsár-Szentmiklósy: *Judicial review of constitutional amendments as a normative requirement originating from the principle of separation of powers*

The doctrine and challenge of unconstitutional constitutional amendments is well known. Some constitutions contain "eternal clauses" which can guide courts when dealing with the related dilemmas, in other cases courts can base their examination only on abstract principles. However, courts usually do not have explicit competence for substantive examination of constitutional amendments. By analyzing theoretical approaches related to constitutional amendments and the principle of separation of powers, as well as the relevant practice of national courts, this conference paper intends to reach a better understanding of the judicial review of unconstitutional constitutional amendments. My position is that judicial review of constitutional amendments is not an exceptional competence, rather a normative requirement originating directly from the principle of separation of powers.

This panel wishes to urge equality law to consider the ways in which subjects embody and perform their identities within the existing legal categories.

Participants	Yofi Tirosh Catherine Powell Barbara Giovanna Bello Jean Thomas
Name of Chair	Nora Markard
Room	UL6 2103

Yofi Tirosh: *Dance Club Bouncers and the Unstable Epistemology of Discrimination*

15 years after the legislation in Israel's of the law forbidding discrimination in private service products and public places this paper seeks to check its actual impact on the everyday practices of the law's infamous heroes: door bouncers in dance clubs. The paper is based on two data sets: A series of in-depth interviews with bouncers from diverse clubs in Israel and an analysis of all the published court opinions regarding discrimination in the entrance to clubs since the enactment of the law. One notable insight is that the findings challenge the doctrine's reliance on ethnicity as a category that is meant to capture the grounds for discrimination because Mizrahis are discriminated not as such but due to a specific (heightened) performance of this identity. How should antidiscrimination law effectively and convincingly conceptualize then the degree in which one performs an identity category?

Catherine Powell: *Women Could Transform the World If Only We Would Let Them*

The UN Security Council's resolutions on Women, Peace, and Security rest on the assumption that women's participation in peace and security will lead to more sustainable peace, because women presumably "perform" in ways that reduce conflict. Assertions that the world would be a better place if women assumed leadership are unapologetically instrumentalist and reinforce essentialist views of women. Gender performance is based on the socially-constructed roles women play as caregivers, nurturers, and collaborators. International law unfortunately reifies these roles and the stereotypes that surround them, even as it tries to open up opportunities. Having to maneuver around formal equality and instrumentalist claims that women will "save" the world means that the category of "woman" can restrict, even as it liberates. After all, not all women are "peace-loving" particularly in a world where the women who often succeed are those who can succeed on terms defined by men.

Barbara Giovanna Bello: *Roma People and Performative Strategies against Institutional Discrimination*

It is estimated that some 10-12 million of Roma people live in whole Europe, of whom about six million live in the European Union. Many of them are EU citizens. In most countries the Roma people have borne the burden of being constructed as the neglected 'Others' for decades. My contribution aims at providing a diachronic overview of the governance of the Roma people in the European scenario and, more in details, in the EU multilevel system, describing how different strategies (identity passing, in/visibility, 'civil rights' movement influenced by the US Ctritical Race Theory and intersectionality) have served as means of resistance to institutional discrimination and processes of assimilation (on the one hand) and marginalisation (on the other hand).

Jean Thomas: *Persons and Cultural Norms: Boundaries, Borders and Bridges*

Differential treatment is wrongful and amounts to discrimination when it is because of a certain kind of personal characteristic. We know that race, religion and sex are such characteristics but it is less clear whether it is wrong when people are adversely affected specifically because of their culture. Is culture a ground of differential treatment that amounts to discrimination? To address that question I argue we must have a clearer understanding of the nature of the way cultural is normative for individuals and I sketch such an account.

101 THE BLURRED BORDERS BETWEEN PUBLIC AND PRIVATE

Panel formed with individual proposals.

Participants	Barbara Boschetti Elisa D'Alterio Valbona Metaj Marko Turudić Ximena Sierra Camargo Jun Shimizu
Name of Chair	Elisa D'Alterio
Room	UL6 2249a

Barbara Boschetti: ***Social clauses in public procurement and international agreements. New borders or just a more inclusive EU market?***

Barriers are raised anytime Member States' authorities lay down special requirements/conditions into public procurement procedures aimed at ensuring the compliance with obligations in the different fields of environmental, social and labor law. Special clauses set barriers to market entry. The non-compliance with relevant obligations gives grounds for exclusion from the awarding procedure. When mirrored in contract clauses, the non- compliance could be considered to be grave misconduct on the part of the economic operator concerned. In recent decisions (ex multis, Regio-Post), the CJEU has minimized previous controversial judgments (Rüffert), allowing for a broader imposition of special conditions in public procurement covered by the EU rules. Special conditions find now new and wider legal basis, after the recent reform of EU Public Procurement law. Do public contracts contribute to a more inclusive society? Are special conditions in line with a EU without borders?

Elisa D'Alterio: ***When the Uncertain Borders of the Public Sector Cause Inequalities: the Case of Hybrid Entities***

Over the past decade, we have witnessed an exponential growth of hybrid entities in all OECD countries, and even at the global level. At the same time, the mixed nature and the peculiarities of these entities may undermine the integrity of their governance, by facilitating the emergence of misbehaviors and conflicts of interest. This phenomenon is even more serious when we consider that many of these organizations deliver important public services, thus causing inequalities in the community damaged by the inefficiency of the "hybrid provider". The main aim of this paper is to analyze how the "mixed legal regime" of hybrid entities can hinder or, more generally, affect the applicability of administrative guarantees (as transparency, participatory rights, publicity, non-discrimination, etc.). The analysis will consider not only domestic hybrid entities but also global bodies, in order to identify possible differences between the national and global levels.

Valbona Metaj: ***Public-Private Partnership (PPP): Comparative Analysis of the Legal Framework in Albania and Italy***

The Public-Private Partnership (PPP) is becoming a successful factor in achieving economic development and good governance, by impacting positively both sectors. This paper will focus on a comparative review of the legal framework of the PPP's and their use in practice, by analyzing the differences regarding governmental openness to those projects. The countries chosen for comparison are Albania as a "developing" country, for which the PPP's constitutes an important link to the European integration, and Italy as a European country. In conclusion of this comparative analysis, it will be interesting to find out which one from these two countries with very different economic development is more favorable towards these partnerships.

Marko Turudić: ***Public procurement-a tool for social integration and sustainable development?***

Public procurement procedures make up to 20 percent of GDP in the EU Member States, making the state perhaps the most important economic entity. However, the scope of public procurement may go beyond the economic benefits. The state, as the arguably largest economic entity in the country, has the right and responsibility to use its economic power to achieve additional social and environmental goals. Through public procurement, it is possible to encourage the employment of vulnerable and minority groups, to demand better working conditions for employees, but also to improve the environmental standards of a country. The last few public procurement regulatory frameworks of the European Union have been developing in this direction, mainly the regulatory framework of 2014. The subject of this paper is the analysis of public procurement procedures as a tool for achieving social and environmental objectives within the legal framework of the Republic of Croatia and the European Union.

Ximena Sierra Camargo: ***Sovereignty, State and Global Governance: the transnational regulation of gold mining and the role of the Colombian Constitutional State***

In the context of a (neo) extractivism model, which has been reintroduced in last twenty years in several countries in Latin America, there is a growing presence of transnational mining companies, which have exercised their power through constitutional states, with the key collaboration of local governments. Namely in Colombia these actors have enacted and supported a large-scale gold mining regulation that reproduces a hegemonic discourse of development and which is mainly oriented to an economic growth but that ignores different views of development and ways of life. From a decolonial perspective this regulation is an expression of 'coloniality of power' because it maintains colonial hierarchies and reproduces some colonial legacies. In this way, I am discussing how the mining regulation, which has been enacted according to domestic legal forms, constitutes a sort of transnational law and reshapes the Constitutional State in colonial terms.

Jun Shimizu: ***Historical Origins of the State Action/Horizontal Effect Problem in the U.S. and Japan: How the Reach of Constitutional Rights into the Private Sphere Became a Problem***

This paper reveals that the horizontal effect problem is not inherent in the nature of a constitution, but a product of historical contingency.

In the United States, from the founding era to the nineteenth century, jurists considered common law rights and constitutional rights were identical. However, this circumstance changed when modernized constitutional problems arose. The concept of constitutional rights, distinct from common law rights, needed to be established. The problem of horizontality appears because the constitutional rights and common law rights diverged at that time.

In 1946, Japanese scholars took it for granted that the Constitution directly applied to private spheres. This is because just after World War II, Japan experienced various liberal and progressive reforms. However, Japanese politics turned to be conservative in the end. Japanese liberal scholars could no longer expect the government to impose liberal ideologies upon society. They built a theory that constitutional rights are bulwarks of individual liberties against the government. From then on, the horizontality problem continues.

102 HUMAN RIGHTS CONCERNS DISCRIMINATION AND BORDERS ONLINE: ALGORITHMS AND LAWS IN THE VIRTUAL WORLD AND THEIR EFFECTS IN THE REAL WORLD

In the realm of this year's theme "Borders, Otherness and Public Law" we propose a panel that looks at how these topics are relevant in the online environment. Borders discrimination and marginalization of others are viewed also in the virtual world of the Internet which to many respects reflects or replicates the physical world. This panel will demonstrate the complex legal issues that arise looking, first, Internet governance (whether certain group of norms create artificial borders for online users), second, at law and technology (how algorithms are "blind" to antidiscrimination or human rights rules) and, third, at international law (how State-sponsored cyber operations affect human rights).

Participants	Argyri Panezi Florian Idelberger Sanjay Jain François Delerue
Name of Chair	François Delerue
Room	UL6 3071

Argyri Panezi: ***Replicating borders online: is it a good development for Internet governance?***

This contribution focuses on legal disciplines that facilitate the creation of borders, or zoning online and mainly looks at examples from copyright law and freedom of expression. The purpose is to draw conclusions on the impact that this tendency has, and can also have in the future, on Internet governance. As citizens in the world are divided with real borders, which they cannot freely cross without following all sorts of national and international rules, from security measures in airports, to border controls, to labor restrictions, similarly Internet users are divided in many respects on the basis of which jurisdiction they access online. Sometimes they also try to evade or circumvent these barriers in reality, physically changing jurisdictions (think for example of the famous case of Edward Snowden) or circumventing them technically (think of pirate websites changing domains). Contemporary discussions of Internet governance need to think in a more holistic manner what kind of rights and obligations should we conceptualize for the cyber-citizen and how do they interplay with the rights and obligations of the real world.

Florian Idelberger: ***Respect for otherness in cross-border algorithmic governance***

Our lives are made easier by algorithms in machines or programs. Great when they work as expected, but what do you do when they produce unexpected results? With the further evolution of algorithms into contractual governance, this can have far reaching consequences. Algorithms by themselves do not respect constitutions or human rights; they do not know the concept of (anti)discrimination.

This is especially relevant in a cross-border context, as it is already difficult to know how these governance algorithms affect your immediate (socio-legal) environment but even harder if the global, cross-border context is taken into account.

This paper describes the current practice in implementing "smart contracts" in blockchain environments, as well as presenting potential alternative approaches. With regard to current practice and different approaches, it is then evaluated if there is a difference between these different approaches with regard to taking account of otherness and cross-border differences. Finally, an outlook towards potential further research is done, leading to a normative part to be drawn from the lessons of the analysis.

Sanjay Jain: ***Enabling the information communication technology: Constitutionalising the right of accessibility of disabled persons in India***

Unless societies embrace principles of accessibility and universal design across all sectors, including Information and Communication Technology (ICT), the normative goal of full participation and social inclusion of disabled persons is merely a distant dream. This is true for all States, including India. Examining accessibility for disabled persons in India reveals a strange paradox. On the one hand, India is making headway generally in the arena of science and technology, including the development, dissemination, and use of ICTs. At the same time, little progress has been made in the evolution of accessible and enabling environments for disabled persons. This paper surveys the status of disabled persons and their access to ICT in India, assesses progress undertaken by the Indian government and the private sector, and considers future avenues for improvements in the sector. It is divided into 3 sections, Relationship of Disability and Technology, International normative regime of accessibility as right and India's Legal Landscape.

François Delerue: ***State-sponsored cyber operations and human rights***

In 2013, the public exposure of the mass surveillance programs conducted by the USA's NSA and the UK's GCHQ in cooperation with Australia, Canada and New Zealand, shined the spotlight on espionage practice in the cyber age. International organizations, States, NGOs and academics expressed their concerns about the violation of international law and human rights law committed through these programs. The bulk collection of data for mass surveillance or espionage targeting specific individuals might clearly violate the right of privacy of the concerned person. Cyber espionage is however not the only one form of state-conducted or state-sponsored cyber conducts that might breach the right to privacy and other human rights. Due to the interconnected nature of the Internet, individuals and groups not specifically targeted by a cyber operation might see their human rights violated by this operation.

The present contribution develops a comprehensive overview on how the various forms of state-sponsored cyber operations might breach the right to privacy and other human rights. One of the objective is to demonstrate that even if the right to privacy is mainly threatened by cyber espionage, the impact on human rights of other forms of cyber operations should not be underestimated.

103 SOLIDARITY TOWARDS THE 'OTHER' – CURRENT CHALLENGES IN THE EU CONSTITUTIONAL LAW

The European Union is, as we all know, in a deep crisis. It is facing a sea of problems, which will almost certainly be prevalent throughout 2016: the so-called refugees' crisis, growing inequalities, impossible political consensus. Many of the EU's current issues are symptoms of a larger problem: the loss of the European social project, the abandonment of an idea of Europe as an inclusive and plural community of equals. This panel aims at discussing these questions, from different points of view. First of all, from the unifying perspective of European Constitutional law questioning its real normative strength and proposing mechanisms to challenge legal and executive measures that affect or exclude 'the other'. Secondly, regarding the specific status of refugees and sustaining that a duty to protect may derive from European Union Law in what regards internationally displaced persons. Finally, analyzing the ECJ's jurisprudence on European citizenship and social rights.

Participants	Mariana Rodrigues Canotilho Ana Rita Gil Rui Tavares Lanceiro
Name of Chair	Andreia Sofia Pinto Oliveira
Room	UL6 3119

Mariana Rodrigues Canotilho: ***European Constitutional Law in crisis: between the inclusion of the other and Realpolitik***

The growth of social and economic inequalities in the EU is a significant problem and leads to questions about the capacity and willingness of the Union's political and constitutional actors to uphold and sustain the European social model. This paper will analyze the multi-level European constitutional system, and try to determine the framework of protection of several vulnerable groups (migrants, minorities, children, citizens living in poverty). These individuals have been especially affected by the economic and social crisis. Having this in mind, the paper aims to propose some answers to a few questions. Is there a reasonable 'common core' of fundamental rights' norms that can constitute a basis for the definition of minimum standards of protection? Under this constitutional scenario, are there legislative and/or executive measures whose constitutionality could be doubtful? Which legal mechanisms are at the citizens' disposal to challenge such measures?

Ana Rita Gil: ***Duty to Protect Refugees – a result from the principle of solidarity and the respect for Fundamental Rights***

A duty to protect may derive from European Union Law in what regards internationally displaced persons that are located in other Member-States. Such duty may be grounded at European "constitutional level", as a result of two European principles: the recognition of a right to asylum and a right to not be subjected to inhuman treatments, read together with the principle of solidarity amongst Member-States. From this conjugation we may develop a constitutional duty to protect forced migrants who are under the jurisdiction of those Member States faced with exceptional migratory pressure. Not only do States have a duty to relieve other Member States from such pressure, sharing both means and burdens, but also they have the duty to, in consequence, receive people who need international protection. Since these persons may not have a specific link to the State, the link that triggers the duty to protect them will be the solidarity principle – understood as solidarity between Member-States.

Rui Tavares Lanceiro: ***EU citizenship and cross-border access to social benefits – the recent evolution of the ECJ case-law***

Since its creation, the concept of EU citizenship, as well as the rights and duties it entails, has evolved greatly, notably in the area of social rights. The ECJ's case-law broadened non-national EU citizens' rights to claim social benefits while narrowing Member States' scope to restrict their access to national welfare systems. However, the recent Dano and Alimanovic judgments present a striking shift in relation to the previous case-law, establishing limits on the right of EU citizens to social assistance in host Member States. The right to reside in another Member State appears to only be unrestricted for three months: after that, the EU citizens must show that they can support themselves, or they must leave, in order to avoid becoming 'an unreasonable burden on the social system of the host Member State'. Several questions remain. Were these decisions an attempt to address the debate 'welfare tourism'? Is the ECJ backtracking? What is left of the previous jurisprudence?

Scheinin identified as one of the most pressing challenges for the EU that of being a value-based actor and promoting global justice. An important part of this endeavor is to realize social inclusion. In current times of economic and social distress, characterized by major displacements and divides, the aim of this panel is test the extent to which the Union has achieved or is on the path of achieving social cohesion and solidarity in various core fields of EU law. It shall start by introducing the normative framework of social inclusion and it will continue by discussing the external dimension of EU solidarity vis-à-vis its citizens abroad. It will continue by discussing the operational tools to deliver the social inclusion, such as the EU financial instruments for migration and the problems posed by the EU legislative framework to the integration of third-country nationals. Lastly, the panel shall tackle the problem of economic exclusion and the overindebtness in the EU.

Participants	Emanuela Ignățoiu-Sora Madalina Bianca Moraru Viorica Vita Géraldine Renaudière Federica Casarosa Nicole Lazzerini
Name of Chair	Deirdre M. Curtin
Room	UL6 2093

Emanuela Ignățoiu-Sora: ***Intra-Mobility and Welfare in the EU: Which normative framework for social inclusion?***

This paper focuses on recent developments in European law in relation to economically inactive European citizens. Starting from the Dano case, the paper will consider the link between welfare benefits, durational residence and resource requirements, especially in relation to Directive 38/2004, and in the line of the interpretation adopted by the Court of Case C-333/13 Elisabeta Dano, Florin Dano v Jobcenter Leipzig. Justice, with its delicate and complex 'balancing of interests'. The purpose is to inquire on the normative understanding of social inclusion at EU level. For this, the author will make use of insights from the political theory field and especially of the debate between Brian Berry and Julian Le Grand on whether social exclusion is, or it should be, based on fairness and welfare.

Madalina Bianca Moraru: ***EU citizenship without borders: Questioning the Member States' solidarity towards EU citizens in need of help outside the EU***

This paper focuses on the external dimension of solidarity among the Member States. It will seek to reply to the question of whether the European integration process had reached a status where Member States solidary assume equal responsibility for protecting all EU citizens or does the EU citizenship stop at the borders of the EU? It will thus critically asses the application of the least-researched EU citizenship right, i.e. consular and diplomatic protection, and illustrate the evolution of Member States' solidarity in securing protection of EU citizens. It will conclude by analyzing whether the current model of solidarity is sufficient to ensure protection of EU citizens in the world and put forward policy recommendations for the future.

Viorica Vita: ***Discussant***

Géraldine Renaudière: ***Non-removable third-country nationals: the legal and social outcasts of the European Migration Policy***

In situations where the removal of irregular migrants has been postponed or made impossible due to significant obstacles, several EU Member States seem to keep the third-country nationals concerned in a legal loophole, in which their stay on the territory is neither legal nor illegal. Not explicitly obliged by the 'Return' Directive to issue residence permits to non-removable migrants, some EU countries opt for divergent regulatory positions (ranging from regularization mechanisms, de facto toleration or ad-hoc statuses) while others do not even provide for a specific legal framework governing the presence of non-removable migrants on their territory. Deprived of any 'secured' status, these foreigners often find themselves in protracted situations of legal limbo and precariousness. In practice, this not only increases their vulnerability to abuses and exploitation but also limits their access to basic human rights, such as social assistance or education, a prerequisite for human dignity.

Federica Casarosa: ***When the consumer does not meet up with the image of efficient economic actor: National (and European) courts steering the lead towards protection of consumers in time of crisis***

As Micklitz and Domurath (2015) pointed out, the approach of the EU towards social inclusion in consumer policy in financial markets was based on the allocation of the task of solving possible cases of (financial) exclusion on Member States. Although reasonable, this lead to disparity of treatment, or to complete lack of protection. Within this context, national courts started to question the inactivity of national legislators, presenting to the ECJ cases where the lack of remedies prompted to the possibility of social exclusion. The paper focuses on the recent streams of cases reacting to the inability of national procedural law to protect consumers in case of over-indebtness, in particular in cases of mortgage loan. Starting from the Aziz case (C-415/11) the paper will analyze the role of national and European courts in pushing the efforts of national legislator toward to provision of sufficient procedural safeguards for consumers.

Nicole Lazzerini: ***Discussant***

105 CONCEPTUALISING JURISDICTIONAL SPACE AND DIVISIONS IN ASIA

The papers in this panel pick up on the themes of borders and line-drawing highlighted in the call for papers. The panelists propose to interrogate these themes from the perspective of spatial and jurisdiction-dividing questions that exist between different state actors in key Asian jurisdictions. The three major spatial questions that the papers will focus on are: (a) demarcation in constitutional interpretive jurisdiction and, in particular, the impact of non-judicial interpretations by political actors on constitutional jurisprudence (b) mapping the contributions of religious courts and state courts to religious freedom, and (c) the division of judicial and political territory in realizing the constitutional aspirations of a state.

Participants	Po Jen Yap Swati Jhaveri Maartje de Visser Jack Tsen-Ta Lee Jaclyn Ling Chien Neo
Name of Chair	Maartje de Visser
Room	DOR24 1.402

Po Jen Yap: ***New Democracies and Novel Remedies***

Common law courts in new democracies have responded to the systemic challenges in their political systems by devising novel constitutional remedies to ameliorate the challenges they face in their environments. In dominant-party democracies like Hong Kong where the semi-permanent ruling government may ignore the court's constitutional determinations, or in India, where the State machinery is bogged down by corruption and bureaucratic inertia, the judges in these two new democracies perceive their role within their regime to be more dynamic in nature. Their judges are 'managerial' or 'catalytic': they play a role in shaping policy with constitutional remedies, which are foreign to the rest of the common law world, to mitigate deficiencies found in their political systems. Two such novel constitutional remedies will be examined: (1) Suspension Orders with 'Bite'; and (2) Judicial Directives. The two constitutional remedies may differ in their 'robustness' but they are innovative judicial strategies to secure the observance of the law by their governments and extend social justice to the underprivileged or marginalised.

Swati Jhaveri: ***Judicialising Politics: The Roles of Courts in the Democratization of Hong Kong***

The Basic Law of Hong Kong establishes principles for reforming the mode of electing members of the Legislative Council and Chief Executive of Hong Kong with the ultimate aim of some form of universal suffrage. While the Basic Law contains concrete provisions on universal suffrage it is clear that the views of the executive in HK, the NPCSC (in China), members of the Legislative Council and the public do not converge on how and when these constitutional aspirations should be realised. In light of increasing dissatisfaction with the political reform process, citizens have deployed various strategies to try and alter the course of reform. The focus of this paper is on one strategy employed by the public: they have identified aspects of the electoral system that they are dissatisfied with and have sought to remove these aspects of the political setup by challenging their 'constitutionality' via judicial review proceedings. While courts may lack institutional competence and capacity to fulfill the goals of universal suffrage, this paper argues that the courts do have a role in clarifying constitutional baselines: a role they need to take seriously in the current climate.

Maartje de Visser: ***Correcting Perceptions of Judicial Jurisdictional Exclusivity: Institutionalising Constitutional Interpretation by Political Actors***

In recent years, there has been a growing interest in looking at the role of political institutions in determining the constitution's meaning and its implementation, with dialogic thinking becoming one of the contemporary darlings in constitutional scholarship. Until now, this discourse has however largely ignored the realities of, and potential for, (quasi-)executive engagement with constitutional fundamentals in Asian jurisdictions that do not fit the Commonwealth mould. In this paper, I suggest that also in such different legal-political settings it is both descriptively inaccurate and normatively undesirable to locate constitutional scrutiny exclusively in the judiciary. On the contrary, and relying on case studies from Japan, South Korea and Thailand, it is clear that there is ample scope for, and evidence of, (quasi-) executive actors taking the constitution seriously during lawmaking processes. At the same time, though, there is room to further cultivate this practice, ideally by putting in place a more sophisticated set of institutional arrangements dedicated to constitutional vetting exercises.

Jack Tsen-Ta Lee: ***"This Seductive Lie"? Checks and Balances, and Deference in Judicial Review***

If most people regard the government as effective and trustworthy, what role should judicial review play in the political system? Courts in some jurisdictions apply doctrines that circumscribe their ability to subject administrative decisions and legislation to in depth scrutiny for compliance with standards established by bills of rights. This paper examines ways in which such a deference doctrine can be manifested in administrative and constitutional law. In this regard, the Singapore courts' experience between 1963 and 2013 will be looked at. It appears the Singapore courts have demonstrated a marked reluctance to adopt doctrines and rules enabling them to conduct more searching inquiries into the correctness of executive and legislative decision-making, appearing to accord the political branches of government the benefit of doubt and, thus, a fair amount of leeway to carry out their functions. The key question is whether such deference is appropriate or undue.

Jaclyn Ling Chien Neo: ***Definitional Questions and Boundaries of Protection in Religious Freedom Adjudication***

The guarantee of religious freedom appears in almost all modern constitutions. One critical constitutional question that has arisen relates to how the term "religion" or "religion or belief" should be interpreted. This definitional question is crucial as it determines which religion, religious beliefs, and practices would fall within the scope of constitutional protection. Where definitions are used to draw boundaries, this raises significant questions as to what would constitute an appropriate definition, as well as the competence and legitimacy of the court in seeking to impose such a definition on religious adherents, especially where their subjective viewpoints differ. This paper examines this definitional conundrum using religious freedom cases in Singapore and Malaysia. It argues that courts should place less reliance on definitional questions and focus more on how to balance the right to freedom of religion proportionally against competing interests. While this approach does not entirely eliminate the problems associated with definitions, it moderates these problems to a significant extent.

106 THE WTO'S NEW BORDERS AND OTHERNESS: REGIONAL AND PRIVATE CHALLENGES

The WTO rules somewhat regulate regional trade agreements (RTAs) and are indirectly applied (through the member governments) to private parties but the latter players are generally not involved in the WTO institutions. Thus, regional and non-states actors are often considered as the distinctive 'Others' whose deviation from the WTO processes typifies the boundaries of the Organization. The proposed panels would focus on two recent challenges to the traditional structure of the WTO, and would explore how the WTO's evolving rules address these challenges of rapid proliferation of RTAs, and the growing influence of non-state actors on international trade flows. These two shifts are significantly affected by the global value chain (GVC) 'revolution', which alters the landscape of the world economy.

Participants	Moshe Hirsch Sungjoon Cho Peter-Tobias Stoll Elisa Baroncini
Name of Chair	Moshe Hirsch and Jürgen Kurtz
Room	DOR24 1.403

Moshe Hirsch: ***Private Standards in Contemporary WTO law***

The paper aims to address several legal and policy questions regarding private standards (which are not legally binding but often affect trade flows), particularly those relating to the scope of WTO member states' obligations. International economic legal doctrine has not yet developed a coherent doctrine regarding the duties of states vis-à-vis private economic operators and the extent to which relevant rules deriving from the ILC Articles on State Responsibility should be applied in this sphere. Consequently, the paper would examine the WTO law (prominently the provisions of the SPS and TBT Agreements) and its interaction with the particular rules of customary international law on state responsibility. An initial examination of the GATT/WTO jurisprudence and other international tribunals' interpretation of state obligations in this sphere law reveals certain divergent tendencies.

Sungjoon Cho: ***Valuing Global Value Chains: A Cultural Perspective***

While the economic rationale of the global value chain (GVC) revolution is well-documented, its cultural aspects have been underexplored. This article aims to fill this gap. The article argues that the GVC revolution is establishing a new logic of global economic governance by shifting the culture of international economic relations among private and public players. Drawing on Alexander Wendt's three cultures (Hobbesian, Lockean and Kantian) of identity politics (Self v. Other) in international relations, the article demonstrates how the GVC revolution is capable of reshaping the image of otherness from an adversary or competitor to a partner. The article also contends that this cultural shift is essential for the GVC's long-term sustainability, in particular in terms of its "systematic" trade barriers, which cannot be simply bargained away; instead, they must be managed through cultural discourse involving learning and persuasion. This fateful connection embedded in GVCs compels us to rethink the nature of international economic law from a mere product of reciprocal bargaining to a cultural code akin to language.

Peter-Tobias Stoll: ***Gated communities in the world market place: free trade agreements and inclusive world trade politics***

The World Trade Organisation (WTO) is a core element of this system whose objectives and achievements can be seen to be determined by the idea of inclusion in various ways. On a detailed level the paper will discuss a number of WTO rules which call for transparency require notifications or even the participation of third members in certain cases and explore whether they are properly respected by language in free trade agreements. On a more general level the question arises what role the WTO has to play in view of the increasing number of free trade agreements. Such discussion has to consider Art. III:2 of the WTO agreement and more general aspects such as the relevance of a multilateral setting for the legitimacy of international trade policy.

Elisa Baroncini: ***The Case-law on the Relation Between WTO and RTAs Dispute Settlement Mechanisms***

While the WTO system is the pillar of international trade, its failure to deepen and widen the multilateral trade discipline has provoked the negotiations of many RTAs, in particular of mega-regionals like TPP, CETA or TTIP.

The positive WTO rules concerning RTAs -i.e. Articles XXIV GATT and V GATS- have not been fully implemented, and the practice is far from producing satisfying mechanisms coordinating the multilateral and regional systems.

The WTO case-law concerning the relations between the dispute settlement mechanisms is therefore essential to establish the priority concerning the interpretation and application of free trade rules. The suggested paper intends to analyze the existent case-law, and then focus on the positive law solutions -i.e. the so called forum rules- adopted in the main currently negotiated or signed mega-regionals -e.g. TPP, CETA, TTIP.

107 THE BOUNDARIES OF GLOBAL AND COMPARATIVE LAW

We appear to be living in the era of the "global". An increasingly globalised world poses challenges for legal disciplines, challenging our conception of the development and deployment of legal norms, the articulation of legal systems and the boundaries between the conceptually contested areas of the national, the international and the global. Traditionally, comparative law compares the treatment of legal issues across jurisdictions while global law advances the idea of universal legal concepts. This panel will explore the scholarly boundaries between comparative and global law and scrutinize the challenges that arise in both fields. The papers presented will address the topics of institutional participation in the development of global and comparative law, plurality and the transposition and adaption of national concepts for the global space. By including presenters from both fields, the panel will foster knowledge exchange between and critical commentary on both disciplines.

Participants	Se-shauna Wheatle Ruth Houghton Jaakko Husa Athanasios Psygkas Vidya Kumar
Name of Chair	Aoife O'Donoghue
Room	DOR24 1.404

Se-shauna Wheatle and Ruth Houghton: *Convergence or Universalism: Lessons from Comparative and Global Law*

This paper signals the beginning of a project that interrogates the relationship between global and comparative law. The paper makes the case for both disciplines to contemplate the boundaries between each other, to define clearly the objectives of each and the scope for communication between both fields. In particular, this paper encourages exchanges on the methodological practices adopted in each field and the way that each field reconciles universalism and difference. We propose that comparativists can benefit from the cosmopolitan outlook of global law the unbounded legal landscape envisioned by global law scholars can inform comparativists' projects and influence the direction of comparative law. Likewise, as part of a renewed interest in the underpinnings of global law, this paper argues that the methodological tools within comparative law scholarship for finding consensus, convergence and divergence can be utilized as techniques for identifying the sources of global law.

Jaakko Husa: *Comparative and Global Law: A Pluralist Discussion*

Global law has become a buzzword in non-national law and legal studies. Its relation to comparative law is ambiguous. Some argue that global law eventually makes comparative law useless, whereas others claim that globalization is actually a new possibility for comparative law. This paper discusses the relationship between global law and comparative law in a pluralist manner. It distinguishes key-notions of global law and highlights the relation of the two disciplines. It is argued that pluralistic comparative law can act as an antidote against too uniformistic ideas about global law. In its relation to global law, the pluralistic comparative law of this century has the function of reminding us of the differences and divergences between legal cultures.

Athanasios Psygkas: *Values in Global and Comparative Public law*

One of the key functions of comparative public law is the development of insights that can then feed into or be 'uploaded' onto the global governance sphere. But what is it that can be uploaded? I suggest three main options – institutional structures, values, and rules – and examine the attractiveness and feasibility of each of these possibilities. While acknowledging the difficulties, the paper suggests that, at the initial stages, the move from the 'comparative' to the 'global' is more feasible at the level of values. The identification of values should draw on a comparative inquiry across multiple domestic jurisdictions representing various traditions. Under this approach, values offer a normative framework that can structure the process of translation into more concrete rules. Values also crystallize the normative aspirations of a community and can offer both, inspiration to the relevant stakeholders, and the vocabulary for the conversation on how to operationalize these principles.

Vidya Kumar: *Global and Domestic Constitutionalism(s): Towards a Constitutionalism of the Wretched*

Unlike western states, India has never been "secular" in a strict sense and definitely not secularized or even "theocratic". The three strands of political processes in India: (a) religious pluralism and enlightened religion-inspired social reform movements from 19th century onwards; (b) multiculturalism- and pluralism-informed India's struggle for independence; (c) and India's multicultural and plural identities shaping public sphere and public reason, would help in answering and developing my thesis of how religion has shaped public reason, public sphere and public law. These three strands of political processes lead to three results: (1) India has its own form of secularism & the transplantation of European ideas has evidently not worked in tempering and controlling, if not eliminating the increased communal violence amongst different communities (post India's colonial contact); (2) Pure secularism can't grasp the religiously informed imagination of the majority in the sense of majority of Indian public and not majority of a particular community and finally, and most emphatically; (3) Public law is shaped by religion.

108 THE DISESTABLISHMENT OF SEX: THE OVERCOMING OF SEXUAL OTHERNESS

The panel examines the latest jurisprudential evolutions on gender recognition of transgender and intersex persons from a comparative perspective. It will identify different legal regimes for sex ascription, depending on the legal and medical conditions required for sex change, as well as on whether or not the process is bound by a binary logic. The panel will identify competing fundamental and human rights and principles which different jurisdictions have held to be relevant in this conversation and place them in their cultural context. It will discuss evolving standards under international and national law for the redress of illegitimately imposed conditions for sex-reassignment. It will assess the harms imposed by legal actors through their different framings of transgender persons relying on discrimination theories of harm. Finally, it will try to understand if the recognition of trans rights may be counterproductive and entrench, rather than disestablish, the gender binary.

Participants	Ruth Rubio-Marín Stefano Osella Tarunabh Khaitan Daniela Alaattinoğlu Thiago Amparo Debjyoti Ghosh Mary Anne Case
Name of Chair	Mathias Möschel
Room	DOR24 1.405

Ruth Rubio-Marín and Stefano Osella: *Towards the Disestablishment of the Gender Binary? A Comparative Analysis*

The paper engages in the comparative analysis of the constitutional and high court jurisprudence on intersexuality and gender reclassification in Italy, Colombia and India as exemplifying different models of control of gender diversity – i.e. intersexuality and transgenderism. The paper highlights how autonomy and equality compete with health framings in the different jurisdictions. The paper also identifies different understandings of the nature and importance of public interests involved in the control and management of gender diversity, and how these public interests are balanced against the rights of the individual. The paper will also highlight that the configuration of the three constitutional models seems influenced by differences regarding historical and cultural elements, attitudes towards same-sex relationships and understandings of the relationships between the genders.

Tarunabh Khaitan: *The Rights of Trans* Persons and the Attitude to Same-Sex Love in India: A Contextualized Analysis*

Tarunabh Khaitan will explain recent legal developments in India with respect to rights of transpersons, and contrast them with the law's attitude to same-sex love. In particular, he will discuss the judgment of the Indian Supreme Court in the Koushal and NALSA cases, and the Transgender Rights Bill pending before Parliament alongside the failed attempt to introduce a bill to repeal the criminalization of sodomy. The trans rights movement in India has been deeply connected with the gay rights movement – they have shared a history, leaders, and demands. Yet, the two movements have been treated very differently by the law: while the legal process is still mulling decriminalization of sodomy, it has taken remarkable strides in recognizing trans-identity and even offered affirmative action benefits for transpersons. Part of the explanation may lie in the historical and cultural specificity of the hijra community in India.

Daniela Alaattinoğlu: *The Sterilization Requirement in the Swedish Sex Association Act: the Development of Rights and State Responsibility*

In this paper, compulsory sterilization as a condition for legal gender reassignment in the Swedish context is explored from the point of view of state responsibility for rights violations. This is done through focusing on the status of involuntary sterilization as a fundamental rights violation and the remedies provided to victims of involuntary sterilizations. The paper compares the evolution and the dialogue between notions of rights and state responsibility in international and regional human rights instruments, and domestic rights notions and the factual responsibility recognized and assumed by the Swedish state in the case of state-driven sterilization of transgender people.

Thiago Amparo and Debjyoti Ghosh: *Sexing Constitutional Equality through Trans People's Rights: Lessons from Brazil, South Africa and Argentina*

This paper reconstructs the road to the recognition of trans people's' rights in Brazil, South Africa, and Argentina through the lens of discrimination theories on harm. Overall, the objective of the paper is to verify whether legal discourse on trans people's' rights in those three countries inflicts harm on their constitutional stature as equal members of society by the way in which legislations describe their political views and judges frame their views. First, the paper describes recent laws and litigation in the three countries regarding trans people's rights. Secondly, the paper will analyze recent discrimination theories of harm, in particular Calhoun's concept of 'losing twice' and Eidelson's view on the role of 'disrespect' in discrimination law in order to assess the legal debates described in the first part from a harm-angle. Finally, the paper concludes by arguing that while trans people's rights have had their day in court and in legislatures in three countries, judges and politicians often harm trans people's rights through their discourse in ways not present in other debates on sexual rights such same-sex marriage debate in the very same countries.

Mary Anne Case: *Will the Movement for Trans Rights Do More to Dissolve or to Reinforce the Sexual Binary in Law and Society?*

Recent efforts to address rights claims by persons identifying as transgender under the U.S. Constitution – Title VII (dealing with employment discrimination),Title IX (dealing with sex equality in education) and proposed new federal and state laws – have built on a half century's worth of successful efforts to dismantle sex distinctions in law and society, including the Ruth Bader Ginsburg revolution in constitutional law and the expansive repudiation of sex-stereotypes characterized by statutory cases such as Price Waterhouse v. Hopkins. But do these developments now risk reinforcing rather than dismantling the sexual binary, especially as both trans claims and opposition to them increasingly begin with acceptance of, and occasionally with insistence on, sex-segregation with respect to facilities such as bathrooms, locker rooms, and living spaces and sex distinctions in such matters as dress and appearance?

Panel formed with individual proposals.

Participants	Adam Weinstein Anne Dienelt Heidi Matthews Devendra Kumar Sharma Jenna Sapiano Adam Shinar
Name of Chair	Jenna Sapiano
Room	DOR24 1.501

Adam Weinstein: ***The High Cost of War Culture: Groundless Logic and Ambiguous Law in the Torture of Suspected Terrorists***

Most law and policy scholarship related to the torture of suspected terrorists since 11 September has focused on ethical questions or the ever-shifting legal definition of what torture is or is not. In contrast, this paper focuses on the question of whether the socio-political costs of torture are outweighed by the strategic advantage it provides – if any. From the outset, it rejects the illogical notion that torture never works or always works. The paper first examines the way American society defines torture in both sociological and legal terms, with particular emphasis on how society's view of torture is shaped through a positive 'reality construction' of torture in popular movies, political rhetoric, and the sterilization of language used to officially describe interrogation techniques. It then explains how international and U.S. law was manipulated through ill-structured analogies, an ever-narrowing definition of torture, and a perverse interpretation of the doctrine of self-defense.

Anne Dienelt: ***Pushing Boundaries! – At the intersection of LOAC, IHRL and IEL***

Fields of law accepted as lex specialis, fields of law accepted as distinct and absolute, are merging. Long accepted boundaries are vanishing, boundaries are being pushed. And new problems arise at the intersection of these fields. An approach to solve them will be developed in this presentation.

The intersection of laws analyzed regards questions of environmental protection and armed conflict, governed by the laws of armed conflict, human rights law and international environmental law. The International Law Commission's Fragmentation Report will help to analyze this intersection, as well as their Draft Articles on the Effects of Armed Conflicts on Treaties. The law of treaties and its legal techniques are also considered. "Systemic integration", codified in Art. 31(3) lit. c VCLT, as well as the evolutionary interpretation will serve as tools to clarify the overlap.

Most of these methods, however, are only discussed within single fields of law. Nevertheless, legal reality is more complex: Legal questions cannot be answered by one field of law only, and methodology has to adapt.

Heidi Matthews: ***Military Necessity, Kriegsraison and the Development of Modern International Criminal Law***

This paper challenges the foundation myth that sees the nineteenth century codification of the laws of war as inaugurating the modern project of humanizing warfare. International lawyers understand the long nineteenth century as a competition between this new modulated conception of military necessity and the German doctrine of Kriegsraison. Whereas under Kriegsraison violations of the laws of war were permitted where required by the exigencies of victory the new military necessity framework admitted of no such defence of justification or excuse. By introducing a discontinuity between the long nineteenth century and the development of international criminal law this paper will help undermine contemporary justifications for ICL which see ad bellum/in bello interdependence as constituting the complete denial of the rule of law.

Devendra Kumar Sharma: ***Terrorism in South Asian Region and Role of SAARC Countries to Combat Terrorism***

The South Asian Association for Regional Cooperation (SAARC) is an economic and geopolitical organization of eight countries that are primarily located in South Asia or the Indian subcontinent. It is an association of countries which includes Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. SAARC was established in Dhaka, Capital of Bangladesh on 8 December 1985. Afghanistan joined this association in 2005. Just after the establishment of the SAARC, a need was felt for collective regional effort to combat terrorism in South Asian Region. All the member countries of SAARC countersigned the SAARC Regional Convention on Suppression of Terrorism with one voice to combat terrorism form their soil. Almost three decades later, cooperation on counter-terrorism among SAARC member countries remains largely symbolic.

Jenna Sapiano: ***Violence in Post-Conflict Constitutions***

Violence is often not considered in constitutional theory, as constitutions are understood to be beyond normal politics, and violence, in the Arendtian tradition, is outside politics. However, a constitution drafted as part of the peace process is intended to end violence, both the actual occurrence of violence and the possibility of renewed violence. Peace agreement constitutions, in fact, intend to move contestation out of violence into politics. Yet, in post-conflict states such as the Democratic Republic of Congo and Burundi the constitution is being manipulated by long-term rulers who are vying to stay in power, making the constitution central to the outbreak of violence. In Nepal, the new 2015 constitutional arrangement, particularly the inclusion of federalism, has caused violence to breakout along the border with India. These case studies suggest the relationship between peace agreement constitutions and violence must be further explored.

Adam Shinar: ***The Real Case Against Police Militarization***

The closing decades of the 20th century have seen a rapid increase in police militarization, the phenomenon by which civilian police forces adopt military behavior, norms, tactics, and equipment. Militarization has been critiqued on instrumental grounds, but the real case against militarization lies in its treating citizens as threats, and the police's capacity to normalize this status through the projection of symbolic power. Police militarization undermines and erodes the delicate relationship between government and its constituents in a democratic society. The hallmark of that relationship is one of sovereignty of the people. Police militarization, precisely because it operates outside the social contract, makes citizens into subjects, and turns policing into occupation.

The development of algorithmic government (AG), where big data is enlisted in a new project of government based on prediction of patterns, presents numerous challenges. This focus here is on how the practice of AG may undermine and then transcend many of fundamental attributes of citizenship presently appearing as part of the bargain between the government – governed. While many of these are anchored in ideas of privacy, and indeed selfhood, they spill over into wider conceptions of community, citizenship and the individual and indeed the whole idea of the liberal state. There are important themes here relating to cyber security and data management, surveillance, privacy and new applications of rights. How can formal government be reconfigured in an age of total information? Might democracy itself be superseded by big data? The challenges that the "internet of things" offers to understandings of privacy are of particular interest as are papers offering new theoretical insights.

Participants	John Morison Rónán Kennedy Paul McCusker
Name of Chair	John Morison
Room	DOR24 1.502

John Morison: ***Algorithmic Governmentality and the Challenge to Democracy***

There is a new world of total information, gained from mining the huge data sets provided by enormous ranges of existing sources and, increasingly, the internet of things. Drawing upon a governmentality approach, the paper examines how algorithmic government (AG) creates a new world of governable subjects. Far from being classical citizens, they are instead made up as temporary aggregates of infra-personal data. The knowledge that AG thus creates is not given meaning by political or other frameworks of reference. Instead it appears ineluctably from the data. AG is something that is not comprehensible naturally: there is no self or relationship with the natural world as presently understood by us. At the same time, AG offers a false emancipation by appearing to be, by its very nature, all-inclusive – ultimately "democratic". This paper develops the new agenda that this revolution in data presents to constitutional lawyers, particularly in the context of democracy.

Rónán Kennedy: ***E-Regulation, Trade Secrets, and Defeat Devices: Any Low-Emissions Car You Want, Provided it is a Black Box***

The 'Digital Age' may offer new opportunities for transparency, giving regulators and consumers better access to the information that is needed for better policy and purchasing decisions. However, recent controversies regarding deliberate embedding of software in cars in order to generate unrealistically positive results in standardized pollution emission tests indicates problems. The use of 'e-regulation' can significantly improve the regulatory process. However, the opacity of digital devices, the creation and application of standards, and the increasing insistence of industry on strong protections for trade secrets risk undermining the integrity of fundamental aspects of the complex compact between citizen and state which underpins the legitimacy of the post-regulatory state. Drawing upon the still-unfolding scandal regarding car emissions testing in the US and Europe, the paper places the growing phenomenon of e-regulation in an interdisciplinary context, critiquing the processes.

Paul McCusker: ***Conceptualising e-government as disciplinary power***

This paper explores the pervasive nature of the surveillance aspect of e-government systems. Using the Republic of Ireland's online tax system as an example, it will be argued that the data used to populate the datasets is provided by the users who in Foucaultian terms voluntarily make themselves subjects to the system but the basis for control is that the Revenue Service will routinely access up to fifty different data sources about behavior and lifestyle choices. The Eircode system (a postal or zip code) is a further example of a control mechanism. Both of these systems create a discourse of normalization and examination, they create a "field of documentation" whereby knowledge can be extracted to increase the limits of the disciplinary power and they also demonstrate the "panoptic" nature of e-government systems which through both implicit and explicit means cause individuals to act as if they are being observed even when they are not.

Panel formed with individual proposals.

Participants	Ebrahim Afsah Giovanna Spanò Lisa Harms Jonathan Parent
Name of Chair	Lisa Harms
Room	DOR24 1.601

Ebrahim Afsah: ***The Empty Fortress or the Poverty of Islamic Public Law: The Role of Law in Arab State Failure***

The current near collapse of the Arab state system is but the most recent manifestations of an enduring failure to adapt to the exigencies of an inescapable modernization process. At the heart of that systemic failure is the lack of an effective public law, as Western legal transplants have not worked and an indigenous public law based on religious tradition has proven elusive. Still, contemporary political discourse is dominated by religious imagery and the apparent inability to express the res publica in anything but religious terms. The insistence on the specifically Islamic character of the polity that has dominated constitutional debates since 1979 has not produced substantially better governance outcomes than discredited authoritarian monarchic or republican systems. Whatever the philosophical value of the long struggle over Islamic hermeneutics, the ensuing relatively shallow dogmatic effort to systematize public law is unlikely to resolve the enduring crisis of governance.

Giovanna Spanò: ***Islamic Fundamentalism and Its Interaction with Migrations. The New Islamic State of Gambia Case Study: A Paradigm of Minorities' Repression***

The topic I would like to propose aims to connect crucial and current issues: the status of protection and promotion of (gender) minorities' fundamental rights in contexts where radical Islam assumes a primary place in determining anti-pluralist governmental policies. In particular, my research focuses on Gambia, a Country oppressed by a controversial political situation, due to imperialist and colonial influences as well as military coups, which recently has been officially proclaimed as an Islamic State. The actual Jammeh's regime- which has consciously adopted a tough and severe policy line to subdue internal and external instances- may result as a general example to explain and to summarize all the dilemmas related to an insensitive approach.

Have persecutions perpetrated against (gender) minorities in the name of religion eminently affected and encouraged masses' migration towards the European continent, for the purpose of gaining international protection as political refugees?

Lisa Harms: ***The imprint of the absent: Understanding the non-mobilization of Muslim advocacy groups in transnational litigation for freedom of religion***

With international human rights bodies evolving into instances of major importance for religious struggles in Europe, the European Court of Human Rights has become a key arena for strategic litigation of faith-based advocacy groups. A significant number of cases brought to the Court by members of religious majorities and minorities are embedded in faith-based activist networks seeking to influence the normative debate about religious liberty. Surprisingly, faith-based advocacy groups seem absent from judicial struggles for Muslims' religious rights. How can we explain this absence of Muslim advocacy groups in the transnational judicial sphere and which consequences does it imply? Drawing on a field-theoretical approach, this paper demonstrates the interplay of institutional structure, interests and resources in explaining the reasons and consequences of the non-mobilization of Muslim advocacy groups in transnational litigation.

Jonathan Parent: ***Selling Islamophobia: The Pursuit of Sharia Law Bans in Ontario and Oklahoma***

In 2010, voters in Oklahoma approved an amendment to the state constitution banning the use of international, and specifically Sharia, law in the state's courts. Four years earlier, the Canadian province of Ontario had adopted legislation prohibiting the use of religious law in the arbitration of family disputes. While both of these measures represented attempts by subnational governments to curb the use of Sharia law within their jurisdictions, they were framed by their supporters in very different terms. Using these case studies as an illustration this paper addresses the question of how proponents of bans on Islamic law sought to achieve their goals under highly divergent political, cultural and religious circumstances. Through the use of content analysis and processes tracing methods, I argue that prior legislative and legal commitments to specific constitutional values largely determined the rhetorical strategies supporters of these bans employed.

112 REFUGEE PRIVILEGE OR HUMAN RIGHTS MINIMALISM? RIGHTS RESTRICTION IN A RE-BORDERING EUROPE

This panel examines the continuing relevance of 'refugee' status in both law and popular discourse. The crisis of migrant protection in Europe raises questions about the demarcation and control of borders, those that are territorial and those that are conceptual. The five papers presented here engage in close conversation with each other to explore different facets of this 'border control.' Most centrally, we interrogate the relationship between human rights and refugee law. We also consider how claims for asylum made by different protection-seekers (for example, the spontaneous arrivee, the person with a disability, the trafficked woman) are subject to legal and other processes of inclusion or exclusion, deterrence, reallocation and criminalisation.

Participants	Catherine Briddick Cathryn Costello Stephanie Motz Siobhán Mullally
Name of Chair	Cathryn Costello
Room	DOR24 1.604

Catherine Briddick: ***Some other(ed) 'refugees': women seeking asylum under refugee and human rights law***

Working from the premise that feminist critiques of human rights law and responses to violence against women situated squarely within refugee law remain relevant, this paper argues that a consideration of each regime's response to violence against women demonstrates that issues arising from women's inclusion in both are far from being resolved. In making this claim, the paper considers the potential and actual impact of the Istanbul Convention, CEDAW's General Comment 32 and recent jurisprudence on women's ability to seek and obtain international protection from violence against women under both refugee and human rights law.

Cathryn Costello: ***The degradation and salvation of asylum***

Claiming asylum, particularly in Europe, is hazardous, and has come to entail various rights restrictions. The legal vulnerability, and even detainability, of asylum-seekers, is built into the process of claiming asylum. As irregular routes become normalised, coercive mechanisms to 'allocate responsibility' for asylum claimants are portrayed as an apparently necessary response to those irregular journeys. The protective nature of 'asylum' is undermined by the legally imposed ordeal that is its prelude; the rights-limitations imposed during the process of claiming asylum have enduring legal qualities; and the territorial limits of asylum fit uneasily with the transnational nature of refugee travel and refugeehood itself. This phenomenon will be problematized, using illustrations concerning the caselaw of the European Court of Human Rights and Court of Justice of the European Union on detention of asylum-seekers and Dublin transfers.

Stephanie Motz: ***Less equal than others? The exclusion of medical refugee claims through human rights law***

Human rights law is often seen as reinforcing protection standards in refugee law. However, scholarly debate also points to the inherent dangers of dilution between the two legal regimes. This is exemplified by the stifling impact of the restrictive ECtHR's case law in N v UK on refoulement cases involving medical needs. This exceptionally high threshold under Art. 3 ECHR has crept into asylum law, rendering refugee claims involving medical needs futile in countries like the UK. A look beyond Europe shows that this stands in stark contrast to developments in jurisdictions such as Canada, New Zealand and Australia. The paper will consider the influence of human rights law on asylum law and practice in Europe and abroad. It will argue that a human rights approach to the refugee definition can result in both 'over-inclusiveness' and 'under-inclusiveness', particularly in the context of medical claims.

Siobhán Mullally: ***The right to stay – gender, human trafficking and asylum***

The orthodox view is that the refugee definition properly interpreted includes asylum claims that arise from persecution related to gender. The claim to asylum is one that presents a significant challenge to the state insisting as it does upon a duty of hospitality. This duty arises only however if the complex legal categories of the refugee definition apply. Reflecting on the context of legal responses to human trafficking and the continuing reinforcement of border norms this paper explores the claim to inclusion that comes with presentation of a claim to asylum and the burden of exclusion that falls on claims that do not fit within its definitional limits.

113 REGULATING THE "BORDERLESS" INTERNET

The last two decades have seen a revision of the overly simplistic idea that the "global Internet" (Orin Kerr) could not be regulated by territorial entities, i.e., states or supranational organizations. Rather, these entities have gradually found ways to establish legal responsibility within the Internet by identifying new addressees of legal obligations, by introducing "territorializing" techniques such as data localization requirements, or by improving international legal cooperation.

Nevertheless, the "borderless" Internet still challenges sovereign decisions in many areas and legal regulation faces various difficulties. This panel will discuss experiences from privacy law and from information security law and tackle the question of how to address the "un-territoriality of data" (Jennifer Daskal).

Participants	Thomas Wischmeyer Enrico Peuker Johannes Eichenhofer
Name of Chair	Matthias Roßbach
Room	DOR24 1.606

Thomas Wischmeyer: ***Towards a Transnational Order of Information Security***

While information security is widely considered to be one of the most pressing problems of our time, it is far from clear how public actors can contribute to making information technology and information networks safe. Nevertheless, lawmakers across the globe have recently started to address the issue. But can national or even supranational actors effectively regulate this truly global problem? In this paper, I reconstruct the legal regime of information security governance and sketch the main challenges faced by regulatory reform. Focusing on one particular challenge, namely the allegedly a-territorial architecture of the Internet, I provide an account of the transnational and hybrid process of rule-making in this field. I contextualize my findings by asking how they relate to the traditional "Hobbesian" purpose of government to maintain order and security: What can public law still achieve in this field?

Enrico Peuker: ***The General Data Protection Regulation: Powerful Tool for Data Subjects?***

The General Data Protection Regulation (GDPR) is on the home stretch. As a result of so called trilogue negotiations between European Commission, European Parliament and Council, a final regulation draft is about to be passed. Here, the rights of the data subjects are of special interest – they serve as a touchstone of an effective data protection in the European Union. The regulation picks up individual rights from the precedent Data Protection Directive from 1995. Furthermore, it adds new individual rights such as the right to be forgotten. The presentation gives a short overview of the data subject's rights. It examines whether the GDPR achieves the aim of a better protection of personal data as required by EU Fundamental Rights and shaped by the EU Court of Justice.

Johannes Eichenhofer: ***Between Regulating and Negotiating: How to Protect Internet Privacy Against Global Internet Service Providers***

Internet service providers play a key role in the protection of Internet Privacy. One the one hand, search engines, social networks or online dating platforms allow and enforce their users to share private information and to take private actions. On the other hand, multilateral enterprises like Google and Facebook withdraw the privacy legislation of many states. The presentation should discuss whether the current model of "negotiating privacy" between user and provider is reasonable and to which extent a further "privacy regulation" by public actors is needed and what it should take into account.

Panel formed with individual proposals.

Participants	Colm O'Cinneide Elisabeth Roy Trudel Clemens Rieder Anna Södersten Gershon Gontovnik Michal Tamir Romy Klimke
Name of Chair	Anna Södersten
Room	DOR24 1.607

Colm O'Cinneide: ***The 'Otherness' of Europe: Openness and Insularity in the UK Bill of Rights Debate***

This paper explores how the jurisprudence of the European Court of Human Rights is increasingly conceptualized as an alien transplant into the 'native' body of UK public law, and how this has shaped the ongoing debate in the UK as to whether to adopt a new Bill of Rights and/or to exit the ECHR. It also analyses how this specifically UK debate links to wider points of tension in the relationship between transnational legal frameworks and national constitutional systems, in particular the issue of whether it is compatible with core principles of constitutional democracy for national legislatures and courts to defer to judgments of international human rights adjudicatory bodies such as the Strasbourg Court. The paper makes the argument that insularity in this regard is a defect in national constitutional systems. However, opening up the borders of such systems may require a break with their internal structural logic – which, as the UK example shows, may be difficult to achieve.

Elisabeth Roy Trudel: ***Beyond Visiocracy: The Construction of the Other in Human Rights Discourses***

The international human rights system might seek to include and even to empower; in reality there is a paradoxical tendency in modern human rights law and practice to create exclusions and otherness. By relying on an interdisciplinary approach drawing on the anthropology of the senses and inspired by postcolonial theory this paper seeks to reveal the implicit yet powerful role of images in the creation of such exclusions. It argues that the dominant paradigm of law – in which vision plays a disproportionate role – must be reconsidered. In other words more attention must be paid in international human rights law and in law more generally to the ways in which non-Western individuals and groups construct their identities including their legal identity. To achieve justice in a highly diverse world the West must hence go beyond its traditional borders embrace plurisensoriality and welcome alternative modes of understanding and sensing the world.

Clemens Rieder: ***Boundaries and Solidarity***

This paper reflects on the relationship between boundaries and solidarity. Arguably, European integration has reached a stage where it has become necessary to examine whether it would be possible to redraw boundaries while at the same time achieve solidarity which resembles in its robustness national solidarity. Somek (2011) suggests, that the social question 'may turn out to be the death knell of integration.' This paper attempts to give an answer to the solidarity-dimension of the social question and discusses the issue by applying two sets of boundaries: philos-boundaries and interest-boundaries. While the former are based on emotional identity (nationality), the latter refer to identity based on common interests. Depending on what type of boundaries generates national solidarity, this will determine as to whether supranational solidarity is achievable. After all, philos-boundaries are far less adaptable than interest boundaries.

Anna Södersten: ***The Evolving Concept of Solidarity***

This paper explores the principle of solidarity and its expressions in public international law and EU constitutional law. The principle is referred to in a plethora of legal instruments. Yet, its contours are unclear, contested, and controversial. The paper discusses its different forms (horizontal, vertical, intergenerational), elements (e.g., existence of obligations, common values), institutionalized expressions (e.g., mutual assistance), explanatory value, and limits (e.g., relationship to other principles and concepts). Is it at all a legal principle? Does it have legal content? Is it at all a principle? What functions does it have? The aim is to provide a taxonomy of how the concept of solidarity can be applied and understood.

Gershon Gontovnik and Michal Tamir: ***The Reality Challenge of the Bedouin Society in the Negev – Recognition of the Politics of Recognition***

The subject of Bedouin dispersion has accompanied the State of Israel from the day of its establishment. The Bedouin community and the State of Israel are in the midst of intensifying conflict over land control, and this reality poses a real challenge for those wishing to achieve solidarity between the Bedouin community and the general Israeli society, accompanied by protecting the Bedouin human and cultural rights.

From a legal point of view, this subject has offered a launchpad for creative judicial decisions. The article analyzes those decisions resorting to different Recognition Theory's insights. First, the liberal recognition that demands equal concern and respect for all. This recognition forbids even indirect discrimination, but demands that the State stay neutral with regard to cultural conflicts. Second, the Multicultural recognition (The Politics of Recognition) which calls for affirmatives steps taken by the State to recognize and aid minority cultures.

Examples for court's decisions that we analyze: Can the State Build Townships in which only Bedouin will reside? How should the Court address the troubling reality in which there are no shelters in the Bedouin communities?

Romy Klimke: ***Rethinking 'culture' in the contemporary discourse on harmful cultural practices***

Debates on certain harmful cultural practices took place within the United Nations since the early 1950s. As the first legally binding treaty, CEDAW contains provisions, which explicitly relate to the concept of harmful cultural practices. Since then, the issue has been incorporated in several international and regional human rights instruments. In my presentation, I will argue that the conception of CEDAW constitutes a decisive influence on how the concept of harmful cultural practices developed until today. The objective of the report will be, firstly, to give a short overview on the current concept of harmful cultural practices. As a result, I will come to the conclusion that the concept does not allow for the inclusion of other groups than women and girls, e.g. men and intersexuals. Furthermore, I will argue that the discourse reveals an almost exclusive focus on practices in developing countries. To overcome this bias, I suggest the method of cross-cultural dialogue.

115 HUMAN RIGHTS AND BUSINESS: SUSPECT BORDERS OR HOW LEGAL FIELDS GET TO BE CONSTITUTED

This panel explores how various paradoxes, linked to the way in which legal domains have emerged and are 'bordered', play out in the human rights and business field. The three papers respectively concern the protection of the alien in investment law, whether the US Dodd-Franck Act came to the rescue of children in the DRC, and why business enterprises must be considered to hold human rights duties.

Participants	Marie-Bénédicte Dembour Gamze Erdem Türkelli Lieselot Verdonck
Name of Chair	Marie-Bénédicte Dembour and Françoise Tulkens
Room	DOR24 1.608

Marie-Bénédicte Dembour: *Aliens, foreign investors and refugees: for whom international protection?*

International investment law grants foreign investors special protection due to their assumed vulnerability as non-nationals with no political voice in the domestic stage. This justifies treating them differently, i.e. more favorably than nationals. The arbitration of international investment disputes outside national courts is an example of this. International refugee law recognizes as refugees people who are outside their country of nationality and unable to rely on its protection – because it persecutes them. This legal regime recommends the refugee to be treated, as far as possible, as a national by the country in which they find themselves. However, the regime cannot impose and enforce its principles upon reluctant states. Although these two bodies of law seem to emerge from broadly similar ideas and concepts, they produce rather different results. What can be yield from thinking about each of them by reference to the other?

Gamze Erdem Türkelli: *Mining of the 3 Ts in Eastern DRC and Children: Law, borders and business behavior*

Sourcing from conflict-affected zones such as the DRC (a hotspot the mining of tin tantalum and tungsten (3Ts) used in computing and mobile communications) poses a major challenge for children's rights where children are not only involved as laborers in the supply chain but also often as child soldiers or members of communities experiencing violence. Although no meaningful rights protection against business-related violations had been available in the national setting, in 2010, the US enacted the Dodd-Frank Reform Bill. Section 1502 requires disclosure and certification for companies using minerals from the DRC. After the bill was passed, the profits of armed groups from the trade of 3 T minerals is reported to have seen a 65 % drop, resulting also in a shift in sourcing policies on the industry side (De Koning and Enough Team, 2013). Based on the DRC example, what role can law beyond national borders be expected to play in resolving local business-related human rights impacts?

Lieselot Verdonck: *Business: shielded from international law but not from human rights obligations*

According to the UN Guiding Principles on Business and Human Rights (UNGPs), business enterprises do not (yet) bear direct obligations under international human rights law. This has prompted many States, business enterprises and civil society actors to convey, relieved or dismayed, a one-sided message: business enterprises have no human rights duties. The UNGPs' idea that business enterprises are forced by national law to respect human rights is lost in translation. Unjustifiably, because since abuses are experienced at the local level, national law is the first line of defense. The time has thus come to dispel a fundamental misconception about human rights and business, which is that business is shielded from obligations. Rather than investing in a dialogue of the deaf about the need for a binding treaty all stakeholders should play their part in making the UNGPs succeed in their mission which is to ensure that business enterprises are truly accountable for respecting human rights.

116 THE RIGHT OF NON-CITIZENS TO CONSTITUTIONAL REVIEW AND IMPLICATIONS FOR HUMAN RIGHTS AND DEMOCRACY

In this age of routine transnational mobility, the topic of non-citizen residents' access to constitutional review, partly as a means for protecting their human rights is pertinent to most countries. This panel from East Asia engages in: Comparative examination of non-citizens' right to constitutional review in defense of their human and constitutional rights. Normative evaluation of the questions: How should constitutional rights practices respond to the expansions and complications of human rights brought on by globalization and migration? What kind of role can constitutional rights review play in realizing the universal human rights of everyone, including "Others"? Does granting constitutional review rights to non-citizens threaten or facilitate democracy? Do mechanisms of constitutional rights review enable non-citizens to participate in the constitutional process of their society of residence? Does the meaning of democracy need to be reconstructed or reconceived in our time?

Participants	Jiewuh Song Yoon Jin Shin Kelley Ann Loper Yi-Li Lee
Name of Chair	Jiewuh Song
Room	UL9 E25

Jiewuh Song: ***Rights, Borders and Democracy: in Theory, Law and Asia***

This paper has three aims. First, it presents a human rights justification for non-citizens' rights to constitutional review. Second, this paper argues – against e.g. some South Korean jurisprudence – that non-citizens' access to constitutional review should range over both civil and political and socioeconomic rights. In particular, this paper criticizes the jurisprudential argument that the logic of cooperatively produced socioeconomic goods excludes noncitizens. Finally, this paper argues that previously authoritarian Asian countries should institutionalize robust constitutional review for non-citizens as, inter alia, safeguards against predictable human rights threats. This conclusion is consistent with both the moderate position – still standard in international law – that political participation rights are citizen rights and the ambitious position – advocated by some co-panelists – that sees non-citizens' constitutional review rights as part of a more inclusive vision of democracy.

Yoon Jin Shin: ***Constitutional Rights Practice by Non-Citizens and Implications for Democracy and Human Rights: The Case of South Korea***

This paper discusses how constitutional rights practice can empower non-citizens, those residing within a state boundary but outside the political community, in terms of human rights and democracy. The research introduces South Korean Constitutional Court cases, including a landmark case on the guest worker system. Migrant workers, who as a group had been excluded from equal protection of labor-related human rights, challenged the law and brought about a constitutional decision that transformed the national foreign labor policy. The paper argues that constitutional rights adjudication process does not pose a threat to democracy, but can indeed be a facilitator of it, by providing a venue of rights discourse to articulate, communicate, and accommodate conflicting views and interests among diverse groups of citizens and non-citizens. This transnational rights practice enables more effective and comprehensive human rights protection and a democratic society with more cosmopolitan nature.

Kelley Ann Loper: ***Protecting the Rights of Non-Citizens in Hong Kong: The Role of Judicial Review***

As the causes and nature of migration continue to evolve across the region Asian jurisdictions face new challenges and fresh human rights claims made by non-citizens living within their borders. This paper examines the Hong Kong experience in this regard and aims to contribute to comparative research on judicial approaches to non-citizens' rights. This paper considers selected cases that illustrate i) the courts' approach to determining the legitimacy of limitations on rights based on residency status; ii) issues related to reliance on the right to equality as the basis for such claims; and iii) the extent to which 'non-citizens' can access socio-economic rights. This analysis raises broader questions about the effectiveness of judicial review as a means of protecting human rights in a non-democratic political system and the possible contribution of the courts toward an evolving understanding of 'citizenship' in the sense of inclusion.

Yi-Li Lee: ***The Constitutional Landscape of Immigration and the Rights of Non-Citizens: The Case of Taiwan***

Globalization and competitive international economy facilitate the free movement of goods trade and people. Numerous non-citizen complaints have been witnessed to appear before the Constitutional Court of Taiwan in recent years. This paper is aimed at systematically examining these judgments and analyzing in what ways and to what extent the Constitutional Court of Taiwan strategically deal with those non-citizen disputes. This paper argues the Court was actively involved in the rights of foreign workers while Taiwan incorporated itself into international human rights regime in recent years. However the Court took a rather deferential approach in reviewing the cases about the immigrants from mainland China in the context of changing cross-strait relations.

117 FEDERALISM OF RIGHTS: A COMPARISON

The general aim of the panel is both to raise conceptual issues and to pursue a number of case studies regarding the interplay between federal structure and rights in Europe and the United States. We suggest federalism theory as a shared alphabet that allows transatlantic comparisons to enrich our knowledge of concrete arguments involved in current salient debates on rights that are unfolding on opposite shores of the Atlantic. The paper givers are both European and American scholars, the case studies we look at are gender quotas, gay marriage and data privacy. We suggest a novel conceptual framework that stands out from other comparative work on the United States and the European Union where the analyses are usually historically oriented, the general assumption being that the EU, as a younger entity, should learn from the US experience. Instead, we demonstrate that regarding the responses of the law in sensitive areas there is space for mutual learning in the search for solutions.

Participants	Thomas Kleinlein Bilyana Petkova Brian Soucek Julie Suk Yonatan Tesfaye Fessha
Name of Chair	Andreas Føllesdal and Pietro Faraguna
Room	UL9 210

Thomas Kleinlein and Bilyana Petkova: *Federalism All the Way*

This paper fathoms the capacities of federalism theory as a common framework of analysis for the fundamental rights architecture and dynamics of centralization and decentralization in the U.S. and the EU. We suggest a novel conceptual framework and demonstrate that regarding the responses of the law in sensitive areas such as gender quotas, marriage equality and privacy there is space for mutual learning in the search for working solutions. We introduce the theoretical toolkit of the U.S. school of "new federalism", this new strand of federalism theory focuses on decentralization as promoting "voice not exit, integration not autonomy, and interdependence not independence". Federalism, thus understood, still justifies otherness but no longer defines strict borders. Even if sovereignty might not necessarily be a stand-alone value, we show how states, state institutions and localities in a federated system matter for democracy in a very tangible way.

Brian Soucek: *Marriage and Morality: Putting the U.S. and Europe in Dialogue*

Same-sex marriage cases, both in the United States and Europe, have often pitted rights against state autonomy, and religious and moral beliefs against equality norms. Where U.S. courts and the ECtHR have diverged furthest is in their willingness to consider moral arguments made by states opposed to same-sex partnerships. Treating these as illegitimate, as the U.S. has done, paved the way for the nationalization of same-sex marriage in 2015. But it also caused courts to sidestep the most important concerns voiced on both sides of the debate – not just opponents' moral arguments, but also gay rights advocates' equality claims. Further, by refusing to hear the one thing that made states meaningfully different on the issue of marriage, U.S. courts made federalism largely irrelevant. Recent battles over same-sex marriage in Europe show how this dialogue might have been – and could still be – conducted differently.

Julie Suk: *Gender Quotas and Federalism in Europe and the United States*

In Europe, many national legislatures have passed statutes imposing gender parity in elected office and/or corporate boards of directors in the last twenty years. The European Union is now considering a proposed directive to impose corporate board gender quotas on all member states. The election laws of many states in the United States also require gender parity in the leadership of state political party committees, but these American gender quotas have largely escaped notice in the legal literature. This article highlights the dynamics by which gender quotas, and the law that constrains them, are creatures of federalism.

Yonatan Tesfaye Fessha: *Territorial management of ethnic diversity and internal minorities in two African federations*

The provision of self-government within a territorial framework has provided an opportunity to locally manage fault lines and empower communities that were marginalized in the past. It has not been, however, without challenges. As the experience of Ethiopia and Nigeria illustrates, the territorial structure of federalism might have helped to avoid large scale ethnic conflicts but the practical impossibility of creating an ethnically pure subnational unit has brought new tension: the majority-minority tension at the level of the constituent units. Both in Nigeria and Ethiopia, groups and individuals that do not belong to the regionally empowered group, usually known as internal minorities, face discrimination and marginalization from subnational authorities and are often treated as second-class citizens. The focus of this paper is to examine how the federal designs of the two countries have responded to the challenges of accommodating internal minorities.

118 THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) AND THIRD PARTIES

Panel formed with individual proposals.

Participants	Alberto Alemanno Joana Mendes Thomas Streinz
Name of Chair	Gráinne de Búrca
Room	UL9 213

Alberto Alemanno: ***Third Parties in Regulatory Cooperation***

The Transatlantic Trade and Investment Partnership (TTIP) seeks to create new mechanisms for regulatory cooperation between the parties and involvement for a wider set of stakeholders. This paper explains how the TTIP's regulatory processes and institutions can account for external stakeholders. It surveys the access and potentials influence of different stakeholders, such as corporations, civil society groups, citizens and non-party interest and contrasts this with the role of the established political actors, such as the central executive branch, regulators and parliamentarians in the regulatory coordination effort.

Joana Mendes: ***Participation, Inclusiveness, and Third Parties***

Participation is one important feature of the proposals of the European Commission on regulatory cooperation in TTIP. The opportunities of participation foreseen in the Commission's proposals vary, highlighting the different functions and normative meanings of participation. Nevertheless, functional-instrumental reasons arguably explain, by and large, the centrality of participation in the regime proposed by the Commission. The paper will argue that potential distributional effects of decisions adopted via regulatory cooperation may affect the legal spheres of persons concerned throughout the trade chain. Participation should be a means to give voice, in equal terms, to the competing legally protected interests affected. But what could be the legal yardsticks of inclusiveness in the context of regulatory cooperation? What would be the legal position of holders of legally protected interests in third countries?

Thomas Streinz: ***Third Parties in European Courts: Lessons from the Polisario Case***

The EU's General Court last December annulled a decision by the Council to conclude an agreement between the EU and Morocco on reciprocal liberalization of agricultural and fishery products in so far as the agreement was applicable to Western Sahara, a disputed territory that is claimed by Morocco without international recognition. The Court reasoned that the Council failed to ensure that the agreement would not apply to the detriment of the population in Western Sahara and did not entail or encourage infringements of their fundamental rights. This broad approach (if upheld by the Court of Justice) requires the EU to take third parties seriously and shows that the extraterritorial reach of EU fundamental rights is no one way street. Legal challenges of the Transatlantic Trade and Investment Partnership (TTIP) by third parties may not be without merit if their interests are ignored in its institutional design and operation.

119 JUDICIAL REVIEW AND CONSTITUTIONAL STRUCTURE

Panel formed with individual proposals.

Participants	David E. Landau Ozan Varol Rosalind Dixon
Name of Chair	Yaniv Roznai
Room	UL9 E14

David E. Landau: *Courts and the Shaping of Support*

Two separate strains of existing work have shown that exercises of judicial review can be either redundant because so much external support for a constitutional equilibrium exists (the "structural safeguards" literature in US law), or futile because so little external support exists (much of the courts and social change literature). The coexistence of these two theories suggests considerations that should inform a theory of judicial review, particularly (but perhaps not exclusively) in newer democracies. Courts can target issues where levels of support render review neither futile nor redundant. Further, they can shape their judgments to increase the amount of support they receive from political, civil society, and international actors, rather than merely taking their political environments as a given. The paper draws on examples from a number of countries to demonstrate the feasibility and attractiveness of such an approach to judicial review.

Ozan Varol: *Structural Rights*

Constitutional theory commonly casts individual-rights provisions and structural provisions as conceptual opposites. Conventional wisdom suggests that structural provisions establish and empower government institutions, and rights provisions protect individual freedoms. Although scholars have long explored how government structure can affect individual liberty, its mirror image has been neglected. Scholars have largely assumed that individual rights have little resemblance to constitutional structure. This Article fills a scholarly gap by identifying and elucidating structural rights, which straddle the right-structure dichotomy and complicate contemporary constitutional theory. Although rights are commonly assumed to restrict government institutions, this Article argues that rights can generate and distribute power, similar to structural provisions.

Rosalind Dixon: *Constitutional Self-Interpretation*

In a constitutional context, separation of powers understandings generally contemplate a strict institutional separation between the drafting and interpretation of laws. Yet this understanding is frequently violated at the level of actual legal practice, in ways that encourage us to rethink basic assumptions about core structural commitments in constitutional law. In international law, constitutional law and administrative law, particularly in the US, it is quite common to see a variety of forms of legal 'self-interpretation' – i.e. processes by which those who help write a law play a central role in its later interpretation. The article this phenomenon in constitutional and international law, and its potential advantages in terms of access to information in the process of interpretation, but also downsides in terms of loss of interpretive impartiality. It further explores the lessons from US administrative law and theory as to how best to trade-off these factors in different contexts, and in particular, the degree to which relevant laws are (a) are ambiguous; (b) recent in origin; and (c) being interpreted by multimember rather than single member bodies, or (d) reflect areas of significant policy expertise or complexity.

120 OTHERNESS IN LATIN AMERICA: LEGAL PLURALISM AND INDIGENOUS LAW

This panel deals with the relationship between indigenous law and domestic legal systems in Latin America context, where the concept of "otherness" must be reshaped in order to include legal orders with a completely different social and even cosmological basis. It aims to foster the debate on legal pluralism, focusing on both the international and the national protection and regulation of indigenous people. After the methodological introductory talk (by S. Ragone), the first speaker (M. Góngora-Mera) will analyze the implementation of the ILO Convention 169 concerning Indigenous and Tribal Peoples in a comparative perspective. The following panelists will focus on the role of the Inter-American System of Human Rights: F. Piovesan will assess the positive outcomes at the national level of the Inter-American jurisprudence and O. Parra will analyze critically the decisions concerning remedies for indigenous people. After the presentations, X. Soley will intervene as a discussant.

Participants	Sabrina Ragone Manuel Eduardo Góngora-Mera Flávia Cristina Piovesan Laura Ciarico Óscar Parra-Vera
Name of Chair	Sabrina Ragone and Ximena Soley Echeverría
Room	BE2 E34

Sabrina Ragone: ***Introduction and Methodological Framework: Latin American Legal Pluralism***

This introductory speech will highlight the premise, the framework and the objectives of the panel dedicated to "Otherness in Latin America: Legal Pluralism and Indigenous Law". The starting point is that Latin American legal systems have historically been characterized by legal pluralism, combining indigenous law and state law. Although this is a long lasting issue, only during the last decades the problem has been faced more consistently both at the national and the international level. In this context, the panel offers an innovative point of view on the concept of "otherness", since it must be reshaped in order to take into account legal orders with a completely different social and even cosmological basis.

Manuel Eduardo Góngora-Mera: ***Alterity by Law: A Critical Evaluation of the Implementation of ILO Convention 169 in Latin America***

Almost all Latin American countries have ratified ILO Convention 169 concerning Indigenous and Tribal Peoples (with different degrees of reception in the constitutional jurisprudence), and the Inter-American Court of Human Rights has integrated ILO 169 in its case law. This has created a kind of regional constitutional convergence on the basis of ILO 169 standards, which represents a unique case worldwide. Nevertheless, subtle differences in domestic interpretation (in particular in defining the subjects covered by the convention) generate huge differences in results. By analyzing some selected Latin American countries, the aim of the lecture is exploring how implementation varies according to the domestic legal or judicial definition of the subjects covered by the treaty and what is its impact in the reshaping of indigenous and tribal identities.

Flávia Cristina Piovesan: ***The impact of the Inter-American Jurisprudence in raising the level of protection of indigenous people at the domestic level***

This contribution has as a methodological basis the idea that international human rights order plays three important roles: a) establishes human rights standards, b) compensates national deficits, and c) foments a new dynamic of power involving social actors. The presentation will focus on the "Inter-American Corpus Juris" concerning the rights of the indigenous peoples identifying the legacy of the Inter-American jurisprudence in the field based on a typology of key topics from the human rights approach such as the right to land from a collective perspective right of cultural identity, right to participate in decisions affecting their destiny (right to voice).Inspired by the "Inter-American Corpus Juris" concerning the rights of the indigenous peoples, the talk will deal with its impact in raising the level of protection of the rights of indigenous peoples at the domestic level, in order to compensate national deficits and foment a new dynamic of power involving social actors.

Laura Ciarico: ***Legal reasoning in the jurisprudence of the Inter-American Court of Human Rights on the rights of indigenous people***

The Inter-American Court of Human Rights (I/A Court) is well known because of its judgments in matters of rights of indigenous people. This Court has been cautious in administering the test of proportionality in matters of the right of indigenous people in two relevant aspects. First the proportionality test is not the only or the dominant one. Second both methods are mediated by the method of comparison of cases. The I/A Court thus sees itself in the context of a convergence of constitutional practices where there are debates on the conflict of rights and certain doctrines that direct (although do not definitively determine) the weighing of the rights in conflict also in matters where diversity is in the middle of the controversy about the content and scope of the rights.

Óscar Parra-Vera: ***Otherness in the Remedies for Indigenous Peoples: a critical overview of the Inter-American Human Rights Jurisprudence***

Going deeper in the analysis of the role of international adjudication, the speaker will focus on one of the most interesting aspects of the IACtHR's jurisprudence, i.e. remedies issued for indigenous peoples. He will argue that in this respect it is possible to see some progressive approach in recognizing their traditional values and practices and, at the same time, increasing attention seems to be paid to their territorial demands. His presentation will offer some ideas on the major improvements in this area but will also highlight ambivalences and contradictions existing in the approach of the Court. In the final part of the talk, he will explain which the main obstacles in the implementation of the judgments have been, in light of his experience as a legal officer of the IACtHR.

Panel formed with individual proposals.

Participants	Emmanuel De Groof Friederike Eggert Caitlin Goss Tanasije Marinković Zoran Oklopcic David S. Law
Name of Chair	Emmanuel De Groof
Room	BE2 E42

Emmanuel De Groof: ***Invisible Boundaries within Visible Borders: Who's Excluded from "Inclusive" Constitutionmaking Processes?***

After constitutional ruptures or constitutional revolutions interim leaders often call for "inclusive" constitutionmaking processes. The UN Security Council too increasingly requires constitutional transitions to be inclusive and threatens with sanctions against so-called spoilers trying to derail an inclusive transition. The paper examines the requirement of "inclusivity" in constitutionmaking processes in light of the principle of internal self-determination. It argues that this requirement is a means of implementing this principle but also inversely that it may further extend and specify this principle. Thus arguably internal self-determination is partly losing its indeterminacy at least to the extent that (i) the requirement of "inclusivity" has become a mantra in the context of constitutional transitions and that (ii) a fine-grained understanding of inclusivity – both as a rhetorical device and as a (domestic and international) legal requirement – can be acquired. Finally the paper engages with the question whether on that double basis the continuing vitality of said principle can be confirmed.

Friederike Eggert: ***The role of constitutional courts in constitution-making***

The role of constitutional courts in furthering democracy through rights adjudication in the transition phase is well known from Eastern European countries in the 1990s. Today, with constitution-making increasingly conducted in a regulated and institutionalized setting the question arises as to what role constitutional courts play for promoting constitutionalism in this specific context. From determining the scopes of constitution-making to monitoring elections to constituent assemblies, constitutional courts take an increasingly important role not only on how a new constitution is written, but also on their content. In their position as veto players often called for ad hoc, however, their impact on the project of writing a constitutions seems ambiguous. In my research I analyse constitutional court decisions and their effects on both "customary" and modern "constitutionalized constitution-making" in order to solve the apparent contradiction.

Caitlin Goss: ***Constitutional drafting and uncertain borders***

In this paper, I examine cases where constitutional drafting takes place in the context of uncertainty as to state borders. First, I contend that border uncertainty arises in several different ways, including: continuing conflict over territory, possible secession of a sub-state (as in Sudan), a territorial division that the state perceives as temporary (West Germany), territorial claims by putative states (Somaliland), and ambiguity as to which colonies will join a federation (as in Australia). Secondly, I analyze the ways in which this uncertainty is reflected in drafting processes and constitutional texts, and consider how territorial uncertainty relates to statehood under international law. Finally, I reflect upon lessons that can be drawn from constitutional drafting in the context of uncertain borders for constitutional drafting in general, including the extent to which all such drafting may be 'rebuilding the ship at sea' (Jon Elster).

Tanasije Marinković: ***Constitution without a Decision: the Dilatory Compromise in the Shaping of the Serbian Constitutional Identity***

The 2006 Serbian Constitution stands, in many aspects, as an illustration of a dilatory compromise. After the collapse of the communist regime (1990) and the bloody break-up of Yugoslavia, Serbia went through "two transitions" and different state arrangements. In the same period, Kosovo and Metohia was disjoined from it. It follows that even though the 2006 constitutional momentum did not result from a revolution, it did appear as an occasion to reconstitute the Serbian constitutional identity. Instead, it compromised on the essential features of the Serbian polity leaving its identity undefined and split. It embraced primarily the constitutional model build around demos, containing, nonetheless, significant elements of the ethnocentric and multicultural, and, to some extent, transnational models. This paper addresses the context within which the 2006 Constitution was adopted, its key features, in respect of the entrenched constitutional models, and the further shaping of the Serbian constitutional identity through the Constitutional Court's case-law.

Zoran Oklopcic: ***From Constituent Power to a Constitutional Morphology of Tendential Responsiveness***

Contemporary debates about constituent power fall roughly in two camps: those that preserve the idea of 'the people' as the bearer of constituent power, or those that abandon it. In the first case, the idea of constituent power preserves its intelligibility in the eyes of foundational constitutional orders. However, the extra-constitutional change it justifies is indiscriminate and binary: in exercising its constituent power, the entire 'people', constitutes its entire polity anew. In the second case, the idea of constituent power can be used to justify extra-constitutional change across and against existing spatiotemporal boundaries of a constitutional order. The price for that, however, is the loss of intelligibility in the eyes of those who subscribe to the idea of foundational constitutionalism. In contrast to both, this paper will aim to explore the productivity of dissolving this binary, by developing a finer-grained concept: 'registers of responsiveness'.

David S. Law: ***Constitutional Archetypes***

The ideological narratives embedded in constitutions are not fundamentally unique but instead derive from a limited number of competing models. Each of these constitutional models or archetypes is defined by a particular type of justification for the existence and organization of the state, and by a symbiotic relationship with a particular legal tradition. This Article contends that constitutions employ a combination of three basic archetypes – namely, a liberal archetype, a statist archetype, and a universalist archetype. Empirical evidence of the prevalence and content of these three archetypes can be found in the unlikeliest of places – namely, constitutional preambles. Although preambles enjoy a reputation for expressing uniquely national values and narratives, analysis using methods from computational linguistics suggests that they consist of a combination of the three archetypes, and that constitutional law and international law increasingly employ similar ideological language.

Panel formed with individual proposals.

Participants	Lucila de Almeida Inger Johanne Sand Maria Adele Carrai Danielle Hanna Rached Gonzalo Villalta Puig Fulvio Costantino
Name of Chair	Maria Adele Carrai
Room	BE2 E44/46

Lucila de Almeida: ***Radicalizing Pluralism: three steps towards mandatory network***

Global economy has triggered dramatic changes in our society as well as on our traditional understanding of how law regulates markets. As a response to de-emphasis of regulation enclosed in territorial jurisdiction of states new modes of norm and norm-making new forms of adjudication and dispute settlement have emerged and co-existed with old ones to fulfil the regulatory demands of the global economic order. This paper will shed light on the new phenomenon at transnational level when well-known model of voluntary regulatory networks has been transformed into mandatory network and empowered to make binding norms. In other words law. We claim that throughout the two last decades the transnational regulatory regimes in the European energy markets have moved from transnational non-binding self-regulatory regimes issued by voluntary networks of stakeholders to coercive supranational regimes of hybrid regulation designed by mandatory networks. This is what I call radicalizing pluralism.

Inger Johanne Sand: ***The lack of self-reflection of democratic constitutional states under conditions of globalization – in legal and political communication***

A predominant part of domestic law and politics is dependent on or strongly influenced by international obligations, decisions by international bodies and various forms of cooperation. Still, however, in much of the political and legal domestic discourse and authoritative texts a clear distinction between international and domestic affairs and a lack of argumentation concerning the interedepndence seems to be maintained. Nordic states have since 1945 participated actively in international cooperation, organisations and treaties. A study of Norwegian government documents and preparatory works shows that international cooperation is adressed in a dualistic and simplified manner distinguishing clearly between Norwegian and international/European interests. There is a lack of self-reflection on the position of Norway as part of Europe and of the world.

Maria Adele Carrai: ***Global legalism: Where does Chinese exceptionalism fit?***

Global legalism seems on rise. Such scholarship is grounded on a moral monism that perceives Chinese approach to the universal values and the global legal order promoted by it as exceptional. It is argued that discussing China simply in terms of exceptionalism limits not only our understanding of the assumptions that underpin the current international legal order but also a proper dialogue with China for envisioning new ones. After having looked at Chinese approach toward the elements that constitute the so-called Trinitarian mantra (human rights, rule of law, democracy) of global constitutionalism, the paper looks at the limits of adopting the notion of "exceptionality" in defining Chinese international behaviour. Lastly, moving from Rawls' theory of decent hierarchical society, the paper will call for a more pluralistic approach to a possible global legal order to come, more capable of taking into account Chinese tradition and experience.

Danielle Hanna Rached: ***Turning the World Health Organization accountable***

The goal of this project is to scrutinize the World Health Organization (WHO), particularly its emergency committees, through the lenses of accountability. These emergency committees have a significant power to determine the actions states are required to adopt in light of situations classified as "public health emergency of international concern". The Ebola outbreak, for example, was first notified in March 2014, but only in August 2014 did the WHO Director-General declared the situation a "public health emergency" and started to act accordingly. The WHO was criticized by its hesitation. To make matters worse, the death toll of the virus claimed around 11.000 lives in debilitated states of West Africa. The conceptual and analytical work proposed in the project aims at creating an agenda of institutional scrutiny and improvement for the WHO.

Gonzalo Villalta Puig: ***The Construction and Interpretation of the Principle of Free Trade under Economic Constitutions: From Preferential Trade Areas to Federal Markets***

Free trade is a norm that conceives the sale and purchase of goods and services among or within sovereign states and customs territories as an exchange without government discrimination. As such, it constitutionalises the political economy of jurisdictions. This paper discusses the constitutionalisation of free trade in the process of economic integration at all governance levels of political economy. It reviews the construction and interpretation of the principle of free trade under economic constitutions through a sample of model jurisdictions, from a preferential trade area to a federal market. The aim of the paper is to establish that the free trade jurisprudence of supranational and international, regional and cross-regional non-unitary market jurisdictions is significant to the constitutional development of the political economy of domestic non-unitary market jurisdictions and vice versa. Its objectives are twofold: one, to study the difference between unitary market jurisdictions and non-unitary market jurisdictions and the constitutional significance of that difference; two, to study the constitutionalisation of the principle of free trade by constitutional courts. The paper argues for a reconceptualization of preferential trade agreements and economic integration agreements as economic constitutions.

Fulvio Costantino: ***Simplification without borders: World Bank and national reforms***

World Bank publishes annualy a report, Doing Business, to identify the difficulties in starting an economic activity around the world. The research compares parameters such as regulations, length of the proceedings, costs involved, it also provides guidelines, as well as gives advice and examines best practices. Economic operators look at these rankings to decide in which country is better to start their business, and bad ratings may result in a shifting of capital from a country to another, so that national leaders are interested in revising regulation according to the findings of the research. The paper examines what Doing Business is and its impact on national politics, and tries to predict future developments of simplification.

Panel formed with individual proposals.

Participants	Ali Aghahosseini Dehaghani Aleksandra Chiniaeva Shun Kaku Ignazio Impastato Alice Gates Kathleen Tipler
Name of Chair	Alice Gates
Room	BE2 139a

Ali Aghahosseini Dehaghani: ***Beyond Juridical Approaches: The Role of Sociological Approach in Promoting Human Rights of Migrants***

Many questions from a human rights point of view have been raised about how the phenomenon of migrants should be managed in the host countries. Given the multiplicity of factors that affect the application of these rights what is needed is an interdisciplinary approach which combines both juridical approaches and perspective from other disciplines, such as sociology. This paper is an attempt to show how sociology can promote human rights of migrants. To this end the article first explores the usefulness of an interdisciplinary approach to realize how and to what extent sociology may promote the human rights of migrants in the destination country. It then examines mechanisms which help to reach to a systematic integration of law and sociological discipline to advance migrants' rights as well as to encourage legal scholars to consider societal structures in their works.

Aleksandra Chiniaeva: ***International Parliamentary Assemblies as Guardians of Human Rights During the Migrant Crisis***

The proposed paper includes the comparative analysis of two international parliamentary assemblies of the European region: the Parliamentary Assembly of the Council of Europe (PACE) and the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCE PA). The paper describes the structure and activity of the PACE and the OSCE PA. In addition the comparative analysis of these international parliamentary assemblies demonstrates the response of the parliamentarians from different countries to the current migrant crisis readiness to cooperation and their attempts to find solutions not only at national but also at international level.

Shun Kaku: ***Constitutional Democratic Obligation to Outsiders***

This paper will argue that the political ideal of constitutional democracy (PICD) imposes external as well as internal constraints on states. More precisely, the commitment for the PICD requires us to respect collective self-determination and human rights of all people. It will reveal that some important principles of international law are not external constraints for constitutional democracies, but requirements emanating from the PICD itself. The paper examines following points. (1) Kantian-Rawlsian universal principles cannot specify state borders. (2) The Lockean-Nozickian historical principle cannot guarantee the legitimacy of the establishment of the government based on the PICD, and externalities must be taken seriously. (3) The PICD is premised on respect for democratic collective self-determination and individual human rights. The universality of moral principles requires us also to respect these values beyond borders, albeit to a lesser extent.

Ignazio Impastato: ***Global economic and public order crisis vs. immigrants' rights***

The scope of this paper refers to how, in the context of the recent theoretical reflection of citizenship, the national and European regulatory framework on migration management principles has put in place a set of effective rules offering an adequate and dignitous level of protection of the human rights of immigrant's non EU nationals and stateless people – such as the right to life, health, education, work, family, personal freedom, and freedom of movement and residence – by comparing the effects of "inclusion" and "exclusion" policies for regular and irregular immigrants on public expenditure under the perspective of antiterrorism State measures. By addressing the issue of rationalization and containment of public spending on regular and irregular migration described in the above-mentioned terms, alternative future scenarios on regulatory measures and administrative actions for the integration of legal immigrants and for the prevention of illegal immigration may be enacted.

Alice Gates and Kathleen Tipler: ***A critical exploration of rights education with undocumented immigrants in the United States***

While lively debate persists about the benefits of rights for pursuing large-scale social change, few scholars have examined the dynamics of rights education in the context of liberal democratic states. In this co-authored paper, drawing on data from a qualitative case study of an immigrant worker center in the Midwestern U.S., we critically examine the effects of "know your rights" workshops on undocumented immigrant participants. While recognizing the potential benefits of rights knowledge, we complicate the assumption that rights education is an invariable good. In our analysis, both the indeterminacy of law as well as the positionality of participants shaped their interpretation of legal knowledge. When workshop leaders do not fully take into account how participants interpret rights, rights education may have perverse or at least unanticipated consequences. We argue that legal knowledge is mutually constituted by participants and workshop leaders, and that community legal education can and should be informed by the lived experiences of participants.

Panel formed with individual proposals.

Participants	Zdeněk Červínek Catarina Botelho Pankaj Sinha Vanice Regina Lírio do Valle Lucia Scaffardi Monica Cappelletti Serkan Yolcu
Name of Chair	Catarina Botelho
Room	BE2 140/142

Zdeněk Červínek: ***To Balance or Not to Balance Socio-Economic Rights?***

Proportionality represents the basic methodological approach towards constitutional rights adjudication. The million-dollar question raised in current doctrinal works is the question of its universality. One of the alleged limits of proportionality is its application to socio-economic rights. But the doctrine does not provide clear answer to this issue. It is my goal to prove in this paper that proportionality in its full-extent is not suitable method to review interferences in socio-economic rights, but the balancing stage must be upheld even in these cases. The absence of balancing decreases the protection of individual's fundamental rights. Limitation of review to mere means-ends analysis leaves out the individuals and intensity of interferences in their fundamental rights. Balancing must therefore be maintained even in the case of socio-economic rights.

Catarina Botelho: ***Constitutional social rights protection in a sovereign debt crisis country: the Portuguese experience***

One may argue that the current society is complex, unsatisfied and asphyxiated by political, economic and financial questions that put the Social State at risk and diminish the protection level that, somehow naively, people thought could be perpetuated. These developments do represent potential regression in terms of social protection. In the Portuguese context, as well as in many European countries, a gap is thus emerging between what is written in the Constitution and the reality of the legislative and judicial practice. Does this new era of crises and austerity herald a paradigm shift beyond the confines of traditional constitutionalism?

Pankaj Sinha: ***Judicial Activism – Recent Trends in realizing rights of persons with disabilities in India***

Over past two decades, there has been enhanced awareness on the issues of disability that saw central disability legislation in the country as well as India signing UNCRPD. However, despite very enabling policy and legal framework around disability on paper book, the ground reality is far from satisfactory. This becomes challenging due to the vicious circle of disability and poverty, lack of enabling environment & lack of equal opportunities & absence of support mechanism, to realize the rights available on statute book. This paper will discuss recent trends in India where judicial activism as a tool helped realize several rights for persons with disabilities in India. Some important among them are right of deaf persons to legally drive and seek driving licenses, non-discrimination in insurance sector equal opportunities in employment and realizing equality through the tool of positive discrimination (reservation in jobs) for persons with disabilities.

Vanice Regina Lírio do Valle: ***Enforcing Socio-economic Rights Through Immediate Efficacy: A Case Study of Rio De Janeiro's Right To Housing***

Human rights enforcement through the Judiciary is a widespread option, translated into different constitutional clauses. Many alternatives have been explored to combine the urge in turning those moral commitments into reality without losing the authority legal clauses should have. The Brazilian experience, despite the formal allusion to immediate application, was turned through interpretation into the assertion of immediate efficacy. Adding efficacy as a constitutional feature of the human rights system does not enhance enforcement – in fact, it contributes to increased inequality. The hypothesis is demonstrated through a case study in the right to housing in Rio de Janeiro and the judicial solution created in order to give flesh to a right without any statutory delimitation. A constitutional interpretation that transfers to the Judiciary the inherent urge to create from scratch a right content that should be delimitated through democratic distributive decisions is not the solution.

Lucia Scaffardi and Monica Cappelletti: ***Cross-border health care mobility: a third way of access of a more equal health care system?***

The paper aims to investigate a possible third way of the welfare state system to add to public and private system based. The study examines firstly critical aspects of social rights in relation with economic and social crisis. Then, it focuses on the health care right and in particular the cross-border health care right that is developing in the European Union. This fundamental right, traditionally connected to the place where the person resides, may be enjoyed in another Member State. In this way, this new form of right may be theoretically a new mode of a social right to be added to the two established forms of welfare state. However, this cross-border right raises questions about the real possibility to access to health systems in terms of equality. In fact, despite of European citizens are guaranteed the cross-border health care right, it is subject to objective constraints. Finally, the paper examines if this third way right is a source of (in)equalities.

Serkan Yolcu: ***A New Step for the Protection of Social Rights: Some Observations on Individual Application to CESCR***

The Optional Protocol to the International Covenant on Economic Social and Cultural Rights which entered into force in 2013 created a new function for the Committee on Economic Social and Cultural Rights: the citizens of the countries party to the Protocol can make individual application to the Committee claiming that their rights under the Covenant was violated. There are currently five individual applications before the Committee and only one application (I.D.G. v. Spain) has been decided which concerned right to housing. IDG decision might be seen as a first step towards a new turn in the context of quasi-judicial review of social rights. In this context, this study will examine the process and remedy of the Committee's new competence and the IDG decision within the framework of other international and comparative practices around the world and analyze whether individual application to the Committee would in fact make sense for the vulnerable people or not.

Panel formed with individual proposals.

Participants	Samo Bardutzky Mário Simões Barata Maurizia De Bellis Christoph Henkel Marco Macchia Kangle Zhang
Name of Chair	Maurizia De Bellis
Room	BE2 144

Samo Bardutzky: ***Constitutional boundaries of EU economic governance post-crisis: soft law economic co-ordination and the national constitutions***

The use of soft law, 'hardened' through novel enforcement methods can be considered a prominent feature of the governance in the Economic and Monetary Union – set up during the crisis but designed with post-crisis ambitions. Two 'byzantine' procedures are considered: the excessive deficit procedure and the macroeconomic imbalances procedure. The approach that they exemplify has been denounced as a 'constitutional revolution' and attention has been drawn to the disabling effect on the national democratic processes. The tensions between the competing claims in the relationship national constitutions – EU law, reconciled in the past by the amendments to the national constitutions and constitutional case law might thus reappear in novel forms. If the interest has so far been in the potential of the supranational structures of the EU to re-legitimize the economic governance, the aim of the paper is to assess the role of the national constitutions in the landscape of redrawn boundaries.

Mário Simões Barata: ***Are there any limits to "whatever it takes to preserve the Euro"? The European Central Bank's Outright Monetary Transactions Program between National and European Courts***

One of the most significant developments that has come out of the Euro-crisis, from a European Constitutional Law perspective, is the recourse – for the very first time – to the preliminary reference procedure, foreseen in article 267º of the Treaty on the Functioning of the European Union (TFEU), by the German Federal Constitutional Court (GFCC) regarding the Outright Monetary Transactions (OMT) Program announced by the European Central Bank (ECB). This unprecedented move and the subsequent decision by the Court of Justice of the European Union (CJEU) in the Gauweiler Case have sparked an intense debate in the academic world and this presentation seeks to underline the positive impact of these rulings.

Maurizia De Bellis: ***The Independence And Accountability Of Central Banks: European And Comparative Perspectives***

The activity of the ECB, adopting unconventional measures in the context of the crisis, is under increased scrutiny. Judgments of the German Constitutional Court and of the Court of Justice in the OMT saga clearly show this uneasiness. What are the boundaries of the powers of the ECB and what should be the proper balance between independence and accountability?

The paper is divided in two parts: in the first one, the two OMT judgments are examined, showing different approaches to judicial scrutiny on the activity of central banks; in the second one, a comparative analysis of the independence of central banks is provided. The paper argues that the approach of the CJEU is best suited for judicial scrutiny on the activity of the central bank. However, judicial scrutiny is only one of the instruments through which a central bank can be hold accountable. Other tools – in particular, transparency ones – can be used. Showing how transparency tools are shaped across different jurisdictions, the paper aims at suggesting how the accountability of the ECB could be enhanced.

Christoph Henkel: ***Does the Single Point of Vulnerability for Failure and the Potential of Risk Propagation Outweigh the Benefits of Clearing Derivative Trades Through Central Counterparties (CCPs)?***

It is argued in this paper that the U.S. and the European Union's approach in implementing a central clearing requirement for OTC derivatives is allowing central counterparties to become too big to bail and that this requirements outweighs any of its benefits. Safe harbor protections for financial contracts are not limited or reduced, instead complicated networks of exemptions remain in place undermining the best efforts of risk management as well as limiting the benefits of central clearing of OTC derivatives. The default of any large CCP will require public bailout redefining the meaning of moral hazard and reversing any effect of the intended derivative market reform. The paper will also address the most recent trends discussed by stakeholders, including the ISDA revisions of its Master Agreements by including protocols to impose a stay. The paper concludes by suggesting that the current approach toward central clearing may result in a new phenomenon of too-big-to-bail.

Marco Macchia: ***Cross-border Financial Institutions and Resolution: Outlines of Global Administrative Law***

The resolution of cross-border banking groups raises a number of questions for the GAL. First, this issue is addressed by international bodies (FSB, Basel Committee), the EU and the US. Second, a mechanism for managing the resolution of cross-border groups cannot be simply national, but must operate globally. Third, since the EU and the US have adopted different approaches, this makes it more difficult to coordinate the actions of the supervisory authorities. There are two possible procedures to enable the Systemically Important Financial Institutions-failure: the Single Point of Entry and the Multiple Point of Entry. The US has chosen the first procedure. The EU has not decided ex ante between Spoe and Mpoe. This raises many questions. Will the resolution authority be able to ensure an efficient allocation of resources within the group? How can a technical choice be balanced by political needs? How much space is left to administrative and judicial protection (rule of law)?

Kangle Zhang: ***Border and Authority: Private Credit Rating in Neo-Liberal Society***

The tension between the necessity of private rating and the uncertainty concerning competence of rating leads to the research question: what is the mechanism of private credit ratings in international financial system; what is the relation between private regulatory power and border?

Under the impact of neo-liberalism, the international financial system was established. The system requires private rating agencies with expertise and technocracy to guarantee the creditworthiness and enhance market efficiency. However, the rating activities exemplify the indeterminacy of the public/private distinction, challenging both legitimacy and competence of private credit rating in international financial regulation. Private credit rating as the cure to international financial regulation is the poison.

International financial system is established, geographically unbalanced, as a result of globalization in an unbalanced power-relationship globally. Because the international financial system is such a fragmented system with highly expertise and technocracy, it challenges the traditional border of sovereignty, and the conception of authority.

Panel formed with individual proposals.

Participants	Máté Paksy Milka Sormunen David Fagelson Luke Beck Pratyush Kumar
Name of Chair	Milka Sormunen
Room	BE2 326

Máté Paksy: ***Critical Perspectives on Place-Related Minority Rights. Multinational Federalism and Post-Rawlsian Political Philosophy***

The Post-Rawlsian consideration about the "nationality question" and the so-called place-related rights raises many important questions including the advantages of the federal arrangements in the multinational societies. Being the "nationality question" no longer a domestic affair, but belongs so much as to the global law and politics, scholars cast doubt on the edgy distinction between federations and confederations, too. According to their appropriate observation, not only the ubiquitous globalization, but idiosyncratically used power-sharing techniques including territorial, cultural and functional autonomies, devolution, regionalism, consociational arrangements have gradually obliterated not only the borderline between the federal and the nation-state, but between the different federalist traditions respectively. Indeed, it seems that the contingent local cultural components embarrass the ideal theory and turn them into a non-ideal one. Meanwhile, if the theory has to be broadened out to accommodate the ethno-cultural components of the nation-state, then this complicates enforcement of the principle of state-neutrality vis-a-vis the individual plans of good life.

Milka Sormunen: ***Does borrowing work in human rights law? Best interests of the child in the case law of the European Court of Human Rights***

The paper analyses the concept of the best interests of the child in the context of the European Convention on Human Rights (ECHR). The ECHR does not mention best interests, in contrast, the best interests of the child is one of the most central concepts in the UN Convention on the Rights of the Child (CRC). The CRC changed the nature of the concept in a significant way. Best interests now have to be considered in all cases concerning children, and best interests and human rights are connected. By analyzing case law of the European Court of Human Rights (the Court), the paper examines how the Court has understood and used the concept in different case groups. The Court has relied on the concept on many occasions to the extent that the concept now has an autonomous nature. Similarities and differences with the interpretation of the Committee on the Rights of the Child are addressed as well as possible problems arising from borrowing a concept from another treaty system.

David Fagelson: ***Contested Concepts of Personhood in American Public Law***

My paper examines how evolving concepts of personhood in science, politics, war and even corporate governance have changed the idea of personhood on which legal status and citizenship are based. Some of these shifts, like the creation of 'enemy combatant' alter the laws of war, other shifts, like the granting of privileges and immunities to corporations blur the boundaries between persons, citizens and others who are neither. This alters our understanding of who is within law, how they are meant to be regulated, and perhaps most importantly, what this means for our associative obligations to each other. Finally, evolutionary biology challenges our traditional conception of free will and individual responsibility that is at the root of the idea of the person regulated by law. If theories of human cooperation posited by this field are borne out the person we thought was the subject of law will not exist and cannot be accommodated by existing conceptions of law.

Luke Beck: ***The Theological History of Australia's Constitutional Separation of Church and State Provision***

Section 116 of Australia's Constitution states "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." Section 116 was adopted by the Constitution's drafters largely in response to petitioning organized by Seventh Day Adventists. The Adventists were worried that the Convention's acquiescence to the Protestant Council of Churches' demand for a reference to God in the constitutional preamble would allow the new Federal Parliament to legislate for religious observances. The Adventists also believed that referring to God in the preamble would create the new Australian nation with a definite religious character. My paper explores the theological and legal thinking of the Adventists to explain how they came to believe what, on a strict legal analysis, was absurd.

Pratyush Kumar: ***Religion influencing Public Sphere, Public Reason and Public Law discourse in Colonial and Post-Colonial India***

The three strands of political processes in India: (a) religious pluralism and enlightened religion-inspired social reform movements from 19th century onwards; (b) multiculturalism- and pluralism-informed India's struggle for independence; (c) and India's multicultural and plural identities shaping public sphere and public reason, in answering how religion has shaped public reason, public sphere and public law. These three strands of political processes lead to three claims in my project: (1) India has its own form of evolving secularism & the transplantation of western ideas has evidently not worked in tempering and controlling, if not eliminating, the increased communal violence amongst different communities (post India's colonial contact); (2) Western secularism can't grasp the religiously informed imagination of the majority in the sense of majority of Indian public and not majority of a particular community and finally, and most emphatically; (3) aspects of public law are shaped by religion. The Indian experience is of increasing relevance for the whole world in how to grapple with the different and difficult fault lines of religious, ethnic and the other dozens of differences which exist.

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VENUE

The 2016 ICON•S Conference on "Borders, Otherness and Public Law" will be held at Humboldt University Berlin. All Conference events will take place on the University's Campus Mitte, which is situated in the center of Berlin. The University's historic Main Building is at the heart of Campus Mitte. It has the following address:

→ **Humboldt-Universität zu Berlin**
Unter den Linden 6
10117 Berlin, Germany

All of the plenary events of the 2016 ICON•S Conference will take place in the Audimax, the main lecture theatre, in the University's Main Building. The registration desk will be in front of the Audimax. For our panels sessions, we will use the Main Building (UL6), two buildings of Humboldt University's Law Faculty (BE2 and UL9) and a Seminar Building (DOR24). All buildings are in immediate vicinity of the address mentioned above. You will find a map of Campus Mitte on page 6.

TRANSPORTATION

We suggest the following routes to our Conference participants:
If you are travelling to Berlin on a long-distance train: Use Berlin's Hauptbahnhof (main station). From Hauptbahnhof: Take any eastbound S-Bahn (local railway) in the direction of Friedrichstraße station and get off at Friedrichstraße station. It is a short walk from the Friedrichstraße station to Humboldt University's Main Building and all Conference venues.

If you are travelling to Berlin by plane:
Berlin is served by two airports: Tegel (TXL) and Schönefeld (SXF).

From Tegel you can either take a taxi or the express bus line TXL, which will take you directly to the University's Main Building, if you get off at the bus stop called Staatsoper.

From Schönefeld you can either take a taxi or a regional train. Use the regional train lines RE7 and RB14, which also called Airport Express, to the Friedrichstraße station. It is a short walk from the Friedrichstraße station to Humboldt University's Main Building and all Conference venues. There are direct regional train services between Schönefeld and Friedrichstraße station roughly every 30 minutes. You can also use the S-Bahn (local railway) from Schönefeld to Friedrichstraße, but you will have to change trains at the Ostkreuz station.

If you are travelling to Berlin by coach:
Berlin's Central Bus Station ZOB is located close to the city's trade fair exhibition grounds (Messe). It is a short distance from the bus station to the underground stop, Kaiserdamm. Take the U2 underground line to Pankow and get off at the Hausvogteiplatz stop. Follow the signs for Taubenstraße / Marktgrafenstraße / Gendarmenmarkt and exit the station. After ca. 100m, turn right into Marktgrafenstraße and follow Marktgrafenstraße. It is a short walk from there to Humboldt University's Main Building and all other Conference venues.

If you are using public transport in Berlin:
Humboldt University's Campus Mitte is a short walk away from the Friedrichstraße station. The Friedrichstraße station is a local transport hub and is served by several regional train lines (RE1, RE2, RE7, RB 14), local train lines (S-Bahn lines S1, S2, S25, S5, S7, S75) and Berlin's underground line U6. You can also use the Hausvogteiplatz underground station on the U2 underground line. If you get off at Hausvogteiplatz, use the exit with the signs for Taubenstraße / Marktgrafenstraße / Gendarmenmarkt. After 100 m, turn right into Marktgrafenstraße. See the Map on page 6.

WIFI

Humboldt University offers *eduroam*. In order to use *eduroam*, you only have to connect to the the *eduroam network*. The authentication will be provided by your home institution. If your home institution does not provide you with *eduroam* access, you have the option to use Humboldt University's guest network *HU-Meeting.* You will need personalized access credentials in order to obtain access to *HU-Meeting*, which we will be happy to provide to you at the registration desk located in front of the Audimax.

ATTENDANCE CERTIFICATES

Certificates verifying your attendance at the 2016 ICON•S 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 in front of the Audimax.

CATERING

There will be coffee breaks between the Conference sessions on all Conference days. You will find the respective locations of the coffee stations on page 5. They are also marked with ☕ on the floorplans of the Conference buildings below.

On Saturday, we will offer a light lunch to our Conference participants, which will be served at the Law Faculty in two locations: in the foyer of the Law Faculty (BE2 foyer) and in room UL9 E25. Both locations are marked with 🍴 on the floorplans below.

Should you be looking for a place to have lunch or dinner elsewhere, you will find several restaurants close to all Conference venues in Georgenstraße (see Map on page 6).

At the end of the first Conference day, we would like to invite you to join us for a cocktail reception in the foyer of Humboldt University's Law Faculty (BE2 foyer).

INFO POINTS

We will have three info points for the Conference, one in each Conference building, 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. Do not hesitate to approach them – they're there to help!

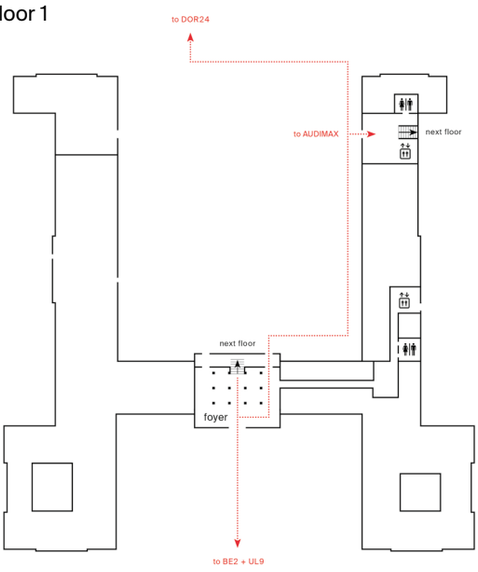
You will find the info points in the following three locations: in front of the Audimax in the Main Building (UL6), in the foyer of the Law Faculty (BE2) and on the fifth floor of the Seminar Building in Dorotheenstraße (DOR24). The info point locations are marked with ⓘ on the floorplans below.

EMERGENCY SITUATIONS

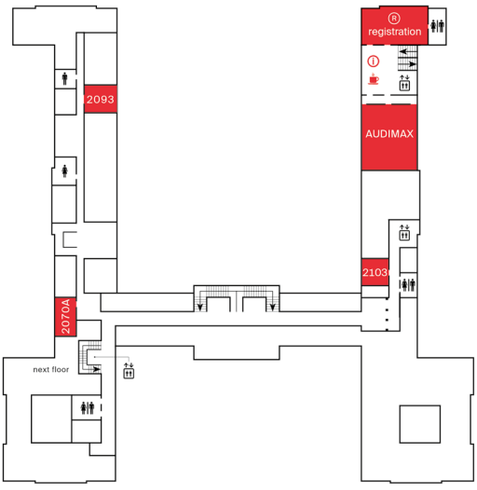
Should you find yourself in an emergency situation with no immediate help at hand during your stay in Berlin, you will reach German emergency services by calling 110 (police) or 112 (fire department and ambulance) from any phone.

UL6 Unter den Linden 6 Main Building

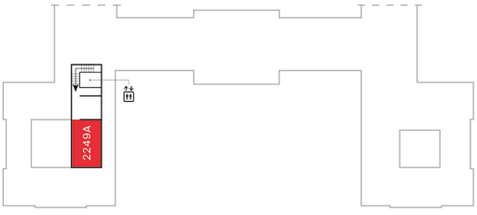
Floor 1



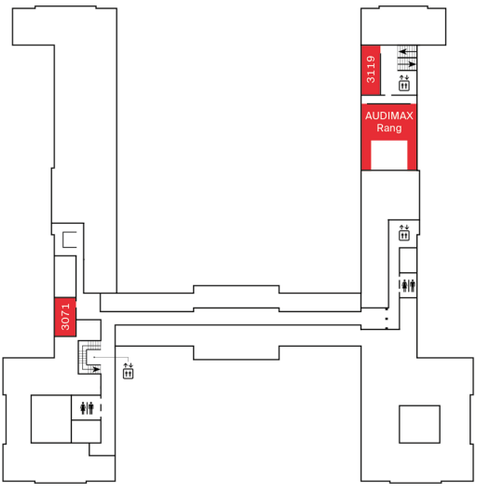
Floor 2



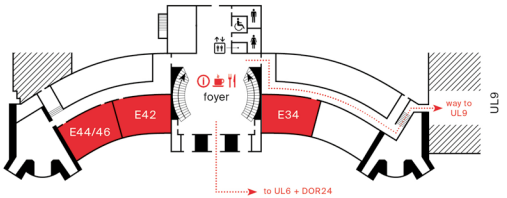
Intermediate Floor (between Floor 2 and 3)



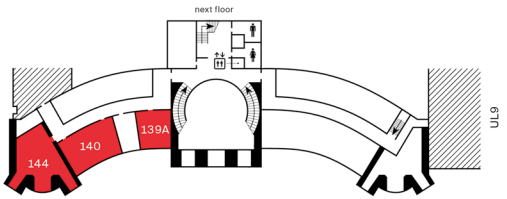
Floor 3



Groundfloor

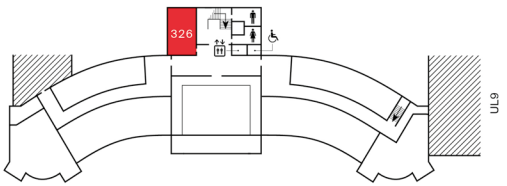


Floor 1



Floor 2 No Conference rooms on this floor.

Floor 3



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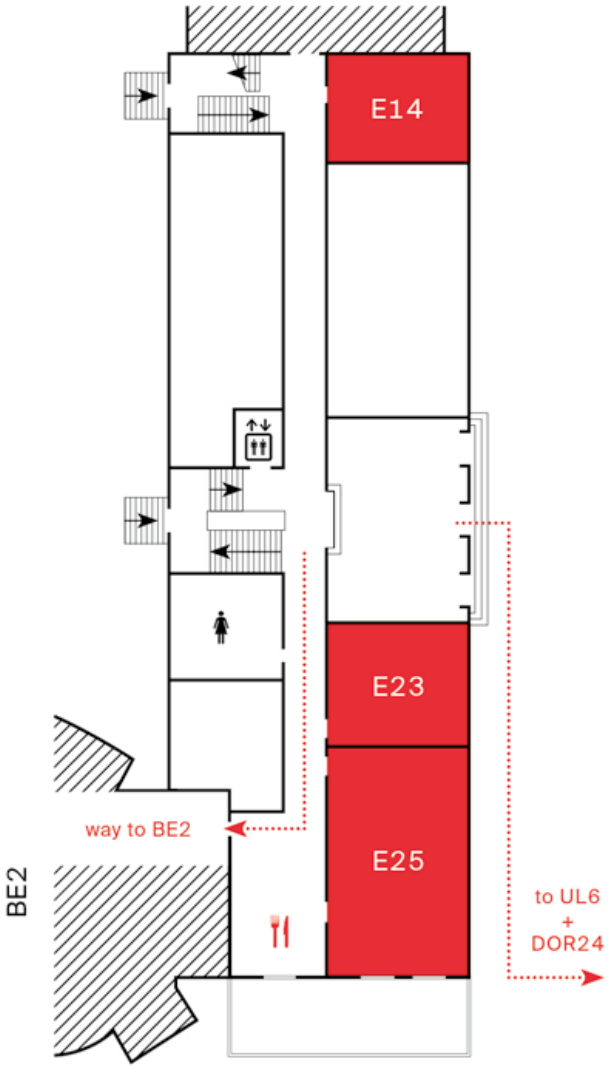
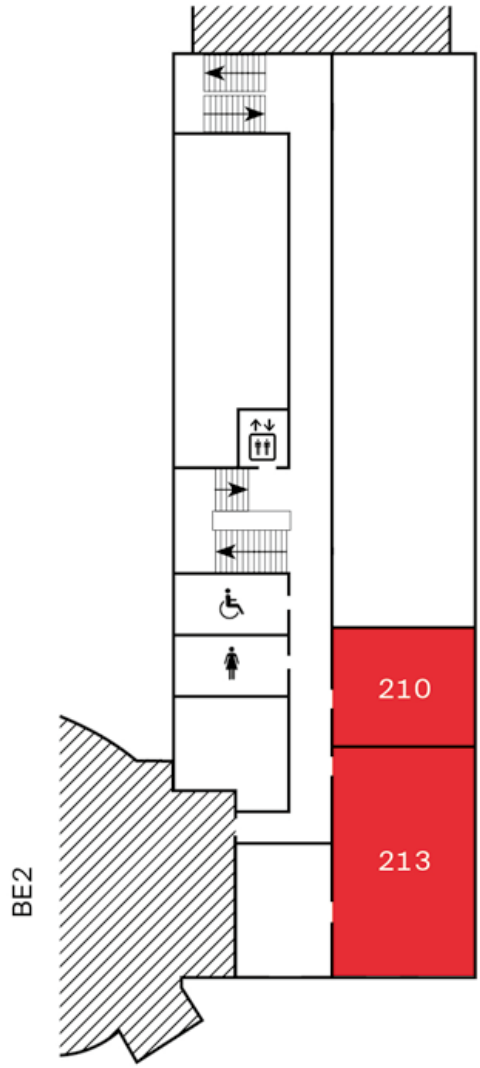


Floor 1 No Conference rooms on this floor.

Floor 2



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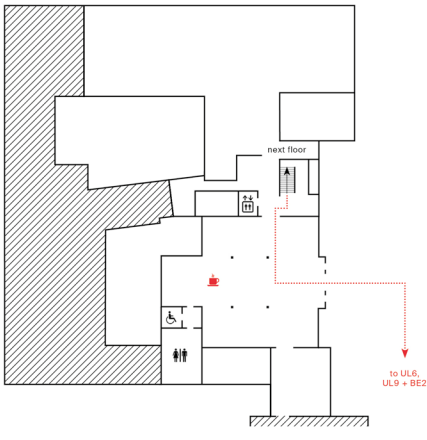

Floor 1	No Conference rooms on this floor.
Floor 2	No Conference rooms on this floor.
Floor 3	No Conference rooms on this floor.

Floor 4

Floor 5

Floor 6


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