

The Role of National Constitutions in European and Global Governance

Conference programme and pre-announcement of project books

26-27 November 2018

(All day on Monday 26/11 and half-day on Tuesday 27/11)

Location:

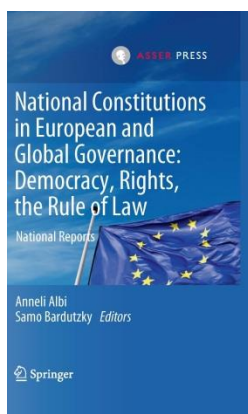
The Goodenough College, The Great Hall
Mecklenburgh Square,
London WC1N 2AB

<http://events.goodenough.ac.uk/function-rooms/london-house/the-great-hall>

NB! Attendance by pre-registration only

For registration information, please refer to the end of the programme and the project website <https://research.kent.ac.uk/roc/>

Outline of the conference



The aim of the conference is to briefly introduce the 29 national reports prepared within the framework of the 5-year European Research Council (ERC) funded project 'The Role and Future of National Constitutions in European and Global Governance'.¹ The national reports are complemented by a comparative study. These works will be published as follows:

- Albi A. and Bardutzky S. (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports. Volumes I and II* (T.M.C. Asser Press & Springer, Open Access book under Creative Commons International Licence 4.0; in press – publication expected in January 2019, <https://www.springer.com/us/book/9789462652729>)
- Albi A. *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. A Comparative Study* (T.M.C. Asser Press & Springer; publication expected early 2019)

¹ This project has received funding from the European Research Council (ERC) under the EU's Seventh Framework Programme (grant agreement No 284316). Views cannot be attributed to the ERC or to the European Union.

PROGRAMME

(NB! Revised as at 20/11/2018)

Monday 26 November 2018		
Introduction		
08:50	09:15	Registration and welcome coffee
09:15	09:40	<p>Welcome and overview of the 5-year ERC-funded research project 'The Role of National Constitutions in European and Global Governance'</p> <p><i>Anneli Albi, Professor of European Law, University of Kent</i></p> <p>The overview will include the following themes:</p> <ul style="list-style-type: none"> • Overview of the 29 national reports and of the comparative study; • The (reductionist) narratives of sovereignty, national constitutional identity and Euroscepticism/Euro-friendliness in the transnational discourse on national constitutions and constitutional courts – the missing themes; • Overview of the three main constitutional cultures in Europe; • The distinctive and advanced (comparative) European achievements in constitutionalism and the rule of law, especially the right to judicial protection in the context of deprivation of liberty as part of human dignity in the post-totalitarian constitutions; • Broader trends and changes in the context of EU and transnational law, including a potential ongoing transition from the constitutional law paradigm to autonomous transnational governance, with foundational changes and changes in constitutional thinking. • NB! The project <u>does not</u> address the following: (a) the ECHR or other treaties which advance the protection of human rights, peace, environmental protection and other traditional areas of international law, but rather explores new types of transnational developments that may have caused strain on fundamental rights and constitutional values; (b) the recent more wide-spread turn towards illiberal constitutionalism (beyond the report of Hungary) – the focus is on the deeper comparative European constitutional culture, the common and diverse elements, and how these have been impacted by autonomous EU and transnational law. <p>Questions and discussion</p>
<p>Europe's political/evolutionary, post-totalitarian and other constitutional cultures: The constitution or the ECHR as the main bill of rights, approaches to constitutional review, EU amendments</p>		
09:40	10:45	<p>Perspectives from the political/evolutionary constitutions: EU law strengthening courts and judicial review</p> <p>Chair: Sebastian Payne, University of Kent; President of the UK Constitutional Law Association</p> <p>The British unwritten constitution and its juridification through EU and</p>

		<p>ECHR law. Reflections on Brexit <i>Alison L. Young, Sir David Williams Professor of Public Law at the University of Cambridge and a Fellow of Robinson College</i> <i>Patrick Birkinshaw, Emeritus Professor of Public Law and Director of the Institute of European Public Law, University of Hull</i></p> <p>The Dutch evolutionary, pragmatic constitutional culture: Rights protection on the basis of the ECHR and EU Charter and a ban on constitutional review <i>Monica Claes, Professor of European and Comparative Constitutional Law, Maastricht University</i></p> <p>Luxembourg's 1868 Constitution, the new Constitution and the evolutionary tradition: No challenges posed by EU law <i>Jörg Gerkrath, Professor of European Law, University of Luxembourg</i></p> <p>The Danish Constitution: Remarks on the absence of EU amendments and on the change of balance in the separation of powers from parliament to judges <i>Helle Krunke, Professor of Constitutional Law, University of Copenhagen, and Vice-President of the International Association of Constitutional Law</i></p> <p>The 2012 EU amendments in the Finnish Constitution and the changes in the constitutional culture <i>Janne Salminen, Professor of Public Law, University of Turku</i></p> <p>Questions and discussion</p>
10:45	11:15	Coffee break with refreshments
11:15	12:30	<p><i>Perspectives from post-totalitarian constitutional cultures from Western and Central and Eastern Europe</i></p> <p>Chair: Evgeni Tanchev, at the time of writing Professor of Constitutional Law, New Bulgarian University, Sofia, and Vice-President, Venice Commission of the Council of Europe; subsequently Advocate General at the European Court of Justice</p> <p><u>Project-external keynote speech:</u> The collapse of totalitarianism and the rise of a constitutional tradition in continental Europe <i>Cesare Pinelli, Professor of Constitutional Law, University of Rome Sapienza</i></p> <p>The Spanish constitutional system 'under stress': The deep impact of European and global governance on the welfare state, the territorial distribution of power and democratic legitimation <i>Joan Solares Mullor, Lecturer of Constitutional Law, Pompeu Fabra University, Barcelona; co-author with Aida Torres Pérez, Professor of Constitutional Law, Pompeu Fabra University, Barcelona</i></p>

		<p>The Polish constitutional culture pre-2016, including constitutional review statistics and grounds <i>Stanisław Biernat, Professor of European Law, Jagiellonian University, Cracow; formerly Vice-President of the Constitutional Tribunal of Poland</i></p> <p>Estonia's constitutional <i>Rechtsstaat</i> modelled on German constitutionalism: Challenges posed by the Constitutional Act suspending the Constitution in areas of conflict with EU law <i>Madis Ernits, Judge, Tartu Court of Appeal, and Visiting Lecturer in Constitutional Law, University of Tartu</i></p> <p>Other constitutional cultures</p> <p>'Efficacy' versus 'legitimacy' approach: Belgium as a case study of efficacy <i>Patricia Popelier, Professor of Constitutional Law, University of Antwerp</i></p> <p>The abandonment of the post-totalitarian constitutionalism in Hungary: Illiberal, populist or autocratic constitutionalism? <i>Nóra Chronowski, Associate Professor of Constitutional Law, National University of Public Service, Budapest, and Researcher, Hungarian Academy of Sciences</i></p> <p>Questions and discussion</p>
12:30	13:30	Hot buffet lunch
<p>The European Arrest Warrant (EAW) beyond the rule of <i>nullum crimen, nulla poena sine lege</i> raised in <i>Advocaten voor de Wereld</i>: Automaticity of extraditions, fundamental/constitutional rights and rule of law safeguards</p> <p>Chair: Anneli Albi</p>		
13:30	15:00	<p><i>Examples from Member States where the automaticity of extradition has been subject to extensive debate/scrutiny, leading to the introduction of constitutional and/or legislative safeguards and/or some degree of judicial review</i></p> <p>Germany: The principle of mutual recognition in criminal law as 'still ... one of the most controversial issues, passionately criticised by many German authors', including with regard to the absence of an <i>ordre public</i> clause unlike in free movement of goods <i>Tobias Reinbacher, Professor of Criminal Law and Criminal Procedure, Julius-Maximilians University of Würzburg</i></p> <p>EAW, the 'journey into the unknown' and the slow emergence of the individual in EU criminal law. Introduction of legislation on proportionality, fundamental rights and rule of law based review in the UK, following NGO-led public debate <i>Valsamis Mitsilegas, Professor of European Criminal Law, Queen Mary University of London</i></p> <p>The 'tormented' legal and political debates regarding <i>nulla poena sine lege</i> and constitutional fundamental rights in Italy</p>

		<p><i>Barbara Guastafarro, Tenured Assistant Professor of Constitutional Law, University of Naples 'Federico II'</i></p> <p>Concerns in Slovenia about the instrumentalisation of and a changing role of courts. Overview of the extensive defence rights and rule of law guarantees in the Slovenian Constitution going beyond those in the ECHR and the EU Charter</p> <p><i>Samo Bardutzky, Assistant Professor of Constitutional Law at the University of Ljubljana, Slovenia</i></p> <p><i>Brief roundtable contributions regarding the presumption of innocence and other defence rights and rule of law guarantees</i></p> <p>The case brought by the Polish Ombudsman (2014) to the Supreme Court with regard to a significant number of complaints from citizens alleging that the impossibility to review evidence breaches the presumption of innocence guaranteed by Art. 42(3) of the Polish Constitution</p> <p><i>Monika Kawczyńska, Assistant Professor of European Law, Jagiellonian University, Cracow; formerly Judicial Assistant, Constitutional Tribunal of Poland</i></p> <p>The preliminary reference to the CJEU from Romania in <i>Radu</i> regarding the presumption of innocence and the right to personal liberty</p> <p><i>Bogdan Iancu, Associate Professor in Comparative Constitutional Law and Constitutional Theory, University of Bucharest, Faculty of Political Science</i></p> <p>Irish judges' constant concerns about automaticity; the gradual reduction of protection in the legislation and by the courts</p> <p><i>Gerard Hogan, at the time of writing the national report Judge at the Court of Appeals of Ireland; subsequently Advocate General at the European Court of Justice</i></p> <p><i>Brief roundtable contributions from some Member States where there was no EAW debate</i></p> <p>Denmark</p> <p><i>Trine Baumbach, Professor of Criminal Law, University of Copenhagen</i></p> <p>Lithuania (noting litigation on the issue of whether the person extradited ought to bear the costs related to extradition)</p> <p><i>Gintaras Švedas, Vice-Dean of the Faculty of Law, University of Vilnius</i></p> <p>Questions and discussion</p>
15:00	15:30	Coffee break with refreshments
<p>The EU Data Retention Directive in national and EU courts: A challenge to national constitutional identity or to a common European tradition?</p> <p>Chair: TBC</p>		
15:30	16:35	<p>Ireland's three cases on the Data Retention Directive at the CJEU; The inviolability of privacy and home having 'deep roots in the continental constitutional tradition'</p> <p><i>Gerard Hogan</i></p>

		<p>Austria: 'A taboo was broken'. The difficulties of undoing the Data Retention Directive after its annulment <i>Konrad Lachmayer, Professor for Public Law, European Law and Foundations of Law, Sigmund Freud University in Vienna</i></p> <p>The public protests regarding the Data Retention Directive in Sweden and the high protection of freedom of expression; European Commission enforcement proceedings and the 3 million EUR fine <i>Joakim Nergelius, Professor of Constitutional Law, University of Örebro</i></p> <p>Cyprus: A constitutional amendment on data retention that became excessive after the annulment of the Directive by the CJEU. Remarks on the 'asymmetrical' approach <i>Constantinos Kombos, Associate Professor of Public Law, University of Cyprus</i></p> <p>Brief roundtable contributions</p> <p>DRIPA, IPA and Beyond: CJEU and domestic judgments enhancing the protection of privacy in the UK <i>Patrick Birkinshaw</i></p> <p>Poland: Judicial adjudication regarding the spillover of the Directive to other areas beyond serious crime <i>Monika Kawczyńska</i></p> <p>Questions and discussion</p>
16:35	16:45	A brief break to change the panel
<p>The financial crisis, democracy and social rights Chair: Sven Simon, Professor of International, European and Public Law, Philipps University Marburg</p>		
16:45	18:00	<p><i>ESM Treaty (beyond Pringle), OMT/mutualisation of debt and the determinability of the financial liabilities: Implications for democracy and parliamentary control over budget</i></p> <p>Overview of the Euro crisis case law of the German Constitutional Court: Strengthening the national parliament's oversight <i>Mattias Wendel, Professor of Public Law, International Law, EU Law and Comparative Law, University of Bielefeld</i></p> <p>The ESM Treaty in the Finnish Constitutional Committee: The achievement of a change of the draft ESM Treaty regarding increase of liabilities <i>Tuomas Ojanen, Professor of Constitutional Law, University of Helsinki</i></p> <p>The ESM Treaty in the Estonian Supreme Court: Narrow ratification, with concerns expressed by nine dissenting judges with regard to the impact on the democratic, rule of law based social state <i>Carri Ginter, Associate Professor of European Law, University of Tartu</i></p>

		<p>Brief roundtable contributions</p> <p>Austria: The ESM Treaty judgment leading to constitutional amendments to ensure parliamentary control <i>Konrad Lachmayer</i></p> <p>The Lithuanian Constitution, the constitutional principle of geopolitical orientation and the absence of discussion on EU measures beyond the financial liabilities entailed by the ESM Treaty <i>Irmantas Jarukaitis, at the time of writing the national report Vice-President, Supreme Administrative Court of Lithuania and Associate Professor, University of Vilnius; subsequently Judge at the European Court of Justice</i></p> <p>EU and IMF austerity programmes, social rights and the social state</p> <p>The social constitutional identity in Portugal: EU and IMF austerity programme cases in the Portuguese Constitutional Court <i>Francisco Pereira Coutinho, Professor, Lisbon Nova Law School</i></p> <p>Constitutional dimensions of the austerity programme in Greece: The dark(er) sides of sovereignty loss <i>Xenophon Contiades, Professor of Public Law, Panteion University, Athens, and Managing Director of the Centre for European Constitutional Law, Athens</i></p> <p>Questions and discussion</p>
18:00	19:00	Reception sponsored by the Kent Centre for European and Comparative Law (KCECL)

Tuesday 27 November 2018

08:50 09:15 **Welcome coffee**

Constitutional issues regarding fundamental rights, judicial review and parliamentary participation in relation to international law and global governance

Chair: Gavin Barrett, Professor of Law, University College Dublin Sutherland School of Law

09:15	10:45	<p>Swiss constitutional amendments regarding global governance and parliamentary participation</p> <p><i>Raffaella Kunz, Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg; co-author with Prof. Anne Peters, Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg</i></p> <p>The stringent amendment procedures for domestic constitutional change and the ease of transfer of powers by ratification of treaties</p> <p><i>Martin Belov, Associate Professor in Constitutional Law, 'St. Kliment Ohridski' University of Sofia</i></p> <p><i>Brief roundtable contributions on selected areas of international/global law</i></p> <p>International extradition treaties: The introduction of a forum bar in the UK</p> <p><i>Patrick Birkinshaw</i></p> <p>Swiss and ECtHR adjudication on access to judicial review in relation to UN anti-terrorist blacklists</p> <p><i>Raffaella Kunz</i></p> <p>Constitutional issues regarding the global economic institutions' drive towards privatisation</p> <ul style="list-style-type: none">- Slovenia: A civil society driven constitutional amendment to ensure the right to water in the form of a non-profit public service<p style="margin-left: 40px;"><i>Samo Bardutzky</i></p> <ul style="list-style-type: none">- Belgium: Adjudication on the constitutionality of conferring broad powers to the Electricity and Gas Regulator, an agency not controlled by Government or Parliament while directly affecting citizens<p style="margin-left: 40px;"><i>Patricia Popelier</i></p> <p>Current challenges for transparency in Swedish and Nordic legal context, including access to documents in international organisations</p> <p><i>Joakim Nergelius</i></p> <p><i>Brief roundtable contributions on the strain on the rule of parliamentary reservation of law and the 'quality of law' in the implementation of EU and international measures</i></p> <p>The concerns of Finland's Constitutional Law Committee regarding the 'quality of law'; constitutional amendment regarding implementation of</p>
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		<p>international commitments <i>Tuomas Ojanen</i></p> <p>The concerns expressed by the Danish Parliament regarding implementation of EU measures by governmental regulations <i>Helle Krunke</i></p> <p>Constitutional challenges to the implementation of the Data Retention Directive by a governmental regulation in France and by a non-organic law in Spain <i>Pierre-Vincent Astresses, Ph.D. Candidate, Sorbonne Law School, University Paris 1 (Panthéon-Sorbonne) and Teaching Assistant, University of Lorraine</i></p> <p><i>Joan Solares Mullor</i></p> <p>Issues regarding publication of IMF measures in Portugal <i>Francisco Pereira Coutinho</i></p> <p>Questions and discussion</p>
10:35	11:05	Coffee break with refreshments
<p>Broader reflections on the role of constitutions in European and global governance Chair: Roman Puff, Senior Scientist, University of Salzburg, and co-director, with Prof. Stefan Griller, of the ECSA Austria research project 'Member States Constitutions and EU Integration'</p>		
11:05	12:55	<p><i>The direction of travel for fundamental/constitutional rights and rule of law safeguards: Minimum floor (ECHR), uniformisation/autonomous approach (CJEU), retaining the diversity of the constitutional cultures?</i></p> <p>The uniformising effect of CJEU case law in Belgium: A dialogue or outsourcing sensitive constitutional issues? <i>Catherine Van De Heyning, Professor of Fundamental Rights, University of Antwerp</i></p> <p>The principles of legitimate expectations, non-retroactivity, property rights and proportionality in the Cypriot Sugar Market cases <i>Stéphanie Laulhé Shaelou, Professor of European Law and Reform, and Head, School of Law, University of Central Lancashire, Cyprus</i></p> <p>The continuing litigation regarding the European Commission's 45 million EUR fine on Estonian sugar stocks: Publication of laws and the principles of legal certainty, legitimate expectations and non-retroactivity <i>Carri Ginter</i></p> <p><i>Brief roundtable contributions</i></p> <p>The French discussion on a <i>pro homine</i> clause; a case for improved judicial dialogues in the light of <i>Jeremy F</i> <i>Pierre-Vincent Astresses; co-author with Laurence Burgorgue-Larsen, Professor of Public Law, Sorbonne Law School, University Paris 1</i></p>

(Panthéon-Sorbonne)

The cumulative constitutional conditions for limitation of fundamental rights in the Polish Constitution pre-2016 and comparison with the EU approach

Monika Kawczyńska

Diversity, the plurality of constitutional cultures and the incommensurability of attempting to unify all traditions in one common constitutional tradition

Konrad Lachmayer

The changing constitutional language in the transnational context

The different meaning of constitutionalism in the national/comparative and transnational context: The need to ensure axiological continuity?

Giuseppe Martinico, Associate Professor in Comparative Public Law, Scuola Superiore Sant'Anna, Pisa

Changes in the constitutional language: Remarks ranging from the principle of proportionality in *Laval*, *Viking*, *Schmidberger* and *Omega* to the quasi-constitutionalisation of the anti-corruption conditionality

Bogdan Iancu

Comparative overview of the outcomes of constitutional defences invoked by Member States in CJEU case law

Márton Varju, Senior Research Fellow at the Hungarian Academy of Sciences, Hungary

Brief roundtable contributions with selected suggestions for introducing a role for national constitutions and constitutional courts in EU structures

A proposal (post-*Landtová*) that all constitutional courts/highest national courts ought to be given the possibility of a hearing by the CJEU

Stanisław Biernat

On the preceding theme, see also the Spanish report for a case for greater use of comparative method by the CJEU to identify whether a common 'synthetic' (rather than autonomous) solution or deference and discretion would be better placed, with reference to publications of Prof. Aida Torres Pérez

'Substantive co-operative constitutionalism' and other suggestions in scholarly literature for retaining a role for national constitutions in EU and global governance

Anneli Albi

The presentation includes a proposal for the inclusion of constitutional grounds beyond subsidiarity and proportionality in the yellow card mechanism for national parliaments, put forward in the Maltese report by *Peter G. Xuereb*, at the time of writing the national report Professor of European and Comparative Law at the University of Malta; subsequently Judge at the European Court of Justice

		Questions and discussion
12:55	13:00	Concluding remarks by Samo Bardutzky: Constitutionalism under strain from growing domestic illiberal movements but also from some aspects of EU and transnational law? The direction of travel for constitutionalism
13:00	14:00	Lunch reception and end of conference

REGISTRATION INFORMATION

- NB! Attendance is by **pre-registration only**. There are **100 places free of charge** (including speakers and chairs).
- Please register as soon as possible, or at the latest by Tuesday 20 November 2018. A limited number of further registrations is available also after that date. The link to the registration website is available at the project website <https://research.kent.ac.uk/roc/conference-registration>
- Contact e-mail for further information: KLSResearch@kent.ac.uk

LOCATION AND ACCOMMODATION

- The Goodenough College is a postgraduate residential centre in the Bloomsbury area, near the Russell Square underground station as well as the Eurostar station at St Pancras and Kings Cross station. For location information, see <http://events.goodenough.ac.uk/contact/location>.
- Accommodation: A limited number of rooms are available at The Goodenough on Mecklenburgh Square (equivalent to 4* accommodation). The website is <https://www.thegoodenough.co.uk/> and the contact e-mail for bookings is reservations@thegoodenough.co.uk.

PROJECT NEWSLETTER

As part of the project, we are in the process of setting up two newsletters:

- 1) Project newsletter ('The Role of Constitutions in European and Global Governance') with updates (e.g. publications) and any follow-up events and developments (approximately 3-4 e-mails per year).
- 2) A general newsletter in the field of comparative and EU constitutional law (e.g. conferences, calls for papers, scholarships and jobs in the field, books and other key publications) (approximately 6-10 e-mails per year).

In case of interest, please sign up either at the conference registration page or through the project website <https://research.kent.ac.uk/roc/contact/> and specify whether you would like to receive one or both of the above newsletters.