Global Constitutionalism

🟧 Human Rights 🟥 Democracy 🟨 Rule of Law

Junior Scholars' Workshop 2020: New Approaches to Global Constitutionalism

Held virtually

Workshop Programme

16 July 2020

9:45 am **Introduction:** Jonathan Havercroft

10:00 am-11:30 am **First panel:** *Norms lie in the Practice*

- Liam Moore (University of Wollongong): Understanding decision-making in a complex world: collective norms and climate-related displacement policies in the Pacific

- Binendri Perera (University of Colomb/Sri Lanka Law College): People's engagement in transnational legal process: School Strike for Climate as Global Constitutionalism

- Oliver Merschel (University of Hamburg): Bringing together Practice Theory and the Study of International Courts: Towards a Novel Methodological Framework

Commentator: Antje Wiener

Break

3:00 pm-4:30 pm **Second panel:** *Constitutional Authority in an Era of Democratic Backsliding*

- Oren Tamir (Harvard Law School): Constitutional Norm Entrepreneuring

- Johann Laux (Oxford Internet Institute at the University of Oxford/Center for Human Rights and Global Justice at New York University): Public Epistemic Authority: An Epistemic Framework for the Institutional Legitimacy of International Adjudication

- Ana Cannilla (University of Reading): Non-core Cases in Political Constitutionalism

Commentator: Jonathan Havercroft

17 July 2020

9:45 am **Introduction**

10:00 am-11:30 am **First panel:** *Constitutional Transformations of the Past and Future*

- Will Ryle-Hodges (Cambridge University): Defining Consultative Governance as a Sharīʿa Duty: Muḥammad Abduh's Islamic reformist challenge to the constitutionalist movement in 19th century Egypt

- Giovanni De Gregorio & Roxana Radu (University Milan-Bicocca & University of Oxford): Fragmenting Internet Governance: Digital Sovereignty and Global Constitutionalism

- Gayatri Malhotra (Jindal Global Law School): Sieving Through Silence: The Partition Question, Constitution of India and Transformative Constitutionalism

Commentator: Jacob Eisler

Break

3:00 pm-4:30 pm **Second panel:** *The changing dynamics of constitutionalism in Europe*

- Nausica Pallazzo (University of Trento, Bocconi University): Judicial Activism in Europe: Not exactly a Neat and Clean Fit Abstract

- Katarzyna Nowicka (European Institute): Constitutional capital. The case of Poland

- Max Steuer (Cambridge University, Corenius University): The Obligation of Constitutional Courts in the European Union: Sustainable Constitutional Pluralism

Commentator: Jo Shaw

4:30 pm-4:45 pm **Closing remarks:** Jacob Eisler

Abstracts of Workshop Papers

1) Liam Moore

Understanding decision-making in a complex world: collective norms and climate-related displacement policies in the Pacific

In recent years both Fiji and Vanuatu have developed new policies around climate-related internal displacement and mobility. On the face of it, the decision to pursue these policies could appear puzzling. While these locations are disproportionately vulnerable to the threat of climate-related hazards, the obligations around protection in these circumstances are fuzzy and both these states have relatively limited capacitates to implement these policies on the necessary scale. So why then are these states adopting and actively promoting such expansive policies around climate-related mobilities?

I argue that to understand cases like this, we need to rethink how we conceptualise decision-making in International Relations constructivist theory. I strive to construct a framework for understanding how actors who are traditionally seen as less powerful can make decisions that influence and shape the international system in ways that they should not seemingly be able to. This framework has three parts. The first follows Seybert and Katzenstein, arguing we need to stretch our understanding of power to include the power of unpredictability and uncertainty.[1] The second builds on this, dealing with how actors engage with the world and the factors that shape their decision-making processes. I argue we need to engage with a plurality of ideas here, including complexity theory, questions of identity, culture, ontological security, routine-based actions, and emotions. Bringing together this range of perspectives highlights both how the complexity and messiness of the world shape the range of choices decision-makers are presented with, and how uncertainty, contradictions, and confusion can allow traditionally smaller or less materially powerful actors to 'innovate within the cracks' of the international system.[2]

The final part builds on the literature around norm contestation and norm complexity, arguing we need to treat norms as collectives. Accepting that norms operate in clusters or regimes allows us to see not just the multiplicity of potentially acceptable actions, but also the variety of factors that can cause actors to consciously or unconsciously pick an action from several, often contradictory, options. I argue that marrying these approaches together is the best pathway to understanding decision-making processes, the range of options actors are faced with, and why they prefer certain decisions over others. It will also allow us to see how traditionally less-powerful states, such as Fiji and Vanuatu, can act in ways that would otherwise be seen as illogical, irrational, or unexplainable.

---

[1] Peter J Katzenstein and Lucia A Seybert, "Protean Power and Uncertainty: Exploring the Unexpected in World Politics," *International Studies Quarterly* 62, no. 1 (March 1, 2018): 80–93: Lucia A. Seybert and Peter J. Katzenstein, "Protean Power and Control Power: Conceptual Analysis," in *Protean Power: Exploring the Uncertain and Unexpected in World Politics*, ed. Peter J. Katzenstein and Lucia A. Seybert (Cambridge, United Kingdom: Cambridge University Press, 2018), 3–26.

[2] Christian Reus-Smit, *On Cultural Diversity: International Theory in a World of Difference* (Cambridge, United Kingdom: Cambridge University Press, 2018), 205–6; Christian Reus-Smit, "Protean Power and Revolutions in Rights," in *Protean Power: Exploring the Uncertain and Unexpected in World Politics*, ed. Peter J. Katzenstein and Lucia A. Seybert (Cambridge, United Kingdom: Cambridge University Press, 2018), 61.

2) **Binendri Perera**

People's engagement in transnational legal process: School Strike for Climate as Global Constitutionalism

Constitutionalism regulates the powers of the state for public benefit and facilitates engagement of people in governance to achieve meaningful public benefits. Where the states have denied these rights and freedoms, the people have mobilized themselves to engage in country-wide protests to assert their sovereignty, as seen through protests in Hong Kong 2019-2020. This paper will analyze how the significance people's engagement, upon which domestic conceptualization of constitutionalism is premised on, has translated into the international sphere. Even though international law was developed on the basis of sovereignty and legal primacy of the states, the concept of transnational legal process acknowledges the multiplicity of actors that are involved in creating and crystallizing international legal norms. While people have been drivers of this process in a range of different capacities, engagement of people through mass mobilization and movements to directly assert their entitlements, remains to be evaluated.

I will focus on four aspects of the public protests in Hong Kong and the School strike for climate in order to highlight similarities in their trajectories. First, I will delineate the respective legal frameworks and the gaps within those legal frameworks which made these movements necessary. Secondly, I will focus upon how the other actors in the domestic and the international sphere exploited the gaps within the existing legal framework which is the immediate cause of both the protests. Similar to how domestic strikes are a result of an attempt to enact an Extradition Law that threated people's autonomy, the school strike for climate is a result of lackadaisical attitude of the states to take precautions over climate change. Thirdly, I will note the similar methods and strategies used by both the movements. Both the strikes use new technology to mobilize people, but it has been uniquely crucial for school strikes. Finally, I will assess the nature of backlash faced by these movements. My aim in comparing the movements and highlighting their similarities is to support my two claims. My first claim is that mass mobilization of people is a form of people's engagement in the transnational legal process. Secondly, I argue that just as people's movement in Hong Kong is trying to fill in the domestic gap in constitutionalism, the School Strike for Climate is promoting the values of global constitutionalism: human rights, democracy, sovereignty of people and solidarity.

3) **Oliver Merschel**

Bringing together Practice Theory and the Study of International Courts: Towards a Novel Methodological Framework

This paper initiates a process of building a bridge between the aspiration of scholars in IR and legal theory to conceptualize international courts specifically and law in general as shaped by practices (often backed up by theoretical arguments) and the practice-oriented methodology that can provide the tools needed to actually study courts as practices. The crucial promise of a practice-oriented perspective on international courts is to offer a plausible account of the continuity (and incremental change) of legal meaning despite the indeterminacy of legal texts. After specifying what kinds of practice theory are suggested to establish a novel methodological framework for the study of international courts (arguing for an interpretive

understanding of practice-oriented research and against mirroring the internal point of view) and how such a framework would respond to and specify arguments in the extant literature, distinct practice-oriented sensitising concepts, research strategies and methodological refinements are put forward. Building on concepts such as background knowledge or the interconnectedness of sites, research strategies such as identifying situations of crisis and refining and putting an emphasis on methods such as interviews and participant observation, tentative suggestions for re-orienting research on international courts can be made. Such a methodological framework must however always remain unfinished and open to refinements and critique through its application in the actual practice of research.

4) **Oren Tamir**

Constitutional Norm Entrepreneuring

Everyone is obsessed today with constitutional norms. They have powerfully penetrated our vocabulary and are mentioned with dizzying frequency. We now know that any account of our valuable constitutional practices cannot end with just politics or law and must also include norms. What is further unique about the current moment in our political era is that an important subset of these norms appears to be exceedingly fragile and is under persistent attack. Some even suggest that the erosion of constitutional norms is at the heart of a global trend of democratic recession. But how precisely do constitutional norms change and ultimately collapse? And is there something actors can do to influence these processes?

This Article's goal is to explore these questions, both in general and in the context of the alleged trend of democratic recession in particular. It argues that although norms can be understood, following H.L.A Hart, as a "primitive" component in our political systems (given the way they differ from formal law), constitutional norms can in fact attain some of the credentials Hart believed could be attributed exclusively to law. More specifically, the Article claims that we can fashion something akin to "rules of change" and "rules of adjudication" in relation to constitutional norms and accordingly gain a firmer grasp of how they develop, change, and ultimately break down and of how conflicts about constitutional norms are "adjudicated" within our politics. As for "rules of change" for norms, the Article argues that constitutional norms tend to change in predictable ways and as a result of the working of several distinctive mechanisms. As for "rules of adjudication" for norms, the Article identifies a set of concrete strategies that constitutional norm entrepreneurs (who wish to change present norms including bringing forth their demise) and constitutional norm anti-preneurs (who wish to safeguard present norms) can use to try to manipulate constitutional norms to achieve their desired, and oppositional, ends.

The Article concludes by implementing that framework to our present moment of democratic recession. It asks, in other words, what constitutional norm anti-preneurs can do to halt further encroachment upon valuable constitutional norms that appear crucial to the resilience of democratic systems.

5) **Johann Laux**

Public Epistemic Authority: An Epistemic Framework for the Institutional Legitimacy of International Adjudication

Scholars of global governance are observing both a quantitative increase in international adjudication and a qualitative change in the role of international courts and tribunals (ICs) from settling disputes towards solving problems for a global society. This development raises the demands for the institutional competence of ICs. Especially where legal regimes overlap, questions persist as to what kind of institution attempts to solve what kind of problem. Current accounts of IC legitimacy, rooted either in moral or empirical conceptions of legitimacy, only inadequately address this issue. This paper suggests a novel framework called 'Public Epistemic Authority' (PEA) for the legitimacy of international adjudication relative to other branches and modes of public decision-making. PEA approaches judicial authority from an often- overlooked institutional dimension.

In the institutional dimension, the collective decision-making setting of ICs finds its due consideration. International adjudicators rarely act as solitary decision-makers. They usually decide as groups. Scholars problematizing judicial competence, however, often fail to account for the collective nature of international adjudication. As PEA takes a comparative point of view on institutional competence, its object of study is not the competence of *the* judge but of the judicial panel or chamber. The novel framework then draws on the mechanisms of collective wisdom popular with epistemic theories of democracy to establish a truth-tracking benchmark for ICs. Their nationally diverse composition may have some legitimizing force through an institutional advantage from higher cognitive diversity, stemming from diverse legal points of view of judges trained in different legal traditions.

Based on the collective benchmark of judicial competence, the paper suggests an epistemically improved institutional (re-)design of ICs and explores epistemic principles for judicial reasoning. The theoretical reflections are derived from an empirical study of IC case law under both scientific as well as normative uncertainty.

PEA's determination of epistemic reliability through mechanisms of collective wisdom is necessarily of an *a priori* nature. Collective wisdom is not a guaranteed, but a potential outcome, given that the right conditions hold. The framework of PEA is therefore inherently connected with the empirical scholarship of global governance. As cognitive and motivational biases distort the functioning of collective wisdom, future research on the institutional legitimacy of ICs will benefit from both theoretical as well as empirical contributions.

6) **Ana Cannilla**

Non-core Cases in Political Constitutionalism

Defenders of judicial review tell us that, in order to protect rights, constitutional states need judges that can strike down legislation. Against this claim, sceptics of judicial review often use a defensive distinction between core and non-core cases against judicial review. To make their critical argument safe, sceptics claim that the argument for parliamentary (or popular) sovereignty is not universal: only those societies that have a track record of respect for human

rights can morally afford supreme legislatures. This distinction allows sceptics to apply different yardsticks of legitimacy to different majorities. In imperfect but otherwise full democracies, they argue, the core of the case against judicial review is strong because majorities are trustworthy. It is sometimes overlooked how, in a similar way, enthusiasts of judicial review make their argument rest on a set of standards and rights that political communities should meet before allowing them their fair share of self-government through political representation. However, these standards impose so tall an order that, in practice, all legislatures would be doomed to having an unelected supervisory body from this standpoint. Their argument is circular: judicial review is a means to secure genuine democracies, but candidate democracies are seldom genuine enough to do without judicial review. Through the core and non-core distinction, sceptics aim at a more modest way out of the circle by conceding that not all majorities are legitimate and therefore judicial review will not always entail a serious loss of democracy. Sometimes, there will be not much to lose.

This is a relevant concession but sceptics needs to say more on how to proceed in weak democracies. In view of the current blurred lines between liberal democracies and populist regimes across the globe, I start by revisiting the distinction between core and non-core case against judicial review. First, I discuss whether the distinction has normative standing by examining if it gives rise to internal inconsistencies within the tenets of political constitutionalism: what is wrong with majorities in real-world non-core cases? Second, I claim that political constitutionalists should start considering when exactly a constitutional state ceases to be deemed apt for the core-case story and, importantly, whether there can be a political constitutionalist case for judicial review in weak democracies. While a lot of attention is now being paid to the failings of legal constitutionalism in its response to global challenges, it is no less true that sceptics of judicial review have made their case based on a assumption that, unfortunately, mirrors reality less every day. I argue that, despite this, political constitutionalist still stands on its own feet.

7) Will Ryle-Hodges

Defining Consultative Governance as a Sharīʿa Duty: Muḥammad ʿAbduh's Islamic reformist challenge to the constitutionalist movement in 19th century Egypt

In the history of the modern Middle East, constitutionalism is often understood as a European mechanism of political order that Arab Muslim intellectuals translated for Muslim audiences. It has been convincingly argued by scholars like Ellen McLarney and Elizabeth Thompson that this binary contrast between Europe and Islam is too simplistic and, in fact Muslim intellectuals, whilst in conversation with global liberal discourses, creatively produced their own constitutionalist principles from conceptual resources in the Islamic traditions. I take the argument a step further through a close and contextual reading of newspaper articles on the Islamic principle of "consultation" (*shūrā*) written by the renowned 19th century Muslim reformer, Muḥammad ʿAbduh. At the time of writing these articles in the early 1880s, ʿAbduh was Director of Communications for the Egyptian state and editor of the official newspaper. I emphasize the importance of considering not only his Islamic conceptual tools, but the way he uses them in practice to address local political challenges, namely the military-backed takeover of government by a constitutionalist movement of Egyptian landed notables in Egypt in late 1881, known as the ʿUrābī Revolution. I argue that ʿAbduh goes further than arguing for the Islamic source or legitimacy of the constitutional reform towards consultative government that this movement was demanding. The issue at stake was the practical one of

defining the meaning of constitutional governance in a way that made it more accountable to collective scrutiny. By interpreting 'consultation' in terms of the *sharīʿa* principle of 'commanding right and forbidding the wrong' (*ḥisba*), he defined 'consultation' as a religious legal duty of criticizing government incumbent on ruler and ruled. The effect was not simply an Islamic validation of the new regime's liberal constitutionalist discourse, but a challenge to that regime to interpret 'consultation' in radical directions: not only their duty to consult the people, but the people's positive duty – not just a right – to contribute to political discourse. ʿAbduh's Islamic reform was an invitation to open up political discourse to be informed by the interests of the people of Egypt and therefore to produce a new kind of constitutional arrangement that could be truly indigenous. It is thus not just an Islamic version of global constitutionalism, but a case study in a creative Islamic contestation of constitutionalism. More broadly, it is an example of religious discourse that is constitutive of constitutionalist principles rather than merely legitimating them.

8) Giovanni De Gregorio & Roxana Radu

Fragmenting Internet Governance: Digital Sovereignty and Global Constitutionalism

The Internet, as we know it today, will likely change face in the next decade. The rampant evolution of new technologies, powered by 5G connectivity and AI technologies, alters the current status of the Internet infrastructure in unprecedented ways. In a move to upgrade technical standards, China and its tech giant Huawei have recently advanced a proposal to the International Telecommunications Union for a new Internet architecture allowing centralised control over authentication and Internet communications through instruments like 'kill-switches'.

Behind technical concerns, however, hides an interest in reshaping Internet governance (IG) as a space for extending (digital) sovereignty. But IG is not only about political and economic power struggles. It also touches constitutional values on a global scale. Seen for a long time as a 'democratizing' platform built on Western ideals, the Internet has not been a neutral environment for global constitutionalism. From the Cambridge Analytica scandal to online hate speech leading to genocide in Myanmar, the new global challenges to democracy and human rights have moved online. Attempts to replace the unitary, decentralized Internet with splinters have real implications for the governance of many sectors which rely on this network. Standards and protocols developed in/by authoritarian regimes bring forward concerns about control and surveillance in new global technologies and ultimately make the protection of fundamental rights and rule of law via constitutional tools obsolete.

This paper argues that a shift in the governance of the Internet towards integrating non-Western standards also entails a new paradigm in the social layer, where individuals exercise their rights and freedoms in various political regimes. In the past, Saudi Arabia, Iran and Russia have already shown support for Chinese ideas and the new IP proposal to centralised enforcement would fit with this trend. Before these two models, the question is: will Europe and the US continue to provide a credible democratic alternative embedded in digital technologies?

As we move to govern digitally sovereign spaces at the crossroads between democracy and authoritarianism, the resulting fragmentation between paradigms across the world opens up a new research agenda. This work provides the first comprehensive analysis of infrastructure-

driven changes in Internet governance and their implications for global constitutionalism. Our study shows how centralisation and fragmentation in governing multiple Internets can affect the principles and values of constitutionalism, and how democratic states can propose an alternative model to protect fundamental rights and democracy on a global scale.

9) Gayatri Malhotra

Sieving Through Silence: The Partition Question, Constitution of India and Transformative Constitutionalism

Much like traditional historiography, the text of the Indian Constitution and its scholarship is also largely silent on the Partition. This textual amnesia seems peculiar considering the Indian Constituent Assembly witnessed the bloodbath of the Partition first-hand and that the Partition formed the foreground of the drafting of the Indian Constitution.

This textual amnesia is also in contrast to other *transformative documents* such as the German Basic Law which references the Holocaust and the South African Constitution notes the injustices of the apartheid.

Challenging traditional historiography, Butalia argues that Partition also lies in the silence and the reluctance to remember it.[3] In this *silence* surrounding the partition and the reluctance to remember it lies genocidal violence, mass displacement of over 20 million people, refugee rehabilitation and the engineering of polarizing citizenship.[4] Zamindar, acknowledging the sites of *silence* as a productive analytical space for investigation argues for a re-reading of 'institutional inscriptions' to realize how government and law shaped the sites of *silence*.[5]

Harping on Zamindar's call for re-reading institutional inscriptions, in Part I of this piece I posit the Indian Constitution, particularly the Preamble as a site of silence- a tabula rasa, mirroring traditional historiography with an induced amnesia of the horrors and trauma of the partition especially in light of emerging *partition effects*.[6]

In Part II of this piece, I am placing the Partition question in Upendra Baxi's matrix of Transformative Constitutionalism, in an attempt to "*re-organize collective memory and forgetfulness*".[7]

In Part III of this piece, building on the Partition question, I examine how the preambles of other Constitutions remember and organize collective memory. Using the database of Constitutions which is hosted by Constitute Project[8], I examine the text of the English

---

[3] Urvashi Butalia , The Other Side Of Silence 7 (Penguin Books 1998).

[4] Vazira Fazila Yacoobali Zamindar, The Long Partition and The Making Of Modern South Asia 14-15 (Viking by Penguin Books India 2008).

[5] Ibid.

[6] Ibid, at 237-238.

[7] Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism in Transformative Constitutionalism* in comparing the apex courts of Brazil, India and South africa (pretoria university law press 2013).

[8] Constitute, Constitute Project,University of Texas, https://www.constituteproject.org/?lang=en .

translation of 154 preambles which are either presently in force or at the stage of drafting. From the 154 preambles, I will particularly be focusing on semblances to references to previous regimes of injustice, colonialism, genocide, mass violence and the different ways in which '*The People*' appear in preambles.

In Part IV, using findings of Part III, I argue that the Partition question is a useful tool to interrogate the other sites of silence in the larger project of *transformative constitutionalism*.

10) Nausica Pallazzo

Judicial Activism in Europe: Not exactly a Neat and Clean Fit Abstract

All jurisdictions strove to achieve a proper balance between enforcing the constitution and avoiding muscular 'judicial supremacy', that is the courts' exercising a policy-making function that is better left to elected representatives. In the United States, this issue has gained substantially higher traction giving rise to intense activism-talk. The relevant American literature has exerted a significant fascination also abroad. Yet, the article intends to advance two claims: first, it warns against an uncritical import of U.S.-style notions of judicial activism to continental Europe; second, it argues that contemporary research on comparative judicial activism requires further analytical tightness.

The first section takes a glimpse of the relevant U.S. literature – both legal and empirical – to shed light on the multidimensional essence of the concept. Section 2 proceeds to articulate three sets of tentative reasons why activism-talk should be 'handled with care'. These reasons pivot on considerations around structure, culture, and type of decisions in continental Europe. After parsing out each aspect, an argument is made that U.S.-style judicial activism is too dependent on the U.S. form of government; too divisive and as such unsuitable to the different European legal professional culture; misleading, as the way European constitutional courts display activism in their decisions is distinctive. Ultimately, the article offers concluding thoughts as to the importance of accounting for these differences.

11) Katarzyna Nowicka

Constitutional capital. The case of Poland

The aim of this paper is to define the concept of constitutional capital and discuss its functionality under the conditions of the current constitutional crisis in Poland. Constitutional capital will mean a set of constitutional narratives based on the constitutional review and legal arguments justifying those decisions. The perspective of constitutional capital, based on Pierre Bourdieu's theory of capitals, is applied to describe battles over the interpretation of the Polish constitution within the captured Constitutional Tribunal. Following Bourdieu's reflexive sociology, I will discuss constitutional field, treated here as a subfield of the legal one[9], which "underscores the generally adversarial nature of social practices and the political

---

[9] P. Bourdieu, "The Force of Law. Toward a Sociology of the Juridical Field", 1987.

and institutional effects of socio-legal struggles over domination."[10] Generally, two different camps exist within the Constitutional Tribunal: justices with low symbolic capital, but strongly supported by the actors from the political field (the PiS government, exercising unconditional power over the judicial nominations), and justices with mostly higher symbolic capital, supported by the international actors, though not effective enough in the national conditions (in this group are also the judges nominated by President Duda). Constitutional judges can be perceived as agents ("legal entrepreneurs") who have the power and competence to develop constitutional adjudication and friendly exchange of national and transnational ideas in cooperation with the ECJ (or to decide against the decision of the ECJ to gain political capital but loose constitutional one), as well as sincerely conduct constitutional review, independently on the different branches of the government. However, when the political sphere enters the constitutional field and breaches the "alleged neutrality of law", and when the conflict is framed as the division between anti- and pro-EU interpretation of the Polish national constitutional order, there is little place for a sincere evolution of constitutional identity. The paper traces the manifestations of the constitutional capital in the judicial decisions and in *vota separata* delivered mostly by the minority judges with high symbolic capital. The tension which occurs in delivered arguments is mostly based on the ground on the interpretation of the ECJ rulings and its possible rejection, or ineffective application.

12) Max Steuer

The Obligation of Constitutional Courts in the European Union: Sustainable Constitutional Pluralism

The continuing non-democratic actions of the current Hungarian government appear as the death knell for the democracy-anchoring function of European integration with European Union (EU) law as its crucial driving force. The EU Court of Justice articulated the supremacy of the Union's legal order, triggering various responses from national constitutional courts as well as a robust literature reflecting on these responses. Scholars of constitutional pluralism have offered an alternative to supremacy by envisioning a non-hierarchical constellation of the legal orders of the EU and its Member States. Their opponents question the sustainability of the rejection of EU law supremacy for upholding common values and maintain that constitutional pluralism fuels their undermining under the guise of a verbal commitment to EU integration. The Hungarian developments appear to support the latter view.

Arguing in favor of constitutional pluralism, this paper locates its ground in republican theory that conceptualizes democracy as a condition of non-domination. Examining the relationship between republican theory and constitutional pluralism against the backdrop of the principle of supremacy of EU law and resistance to it, it develops an interpretation of constitutional pluralism aligned with republicanism. The central concern for republican theory, so conceived, are fundamental rights, rather than the identification of the specific legal order that guarantees them.

Republican constitutional pluralism has at least three implications for the role of EU constitutional courts. Firstly, these courts are in a position of unique responsibility towards

---

[10] Dezelay, Madsen, "The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law", p. 439.

the future of fundamental rights protection across the EU, even if their constitutional position appears to confine them to national jurisdictions. As a result, they cannot hide behind a national political context with executive-legislative actors advancing restrictive interpretations of fundamental rights protection. Secondly, they can enhance democracy by preventing domination that could be imposed upon individuals in case there was only a single final legal arbiter of disputes. Thirdly, they become de facto EU institutions when contributing to the EU-wide protection of fundamental rights.

The paper concludes with lessons offered by republican constitutional pluralism for the practice of constitutional court decision-making. Here, constitutional courts, even if operating under extreme pressure, such as in Hungary, play a role in preventing both domestic and supranational domination. When doing so, they defend both domestic and supranational democracy, and when failing to do so, they violate their obligation to prioritize a fundamental rights perspective, one that stems simultaneously from the EU and domestic legal orders.

Biographies of the Workshop Participants

Liam Moore

Liam Moore is a PhD candidate at the University of Wollongong. His current research interests include the intersection of issues of forced migration, protection, and climate change, and debates around constructivist International Relations theory. His PhD thesis strives to understand the decision-making process of Pacific states around the development, implementation, and promotion of domestic-level policies around climate-related displacement and mobilities.

Binendri Perera

Binendri Perera is a Temporary Assistant Lecturer at the Faculty of Law, University of Colombo, and a Visiting Lecturer at Sri Lanka Law College. She completed her LL.B. at the Faculty of Law of the University of Colombo. She read for her Masters at the Harvard Law School, Cambridge, Massachusetts where she was a Cogan Scholar (2018/19). Her main research interests are constitutional law, the Third World Approaches to International Law, the economic, social, and cultural rights and rights of marginalized groups. Her articles have appeared in the Colombo Law Journal (2016, 2017) and the Asia Pacific Journal of Human Rights and Law (2017). She has also co-authored several works on the rights of persons with disabilities and women with disabilities in Sri Lanka. Her most recent article People's movements as a strand of Popular Constitutionalism: Driving constitutional forces, Distinctive features, and Dilemmas was published in April 2020 at the Washington Journal of International Law.

Oliver Merschel

Oliver Merschel is a postgraduate student in Political Science (MA programme, focus: International Relations) at the University of Hamburg, where he also completed his BA (Political Science) in 2018. His master thesis, which will be completed in May, addresses the 'gap' between theory and practice in the social sciences with a special focus on the 'Practice Turn'. Previous focus areas in his studies included (global) international relations theory, interpretive methodology, security studies, climate change as well as international law. During his studies, he worked as a tutor and student research assistant at the chair of Antje Wiener (Political Science, especially Global Governance, University of Hamburg) as well as at the cluster of excellence "Climate, Climatic Change, and Society" (CLICCS). After completing his MA in summer 2020, he will pursue a career in the social sciences, particularly in the field of International Relations and begin a PhD later this year, focussing on the functioning of International Courts in context. An additional application for third-party funding for this project is currently pending.

Oren Tamir

Oren Tamir is a doctoral candidate at Harvard Law School (the chair of his committee is Mark Tushnet and his other readers are Vicki Jackson, Lawrence Lessig, and Jack Goldsmith, all from Harvard Law). His research interests lie primarily in administrative law and constitutional law, both domestic and comparative. He has work forthcoming in the Maryland Law Review and is currently completing projects on the presidentialozation of politics throughout the world, on the desirability of unified framework for public law, and a (skeptical) project on democratic backsliding in Israel. Oren earned his Bachelor's degree (LLB) in law at the Hebrew University (magna cum laude) and his master's degree at Harvard Law School. He is expected to be appointed as a lecturer on law at Harvard Law School during the next academic year, teaching and assisting in teaching seminars and classes on comparative administrative law and comparative constitutional law.

Johann Laux

Johann Laux is a Postdoctoral Researcher at the Oxford Internet Institute at the University of Oxford, working on the 'Governance of Emerging Technologies' project. He is affiliated with the 'Digital Welfare State and Human Rights Project' at the Center for Human Rights and Global Justice at New York University's School of Law. In 2019, Johann was an Emile Noël Fellow at the Jean Monnet Center at New York University.

Johann holds a Ph.D. in Law summa cum laude from the University of Hamburg, a M.Sc. in Politics and Governance from the London School of Economics, as well as both a Mag. Iur. in Public International Law and European Union Law and a Bac. Iur. in Law from the University of Hamburg. He studied Philosophy at King's College London and was a Visiting Doctoral Researcher at the University of California, Berkeley from 2016 to 2018.

Ana Cannilla

Ana Cannilla is a Lecturer in Law at the University of Reading since 2019. She completed her PhD titled 'Majorities and Courts; A defence of Political Constitutionalism in Liberal Democracies" in 2019 at the University of Reading. Ana also holds an LLM In Advanced Studies in Human Rights from the University Carlos III of Madrid and a Law Degree from the Complutense University of Madrid. Her research interests include jurisprudence, constitutional and feminist legal theory. Ana currently teaches Public Law and Jurisprudence and is the Module Convenor of the Research and Writing Skills module.

Will Ryle-Hodges

I became interested in Arabic and Islamic studies during my BA in Theology at the University of Cambridge. This led me to an MPhil in Modern Middle Eastern Studies at the University of Oxford, during which I was trained in a multi-disciplinary approach to studying the modern Middle East, drawing on methodologies of social anthropology, history and literary studies. I have specialized in intellectual history of the modern Middle east and am currently in the

final year of a PhD on modern Islamic thought at the University of Cambridge. My PhD offers a new perspective on a foundational theorist of Islamic reform, Muḥammad ʿAbduh, by locating his reformist thought in his local practice of being a bureaucrat and chief state censor in 19th century Egypt. My published work to date has particularly commented on the relation between Islam and modern governance.

Giovanni De Gregorio

Giovanni De Gregorio is a PhD Candidate in Constitutional and Public Law at University of Milano-Bicocca and Academic Fellow at Bocconi University. His research focuses on the intersection between constitutional law and the Internet. He has been a visiting PhD student at the Centre for Socio-Legal Studies at the University of Oxford, working with the Programme in Comparative Media Law and Policy. He has been visiting fellow at Centre for Cyber Law and Policy at the University of Haifa. He is member of the editorial board of the Italian law review of internet and media law ("MediaLaws"). His research fields include Constitutional law, Internet law, Privacy and Data Protection law. A selection of his publications is available available on the SSRN page at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=3025316.

Roxana Radu

Roxana Radu is a Postdoctoral Researcher at the University of Oxford's Programme in Comparative Media Law and Policy, working on Internet regulation, algorithms and knowledge production in the public sphere. She is also a Research Associate at the Global Governance Centre, Graduate Institute in Geneva and a non-residential fellow at the Centre for Media, Data and Society, Central European University. Roxana is the 2020 Program Chair of the Global Internet Governance Academic Network (GigaNet). Until May 2018, she was Programme Manager at the Geneva Internet Platform, a dialogue and capacity building centre for Internet governance and digital policy and was chairing the non-for-profit Internet Society-Switzerland. Roxana holds a PhD in International Relations/Political Science from the Graduate Institute of International and Development Studies (Switzerland) and received the Swiss Network of International Studies Award for the Best PhD Thesis in 2017. Her interdisciplinary research and publications focus on international governance and global Internet policy-making.

Gayatri Malhotra

Gayatri Malhotra is a third year law student at the Jindal Global Law School, India. She is presently working as a research assistant at Center for Constitutional Law Studies, Jindal Global Law School. She has interned at Chambers of Mr. Gopal Subramaniam, Senior Advocate, and has also served as a short-term clerk to Justice A.K. Sikri at the Supreme Court of India.
She is a visiting editor at the University of Bologna Law Review and has also served as editor of the Jindal International and Comparative Law Review and notes editor of the Jindal Global Law Review.
Her research interests include constitutional law, administrative law, family law and South Asian legal and intellectual history.

Nausica Pallazzo

Nausica Palazzo is a Postdoctoral Researcher at the University of Trento and Fondazione Kessler - Centre for Religious Studies, and Adjunct Lecturer in Public Law at Bocconi University, Milan.
In 2018, as a Fulbright and Grotius Fellow, she completed an LL.M at the University of Michigan. In 2019, she earned a cum laude PhD. in Comparative Law at the University of Trento, with a dissertation on the legal recognition of polyamorous and non-conjugal relationships.
She published numerous articles in Italian and English in the field of equality, voting rights, constitutional justice in top specialized journals and her book on the legal recognition of non-conjugal couples is forthcoming on Hart Publishing.
As to her civic engagement, she trains public entities on anti-corruption law through Transparency International Italia, works as a pro bono lawyer, and founded a national watchdog group on fundamental rights gathering Italian legal scholars across Europe.

Katarzyna Nowicka

Katarzyna Nowicka is a second-year PhD researcher at the European University Institute in Florence, Italy. In my research I analyse the concept of constitutional identity in Poland and Hungary from the perspective of individual judges: the aim of the thesis is to confront the academic literature and conceptualisations of constitutional identity with the empirical data obtained from the former and current constitutional justices in the countries facing the problems within their constitutional orders.
I graduated from the University of Warsaw and wrote two Master's thesis: in law (focusing on the relation between populism and constitutionalism) and in sociology (empirically analysing the Polish intelligentsia at the EUI). I have published on Verfassungsblog and on the Polish portals. Co- ordinate Constitutionalism and Politics working group at the EUI. In my free time, I read and review books (not in law!) on my blog.

Max Steuer

Max Steuer is a Research Fellow at the Department of Political Science of the Comenius University in Bratislava (Slovakia) and an LL.M. candidate at the University of Cambridge (UK). His doctoral dissertation, defended at Comenius University in 2019, examined how understandings of democracy by constitutional courts condition their democracy-protecting capacity, with case studies of Hungary and Slovakia. With a broad research interest in democracy protection, he has published, among others, in the Review of Central and East European Law, the Max Planck Encyclopedia of Comparative Constitutional Law and in several edited volumes. Max Steuer's academic experience includes participation at international research projects such as the EU Horizon 2020 'EU3D—Differentiation, Dominance and Democracy', and research stays at the WZB Berlin Social Science Center, the University of Oxford and the Washington State University (Fulbright scholarship holder). He is a regular contributor to academic blogs (e.g. Verfassungsblog).