FACULTAD DE DERECHO
PONTIFICIA UNIVERSIDAD CATÓLICA DE CHILE

ICON·S

CONFERENCE
2019

Public Law in Times of Change?

July 01-03

#iconssantiago

Pontificia Universidad
Católica de Chile

I
WELCOME STATEMENTS

ICON·S Conference
01 – 03 July 2019
Pontificia Universidad Católica de Chile

We warmly welcome all of the participants in the 2019 Annual Conference of ICON-S, the International Society of Public Law. This year's meeting will be our first to take place in South America, after Asia, Europe, and North America. And, on this occasion, we are proud that here in Santiago we will have our first bilingual conference, with part of the concurrent panels held in Spanish. The Society and its chapters are increasingly growing worldwide and this strengthens our efforts to make ICON-S a welcoming place for the interdisciplinary, intergenerational and genuinely global study of public law. This latter is facing crucial challenges, which every day call scholars for further commitment, research and education. This is why our Conference's overarching theme this year will be "Public Law in times of Change?", with parallel panels and plenary events dealing with topics at the heart of contemporary public law inquiry. We are grateful to our Chilean hosts for their extraordinary hard work and dedication in putting together such a gigantic event, in every single detail, including child care service for our members; and we thank our sponsors for their generous support. Most of all, we very much thank you, the ICON-S' members, for your constant overwhelmingly enthusiastic response to the calls for panels and papers over these years: you are the key of the success of our Society and of its annual conferences. We are delighted to present here a terrific and intellectually (and physically…) challenging program, featuring scholars from different social sciences and from all parts of the world. And we are proud to confirm this year two events, which are particularly important for the Society's mission and community: the Women's reception and the ICON-S Workshop. We wish all of you a wonderful journey into the change(s) of public law!

Lorenzo Casini
IMT School for Advanced Studies of Lucca

Rosalind Dixon
University of New South Wales Sidney

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

The ICON-S Conference has become the main academic event of the year in Public Law. It is more than an academic conference. It is also the meeting of a vibrant community of scholars, interested in rigorous and open discussion of ideas. For the Faculty of Law of the Pontifical Catholic University of Chile it is a privilege to be hosting this year's Conference, held for the first time in the Southern Hemisphere.

In more than 130 years since its foundation, our Faculty has fashioned a strong commitment to public service. The two largest political parties in the transition (one center right, one center left) were born as student movements in the halls of our Faculty. Among our alumni we count a president, six of the ten justices currently sitting in the Constitutional Court, several judges of the Supreme Court, many senators, deputies, scholars, civil servants, diplomats, and even a canonized saint!

As we start a new phase in the life of our Faculty, one of the most distinguished in Latin America, we want to continue serving. The world is changing. Political debate becomes more intense, while globalization introduces new social and ethical challenges. Technological advancements open new paths for thought and research. At our Faculty of Law we believe that universities need to offer now more than ever a space for profound academic discussion, illuminating the quest for achieving the common good in this context of change.

Public law is at the center of this quest, and must boldly look towards the future. Under the subject "Public Law in Times of Change", the 2019 ICON-S Conference constitutes today an unparalleled forum for scholarly engagement at the highest level, and we are extremely grateful to all members of ICON-S for allowing us to be a part of it. Thank you, and welcome to the Faculty of Law of the Pontifical Catholic University of Chile!

Gabriel Bocksang
Dean of Faculty of Law
Pontificia Catholic University of Chile

Local Host

II
SCHEDULE

Monday
01 July 2019

11.00 – 12.00	**Registration** » Plaza Central
12.00 – 12.30	**Opening Remarks** » Auditorio Fresno
12.30 – 13.20	**Keynote Address** » Auditorio Fresno
13.20 – 13.40	**Coffee Break** » Plaza Central
13.40 – 15.20	**Panel Sessions I** » Sessions 1 - 30
15.25 – 17.00	**Panel Sessions II** » Sessions 31 - 61
17.00 – 18.30	**Plenary Panel I** **Judiciary in Times of Change?** » Auditorio Fresno
18.30 – 19.30	**Opening Reception** » Plaza Central

Tuesday
02 July 2019

08.20 – 9.55	**Panel Sessions III** »Sessions 62 - 91
10.00 – 10.30	**Coffee Break** »Patio de Derecho
10.30 – 12.05	**Panel Sessions IV** »Sessions 92 - 120
12.10 – 13.30	**Lunch Break** »Central Plaza
13.40 – 14.40	**ICON·S Workshop** **"A Research and Publication Strategy for a Successful Academic Career (including How Does Peer Reviewing Really Work Or Not Work)"** »Auditorio Fresno
14.50 – 16.20	**Plenary Panel II** **Crisis or Resurgence of the State?** »Auditorio Fresno
16.20 – 16.40	**Coffee Break** »Plaza Central
16.50 – 18.25	**Panel Sessions V** »Sessions 121 - 150
18.30 – 19.30	**Women's Reception** **Rosalind Dixon and welcome from Justice Gloria Stella Ortíz** Aquiles Portaluppi

Wednesday
03 July 2019

08.20 – 09.55	**Panel Sessions VI** » Sessions 151 - 181
10.00 – 10.30	**Coffee Break** » Patio de Derecho
10.30 – 12.05	**Panel Sessions VII** » Sessions 181 - 212
12.10 – 12.40	**Snack Break** » Plaza Central
12.40 – 14.10	**Plenary Panel III** **Public Law, Democratic Backsliding and the Erosion of Liberal Democracy** » Auditorio Fresno
14.20 – 15.00	**Closing Remarks** » Auditorio Fresno

III Plenary Events

Monday
12.00 – 13.20

Opening Panel

Rosalind Dixon

Professor, University of New South Wales
Co-President, ICON·S

Rosalind Dixon is a Professor of Law at UNSW Sydney, Director of the Gilbert + Tobin Centre of Public Law, and Co-President of I.Con-S. She previously served as an assistant professor at the University of Chicago Law School, and has been a visiting professor at the University of Chicago, Columbia Law School, Harvard Law School and the National University of Singapore. Her work focuses on comparative constitutional law and constitutional design, constitutional democracy, theories of constitutional dialogue and amendment, socio-economic rights and constitutional law and gender. She is co-editor, with Tom Ginsburg, of a leading handbook, *Comparative Constitutional Law* (Edward Elgar, 2011) and related volumes on *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*, and editor of the *Constitutions of the World* series for Hart publishing.

Marisol Peña

Secretary General, P. Universidad Católica de Chile
Former Chief Justice, Chilean Constitutional Tribunal

Marisol Peña, professor at Faculty of Law, Pontificia Universidad Católica de Chile, teaches Constitutional Law and International Public Law. She was a justice of the Constitutional Court of Chile from 2006 until 2018, and served as the former Chief Justice of the Chilean Constitutional Court from 2013 to 2014. She is the only woman to have served in that role. Peña is a member of the Chilean Academy of Social, Political, and Moral Sciences. She graduated summa cum laude from Pontificia Universidad Católica de Chile, and obtained an LLM on International Studies from Universidad de Chile. She is the author of several writings on public law. She is currently the Secretary General of Pontificia Universidad Católica de Chile.

Keynote Address:
Technological Revolution, Democratic Recession and Global Warming: The Limits of Law in a Changing World

Luís Roberto Barroso

Justice, Supreme Federal Court of Brazil

Luís Roberto Barroso, professor at the Faculty of Law, Universidade do Estado de Rio de Janeiro (UERJ) and visiting professor at Universidade de Brasilia, earned an LL.B. from Universidade do Estado de Rio de Janeiro and obtained an LLM from Yale Law School. He received an SJD from Universidade do Estado do Rio de Janeiro and made post-doctoral research at Harvard Law School as a visiting scholar. He is a Senior Fellow at the Harvard Kennedy School. Since 2013 he serves as Justice at the Supreme Court of Brazil. His work focuses on constitutional law, particularly constitutional theory and interpretation. Barroso has published extensively in Brazil, Latin America and Europe. His most recent article published in English was "Countermajoritarian, Representative, and Enlightened: The roles of Constitutional Courts in Democracies" (*American Journal of Comparative Law*, forthcoming, 2019). His most recent books are *A Judicialização da Vida e o Papel do Supremo Tribunal Federal* (Editora Forum, 2017) and *A República que ainda não foi* (Editora Forum, 2018).

Chair

Francisco Urbina

Associate Professor,
P. Universidad Católica de Chile

Francisco Javier Urbina, associate professor at the Faculty of Law of Pontificia Universidad Católica de Chile, where he earned his LLB *summa cum laude* in 2007. He was chosen one of the 100 leaders under 35 by newspaper El Mercurio, before obtaining an M.St. and a D.Phil. in Law from the University of Oxford. His work is in Constitutional Law, Constitutional Theory, and Human Rights, focusing specially in human rights limitations. His work has been published in journals such as the *Oxford Journal of Legal Studies*, the *American Journal of Jurisprudence*, and the *Canadian Journal of Law and Jurisprudence*. He is the author of *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) and co-author of *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018).

Monday
17.00 – 18.30
Plenary Session I
Judiciary in Times of Change?

Luis María Díez-Picazo
Justice, Supreme Tribunal of Spain

Luis María Díez-Picazo, professor at the Faculty of Law, Universidad de Málaga and Universidad Castilla- La Mancha. He earned his Ph.D. from the University of Bologna. Díez-Picazo serves as a justice in the Supreme Tribunal of Spain since 2008 and serves as President of the Third Chamber on Administrative Law since 2015. He has written several books, among which: *Sistema de Derechos Fundamentales* (Editorial Civitas, 4th ed., 2014), *La naturaleza de la Unión Europea* (Editorial Civitas, 2009) and *Constitucionalismo de la Unión Europea* (Editorial Civitas, 2002). He was Distinguished Visiting Scholar at the Georgetown Law Center and has been visiting professor at Indiana University Law School, Institut d'Etudes Politiques de Paris, Université de Paris II (Panthéon-Assas), Université de Bordeaux IV, among others.

Kate O'Regan
Former Justice, Constitutional Court of South Africa
Director, Bonavero Institute of Human Rights, University of Oxford

Kate O'Regan, is the inaugural Director of the Bonavero Institute of Human Rights at the University of Oxford and a former judge of the South African Constitutional Court (1994 – 2009). Since her fifteen-year term at the South African Constitutional Court ended in 2009, she has amongst other things served as an *ad hoc* judge of the Supreme Court of Namibia (2010 - 2016), Chairperson of the Khayelitsha Commission of Inquiry into allegations of police inefficiency and a breakdown in trust between the police and the community of Khayelitsha (2012 – 2014), and as a member of the boards or advisory bodies of many NGOs working in the fields of democracy, the rule of law, human rights and equality.

Juan José Romero
Justice, Chilean Constitutional Tribunal
Associate Professor, P. Universidad Católica de Chile

Juan José Romero, professor at Faculty of Law, Pontificia Universidad Católica de Chile. He serves as justice of the Chilean Constitutional Tribunal since 2013. Romero received his LL.B. from Pontificia Universidad Católica de Chile, a Master of Science in Regulation from The London School of Economics and Political Science, University of London, and a PhD from Universidad de Salamanca. He was a member of the European Commission for Democracy through Law (Venice Commission) and president of the Sub-Comission for Latin America of the same organization (2013-2017). His work focuses on constitutional law and economic regulation.

Chair
Gráinne de Búrca
Professor, New York University School of Law
Honorary President, ICON·S

Gráinne de Búrca is Florence Ellinwood Allen professor at NYU law school. She is Director of the Hauser Global Law School, and Co-Director of the Jean Monnet Center for International and Regional Economic Law and Justice. She is a corresponding fellow of the British Academy, and co-editor-in-chief of the International Journal of Constitutional law. She was previously professor at Harvard Law School, Fordham Law School and the European University Institute. She writes on questions of EU constitutional law and governance, anti-discrimination law, international human rights, and transnational governance. She is co-editor of the Oxford University Press series Oxford Studies in European Law, and co-author with Paul Craig of the OUP textbook: EU Law.

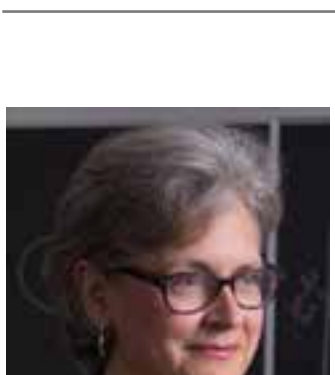
Tuesday
14.50 – 16.20
Plenary Session II
Crisis or Resurgence of the State?

Helena Alviar
Full Professor, Universidad de Los Andes, Colombia
Visiting Professor, Harvard University

Helena Alviar, full professor at Faculty of Law, Universidad de los Andes, Colombia, where she was Dean from 2011 until 2016. She graduated from Universidad de los Andes, and earned an LLM and a PhD from Harvard University. Alviar is a founding member of the Center of Studies of Law, Justice and Society. She has also been a visiting professor at Universidad Pontificia Javeriana de Colombia, Universidad Puerto Rico and Harvard University. She is the author or coautor of several books and publications, among which *El Estado Regulador en Colombia* (Ediciones Universidad de los Andes, 2016), with Catalina Villegas, and *Feminismo y Crítica Jurídica: El Análisis Distributivo como Alternativa Crítica al Feminismo Liberal* (Ediciones Universidad de los Andes, 2012).

Professor Armin von Bogdandy
Director, Max Planck Institute for Comparative Public Law and International Law
Professor, Goethe University Frankfurt

Armin von Bogdandy is the director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and Professor for Public Law at the University in Frankfurt/Main. He graduated in law and philosophy before obtaining a Ph.D. in Freiburg (1988) and qualifying as a professor at the FU Berlin (1996). He has been President of the OECD Nuclear Energy Tribunal as well as a member of the German Science Council (*Wissenschaftsrat*) and the Scientific Committee of the European Union Agency for Fundamental Rights; he has held visiting positions at the New York University School of Law, the European University Institute, the Xiamen Academy of International Law, and the Universidad Nacional Autónoma de México, among others. He is the recipient of the Leibniz Prize (2014), the Premio Internacional "Hector Fix Zamudio" (2015), the "*Mazo*" (gavel) of the Interamerican Court of Human Rights (2015), and the prize for outstanding scientific achievements in the field of legal and economic foundations by the Berlin-Brandenburg Academy of Sciences (2008).



Beth Simmons
Professor, University of Pennsylvania

Beth Simmons is Andrea Mitchell Penn Integrates Knowledge University Professor of Law, Political Science and Business Ethics at the University of Pennsylvania. She researches and teaches international relations, international law and international political economy. She is best known for her research on international political economy during the interwar years, policy diffusion globally and her work demonstrating the influence that international law has on human rights outcomes around the world. Simmons directed the Weatherhead Center for International Affairs at Harvard, is a past president of the International Studies Association and has been elected to the National Academy of Sciences, the American Academy of Arts and Sciences, The American Academy of Political and Social Sciences, and the American Philosophical Society.

Chair
Gabriel Bocksang
Dean,
P. Universidad Católica de Chile

Gabriel Bocksang, professor at Faculty of Law, Pontificia Universidad Católica de Chile. He earned an LLM in Public Law and a Ph.D. from the University of Paris I, Pantheón-Sorbonne, France. He is currently the Dean of the Faculty of Law, Pontificia Universidad Católica de Chile. Bocksang is a member of the Institute of Advanced Legal Studies; he has been a visiting professor at Universidad de Paris 1, Pantheón-Sorbonne. His work focuses on administrative law and the history of administrative law, theory of the administrative act, administrative procedure and comparative public law. He is the author of three books and a number of specialized articles and book chapters. He received the price of the Centre Français de Droit Comparé for his doctoral thesis: *L'inexistence juridique des actes administratifs. Essai de théorie juridique comparée: France, Chili, Espagne, Italie*.

Wednesday
12.40 – 14.10
Plenary Session III
Public Law, Democratic Backsliding and the Erosion of Liberal Democracy

Teresa Bejan
Associate Professor, University of Oxford

Teresa M. Bejan is Associate Professor of Political Theory and Fellow of Oriel College at the University of Oxford. She received her PhD with distinction from Yale in 2013 and was awarded the American Political Science Association's 2015 Leo Strauss Award for the best dissertation in political philosophy. In 2016 she was elected as the final Balzan-Skinner Fellow in Modern Intellectual History at Cambridge. Professor Bejan's first book, *Mere Civility: Disagreement and the Limits of Toleration* (Harvard University Press, 2017; paperback 2019) was called "penetrating and sophisticated" by the *New York Times*. In addition to her many articles in academic journals and edited volumes, she has written on free speech and civility for *The Atlantic* and *The Washington Post*.

Samuel Issacharoff
Professor, New York University School of Law

Samuel Issacharoff is the Reiss Professor of Constitutional Law. He is the author of *Fragile Democracies* (Cambridge University Press, 2015) and is one of the pioneers in the law of the political process, where his *Law of Democracy* casebook (co-authored with Pam Karlan and Richard Pildes) and dozens of articles have helped shape a new area of constitutional law. He served as the reporter for the Principles of the Law of Aggregate Litigation of the American Law Institute. Issacharoff is a 1983 graduate of the Yale Law School. He then began his teaching career at the University of Texas in 1989, where he held the Joseph D. Jamail Centennial Chair in Law. In 1999, he moved to Columbia Law School, where he was the Harold R. Medina Professor of Procedural Jurisprudence. His published articles appear in every leading law review, as well as in leading journals in other fields. Issacharoff is a fellow of the American Academy of Arts and Sciences.

Wojciech Sadurski
Professor, Sydney Law School
Professor of the Centre for Europe at Warsaw University

Wojciech Sadurski is Challis Professor of Jurisprudence at the University of Sydney and Professor of the Centre for Europe at Warsaw University. He has taught at several institutions around the world, such as Yale Law School, NYU Law School and Fordham Law School in the United States, and at universities across Europe and Asia: in Trento, Paris, Singapore etc. He was Professor of Legal Theory and Philosophy of Law at the European University Institute in Florence from 1999 to 2009, and Head of Department of Law at the EUI in 2003-2006. Specializing in philosophy of law, political theory, constitutional theory and comparative constitutional law, his most recent books include: *Equality and Legitimacy* (Oxford University Press, 2008), *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2012) and *Poland's Constitutional Breakdown* (Oxford University Press, 2019). A member of a number of governing and program bodies of think tanks and NGOs dealing with human rights and democracy promotion, he is currently Chairman of Academic Advisory Board of the Community of Democracies.

Chair
David Landau
Professor, Florida State University

David Landau, Mason Ladd Professor and Associate Dean for International Programs at Florida State University College of Law. He writes primarily about the field of comparative constitutional law, with a regional focus on Latin America. He has published several books, including *Colombian Constitutional Law* (with Manuel Jose Cepeda Espinosa, Oxford University Press 2017) and *The Evolution of the Separation of Powers* (with David Bilchitz, Edward Elgar Press 2018). He has also published in various journals including the *Harvard International Law Journal*, the *University of Chicago Law Review*, the *UC Davis Law Review*, the *International Journal of Constitutional Law*, and the *Virginia Journal of International Law*. In 2011, Professor Landau served as a consultant on constitutional issues for the Truth and Reconciliation Commission of Honduras. Since 2012, he has been a founding editor of ICONnect, the blog of the International Journal of Constitutional Law. Professor Landau holds an A.B., J.D., and Ph.D. (political science) from Harvard University.

Wednesday
14.20 – 15.00
Closing Remarks

Lorenzo Casini
Professor, IMT School for Advanced Studies Lucca (Italy)
Co-President, ICON·S

Lorenzo Casini is Co-President of ICON-S. He is Professor of Administrative Law at IMT School for Advanced Studies in Lucca (Italy), where he sits on the Board of Directors and teaches Cultural Heritage and Law and Global Law. In 2008, 2009 and in 2013 he was the Hauser Global Fellow at the NYU School of Law-Institute for International Law and Justice. He worked as legal counsel to the Italian Minister for Cultural Heritage and Tourism (2014-2018). From 2009 to 2014 he served as a law clerk to Justice Professor Sabino Cassese at the Constitutional Court of Italy. Since 2018, he has been responsible for the discipline of "Law" at the National School of Administration of the Italian Government. A sports judge, he is also on the Board of Directors of the Uffizi in Florence (2015-2020). He is the President of the Institute for Research on Public Administration (IRPA) and a member of the European Public Law Group (EPLO). Author of hundreds of works in several languages, his latest book is *Potere globale. Regole e decisioni oltre gli Stati* (il Mulino, 2018).

IV
Concurring Panels

Overview

Panel Sessions I
Monday, 1 July 2019
13.45 - 15.20

p. 21 — 1 POPULISM IN LAW, POLITICS, AND JUSTICE

Participants: Jamil Civitarese, Armando Martins, Svetlana Tyulkin, Paul Blokker, Leonardo Cofre / Chair: Paul Blokker

p. 22 — 2 CHALLENGES TO DEMOCRACY IN LATIN AMERICA

Participants: Glauco Salomao Leite, João Paulo Teixeira, Marcelo Araújo, Emilio Meyer, Joao Archegas, Rafael Patrus, Fernando Acunha, Juliano Benvindo, Priscila Renee Monge Kincaid / Chair: Juliano Besvindo

p. 23 — 3 THE COLLABORATIVE CONSTITUTION

Participants: Aileen Kavanagh, Rosalind Dixon, Stephen Gardbaum, Po-Jen Yap / Chair: Mark Tushnet

p. 24 4 PANEL SOBRE EL LIBRO: “COMENTARIO A LA CONVENCIÓN AMERICANA DE DERECHOS HUMANOS“, FUNDACIÓN KONRAD ADENAUER (EDS. CHRISTIAN STEINER, MARIE-CHRISTINE FUCHS)

Participants: Judge Eduardo Vio Grossi, Claudio Nash, Nancy Yáñez, Magdalena Correa, Juana Acosta, Lorena Ávila/ Chair: Marie-Christine Fuchs

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p. 25 5 ISSUES OF POLITICAL REPRESENTATION

Participants: Andras Jakab, Sanford Levinson, Jeffrey Lenowitz, Howard Schweber / Chair: Howard Schweber, Andras Jakab, Mark Graber

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p. 26 6 CONSTITUTIONAL INTERPRETATION: POLITICS OR LAW? SOME ISSUES ON CONSTITUTIONAL REASONING IN CHILE AND ARGENTINA

Participants: Andrés Rosler, Guillermo Jensen, Luis Silva / Chair: Luis A. Silva

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p. 27 7 RULE OF LAW CHALLENGES IN

A TIME OF CRIMINAL JUSTICE CRISIS. THEORETICAL AND CONSTITUTIONAL ISSUES 1

Participants: Leora Dahan Katz, Vincent Chiao, Christoph Burchard / Chair: Javier Wilenmann

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p. 28 8 GÉNERO EN TRANSICIÓN: LOS DERECHOS DE LAS MUJERES Y LAS PERSONAS LGBT EN LOS PROCESOS DE TRANSICIÓN Y EN LA EMERGENCIA DE POLÍTICAS NEO-CONSERVADORAS

Participants: María Cielo Linares, Valeria Silva, Lucía Baca, Lilibeth Cortés, Daniela Díaz / Chair: Carolina Vergel

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p. 29 9 EMERGING NATION STATE IN TRADITIONAL SOCIAL STRUCTURES IN MIDDLE EAST: A BRIEF STUDY OF IRAN & AFGHANISTAN

Participants: Seyed Masoud Noori, Zahra Azhar, Ali Akbar Siapoush, Shafiq Shargh, Shahideh N Mohajer, Shiva Modarreszadeh / Chair: Mohammad Djalali

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p. 30 10 DIALOGUES: BUILDING BRIDGES TO PROTECT DEMOCRACY AND

HUMAN RIGHTS

Participants: Ana Carolina Olsen, Melina Girardi Fachin, Bruna Nowak, Juan Jorge Faundes Peñafiel, Amélia Rossi, Camila Salgueiro da Purificação Marques, Claudia Maria Barbosa/ Chair: Jorge Ernesto Roa Roa

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p. 31 11 LIVING CONSTITUTIONALISM IN A CHANGING WORLD: COMPARING UNITED STATES, CANADA, SOUTH AFRICA, JAPAN AND UNITED KINGDOM

Participants: Lisa Parshall, Peter Oliver, Julian Jonker, Keigo Obayashi, John Morgan/ Chair: Lisa Parshall

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p. 32 12 SOVEREIGNTY, CONSTITUTION AND DEMOCRACY: TENSIONS, CONTRADICTIONS AND CONVERGENCES IN THE 21ST CENTURY (PART A)

Participants: Estefânia Maria de Queiroz Barboza, Claudia Beeck Moreira de Souza, Alfonso Palacios, Jairo Lima, José Mauro Garboza Junior, Luiz Guilherme Arcaro Conci, João Vitor Cardoso / Chair: Katya Kozicki

p. 33 13 THE MEANING OF CITIZENSHIP: INSTRUMENTAL, POLITICAL, AND CONSTITUTIONAL APPROACHES TO CITIZENSHIP

Participants: Yossi Harpaz, Astrid Voorwinden, Sofia Ranchordas, Antonios Kouroutakis / Chair: Dimitry Kochenov, Zoran Oklopcic

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p. 34 14 CHANGING CONSTITUTIONS AND SOURCES OF LAW

Participants: Paul Craig, Lorenzo Casini, Margherita Croce, Eduardo Jordao, Joana Mendes, Rodrigo Vallejo / Chair: Joana Mendes

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p. 35 15 JUDICIAL APPOINTMENT AND INDEPENDENCE

Participants: Nauman Reayat, Kate Berger, Julio Rios-Figueroa, Maximiliano Ravest, Piotr Mikuli / Chair: Kate Berger

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p. 36 16 BRAZILIAN CONSTITUTIONALISM: CHALLENGES AND PERSPECTIVES

Participants: Anderson Luís da Costa Nascimento, Bruno Joviniano de Santana Silva, Rodolfo Bastos Combay, Maria Clara Conde Moraes Cosati, Rodolfo Bastos Combat, Victor Hugo Pacheco

Lemos, Rebecca Féo de Oliveira, Juliana Paixão / Chair: Cássio Luis Casagrande

p. 37 17 ALGORITHMIC "CITIZENSHIP"

Participants: Graziella Romeo, Elisa Bertolini, Paolo Cavaliere, Sarah Eskens, Delphine Dogot / Chair: Elisa Bertolini

p. 38 18 REGIONAL AUTONOMY IN ASYMMETRICAL UNITARY STATES: CENTRE-PERIPHERY COORDINATION AND CONFLICT

Participants: Feng Lin, Francisco Manuel García Costa, Benoît Delooz, Juan E. Serrano Moreno / Chair: Juan Enrique Serrano Moreno, Sulan Wong

p. 39 19 JUDGING AND ENFORCING HUMAN RIGHTS

Participants: Eleni Frantziou, Valéria Zanette, Angel Aday Jimenez Aleman, Iwona Wróblewska, Arpita Sarkar, Ana Cristina Pinheiro, Estenio Menezes Freitas / Chair: Ana Cristina Pinheiro

p. 40 20 THREATS TO DEMOCRACY

Participants: Badrinath Rao, Dariusz

Adamski, Eoin Carolan, Atagun Mert Kejanlioglu, Tushar Kanti Saha, Zachary Elkins / Chair: Eoin Carolan

p. 41 21 ANTIDISCRIMINATION AND EQUALITY

Participants: Yuvraj Joshi, Viviana Ponce de León Solís, Fernando Muñoz, José Manuel Díaz de Valdés, Carissima Mathen, Jennifer Chandler, Ilias Trispiotis / Chair: Carissima Mathen

p. 42 22 CONTEMPORARY CHALLENGES TO THE FUNDAMENTAL RIGHTS OF POLITICAL MINORITIES

Participants: Jane Reis Gonçalves Pereira, Juliana Cesario Alvim Gomes, Ligia Fabris Campos, Delfina Beguerie, Sofía del Carmen Treviño Fernández / Chair: Jane Reis Gonçalves Pereira

p. 43 23 ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW

Participants: Justine Bendel, Alba Nogueira, Raul Campusano, Mariarita Circi, Chiara Ingenito, Felipe Clavijo-Ospina, Elizabeth Macpherson / Chair: Justine Bendel

p. 44 24 CORRUPTION'S CORRUPTING OF LIBERAL DEMOCRACY

Participants: Donna Greschner, Leonardo Borlini, Justin Orlando Frosini / Chair: Joana Mendes

p. 45 25 JUSTICIA Y DERECHO EN EL URUGUAY

Participants: Ruben Correa Freitas, Cristina Vazquez, María Elena Rocca, Mariel Lorenzo, Javier Paolino / Chair: Ruben Correa Freitas

p. 46 26 CONSTITUTIONAL COURTS ENFORCING THE DUE PROCESS OF LAW-MAKING. CHALLENGES FOR THE CONCRETE CONTROL

Participants: Sebastián Soto Velasco, Maria Pía Silva Gallinato, Sabrina Ragone, Enrique Navarro Beltrá, Manuel Nuñez Poblete, Miriam Henríquez Viñas / Chair: Miriam Henriquez Viñas

p. 47 27 THE DEMISE OF CONSTITUTIONAL JUSTICE IN CHILE?

Participants: Christian Viera, Daniela Mendez, Domingo Lovera, Daniela Marzi / Chair: Jorge Contesse, Sergio Verdugo (discussant)

p. 48 28 BEYOND REFERENDUMS IN CONSTITUTIONAL CREATION AND CHANGE

Participants: Richard Stacey, Elisabeth Perham Maartje de Visser, Oran Doyle, Rachael Walsh / Chair: Yaniv Roznai

p. 49 29 ROUNDTABLE: JUDICIAL APPOINTMENTS IN A COMPARATIVE PERSPECTIVE - THE KAVANAUGH CONFIRMATION AND BEYOND

Participants: Kai Möller, Tímea Drinóczi, Javier Couso Salas, Amnon Reichman / Chair: Sujit Choudhry, Amnon Reichman

p. 50 30 A LATIN AMERICAN APPROACH TO INTERNATIONAL ECONOMIC LAW? A REFORM AGENDA FOR A TIME OF CHANGE

Participants: Belen Olmos, Jaime Tijmes, Andres Delgado, Andrea Lucas / Chair: Andres Delgado, Nicoló Lanzoni

p. 51 31 COMPENSATORY DAMAGES FOR HUMAN RIGHTS VIOLATIONS

Participants: Kate O'Regan, Pier Pigozzi /Chair: Álvaro Paúl

Overview

Panel Sessions II
Monday, 1 July 2019
15.25 - 17.00

Overview

Panel Sessions III
Tuesday, 2 July 2019
08:20 - 09:55

Overview

Panel Sessions IV
Tuesday, 2 July 2019
10:30 - 12:05

p. 113 93 EUROPEAN PUBLIC ORDER IN TIMES OF CHANGE
Participants: Kanstantsin Dzehtsiarou, Vassilis Tzevelekos, Dimitrios Kagiaros, Michael Lancaster Steiner, Antal Berkes, Rumyana Grozdanova / Chair: Wojciech Sadurski

p. 114 94 THE INSTITUTIONS OF CONSTITUTIONAL DEMOCRACY
Participants: Enelda Desiree Salgado, Alexei Trochev, David Schneiderman, Michael Pal, Mark Tushnet / Chair: Lorenza Violini

p. 115 95 EU ANTI-DISCRIMINATION LAW IN TIMES OF CONTESTATION
Participants: Aleksandra Gliszczynska-Grabias, Uladzislau Belavusau, Dimitry Kochenov, Mathias Möschel, Dr Beryl ter Haar, Alina Tryfonidou / Chair: León Castellanos-Jankiewicz

p. 116 96 INTEGRATING SOCIAL SCIENCE AND NORMATIVE LEGAL APPROACHES TO COMPARATIVE CONSTITUTIONAL LAW
Participants: Theunis Roux, Niels Petersen, Emanuel V. Towfigh / Chair: Joana Mendes

p. 117 97 LIBERALISM, AUTHORITARIANISM AND THE TASKS OF CONSTITUTIONAL THEORY: MAKING SOVEREIGNTY POPULAR AGAIN?
Participants: Margaret Martin, Zoran Oklopcic, Eugénie Mérieau, Samuel Tschorne, Michael Wilkinson, Alexander Somek / Chair: Michael Wilkinson

p. 118 98 TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: CHALLENGES IN DARK TIMES
Participants: Patricia Perrone Campos Mello, Jorge Roa, Danielle Pamplona, Anna Luisa de Santana, Katya Kozicki, Bianca van der Broocke / Chair: Vera Chueiri

p. 119 99 CULTURAL HERITAGE AND ITS LAW IN TIMES OF CHANGE
Participants: Clizia Franceschini, Anna Pirri Valentini, Ted Oakes / Chair: Lorenzo Casini, Sabino Cassese

p. 120 100 RULE OF LAW CHALLENGES IN A TIME OF CRIMINAL JUSTICE CRISIS THEORETICAL AND CONSTITUTIONAL ISSUES 3
Participants: Benjamin Berger, Rocio Lorca, Andrea Galanter / Chair: Javier Wilenmann

p. 121 101 CONSTITUTIONAL PREAMBLES: AT A CROSSROADS BETWEEN LAW AND POLITICS
Participants: Ebrahim Afsah, Ghazaleh Faridzadeh, Pablo Riberi, Donna Greschner, Justin Frosini / Chair: Donna Greschner

p. 122 102 PERSPECTIVES ON ADMINISTRATIVE LAW
Participants: Verónica Pelaez, Antoine Claeys, Marta Franch, Juan Carlos Pelaez, Robert Siucinski, Ana Luiza Calil, Leonardo Ferrara / Chair: Robert Siucinski

p. 123 103 LATIN AMERICAN CONSTITUTIONAL REFORMS AND CONSTITUENT PROCESS IN TIMES OF POPULISM
Participants: Verónica Pelaez, Antoine Claeys, Marta Franch, Juan Carlos Pelaez, Robert Siucinski, Ana Luiza Calil, Leonardo Ferrara / Chair: Robert Siucinski

p. 124 104 CONSTITUTIONAL CHANGE AND DEMOCRACY IN LATIN AMERICA
Participants: Helena Colodetti, Christian Schallenmüller, Maria Cristina Escudero, Claudia Heiss, Rodrigo Espinoza, Nicolás Figueroa García-Herreros, Gerardo Ballesteros de León, Johanna Cortés Nieto / Chair: Nicolás Figueroa García-Herreros

p. 125 105 CONSTITUTIONAL EXPERIMENTS IN LATIN AMERICA: THE QUEST FOR EFFECTIVE CONSTITUTIONAL ENTRENCHMENT MECHANISMS – PART 2
Participants: Johanna Fröhlich, Andrea Katz, Sergio Verdugo, Joel Colon-Rios / Chair: Joel Colon-Rios

p. 126 106 THE RANDOM SELECTION OF RULERS? IDEAS FOR THE REFOUNDATION OF MODERN DEMOCRACY
Participants: César Vallejo, Andrea Celemin, Felipe Paredes, Felipe Rey Salamanca / Chair: César Vallejo

p. 127 107 INEQUALITY, INSTABILITY AND CONSTITUTIONALISM
Participants: Tarunabh Khaitan, Jeff King, Colm O'Cinneide, Julie Suk, Richard Holden / Chair: Jeff King

p. 128 108 REGULATING THE ECONOMY I
Participants: Andrea Cristina Robles Ustariz, Julian Barquin, Alexander Svetlicinii, Paula Ahumada, Krzysztof Krzystek, Francesco Farri / Chair: Paula Ahumada

p. 129 109 LAW AND TECHNOLOGY IN CONTEXT II
Participants: Jan Podkowik, Magdalena Jozwiak, Judit Sandor, Mayu Terada, Ryszard Piotrowski, Mikolaj Barczentewicz / Chair: Mikolaj Barczentewicz

p. 130 110 PRIMERO RÍOS, DESPUÉS MONTAÑAS Y AHORA LA AMAZONÍA: DERECHOS DE LA NATURALEZA EN PERSPECTIVA COMPARADA
Participants: Felipe Clavijo-Ospina, Tatiana Alfaro, Juan C Herrera, Natalia Castro, Juan Ubajoa / Chair: Juan Camilo Herrera

p. 131 111 "GOLD-PLATING" AND LAW MAKING - AN EU LEGAL SPACE ODISSEY
Participants: Raquel Franco, Manuel Cabugueira, Rui Lanceiro, João Tiago Silveira, Patricia Popelier / Chair: Patricia Popelier

p. 132 112 INTERNATIONAL LAW AND HUMAN RIGHTS
Participants: Francisco Lobo, Sanja Dragic, Sejal Parmar, Klaus D. Beiter, Samantha Velluti, Violeta Besirevic / Chair: Samantha Velluti

p. 133 113 GENDER EQUALITY AND POLITICAL PARTICIPATION
Participants: Marjo Rantala, Dmitry Kurnosov, Bernardo Campinho, Rostam J. Neuwirth, Bárbara Bertotti, Ana Cristina Viana, Beverley Baines / Chair: Beverley Baines

p. 134 114 THE JUDICIALIZATION OF POLITICS AND JUDICIAL DEFERENCE
Participants: Marina Bonatto, Leonardo Cabral, Vanice Lírio do Valle, Clemente José Recabarren, Nadja Lirio do Valle Marques da Silva Hime Masset, Guy Seidman, Gary Lawson / Chair: Vanice Lirio do Valle

p. 135 115 THE MULTIPLES DIMENSIONS OF MIGRATION IN LATIN AMERICA: CHALLENGES, PROPOSAL AND DEBATES
Participants: Alexandra Castro Franco, María Teresa Palacios Sanabria, Carolina Moreno Velasquez, Gracy Pelacani / Chair: Juan Manuel Amaya Castro

p. 136 116 WHAT DOESN'T KILL IT MAKES IT STRONGER? THE RESILIENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM IN AN AGE OF BACKLASH
Participants: Silvia Steininger, Ximena Soley, Marie-Christine Fuchs, Judith Schönsteiner / Chair: Alexandra Huneeus, Silvia Steininger, Ximena Soley

p. 137 117 EL IUS COMMUNE Y LO COMÚN DE LA CRÍTICA CONSTITUCIONALISMO TRANSFORMADOR Y EL ESPACIO JURÍDICO LATINOAMERICANO
Participants: Miriam Lorena Henríquez Viñas, Ana Micaela Alterio, Cecilia Medina Quiroga, Juana Acosta / Chair: Armin von Bogdandy

p. 138 118 COURTS UNDER EXTREME PRESSURES
Participants: Ana Beatriz Vanzoff Robalinho Cavalcanti, Francesco Biagi, Daniel Capecchi Nunes, Marcin Szwed, Roberto Machado Filho, Paula Pessoa, Wojciech Brzozowski / Chair: Ana Beatriz Vanzoff Robalinho Cavalcanti

p. 139 119 GLOBAL BUST_AFRICAN BOOM? AFRICA'S MARCH TOWARDS DEMOCRACY AND MULTILATERALISM
Participants: AdemAbebe, Charles Fombad, Horace Adjolohoun, Janine Silga, Iyiola Solanke / Chair: Iyiola Solanke, Adem Abebe

p. 140 120 CONSTITUTIONAL DEMOCRACY IN EUROPE
Participants: Antonia Baraggia, Matteo Bonelli, Timea Drinoczi, Agnieszka Bien-Kacala, Paul Blokker, Kim Lane Scheppele, Grainne De Burca / Chair: Sujit Choudhry

p. 141 121 DIALOGIC CONSTITUTIONALISM II
Participants: Nicola Lupo, Teresa Nascimento, Daniel Bogéa, Pablo Holmes, Antonio Maués, Bruno Magalhães, Manuelita Hermes Rosa Oliveira Filha / Chair: Daniel Bogéa

Overview

Panel Sessions V
Monday, 1 July 2019
15.25 - 17.00

p. 142 122 THE STATE OF CONSTITUTIONAL DEMOCRACY: OBSERVATIONS

Participants: Michaela Hailbronner, David Law, James Fowkes, Antonia Baraggia, Mathias Moschel, Tom Ginsburg / Chair: Mark Graber

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p.143 123 THE AMERICAN CONVENTION ON HUMAN RIGHTS AT 50

Participants: Juana Acosta, Cecilia Medina, Eduardo Vío, Antonia Urrejola, René Urueña, Alexandra Huneeus / Chair: Jorge Contesse

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p. 144 124 LA JUSTICIA CONSTITUCIONAL EN TIEMPOS DE CAMBIO EN AMÉRICA LATINA

Participants: Roberto Gargarella, Ana Micaela Alterio, María Francisca Pou Giménez, Roberto Saba / Chair: Roberto Niembro

p. 145 125 MIGRATION AND CITIZENSHIP

Participants: Martín Canessa Zamora, Tomás Pedro Greene Pinochet, Zachary Elkins, Jhuma Sen, María Elisa Zavala Achurra, Paula Almeida, Gabriela Hühne Porto / Chair: David Abraham

p. 146 126 THE STATE OF CONSTITUTIONAL DEMOCRACY: DIRECTIONS

Participants: Heinz Klug, Mattias Kumm, Rosalind Dixon, David Landau, Vicki Jackson, Sujit Choudhry, Marcela Prieto Rudolphy / Chair: Tom Daly

p. 147 127 MULTI-ACTOR GLOBAL GOVERNANCE AND HUMAN RIGHTS

Participants: Elena Pribytkova, Alicia Ely Yamin, Maria Varaki, Karen Solveig Weidmann, Claire Methven O'Brien / Chair: Gráinne De Búrca

p. 148 128 FRONTIERS OF LAW AND DEMOCRATISATION

Participants: Glenn Patmore, Felix-Anselm van Lier, Antoni Abat i Ninet, Carlos Bernal / Chair: Glenn Patmore

p. 149 129 JUDICIAL REVIEW OF LEGISLATIVE PROCESSES

Participants: Ittai Bar-Siman-Tov, Stephen Gardbaum, Aileen Kavanagh, Patricia Popelier / Chair: Stephen Gardbaum

p. 150 130 WHITELASH: UNMASKING WHITE GRIEVANCE IN THE AGE OF TRUMP

Participants: Terry Smith, Thiago Amparo, Audrey MacFarlane, Tanya Hernandez / Chair: Iyiola Solanke

p. 151 131 BOOK ROUNDTABLE ON ADVISORY OPINIONS: CARISSIMA MATHEN, "COURTS WITHOUT CASES" (HART 2019)

Participants: Ran Hirschl, Margot Young, Jeff King, Amelia Simpson, Yasmin Dawood, Carissima Mathen / Chair: Richard Albert

p. 152 132 COLLECTIVE DECISION-MAKING IN CONSTITUTIONAL REASONING

Participants: Génevieve Cartier, Tania Busch, Rodrigo Kaufmann, Pablo Grez, Cristóbal Caviedes / Chair: Virgilio Afonso Da Silva

p. 153 133 GLOBAL CONSTITUTIONALISM IN

CRISIS?

Participants: Moshe Cohen-Eliya, Iddo Porat, Kai Möller, Gila Stopler, Jamal Greene / Chair: Jaclyn Neo

p. 154 134 DISPUTATIO MEDIEVALE: ¿UN GIRO LIBERAL EN LA IGLESIA PARA APROXIMARSE A LA RELACIÓN ENTRE LA RELIGIÓN Y EL ESTADO?

Participants: Julio Alvear Téllez, Joseph Weiler, Sergio Verdugo / Chair: Sergio Verdugo

p. 155 135 POPULISM AND DECISION-MAKING PROCESS: BETWEEN REPRESENTATIVE BODIES AND JUDICIAL AUTHORITIES

Participants: Omar Makimov Pallotta, Paolo Bonini, Benedetta Barbisan / Chair: Benedetta Barbisan

p. 156 136 THE RISE OF MEMORY LAWS IN TIMES OF CONTESTATION

Participants: Natalie Alkiviadou, Grazyna Baranowska, León Castellanos-Jankiewicz, Aleksandra Gliszczynska-Grabias, Ioanna Tourkochoriti / Chair: Dr Uladzislau Belavusau

p. 157 137 JUDICIAL METHODOLOGY AND DECISION-MAKING I

Participants: Sebastian Lewis, Dean Knight, Elena Drymiotou, Beverley Baines, Raquel Sarria, Jose Miguel Rueda Vásquez, Anthony Tonio Borg / Chair: Dean Knight

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p. 158 138 LA JURISDICCIÓN CONSTITUCIONAL EN LA CONSTRUCCIÓN DE LA CONVENCIONALIDAD DE LOS SISTEMAS NACIONALES LATINOAMERICANOS

Participants: Carolina Machado Cyrillo Da Silva, luz Eliyer Cárdenas Contreras, Pablo Sebastían López Hidalgo, María Lorena González Tocci, Edgar Hernán Fuentes Contreras / Chair: Diego Dolabjian, Gonzalo Ramírez

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p. 159 139 REGULATING THE ECONOMY II

Participants: Sebastian Soto, Ana Luiza Calil, Nikolaos Vgdoutis, Stephane Braconnier, Adilkhan Turekhanov, Angelo Jr Golia / Chair: Sebastián Soto

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p. 160 140 CONSTITUTIONAL SHOCKS AND TRANSITIONS I

Participants: Luis Claudio Martins de Araujo, Vera Chueiri, Ebrahim Afsah, Yuvraj Joshi, Zoé Vrolix, Christian Behrendt / Chair: Fred Felix Zaumseil

p. 161 141 RAZONAMIENTO JUDICIAL Y EL CONTROL DEL PODER

Participants: Cristian Villalonga, André Saddy, Miguel Saltos, Andrés De Gaetano, Federico Acheriteguy, Benjamin Gajardo, Abraham Bechara, Eloy Espinosa-Saldaña / Chair: Eloy Espinosa-Saldaña, Cristián Villalonga

p. 162 142 GLOBALIZATION OF PUBLIC LAW: INNOVATIONS AND TRENDS OF PUBLIC LAW

Participants: Helena Colodetti, Juan David Duque Botero, Hugo Andres Arenas Mendoza, Diana Carolina Valencia-Tello, Johanna Cortes Nieto / Chair: Diana Valencia-Tello, Johanna Cortes Nieto

p. 163 143 THE PUBLIC AND PRIVATE DIVIDE IN THE DIGITAL WORLD: WHAT ROLE FOR PUBLIC LAW?

Participants: Rui Lanceiro Francisco Duarte, Vicky Kosta, Raquel Franco, Domingos Farinho, Ricardo Campos,

Sofia Ranchordas / Chair: Rui Lanceiro, Domingos Farinho

p. 164 144 AUTHORITY, RESPONSIVENESS AND DEMOCRATIC CHECKS: THE CHALLENGES OF PUBLIC LAW IN THE NEW CONSTITUTIONAL LANDSCAPE

Participants: Guillermo Jiménez, Matías Guiloff, George Lambeth, Pablo Contreras, Daniel Mondaca / Chair: Viviana Ponce de León

p. 165 145 COMPARATIVE ADMINISTRATIVE LAW: ASSESSING THE STATE OF THE FIELD

Participants: Yoav Dotan, Mariolina Eliantonio, Cheng-Yi Huang, Jud Mathews, Joana Mendes, Giulio Napolitano / Chair: Peter Lindseth, Mariana Prado

p. 166 146 NEW APPROACHES TO ENDURING PROBLEMS IN PUBLIC LAW

Participants: Beke Zwingmann, Maíra Almeida, Carlos Bolonha, Gustavo Buss, Ricardo Cruzat Reyes, Gisela Ferrari / Chair: Carolina Cardenas

p. 167 147 THE ROLES OF THE PEOPLE IN

LAW AND POLITICS

Participants: Mauricio Wosniaki Serenato, Michael Da Silva, Daniel Weinstock, Sarah Burton, Hoai-Thu Nguyen, Andres Biehl, Francisco Urbina, Rodrigo Perez de Arce / Chair: Andres Biehl

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p. 168 148 DEVELOPING INTERNATIONAL LAW AND INSTITUTIONS

Participants: Danielle Rached, Francisco Lobo, Pablo José Castillo Ortiz, Carlos Closa, Nikos Vogiatzis, Elisabetta Morlino, Valentina Volpe / Chair: Danielle Rached

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p. 169 149 THE POWERS OF LEGISLATORS AND LEGISLATION

Participants: Giovanni Piccirilli, Maciej Pisz, Ivan Sammut, Martijn van den Brink, Vanessa MacDonnell / Chair: Vanessa MacDonnell

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p. 170 150 CHANGING PUBLIC LAW THROUGH CULTURAL HERITAGE

Participants: Evgeniia Volosova, Felicia Caponigri, Mariafrancesca Cataldo, Gabriela Atucha Rossi / Chair: Lorenzo Casini, Sabino Cassese

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p. 171 151 THE UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT DOCTRINE

Participants: Atagun Mert Kejanlioglu, Ondřej Preuss, Eduardo Moreira, John Dinan, Katy Sowery / Chair: Eduardo Moreira

p. 172 152 COURTS AND CONSTITUTIONS IN AUTHORITARIAN REGIMES

Participants: Samuel Issacharoff, James Fowkes, Yvonne Tew, Po Jen Yap / Chair: Mark Tushnet

Overview

Panel Sessions VI
Tuesday, 2 July 2019
08:20 - 09:55

p. 173 153 CHALLENGES TO FREEDOM OF EXPRESSION I
Participants: Cristian Román, Cherian George, Fritz Siregar, Uriel Silva, Magdalena Jozwiak / Chair: Cristian Román

p. 174 154 CRIME AND PUNISHMENT I
Participants: Maksim Karliuk, Chianarakpere Ike, Azubike Onuora-Oguno, Herlambang P Wiratraman, Daniel Pascoe, Andrew Novak, Marcin Szwed / Chair: Ike Chianarakpere

p. 175 155 DEBATE: IS THERE A REGIONAL IUS COMMUNE IN LATIN AMERICA?
Participants: Arturo Villagran, Ximena Soley, Alejandro Rodiles, Juan C. Herrera / Chair: J.H.H Weiler

p. 176 156 INTERNATIONAL ECONOMIC LAW AND TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA I: FRAMING THE ISSUES
Participants: Rene Uruena, Paulina Barrera Rosales, Judith Schönsteiner, Franz Christian Ebert / Chair: Armin von Bogdandy

p. 177 157 CONSTITUTIONAL FOUNDATIONS
Participants: Rivka Weill, Peter Oliver, Nicholas Barber / Chair: Vanessa Macdonnell

p. 178 158 CONSTITUTIONAL POLITICS AND COMPARATIVE INSTITUTIONAL DESIGN
Participants: Diego Werneck Arguelhes, Jaclyn Neo, Thomaz Pereira, Fernando Munoz, Or Bassok / Chair: Jaclyn Neo

p. 179 159 ADMINISTRATIVE LAW AND AUTOMATED GOVERNMENT DECISION-MAKING
Participants: Maria O'Sullivan, Katie Miller, Janina Boughey / Chair: Janina Boughey

p. 180 160 COMPARATIVE IMPEACHMENT: REMOVING EXECUTIVES
Participants: Aziz Huq, Tom Ginsburg, Yoav Dotan, Juliano Zaiden Benvindo, Sabrina Ragone / Chair: Tom Ginsburg

p. 181 161 CHALLENGES TO CONSTITUTIONAL DEMOCRACY IN LATIN AMERICA
Participants: Luisa Netto, Jorge Contesse, Joshua Braver, Raul Sanchez-Urribarri, Ana Micaela Alterio, Tarunabh Khaitan / Chair: Ana Micaela Alterio

p. 182 162 THE RELATIONSHIP BETWEEN CONSTITUTIONAL DEMOCRACY AND A JANUS-FACED CIVIL SOCIETY
Participants: Wen-Chen Chang, Chun-Yuan Lin, Yung-Djong Shaw / Chair: Wen-Chen Chang

p. 183 163 TRANSITIONAL JUSTICE: THE NEW CHALLENGE FOR MCO
Participants: Luis Efren Rios Vega, Juan Francisco Reyes Robledo, Paloma Lugo Saucedo / Chair: Irene Spigno

p. 184 164 CURRENT CONTROVERSIES IN EUROPEAN LAWMAKING
Participants: Robert Siucinski, Marta Morvillo, Martijn van den Brink, Zsolt Szabó, Ute Lettanie / Chair: Zsolt Szabó

p. 185 165 SISTEMA DE JUSTICIA Y DESAFÍOS PARA LA PROTECCIÓN DE LOS DERECHOS
Participants: Diego Gamarra, Francisco Bustos, Lautaro Rios, Ariana Macaya, Gaspar Jenkins Peña y Lillo, Carolina Vergel / Chair: Lautaro Rios

p. 186 166 AUTHOR MEETS READERS: DEMOCRACY, CATEGORY POLITICS AND ANTI-DISCRIMINATION LAW
Participants: Tanya Hernandez, Audrey MacFarlane, Thiago Amparo, Terry Smith / Chair: Iyiola Solanke

p. 187 167 RISE AND FALL OF CONSTITUTIONS: PROMISES AND CHALLENGES
Participants: Ghazal Miyar, Bruno De Sousa Rodrigues, Eirini Tsoumani, Mohamed Abdelsalam / Chair: Ghazal Miyar

p. 188 168 BEYOND CAKE-BAKING : FREEDOM OF EXPRESSION, FREEDOM OF RELIGION AND EQUALITY AFTER MASTERPIECE CAKESHOP AND ASHERS BAKING COMPANY
Participants: Amnon Reichman, Kai Möller, Menaka Guruswamy / Chair: Mattias Kumm

p. 189 169 THE POSSIBILITY OF REGIONAL CONSTITUTIONALISM IN ASIA
Participants: Chien-Chih Lin, Yen-Tu Su, Jiunn-Rong Yeh / Chair: Jiunn-Rong Yeh

p. 190 170 LAW AND VIOLENCE: STRUCTURAL ENTANGLEMENTS OF PUBLIC/EU/PUBLIC INTERNATIONAL LAW
Participants: Maria Tzanakopoulou, Maria Ioannidou, Tanzil Chowdhury, Eva Nanopoulos / Chair: Eva Nanopoulos

p. 191 171 CONSTITUTIONALISM, DEMOCRACY AND CONSTITUTIONAL CHANGE
Participants: Kim Scheppele, Richard Albert, Rosalind Dixon, David Landau, Yaniv Roznai, Tamar Hostovsky Brandes / Chair: Francisca María Pou Giménez

p. 192 172 LA CONSTITUCIONALIZACION DE LA TEORIA DEL DERECHO
Participants: Juan Carlos Ospina, Guillermo Otarola Lozano, Fabian Salazar, Diana Maria Molina Portilla, Carolina Valencia Mosquera, Alejandro Gomez Velasquez / Chair: Milton César Jiménez Ramírez, Sergio Iván Estrada Velez, Jorge Ernesto Roa Roa

p. 193 173 JUDICIAL METHODOLOGY AND DECISION-MAKING II
Participants: Eneida Desiree Salgado, Renan Guedes Sobreira, Erick Kiyoshi Nakamura, Kenny Chng, Shucheng (Peter) Wang, Sebastian Lewis, Carolina Alves das Chagas, Eszter Bodnar / Chair: Eneida Desiree Salgado

p. 194 174 CONSTITUTIONAL SHOCKS AND TRANSITIONS II
Participants: Cristian Eyzaguirre, Ventura Charlin, Davide Zanoni, Nikolaos Skoutaris, Timothy Waters, Ayesha Wijayalath, Oya Yegen / Chair: Oya Yegen

p. 195 175 RIGHTS IN HARD TIMES
Participants: Marco D'Alberti, Francesca Pileggi, Diana-Maria Castano Vargas, Peter Lincoln Lindseth / Chair: Bernardo Giorgio Mattarella

p. 196 176 THE EVOLUTION OF PUBLIC LAW IN TIMES OF DEMOCRATIC TRANSITION: SOUTH AFRICA AND BEYOND
Participants: Raisa Cachalia, Hannah Woolaver, Lauren Kohn / Chair: Hannah Woolaver

p. 197 177 PLURALISMO JURÍDICO Y DESAFÍOS PARA EL ESTADO
Participants: Cristian Montero, Sergio Estrada, Gerardo Enrique Vega, Hernán Correa-Cardozo, Diana Valencia-Tello / Chair: Diana Valencia-Tello

p. 198 178 LITIGATION AND REPRESENTATION IN THE PUBLIC AND PRIVATE SPHERES
Participants: Eli Buksman, Sofia Ferrara, Ranieri Lima-Resende, Ricardo Cruzat Reyes, Barry Solaiman, Diogo Alves Verri Garcia e Souza / Chair: Sofia Ferrara

p. 199 179 ENVIRONMENTAL PROTECTION IN COMPARATIVE PERSPECTIVE
Participants: Justine Bendel, Juan Sebastián Villamil Rodríguez, Manuel Fernando Quinche Ramírez, Thuany de Moura Costa Vargas Lopes, Ignacio Urbina, Shazny Ramlan, Pasquale Viola / Chair: Pasquale Viola

p. 200 180 REFORMING THE CHILEAN CONSTITUTIONAL COURT: THE COMPLEX VOYAGE OF THE EXPERTS COMMISSION - DISCUSSION PANEL
Participants: Gaston Gomez, Miriam Henriquez, Patricio Zapata, Arturo Fermandois / Chair: José Francisco Garcia

p. 201 181 CONSTITUTIONAL ASYMMETRY IN MULTINATIONAL FEDERALISM
Participants: Maja Sahadžić, Erika Arban, Pieter Van Cleynenbreugel, James Gardner / Chair: Patricia Popelier

p. 202 182 BOOK LAUNCH PANEL: "RECONCILING INDIGENOUS PEOPLES INDIVIDUAL AND COLLECTIVE RIGHTS PARTICIPATION, PRIOR CONSULTATION AND SELF-DETERMINATION IN LATIN AMERICA" (JESSIKA EICHLER)
Participants: Jessika Eichler, Jose-Manuel Barreto, Luiz Guilherme Arcaro Conci, Felix Anselm van Lier / Chair: Dimitry Kochenov

Overview

Panel Sessions VII
Wednesday, 3 July 2019
10:30 - 12:05

p. 203 183 **POLAND'S CONSTITUTIONAL BREAKDOWN - BOOK DISCUSSION**
Participants: Samuel Issacharoff, Martin Krygier, Tom Gerald Daly, Sergio Verdugo, Wojciech Sadurski, Marek Zubik / Chair: Rosalind Dixon

p. 204 184 **CHALLENGES TO FREEDOM OF EXPRESSION II**
Participants: Bruno Silva, Herlambang P Wiratraman, Cynthia Juruena, Renan Guedes Sobreira, Mary Anne Case, Anderson Luis da Costa Nascimento, Javier García / Chair: Mary Anne Case

p. 205 185 **INTERNATIONAL ECONOMIC LAW AND TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA II: TRADE AND INVESTMENT (DUPLICATE)**
Participants: Gustavo Prieto, María Angélica Prada-Uribe, Federico Suárez Ricaurte, Pedro A. Villarreal / Chair: Magdalena Correa Henao

p. 206 186 **CRIME AND PUNISHMENT II**
Participants: Daniel Pascoe, Andrew Novak, Melinda Rankin, Erika De Wet, Aua Balde, Mariana Cantu, Verónica Undurraga / Chair: Daniel Pascoe

p. 207 187 **"AUTHORITARIAN CONSTITUTIONALISM" - AUTHORS MEET CRITICS**
Participants: Günter Frankenberg, Helena Alviar García, Michael Wilkinson, Eugénie Mérieau, Roberto Gargarella, Norman Spaulding, Dennis Davis / Chair: Egenie Merieau, Gunter Frankenberg, Helena Alviar García

p. 208 188 **TIMES OF CHANGE?: VIEWS FROM POLITICAL THEORY**
Participants: W. Elliot Bulmer, Massimo Fichera, Katariina Kaura-aho, Panu Minkkinen / Chair: Panu Minkkinen

p. 209 189 **ROUNDTABLE: JUDICIAL APPOINTMENTS IN A COMPARATIVE PERSPECTIVE II - THE KAVANAUGH CONFIRMATION AND BEYOND**
Participants: Michaela Hailbronner, Amnon Reichman, Sanford Levinson, Carissima Mathen / Chair: Mark Graber, Amnon Reichman, Vanessa MacDonnell

p. 210 190 **WHAT DO WE MEAN BY "TRANSFORMATIVE CONSTITUTIONALISM" IN LATIN AMERICA?**
Participants: Sabrina Ragone, Cecilia Medina Quiroga, Javier Couso, Juan C. Herrera / Chair: Armin von Bogdandy

p. 211 191 **CONSTITUTIONAL PRESENT CHALLENGES**
Participants: Luis Claudio Araujo, Cristina Gaulia, Rodrigo Brandão, Eduardo Moreira / Chair: Eduardo Moreira

p. 212 192 **MATICES DEL CONTROL CONSTITUCIONAL DE LA LEY**
Participants: Mathias Moeschel, Maria Bertel, Andreas Th. Mueller, César Landa / Chair: Uladzislau Belavusau

p. 213 193 **COERCIVE HUMAN RIGHTS LAW: THE IMPACT OF THE ECHR ON DOMESTIC CRIMINAL LAW (ENFORCEMENT) AND PROCESS**
Participants: Laurens Lavrysen, Natasa Mavronicola, Liora Lazarus, Corina Heri, Mattia Pinto / Chair: Natasa Mavronicola, Laurens Lavrysen

p. 214 194 **HATE SPEECH IN THE DIGITAL ERA: A COMPARATIVE ANALYSIS**
Participants: Irene Spigno, Elisa Bertolini, Paloma Tanzarella / Chair: Luis Efren Rios Vega

p. 215 195 **A NEW DAWN FOR THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION IN EU LAW?**
Participants: Chiara Feliziani, Giuliano Vosa, Matteo Borelli, Mariolina Eliantonio, Paul Dermine / Chair: Mariolina Eliantonio

p. 216 196 **RELIGION IN THE CRISIS OF CONSTITUTIONAL DEMOCRACY?**
Participants: Gila Stopler, Jaclyn L. Neo, Peter Danchin, Manoj Mate, Tarun Khaitan / Chair: Moshe Cohen Eliya

p. 217 197 **FEMINIST CONSTITUTIONALISM IN LATIN AMERICA**
Participants: Barbara Sepulveda Hales, Lieta Vivaldi, Melisa Sol Garcia, Catalina Lagos / Chair: Lieta Vivaldi

p. 218 198 **CLERGY, COLLECTIVES AND CORRUPTION: INNER SANCTIONS AND IRAN'S RESISTANCE ECONOMY**
Participants: Ebrahim Afsah, Ghazaleh Faridzadeh, Viktor Forian-Szabo / Chair: Ebrahim Afsah

p. 219 199 **PUBLIC LAW PATHOLOGIES**
Participants: Alberto Coddou, Pablo Marshall, Rocio Lorca, Emily Kidd White / Chair: Rocio Lorca, Emily Kidd White

p. 220 200 **CONSTITUTIONAL MOMENT IN JAPAN: ITS CONTEXTUAL AND UNIVERSAL CHARACTERS**
Participants: Keigo Komamura, Mayu Terada, Cheng-Yi Huang, Masahiro Kinoshita / Chair: Richard Albert

p. 221 201 **COMPARATIVE PUBLIC LAW AND INTERNATIONAL INVESTMENT LAW REFORM**
Participants: Peter Lindseth, Joanna Jemielniak, Georgios Dimitropoulos, Maurizia De Bellis, Damilola Olawuyi / Chair: Gráinne de Búrca

p. 222 202 **NEW COMMITMENTS IN INTERNATIONAL TRADE AGREEMENTS? AN EXAMINATION OF CHILEAN NEGOTIATIONS**
Participants: Javiera Caceres, Felipe Munoz, Dorotea Lopez, Bradly Condon, Fabiola Zibetti / Chair: Dorotea Lopez, Felipe Munoz

p. 223 203 **THE FUTURE OF SOCIAL AND ECONOMIC RIGHTS**
Participants: Alessandro Liotta, Diana Maria Molina Portilla, Maria Clara Conde M. Cosati, Luigi Bonizzato, Pedro Hartung, Joao Guilherme Walski de Almeida, Aneta Tyc / Chair: Luigi Bonizzato

p. 224 204 **THE RELATIONSHIP OF THE CONSTITUTION WITH THE PAST**
Participants: Jamal Greene, Yvonne Tew, Rivka Weill, Mattias Kumm / Chair: Yvonne Tew

p. 225 205 **COMPARATIVE PERSPECTIVES ON THE EMPIRICAL STUDY OF JUDICIAL BEHAVIOR**
Participants: Diego Pardow, Flavia Carbonell, Alvaro Bustos, Pablo Bravo-Hurtado, Andres Pavon, Diego Carrasco / Chair: Diego Pardow, Alvaro Bustos

p. 226 206 **POPULISM, FEAR OF THE PEOPLE AND CONSTITUENT POWER**
Participants: Sarah Kay, Ruth Houghton, Aoife O'Donoghue, Oran Doyle / Chair: Alan Greene

p. 227 207 **FISCAL FEDERALISM, TERRITORIAL INEQUALITIES AND EQUALISATION MECHANISMS: A WORLDWIDE OVERVIEW**
Participants: Erika Arban, Claudia Marchese, Horacio Guillermo Corti, Francisco Javier Ferrer, Mauricio Conti, Mariana Canotilho / Chair: Lorenza Violini

p. 228 208 **PARTICIPATORY DEMOCRACY: A SUITABLE SOLUTION TO COPE WITH THE PUBLIC LAW CHANGES**
Participants: Giorgia Crisafi, Nicola Berti, Martina Condorelli, Anna Giurickovic / Chair: Anna Giurickovic

p. 229 209 **CAN PUBLIC LAW RESEARCH BE SCIENTIFIC?**
Participants: Eduardo Aldunate, Maria S. Pardo, Pablo Gres, Octavio Hensabdi / Chair: Miriam Henriquez

p. 230 210 **THE FRONTIERS OF PUBLIC LAW**
Participants: Vicente F. Benitez-R., Elena Chachko, Joshua Braver, Oren Tamir / Chair: Oren Tamir

p. 231 211 **LA CONSTITUCIONALIZACION DE LA TEORIA DEL DERECHO (II)**
Participants: Olga Carolina Cardenas Gomez, Milton César Jiménez Ramírez, Maria Cristina Gomez Isaza, Abraham Bechara Llanos, Sergio Ivan Estrada Velez / Chair: Milton César Jiménez Ramírez, Sergio Iván Estrada Velez

p. 232 212 **COMPARATIVE ADMINISTRATIVE LAW DYNAMICS: DIVERSITY, IDENTITY, AND TECHNOLOGY IN MULTI-LEVEL GOVERNANCE**
Participants: Janina Boughey, Geneviève Cartier, Juan Carlos Covilla Martinez, Mary Liston, Giorgio Mocavini, Jud Mathews / Chair: Carlo Columbo

p. 233 213 **IMPLEMENTACIÓN DEL ACUERDO DE PAZ CON LAS FARC-EP EN COLOMBIA. ASPECTOS CONSTITUCIONALES Y SOCIOLÓGICOS**
Participants: Magistrado Antonio José Lizarazo-Ocampo, Gonzalo Ramirez-Cleves, Iris Marin-Ortiz, Laetitia Braconnier-Moreno, Marcos Criado-De Diego, Tanya Hernandez / Chair: David Landau, Joel Colon-Rios

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

1 POPULISM IN LAW, POLITICS, AND JUSTICE

Panel formed with individual proposals.

Room:

D303

Chair:

Paul Blokker

Presenters:

Jamil Civitarese & Armando Martins
Svetlana Tyulkina
Paul Blokker
Leonardo Cofre

Jamil Civitarese & Armando Martins: A Game-theoretical Model of Penal Populism and Judicial Culture

In this paper, we study the penal populism through a game-theoretical model. We assume the public choice hypothesis of criminal system bureaucrats being budget-maximizers agents, and the government as a principal intending to reduce the impacts of crime on public opinion. The government might decide to fight crime in two fronts: first by using legislation and intelligence investment to reduce crime financing - second, it might increase street level imprisonment to satisfy local demands. It is possible to show that if the crime organizations are difficult enough to fight using intelligence (or if electors do not reward these crime-fighting activities), then a punitive penal culture will emerge from the interaction between politicians and the decision of non-ideological rational judges. As a consequence, the penal populism from politicians and judges must be framed in a much broader concept of punitivism as an element of civic culture, not only in a legal or political scheme.

Svetlana Tyulkina: Populist Politics and Democracy: Rediscovering Inherent Democratic Quality of Self-Defence

Recent political developments around the globe demonstrate strong capacity of populist political movements to mobilise voters, gain their support and access to power. Public law should remain on guard to protect democracy from its potential enemies. This paper argues militant democracy is an inherent quality of democracy and offers valuable theoretical and practical tool to address this new challenge to democracies and their existence. The paper analyses the role of public international law and international organisations to argue there are strong signs public international law favours a substantive view of democracy and moves towards considering states as having an obligation to preserve and guard democracy and its institutions from attacks within. Public international law grants capacity to international organisations to exercise militant democracy measures in relation to Member States that disrespect and ignore major democratic principles and rules.

Paul Blokker: Shifting constitutional imaginaries

Taken-for-granted notions of the political, regarding representative democracy, the rule of law, and constitutionalism, are being put to an existential test. The longue durée of modern democracy has arrived at a turning point. This turning point calls for a profound analysis, which is able to identify fields of tensions and important shifts in meaning. In-depth analysis ought to be based on a historical perspective grounded in the idea of social and political imaginaries. Strictly tied up with the emergence of the political imaginary of modern democracy are constitutional imaginaries, in particular a dual imaginary of order and self-government. The paper will, first, elaborate the notion of imaginaries. Second, it will explore the idea of constitutional imaginaries. Third, the paper will discuss contemporary shifts in (the hold of) political and constitutional imaginaries, engaging in particular with what could be identified as a ‘populist imaginary‘ of constitutionalism.

Leonardo Cofre: The possible links between citizen participation and populism

At least two aspects are worth mentioning in the relation between citizen participation & populism. Firstly, the latter is aware of the current participatory gap. In this aspect it is similar to “innovative“ theories such as participatory and deliberative democracy. Nevertheless, solutions are different. I will explain to what extent it is such a difference. A second relation is that populism has a distinctive conception of citizen participation. Even when populist movements tend to reject constitutional structures, once in power, populist governments tend to instrumentalize constitutions for their own good. “Populist constitutionalism“ serves us to understand that ambivalence. As a theory, populist constitutionalism places itself between popular and authoritarian constitutionalism. I argue that a “participatory“ criterion is useful in defining its closeness to one of these poles. The cases of Andean and Hungarian populist constitutionalism serves to exemplify this idea.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

2 CHALLENGES TO DEMOCRACY IN LATIN AMERICA

Panel formed with individual proposals.

Room:

D304

Chair:

Juliano Benvindo

Presenters:

Glauco Salomao Leite, João Paulo Teixeira & Marcelo Araújo

Emilio Meyer

Joao Archegas

Rafael Patrus

Fernando Acunha

Juliano Benvindo

Priscila Renee Monge Kincaid

Glauco Salomao Leite, João Paulo Teixeira & Marcelo Araújo: Autocratic Legalism and the New Challenges to Public Law in Brazil

Because of decades under authoritarian regimes, Latin American countries – such as Brazil - experienced longs-tanding periods of political instability and human rights violation. Dissolution of Parliaments, Court-packing and hegemonic Executive were part of this scenario. We assume that the pursuit of a limited government and protection of human rights, which are the very core of the constitutional democracy, shall not be understood separately from the system of checks and balances. For this matter, in the midst of a political crisis, the Brazilian case displays important challenges to Public Law due to the rise of a populist agenda recently. We claim that the new threats to democracy are related to an autocratic legalism, which means that political actors have been using legal devices in order to achieve illegal or unconstitutional aims. In this sense, it´s a more subtle, gradual and yet dangerous move that, in the end, might undermine constitutional values via democratic procedures.

Emilio Meyer: Democracy Decay in Brazil: How the Military and Judges Interfere in Growing Authoritarianism

The paper will describe and analyze how, in the thirty years of the Brazilian Constitution of 1988, military and judges have acted as political elites who have pressured, advised, and interfered in political issues in order to change the social-democratic landscape. It will approach the parallel empowerment of the judiciary, detailing how it has contributed to the constitutional crises surrounding Brazil. Considering the return of the military to Brazilian politics, this work will present the different positions and prominent government posts that were allocated to the military during the Temer administration. It will cover the strong participation of military in the 2018 elections for the executive and legislative branches, including Bolsonaro‘s presidential victory and the formation of the cabinet. Finally, it will establish the different relationships that can be described between the courts and the military.

Joao Archegas: OUT OF TUNE: The Brazilian Supreme Court and Democratic Erosion

Liberal and democratic constitutionalism is usually taken for granted. Nevertheless, the “constitutional mold“ can be kept untouched while “liberal constitutional content“ is drained out to make room for authoritarian rule. This process is known as democratic backsliding. But how can a constitutional court respond to an undemocratic agenda? The answer may rely upon one of the functions of judicial deferral: to avoid a head-on collision between the court and other political actors while the judiciary entrenches itself as an institution. Because constitutional retrogression presents itself as a steady corrosion of the main pillars of liberal democracy, courts must fine-tune their judicial responses to the pace of events that can lead to democratic backsliding. When it comes to the Brazilian Supreme Court two obstacles emerge: the Court lacks an institutional identity and still needs to learn how to embrace its political duties through a pragmatic approach to constitutional law

Rafael Patrus: Political political judges: the Brazilian National Justice Council and the burning question of judicial freedom of political speech

In a 2017 landmark case, the Brazilian National Justice Council decided to take disciplinary action against four judges who had participated in a political demonstration in opposition to the impeachment of former President Dilma Rousseff. The decision was later invalidated by the Supreme Court, but the incident shed light on the burning question of judicial freedom of political speech. This paper examines the arguments brought up before the Council and the Court, with the purpose of drawing a comparison with the Interamerican Court of Human Rights‘ ruling in the López Lone et al. versus Honduras case. Premised on the idea that the way the judiciary deals with politics and media visibility is a key factor for/against the development of the Brazilian and Latin American democratic rule of law, the article advances that judges ought to be free to express political views and defend political positions as long as the exercise of such freedom does not jeopardize the independence and the integrity of the special contribution the judicial apparatus has to offer to the practices of the state.

Fernando Acunha: The “guardrails of democracy“ and the 1988 Constitution against authoritarianism: can democracy be preserved in Brazil?

Since the campaign, then presidential candidate Jair Bolsonaro showed signs of authoritarianism. To list a few, he vowed to shoot opponents, praised dictatorship-era military officials who committed torture, attacked media outlets, etc. Under the criteria proposed by Steven Levitsky and Daniel Ziblatt in How Democracies Die, he averaged high in all “Four Key Indicators of Authoritarian Behavior.“ Nothing has changed since he took the oath of office. He insists on assailing independent coverage (even threatening some media outlets with cuts of official funds), portraits adversaries as enemies, and achieved zero practical results so far. Nevertheless, some are noticing that different actors and institutions started to react forcefully to tentative encroachment on democracy. The paper aims to examine whether the “guardrails of democracy“ (unwritten rules of “mutual toleration“ and “institutional forbearance“) can survive and what constitutional strategies are available.

Juliano Benvindo: The Authoritarian Mindset and the Rule of Law in Brazil‘s Decaying Democracy

As Brazil becomes one important example of democratic decay, this paper explores the maintenance of an authoritarian mindset in some crucial moments of Brazilian recent history. It shows how this authoritarian mindset has had a vigorous capacity of reinventing itself as democratic in both explicitly authoritarian and democratic moments. Brazil has a fascinating history of transition to democracy and improvement of the rule of law. However, some impactful authoritarian legacies have not been overcome and have impaired the development of the country. This is the paradox many of the Brazil‘s recent developments reveal: on one hand, there is visibly an institutional improvement, so the obedience to the “rule of law“ has indeed become a more serious concern - on the other hand, that authoritarian mindset is also gaining momentum, as currently observed with the rise of Jair Bolsonaro as President. The future of Brazilian democracy depends on which side of this paradox will prevail.

Priscila Renee Monge Kincaid: The Mexican Paradigm: Participatory Democracies or a door to Authoritarianism?

All around the world (e.g. United Kingdom, Spain, etc.) mechanisms for participatory democracy (e.g. referendum, plebiscite, popular consultation, citizen law proposal, etc.) have emerged, mainly as a result of the failure of the representative democracy model to capture society´s needs, socioeconomic inequality, the increase of corruption and the lack of rule of law. This has generated both anger and the rise of social movements demanding justice and the recovery of all sort of rights. Latin America and, particularly Mexico, have not been the exception. However, considering the Latin American history with repressive governments and the recent popular consultations that have been conducted by the Mexican government, under no compliance with constitutional and legal procedural rules, this type of mechanisms can open the door for authoritarian governments. Should this type of mechanisms be restricted to certain matters or should the representative democracy model renovate itself?

Panel Sessions I

Monday, 1 July 2019
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3 THE COLLABORATIVE CONSTITUTION

This panel will discuss Aileen Kavanagh's forthcoming book called The Collaborative Constitution. This book argues that protecting constitutional rights is a collaborative enterprise between all three branches of government, where each branch has a distinct and complementary role to play. Rather than championing either courts or legislatures as the supreme repository of rights, on the one hand, or seeking to uncover a metaphorical 'dialogue' between them, on the other, Kavanagh moves 'from conversation to collaboration', to uncover the intricate workings of a collaborative process of engaging with rights both within and between the three branches of government. Using the UK's Human Rights Act 1998 as a central case-study, this book situates this example in comparative context, rounding out an analysis which has theoretical, empirical, analytical and comparative dimensions.

Room:

Auditorio Claro

Chair:

Mark Tushnet

Presenters:

Aileen Kavanagh

Commentators:

Rosalind Dixon

Stephen Gardbaum

Po-Jen Yap

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

4 PANEL SOBRE EL LIBRO: "COMENTARIO A LA CONVENCIÓN AMERICANA DE DERECHOS HUMANOS", FUNDACIÓN KONRAD ADENAUER (EDS. CHRISTIAN STEINER, MARIE-CHRISTINE FUCHS)

Since 2014, the "Commentary to the American Convention on Human Rights" in its first edition has become one of the most consulted publications on the Inter-American System of Human Rights (IASHR) in the Spanish language. It provides an hermeneutic analysis of all articles of the American Convention of Human Rights by acknowledged experts on the IASHR as well as public international law in general, and contains jurisprudence of the organs of the IAHRS as well as cross-references to the jurisprudence of the European Court of Human Rights. In 2019 the Konrad Adenauer Foundation's Rule of Law Program for Latin America has successfully launched the second edition of the book. The panel unites perspectives from authors of the Commentary, representatives of the IASHR, actors before the same system, law faculties and human rights' experts on the pertinence of this text for addressing the most relevant trends and jurisprudence within the IASHR which has marked the last 5 years such as justiciability of ESCR, jurisprudence on modern slavery and new discussions on indigenous peoples' and migrants' rights.

Room:

Sala Mediación

Chair:

Marie-Christine Fuchs

Presenters:

Judge Eduardo Vio Grossi
Claudio Nash
Nancy Yáñez
Magdalena Correa
Juana Acosta
Lorena Ávila

Judge Eduardo Vio Grossi: Reflexión sobre la relevancia del Comentario desde la perspectiva de la Corte Interamericana de Derechos Humanos

Claudio Nash: Reflexión como autor del artículo 5 del Comentario

Nancy Yáñez: Reflexión sobre la relevancia del Comentario para los derechos de los pueblos indígenas

Magdalena Correa: Reflexión sobre la relevancia del Comentario para la educación jurídica

Juana Acosta: Reflexión sobre la relevancia del Comentario como un actor de litigio ante el Sistema Interamericano de Derechos Humanos

Lorena Ávila: *Discussant*

Panel Sessions I

Monday, 1 July 2019
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5 ISSUES OF POLITICAL REPRESENTATION

This panel comprises a series of papers considering norms and practices of political representation and the connection between claims of representation and political legitimacy. Each of the papers considers a challenge to routinely accepted assumptions about the kind of political representation that is essential to democratic and constitutional governance. These are critically important questions for constitutionalism and public law in an era in which liberal democratic norms and institutions are widely perceived to be in decline. What changes in practices or ideas of representation might provide a basis for reinvigorating the claims of liberal democracy to represent a truly legitimate form of self-government?

Room:

Auditorio A. Silva

Chairs:

Howard Schweber
Andras Jakab
Mark Graber

Presenters:

Andras Jakab
Sanford Levinson
Jeffrey Lenowitz
Howard Schweber

Andras Jakab: Children's suffrage and the principle of sustainability

The electoral system in modern democracies only allows those citizens who have reached a certain age to vote, i.e., children are excluded from this right. It also means that their interests are less represented than those of retired people, which makes the emergence of structurally biased social security systems more likely (and in fact they are biased). By giving suffrage to children - so the argument goes - this structural bias could be corrected, as the population is growing older and it is consequently more interested in shorter term goals. In a more generalised form we could even state that not only demographic, but also financial or environmental sustainability arguments might support the introduction of suffrage for children: as children 'represent the future', their voice would strengthen the weight of long-term considerations in general. The paper will analyse arguments and counter-arguments about the above questions.

Sanford Levinson: Representative Samples, Public Opinion, and Democratic Legitimacy

To what extent is the "crisis of liberal constitutionalism" linked to a growing disillusionment with the "representation" ostensibly provided by "representative democracy"? Consider the rising interest in alternatives that focus on versions of sortition, ie, the use of lotteries rather than elections to select at least some political leaders. One sees this most interestingly, I believe, in the work of James Fishkin, but there's also the very interesting book Against Elections. Both, I would argue, rely on the perception of most social scientists that a well designed random sample is far more likely to be "representative" of public opinion than the result of an election process. But, one assumes, most laypersons do not share the perspective of the social scientist. Does this create insurmountable problems for constitutional reformers or designers who themselves have become skeptical about election-based theories of legitimate government?

Jeffrey Lenowitz: Representation during Constitution-making?

Are constitution-makers political representatives? In this paper, I argue that absent the creation of new constitution-making procedures and institutions, framers cannot be understood as political representatives in the traditional sense because, among other things, accountability mechanisms are lacking. However, I argue that this is unproblematic, because the ideal relationship between representatives and their constituents, at least as explained by mainstream accounts in democratic theory, runs against the central task facing constitution-makers. This finding provides reason to be suspicious of the uncritical importation of normative concepts designed to explain ordinary democratic politics to the realm of constitution-making.

Howard Schweber: Representation and Constitutionalist Politics

The term "constitutionalist politics" is used to refer to the idea that a constitutional system includes a certain model of how politics--in its partisan, electoral sense--will be conducted and what constraints the formal rules, conventions, and norms of a particular constitution requires. Key among these requirements are certain conceptions of representation and their identification as either consistent or incommensurate with constitutionalist principles. This paper examines these implied norms of political representation and considers the question of when failure of political representation becomes failure of a constitutional order. Within the conceptual framework of a constitutional order, what are the distinctions between true and "sham" forms of representation? What kinds of representative claims are implied by particular forms of constitutionalism? To what extent is constitutional failure attributable to a prior failure of representation?

Panel Sessions I

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6 CONSTITUTIONAL INTERPRETATION: POLITICS OR LAW? SOME ISSUES ON CONSTITUTIONAL REASONING IN CHILE AND ARGENTINA

The panel tackles the usual tension that ensues from judicial interpretation of the Constitution in that at times it is very difficult to tell judicial reasoning from political reasoning. Legal interpretivism, however, does not seem to be particularly worried about this, since one of its basic claims is that legal reasoning is an exercise in political reasoning. We would like to cash in on this opportunity to explore how some local variations of the theme of legal interpretivism have been brought to bear on some cases regarding crimes against humanity, thereby affecting some fundamental rights of defendants and, as a result, undermining the very basis of republican government.

Room:

LLM94

Chair:

Luis A. Silva

Presenters:

Andrés Rosler
Guillermo Jensen
Luis Silva

Andrés Rosler: If you want a constitutional guarantee, buy a toaster

Constitutional reasoning falls mainly under the description of political reasoning in that many of its dispositions admit of different conceptions and interpretations. The question, however, is whether any token of constitutional reasoning as such is political by definition. This issue is particularly relevant when it comes to the constitutional guarantee against ex-post-facto criminal legislation. Although this guarantee used to sway legal thought uncontestedly for ages, it has been recently challenged by scholars and judges, at the very least in Argentina. In this work I would like to put forward two hypotheses that explains this recent resistance: a comeback of classical penal republicanism and the hegemony of interpretative jurisprudence.

Guillermo Jensen: Constitutional interpretivism and its democratic flaws

Interpretativism usually conceives the Constitution as a set of open clauses, which for it to be effective it must be completed by judicial interpretation. Thus, interpretative judicial review entails not so much an interpretation of the Constitution as a constitutional amendment. This brings about, as a result, partisan politicization of constitutional interpretation and a displacement of public discussion and political decision-making from the representative institutions of the State to the judiciary. In opposition to this paradigm I would like to argue that the Constitution is a political decision that claims to be authoritative and hence constraints the range of its possible interpretations. In order to drive my point home I will dwell on some issues raised by the imprescriptibility of crimes against humanity.

Luis Silva: Constitutional interpretivism: how the law becomes politics

Judicial Supremacy is usually mistaken for the Supremacy of the Constitution, as if the former were entailed by the latter. This error rests on a particular idea of the Constitution, one that stresses its legal element at the price of eclipsing its political element. Within this frame interpretativism has thriven. The result is that judges might understand that they are free to decide whether to follow statutes or not. In this presentation I state that such a landscape promotes judicial decisionism, which is an undercover way of making politics that in the end harms both justice and politics. This proposal is made through the exposition of the caselaw regarding criminal liability of the military during Pinochet's regime. Specifically, the attention is focused on those judicial decisions that overlook the rule of extinctive prescription of the Chilean Criminal Law Code thereby weakening the role of the Judiciary as well as the role of Congress.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

7 RULE OF LAW CHALLENGES IN A TIME OF CRIMINAL JUSTICE CRISIS. THEORETICAL AND CONSTITUTIONAL ISSUES 1

A series of three panels will explore some of the central challenges to the idea of the rule of law in the face of contemporary criminal justice. Tying criminal justice and state punishment to the rule of law has been traditionally understood as a necessary feature of modern liberal democracies. Contemporary criminal justice, however, seems to challenge many of the central features that rule of law thinking attributes to state action: it is selective, and not universal, the content of the rules applied are complex and thus not always easy to grasp, and administered by a variety of agents acting under very different frameworks. In the fact of this reality, can criminal justice be reconciled with the rule of law? What issues arise out of these tensions? What roles do international human rights and constitutional law play in maintaining the rule of law?

Room:

Sala Reuniones LLM

Chair:

Javier Wilenmann

Presenters:

Leora Dahan Katz
Vincent Chiao
Christoph Burchard

Leora Dahan Katz: The Retributive Authority of the State: A Web of Duties Approach

Contemporary punishment theory is often criticized for attending to strictly moral aspects of punishment while neglecting a major feature of criminal punishment: that it is imposed by the state. In the case of retributive theory, the objection goes, while people may deserve to be punished and their wrongs responded to retributively, by what right does the state punish? This paper offers an answer to this demand. It proposes that the authority to punish is entailed in the retributive responsibility of the state, a responsibility incurred by virtue of the relations between the state and the governed (and which cannot be excluded by voluntaristic construction). Significantly, it proposes that such authority need not be justified in terms of the basic legitimation of the state. Rather, it develops a novel "web of duties" account of the particular retributive function of the state, which if solid, can attach to a variety of political theories that offer differing conceptions of the state.

Vincent Chiao: Hyperlexis and the rule of law

On a familiar view, the rule of law is valuable primarily because it enables people to plan their lives. Although familiar, I argue that planning-centered conceptions are undermined by equally familiar features of modern, institutionally dense administrative states. This is the phenomenon of "hyperlexis": the sheer quantity of legal rules, regulations and policies, overwhelm law's subjects. Under conditions of hyperlexis, people are reasonably ignorant of that law, as the costs of acquiring and maintaining accurate legal knowledge rise in the face of law's superabundance. Rather than conclude that the rule of law is an empty ideal, I sketch an alternative conception. On what I term a contestatory conception, the rule of law requires an adequate opportunity to challenge decisions made by officials. The animating idea of a contestatory conception of the rule of the law is that officials should relate to citizens in the space of reasons rather than merely through the exercise of power.

Christoph Burchard: The blind-spot(s) of the rule of law thinking in (continental European) criminal law theory

German and continental European criminal law theory is rooted in 19th century rule of law thinking. My presentation will explore, by way of two examples, its blind-spot(s) and how they are to be remedied. With regard to criminalization theory, I will claim that substantive theories fail to address questions of procedural legitimation in democratic polities . With regard to criminal law doctrine, I will shed light on why (and if) justifications (like self-defense or possibly whistle blowing) do not require a positive codification in a certain and parliamentary norm. Put differently, I will explore why the legality principle is not applied to justifications, although actual criminal liability depends on both the realization of the positive elements of an offense, and the non-realization of any justification. My presentation will bring to the fore that this doctrinal state of affairs results from blind-spot(s) of an outdated rule of law thinking.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

8 GÉNERO EN TRANSICIÓN: LOS DERECHOS DE LAS MUJERES Y LAS PERSONAS LGBT EN LOS PROCESOS DE TRANSICIÓN Y EN LA EMERGENCIA DE POLÍTICAS NEO-CONSERVADORAS

The purpose of this panel is to bring together different views from the fields of law and political science on the impact of political transitions on the women's and LGBT's rights movements. We are interested in evaluating how Latin America's rightward shift has impacted or could impact the human rights achievements of women and people with diverse sexual orientations and gender identities as well as in exploring how public law could play a role in defending these rights or allowing them to regress.

Room:

Seminario 3

Chair:

Carolina Vergel

Presenters:

María Cielo Linares & Valeria Silva
Valeria Silva & María Cielo Linares
Lucía Baca & Lilibeth Cortés
Lilibeth Cortés & Lucía Baca
Daniela Díaz

María Cielo Linares & Valeria Silva: Derechos de las mujeres y regresividad material en los gobiernos actuales de Argentina y Colombia: posibilidades desde el derecho constitucional

Over the last century, the women‘s right movement has succeeded in creating the consensus that, to achieve material gender equality, governments must guarantee certain minimums. This consensus has not come without pushback. Although the proliferation of international norms and standards has been vital to advances in women‘s equality, there is an marked tendency to use a rights “checklist“ as a measuring stick for progress on women‘s rights without creating the conditions for material equality. The new governments in Latin America exemplify this trend: while they regulate women‘s issues, they show little political will to take the necessary steps to bring these regulations to fruition. Using Argentina and Colombia as case studies, this paper seeks to define the minimum guarantees required for material quality, identify the obstacles created by the current political climate, and clarify the ways in which constitutional law can prevent backsliding on women‘s rights.

Lucía Baca & Lilibeth Cortés: Reconfiguraciones del derecho a la igualdad y no discriminación en las democracias liberales: el posicionamiento de las agendas de los grupos anti-derechos en Latinoamérica

Over the course of the past decade, Latin America has made great strides toward ensuring equal rights for LGBT people. Several countries across the region have legalized same-sex marriage and recognized LGBT people as a protected class on the grounds of sexual orientation and gender identity. Activists secured these rights gains by arguing that the right to equality and nondiscrimination lies at the core of modern liberal democracy. As such, this right has provided the chief legal basis for advancing LGBT rights. The anti-gender backlash that has swept across Latin America in recent years poses a clear threat to LGBT rights, particularly because anti-rights actors are attempting to coopt equality and nondiscrimination claims to further their reactionary agendas. This paper aims to identify the equality arguments marshaled by anti-rights groups, analyze their role in the potential legal reconfiguration of this right, and assess how public law could intervene to prevent such an outcome.

Daniela Díaz: Del silencio a la escucha: aproximaciones teóricas feministas a la comprensión de la violencia a gran escala y las transiciones políticas en Latinoamérica

Since the 1990s, Latin American(LTA) feminists have developed important reflections on different socio-political issues. From then on, LA-feminism(LAF) has consolidated its own analytical readings and categories, seeking to explain and transform the structural conditions of exclusionary violence to which Latin-American women are subjected. However, despite that LAF insights cover multiple disciplinary fields, they are still absent from political and constitutional reflections based in LTA. With that in mind, the paper aims to present an overview of the LAF approaches to the challenges faced by societies in transition. It discusses the theoretical contributions made by feminist to the understanding of Latin American political context in:(1) a relatively close past, marked by widespread violence, such as the South Cone‘s dictatorships or the several armed conflicts that took place between the 1970s and the 1980s -(2) the transition processes carried out in the aftermath of those periods.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

9 EMERGING NATION STATE IN TRADITIONAL SOCIAL STRUCTURES IN THE MIDDLE EAST: A BRIEF STUDY OF IRAN & AFGHANISTAN

The Modern State brings with itself a new Social Structure to impose social order. The import of Modern State into societies with previously established social structures has encountered some problems. The nature and outcomes of this face off depends on the nature and structure of social orders. That means, the process of emergence of the modern nation-state and state building is deeply rooted in the confrontation between two different social orders. In societies like Iran and Afghanistan, where the current social structures of Family and Religion were still strong, and there is a unique situation of tradition-modernity confrontation, the emergence of the modern concept of nation-state can be a topic for study. Such a study would focus on the issues that can be defined as the heart of the confrontation between tradition and modernity - therefore, the current panel tries to study Concept of Legal Personality of State in Shia-Imamie Jurisprudence, Women's Party Activity in the processes of state building Iran - From Legal Barriers and Civil underdevelopment, and the study of modern state core elements in contemporary Afghanistan.

Room:

Seminario 2

Chair:

Mohammad Djalali

Presenters:

Seyed Masoud Noori & Zahra Azhar

Ali Akbar Siapoush & Shafiq Shargh

Shahideh N Mohajer & Shiva Modarreszadeh

Seyed Masoud Noori & Zahra Azhar: Concept of Legal Personality of State in Shia-Imamie Jurisprudence

The concept of legal personality has been among the favorite concepts of legal studies. It has its roots in private law, therefore, to approach the meaning of this notion in public law, it is convenient to review the function of personality in private law. The most important actor and legal personality in Public Law is state which the concept of its legal personality is the object of this study. The emergence of the concept of legal personality of the state can be reviewed from different points of view. Legal personality of states was of interest for Islamic philosophers and jurists. When we refer to Islamic jurisprudence texts in four prominent schools (madh'hab) of fiqh within Sunni practice and two (or three) within Shia practice and their hadith books, we do not find an independent section under the title of legal personality and its similarities and differences with a real person. This concept has precursors in Shia jurisprudence specially in Iran, since The Safavid dynasty. So, this study is trying to find the roots and to provide a theory of legal personality of state in Shia jurisprudence without such understanding, study of state theory in Shia is defective.

Ali Akbar Siapoush & Shafiq Shargh: The study of modern state core elements in contemporary Afghanistan

Within the last hundred years, political structure of Afghanistan has undergone several dramatic changes. Numerous subsequent Coup d'états and decades of wars, both civil wars and foreign invasions, put serious doubt on the effectivity or even the mere existence of any political structure in this country. To this one should add strong family and ethnical structure as a powerful tradition in the society. Therefore, the question presented by this paper is that whether among succession of various ideologies and political structures, one can find core elements of modern state in contemporary Afghanistan? This includes sustainability of political structures, dominance in territory, the existence and proper function of permanent and impersonal organs, consensus over the necessity of the existence of an ultimate authority to take final and imperative decisions, and the recognition of loyalty to the power. The targeted time period starts by the independence of Afghanistan from British colonialism. The study covers the structural analysis of political powers in addition to the form and effectiveness of exercise of control over different parts of the country. It also studies political dialogue among major political activists and investigates their relation to traditional structure like family and tribe.

Shahideh N Mohajer & Shiva Modarreszadeh: Women's Party Activity in the processes of state building Iran: From Legal Barriers and Civil underdevelopment

Activity of political parties is one of the central factors of development in democratic society and it is considered as the third element of democracy and a barometer to measure development of political structure of countries. Taking in to account obtaining the political power of state as the main function of political parties, there is no other way for women as the half of the population, in order to enter operational field of the politics and administration of the country, gaining their position in structure of power and reaching higher level, than to act within the framework of political parties. Since obtaining sources of power most rely on the proper function of parties, lower levels of women participation in higher party positions can be seen as a major challenge in political demands and discussions over power divisions. A glance at parties' situation in Iran and participation rate of women in active parties shows that Iranian women have a small share in party activity like other political positions. None of the party leadership positions in Iran belongs to women while all the secretaries of the recognizedparties in Iran are men with no exception. Democratic structures in the world have used two strategies to increase women's political participation, one uses a legal reform solution, including the quotas for women with a positive discrimination approach in the electoral law And the other boosted the presence of women's party by persuading parties as the main actors in power and power rotation to use more of their capacity to increase the presence of women in the electoral rolls and seats of power, and through the formation of women's parties. The question is, first of all, why women are so marginal in party activity in Iran, and what are the structural barriers to their work in the field of party work in order to overcome politics and enter official policy assemblies? And second, given the widespread experience of the world in applying the mentioned strategies, what has made it impossible, despite the necessities and requirements of the Iranian society, to eliminate the weakness of women's competitive capacity, to change the legal and civil status so far? And what is the starting point to change this situation.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

10 DIALOGUES: BUILDING BRIDGES TO PROTECT DEMOCRACY AND HUMAN RIGHTS

The last years have testified to construction of an Ius Constitutionale Commune in Latin America, due to most of its States adherence to human rights treaties, and recognition of the Inter-American Court jurisdiction. Nevertheless, the continent is facing many challenges. From allegedly consolidated democracies turning to authoritarian leaders, to the ongoing difficulties in consistently implementing human rights, this panel offers a diverse range of propositions to discuss those issues. It addresses the roles of the Inter-American Court on Human Rights and constitutional courts, as well as the influence of the European Human Rights System, in order to establish profitable dialogues towards human rights protection and transformative measures. It also brings the perspective of the decolonial critic on human rights templates and suggests that the judicial interference in politics should be taken with proper caution, to which a comparative study could be enlightening.

Room:

D402

Chair:

Jorge Ernesto Roa Roa

Presenters:

Ana Carolina Olsen & Melina Girardi Fachin

Bruna Nowak & Melina Girardi Fachin

Juan Jorge Faundes Peñafiel

Amélia Rossi

Camila Salgueiro da Purificação Marques & Claudia Maria Barbosa

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Ana Carolina Olsen & Melina Girardi Fachin: Cooperative Judicial Dialogue in Latin-America: Integration and Transformation towards human rights defense

The Inter-American Human Rights System contributes with the formation of an Ius Constitutionale Commune (ICC), in which national and supranational Courts exchange judicial reasoning in vertical-horizontal dialogues. Progress has been made, but some national systems have shown resistance to comprehend human rights adjudication as a common endeavor. This essay intents to propose a cooperative judicial dialogue in order to consolidate the ICC, so every jurisdiction plays a significant role, opening channels to transform a history of massive human rights violations into a fairer social reality. Such cooperative interaction is fundamental, for the conformation of a multilevel legal system relies on a two-way argumentative interchange in human rights adjudication. Therefore, the Inter-American Court strengthen its authority by being attentive to local particularities, and Constitutional Courts gain regional support to embrace a transformative agenda towards human rights defense.

Bruna Nowak & Melina Girardi Fachin: Democracy in danger: judicial dialogues as means to refrain setbacks in Latin America

Latin-American States are facing democratic challenges: has been witnessing the collapse of democratic institutions in many of its countries. When democracy is in danger, because of their bond, human rights are also in risk and courts should play an active role of resistance. Dialogues can hold setbacks in the human rights field. In this sense, this essay aims to investigate how judicial dialogues can prevent and reverse authoritarian tendencies and, thus, contribute to the strengthening of democracy in Latin America. The Inter-American Court of Human Rights (IACtHR) holds a prominent position in this task since it establishes minimum standards that must be observed by the States subject to its jurisdiction. Because national courts tend to disregard international parameters in moments when democracy is overlooked, these interactions with international courts appear to be relevant means to preserve the rule of law and guarantee the protection of human rights.

Juan Jorge Faundes Peñafiel: Fundamental Right to Cultural Identity of Indigenous Peoples: Challenges for a Euro-American Dialogue on Human Rights

We propose a dialogue between the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR), based on the idea of "ius commune universal": a shared and inalienable nucleus of human rights, that shall be turned into concrete practice by the jurisprudence of these courts. The proposed dialogue will focus on the right to cultural identity of indigenous peoples. We demonstrate that the IACHR recognized this right as a collective right, which must be respected in a multicultural and democratic society. We also show that the ECHR recognizes the "cultural rights" of minorities, but with a weaker scope and a wide margin of national appreciation. Based on the jurisprudence of both courts, we propose a move towards a "Euro-American fundamental rights" system, including the fundamental right to cultural identity.

Amélia Rossi: Human Rights in a colonial perspective: a key to understanding for the better realization of rights in democratic constitutionalism

Fundamental human rights would have been the result of the political and legal setting of modernity, which did not take into account the existence of subjects other than the ideal and abstract individual, other knowledge and other forms of structuring power. It is in this perspective that, with the help of the historical-dialectical method and using bibliographical research, it is intended to deepen the knowledge about the decolonial critical view of human rights in order to throw light on the obscure dimension of coloniality concealed by modern hegemonic thinking. The decolonial perspective, by pointing to the unfolding of the domination of the non-European "other" and the universality of Eurocentrism as a way of being, of knowledge and power, can show the inconsistencies of the prevailing understanding of human rights and its low effectiveness.

Camila Salgueiro da Purificação Marques & Claudia Maria Barbosa: The judicialization of the "megapolitics" from the perspective of institutional dialogue: Brazil and South Africa

In addition to the strengthening of judicial review and the judicialization of politics in countries of the Global South, in the current Brazilian political-institutional crisis, there is also the judicialization of the "megapolitics" as an instrument of the elites to insulate central issues of democratic control, leading to a new kind of political order, called by Hirschl (2008) of "juristocracy". South Africa is also an example of this more extreme aspect of the judicialization, but its Court enhances a dialogical atmosphere for the design of public policies, with the prior engagement of those interested in seeking solutions, even shared among the Powers. Thus, through a comparative study, especially of the "meaningful engagement" and the "general restrictions clause", it is analyzed how dialogic mechanisms can contribute to overcoming the political-institutional crisis in Brazil.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

11 LIVING CONSTITUTIONALISM IN A CHANGING WORLD: COMPARING THE UNITED STATES, CANADA, SOUTH AFRICA, JAPAN AND THE UNITED KINGDOM

The idea of living constitutionalism is itself evolving. Although the idea is based on common law constitutionalism, which means judicial constitutional implementation without binding original meaning or formal constitutional amendment, the issues are not necessarily confined to that realm. Living constitutionalism links to the ideas in constitutional interpretation such as the purposive approach and judgments regarding constitutionality in the face of social change. It also relates to the changes by political branches that seek to allow the constitutional order to respond to such social change. Living constitutionalism varies -conceptually and practically- according to the soil in which it grows. We reveal various living constitutions: in the United States, Canada, South Africa, Japan and the United Kingdom. This panel will contribute to an understanding of contemporary trends regarding living constitutionalism, notably in a comparative perspective.

Room:

Auditorio E. Frei

Chair:

Lisa Parshall

Presenters:

Lisa Parshall
Peter Oliver
Julian Jonker
Keigo Obayashi
John Morgan

Lisa Parshall: Living Constitutionalism and Interpretive Debate in the United States: Changing Interpretations on the U.S. Supreme Court

A “living constitution“ is more than poetic metaphor. As a philosophical approach and interpretive methodology, it is a developing theory encompassing normative judgements and active debate over the empirical practices as justices seek to reconcile the original meaning of constitutional text with contemporary circumstances. I review the debate between interpretive and non-interpretive methodologies within the context of American constitutional theory with a focus on the views of U.S. Supreme Court Justices as to the legitimacy of living constitutionalism. The departure of Justices Scalia, a living constitutionalism critic and Kennedy, who embraced emergent rights, and addition Justices Gorsuch and Kavanaugh. proponents of interpretive conservatism, renews the debate over living constitutionalism and its future in American jurisprudence.

Peter Oliver: Canada and the Living Tree

Living tree constitutionalism is firmly established in Canadian constitutional interpretation, notably since the arrival of the Charter of Rights and Freedoms. Some recent Canadian writing questions the early authority for the living tree (Edwards v AG Canada (1929)), arguing that the doctrine was essentially re-invented to support progressive Charter interpretation, and instead supports originalist constitutional interpretation along American lines. This paper re-examines the record and concludes that Canadian courts from the 1930s onwards understood the living tree doctrine and applied it, in particular to the changing context of Canada‘s progress from colony to independent nation. This paper also attempts to put living tree constitutionalism in a broader theoretical frame, arguing that it is in conformity with other constitutional principles, such as democracy and the rule of law.

Julian Jonker: Transformative Constitutionalism and the Text of the South African Constitution

South Africa‘s Constitutional Court has adopted a purposive approach to interpreting the Constitution of 1996. It first signaled that it would take this direction in the early decision S v Mhlungu, concerning whether criminal cases pending at the time of the adoption of the Interim Constitution were subject to constitutional litigation. That decision became the focal point of scholarly disagreement about whether the purposive approach permitted the court to abandon the plain meaning of the constitutional text. Scholars and judges have increasingly come to support the purposive approach by invoking the idea of transformative constitutionalism i.e. that the Constitutional text itself mandates a break from the legal culture of the past. I evaluate this justification for purposivism and explore the controversy it has generated, particularly with respect to the Constitution‘s influence on private law.

Keigo Obayashi: Ad Hoc Living Constitution in Japan

I will clarify the figure of the Japanese living constitution. The theory of living constitution in Japan has focused on constitutional change by political branches without formal amendment of Constitution. On the other hand, there have been a few discussions over living constitution by the judiciary. In spite of a few arguments, the Japanese Supreme Court has sometimes determined constitutionality of laws in the light of social change. In fact, the Court has implemented living constitution through responding to social change. However, it is a little different general living constitution because the Court doesn‘t change constitutional interpretation. Although the Court adjusts laws to social change in the constitutional case, it doesn‘t change constitutional meaning. The Court just held that the law was invalid as it was unreasonable in current situation even if it had been reasonable before. It seems that this is living constitution formed in Japan.

John Morgan: The UK‘s inherently living constitution

The UK‘s constitution always was ‘living‘. We enjoyed no constitutional entrenchment: Parliament could, famously, make or unmake any law, it was bound by no predecessor and could not bind its successors. We lacked judicially enforceable rights in any sense: even breaches of supranational human rights protections could not trump Parliament. The constitution was thus living in the sense that each government could bend the constitution to its will. Change began with the UK‘s accession to the EU in the 1970s. This required courts to disapply Acts of Parliament. Thus started a cavalcade of constitutional amendment - power was devolved downwards to the nations, while being limited through judicial enforcement of fundamental rights. The new state of affairs crystallised in the 2015 HS2 case.
It was recognised we have a deeper level of entrenched constitutional statutes. It is only now our judges begin to grapple with ‘constitutional‘ interpretation. We have much to learn from foreign friends.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

12 SOVEREIGNTY, CONSTITUTION AND DEMOCRACY: TENSIONS, CONTRADICTIONS AND CONVERGENCES IN THE 21ST CENTURY (PART A)

This panel, split into parts A and B, aims to face the existent challenges in the relationship between Law and Politics, basing itself on the assumption that such challenges are inevitable consequences of the tension between constitutionalism and democracy. Latin America has been going through a conflicting moment in its political and constitutional history: after a period of arising of new rights in constitutions with institutional designs which were more amenable to the sharing of political power, one now notices a great tension between political agents as to what regards the just (or at least more prudent) sharing of authority. In this contentious scenario, rethinking the relationship between constitutionalism and democracy is a must. It is this panel's proposal, thus, to think of new possibilities in the relationship between Law and Politics and ways of sharing political authority, in an agonistic perspective, connected to the challenges of the 21st Century.

Room:

LLM91

Chair:

Katya Kozicki

Presenters:

Estefânia Maria de Queiroz Barboza & Claudia Beeck Moreira de Souza

Alfonso Palacios

Jairo Lima & José Mauro Garboza Junior

Luiz Guilherme Arcaro Conci & João Vitor Cardoso

Estefânia Maria de Queiroz Barboza & Claudia Beeck Moreira de Souza: Is brazilian democracy in decline?

Charismatics presidents elected in Latin America, as well as in other ancient authoritarian regimes, have been using constitutional change mechanisms (amendments or new Constitutions) with the aim of destroying both constitutionalism and democracy. They create new autocratic regimes in order to remain in power and/or weaken the control system. The strategy makes the Constitution appear democratic at a distance and the danger to the rules of democratic play and liberal democracy goes unnoticed by the international community (Schepelle). The proposed presentation works with the hypothesis that the Brazilian presidential design, combined with the conflictive experience of coalition presidentialism, as well as the history of authoritarianism in the country, benefits this kind of maneuver, being the cause of a democratic and institutional crisis, in an hypothesis of a weak president as well as a strong one

Alfonso Palacios: Are the People always wise? Recent referenda and its outcomes in Latin America

The direct participation of the People –mostly through referenda- in the construction of political decisions has increased, and very much exceed the fore imagined limits of its spectrum. These new opportunities always come with different challenges, as well as unexpected risks for democracy and minority rights. Through this paper I look for a common pattern in the processes that have taken place in recent times in Latin American countries. Elements of the analysis will be the political situation, the questions asked, the level of conclusiveness of the People's answer with respect to the whole decision making process, and the controls established by the very same juridical order.The given experiences enlighten us about the problems and dangers, but as well will give us the chance to rethink the role of the public law and the public actors –People, politicians, judges, etc.- in the whole scenario

Jairo Lima & José Mauro Garboza Junior: Not a step back? Constitutional amendments and the principle of non-regression

The judicial supremacy represents the product of the idea that constitutional courts have a final say in constitutional interpretation, despite its democratic deficit. Within this debate, we selected arguments that challenge the constitutional interpretation monopoly by courts. That arrangement includes parliaments by means of constitutional amendments when they are reversing constitutional court rulings. However, the description of this decision-making process does not contain any normative ought on the content of constitutional rights. In order to solve it, the principle of non-regression is used as an instrument to keep fundamental rights immune to reforms. Therefore, we propose to discuss that principle in order to demonstrate its implicit effect, specifically, the problem that seeks to equate in an anticipated and calculated way the technological productive forces of progress with the legal and social relations of production and reproduction.

Luiz Guilherme Arcaro Conci & João Vitor Cardoso: Confronting visions of Legal Pluralism in Latin America: Indigenous Jurisdictions between a Liberal perspective and the Epistemologies of the South

The recognition of indigenous jurisdiction works out a conception of democratic constitutionalism in which rights are a key concept in the liberation struggles of indigenous people. If constitutionalism remains strongly attached to traditional liberal thought, the moment of conceptualizing non-liberal values of indigenous law has an increased affinity with the Epistemologies of the South. On the one hand, the recognition of indigenous self-government threats fundamental notions of liberalism - on the other, it remains unclear if this can bring about greater control of power. This essay reflects upon how Latin American Constitutionalism implements legal pluralism and how it could help provide institutional innovation in Brazil, Bolivia, Colombia and Peru

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

13 THE MEANING OF CITIZENSHIP: INSTRUMENTAL, POLITICAL, AND CONSTITUTIONAL APPROACHES TO CITIZENSHIP

Citizenship has defined for centuries the relationship between individuals and the state. The meaning of citizenship has thus been crucial to the determination of individuals' rights and duties and their belonging to national or local communities. However, throughout the times, the meaning of citizenship and its reference points have changed significantly. This panel addresses three developments: (i) the transformation of citizenship into an instrumental resource or a commodity with a visible reduction of citizenship duties - (ii) the development of vague citizen-centric approaches in public policymaking with limited reference to constitutional or legal frameworks (e.g., in smart cities) - (iii) the decreasing trust of citizens in government and limited democratic participation caused by the ill-defined position of citizens vis-a-vis democratic institutions.

Room:

Auditorio P. Aylwin

Chairs:

Dimitry Kochenov
Zoran Oklopcic

Presenters:

Yossi Harpaz
Astrid Voorwinden & Sofia Ranchordas
Antonios Kouroutakis

Yossi Harpaz: From Sacred to Instrumental: The Changing Meaning of Citizenship

In recent years, scholars have argued that citizenship in Western countries is becoming an instrumental resource, even a commodity.Those arguments mostly draw on a relatively narrow set of empirical cases, focusing on outsiders who seek admission into citizenship. Moreover, there is no systematic theory that explains the relationship between rules of admission and the emotional meaning of citizenship. This paper expands the empirical and theoretical scope of this literature by examining the effect of citizenship transformations on individuals who are already citizens of a country and their changing relation to the state. It focuses on 3 areas of change: 1) diminishing weight of citizen duties, reflected mostly in the elimination of conscription - 2) growing toleration of multiple citizenship - 3) growing diversity in terms of ethnicity and place of residence.I will discuss the potential implications of these developments while drawing on insights from psychology and economic sociology.

Astrid Voorwinden & Sofia Ranchordas: Citizen-centrism in Smart Cities and Democratic Participation

A number of smart city projects claim to be 'citizen-centric', they aim to use technological innovation to foster citizen engagement and participation. However, it is unclear who is included and excluded from the concept of citizenship. A non-legal definition includes residents, commuters or tourists. However, the legal status of citizen is defined in relation to a state and a national government, not a local community. Interestingly, in Ancient Greece, citizenship was defined by reference to the city and shaped in terms of local participation. This paper explores the mismatch between the way citizen participation is framed legally and the way it is framed technologically in smart cities. It does so by drawing on the historical meaning of citizenship, exploring the goals of smart cities and citizen participation, and the problem of exclusionary effects stemming from technological biases, as well as the possibility of 'opting out' of the smart city.

Antonios Kouroutakis: "Demossibility" and the design of democratic institutions: How to place citizens at the heart of the political system

Democracy, a very successful form of governance in the 20th century, at the turn of the 21st century is traumatized. Among the most established democracies, people express concerns about democracy and the confidence on democratic institutions is shaken. Within this context of democratic backsliding and distrust, this paper argues that the design of democratic institutions is crucial to reverse the distrust on democracies. But there is need for institutions that will activate people's participation and make democratic institutions more accessible. This paper explores how a novel rethinking of the rights and duties of citizens can shed new light into democratic participation and enhance the trust of citizens in political institutions.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

14 CHANGING CONSTITUTIONS AND SOURCES OF LAW

Globalization has sanctioned the overcoming of the State as the 'monopolist' of normative production. Public law is therefore undergoing profound changes: instead of relying on State and Statutes (or, more generally, on formal Statutory instruments), normative production is increasingly polycentric and informal. Therefore, a redesign of the rule of law principle and the sources of law is necessary. This panel will deal with these issues making use of the acquisitions reached in the field of global law studies.

Room:

Auditorio Card. Oviedo

Chair:

Joana Mendes

Presenters:

Paul Craig
Lorenzo Casini
Margherita Croce
Eduardo Jordao
Rodrigo Vallejo
Joana Mendez

Paul Craig: In Quest for the Rule of Law

Lorenzo Casini: Sources of Law: A Global Administrative Law Perspective

Margherita Croce: Standards: What Kind of Certainty?

Eduardo Jordao: Judge-made Law

Rodrigo Vallejo: After the regulatory state: The idea of a private administrative law

Joana Mendez: *Discussant*

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

15 JUDICIAL APPOINTMENT AND INDEPENDENCE

Panel formed with individual proposals.

Room:

LLM93

Chair:

Kate Berger

Presenters:

Nauman Reayat
Kate Berger
Julio Rios-Figueroa
Maximiliano Ravest
Piotr Mikuli

Nauman Reayat: Judicial Independence as a Middle Class Phenomenon: Comparing Pakistan, Indonesia and Colombia

This article is aimed at resolving the puzzling phenomenon of independent judiciaries in the context of unstable democracies. An increasing engagement between middle-class groups, represented by NGOs and other civil society organizations, and the higher judiciary is visible in three unstable democracies: Pakistan, Indonesia, and Colombia. The existing studies do not explain judicial independence as a middle-class phenomenon. By comparing the higher constitutional judiciaries of Pakistan(2009 to 2017), Indonesia(2003 to 2017) and Colombia (1990 to 2017) as most different and least similar cases, this article argues that independent judiciaries in the context of weak democracies is a middle-class phenomenon because one similar driver-the middle class-is giving rise to independent judiciaries in different historical and political contexts. This work finds that middle-class groups are important for the establishment and maintenance of an independent judiciary.

Kate Berger: Judicial Independence, Judicial Discipline & the Administrative State

This paper explores the impact of constitutional rules and principles on the design of the administrative state. Drawing on theories of structural constitutionalism and comparative public law, this paper considers the intersection of constitutional and administrative law in a particular context, that of judicial discipline and removal. It asks whether certain institutions, such as judicial oversight and disciplinary bodies, must exist within a constitutional order that takes judicial independence seriously. It contends that the answer to this question is yes and goes on to study the necessary features of such institutions and the consequences of their absence. In its theorization of the relationship between a constitution and the administrative state using the particular case of judicial independence and discipline, this paper advances understandings of constitutional architecture and of the necessary mechanisms for ensuring judicial integrity in times of complexity and change.

Julio Rios-Figueroa: Patronage and Nepotism in the Mexican Federal Judiciary, 1917-2017

This paper analyzes patronage networks within the Mexican Federal Judiciary in the last one hundred years. The paper first uncovers and characterizes the patronage networks created from 1917 to 1994, when the Supreme Court hand-picked lower court judges. In 1995 a Judicial Council was created to select judges based on merit. The paper thus moves to gauge whether the patronage networks have had any persistent effects. Specifically, the paper evaluates whether hand-picked judges (pre-1995) engage in more nepotistic practices (i.e. employ more family members) than merit-selected judges (post-1995). Based on a rich and original database collected from different sources, the paper analyzes the judiciary as an organization, bringing a new light on the organizational pre-conditions required for the judiciary to become an effective institution for the administration and production of public law.

Maximiliano Ravest: The relationship between constitutional amendment procedure, judicial review and judge‘s appointments. The United States and Chile case

The main idea of this research is to contrast the constitutional amendment procedure, the judicial review and judge´s appointments. Considering the United States and Chile cases, this investigation will analyze if a rigid constitutional amendment procedure produces a more activist judicial review. The comparison between the United States and Chilean Constitutions reinforces the theory made by professor Elikins, Ginsburg and Melton, in order that the flexibility in a constitutional allows high durability of a Constitution. The Chilean Constitution is flexible enough and there is no need for a new constitution because the political actors have been using the amendment procedure many times. The Judicial Review in Chile is not so relevant. In the case of the United States, the US constitution looks inflexible but is a flexible document because it allows the States to enact their own constitutions. In addition, the statistics don´t show a strong judicial review.

Piotr Mikuli: What is the optimal model for the internal structure of the judicial council?

The author considers the advantages and drawbacks of judicial councils in contemporary states, especially of their internal structure. Despite significant criticism expressed by certain legal scholars in academia, the author is of the opinion that the council can be perceived as an important factor in securing, on the one hand, the judicial independence, and the accountability, on the other. The author argues that a mixed composition may be an advantage for this type of body as the council becomes a platform for the dialogue with representatives of political powers, different legal jobs as well as lay members. Simultaneously, the author expresses the conviction that it does not mean that the most desirable model for the council is one in which representatives of the legislative or the executive would have the same number of members as judges. This might create a wrong impression that greater involvement by such members strengthens the legitimacy of the judiciary.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

16 BRAZILIAN CONSTITUTIONALISM: CHALLENGES AND PERSPECTIVES

Focusing mainly on Brazilian constitutionalism, the panel will adress the different perspectives on its most important aspects. At first, historical influences will be analysed in order to perceive its consequences for the brazilian jurisditional experience. The relevant subject of fundamental rights will be treated in accordance with the issues and the limits involving the right to freedom of expression and its parallels with hate speech. Finally, the debate will focus on the main issues related to the Brazilian constitutional jurisdiction, especially judicial activism and judicialization of politics, as well as the judicial deference on the rule-making power of Brazilian agencies for market regulation.

Room:

Seminario 1

Chair:

Cássio Luis Casagrande

Presenters:

Anderson Luís da Costa Nascimento

Bruno Joviniano de Santana Silva

Rodolfo Bastos Combat

Maria Clara Conde Moraes Cosati, Rodolfo Bastos Combat & Victor Hugo Pacheco Lemos

Rebecca Féo de Oliveira

Juliana Paixão

Anderson Luís da Costa Nascimento: About brazilian constitutionalism: Where are we and where do we go?

The object is Brazilian constitutionalism. To do so, a historical approach was made, raising the possible origin, the foreign influences of the United States of America and Europe, as well as future prospects. The debate revolves around the role of Common Law in Civil Law, due to the expansion of the American system and globalization. The importation of institutes, the uncertainty of their applications and cultural differences reflect consequences in Brazil, as it happens in the so-called Judicial Activism. Thus, the problem involves the difficulties of the Judiciary in turning to social and political interests, without violating the constitutional precepts. The paper does not propose to exhaust the theme, neither present a definitive solution to this complex scenario. Finally, the research was documentary and bibliographical, resorting in time to the projection of possible destinations, perhaps a proposal of rupture, if related to the New Latin American Constitutionalism.

Bruno Joviniano de Santana Silva: Freedom of expression in corrosive erosion

In the present panel, it is analyzed the hate speech as erosive variation of the content of the freedom of expression. In this approach, freedom of expression is seen as a structural element of the democratic regime, but this right is not presented as absolute but relative. In this optic, it is focused hate speech against vulnerable groups, as a harmful re-signification of the democratic substratum of freedom of expression, with the capacity to implode, deconstruct and denature it. In this dimension, it is considered the hate speech in the North American and Brazilian jurisprudence. Finally, It is emphasized that the freedom of expression cannot become an oppressive and excluding instrument against hypersensitive groups.

Rodolfo Bastos Combat: Random Democracy and Constitutional Juristocracy

Through the reaffirmation of self-government and pluralism, this paper aims to propose means of increasing participation and inclusion of the greatest number of actors in the decision-making process in order to give it greater legitimacy from a democratic perspective, either to broaden the participants in the deliberation or to reveal the interests behind the claims. In this sense, it is proposed the formation of popular courts through mechanisms of random democracy, notably the draw, as an instrument of inclusion of the common citizen in the process of constitutional interpretation, more specifically in the concentrated control of constitutionality or judicial review regarding social, political and economic relevant themes. The popular appropriation of the Constitution is promoted instead of the current "juriscentric" monopoly through dialogue with the social movements and other political actor committed to changing reality. This is where democracy acquires its existence.

Maria Clara Conde Moraes Cosati, Rodolfo Bastos Combat & Victor Hugo Pacheco Lemos: Judicialization of politics, judicial activism and the Brazilian Supreme Court

On the eve of second round of brazilian presidential elections, regional electoral court ordered the search and seizure of alleged irregular propaganda material inside public universities without a court order. In record time, the case has been shifted from the political arena to the judicial sphere. This paper aims to analyse ADPF No. 548 as a notorious case of judicialization of politics adjudicated by the Federal Supreme Court of Brazil, in which the Judiciary Power plays the role of inspector of the democratic process such as the fifth branch pointed out by Ran Hirschl. In addition, it is possible to verify elements of expansion of power and procedural activism by the court based on individual activist behaviors concentrated by the justices, when pronouncing a monocratic decision only one day after the distribution of the process. This phenomenon characterizes an imbalance in separation of powers, due to interference in issues related to Legislative and Executive Powers.

Rebecca Féo de Oliveira: Judicial deference on the rule-making power of Brazilian agencies for market regulation

On the 1990s, through a political reform, also when the cooperation between Brazil and OECD began, the model of market regulation agencies was adopted in Brazil. Influenced by USA administrative agencies, Brazilian agencies are rule-making empowered. Controversies concerning the boundaries of agencies' rules are usual, considering the separation of powers and the Legislative function. There are no general standards in Brazil to guide the judge´s analysis on whether the agency act was under its legally stated competence or not. Therefore, Brazilian courts oscillate from unrestricted deference on the agencies' regulation to its invalidation in specific cases. In 2018, it was stated by law that whenever an administrative rule is invalidated by the judge, he ought to explicit the consequences of such decision, which may discourage judicial activism on this issue. In this scenario, the debate is on the importance of establishing general standards for this kind of judgment.

Juliana Paixão:Unconstitutional State of Affairs in Brazil

The Brazilian Supreme Court has adopted the theory Unconstitutional State of Affairs by influence of Colombian judicial review. Due to failure of public policies against widespread and systemic violation of fundamental rights, the Supreme Court acts as an institutional coordinator, helping state organs overcome political and structural barriers and increase dialogue with the civil society. In the judicial activism, the Supreme Court becomes a key player to coordinate Legislative and Executive branches of government to promote an institutional development. This constitutional adjudication technique guarantees a minimum mandatory level of protection of human rights. This structural injunction model bring up a passionate debate about crisis of democratic legitimacy, judicial intervention and effectiveness of constitutional rights.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

17 ALGORITHMIC "CITIZENSHIP"

The panel investigates algorithmic citizenship: how does the implementation of algorithmic analysis expand, compress or manipulate citizenship rights and freedoms? The widespread use of algorithms stems from their perceived potential to increase public sector delivery capability (i.e. protecting rights and freedoms, granting access to welfare schemes and ensuring legal certainty) and societal inclusiveness. However, these processes often result in the exclusion of disadvantaged groups or minorities and unequal classes of citizens. Further concerns regard the effects of practices such as digital profiling on personality rights, and the impact of mis- and disinformation and targeted political propaganda on social network sites on political rights. Algorithmic analysis creates many concerns, even though its full scale has not been properly explored yet. The five panelist discuss various examples, concerns, legal notions, and state obligations regarding algorithmic citizenship.

Room:

Allende Bascuñan 2

Chair:

Elisa Bertolini

Presenters:

Graziella Romeo
Elisa Bertolini
Paolo Cavaliere
Sarah Eskens
Delphine Dogot

Graziella Romeo: Is algorithmic citizenship a depersonalized citizenship?

Scholarship debate maintains that through technology advances in data processing we can personalize law in order to produce efficiency in its application. This takes place by tailoring legal rules to individual behaviors and features and by adopting micro-directives aligned to each individual. Micro-directives ensure a good grade of law enforcement. But when personalization occurs in the context of citizenship, implications are different. I argue that citizenship should not be personalized for two reasons. Firstly, for the risk of altering the meaning of citizenship to such an extent that it does no longer imply any state commitment. Secondly, for the risk of depersonalizing citizenship by detaching the real individual from his/her persona, ie the character played in a social context. Indeed, through the processing of individual data and behaviors, what we reconstruct is the individual's virtual mask.

Elisa Bertolini: Rated by the algorithm: suggestions from the Chinese Social Credit System

Algorithmic analysis is the technical tool enabling citizens' rating systems to function. The biggest one in terms of people involved and data gathered is the Chinese Social Credit System. Though still in a preliminary stage, the SCS has been tested in some municipalities with different success. The SCS starts from the awareness of state deficiencies (low rate of enforcement of law - financial scams - corruption - tax evasion) and the need to overcome them in the context of a market economy. In order to do so, rating and ranking citizens into different classes allows government and private sector to assess their trustworthiness and compliance to socially acceptable behaviour. Connected to one's score is a specific shade of citizenship, a different extent of enjoyment of rights and freedoms and access to services and benefits. Despite the SCS allows control and fosters political conformity, it's not its primary target. Indeed, it fits the Chinese traditional favour for social conformity.

Paolo Cavaliere: Astroturfing, computational propaganda and the case for "digital disarmament"

During the Conference for the Reduction and Limitation of Armaments of 1932, a motion for 'moral disarmament' emerged, calling for States to cease 'bellicose or aggressive propaganda'. Ever since, the legal notion of propaganda has remained confined to war and hatred - means for propaganda have instead changed and so have the risks connected to it. Current communicative practices based on combined use of algorithms, automation and human curation are widely understood to destabilise democracies and foster hostile narratives at the global level. The paper seeks to reframe the notions of propaganda, on one hand, to reconsider its restrictions in a way attuned to the times, akin to the development of the principle of human security and its focus on the security of citizens in their daily activities through the 1990s - and national information sovereignty on the other hand, as a rationale for the regulation of digital means to counter the spread of malicious propaganda.

Sarah Eskens: Algorithms in the news industry: obligations of states to ensure media freedom and information rights of citizens

Online media increasingly use algorithms to produce and distribute news. Next to that, we see new players in the news industry, e.g. social media. These new technologies and participants challenge the democratic role of the media as watchdog and forum for public debate. Algorithms also change the relationship between media and audiences. News media try to give people what they want, thereby risking that citizens are less informed about public affairs. In Europe, Art 10 ECHR protects freedom of expression and information, including media freedom. Art 10 has been developed by the European Court of Human Rights, and the Council of Europe has further translated these principles into media policy guidance and obligations for States to ensure a favorable environment for free speech. This paper analyses what (positive) obligations European states have to ensure a diverse media market that delivers the news people need to fulfil their role as informed citizen in the face of algorithms.

Delphine Dogot: Digital Profiling, Law and the Stakes of Personalized Governance

Digital profiling is a datamining technology that finds patterns of behavior in large amount of data, with the aim of forecasting future events by correlating data traces about past behavior. Profiling is being used by corporations and regulatory bodies across multiple domains such as security, tax, finance, and health. What is a profile and what does it say about the subject it purposes to capture? The paper analyses the commonalities and differences of various profiling practices, exposing their specific rationale: prediction, targeting, personalization. Investigating the type of governmentality algorithmic profiling is producing, the paper investigates the background rationality of profiles: subjects reduced to their traceable behavior, to correlation and repetition of itemized data. A subject at the same time hyper-contextualized and radically decontextualized, a hypervigilant citizen expected to constantly conform to an ever-changing norm.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

18 REGIONAL AUTONOMY IN ASYMMETRICAL UNITARY STATES: CENTRE-PERIPHERY COORDINATION AND CONFLICT

The panel will discuss how comparative constitutional law can explain new centre-periphery relations observed in countries that share a model of state that we call "asymmetrical unitary state" as they recognize different degrees of administrative and political autonomy to their regions. For instance, the Catalan crisis is the result of a state model that encourages a permanent renegotiation between regions and central government. In China, the ethnic tensions in the Xinjiang Region illustrates the challenges that another asymmetrical state has to face. The French centralized state is actually less symmetrical than it may seem due to current postcolonial dynamics. In the UK, the effects of Brexit on Scotland are still uncertain. By comparing these cases, panelists will identify which are the constitutional mechanisms that facilitate an effective administrative coordination or political tensions between centre and periphery.

Room:

Allende Bascuñan 1

Chairs:

Juan Enrique Serrano Moreno
Sulan Wong
María Gabriela De Abreu Negrón

Presenters:

Feng Lin
Francisco Manuel García Costa
Benoît Delooz
Juan E. Serrano Moreno

Feng Lin: Does the Policy on Ethnic Autonomy Work in China? A Critical Examination of Autonomy Enjoyed by Xinjiang Uyghur Autonomous Region in China

A series of riots happened in Xinjiang in 2009 indicate that Chinese policy on the relationship between the Central Government and Xinjiang Autonomous Region has not worked satisfactorily. It may even be argued that there is something seriously wrong about the policy. The purpose of the paper is to critically evaluate such relationship from legal perspective through comparative study in order to (1) find out what has gone wrong with Chinese ethnic autonomous policy as contained in its Constitution and the national Law on Ethnic Autonomy and (2) offer some suggestions on how to improve the relationship between Xinjiang Autonomous Region and Chinese Central Government.

Francisco Manuel García Costa: Spanish Autonomous State: regulation, development and, final crisis?

We will analyze the creation, development and perspectives of the Autonomus State regulated by the Spanish Constitution of 1978. We will study, first, its constitutional frame: general characteristics, principles, types of Autonomous Communities, ways of exercise of the right to self-government, competences of the Autonomous Communities and Statutes of Autonomy. Secondly, we will examine the evolution of the Autonomous State from 1978 to the present. Finally, we will analyze the process that reached its highest point in the declaration of independence of Catalonia passed in 2017 by the Catalan Parliament as well as the regulation contained in the Spanish Constitution of 1978 concerning the "right to decide" or the "right of secession" or the "disappearance of a State by separation of its parts". The Constitution contains an appropriate regulation of the secession of a part of the State since the "right of secession" is a consequence of the exercise of the power of constitutional review

Benoît Delooz: Unitary state and asymmetrical decentralization in France: solution or source of conflicts?

Contrary to the preconceived ideas, France is no longer the paradigmatic centralized unitary state. Indeed, the country practices an asymmetric decentralization enshrined in the Constitution, and other laws, as a solution to eventual political conflicts with the overseas territories resulting of the colonial era. Since the 1990s, asymmetric decentralization also concerns, on an administrative plane rather than on a political one, the territorial entities of the so-called metropolitan or continental territory. Today, in view of the future introduction of a "right to territorial differentiation" in the Constitution, we need to reflect on the possibilities of combining differentiation, regionalization and reform of the State, without opening the pandora's box that would lead to the local withdrawal, electoral apathy or, worse, the end of peaceful coexistence based on a minimum respect of the principle of equality before the law.

Juan E. Serrano Moreno: The limits of freedom of political association in China and Spain due to centre-periphery conflicts

The recent disqualification on pro-independence claims in Hong Kong and in Catalonia needs to be introduced in the discussion of the current evolution democracy and rule of law. Even if these interdictions may seem undemocratic, the protection of fundamental rights, national unity and security had been considered in the past by constitutional judges as legitimate reasons to restrain the freedom of political association and participation. The comparison between Spain and China is relevant as in both countries the disqualification of candidates and the prohibition of political parties are a result of tensions between the central government and political actors from autonomous regions (Hong Kong, Catalonia and Basque Country). This comparison will allow us to cool down the analysis of these highly controversial issues and explore the border between democracy and authoritarianism.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

19 JUDGING AND ENFORCING HUMAN RIGHTS

Panel formed with individual proposals.

Room:

Auditorio CAP

Chair:

Ana Cristina Pinheiro

Presenters:

Eleni Frantziou
Valéria Zanette
Angel Aday Jimenez Aleman
Iwona Wróblewska
Arpita Sarkar
Ana Cristina Pinheiro & Estenio Menezes Freitas

Eleni Frantziou: A Communicative Theory of Horizontality for Constitutional Rights: More than the Privatisation of Public Law?

Can I host an all-female dinner in my flat? Can I make a room in my flat available to female tenants only? Can I pay female workers less than male workers? This paper aims to identify to what extent constitutional law should be concerned with such questions, as well as if it should supply the relevant method for resolving them. There is a terse relationship between the idea of horizontality (the application of constitutional rights to disputes between private parties) and the identity of constitutional rights as public law claims regulating the process of governing (Loughlin 2003). Horizontal extensions of rights are normally justified by reference to dignity or globalization (Clapham 2006 - Teubner 2012). This paper advances an alternative approach. It argues that an internally coherent theory of horizontality for democratic constitutions can be based on a single jurisdictional test of equal access to the public sphere, understood not through a spatial but through a communicative lens.

Valéria Zanette: Good governance, rule of law and social rights

In periods of economic crisis, social rights have proved to be fragile and neglected by States. It is exactly in these periods, however, that these rights show their intrinsic fundamentality. Constitutional States, in order to achieve good governance, in compliance with the rule of law, must guarantee social rights even in times of crisis - only justifiable setbacks can be accepted. This understanding represents an important development in public international law - good governance is no longer regarded as a neoliberal construction, but as a necessary instrument for States to cope with its constitution and international duties in guaranteeing all human rights, including social rights. Fundamental rights, understood as a whole, demand enforcement of all kinds of rights, realizing the rule of law, as a structuring pillar in good governance, which must go beyond the "publicly promulgated, equally enforced and independently adjudicated".

Angel Aday Jimenez Aleman: Multilevel Protection of the Right to Housing: Towards an Effective Right?

The last decade of financial turmoil in Spain has caused the reconfiguration of its Welfare State. We can confirm this statement looking to the field of the right to adequate housing. Legislatures, courts and public administrations in all the different levels (local, regional, domestic and international) have coped with an increasing social vulnerability in relation with the access and stay in the house, offering us a laboratory to think about what is the best way to realise the right to housing. The objective of this paper is to analyse the recent evolution in the legal nature of this right. Hence, we will take into account the legislative amendments, the forward and backward movements in the constitutional and European case-law, and the wakeup calls from the organs of the universal system of protection of fundamental rights, for the sake of evaluating whether we have come closer to an actual building of an effective subjective right to housing.

Iwona Wróblewska: Publicization of Private Relations by Horizontal Application of Constitutional Rights

Constitutional courts (CCs) are more and more often facing situation in which the status of entities of legal relation escapes public - private distinction. The reasons for this include i.a. the fact that states delegate their tasks to private actors and use private legal forms of action. On the other hand, in the relations between private entities we have often to do with a significant economic or social dominance of one of them, which disturbs the balance between them. To ensure efficiency of fundamental rights CCs develop different instruments that make it possible to apply constitutional provisions also in formally private relations. In this way, CCs play an active role in publicization of private relations. The analysis of the judicial decisions of CCs in particular countries proves that despite significant differences between their legal systems and tools used by CCs (Drittwirkung, state action theory etc.) the mechanism of this publicization is based on universal argumentation.

Arpita Sarkar: Reservation on economic basis in India and its impact on inclusive society

Through principle of precedent and influence of obiters, Supreme Court decisions on reservation have become alienated from historical struggles of depressed classes. The original intent of building inclusive society through reservation is making way for populist demand for reservation on economic basis. Two new developments on this issue have taken place since 2018. Firstly, the Supreme Court decided in Jarnail Singh (2018) that 'creamy layer' applies to Scheduled Castes and Scheduled Tribes as well. Secondly, a constitution amendment in January 2019 inserted reservation for economically weaker sections other than SCs, STs and OBCs, on the basis of family income. These are instances where depressed classes are identified primarily on economic basis both by the judiciary and legislature. The research intends to explore whether the judiciary with support from the legislators, is re-writing jurisprudence of Articles 15 and 16 contrary to original intent, in the name of interpretation?

Ana Cristina Pinheiro & Estenio Menezes Freitas: The principles of dignity and legality in times of change for the guarantee of the social rights of transgendered individuals

The purpose of this study is to analyze the role of constitutional jurisdiction in the application of fundamental principles, focusing on the dignity of the human person, in contravention of the principle of legality, also contained in constitutional norms, especially regarding transgendering / objective requirements for entering the public service, more specifically, in the Armed Forces. Thus, it will be investigated the contemporary problematic affects post-positivism, that is, judicial discretion based on an open, flexible system, so that individual guarantees are in harmony with the legal effects produced, through hermeneutics, so that respect for the right of the personality, can confer dignity, freedom of the use of one's own body and equality to defend minorities, legitimizing the right to obtain judicially the change of gender in the civil registry, with repercussion in the most diverse spheres of law, without prejudice to institutional legality.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

20 THREATS TO DEMOCRACY

Panel formed with individual proposals.

Room:

LLM92

Chair:

Eoin Carolan

Presenters:

Badrinath Rao
Dariusz Adamski
Eoin Carolan
Atagun Mert Kejanlioglu
Tushar Kanti Saha
Zachary Elkins

Badrinath Rao: A Government without power? The aberrations of federalism in India

The Delhi state government has limited powers. Since 2015, the Indian government has impeded its functioning by denuding it of the power to prosecute corrupt officials. It vested administrative powers in the Lieutenant-Governor (LG), an appointee of the Center. In litigation, the Supreme Court ruled against usurping the powers of the state government in service matters. It held that the LG is bound by the advice of the cabinet. I offer three arguments about federalism in India. First, the status of Delhi needs to re-examined to ensure that popular mandate is not thwarted. It has a strong case for full statehood. Ignoring this demand would be a perversion of federalism. Second, an elected government must have autonomy in service matters without which it will be hamstrung. A popular government bereft of police powers is largely ineffective. Third, circumventing federalism sends the ominous message that attempts to change governance will be frustrated.

Dariusz Adamski: EU law against the emerging social contract of democratic backsliding

Democratic backsliding in the EU poses questions about how to understand and how to remedy it. This paper explains this phenomenon as a search for a specific social contract between the illiberal forces and the societies they seek to govern. Potential and actual responses by European institutions to this very challenge, with the particular emphasis on the ground-breaking potential of infringement procedures for supporting the division of powers in the Member States, are discussed next.

Eoin Carolan: Investigating authority in constitutional systems

This paper considers the question in the call for papers as to whether public law has the resources to adapt and respond to the challenges posed by authoritarian threats and rising public distrust? The paper argues that public law's current difficulties are in part related to its tendency in recent decades to rely on narrowly law-oriented conceptions of institutional power. This neglects other potential pathologies of power in a way that inhibits the capacity of public law to deliver on its promise. The lesson from this, it is argued, is that there is a need to adjust our constitutional models to take better account of the sociological and political dimensions of power. In particular, there is a need to move beyond legal-rational notions of authority and investigate the socio-political dynamics through which authority is established - and lost. The paper concludes with a discussion of potential investigative strategies for a forthcoming European Research Council project.

Atagun Mert Kejanlioglu: Legal Education in the Context of Autocratic Legalism

Law is not as static as it appears to be at first sight, it is made or remade in the capillaries of legal profession. This makes legal education an important target for regimes in which autocratic legalism is present. As these regimes try to keep their democratic façade, how law is practiced in the capillaries of society becomes more important. Control over legal education gives the regime an opportunity to influence legal practice more subtly. Therefore, rather than focusing solely on instruments of public law, it may be useful to turn our attention to legal education. In this perspective, I will examine how these regimes target legal education and Turkey will be my main example. I will explain how centralized type of governance for universities blocks the possibility of critical approaches to legal education while allowing the government to have more control on legal education. I will also focus on the tensions between bar associations and government in Turkey and the impact this has on legal training, and eventually, on "law as it is lived" in society.

Tushar Kanti Saha: Presidential Terms, Electoral Contests and Protests against Dictatorial Regimes in Africa

In spite of constitutional democracy installed in paper, African nations and people are suffering relentlessly by dictatorial regimes and the tendency to to rule over people against their free will. An oasis of comport may be gathered from a few countries like Mauritius,, Botswana, Tanzania and South Africa. Most other African countries suffer from trust deficit in the system. African constitutions are mostly designed in Presidential form of government making the term limit a constitutional necessity. However, constitutional term limit in many African countries are being changed in order to extend the lease of life to the class of elected dictatorship.These unhealthy trends are serving as retrograde steps reversing the gear of democratisation process in Africa.The examples of Zimbabwe, Burundi,Togo and election scene in Gambia and emerging scene in Algeria show a Kingly attitude to stay in power. The paper addresses the attendant issues and explores new paths to progress of democracy.

Zachary Elkins: What does militant democracy look like?

I explore the concept of militant democracy in the context of what appear to be persistent threats to the democratic order. I begin with reconstruction of militant democracy, intended to distinguish and identify historical manifestations of the concept. I then trace and document a core element of the concept -- party regulation -- across historical constitutions. I then turn to a particularly acute threat to democracy in developing societies -- executive term-limit evasion. Term-limit evasion accelerates a pernicious negative cycle in which constitutional non-compliance begets constitutional weakness, which in turn begets subsequent non-compliance. Such a negative feedback loop is a core problem in law. Militant democracy, the logic of which implies the entrenchment and protection of term limits, would potentially disrupt such negative cycles.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

21 ANTIDISCRIMINATION AND EQUALITY

Panel formed with individual proposals.

Room:

D302

Chair:

Carissima Mathen

Presenters:

Yuvraj Joshi
Viviana Ponce de León Solís
Fernando Muñoz
José Manuel Díaz de Valdés
Carissima Mathen & Jennifer Chandler
Ilias Trispiotis

Yuvraj Joshi: Affirmative Action as Transitional Justice

This article examines affirmative action as an element of transitional justice by studying the experiences of South Africa and the United States. In fixing their gaze on a limited set of measures such as truth and reconciliation commissions and criminal prosecutions, transitional justice scholars have largely overlooked the role that affirmative action plays in facilitating transition. At the same time, affirmative action scholars have often neglected the ways in which transitional dynamics shape legal and political debates over affirmative action. This article addresses these shortcomings in two primary ways. First, it brings affirmative action and transitional justice scholarship into conversation to show how fundamental insights from transitional justice apply in the context of affirmative action, and how affirmative action sheds light on transitional debates and dilemmas. Second, the project compares the evolving struggle over affirmative action in two countries seeking racial transition.

Viviana Ponce de León Solís: Choice architecture and constitutional values: a nudge towards equality

In recent years, the use of nudges as regulatory tools—including disclosures, graphic and textual warnings, default rules, alterations of physical environments, messaging of social norms, and other forms of choice architecture—has gained increasing attention. While nudge literature typically focuses on the impact of nudging on constitutional values such as human dignity, autonomy, transparency, and welfare, the value of equality is quite often overlooked. Accordingly, this paper seeks to correct this oversight by discussing two phenomena. Firstly, how existing inequalities among nudge recipients can undermine the effectiveness and legitimacy of choice architecture. Secondly, how certain kinds of nudges can either reinforce or overcome existing social stigmas. In light of this analysis, it is argued that nudging can indeed promote equality, as long as it is complemented by other traditional regulatory techniques and takes into account existing inequalities between its recipients.

Fernando Muñoz: Discrimination: on the constitutional history of a fundamental concept

Discrimination is a social phenomenon that can be studied through the exploration of the societal patterns, behavioral strategies, cultural symbols, and economic arrangements that organize, materialize and reproduce the multiple and heterogeneous sources of structural disadvantage that affect various human groups as a whole within past and present societies. But the word discrimination is also a linguistic convention that brings these phenomena to our minds when pronounced - a concept that condenses them semantically. For this reason, it is also possible to approach the social phenomenon that we now call discrimination using as an entry point the study of the construction, circulation and appropriation of the concept that bears this name, the concept of discrimination, in order to understand its place within our sociopolitical vocabularies and to cast light on its continuities and changes over space and time. This presentation seeks to provide historical support for the intuition that at some point a differentiation emerged between discrimination as a "mere" word and discrimination as a fundamental sociopolitical concept.

José Manuel Díaz de Valdés: Reform to the Chilean Antidiscrimination Law and Comparative Standards

The Chilean Antidiscrimination Law has proved to be insufficient and seriously flawed. Enacted in 2012, it has been applied scarcely, with limited results before the Courts. This year, the Government has announced a bill reforming the Antidiscrimination Law, opening a public consultation. This presentation summarises the main problems of the current law. Then, drawing from Comparative Antidiscrimination Law, it proposes several improvements.

Carissima Mathen & Jennifer Chandler: The Equality Rights Implications of Medically Assisted Death in Canada

In 2016, Canada amended its Criminal Code to permit medical assistance in dying (MAID). The amendments followed a Supreme Court decision that the criminal prohibitions on assisted suicide violated the section 7 Charter rights of competent adults who had a "grievous and irremediable condition" that caused them "intolerable suffering." The new law permits some MAID to occur. But it includes two criteria not discussed in Carter: that the condition be "incurable" and that death be "reasonably foreseeable". As a result, some individuals have launched fresh challenges against the new law. This paper looks at the equality rights implications of the new regime with specific attention to substantive equality and the possible role of the Constitution's "affirmative action" clause. Acknowledging competing arguments from the disability rights community, the paper considers which analytical framework is consistent with previous equality rights jurisprudence, and can promote just outcomes.

Ilias Trispiotis: The wrongfulness of religious discrimination

Focusing primarily on the ECHR, my paper tracks the normative justification of religious antidiscrimination on the moral right to ethical independence. The analysis proceeds from the theoretical and doctrinal uncertainty over the relationship between religious antidiscrimination and other rights, such as freedom of religion and freedom of association. Based on a liberal egalitarian account of ethical independence, the paper pursues the argument that religious antidiscrimination, religious freedom and freedom of association, among other rights, share significant parts of their normative foundation on ethical independence. Moreover, I argue that religious antidiscrimination functions as a distinct axis, which complements other rights and, in specific ways, aims to secure sufficient social conditions for ethical independence. The paper aims to highlight the morally distinctive features of religious discrimination and their broader implications for a general theory of discrimination law.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

22 CONTEMPORARY CHALLENGES TO THE FUNDAMENTAL RIGHTS OF POLITICAL MINORITIES

Political minorities are under challenge. Although widely recognized in domestic and international legal arenas, political minorities face a number of theoretical and practical obstacles to the enforcement of their rights. Currently, recent populist upsurges scattered around the globe claim the reversal of longstanding democratic gains contributing to the worsening of this situation. In these contexts, the protection and promotion of fundamental rights of political minorities are under threat. This menace affects not only their realization but also their symbolic and discursive legitimacy. Departing from a Latin-American perspective, this panel seeks to address contemporary challenges in this field of legal theory shedding light on both substantive and institutional aspects regarding women, LGBT and migrant's rights.

Room:

R510

Chairs:

Jane Reis Gonçalves Pereira

Presenters:

Jane Reis Gonçalves Pereira
Juliana Cesario Alvim Gomes
Ligia Fabris Campos
Delfina Beguerie
Sofía del Carmen Treviño Fernández

Jane Reis Gonçalves Pereira: Democratic representation and courts: the problem of political minorities

The paper analyzes how the concept of political representation can be applied to the Judiciary, focusing on the problems of democratic legitimacy that arise when the courts decide about issues that affect political minorities. Confronting several concepts of representation, the author discusses four questions: 1) Can the Judiciary be understood as a representative arena for the people? 2) What are the risks and implications of recognizing, conceptually, that the Judiciary has a representative role? 3) What are the burdens and institutional boundaries that the recognition of this attribute must impose on judges? 4) How underrepresentation of political minorities in courts impact its democratic legitimacy?

Juliana Cesario Alvim Gomes: Sexual Rights: limits and possibilities to the use of the concept

The paper argues that since its origins, the very notion of sexual rights presents itself with contradictions and paradoxes that reflect unresolved conflicts between freedom and equality. Despite the specific contributions that each one of these principles brings to the debate around sexual rights, there are also tensions between them that lead to opposite solutions for concrete cases concerning sexual rights. Based on this premise, the paper aims to explore this point by calling attention to the absence of a legal framework to deal with complex cases involving sexual rights and proposing the adoption of an integrated approach between freedom and equality to cope with them.

Ligia Fabris Campos: Variations on transgender rights in light of the liberalism vs. paternalism debate: a feminist critique

The paper argues that the legal turns on the recognition of transgender rights can be explained as variations within the legal liberalism and paternalism framework: initially as damage (i.e. must be prohibited), then as beneficence (i.e. must be provided and required), lastly as a space of self-realization authorized by the State. Additionally, it calls attention to the fact that the shifts between frameworks occurred within heteronormative paradigm. Finally, it points out the limitations of not challenging heteronormativity and disregarding the contributions that feminist theory and gender studies can bring to this case.

Delfina Beguerie: Fidelity to the Multicultural Transformation: the harm of using stereotypes

Following the return to democracy in the eighties, Latin American constitutions incorporated human rights treaties and embraced multicultural values. This constitutional change could be interpreted to entail an egalitarian commitment to both redistribute wealth and recognize disadvantaged groups. However, governments from across the political spectrum enforced multicultural constitutions favoring recognition of ethno-racial diversity over claims of redistribution of wealth. Using empirical evidence of the profiling of poor young brown boys in the City of Buenos Aires as a case study, I argue that crime prevention law is unfaithful to the egalitarian imperative of multicultural constitutions, even in its most reduced form—the one attending solely to the recognition of diverse groups without any redistribution. I claim that crime prevention standards betray equality because they assume that disadvantaged groups are fixed entities instead of groups disadvantagized through stereotypes.

Sofía del Carmen Treviño Fernández: Backlash and same-sex marriage in Mexico: what is the law of the land?

Using the process of recognition of same-sex marriage in Mexico as a case study, I claim that specific institutional features of a constitutional culture diminish the chances of backlash against supreme court's rulings. This paper identifies two features of the Mexican constitutional culture that can explain why the Mexican Supreme Court ruling was not followed by backlash on this highly contested issue. First, the Mexican approach to judicial review limits the reach of the Court's interpretation of the Constitution, and therefore restricts the role of judges in altering social realities. Second, due to operational dysfunctionalities, the Court is a week institution vis a vis other political actors and for that reason judicial decision-making goes unnoticed and uncontested. In doing so, this paper contributes to the recent discussions on law and politics in Latin American legal scholarship.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

23 ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW

Panel formed with individual proposals.

Room:

D401

Chair:

Justine Bendel

Presenters:

Justine Bendel
Alba Nogueira
Raúl Campusano
Mariarita Circi
Chiara Ingenito
Felipe Clavijo-Ospina & Elizabeth Macpherson

Justine Bendel: Challenging the judicial nature of international courts in international environmental law: an exploration of the relationship between judicial bodies and non-compliance procedures

This paper focuses on the methods of enforcement specific to international environmental treaties. In this area, non-compliance procedures were created to respond to the specificities of international environmental obligations, as an alternative to international courts and tribunals, putting into question the role of such courts and tribunals. Comparing non-compliance procedures with formal dispute settlement allows us to redefine the contours of international adjudication. Therefore, relationships between non-compliance procedures and international courts will be analysed. A core question is whether or not both mechanisms are "competitors" excluding each other or "guarantors" working together, and which of these cases strengthen environmental protection. In other words: how do they interact? Could potential coordination enhance environmental protection? This paper will explore different models on which their relationship can be based.

Alba Nogueira: Circular Economy in the Liberalization Era. Is Public Law prepared to address this new legal paradigm?

Since the birth of environmental Law, its impact on economic development has been a constant.The so-called "most relevant paradigm changes" in the EU Law and policies bring about that debate again.On one hand, the ambitious impulse of liberalization and administrative simplification, especially after the approval of the "Bolkestein Directive" - on the other, its compatibility with the Circular Economy (CE) Strategy that seeks to curb environmental collapse. CE was meant to produce a "complete systemic change ... not only in technologies, but also in organization, society, financing methods and policies".CE requires strong public planning and support.A comprehensive view of CE calls to go beyond waste and focus on design, production and consumption.The dynamics of multi-level, public-private and between companies' collaboration, necessary for CE, can collide with elements clearly prevalent in the current legal order, such as liberalization for an internal market or Competition law.

Raúl Campusano: Escazú treaty: should it be signed? A new environmental debate

The "Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean," Escazu Treaty, it is in the period of signature and ratification. Chile was one of the most active countries in the negotiation process, which began in Santiago in 2014. However, Chile decided not to sign the treaty, arguing the following: First, the need to review in greater depth the possibility of filing claims before the International Court of Justice within the framework of the Pact of Bogotá. That is, review the dispute resolution systems of the treaty and decide if it is in the national interest to adopt those systems. Second, the convenience of reviewing whether national legislation is consistent with the rules and obligations of the treaty. Or, that the country already covers the topics of the treaty with its national legislation and, therefore, its adoption is not necessary. The paper challenges these arguments.

Mariarita Circi: The global framework for integrating the Environmental Social and Governance (ESG) considerations into investments: from preference to duty?

The integration of the ESG considerations into investments is a step-by-step process, which has led to stronger and deeper forms of collaboration between diverse players who are called upon to fulfil a range of roles at a number of different levels and forms: international, regional and national, formal and informal. Is there a risk of conflict and an overlap of competences among them? And how far has this step-by-step approach gone? Do investors have a duty to consider ESG issues? And what is the role of central banks? The multiplication of global standards makes the decision-making process more complex but these standards encourage an improvement of investment institutions' internal procedures possibly producing positive outcomes for investment. How can we bring together these various public interests? Are they conflicting or do they all seek to improve investment performance, opening up new horizons for more sustainable development? And in case of conflicts, who is the judge?

Chiara Ingenito: The role of soft law in environmental protection

Soft law plays an important role in the protection and conservation of environment. In particular environmental law has developed soft law instruments like treaties, declarations, general principles like an example sustainable development goals (SDGs), and guide-lines. Indeed non-binding norms define the protection of environment, in particular after Stockholm Conference, through the creation of UNEP and the Johannesburg Declaration on sustainable development. This paper analyzes the evolution that lead soft law to acquire autonomous role in environmental protection. It started to be applied as such and without the neet of a transposition in norms of hard law. Now, instead, soft law creates norms deliberately non-binding that have legal relevance and able to create a "soft obligation". (In Italy, an example, the numerous cases of guide-lines regarding environment and in partucular waste andling storage and transportation).

Felipe Clavijo-Ospina & Elizabeth Macpherson: The pluralism of river rights in Aotearoa New Zealand and Colombia

In the past year there have been two discrete cases, in very different parts of the world, where rivers have been declared to be 'legal persons'. Much academic and political attention has been given to the case of the Whanganui River in Aotearoa New Zealand, declared by legislation to be a legal person in March 2017. Less-known is the case of the Río Atrato in Colombia, recognised as a legal person by the domestic Constitutional Court in November 2016. In this paper we interrogate the key features of the legal person model adopted in each of the New Zealand and Colombian cases and explore the challenges posed by those features in the local context. We argue that, although there are obvious contextual differences, there are interesting commonalities in the recognition of rivers as legal persons across the New Zealand and Colombian models, which might herald the emergence of a (loose) transnational concept of legal rights for rivers.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

24 CORRUPTION'S CORRUPTING OF LIBERAL DEMOCRACY

Former UN General Secretary Kofi Annan famously defined corruption as "an insidious plague that has a wide range of corrosive effect on societies". Undoubtedly corruption is one of the principal elements that contributes to undermining liberal democracy and is a serious threat to democratic constitutionalism. This panel will consist of two comparative papers and one case study. Greschner's paper will pose the question of whether corrupt actions should also be framed as human rights violations, Borlini's contribution will focus on the achievements and deficiencies of international anti-corruption cooperation, while Frosini's paper will consist of a case study on the successes and failures of Italy's National Anti-Corruption Authority. The panel will be chaired by Tom Daly who in a 2017 underlined how corruption was one of the most important elements in diagnosing "democratic decay".

Room:

D405

Chair:

Tom Gerald Daly

Presenters:

Donna Greschner
Leonardo Borlini
Justin Orlando Frosini

Donna Greschner: Corruption and the Narratives of Human Rights

Corruption is a serious threat to democratic constitutionalism. Anti-corruption measures have criminalized corrupt conduct, and facilitated international cooperation to deter and prosecute crimes of corruption. This presentation will focus on a complementary question. In light of the far-reaching and often horrific consequences of corruption, should corrupt actions also be framed as human rights violations?

Leonardo Borlini: "Not Such a Retrospective": Reflections on the Origins, Evolution and Outcome of the International Anti-Corruption Cooperation

The contribution is a retrospective on the origin and evolution of the international legal framework against corruption. It is developed in two main sections. The first sketches the genealogy of the international legal framework regarding corruption, with a view to showing the multiple elements that have driven its advancement. The second offers a tour d'horizon of the international anti-corruption norms, by showing their main features, common elements and divergences and, ultimately, their achievements, complementing the discussion by highlighting their main deficiencies.

Justin Orlando Frosini: Has the National Anti-Corruption Authority (ANAC) Proved to Be the Best Way of Fighting Corruption in Italy?

In 1980 , after yet another public scandal involving Italian institutions, the-then Secretary General of the Italian Communist Party, Enrico Berlinguer, famously declared that the responsibilities for the malfunctioning of te Italian institutions had to be searched in "a style of government that had constantly generated inefficiencies and confusion, corrupt practices and scandals, connivance and impunity". That was the moment in which the so-called Questione morale (the Moral Question) became Italy's most important national issue. As part of the fight again corruption, in 2012 the Italian National Anti-Corruption Authority was set up. This paper will try to ask the following question: has ANAC been a success in fighting corruption in Italy?

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

25 JUSTICIA Y DERECHO EN EL URUGUAY

The panel will discuss the evolution and the current state of justice and law in Uruguay. Especially in regard to constitutional supremacy, the control of conventionality by the Inter-American Court of Human Rights and the practical application of the Uruguayan Supreme Court of Justice, as well as judicial activism. Likewise, the concurrent or dissident votes of the Uruguayan judges in the Inter-American Court of Human Rights, since its creation, are analyzed.

Room:

D404

Chair:

Ruben Correa Freitas

Presenters:

Ruben Correa Freitas
Cristina Vazquez
María Elena Rocca & Mariel Lorenzo
Javier Paolino

Ruben Correa Freitas: La supremacía constitucional y el control de convencionalidad en el Uruguay

The new reality regarding International Human Rights Law has brought profound changes in the classical concepts of state sovereignty and supremacy of the Constitution. A study on the relationship between the concepts of constitutional supremacy and conventionality control is carried out in the light of the case law of the Inter-American Court of Human Rights. In particular, the concept of constitutional block, the problem of the hierarchy of international treaties on human rights, as well as the scope and effects of conventionality control are analyzed, seeking to determine the viability of its implementation in Uruguay.

Cristina Vazquez: Derecho público, tiempos de cambio y activismo judicial

In this paper we begin by examining the evolution of jurisdictional activity, both with reference to its relative weight in the "checks and balances" system, and in relation to changes in the vision of law, particularly in times of what has been called the "Liquid Law", typical of postmodern society. In this context, the notions of judicial activism and "judicialization" of political activity will be analyzed from a doctrinal and jurisprudential perspective, exploring its origins in the jurisprudence of the US Supreme Court. Next, the evolution of the jurisprudence of the Uruguayan Supreme Court of Justice will be studied in order to show the confrontation of arguments around the question of judicial activism. To conclude, we will outline some final reflections on the topic, even taking into account it is a topic in which we consider extremely difficult to arrive at definitive conclusions.

María Elena Rocca & Mariel Lorenzo: La actuación de los jueces uruguayos en la corte interamericana de derechos humanos

In 2019, 40 years of the creation of the Inter-American Court of Human Rights are commemorated. During these four decades, three of its ministers have been Uruguayan: Héctor Gros Espiell, Alberto Pérez Pérez and, currently, Jorge Pérez Manrique. The date becomes an opportunity to analyze their participation in the judgments of the regional Court. The objectives set forth then are: a) systematize quantitatively dissident or individual opinions of magistrates Gros Espiell and Pérez Pérez, now deceased - b) try to reflect substantive criteria in those dissident or individual votes - and c) intend to explain if these dissident or particular foundations have their cause in opinions of the constitutional Uruguayan doctrine more accepted or not. Of these, the study will be restricted to those in which their vote was dissenting or individual under the terms of Article 66.2 of the American Convention on Human Rights.

Javier Paolino: Control de cumplimiento del derecho internacional de los derechos humanos en el Uruguay

Recently, the Uruguayan Supreme Court of Justice has included in several decisions, assertions about its competence to carry out "conventional control" of laws. Notwithstanding the fact that this jurisprudence of the hierarchical body of the judicial branch has the support of prestigious national doctrine, we allow ourselves to make some points about it. As an example, we analyze the arguments contained in Supreme Court´s decision that resolves about the unconstitutionality of Law No. 18.335.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

26 CONSTITUTIONAL COURTS ENFORCING THE DUE PROCESS OF LAW-MAKING. CHALLENGES FOR THE CONCRETE CONTROL

The panel presents the question on the provenance of the concrete control of constitutionality of the laws and constitutional amendments for defects of form, with emphasis in the Chilean case regarding the inapplicability action. The proposed objectives are to analyze historically and with a comparative perspective the provenance of the control of the legislative processes and the constitutional amendment, the tensions that occur between such control with democratic principle - and the position assumed by the Chilean Constitutional Court on such types of vices. The hypothesis is that, in case of being proceeding, the concrete control of the constitutionality of the vices of form does not operate in the same way as in respect of the substantive vices and that the decision of unconstitutionality generalizes the effects that, in principle, are circumscribed to the specific case. The panel is oriented, in part, to the research framed in the Fondecyt Regular 1180530 project.

Room:

A101

Chairs:

Miriam Henriquez Viñas

Presenters:

Sebastián Soto Velasco
Maria Pía Silva Gallinato
Sabrina Ragone
Enrique Navarro Beltrán
Manuel Nuñez Poblete
Miriam Henríquez Viñas

Sebastián Soto Velasco: Experiencias comparadas del control de constitucionalidad que realizan las cortes sobre los procesos legislativos

In 1688, the Bill of Rights stated that “debates or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament“. Since then, and for centuries, lawmaking process was far from the scrutiny of the judiciary. However, with the spread of constitutional courts after WWII, the so-called interna corporis acta doctrine started to limit its effects in the legislative process. The presentation examines case law of Chilean, Spanish, German and Colombian Constitutional Court and sheds light to new debates over the role of judges in the legislative arena and the right judicial scrutiny of law making due process. At the end, case law shows an active intervention of courts looking for the protection of several constitutional clauses or democratic values.

Maria Pía Silva Gallinato: Control abstracto y concreto de vicios de forma: importancia de los principios democrático y de conservación de los actos del legislador

This contribution analyzes the characteristics of abstract and concrete constitutional control of the vices of the law. Given the autonomy of the legislator in the process of law-making, the powers of the Constitutional Court of Chile and the limits to which it is subject in the examination of such defects are reviewed. To do this, his most relevant case law is analyzed, stopping in which invoked respect for the democratic principle and conservation of the acts of the legislature.

Sabrina Ragone: Requisitos procedimentales como parámetros para el control de normas de rango constitucional

This contribution analyzes the adjudication of constitutional norms on procedural grounds through the lens of comparative law. It shows how and when Supreme and Constitutional Courts have used procedural criteria to decide upon constitutional amendments, devoting special attention to those judgments in which the corresponding parliaments have been considered not to be entitled to pass such amendments. The presentation will focus on concrete cases in order to build a more comprehensive reconstruction of the issue.

Enrique Navarro Beltrán: Inaplicabilidad por vicios de forma. jurisprudencia constitucional del Tribunal Constitucional de Chile

The inapplicability action delivered to the Constitutional Chilean Court (TC) emphasizes the concrete control mechanism of constitutionality. The history of the constitutional norm confirms the thesis that the control of constitutionality also extends to the vices of form - which has been ratified by the jurisprudence of the TC. The presentation examines the jurisprudence of the TC, that has analyzed the situation -particularly- in relation to inapplications linked to precepts that would not have been approved by the constitutional organic quorum, actions that in general have been discarded. There have also been regarding precepts revised preventively by the TC. In the same way, they could also be related to vices associated with the lack of consultation of bodies during the processing of the law, violation of the legal reserve and constitutional limitations on matters delegable in DFL and, in general, breaches to the approval quorum.

Manuel Nuñez Poblete: La generalización de los efectos de la acción de inaplicabilidad por vicios de forma

Miriam Henríquez Viñas: La desnaturalización de la acción de inaplicabilidad por vicios de forma

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

27 THE DEMISE OF CONSTITUTIONAL JUSTICE IN CHILE?

Many suggest that the Chilean Constitutional Court is eroding Chile‘s democracy by preventing parliamentary coalitions from passing sensible legislation on workers‘, students‘, women‘s, and consumers‘ rights. In recent years, the Court has embraced a form of activism erecting itself as the guardian of the Pinochet dictatorship‘s legacy. Some consider these practices and decisions diminishing of the Court‘s own political power, which may actually explain why current parliamentary debates on the Court point toward amending its review powers. This panel reflects on the evolution and trajectory of Chile‘s Constitutional Court‘s case law and practice, in order to place these complaints in due light.

Room:

A102

Chairs:

Jorge Contesse
Sergio Verdugo

Presenters:

Christian Viera
Daniela Mendez
Domingo Lovera
Daniela Marzi
Sergio Verdugo

Christian Viera: Activismo político del Tribunal Constitucional chileno

De un tiempo a esta parte, el Tribunal Constitucional chileno (TCCh) se ha transformado en importante actor en el proceso de formación de las leyes. Lejos de asumir una actitud deferente con el legislador, ha instalado una práctica en que, con interpretaciones extensivas, termina torciendo lo resuelto en el espacio de la deliberación democrática. Esta crítica al TCCh ya se ha hecho, pero cuando su integración era diferente a la actual. Algunos denunciaron que se estaría dando una preocupante práctica de activismo judicial, lo cual supone una amenaza para el sistema democrático. En el presente trabajo se va a retomar esa crítica y mostrar cómo en los últimos años, el TCCh ha terminado siendo el más importante legislador, pero actuando no cómo un árbitro de competencias sino que un actor político al servicio de una determinada ideología.

Daniela Mendez: El Tribunal Constitucional chileno y el activismo judicial: una mirada desde la justicia transicional

El objetivo de esta presentación es explorar las críticas al activismo del Tribunal Constitucional desde una perspectiva de Justicia Transicional, examinando dos hitos que han causado revuelo en el último tiempo. En primer lugar, el cambio de criterio del Tribunal Constitucional desde el año 2015 respecto de los requerimientos de inaplicabilidad por inconstitucionalidad interpuestos por la defensa de acusados en causas por violaciones a los derechos humanos cometidos durante la dictadura. Y en segundo lugar, el requerimiento de inconstitucionalidad en contra de ciertas normas del proyecto de ley que regulan el otorgamiento de la libertad condicional respecto de los condenados por estas violaciones a derechos humanos. Se espera confirmar la existencia de activismo judicial en estos casos, lo que sería una práctica común en la justicia transicional, facilitada, entre otros factores, por la interpretación de carácter maleable dada amuchas de las normas en esta área.

Domingo Lovera: La deforma del derecho

El Tribunal Constitucional ha desarrollado una serie de prácticas que lo alejan del respeto a las formas que gobiernan su funcionamiento y de su propia sujeción a derecho. Esto ha ocurrido cuando ha rectificado el quórum de aprobación de las leyes para así poder juzgar sobre su apego a la constitución - cuando ha admitido formas de interacción con él que frustran las reglas sobre legitimidad activa - cuando se ha desatado de las reglas que regulan sus propias facultades emitiendo pronunciamientos sobre asuntos respecto del que nadie ha reclamado su intervención - y, también, en la medida que se ha animado a reescribir, antes que solo a escrutar la constitucionalidad, las leyes sometidas a su conocimiento. La infracción a las formas que gobiernan las competencias del TC no solo son preocupantes en su propio mérito, sino que en especial tratándose del desempeño de funciones por parte de un órgano cuyas credenciales democráticas son, comparadas con las demás ramas del poder, más débiles.

Daniela Marzi: Tribunal Constitucional y trabajo: un derecho de migajas

Esta presentación examina la manera como el Tribunal Constitucional chileno ha decidido sobre la constitucionalidad de diversas normas laborales y de derecho sindical. Se destaca el capítulo más reciente del papel desempeñado por el TC en materia de trabajo como el más sorpresivo: en el año 2018 determinó que los trabajadores del sector público no tienen derecho a un tribunal para reclamar derechos fundamentales, remitiéndose a la historia de la elaboración de la Constitución de 1980. Esta decisión es criticable no sólo porque el elemento histórico como fundamento para la interpretación constitucional sea particularmente inadecuado en términos técnicos, sino porque el Tribunal Constitucional con ello se vale para fundamentar del proceso que llevó a la dictación de un decreto-ley de dictadura, lo que es en su origen la Constitución de 1980, dejándolo así en la más plena politización de sus funciones y en las antípodas de ser el garante de una Constitución para una democracia.

Sergio Verdugo: *Discussant*

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

28 BEYOND REFERENDUMS IN CONSTITUTIONAL CREATION AND CHANGE

Referendums claim to provide a democratic authorisation for constitutional creation and constitutional change. However, referendums leave a lot to be desired as a complete mechanism for constitutional creation and change. At the level of constitutional practice, many countries have developed mechanisms of participatory and deliberative democracy that function alongside or instead of referendum processes. At the level of constitutional theory, the relationship between referendums, democracy and popular sovereignty has been questioned. The papers in this panel explore both the theoretical and normative limitations of referendums as well as the practical mechanisms that have been developed to replace and supplement them.

Room:

A103

Chair:

Yaniv Roznai

Presenters:

Richard Stacey
Elisabeth Perham & Maartje de Visser
Oran Doyle & Rachael Walsh

Richard Stacey: The Unnecessary Referendum

In emerging and transitioning democracies, a new constitution is often approved by referendum. In a constitutional interregnum, where the previous constitutional system has been abrogated and there are no mechanisms of political expression in place, approval at referendum appears necessary for a new constitution to make a claim to the authority of popular sovereignty. At the same time, the new constitution‘s approval at referendum appears sufficient for that claim. This paper challenges both of these views, arguing that a referendum is neither necessary nor sufficient for a constitution‘s claim to the authority of popular sovereignty. By drawing a distinction between constituent power and popular sovereignty in the first place, and between popular sovereignty and sociological legitimacy in the second place, the paper argues that the claim to popular sovereignty brings with it a substantive commitment to every individual‘s moral autonomy and political equality.

Elisabeth Perham & Maartje de Visser: Challenges and Opportunities of Democracy-enhancing Tools in Constitution-Making in Small States

Expectations around public participation in constitution-making are changing. It is now rarely sufficient for constitutional choices to be crafted by experts and ratified by popular representatives. Nor, often, is it sufficient to endorse constitutional choices through popular referenda or plebiscite processes. Instead, there is an increasing focus on, and arguably an emerging transnational norm around, providing opportunities for active and direct public participation. This paper contributes to that discourse by, first, taking a comparative look at the phenomenon to begin to sketch a typology of participatory mechanisms grounded in their actual usage and second, by analysing the challenges and opportunities associated with such mechanisms using small states (with populations of less than 1.5 million) as the lens, instead of larger states which have been the lens for much existing academic analysis. 15 such small states are found in the Asia-Pacific.

Oran Doyle & Rachael Walsh: Constitutional Disagreement, Deliberation and Change

Constitutions mediate political disagreement across time: constitutional change mechanisms allow the contemporary generation to alter constitutional commitments, thereby impacting upon future generations. Ireland has recently undergone a significant period of constitutional change, during which the right to life of the unborn and the criminal prohibition on blasphemy were removed and the recognition of same-sex marriage was mandated. These changes were all approved by referendum but the proposals for change were shaped by initial recommendations from a forum of deliberative democracy. In this paper, we present Ireland’s Citizens Assembly as a mechanism that: (a) softened the elite power to initiate a referendum - (b) allowed the exploration of contested legal issues that paved the way for the referendum campaign - (c) altered the parameters for the politically-driven constitutional change process, and (d) demonstrated the potential for informed debate on a highly contentious issue.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

29 ROUNDTABLE: JUDICIAL APPOINTMENTS IN A COMPARATIVE PERSPECTIVE - THE KAVANAUGH CONFIRMATION AND BEYOND

The process through which judges are appointed is understood as a key feature in the design of any constitutional democracy. Since judges determine the meaning of the constitutional text and exercise the (stronger or softer) power of judicial review, the control over the composition of the bench caries significant political, economic and legal consequences. Who appoints judges vested with constitutional powers, pursuant to which procedures and criteria, and subject to what forms of review or approval – are all significant questions, as a matter of political practice and theory. The Kavanaugh confirmation in the US and developments in other jurisdictions in liberal and less liberal constitutional democracies call for reflection on the state of the art. The roundtable will address these questions, consider the main challenges facing the appointment procedures in selected jurisdictions, and debate the lessons – practical and theoretical – that may be learned from these developments.

Room:

Aquiles Portaluppi

Chairs:

Sujit Choudhry
Amnon Reichman

Discussants:

Kai Möller
Tímea Drinóczi
Javier Couso Salas
Amnon Reichman

Kai Möller: Discussant – Reflections on Judicial Appointments: Theory and Practice

Tímea Drinóczi: Discussant – Judicial Appointments: The Hungarian Lesson and the Eastern European Context

Javier Couso Salas: Discussant – Judicial Appointments – The Latin American Perspective

Amnon Reichman: Discussant – The Historical Arc and Comparative Significance of the Kavanaugh Confirmation

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

30 A LATIN AMERICAN APPROACH TO INTERNATIONAL ECONOMIC LAW? A REFORM AGENDA FOR A TIME OF CHANGE

Climate change and the protection of other public goods and societal values create a challenge to the orthodoxy in International Economic Law (IEL). Whilst the current zeitgeist increases the necessity of a global approach to public goods' regulation, IEL has not provided satisfactory solutions to those problems. Furthermore, IEL institutions are currently immersed in deep existential crises. It is against this background that this panel aims to provide a novel approach to those discussions by shifting the perspective by focusing on the efforts to tackle those issues through a regional approach. The panel ventures into the analysis of a ´Latin American approach' to discern how the recent international trade and investment agreements concluded in the region tackle both the challenges that trade regulation poses to the protection of public goods widely understood, and the current crisis of traditional IEL.

Room:

Sala Juicio Oral

Chairs:

Andres Delgado
Nicoló Lanzoni

Presenters:

Belen Olmos
Jaime Tijmes
Andres Delgado
Andrea Lucas

Belen Olmos: A "Latin American approach" to International Economic Law?: Reconciling trade liberalisation and investment protection with the safeguard of public interest

Traditionally, Latin American countries have combined their efforts to create customs unions and look-like free trade areas with the pursuit of other societal values, traditionally related to social aspects (labour issues) and the safeguard of human rights and, more recently, environmental protection. All these agreements together make understanding the dynamics of trade and regional integration in Latin America vital to understanding the current context in which International Economic Law (IEL) operates within the region. This paper examines the basic rules and principles of IEL which are applied in the Latin American context so as to show how there might be a specific Latin American approach to IEL. Though Latin American countries have traditionally been considered to be the 'rebels without (or perhaps with) a cause', this rebel nature has also opened the door for further change and innovation when it comes to International Economic Law.

Jaime Tijmes: International Economic Law (& Politics): A Latin American Perspective

International Economic Law (IEL) is law. But is it just law? Is it an exclusively legal phenomenon? Or is it a mere rhetorical tool? The Latin American experience, has taught us not to over-legalize international economic law. IEL is a social phenomenon and, as such, is necessarily linked to politics. IEL is born out of diplomatic negotiations and exists in a political context. Even though in Latin America, the political and diplomatic nature of many economic integration projects may have not been all that evident back in the 1990's, the Latin American experience has not only echoed, but amplified and perhaps even forecasted what would happen at the WTO. An understanding that the essence of IEL is linked to other spheres, and especially to the sphere of international politics and diplomacy. Latin American scholarly debate and the practice of Latin American international economic law have arguably made a significant contribution in this regard.

Andres Delgado: A Latin American Approach to Investor-State Dispute Settlement (ISDS) reform

It is now a commonplace to argue that ISDS is currently going through a legitimacy crisis. Whilst the critique against ISDS has extended throughout the globe the origins of such critique can be traced to Latin America. This paper shows how Latin American States are finding novel ways to reform ISDS. It goes beyond false dichotomies and reflects upon the realities of ISDS reform. Three factors play into such an argument. First, Latin America is the biggest client of ISDS. A majority of ISDS claims have targeted Latin American States. Second, the biggest backlash against the current state of affairs in ISDS has come from Latin American States. Third, the new generation of investment agreements concluded by Latin American Sates are already taking into account the systemic deficiencies that led to the crisis and providing innovative solutions that, not surprisingly, are being downplayed at the multilateral level.

Andrea Lucas: Trade and Investment from a Climate Change perspective: A Latin American approach in a changing time

The relationship between IEL and climate change is only bound to increase in the next years. Latin American States have built a sizeable toolbox to fight against Climate Change . Though the toolbox includes orthodox tools like adaptation and mitigation, it also envisages, more innovative measures closely intertwined with trade and investment flows. This paper argues that Latin American States are a fertile ground to innovate in the fight against climate change. Specifically, this paper shows how the new international trade and investment agreements, and domestic legislation adopted in the Latin American region in the last years are reflecting the increasing impact that Climate Change is having in the regulation of trade and investment in the region. The paper also posits that the Latin American approach to the relationship between trade, investment and climate change can serve as a template for the Global South.

Panel Sessions I

Monday, 1 July 2019
13:45 - 15:20

31 COMPENSATORY DAMAGES FOR HUMAN RIGHTS VIOLATIONS

This panel inaugurates a section of the project "Inter-American Scholarship" (*Doctrina Interamericana*), whose portal http://www.doctrinaidh.com will now include not only an "updated" version of the American Convention on Human Rights according to the Inter-American Court's case law, but also a table with all of the compensations that the Inter-American Court has granted to victims. The portal's information about compensations is broken down according to the type of victim, the kind of damages, the familial relationship of the "secondary victim", etc. The presentations of this panel will deal with the challenges of a system of compensatory damages for human rights violations and with the Inter-American Court's granting of compensatory damages in particular.

Room:

FD 101

Chair:

Álvaro Paúl

Presenters:

Kate O'Regan
Pier Pigozzi
Álvaro Paúl

Kate O'Regan: The Challenges of a System of Compensatory Damages for Human Rights Violations: the Perspective of a Constitutional Court Judge

Pier Pigozzi: A Tool for Analyzing the Inter-American Court's Case Law and Compensations

Álvaro Paúl: The Inter-American Court's Granting of Compensations

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

32 GLOBAL DATA GOVERNANCE AND THE FUTURE OF INTERNATIONAL ORGANIZATIONS

International organizations (IOs) have long been both producers & consumers of data. Digitization, vast volumes of data and new technologies, however, are offering new opportunities. Aggregated in large datasets, digital data from different sources can supplement scant government statistics and offer unprecedented insights into constituencies, space, resources and environments. Often, however, this data is concentrated in the hands of commercial actors whose willingness to share it may be hampered both by business and legal concerns. As both a product of and a key input for emerging technologies, digital data has become an intangible capital, with both public and private actors racing to capture its value and legislators around the globe attempting to regulate data flows & mediate access to public and private data, often with 'extraterritorial' effects. The panel will discuss the role that IOs can play in global governance of data.

Room:

LLM94

Chair:

Guy Fiti Sinclair

Presenters:

Eyal Benvenisti

Dimitri van den Meerssche

Angelina Fisher

Eyal Benvenisti: Global Access to Data: The Role of International Organizations

Digitization and the new sources of data raise questions about obligations of international organizations via-a-vis the data they collect, process and use. Do international organizations have a duty to allow access to their data, and do they have a role in facilitating the flow of data also across state borders to those who wish to benefit from such access?

Dimitri van den Meerssche: Digital Data in Border Control Governance

International organizations are increasingly relying on capacity of private actors to deploy and test emerging technologies. One such context is the deployment of data mining, machine learning and artificial intelligence technologies for border controls, funded by the European Union. What role do international organizations play with respect to governance of data generated by such public-private initiatives?

Angelina Fisher: International Organizations as Global Regulators of Digital Data Flows

International organizations interphase with both public and private actors and operate in multiple jurisdictions. At the same time they enjoy immunity from every legal process of national jurisdictions and their assets and archives are inviolable. As states struggle to align jurisdiction-bound laws with de-territorialized nature of digital data, international organizations may emerge as "data havens". Can international organizations become key actors in global regulation of data flows?

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

33 EL ROL DEL PODER JUDICIAL EN EL CONSTITUCIONALISMO TRANSFORMADOR LATINOAMERICANO Y CONSTRUCCIÓN DEL IUS COMMUNE

(The Role of the Judiciary in Transformative Constitutionalism in Latin America and the Construction of the Ius Commune) - The panel explores the role played by the Judiciary in the construction of a transformative constitutionalism in Latin America: one that contributes to changing the political and social reality of the region, which is strongly marked by exclusion and inequality. It will showcase the experiences of transformative constitutionalism in Chile, Colombia, Brazil, and Mexico, demonstrating that the Judiciary is a central agent for the implementation of rights and for the fulfillment of constitutional promises. These experiences also unveil the development of common denominators concerning human rights, democracy and the rule of law in the region, based on the open statehood of the various national systems to international and regional law. The Judiciary is one of the most relevant agents that have played a key role for the construction in progress of a Ius Constitutionale Commune en América Latina (ICCAL), an original Latin American path of transformative constitutionalism.

Room:

Auditorio A. Silva

Chairs:

Armin von Bogdandy

Presenters:

Miriam Lorena Henríquez Viñas
Jorge Ernesto Roa Roa
Patrícia Perrone Campos Mello
Roberto Niembro

Miriam Lorena Henríquez Viñas: La Jurisprudencia de la Corte Suprema de Chile como un Agente Transformador en la Protección de los Derechos de los Migrantes (The Supreme Court of Chile as a Transformative Agent concerning the Protection of Migrants' Rights)

This paper explains that, for almost a decade, the jurisprudence of the Supreme Court of Justice of Chile has been a leading agent in the protection of the personal liberty of migrants. With this objective, it identifies the eventual violation of the personal liberty of the migrants originated in the application of the immigration law on the occasion of their deportation and the way in which such decisions are reviewed by the Supreme Court via habeas corpus guided by a series of postulates coinciding with the transformative constitutionalism. Undoubtedly, this case law has contributed to the configuration of the Ius Constitutionale Commune en América Latina.

Jorge Ernesto Roa Roa: El Constitucionalismo Transformador frente a la Sala de Máquinas (The Transformative Constitutionalism before the Engine Room)

The paper discusses the engine room's thesis about Latin American constitutionalism (Gargarella, 2013). In particular, the paper remarks that there are manifestations of Transformative Constitutionalism in Latin America through which the infra-application of constitutional promises has been overcome. Also, it will be demonstrated that there are significant incursions in the engine room of some Latin American Constitutions. Some factors have allowed the incursions: i) the generosity of the constitutional provisions, ii) the extension of standing to access constitutional justice (both in the amparo proceedings and in the processes of judicial review), iii) a strong but deliberative judicial power that reacts to structural cases of violation of fundamental rights and iv) mutual support between constitutional justice and inter-American justice.

Patrícia Perrone Campos Mello: Constitucionalismo Transformador y Protector en Brasil: el Ius Commune en América Latina como Estrategia de Resiliencia (Transformative and Protective Constitutionalism in Brazil: The Ius Constitutionale Commune en América Latina as a Resilience Strategy)

This paper has two purposes. The first is to explain the transformative and progressive role played by the Brazilian Supreme Court over the last thirty years of the Brazilian Constitution of 1988, and how the Court's rulings may represent an important contribution to the construction of the Ius Constitutionale Commune en América Latina (ICCAL). The second purpose is to demonstrate that Brazil is currently facing a moment of political and economic crisis, which may endanger part of these achievements. In this new context, ICCAL may be a major tool for the protection of fundamental rights and democracy in the country, and I will explain how.

Roberto Niembro: El Constitucionalismo Transformador en México (The Transformative Constitutionalism in Mexico)

Social transformation is a commitment assumed by the Framers of 1917, so it can be said that our constitutionalism has always been transformative. The agenda of transformative constitutionalism in Mexico has gained momentum in recent years, following a number of progressive rulings issued by the Supreme Court. However, it is important to recognize that the promises of the Constitution of 1917 concerning the implementation of social rights have not been fulfilled. Therefore, constitutional justice must be turned to this matter. Mexico is experiencing a period in which a great social transformation is announced, in which transformative constitutionalism has the opportunity to become a reality, because as Klare explained a long time ago, the transformation can take place in a suitable political and social conjuncture. In addition, it needs continuous popular participation without which it cannot be carried out.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

34 RULE OF LAW CHALLENGES IN A TIME OF CRIMINAL JUSTICE CRISIS: THEORETICAL AND CONSTITUTIONAL ISSUES 2

A series of three panels will explore some of the central challenges to the idea of the rule of law in the face of contemporary criminal justice. Tying criminal justice and state punishment to the rule of law has been traditionally understood as a necessary feature of modern liberal democracies. Contemporary criminal justice, however, seems to challenge many of the central features that rule of law thinking attributes to state action: it is selective, and not universal, the content of the rules applied are complex and thus not always easy to grasp, and administered by a variety of agents acting under very different frameworks. In the fact of this reality, can criminal justice be reconciled with the rule of law? What issues arise out of these tensions? What roles do international human rights and constitutional law play in maintaining the rule of law?

Room:

Sala Reuniones LLM

Chair:

Javier Wilenmann

Presenters:

Hamish Stewart
Javier Wilenmann
Nicola Recchia
Francesco Viganò

Hamish Stewart: The Elusive Virtue of Congruence

Congruence is the requirement that the law should be applied in accordance with its stated content. Congruence is essential to the rule of law. Yet assessing whether any given legal order exhibits this virtud is an extremely difficult task. A particular legal decision is congruent if it is a correct application of the law to facts that have been correctly determined. Moreover, the scale of error matters - the larger the proportion of erroneous decisions in a given society, the less the society it is governed by law. Thus, in order to assess whether a particular decision is congruent, an observer needs to have a better understanding of the facts and the law than whoever made the decision - and to assess whether the legal order exhibits the virtue of congruence, the observer needs to have an enormous amount of information about it. The paper will conclude with some reflections on the relevance of the elusiveness of congruence for the function that the rule of law is supposed to serve.

Javier Wilenmann: State theory, criminal justice decision making and the rule of law project

Traditional accounts of the rule of law do not normally question their theoretical conceptions of the state. As the concept itself deals with the idea of equal normative constraint of all members of a polis, it assumes a vision of the state that makes it partially identical to the formal law itself in both its generality and impersonality. The paper seeks to question the performance of such an assumption by looking at the area of the state that is most sensitive to rule of law demands, namely criminal justice. Modern states show a level of bureaucratic fragmentation that challenges not only the reality but the utility of the impersonal and central image of the state. More importantly, fragmented and selective as it is, modern criminal justice can be hardly linked with the image of the impersonal state. The paper will show how a revision of the state theoretical assumptions may hold much value for the development of the idea of the rule of law.

Nicola Recchia: Is criminal law “special“? A defense of a stricter scrutiny of judicial review of legislation in criminal matters

The question of the legitimacy in a democratic society of the judicial review of legislation has been widely discussed in the constitutional law theory. Is this question to answer differently in the criminal law context? Is, in other words, criminal law special? And in what terms? The paper will try to defend the thesis that criminal law is indeed special and calls for a stricter scrutiny of legislation. The fundamental rights in this context tend to find no representation in the political arena and have then much more difficulties to find their way through democratic representation. It is then understandable that, especially in this context, constitutions are much more detailed than in other areas of law and constitutional courts adopt a stricter scrutiny.

Francesco Viganò: Proportionality of penalties as a fundamental right?

Proportionality in criminal law is usually discussed in relationship to criminalization or as a criterion for the judicial determination of the penalty. This paper asks to what extent proportionality of the penalty can also work as an individual fundamental (or human) right, based on domestic Constitutions or international human rights instruments. As a fundamental right, proportionality of penalties operates in two directions. On the one hand, it is a limit to judicial discretion in the determination of the penalty. On the other hand, it can be conceived as a limit to legislative discretion in setting the appropriate sentencing framework for an offence. Thus, criminal laws providing for disproportionate sentencing frameworks could be declared void or held incompatible with human rights standards, in as far as they can lead to the imposition of such sentences. These two basic functions are discussed in the light of the most recent case law of the Italian Constitutional Court.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

35 SOVEREIGNTY, CONSTITUTION AND DEMOCRACY: TENSIONS, CONTRADICTIONS AND CONVERGENCES IN THE 21ST CENTURY (PART B)

This panel, split into parts A and B, aims to face the existent challenges in the relationship between Law and Politics, basing itself on the assumption that such challenges are inevitable consequences of the tension between constitutionalism and democracy. Latin America has been going through a conflicting moment in its political and constitutional history: after a period of arising of new rights in constitutions with institutional designs which were more amenable to the sharing of political power, one now notices a great tension between political agents as to what regards the just (or at least more prudent) sharing of authority. In this contentious scenario, rethinking the relationship between constitutionalism and democracy is a must. It is this panel's proposal, thus, to think of new possibilities in the relationship between Law and Politics and ways of sharing political authority, in an agonistic perspective, connected to the challenges of the 21st Century.

Room:

LLM91

Chairs:

Estefânia Maria de Queiroz Barboza

Glauco Salomao

Presenters:

Vera Karam de Chueiri & Heloisa Fernandes Câmara

Katya Kozicki & Maria Helena Fonseca Faller

Vera Karam de Chueiri & Ana Claudia Milani e Silva

José Arthur Castillo de Macedo & Thais Amoroso Paschoal

Vera Karam de Chueiri & Heloisa Fernandes Câmara: Brazilian Constitutional Hardball: Institutions and the Constitutional Instability

Past experiences considered that main threats to democracy were the coups d'états. However, in a global context, the processes initiated in elected governments resulted in the democracy embrittlement. One of the mechanisms used in this process is the constitutional hardball: the use of mechanisms allowed by the constitution and laws regard the relationship between the powers, can lead to the weakening of the mechanisms of checks and balances. It occurs when the mechanisms of direct confrontation between the powers are established, extrapolating the regular and cooperative interpretation. The present work intends to analyse the Brazilian political crisis based on the constitutional hardball. The process of a political and economic crisis led to the questioning of institutions and, for some, a constitutional crisis. The aim of this paper is to evaluate to what extent the different interpretation of the constitution is a central part of the process of Brazilian democratic fragilization

Katya Kozicki & Maria Helena Fonseca Faller: Radicalizar la democracia, popularizar la constitución: un ensayo para mayor participación ciudadana en la política

Contemporary democracies have been experiencing a process of exhaustion of its certainties and of its paradigms which sustained them for decades. It is necessary to rethink its foundations and to reformulate its central institutions. In plural societies, the matter of a greater sharing of political power is imposed. The definition of politics must be debated by who will be affected by it. From this perspective, this essay articulates the theoretical matrix of radical democracy with theories of popular constitutionalism, in order to verify whether democratic institutional designs and public spheres would provide greater popular participation in politics. It concludes that the democratic radicalization associated with the strengthening of a popular constitutionalism favors the notion of plural public spheres, with democratically designed institutions, to develop greater access to political power by the people, increasing citizen participation in the construction of democracies

Vera Karam de Chueiri & Ana Claudia Milani e Silva: Urban struggles and radical democracy: perspectives for a democratic constitucionalism

The right to the city is a right to reinvent the city according to the wishes and desires of its own inhabitants. It is about reconstituting the city as 'oeuvre' instead of product, of retaking its use value to the detriment of the exchange value and recovering the characteristics of mediation, centrality and difference typical of the urban. The struggles for the right to the city thus puts in question the restoration of this space as a political environment and are oriented towards the construction of a more democratic urban space, replacing the fragmentation by the reunion without, however, eliminating the conflict. In this sense, these struggles present the potential of a radical democracy. This paper therefore aims to analyze under what aspects the relationship between urban struggle and radical democracy is constituted and in what sense the elements resulting from this analysis can contribute to the debate on a democratic and transformative constitutionalism

José Arthur Castillo de Macedo & Thais Amoroso Paschoal: Tutela colectiva, cooperação e transfederalismo: compartilhando problemas e soluções

The text presents a reinterpretation of the constitutional system of division of powers, of state cooperation and of the collective protection of rights based on a concrete case: the breakdown of the Mariana Dam (in Brazil) in 2015. The case illustrates what we refer to as transfederalism. This notion describes the reconfiguration of the Brazilian state in the 21st century, which is structurally crossed by transversal relations of power and is constituted by the dispute for rights, powers and identities. By recognizing the current stage of the vindication if rights and the configuration of state structure allows for a more complex understanding of the problems and institutes of cooperation, of collective enforcement of rights and of shared authority. In this sense, the case is emblematic to exalt the need for judicial cooperation between organs of different federated entities, encouraged by collective tutelage of rights and, above all, how such cooperation can occur

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

36 THE NORMATIVE FOUNDATIONS OF ADMINISTRATIVE LAW

Historically, administrative law has proved to be a rather flexible and adaptable body of law. It has developed as a multi-purpose project, aimed both at developing and structuring administrative power. Such process has followed several routes, the combination of which has gradually defined the mission of administrative law within and outside state legal orders. Administrative law has also been functional to the operationalization of a great variety of ideologies and political programs, ranging from socialism to economic liberalism. And it has flourished within different constitutional settings and legal contexts. While flexibility and adaptability may contribute to explain the lasting success of administrative law and its expansion in the globalized legal world, they also question its capacity as a normative project. The panel aims at reflecting on such issues, in order to identify their multiple dimensions and to frame a research agenda on administrative law as a normative project.

Room:

LLM93

Chair:

Edoardo Chiti

Presenters:

Bernardo Giorgio Mattarella
Mariana Prado
Peter Lindseth
Joana Mendes

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

37 FOREIGN DIRECT INVESTMENTS SCREENING: A CHALLENGE FOR PUBLIC LAW

The administrative measures of economic protectionism do not only consist in the classical imposition of commercial duties. A modern way to conduct trade wars consists in the use of administrative measures formally aimed to check foreign direct investments for national security and other public interests‘ concerns. On the one hand, FDI can be an opportunity for national economic development, while, on the other hand, they can be an instrument through which foreign entities may acquire control of strategic sectors of other nations‘ economies. The panel intends to discuss the different ways through which the national governments control the flow of resources from abroad, to understand their stage of development and the steps made for their harmonization. It should be considered that the whole set of laws in this field is undergoing a series of reforms in many countries, such as the one adopted in the USA and the new EU regulation establishing a common framework for the screening of FDI.

Room:

LLM92

Chairs:

Giulio Napolitano

Presenters:

Samed Sahin

Bruno Paolo Amicarelli

Maria Stella Bonomi

Samed Sahin: European Foreign Direct Investment Screenings and Control Mechanisms in the Light of the Charter of Fundamental Rights

Despite the judicial doctrine on fundamental rights in the EU being not fully developed yet, the status quo allows us already to contextualize regulatory activities in the fundamental rights framework. The codification of the Charter of Fundamental Rights in the EU has contributed to this development significantly. In this regard, the recent “Regulation establishing a framework for screening of foreign direct investments into the EU“ raises several issues, e.g. the personal scope of the Charter – particularly regarding third country entities and state owned enterprises or entities with strong links to third country governments - the material scope of certain fundamental rights with regard to FDI - and eventually the effectiveness of fundamental rights against administrative measures under FDI regulation. The analysis addresses these issues and sheds light on a potential shift concerning the functioning of fundamental rights in this field: from remedies to regulatory design.

Bruno Paolo Amicarelli: Remedies against Unlawful Foreign Direct Investments Screening Measures under the New Common EU Regulation

The use of powers aimed to check FDIs always poses many problems for foreign investors: firstly, unclear legal frameworks in this field are quite diffused, and this gives a problem of legal certainty - a second related problem concerns the possibility to exercise remedies against unlawful decisions which forbid foreign investments, especially the chance to appeal the decision in court. Very often States do not provide any kind of remedy: in this case the foreign investor can only invoke the diplomatic protection from its own State. As a consequence, special attention will be devoted to the Investor-State dispute settlement mechanism, which allows the involved parties to refer to an international arbiter rather than defer disputes to local courts or to diplomacy, and the new European regulation on FDIs, which obliges every EU member State to guarantee judicial review against screening measures issued by the Government.

Maria Stella Bonomi: Foreign Direct Investments Screening Measures and Duty to Give Reasons

The recent reforms in the field of foreign direct investments screening measures address national securities and other public interests‘ risks in various forms. However, they may also conceal different concerns, such as the fear of predatory acquisitions of relevant local businesses from foreign countries. As a consequence, the above-mentioned measures may be used to create commercial barriers in spite of the many international Treaties which guarantee freedom of trades. Therefore, attention must be devoted to analyze how national governments justify the use of powers which forbid investments from abroad and to understand if there are common reasons among different countries. In particular, the study will deepen recent cases of use of the so-called “golden power“ in Italy, which were aimed to oppose possible phenomena of foreign governments driven acquisitions.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

38 CURRENT CONSTITUTIONAL AND POLITICAL CHALLENGES IN EUROPE

Panel formed with individual proposals.

Room:

Seminario 3

Chairs:

Pablo José Castillo Ortiz

Presenters:

Radek Píša
Ivan Sammut
Ermioni Xanthopoulou
Pablo José Castillo Ortiz
Orbán Endre
Beniamino Caravita di Toritto

Radek Píša: Fortified Majority

This paper explores the motives to include significant safeguards into the new Hungarian constitution. The first part describes the rise of Fidesz and its electoral victory in 2010, including more systematic interpretation concerning the origins of this large party system shift. The second part probes relevant theories of constitutional entrenchment and finds that there is no fundamental explanation why the constitution is drafted like it is. In conclusion, the paper disagrees with the most of present scholarship, which is considering the new Hungarian constitution to be formally within EU mainstream, while expressing concerns about Viktor Orbán's illiberal project behind it. In contrast, I think the constitution itself is sloppily drafted, with a potential to create a dangerous crisis after Orbán's eventual demise.

Ivan Sammut: Mixed legal systems – A 'loving' marriage of legal systems or a curse – The case study of Malta in the EU context

A state who has ended up with a mixed legal system whether by choice or by history is in a better position to face the new legal challenge posed by economics and politics? Hence reference is made to the constitutional/administrative law setting. Reference is made to the evolution of the legal system of Malta which for centuries has been a pure civil system. Then when Malta has been a British colony for a century and a half, common law was introduced. After independence, Malta opted out of a free choice to consolidate the mixedness in its system and common law influence became stronger. Needless to say, for the last two decades, there has also been a strong influence from the EU legal system. Reference is also made as to how the Maltese legal system adapted itself with its 'marriage' with the EU legal order and how Malta managed to reconcile the Westminster model of parliamentary supremacy with constitutional supremacy and then with EU law supremacy with its accession to the EU.

Ermioni Xanthopoulou: Rights and Trust in EU Criminal Law: Age of Distrust or Pragmatic Trust?

The goal of the EU with respect to the AFSJ is the creation of an open and secure space in a Europe, without internal borders, but with an evolving justice agenda. Transnational cooperation in these areas is based on Member States mutually trusting each other on offering a sufficient level of fundamental rights protection, which allows the mutual recognition of decisions of national authorities (judicial or not). The existence of mutual trust is therefore the cornerstone in this area, without which the operation of mutual recognition becomes dysfunctional. Mutual trust among Member States regarding the protection of fundamental rights is more often presumed or commanded by the Court rather than properly constructed, or even thoroughly checked. This crisis in the premise of mutual trust stemming from a compulsive presumption has acted to the detriment of the protection of fundamental rights. However, this is slowly changing. The paper will discuss the slow changes of this relationship in light of recent case law.

Pablo José Castillo Ortiz: The Radical Right Party 'Vox': a Threat to Liberal Constitutionalism in Spain?

The emergence of the radical right party Vox in Spain has dramatically altered the political landscape in this country. This paper carries out an analysis of the political manifesto of this party with a double aim: analyzing whether their political proposals qualify as 'illiberal' and assessing the extent to which the Spanish Constitution can constrain the party. As it will be showed, a number of proposals by this party do qualify as 'illiberal' and, if implemented, might deteriorate democracy in Spain. However, those proposals are hardly compatible with any reasonable interpretation of the Spanish Constitution. Given that such Constitution is very rigid, such proposals are not politically viable. This will force the party to face a constitutional politics dilemma: either the party moderates so that its proposals fit the constitutional frame, or it radicalizes and rejects the Spanish Constitution as an insurmountable obstacle to the realization of its policy preferences.

Orbán Endre: The Symptoms of Distrust in the Fundamental Law of Hungary and in its 7th Amendment

North differentiates between formal and informal elements of institutions, and there might be a strong relation between the two. E.g. the idea of power-sharing can be seen as a tool to overcome the 'state of fear'. However, other emotions may shape the wording of constitutions, too (Sajó). E.g. a short text can be labelled as a trust-based text which leaves a larger interpratative sphere for the judges (Dixon). Yet, an empirical research has shown that there is a negative correlation between the level of trust and the length of constitutions (Voigt). This paper aims to present the symptoms of institutional distrust within the Fundamental Law of Hungary and its 7th amendment. It will be presented a restrictive tendency vis-á-vis the Constitutional Court (e.g. the repeal of the former case law, the overruling of the decisions, the limitation of the powers and so on) and the new pressure for a centralized interpretation of the laws toward ordinary courts appeared in the 7th amendment.

Beniamino Caravita di Toritto: Where is Europe going? Paths and perspectives of the European federalising process

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

39 DIALOGIC CONSTITUTIONALISM I

Panel formed with individual proposals.

Room:

Seminario 2

Chairs:

Daniel Wunder Hachem

Presenters:

Arturo Fermandois
Carlos Ignacio Giuffré
Daniel Wunder Hachem & Eloi Pethechust
Jan Podkowik, Marek Zubik & Robert Rybski
Chien-Chih Lin

Arturo Fermandois: Constitutional dialogue between judicial branches: removing obstacles for concrete review of constitutionality in Chile

New and increasingly intense jurisdictional disputes arise between the Constitutional Court (CC) and the Supreme Court (SC) in Chile. In 2005, a constitutional amendment took away from the SC the concrete review of constitutionality, i.e., the constitutional review of legislation in a concrete case, with effect only for the parties of the case. The amendment made the CC the see of the concrete review, thus making it the single most relevant organ in the judicial review of legislation. Because the CC only decides on whether the legal provision is constitutional - the actual case being still decided by ordinary courts - the actual design has produced friction between the CC and the SC. That happens when they disagree on the relevance of the legal provision declared inapplicable on grounds of unconstitutionality by the CC. Dialogic constitutionalism may illuminate and mitigate this problem. We argue that the corresponding provisions of the Constitution and the organic law of the CC should open a procedural opportunity for these branches to dialogue procedurally. If the ordinary judge or court is heard at the moment when the CC decides on the admissibility of a concrete constitutional claim, that decision will consider and may reflect the opinion of ordinary courts, thus reducing friction after the decision. As a counterpart, we propose to make binding the CC decision on the decisiveness issue. That means the Supreme Court should consider the legal provision reviewed, and eventually struck down because its unconstitutionality, as decisive in the lawsuit.

Carlos Ignacio Giuffré: Dialogic Constitutionalism: An Analysis of its Conditions of Appearance

The aim of this work is to examine the conditions of appearance of the dialogic constitutionalism. The thesis that is desired to defend is that the reason because the dialogic constitutionalism emerges at the end of the 20th century is double. On one hand, as a result from structural objections led to constitutional jurisdiction. On the other hand, as a result from the deliberative turn of democracy, specifically for its theoretical contributions to the development of dialogic constitutionalism and for its limitations in order to approach to those objections to the courts. This paper proposes three specific argumentative stages. Firstly, systematise structural objections that are led to constitutional jurisdiction. Secondly, examine the most outstanding links of deliberative democracy. Thirdly, reconstruct the structural objections that are led to constitutional jurisdiction and the deliberative turn of the democracy as conditions of appearance of the dialogic constitutionalism.

Daniel Wunder Hachem & Eloi Pethechust: Forced dialogue or overlapping monologues? The override of Brazilian Supreme Court's decisions by the Congress through constitutional amendments

The Brazilian system of judicial review confers broad powers to the Federal Supreme Court regarding the definition of the meaning of the Constitution. As a reaction to this strong model of control, the National Congress has adopted as a reaction strategy the approval of constitutional amendments as a way of overriding judicial decisions that strike down legislation. The article aims to examine this phenomenon based on the theory of constitutional dialogues developed in Canadian law, using as theoretical framework the ideas of Peter Hogg and Allison Bushell, Kent Roach and Luc Tremblay, to verify if it is possible to consider this interaction between Legislative and Judiciary as an authentic constitutional dialogue. The method used was the bibliographical review, the case study, the analysis of jurisprudence and the manifestations of the parliamentarians in the National Congress. The study concludes that in the cases analyzed there was no effective dialogue, but rather an overlap of monologues among the actors involved, since the reasons of the Federal Supreme Court in general are not taken into account by the National Congress.

Jan Podkowik, Marek Zubik & Robert Rybski: Judicial dialogue in Europe. Between harmony and cacophony on the example of personal data protection

Between 2008 and 2015 a dozen of the European constitutional courts, as well as the UE Court of Justice, assessed legal provisions on data retention. Judiciary on this pan-European mass-surveillance measure poses a unique research opportunity. We argue that ad hoc confederation of constitutional courts within the EU has been established despite lack of regulations enforcing such cooperation. It was caused by the introduction of a legal mechanism interfering with fundamental rights, specificity of the EU legal order which resembles a system of connected vessels and one common legal problem of a major social significance. On the basis of this unique maze of judgments, we identified three cooperation models that those constitutional courts took. The keystone of those models was their approach towards the European Court of Human Rights and the Court of Justice of the European Union. In our presentation, we will discuss how this unique dialogue of courts proceeded and what its effects were.

Chien-Chih Lin: Judicial Dialogue or Monologue? Exploring Noncompliance with Judicial Rulings

Recent decades have witnessed the mushroom of constitutional courts around the globe. Nevertheless, constitutional interpretation is a politically risky enterprise: some constitutional courts encounter vehement political backlash and have been dismantled. Even for those that survive the political attack, not all courts are equally successful in checking the political branches and protecting fundamental rights. Using the Taiwan Constitutional Court as an example, this paper suggests that there are three dimensions of failure: 1) judicial decisions are simply ignored by the political branches as if it did not exist - 2) judicial decisions are not implemented in time - 3) judicial decisions are implemented in a wrong way that is not what the Constitutional Court demanded or expected. The fact that judicial decisions are not always faithfully implemented by the political branches further casts doubt on, among other things, the effectiveness of judicial dialogue.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

40 THE PRACTICE OF CONSTITUTIONAL DEMOCRACY

This panels explores several contemporary problems in constitutional democracy. The first problem is that of social rights and equality. Equality is said to be a foundation of constitutional democracy, but that is only a threat in many regimes. A second problem is abusive constitutionalism, the use of constitutional reform to subvert constitutionalism.

Room:

D304

Chairs:

Antonia Baraggia

Presenters:

Mariana Rodrigues Canotilho
Oren Tamir
Carmen Montesinos Padillo
Johanna Frolich
Alexander Somit

Mariana Rodrigues Canotilho: No taxation without equality: taxes and (other) austerity measures from an equality perspective

Portugal was one of the most affected countries both by the economic and social crisis that swept through Europe after 2008, and by the austerity measures adopted to tackle with it. Between 2010 and 2014, the country‘s Governments approved different packages of legislation with the intention of lowering the public deficit - addressing creditors‘ demands - stabilizing the economy and creating a legal framework that would promote economic growth. The so-called ‘austerity measures‘ may be grouped around three interdependent and intertwined axes: fiscal policy, social rights and labour law. This paper will critically evaluate many of these measures under an equality perspective. I will review significant reforms regarding all three main policies (fiscal rules, social rights rules and standards, and labour law).

Oren Tamir: Abusive “Abusive Constitutionalism“

The paper focuses on the case study of Israel and argues that scholars there have accepted the “abusive constitutionalism“ framework and made it central to their critique of current political and constitutional affairs there, suggesting that the country faces a serious risk of sliding into some form or another of authoritarianism. Rather than a change from a constitutional democracy to an authoritarian regime, the paper argues that the change Israel is going through is in fact a change within the broader project of liberal constitutionalism. Importantly, the paper further suggests that the critique that frames Israel as an “abusive“ system strengthens the forces that support this particular change, which is precisely what those raising the critique wish to avoid and what makes the Israeli case one of abusive “abusive constitutionalism.“

Carmen Montesinos Padillo: The Constitutional Reform as a Barrier against the Economic Globalization. State of the Matter in Spain and Proposals for Action

The institute of constitutional reform conciliates the principles of democracy and constitutional supremacy and fosters the balance between stability and change. Nowadays, in Spain this change is inescapable. However, in the face of proposals relating, among others, to the distribution of powers between the State and Autonomous Communities, or the recovery of public confidence in democratic institutions, well articulated and sufficiently well-founded, the impulses to contain the perverse effects of globalization on our economic constitutional model, they seem timid and insufficient. Especially as regards the effects of the constitutionalization of the principle of budgetary stability on the social rights. This paper aims to highlight the need to erect walls of constitutional containment to an unbridled neoliberal capitalism, formulating reform proposals to pave the way to the recovery by the State of part of the lost power in the context of the post-Westphalian model crisis.

Johanna Frolich: ***Discussant***

Alexander Somit: ***Discussant***

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

41 PROBLEMS IN THE THEORY AND PRACTICE OF CONSTITUTIONAL DEMOCRACY

This panel explores different problems in the theory of constitutional democracy. Some problems concern the role of the rule of law. Others concern the constraining power of constitutions. Still others concern the role of courts and the fine line between a constitutional democracy and autocracy.

Room:

Auditorio E. Frei

Chairs:

Sandy Levinson

Presenters:

Kim Lane Scheppele
Martin Krygier
Mark Graber
Mariana Rezende Oliveria
Yvonne Tew
Sandy Levinson

Kim Lane Scheppele: Wolves in Sheep's Clothing: Distinguishing Democrats from Autocrats in a World of Backsliding

New autocrats these days comes to power in (more or less) free and fair elections. They then change the legal rules to ensure that the constraints under which they should constitutionally govern are loosened and they alter the election laws to ensure that they cannot be removed from power. The fact that all of this occurs by law often fools the critics. In this paper, I discuss how to recognize the danger signals of creeping autocracy by deconstructing some of the typical legal moves that creeping autocracy takes.

Martin Krygier: What's the Point of the Rule of Law

While the idea of the rule of law is too important to reject or ignore, as thrown around in contemporary discussions it is too confused and confusing to guide. If it is to be revived, it needs to be re-imagined. What follows is an attempt at such re-imagining. Since the rule of law is typically seen as a response to a problem, often described as arbitrary power, the paper attempts to say what sort of a problem that is, and why it has so often been regarded as problematic.

Mark Graber: Constitutions as Constraints

This paper examines constitutions as constraining mechanisms. The first section reviews the common view that constitutions are mechanisms for constraining political enemies or unsympathetic constitutional decision makers. The second section examines invalidation, neglect, circumvention and capture, the strategies unsympathetic constitutional decision makers may employ when seeking to frustrate efforts to constrain them constitutionally. The last section explores the limited capacity constitutional reformers have to prevent or inhibit invalidation, neglect, circumvention and capture. Constitutionally constraining unsympathetic decision makers is at best a reasonable strategy for achieving a particular constitutional result, such as establishing the date on which a president takes office. Constitutional reformers seeking fundamental regime change, must employ other strategies for making their constitutional vision the official law of the land.

Mariana Rezende Oliveria: Which democracy: Questioning Courts as Democracy Builders

Literature on democratization poses a strong emphasis on belief in constitutional courts as building tools for democracy. More recently, however, critical views of this correlation have been presented, especially regarding democratic consolidation. Hirschl questions the construction of a "Juristocracy," whereby the empowerment of the courts leads to a gradual shift from the legislative to the judiciary as the final instance of political decisions. Daly, on the other hand, questions the supposed efficacy of constitutional courts as tools of democracy building and consolidation, especially when qualitative evaluation is brought to the equation. Further on, underlying the defense of this tool as indispensable for a successful democratization process, there is a specific, non-neutral, paradigm of democracy, which leads to the promotion of certain tools, in detriment of others. In order to contribute to that debate, this paradigm is to be investigated, as proposed in the paper.

Yvonne Tew: *Discussant*

Sandy Levinson: *Discussant*

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

42 CHALLENGING AND PROPAGATING NEOLIBERALISM ACROSS THE GLOBE

Panel formed with individual proposals.

Room:

Seminario 1

Chairs:

Diego Gil Mc Cawley

Presenters:

Leticia Kreuz
Aneta Tyc
Dragica Vujadinovic
Vijayashri Sripati
Diego Gil Mc Cawley

Leticia Kreuz: From abusive to intersectional constitutionalism – a deontologial analysis

The Brazilian Constitution of 1988 states a project of a Social State, committed to defending gender and racial equality, social justice and human dignity. However, Brazil has undergone a series of legal changes that take away social rights and put the constitutional project at risk. The current office is an example of abusive constitutionalism, which utilizes popular legitimacy to impose constitutional-amendment proposals that can radically change the Constitution‘s purpose, like the neoliberal social-security reform, flexibilization of labour rights, changes related to abortion rights, amongst others. This paper aims to defend the concept of intersectional constitutionalism, which is the vindication of a radical point of view about the Constitution based on gender, race and social relations, with minorities at the centre of the constitutional design. In an ideal scenario, intersectional constitutionalism is a deontological state of constitutionalism.

Aneta Tyc: How to Shape the Future Direction of Global Labour Governance

As the ILO celebrates its 100th anniversary in 2019, it is unavoidable to take stock of the effectiveness of its enforcement mechanisms. Although the ILO has proved its capacity to define, evaluate, and monitor international labour standards, it lacks tools to enforce compliance with ILO agreements. Procedural compliance, concerned with formal obligations such as reporting, seems to be on the decline. Substantive compliance, i.e. whether states have fulfilled obligations set out in an international instrument, is also unsatisfactory, especially in terms that ILO appears to be unable to respond to cases of non-compliance. As ILO has no effective mechanism to impose sanctions against countries that fail to comply with its agreements, many authors draw attention to the potential of the WTO in this regard. The findings complement existing research on possible future strategies related to both “the institutional approach“ and “the integrated legislative approach“.

Dragica Vujadinovic: Neoliberal and Welfare State Strategies of Development and of Understanding the Causes of the Crisis and Ways Out

This presentation deals with the neoliberal and welfare state conception of social development as dominant but mutually contrasted ones in the contemporary political discourse and real life. Policies based on one or another conception have determined a destiny of many generations and will significantly determine solving of the current crisis and insofar also the destiny of future generations. There lies an importance of a comparative analyzing these two conceptions. Main ideas behind this presentation are: 1. The neoliberal turn in a development of liberal capitalism from 1980s caused the current global and Euro zone crisis. 2. Austerity measures represent the neoliberal mechanism which cannot solve the crisis, but make it ever deeper - 3. The new welfare turn is necessary (different from the post WWII social welfare model) for overcoming both the Euro zone and global crisis. 4. Standards of social progress have to be revived in terms of an essential inter-connection of the economic growth and the peoples` quality of life.

Vijayashri Sripati: The global spread of neoliberalism via United Nations Constitutional Assistance: A salient but understudied international constitutional mechanism

My paper reveals the global spread of neoliberalism via an uncharted mechanism: United Nations Constitutional Assistance (UNCA) (1989-2019). The UN assists states adopt the Western liberal constitution (the Constitution) and its capitalist property rights. This is UNCA. Which was conceived in response to Third World peoples‘ perceived incapacities. UNCA enabled colonies transit to independence from 1949-1960 for in 1960, self-determination became an absolute right. I therefore, ask: Why has UNCA been revived in over forty Third World sovereign states (States). I answer this question based on the UN‘s official statements. My paper reveals that from 1989-2018, the UN and the International Financial Institutions (IFIs) have co-promoted the Constitution, (the latter‘s conditionality), which is key to achieving their neoliberal policies. For this reason, conflict was defined broadly to include socio-economic causes. And UNCA worked ostensibly to prevent conflict, but created within debtor-states, based on their contrived consent, an environment favouring powerful transnational interests. In this way, it violates their right to self-determination.

Diego Gil Mc Cawley: The Institutionalization of Neoliberal Reforms: A Case Study of Chile‘s Housing Law and Policy

Neoliberalism has had a pervasive influence in many developed and developing countries around the world. Chile has been at the core of this trend. The country was a pioneer in implementing neoliberal reforms during the dictatorship that governed the country in the 1970s and 1980s, and, despite the fact that democratic governance resumed in 1990 and since then most of the time a center-left coalition has controlled the administration, the market-based approach still persists in most policy sectors. This paper examines the hegemony of neoliberal reforms through an in-depth case study on the trajectory of Chile‘s influential market-based approach to housing law and policy in the last four decades. The main argument the paper provides is that the neoliberal regulatory rationale has been institutionalized into a set of formal and informal norms, institutional practices and ideas that over time have reduced the range of viable alternative regimes to the one adopted during the dictatorship.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

43 LAW AND POLITICS IN BRAZIL

Panel formed with individual proposals.

Room:

Allende Bascuñan 2

Chairs:

Janaína Silva

Presenters:

Luísa Netto
Marina Bonatto & Leonardo Cabral
Bernardo Campinho
Marcelo Labanca
Janaína Silva

Luísa Netto: Fight against corruption in Brazil: the risk of selective and unbalanced legal enforcement

The working hypothesis concerns Brazilian controlling institutions. Controllers, nation's saviours against corrupt politicians, exercise selective legal enforcement which can lead to illegitimate constraint on politics, threatening democracy. Controllers are willing to defend their privileges in front of the public and yearning to keep a good relationship with politicians to maintain the privileges. The appointment of the judge responsible for the carwash operation to the ministry of justice symbolizes this populist appeal of the judiciary and represents a dangerous closeness between controllers and politicians, biasing controlling tasks development. Investigation measures, information leaks to mass media and judicial decisions will be analysed in order to answer to the specific questions whether the fight against corruption is being distorted into an illegitimate political weapon capable of threatening democracy - which is the role of the controlling institutions in this process.

Marina Bonatto & Leonardo Cabral: Rethinking Brazilian Democracy from a Gender Perspective

Nowadays, although the several achievements in the protection of women's rights in Brazil, the reality is still worrisome. There are recurrent violations of rights, the absence of public policies to promote them and the growing conservatism of the public authorities. It's also important to consider that the Judiciary has not fulfilled its role for the realization of women's rights, and Law, in a broader sense, has failed to ensure them protection. The fundamental rights are not being assured, what represents actual damages to Brazilian Democracy. The crisis of women's rights is a crisis of the democracy itself. For this reason, this paper follows the hypothesis that, because law was created and structured from an androcentric perspective, the adoption of a gender perspective appears as a possible path to be taken towards the realization of women's rights, which are crucial to guarantee women's democratic participation.

Bernardo Campinho: The differences between the procedures of refuge and asylum in the Brazilian constitutional experience: an analysis in the light of the dialogue between International Law, Constitution and Brazilian migratory law

This article analyzes the institutes of political asylum and refuge based on a comparative analysis of the legal regimes that regulate the two institutes in international and Brazilian law, especially delimiting the constitutional foundations of both and their regulation in the Migration Law, its connection to the protection of human rights and the applicable procedures for asylum and refuge. Based on the dialogue of the sources, it seeks to establish the approximation of the two institutes by the guideline of the protection of the human person, demarcating their differences regarding the application requirements, effects and margin of decision-making freedom of the Brazilian State to implement each of these institutes in concrete situations, and analyzing the judicial precedents of the Brazilian Federal Supreme Court, especially the cases of Olivério Medina and Battisti, to understand the dimension given by the two institutes in the jurisprudential practice of the Court.

Marcelo Labanca: The role of state constitutions in the densification of fundamental rights at the subnational level in federal or quasi-federal countries: A prospective agenda from the Brazilian case

The research focuses on a critique of the thesis that fundamental rights are present only at the federal constitutional level. There is a neglect of the role of state constitutions (in federal countries) or subnational legal arrangements (in quasi-federal countries). The state constitutions are also source of bill of rights. Its strengthening serves the multi-level protection of rights, at the lowest level. In this context, the state Courts also play an important role in affirming local rights regarding specificities of each state of the federation. The research is developed from the Brazilian case, however confronting with experiences of state constitutions of other federal or quasi-federal countries, as United States, Mexico, Argentina, Italy and Spain.

Janaína Silva: Women and Constitution: a case study about the political participation of women in Brazil

Brazilian feminists were one of the most activist social actors struggling in favor of social and individual rights in the last years. This paper analyzed three moments of women's political participation in resistance to the ongoing rights reduction process: President Dilma Roussef's impeachment, in 2016 - the elections of President Bolsonaro, in 2018 and the feminicide of Marielle Franco, city councilor of Rio de Janeiro, in 2018. The hypothesis of the study is that the approval of two criminal laws against domestic violence and femicide in the last decade developed an important role on the "feminist spring". The level of violence and sexual abuses organized the feminist movement in Brazil not just in favor of women's rights but also in favor of equality.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

44 THE MOVEMENT OF PEOPLE AND THE STATE: A HISTORICAL AND LEGAL APPROACH TO JAPAN'S EXPERIENCE

The movement of people across borders interests states in such respects as territorial integrity, social solidarity, and national identity. Japan has been expected and able to keep an effective immigration control because of its territorial insularity and (supposed) national homogeneity. However, its immigration policy has now undergone a remarkable transformation in response to the aging of its population and globalization. This panel casts light on this process from historical and legal perspectives. Iokibe and Inayoshi, both historians, deal with the Meiji Government's regulation on foreign visitors in the territory and their entry at ports in the 19th century. Ohnishi, legal comparatist, builds a bridge from the history to the current legislation, focusing on the post-war development of immigration law. Sekine, specializing in social security law, and Okitsu, in administrative law, respectively analyze social rights of non-nationals and refugee recognition.

Room:

Allende Bascuñan 1

Chairs:

Yukio Okitsu

Presenters:

Kaoru Iokibe
Akira Inayoshi
Nami Thea Ohnishi
Yuki Sekine
Yukio Okitsu

Kaoru Iokibe: The Modernization of the Japanese State: How to Regulate Foreign Visitors

The standard narrative of modern Japan is the success story of rapid state building, which makes its history interesting and a model case for others to emulate. Nevertheless, because Japan successfully obstructed the development of foreign settlements as autonomous administration, Japanese modern administration from the very beginning had to deal with almost all the spheres of foreigners' lives in its territory and was thus kept under severe monitoring and intervention by the treaty powers. This paper aims to trace the efforts made by the Japanese government to regulate foreign residents through the examination of its conduct on various minor administrative issues, from which this paper extracts distinctive patterns of Japanese tactics. The question is whether and what kind of metamorphosis took place in the core functions of state in Japan, and ultimately to reexamine the modern myth of development that was mentioned at the front of this abstract.

Akira Inayoshi: Regulations for Ports and Harbours in Japan's Open Ports in the 1860s

Port and harbour was the first place where a person encounters someone else who has a different background. In the middle of the nineteenth century, the Japanese government abolished its so-called closed-door policy and started trading with foreign countries. One of the biggest issues in the negotiations between Japan and western powers was who and how governed the brand-new opened port towns. In contrast to the cases of Chinese open ports, the self-governing body of the foreign settlements in Japan did not last. Therefore, regulations which were issued by both Japanese governments and foreign representatives were the bases of administrations in these towns. This paper aims to examine what kind of regulations were needed and how they went through changes in Japan's open ports, particularly in the earliest stages.

Nami Thea Ohnishi: The Japanese Immigration Policy and its Legal Fundaments

The post war Japanese immigration policy can be divided into four periods. The first period is during 1952 to 1981, which is characterized by strict immigration regulation. After the legislation of Immigration Control Act (ICA) in 1952 Koreans and Taiwanese lost their Japanese nationality. It was a part of the post war cleanup process. The second period is during 1982 to 1989. After ratifying the ICESCR in 1979 and the Refugee Convention in 1981 the rights of non-nationals were improved. The third period is during 1990 to 2008. The revision of ICA in 1990 opened door for unskilled foreign labor force. The fourth period is from 2009 up to the present. Since the revision of Immigration Control Act in 2009 Japan heads toward strategic recruitment of foreign workers. This paper examines the legal fundaments of the post war Japanese immigration policy especially from the view point of restricted sovereignty.

Yuki Sekine: The Mutual Implications of Social Security and Immigration Laws: the Case of Japan

Immigration is one of the latest responses of the Japanese administration in tackling both with globalization and the ageing of its population. As most of countries of the world, Japan has been faced in the last decades, with the pressing issue of an ageing population at the same time that it has been pressured (both internally by its economic actors and externally by Trade and Human Rights organizations) to open its borders to more immigrants, both workers and refugees. Today we can state that over these years, Japan's administration has been prudently preparing itself to respond to those pressures. It has developed various and sophisticated immigration control mechanisms, educated the population, amended legislations including social security laws. My presentation will focus on this last aspect, combining responses both to an ageing population, growing immigration, and their mutual implications in these fields of law, changes that were made, and those to be foreseen in the future.

Yukio Okitsu: Refugee Status Determination: State v. UNHCR

The protection of refugees is unquestionably a global issue that should be addressed by the international community as a whole. However, refugee status determination (RSD) is procedurally decentralized to municipal authorities. As a matter of fact, each state party to the Refugee Convention is enabled to judge whether or not an asylum seeker who reaches its territory fulfills the refugee criteria. UNHCR, on the other hand, has also a power of RSD to complement the possible lack and inadequacy of states' RSD system and discharge its own mandate under the UNHCR Statute. The question this paper addresses is what if a person who has previously been determined as a refugee by UNHCR newly applies for asylum to a state. Although the previous RSD by UNHCR is not legally binding on the state authority because of the difference of sources (Statute/Convention), I will explore if it has any weight that the government has to take into consideration and what this weight can be.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

45 PROPORTIONALITY AROUND THE WORLD

Panel formed with individual proposals.

Room:

D302

Chairs:

Dam Shubhankar

Presenters:

Murray Wesson
Virgilio Afonso da Silva
Elena Drymiotou
Shubhankar Dam
João Andrade Neto
Fabio Estrada Valencia

Murray Wesson: Australian Constitutional Culture and the Reception of Structured Proportionality

Australian public law is in a time of change. Notwithstanding the absence of a Bill of Rights, the High Court has imported a doctrine of structured proportionality into its implied freedom of political communication jurisprudence. However, Australia has a distinctive constitutional culture, shaped by a utilitarian political culture and a 'legalistic' approach to constitutional interpretation that eschews values-based reasoning. How will these factors inform the reception of structured proportionality in Australian public law? The paper traces the contentious nature of structured proportionality on the High Court and discusses its status as a 'tool of analysis' as opposed to a principle. The paper considers whether structured proportionality is leading the High Court to embrace values-based reasoning or if the Court is avoiding those aspects of the test that require engagement with values. The paper assesses the status and future of structured proportionality in Australian public law.

Virgilio Afonso da Silva: It is not all about balancing: proportionality's necessity test

Many articles or even whole books on proportionality barely mention its first two prongs, the suitability and necessity tests. It seems that it is all about balancing. In my paper, I argue that the necessity test has a much more important role than it has been acknowledged so far. Although the most obvious implications of shedding the appropriate light onto the importance of the necessity test are analytical (for instance, to make clear that proportionality is not only about balancing), I also show that taking the necessity test seriously has important implications for other ongoing debates related to the proportionality test, such as those concerning its rationality and the relationship between courts and political powers.

Elena Drymiotou: Proportionality in two analytical zones of human rights adjudication

The paper identifies three analytical zones in human rights adjudication and places a proportionality analysis only in the two last zones. The judge should first define the right and decide whether there is a restriction of the right at stake in the certain case. The second analytical zone starts once the judge decides that there is a restriction, or in other words, an infringement of the right. The question is whether this restriction is a violation of the right or a reasonable limit in a democratic society. If the minimum content of the right is violated, then the right is violated. If the minimum content of the right is not violated, then the analysis involves a proportionality test. The test can become less controversial, appealing to the democratic principle and once it is agreed what is a democratic society. The proportionality analysis can also take place in a third but exceptional analytical zone - the zone of the derogation of the right.

Shubhankar Dam: Shades of Proportionality: Fundamental Freedoms and Reasonable Restrictions in India

This paper tells the story of the proportionality doctrine in Indian constitutional reasoning. It is, I argue, one of innovation, loss, recovery, and pretence. Innovation: The Supreme Court, in 1950, summoned the deep structure of proportionality to invalidate legislation. It was a robust form of proportionality but without the term. Loss: By the late 1950s, proportionality analysis fell away. Assessing the reasonableness of legislative restrictions involved erratic doctrines. Recovery: It began in 2000. Without apparent context, the court invoked the language of proportionality in constitutional law. But reference to structure came only in 2016. The court outlined the steps proportionality entailed in India. Proportionality, its language and substance, had arrived in India, or so it felt. Pretence: With a clear approach to proportionality now in place, how has the court applied it? It hasn't. So, proportionality analysis in India now is present in theory and absent in practice.

João Andrade Neto: The Mendes Court (2003-2013): Progressist, Pro-Freedom, and Socially Engaged, but a Political Moralist

This essay discusses the Mendes Court, i.e. the phase of the Federal Supreme Court of Brazil (STF) lasting from the judgement of the Ellwanger Case, in 2003, to the 26th appeal in the Mensalão Scandal Case, in 2013. As I submit, the Judicial Reform, inspired by the model of a European Continental Court like the Federal Constitutional Court of Germany, was relevant to explain why the STF changed its attitude towards lower courts and other state branches. However, the determinant factors were the STF's shift in case law towards the wide-scope conception of fundamental rights, taken from German legal theory. Under the influence of Justice Mendes, the STF borrowed the proportionality test from Germany, engaged in enhancing the effectiveness of social rights, and adopted a progressist view on individual freedoms and a protective approach of criminal guaranties, but a moralist attitude towards electoral and political matters, which reflect in the Brazilian polity still nowadays.

Fabio Estrada Valencia: The penal sanction in the Colombian peace agreement with the farc-ep and the international standard of proportionality of punishment

The Government of Colombia signed a Peace Agreement with the FARC EP. A problem lies in the fact that the penalties to punish the culprits of international crimes supposedly are not compatible with the proportionality standard of the sanction provided in the Rome Statute. An issue that has prevented reaching a consensus to allow the implementation of the Peace Agreement in Colombia. The Deal contemplates sanctions called "effective restriction of freedom and rights," between five and eight years for those who have reveal the truth. The paper shows that, the Peace Agreement obeys the standard of proportionality, due to its abstract nature, and it allows that the State on the exercise of its sovereignty, acquires a margin to define specific types of penalties to punish the culprits of international crimes. A mixture among retributive, restorative and reparative measures is a proportional way to sanction, as long as it is conditioned to the recognition of truth and liability.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

46 LA PARTICIPACIÓN CIUDADANA EN EL OTORGAMIENTO DE TÍTULOS MINEROS

At the beginning of the 21st century, two opposing forces entered into conflict: on the one hand, a legislation informed by a highly centralized, established to protect mining companies with conception of the management of mining and hydrocarbon resources. On the other hand, communities dedicated to protect local affairs, the defense of their territory and their well-being, as well as the new trends of Latin American constitutionalism in the last section of the 20th century and the beginning of the 21st century this new conceptions of development promoted by international organizations such as the World Bank or UNDP. In Colombia, constitutional case-law was receptive to the claims of the communities. These have been an interesting debate on the role that corresponds to citizen participation and local institutions in the management of mineral wealth and hydrocarbons. This Panel seeks to analyze the central lines of this transformation, identify the actors in this field.

Room:

D401

Chairs:

Federico Suarez

Presenters:

Hector Santaella

Juan Carlos Covilla

Ramon Huapaya

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

47 CONSTITUENT POWER, VIOLENCE AND THE MATERIAL CONSTITUTION

The involvement of violence in the constitution-making process has not been traditionally analyzed by constitutional theory. Whereas predominant constitutional law scholarship has focused on developing both a normative and a descriptive theory on constituent power from the perspective of citizen participation in the creation of a constitutional framework, the present panel analyses the importance of physical coercion and abuse in foundations of constitutional democracies. The discussion counts with approaches from the theoretical perspective on the relations between violence in the constitutional origins and the material constitution provided by Zoran Oklopcic, Joel Colón-Ríos and Hèctor López Bofill. In addition, the panel includes a contribution focused in particular empirical cases regarding the problem of the violence in the constitutional foundations such as the digression provided by Vito Breda.

Room:

Auditorio Claro

Chair:

Francesca Maria Pou Giménez

Presenters:

Joel Colón-Ríos
Zoran Oklopcic
Hèctor López Bofill
Vito Breda

Joel Colón-Ríos: Of Historical and Material Constitutions

The idea that there are some norms that, because of their content, have a fundamental character and should be treated as such by the legal system has a long trajectory in the history of constitutional thought. In the 19th century, it was usually expressed through the notion of the internal (or historical) constitution. The better known of these is the concept of the constitution in the material sense, generally understood as including the norms that establish the basic structure of the state and that regulate the legal relations between state and citizens. This paper explores the notion of the material constitution in the work of several mid-20th century constitutional theorists. The objective will not be to summarise the constitutional thought of these authors but to show the ways in which they understood the relationship between the material constitution and constituent power, and how that understanding affected their views about the limits of constitutional reform.

Zoran Oklopcic: Dark material(s) and material constitutions: constituent power, institutional aims and productive forms

Debates in constitutional theory are cyclical. Every so often, constitutionalists re-discover some previously influential, but in the meantime neglected, theoretical concept. The same is the case with ‘constituent power‘ and ‘material constitution‘, the two concepts that many recent scholars have been trying to make great again. This presentation starts from the assumption that this ‘procedure’ entails one important disadvantage: while it seems to create the conditions for a more focused debate, it unduly restricted the range of theoretical approaches to a particular concept. Or more concretely: Though we‘ll more or less know what to expect when we debate Schmitt‘s constituent power or Lassalle‘s material constitution, we’ll often do so without reflecting on the meaning of the implicit, more basic preconceptions of “power“, “material“, and “constitution“. The aim of this presentation is to explore what might happen if we did otherwise.

Hèctor López Bofill: The Constituent Power, the Problem of Violence, and a Theory of the Constitution

The basic idea of this contribution lies in building a concept of constitution given the relevance of violence in the foundations of the legal order. The author distinguishes different stages of high-scale conflicts in the configuration of a state‘s constitutional system such as the violence perpetrated during state-building, the coercion displayed during the formal constitution-making process, and the use of force in imposing the constitutional principles under emergency circumstances. The link between violence and constitutional formation leads to a material concept of constitution grounded in the decision about the allocation of power. The contribution closes with a normative proposition on the exercise of constituent power which states that the legitimacy of a constitutional creation hinges on the lack of victims (the “no victims rule“) in all the stages concerning the establishment of a new constitutional structure.

Vito Breda: The New Caledonian referenda and the strategies of diverting political power into violence

This contribution discusses the circular process that has the effect of disfranchising an identity group by endorsing a paradigm of unity. Under a veneer of normativity the process hides, it would be argued, a series of precarious constitutional assumptions which steer institutional and judicial narratives into a self-referential loop that denies the contextual reasons which justify the normative existence of democracy as a model of governance. The effect of self-referential use of power on individuals is well covered by critical literature. Benjamin‘s analysis on the German word ‘staatliche Gewalt‘ is perhaps the best known example of the sophistic circularity of administrative or judicial activities. In the case of Benjamin, it was an attempt at justifying his decision to avoid conscription. However, the circularity of the process in which institutions set the limits of ‘proper‘ and then adopt obscene methods to achieve such equanimity has also an effect on groups

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

48 METHODOLOGICAL PLURALISM IN COMPARATIVE CONSTITUTIONAL RESEARCH

Research methods in comparative constitutional law are in transition. The ongoing debate on methodology in comparative constitutional law distinguishes between legal-hermeneutical and social sciences-empirical approaches. The panel does not only intend to open up the plurality of methods but shall also discuss the potential of methodological pluralism. Different approaches, like empirical, historical, hermeneutical and knowledge-based methods, will be evaluated, discussed and linked to each other. The interrelation between the purpose of comparative research and the research methods create a benchmark to re-evaluate the methodological approaches. A critical evaluation of existing methods will develop new perspectives towards a consolidation of the existing methodological discourse.

Room:

D402

Chair:

Konrad Lachmayer

Presenters:

Theunis Roux
Renata Uitz
Matthias Goldmann
Konrad Lachmayer
Wen-Chen Chang

Theunis Roux: Interdisciplinary Research in Comparative Constitutional Law: Benign Toleration or Critical Engagement?

This paper considers the call for the integration of legal-interpretive and social science perspectives in comparative constitutional law (CCL). It argues that two features of the field complicate how we respond to this call. First, whatever the possibilities of interdisciplinary research are at an ideal level, the practical implementation of this call depends on the field's capacity to transcend the competing views of this issue in different national research traditions. The second complicating factor is the contrasting ways in which scholars from different disciplines and regions of the world have been defining the field's object of study. Concluding on this score that what matters is not how we define the field, but how we interact in it, the paper maps two ideal-typical models of interdisciplinary interaction – the critical engagement and benign toleration models – and explains why the former is to be preferred.

Renata Uitz: The Rise of Illiberalism as an Invitation for Interdisciplinarity in Comparative Constitutional Scholarship

Drawing on lessons from multiple jurisdictions, the paper argues that interdisciplinarity enables critical reflection on intellectual constructs (such as metaphors and labels) used for constitutional analysis. It also triggers reflection on every discipline's own canons and convention - exposing how canons enable as much as limit scholarly inquiry. Furthermore, it forces reflection on the manner in which we pose our research questions. When studying the ways of illiberal rulers an interdisciplinary perspective pushes comparative constitutional scholars to move beyond asking diagnostic 'what' and 'how' questions towards exploring 'why' and 'what for' questions.

Matthias Goldmann: Public Interests in Sovereign Debt Litigation: An Empirical Analysis

This paper illustrates the possible use of empirical methods for the textual analysis of large collections of cases with the intention to contribute to a mutually fruitful interplay of empirical and hermeneutic methods. Based on a collection of ca. 400 cases of sovereign debt litigation before U.S. courts, the paper analyzes how U.S. courts take into account the public interest of the debtor state in achieving a sustainable debt burden. For this purpose, the paper focuses on the defenses raised by the debtor state and categorizes them. It turns out that these defenses change over time broadly in line with the foreign policy preferences of the U.S. government. While sovereign immunity was an important defense in the 1980s, the 1990s saw a wealth of sometimes newly-created public interest defenses. In the 2000s, defenses articulating a public interest of the debtor state become very rare. Some explanations are offered for these findings.

Konrad Lachmayer: A knowledge-based approach towards constitutional comparison

Beyond the discussion of empirical and hermeneutical methodology the comparison of constitutional law can be understood from a knowledge-based approach. Based on legal knowledge of a particular legal system constitutional comparison creates an inter-legal knowledge, which is per se not part of legal order, but determines a specific interrelation between different legal systems. This comparative constitutional knowledge is the result of abstraction and interrelation. It does not create legal knowledge itself, but can be used for different purposes (like theoretical conclusions or practical legal argumentation). In a pluralistic understanding comparative constitutional knowledge transforms the knowledge of different legal orders, while using a plurality of comparative methods. The latter are determined by the purpose of the comparison itself, which shall be made transparent in the overall comparison of constitutional law.

Wen-Chen Chang: *Discussant*

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

49 PUBLIC VALUES IN EXPERT DECISIONMAKING

Panel formed with individual proposals.

Room:

Auditorio CAP

Chair:

Renata Brindaroli Zelinski

Presenters:

Quentin Pironnet & Xavier Miny
Renata Brindaroli Zelinski
Paul Mertenskötter & Tim Dorlach
Robert Grzeszczak & Joanna Mazur
Yu-Yin Tu
Esther van Zimmeren

Quentin Pironnet & Xavier Miny: A two-tiered justice system ? – Or how to attract foreign investors through the State justice mechanisms

Investors settle where conditions (wages, tax, ...) would make them the most competitive. However, globalisation has lead the States to reshape their regulations to encourage investments. States compete with each other also through their judiciary. Investors are paying attention to the effectiveness and the quality of the judicial system of a chosen State of settlement. In Europe, Brexit gave a new kick to this phenomenon. Some States are now creating ad hoc domestic English-speaking Courts for international commercial disputes to lure corporations, allowing them to benefit from a legitimate court but with looser procedures. In Belgium, the Brussels international Business Court will be established and will follow arbitration procedures. It is ironic for a country that almost teared down the CETA negotiations because of an ISDS clause. Our paper addresses the tension between this dynamic and the notion of sovereignty, and a shift from an independent judiciary to a hybrid justice system.

Renata Brindaroli Zelinski: Consensual public administration: a new paradigm of a participatory and democratic activity

Consensual public administration has become a new facet of the Brazilian Public Administration. Once characterized by the way of acting based on rigidity and one-sidedness, now the new conception of the Administration is endowed with a participatory and democratic bias. In addition to the mandates of the Federal Constitution for the peaceful settlement of disputes, there are notable normative reforms, such as the new Code of Civil Procedure, which benefit the overcoming adversarial mentality in which they aim to insert in the administrative arena the consensual solution of conflicts through negotiation, mediation, conciliation, term of adjustment of management or conduct and use of unnamed techniques. The new paradigm of Public Administration tends to adjust to the demands of modern society, in order to be able to provide efficient management, based on mechanisms governance and decision-making processes with democratic participation, based on the logic of consensus.

Paul Mertenskötter & Tim Dorlach: Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile‘s Food Warning Label

International economic law imposes limits on policy spaces. But scholars rarely study empirically the interpretive acts that determine the accepted meaning of investment or trade law as applied to a specific regulation long before a formal dispute. To fill this gap, we focus on interpretive contests over the meaning of WTO law between corporations and bureaucrats and their implications for states‘ policy space. Based on a case study of Chile‘s landmark 2015 nutrition labeling regulation and drawing on documents from freedom-of-information requests as well as interviews, we make two arguments. First, superior resources and a favorable global institutional environment enable transnational corporations to directly assert self-interested interpretations of international law to social regulators worldwide. Second, national bureaucrats can only refute these business-friendly interpretations and claim policy space by drawing on relevant expertise, in-house or through inter-agency cooperation.

Robert Grzeszczak & Joanna Mazur: Regulating without Regulation? Regulating without the Sovereign? The Transition from Government to Governance on the example of the GDPR

Globalisation, the development of transnational law and strengthening of the position of private entities enforce changes in the approach towards the government: in order to support its legitimization and build trust for the state it is necessary to shift from government to governance. The concept implies that significant redistribution of political power, combined with enhancing the presence of non-governmental organisations, epistemic communities, “networked structures“ and public-private partnerships, plays a role in improving the efficiency of the state and international organisations. In our paper we examine how does the concept of good governance has been implemented in the regulatory framework provided by the General Data Protection Regulation. The reason for choosing this example is the fact that it has an impact on all of the dimensions of reality: public and individual, business and citizens, political life and everyday life.

Yu-Yin Tu: The Governance of Independent Agencies-Starting from the Analysis of Taiwan Experience

Independent agencies (hereinafter as “IA“) are found in countries with different government designs. This symbolizes a worldwide trend to adjust the traditional mechanism of separation of powers. Most countries with IA are facing governance issues in different degree. For example, Taiwan FTC’s settlement with an enterprise overturned whole communication policy direction without any participation of other agencies. I will define whether the IA to be functionally or organizationally independent, externally or internally independent, and independent in a general or case-by-case sense at first. I suggest different goal-settings of independence would affect institutional designs of IA, and institutions such as staggered terms are not necessary under the goal to keep IA from the head of government. Finally, I contend the key to a feasible governance of IA is in Congress. Except for reviewing IA nominee‘s competency, it may reserve the final decision powers in the head of government.

Esther van Zimmeren: Trusting New Institutional Actors: Specialized Courts in the field of Intellectual Property Law

A global trend to establish specialized intellectual property (IP) courts can be observed. Consensus exists that IP courts can be important for improving quality, coherence and speed of the dispute resolution process. However, such specialized courts are criticized because of the risk of isolation and their pro-patent bias. Therefore, the institutional design of such specialized IP courts is vital for generating “trust“. The objective of this paper is to examine the interdisciplinary trust literature and to propose a conceptualization of trust that could contribute to the debate about specialized courts. The paper first maps the main features of the future “Unified Patent Court“ (UPC) as a case study. Then it provides a comparative analysis of specialized IP courts resulting in insights in measures that can be used to build trust in the UPC. This may ultimately trigger the “leap of faith“ (Möllering, 2007) that is required to stimulate collaboration with such new judicial actors.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

50 JUDICIAL INDEPENDENCE IN HARD TIMES

The panel on judicial independence is based on a presumption that in the representative democracy Parliament should play a role of delegated power. However, Parliament tends to overstep its competences. To prevent such a situation an independent arbiter is needed. The judiciary usually plays such a role. But if courts are captured by ill-founded majority, they fail to act as neutral arbiters. The institutional balance is violated. The panelists provide three examples of systems in crisis. Acting as servant of political will the Polish Constitutional Tribunal enables transformation of the system towards illiberal democracy. In the Hungarian consolidated illiberal system, the judges of the younger generation have been socialized in the illiberal system, thus they perceive judicial independence in a specific illiberal way. Another example is connected to Romania's judiciary reform. The reform triggered debates on the progress made by the country in strengthening the judicial system.

Room:

D405

Chair:

Anna Tarnowska

Presenters:

Anna Tarnowska & Wojciech Włoch

Agnieszka Bień-Kacała

Tímea Drinóczi

Mónika Márton

Anna Tarnowska & Wojciech Włoch: Constitutional Courts and representative democracy

In the representative democracy Parliament should play a role of delegated power (using the paradigm of liberal democracy). However, in certain circumstances Parliament tends to overstep its competences. To prevent such a situation independent and impartial arbiter is needed. Constitutional court plays usually such a role. The court should be a kind of constraint on political brunch of government. If constitutional court is captured it fails to act as neutral arbiter. The court becomes a servant of political will - a kind of addendum to unconstrained Parliament. From systemic point of view constitutional court become a safeguard of ill-functioning system (eg illiberal democracy).

Agnieszka Bień-Kacała: Judicialization of politics or politicization of the constitutional court in Poland

Constitutional court plays crucial role in the process of illiberal system consolidation. In the analysis, the Polish Constitutional Tribunal (CT) is used as an exemplification of such a role. The Tribunal has been taken over by newly established majority in 2015 general election. After the capture, the CT started to confirm unconstitutional actions of the unconstrained majority. Additionally, the CT delivers a new interpretation of the constitution. Such new interpretation enables transformation of the system towards illiberal democracy. In result, constitutional judges become servants of political will rather than a constrain on the Parliament and a guarantor of human rights. Such a change of the Constitutional Tribunal's goal hinders systemic re-transformation and provides stabilization of illiberal democracy. Is the CT only the servant or more a politically active actor?

Tímea Drinóczi: Customizing judicial independence

The illiberal Hungarian constitutionalism keeps the contours of constitutional democracy, but it selectively imbues it with content. It does not deny the need for an independent judiciary but, by addressing genuine structural issues, it customizes judicial independence. The "independence of the judiciary" means independence from the supranational community, NGOs, the opposition, and it serves the preservation of the homogeneity and constitutional identity of Hungary. The illiberal independence is shaped by constitutional and ordinary legislation. Additionally, informal methods of customizing the judiciary have a chilling effect on more experienced judges and are apt to corrupt the integrity of the younger judges. The legal framework is relatively easy to correct, provided that political and social preconditions exist, which might not be the case in Hungary. It would be much more difficult to change the attitude of the younger judges who have been socialized in the illiberal system.

Mónika Márton: Judiciary reforms in Romania: progress or democratic backsliding?

Romania's fight against corruption was in spotlight since the country's accession negotiations to the European Union have begun. With the creation of specialized institutions to monitor and persecute corruption under the Cooperation and Verification Mechanism the aim was to slowly strengthen the judicial system thus protecting it from political interference in a country that is considered to have the highest level of corruption in the EU. The reform propositions by the Ministry of Justice sparked harsh debates between the judiciary and the political bodies, and international actors such as the European Commission expressed its concerns whether the amendments threaten the progress made by the country. Moreover, the dispute over the competences regarding the recall of the head of the National Anticorruption Directorate underline the tension between institutions based on party membership. In this fragile situation judiciary has critical controlling role where independency can be the key.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

51 UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND ABUSIVE CONSTITUTIONALISM IN LATIN AMERICA

Panel formed with individual proposals.

Room:

A102

Chair:

Leticia Kreuz

Presenters:

Leticia Kreuz
Rick Pianaro
Daniel Capecchi Nunes
Arthur Passos El Horr
Trilce Valdivia

Leticia Kreuz: Abusive constitutionalism and the fraudulent female Legislative candidacies in Brazil

Abusive constitutionalism is a phenomenon observed especially in Latin America, in which constitutional methods designed to increase popular participation in democracies are misused by authoritarian governments to disrupt democracy itself. The Brazilian election of 2018 is in debate, since Jair Bolsonaro‘s Party (PSL) was accused of tampering with the electoral gender quota. Brazilian law dictates that a minimum of 30% of Legislative candidatures should be reserved for female candidates in each Party – in addition, 30% of public funds for campaigns shall be destined to female campaigns. PSL’s scheme involved submitting fake female candidacies with the intent of taking money destined to women‘s campaigns in a fraudulent way, therefore embezzling the Electoral system. The purpose of this paper is to analyze these accusations through the concept of abusive constitutionalism, considering that the authoritarian government elected for presidency has been deceiving democratic instruments.

Rick Pianaro: How democracy is being undermined by constitutional amendments in Brazil

Scholars have repeatedly denounced the existence of a recent movement of democratic deterioration around the world. The use of legal means to do so is known as “abusive constitutionalism“ overcoming typical illegal military coups that denied the agenda of liberal democracy, maintaining a full democracy appearance. Recently, Brazil has experienced challenges to its young democracy, while constitutional amendments, when analyzed by the lens of abusive constitutionalism, can denote threats to the institutional design adopted inasmuch as, in casuistic and circumstantial ways, compromises independent checks as the Supreme Court. A clear example of this movement is the “amendment of the cane“, a constitutional amendment whose meaning, by increasing the age of ministers retirement, was to exclude from the Workers’ Party Brazilian President Dilma Rousseff two nominations to the Supreme Court during her tenure, adapting democracy to the wishes of legislative and executive elites.

Daniel Capecchi Nunes: The 1988 Brazilian Constitution‘s dismemberment: abusive constitutionalism and the ending of the democratic political cycle

The hypothesis of the present work is that the most recent transformation processes suffered by the Brazilian Constitution are closely related to the ending of democratic political cycle and the opening of a new cycle – which features are still unknown. In order to explain the political cycles‘ functioning, the work uses the the three moments theory of the relationship between the people and their constitution, created by Schmitt, and the theory of the populism‘s chain of equivalence, developed by Laclau. In the Brazilian case, the ending of the previous political cycle will be related to the exercise of what the specialized literature has called “abusive constitutionalism“, a concept used to describe moments in which the political class uses democratic constitutional instruments to make the constitution less democratic. The result of the constant appeal to abusive constitutionalism is a “constitutional dismemberment“, causing the downfall of the 1988 Constitution‘s foundations.

Arthur Passos El Horr: The judicial review of constitutional amendments in Brazil and it’s democratic importance considering the specificities of the Constitution of 1988

The discussion about the democratic viability of the judicial review of constitutional amendments has become increasingly important considering the worldwide threats of disfiguring reforms. It is important to discuss: “Is it a good practice?“. In general, the doctrine is divided among those who: (a) accept the practice as a way to protect the constitutional text - (b) refute this type of review because it gives exorbitant powers to the judiciary. Brazil‘s case, in this context, has to be analyzed taking under consideration some specificities of the Constitution of 1988: (i) a long and detailed text - (ii) a facilitated constitutional reform process - (iii) a long list of entrenched clauses. These characteristics result in numerous amendments (99 reforms in 30 years). In addition, they make the constitution very vulnerable to abuse. Thus, the judicial review of constitutional amendments becomes a much more acceptable instrument for democracy in Brazil than in a number of other countries.

Trilce Valdivia: Unconstitutional constitutional amendments in the Peruvian way. A first approach

This papers purpose is to offer a first approach on the power of the Peruvian Constitutional Court (PCC) to declare the unconstitutionality of a Constitutional Amendment. In its ruling 008-2018-AI/TC, the PCC developed its competence to revise the constitutionality of constitutional amendments. This paper aims to analyze whether the reasons offered by the PCC in this ruling to justify its “amendment control power“ are sufficient. It will answer the next questions. Firstly, whether the Peruvian Constitution grants an explicit or implicit mandate to the Court to evaluate the constitutionality of constitutional reforms. Secondly, whether the PCC has the same power to evaluate the constitutionality of the amendments proceeding from Legislature or referenda processes. Finally, to draw the limits to this kind of constitutional control and to sketch a possible test to evaluate the constitutionality of constitutional amendments.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

52 NUEVOS DERECHOS Y DESAFÍOS PARA SU PROTECCIÓN

Panel formed with individual proposals.

Room:

R510

Chair:

Ana María García

Presenters:

Mariana Canales
Ana Maria Garcia
Carmen Droguett González
Jhonathan Avila Romero
Guilherme Scotti & Rodrigo Gomes
Fabiana Lanke, Eduardo Domingues, Eliane Almeida & Milton Souza

Mariana Canales: ¿Es la separación de poderes suficiente?

On November of 2018 the Supreme Court of Chile ordered the State to finance an expensive medical treatment for a child who had a rare disease. The medical treatment was not listed among the ones that, by law, the State must finance - but the Supreme Court argued that not financing the treatment was a violation to the right to life and physical and mental integrity of the child. Cases like this are commonly criticized arguing that, by not applying the legislation, the judges violate the separation of powers: they create a public policy and decide a financial issue that concerns to the Congress and the Government. But the separation of powers is a general principle that is insufficient to tackle this kind of problems. In this paper I argue that there are other categories required by the Rule of Law useful to approach these problems, for example, the institutional capacity of the courts. To conclude the previous, I analyze the sentence of the Supreme Court and identify its main tensions.

Ana Maria Garcia: Derechos Implícitos y su desarrollo en la Jurisprudencia Constitucional Chilena

Implicit rights and their development in Chilean constitutional jurisprudence This paper analyzes the development of the so-called “implicit rights“ in Chilean constitutional law. Such rights, which lake expressed recognition in the Fundamental Charter, have been developed by constitutional jurisprudence on positive rights. Examples of implicit rights are the right to personal identity, the right to one’s own image, the right to be forgotten, and the right to receive information

Carmen Droguett González: El reconocimiento del derecho de acceso a la información de interés público como derecho fundamental, en la jurisprudencia constitucional y administrativa chilena a 10 años de la promulgación de la Ley N° 20.285 sobre acceso a la información pública

The principles of probity, transparency and especially the right of access to public information are control mechanisms of the authority. In 2008, Chile established a new regulatory framework for this right with the promulgation of Law No. 20,285. In 2018, the presentation of a new Bill aimed at modernizing institutional management and strengthening probity and transparency in the Forces of Order and Public Security. As a result of this and from the concept of fundamental right that is proposed, this paper aims to examine the regulation of the right of access to public information in Chile, its importance, legal nature and jurisprudential recognition given to it by the Chilean Constitutional Court . The foregoing, to then point out the main challenges to which this right is still faced and whose compliance will strengthen public management, open government and democracy.

Jhonathan Avila Romero: El Rol del Tribunal Constitucional Peruano y la Eficacia de los Derechos Sociales

The Peruvian Constitution includes many socio-economic rights like health care, housing and social security - but difficulties emerge in the practical application of social rights by the Peruvian Constitutional Court. The main purpose of this paper is to answer some of the main questions arisen by the social fundamental rights critiques as (i) who are the beneficiaries of the social fundamental rights protections?, (ii) should the Constitutional Peruvian Court be the guardianship of those rights, and if this true, to what extent? - and finally (ii) do the social fundamental rights has a transformative effect?

Guilherme Scotti & Rodrigo Gomes: Los impactos de la matriz histórico-jurídica producida en el contexto de las diásporas afrobrasileñas sobre los derechos de las comunidades quilombolas

The paper seeks a critical reappropriation of constitutional history for an interpretation of the Brazilian Constitution of 1988 that is capable of confronting the constitutive racial inequalities of Brazilian social formation. The official narrative has erased the impact of the quilombos’ experience in their struggle for freedom, equality, and access to land. In this sense it is fundamental to face the past. The problem of the effectiveness of rights is confronted by the tension over the narrative of constitutional history from a displacement based on the historical-legal matrix produced by Afro-Brazilian diasporas. The trajectory of the quilombos as struggles for autonomy is rescued, since the abstract, universal and open character of the fundamental rights needs a historical rootedness in the movements of affirmation of equality, freedom and citizenship, by reshaping constitutional principles on a more pluralistic and democratic basis.

Fabiana Lanke, Eduardo Domingues, Eliane Almeida & Milton Souza: Seguridad alimentaria en Brasil – Análisis bajo el enfoque del ciclo de las políticas públicas

Proper nutrition is recognized as a basic human right since the Universal Declaration of Human Rights and is guaranteed by art. 6 of the Federal Constitution of the Federative Republic of Brazil. The first Provisional Measure by the current government, MP No. 870/2019, extinguished the National Council for Food and Nutrition Security (Consea), a consultative body for guidelines and budget. This extinction can lead to the emptying of social participation in the evaluation of that public policy. The objective of this research will be to analyze the policy from the perspective of the public policies cycle. To do a review of the literature of public policies, nutrition, law, the documents by the Brazilian Federal Government, from 2004 to 2019, on the public budget. In the case of public budget analysis and the fiscal austerity that began in 2016. It is of great importance to determine whether vulnerable social groups are having their rights to food security and nutrition reduced in Brazil.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

53 UNEQUAL PROTECTION: IMMIGRATION DETENTION AND DEPORTATION AS FUNDAMENTAL RIGHTS BLIND-SPOTS. THE US AND CHILE COMPARED FROM AN INTERDISCIPLINARY PERSPECTIVE

Immigration has been an ever-present issue in the history of humanity, and for almost two centuries has required specific legislation from most states. But never had it been such a pressing issue for public policy, nor had it shined a light so brightly upon the nation-states' and international community's shortcomings as in recent decades. This panel focuses on one of the largest blind-spots in immigrants' rights protection: detention and deportation. The topic is reviewed in compared perspective, from a theoretical and practical point of view (having faculty from UC Davis and PUC with field experience), and from an interdisciplinary approach (through presentations of two sociologists). Do states have the right to deny constitutional protection to immigrants? Is it a legitimate exercise of sovereignty? What are the long-term consequences of racialized detention, deportation and family separation? Are Courts in the US and Chile doing enough when facing these human rights blind-spots?

Room:

D404

Chair:

Martín Bernardo Canessa Zamora

Presenters:

Caitlin Patler

Eleonora López Contreras

Tomás Pedro Greene Pinochet

Leticia M. Saucedo

Caitlin Patler: The Fiscal, Social, and Human Impacts of U.S. Immigration Detention

The last thirty years witnessed a dramatic increase in the number of noncitizens detained in the United States. Individuals detained under immigration laws are held pending adjudication, often mandatorily, and without many basic constitutional protections. Immigrant detention imposes severe burdens on immigrants and their households and levies significant costs to society – financially, as well as in terms of social capital and community well-being. Chiefly due to the difficulty in accessing noncitizens in the process of detention and deportation, this system has largely escaped sociological inquiry. This presentation provides a background for understanding the growth and consequences of detention in the United States. It then presents findings from research based on administrative data, as well as surveys and in-depth interviews, about conditions of confinement and the impact of confinement on detained individuals as well as their families and communities.

Eleonora López Contreras: Deportación de poblaciones migrantes en Estados Unidos y Chile: Una expresión del racismo estatal

From a socio-historical analysis focused on the main immigration and deportation policies in the United States and Chile, it is possible to identify discourses and practices focused on specific migrant groups, strongly determined by their national origins and their ethnic and "racial" characteristics. This presentation focuses on the analysis of the main milestones of the immigrant deportation policy in the United States and Chile, having as an analytical axis the concept of "State Racism". To do so, we will first delve into the definition of State racism, unraveling the concepts of racism and the national State - in order to subsequently carry out, through a comparative perspective, a brief overview of the main deportation actions and policies adopted by the states of both Chile and the US.

Tomás Pedro Greene Pinochet: The constitutional protection of immigrants' rights against the Administration's powers to detain and deport: Chile and the US compared

This presentation will compare the ways in which the Chilean and the US Constitution provide protection to immigrants against the detention and removal powers that are enforced by the Administration in order to defend its sovereignty and other interests, such as national security. The presentation will have a practical approach to the subject, taking into consideration some recent jurisprudence of both Supreme Courts, the experience of litigation in these matters and also the current discussion that is taking place at the Chilean Congress in regards to the new immigration act project that is meant to replace the existing law. Finally, it will critically analyze if the protection granted by the Courts to the migrant population is enough to satisfy human rights standards.

Leticia M. Saucedo: The Narratives in the U.S. Courts Justifying Restricted Rights for Immigrants

Historically, constitutional protection for individual migrants in detention and in deportation proceedings have been outweighed by federal concerns over sovereignty, safety and security. Today, the federal government supports its position that the state's interest in security outweighs the basic liberty interests of immigrants by characterizing migration as a crisis threatening the well-being of the country. This narrative has, in turn, produced a socio-legal environment that produces even more restrictions for entering migrants. This presentation will explore the narratives that the government and the courts have used to uphold an immigration regime that continues its hostility to immigrants and their individual rights.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

54 SOBERANÍA, CONSTITUCIÓN Y DEMOCRACIA

Panel formed with individual proposals.

Room:

A101

Chair:

Guillermo Otalora Lozano

Presenters:

Denis Junior Cahuana Marca
Guillermo Otalora Lozano
Eduardo Esteva
Esteban Szmulewicz
Federico Ambroggio
Xavier Vence
Claudio Alvarado

Denis Junior Cahuana Marca: Ámbitos excluidos de la reforma constitucional en el Perú

The unamendable provisions, as an explicit material boundarie to the power of amendment, are not configured in the Peruvian Constitution. However, in the Peruvian legal system is possible to control any constitutional amendments by judicial review. The Peruvian Constitutional Court carries out this exercise using the "basic structure" of the Constitution, referring to the elementary precepts that confer identity to the Peruvian Constitution and that, therefore, are devoid of any modification in their content. In this sense, in this article, based on a theoretical and casuistic analysis, we will try to answer, on the one hand, to: i) what are the criteria that allow to justifiably control the content of the amendments and, on the other, ii) how can we establish that these criteria are sufficient so that the result of the control is not subject to democratic objection.

Guillermo Otalora Lozano: Constitución y clientelismo

Clientelism, or machine politics, is a widely known phenomenon in the world. The distribution of benefits to individuals and the attempt to hold them accountable for their votes (Stokes et al., 2005) is practiced in both developed and developing countries, in both presidential and parliamentary systems. Clientelism is contrary to political equality and a distortion of basic ideals of democratic governance, including the "representative ideal" and the "deliberative ideal". Constitutional law can react to, or interact with, clientelism, in various ways. The Colombian Constitution attempted to outlaw clientelistic practices with little success. In turn, its Constitutional Court has so far ignored clientelism when exercising judicial review of legislation and administrative decisions. Building from the Colombian example, this paper attempts to lay out a foundation on how to incorporate distortions of democratic governance, such as clientelism, in reflections about constitutional law.

Eduardo Esteva: El Estado y su supervivencia desde el Renacimiento: una categoría histórica o absoluta?

The State, from its origin, experienced tensions of different intensity, which in certain cases seemed to compromise its subsistence, but overcame them through transformations. The last century was prototypical: Nazi totalitarianism and the universal state - Marxism with its failed conception of state extinction - the so-called failed states - the migrations that blur the borders - the attempt to restore the EI Caliphate. At present the population of the world are subject to states, although the majority of the people does not integrate states in which the rule of law and democracy prevails. There is a new Public Law, product of the overcoming of the borders between internal and international law and of the confluence of Constitutional and International Law in all its facets (fundamental human rights, humanitarian law, etc.). That globalizaed Public Law, founded on the principles of civilized nations, it will be instrument with which the state can reaffirm itself as a permanent category.

Esteban Szmulewicz: Igualdad política: implicancias para el diseño institucional y los derechos fundamentales

This paper explores the relationship between political equality and other types of equality, as well as its implications on the design of key public institutions and fundamental rights. In particular, it evaluates the configuration of civil and political rights (freedoms of expression, assembly and association), and certain political institutions. The paper concludes that Chilean constitution double structure -elitist democracy on the one hand, and neoliberal civil society, on the other-, does not promote voting equality, effective political participation and control of the political agenda, which are Robert Dahl's conditions for a full democracy. In other words, it is worth asking, in this context, whether citizens have the discursive means and the participation channels to effectively carry out the making of collective decisions. Restated, given the conditions stated above, can the people be considered as "free and equal" in political matters?

Federico Ambroggio: La judicialización de la política y el problema de su indeterminación conceptual

Judicialization of politics implies, as a general feature, the social propensity to submit various private and public matters to the decision of the magistrates and, correlative to said collective dynamics, the institutional vocation of the judges to assume themselves as deciding subjects of those matters. However, a correct approach to the notion of the judicialization of politics, leads us to warn in a preliminary, that such phenomenon suffers a constant vagueness in its use in academic settings and in public discourse. Even, in certain occasions, the concept is used to identify undue interventions of the courts in matters traditionally assigned to the political powers. Indeed, the difficulty in determining the contours of the phenomenon is based on the fact that the judicialization of politics refers to several interdependent processes with asymmetric characteristics that developing in juxtaposed planes, which require their differentiation and particular analysis.

Xavier Vence: Los Tratados comerciales y la privatización del derecho: amenazas para la soberanía y la democracia

The deepening of the neoliberal or ordoliberal globalization that has taken place in recent decades has radically modified the relationship between the State and the market. The autonomization of the regulation of markets, removing it from the legislative power and even from the executive power itself, has transferred a large part of the regulatory power to agencies called independent. The example of the "independence" of the Central Banks allows us to see the consequences but the extension of this model to many other fields, granting the capacity to make decisions, self-regulating to create "private law" is a step of incalculable scope for the future of democracy. A further step is the creation of "international tribunals" of a private nature. The TTIP and other bilateral treaties show the extent of the flight from the law by the great global economic powers and the threats hanging over the sovereign legislative capacity and over the jurisdiction of the judiciary itself.

Claudio Alvarado: Origen y legitimidad de la Constitución de Chile: notas de teoría política y legal

The year 2019 will mark the 40th anniversary of the Chilean Constitution, approved under the dictatorship of Augusto Pinochet. With multiple and relevant amendments, this Constitution remains in force. However, those who criticize its legitimacy continue to do so on the grounds of its origin. The aim of this paper is to explore, from the standpoint of political and legal theory (John Finnis, Eric Voegelin), why a Constitution's origin does not necessarily determine its legitimacy. In addition, all of this refers to a deeper and more relevant problem for constitutionalism: its relationship with contractualism. We will argue that reflecting on this is fundamental for public law in modern times.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

55 FLEXIBLE JUSTICE, ENDURING PEACE? COURTS, TRANSITIONAL GOVERNANCE AND TRANSFORMATIVE CONSTITUTIONALISM IN COLOMBIA AND MEXICO

Courts play a pivotal role in the design and implementation of transitional governance in Latin America. However, adjudication in this context is sometimes controversial. The priorities, legal doctrines, or strategic incentives of international courts may sometimes collide with those of national decision-makers, activists, or victims. And domestic courts are often asked to step up their participation in transitional governance, but they could end up playing a role they are reluctant (or unable) to perform. By exploring the Colombian and Mexican experiences under the framework of the project Ius Constitutionale Commune en América Latina (ICCAL), this panel discusses some of the tensions underlying adjudication in transitional settings focusing on how the choice between rigid and flexible standards, between dialogue and commands, could foster (or hinder) successful transitions in the region.

Room:

D303

Chair:

Rene Uruena

Presenters:

Ana Maria Ibarra
Juana Acosta
Alexandra Huneeus
Manuel Góngora

Ana Maria Ibarra: The Ayotzinapa decision: self-restraint and transitional justice under review

Transitional justice seeks to foster public trust, social reconciliation and effective victim reparation (De Greiff, 2011). Some commentators argue that constitutional courts should contribute more actively toward these aims (Ginsburg, 2012). This may bring about a tension among the goals of transitional justice and the limits of judicial power. The decision in which a Mexican court ordered the executive branch to establish an ad-hoc commission of inquiry to solve the Ayotzinapa case (June 4th, 2018) provides a useful example to discuss the role of the judiciary faced by the systemic failure of justice institutions. The presentation aims to explore the ways in which we can evaluate courts‘ decision to exceed the powers placed upon them, with the view of restoring the Rule of Law.

Juana Acosta: Rights of victims in transitional contexts vis-a-vis the Inter-American Human Rights System: amidst the Conventionality Control and the National Margin of Appreciation

This contribution analyzes the rights to justice, truth and reparation in the Inter-American Human Rights System. It argues that in transitional justice contexts, these rights not only entail the obligation to investigate, prosecute and punish human rights violations, but also to exercise due diligence in preventing those violations - guaranteeing non-repetition - clarifying the truth - and providing security. These obligations are intermingled, and their inter-dependence reinforced in a transitional context. It also suggests a balance between the conventionality control and the national margin of appreciation in contexts of transition from armed conflict towards a negotiated peace. In particular, the paper advances that these contexts require the latter doctrine be re-assessed: states are better placed to design and implement the necessary mechanisms and platforms to move to a lasting peace - leaving the parameters of the conventionality control to a minimum core of prohibitions.

Alexandra Huneeus: The Judicialization of Peace

As international courts gain in influence, many worry that they will impoverish domestic politics. This paper (co-authored with Sandra Borda and Courtney Hillebrecht), focuses on the Colombian peace process, to show that these concerns misconstrue the way international courts actually work. The 2016 Colombian peace accord opens the way to a far less punitive peace than many of those familiar with the courts and underlying treaties would have deemed possible. The effect of the engagement of the international courts in Colombia has not been to impose rigid conditions from afar, but rather to allow domestic players to reinterpret the content of Colombia‘s international legal obligations: the terms of Colombia‘s peace were produced through—not despite—the international courts‘ ongoing deliberative engagement with the peace process. The Article draws on original empirical data to reveal precisely how the international courts enabled the construction of Colombia‘s sui generis agreement.

Manuel Góngora: The Inter-Americanization of Transitional Justice: The Colombian Case from a Coevolutionary Perspective

There is an ongoing debate on the role of international courts in national politics. Taking as an example the peace process between the Colombian government and the FARC, Hillebrecht, Huneeus and Borda (2018) have identified a process of “judicialization of peace“, underlining the special weight that international courts (in particular, the ICC and the Inter-American Court) had in the peace negotiation. Gargallela (2019), in turn, has objected the latter‘s reading of the role of international courts in the Colombian case, proposing the theory of deliberative democracy as a more appropriate approach. This paper aims to contribute to this debate, and propose a coevolutionary analysis of the phenomenon, based on a dialogic, polycentric and incremental view of the interactions of the courts involved in the design of Colombian transitional justice.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

56 INVESTMENT LAW AND CONSTITUTIONAL LAW FROM A (POST)COLONIAL PERSPECTIVE

Investment law's mechanism for enforcing its standards of protection, investor-state dispute settlement (ISDS), continues to attract a great deal of controversy, in part, because of the constitutional functions that are served by this new transnational legal order. It origins are traceable to the period of formal decolonization, when ISDS emerged as the most effective means, short of armed invasion, for protecting the property of metropole investors. This privatized form of justice enables investors to sue newly decolonized states and to claim compensation in circumstances when these states seek, among other things, to exercise sovereignty over their natural resources. This panel will focus upon the relationship between investment law and constitutional law through a (post)colonial lens. Of particular interest are the implications for states in the Global South. Panellists will explore how the ISDS is reshaping and renewing colonial relationships between states home to former empires.

Room:

Sala Juicio Oral

Chairs:

Federico Suarez

David Schneiderman

Presenters:

Magdalena Correa
Guillermo Moro
David Schneiderman
Ximena Sierra
Federico Suarez

Magdalena Correa: The BITs in Colombia and the principle of equality: a new constitutional control

The negotiation, signing and ratification of BITs require taking seriously the constitutional obligations, in order to preserve the coherence of the legal order and to avoid a radical mutation of the Constitution. On this regard, the role of the Constitutional Court as a guardian of the Constitution is crucial, especially because of its duty of reviewing the clauses of the BITs that could cause significant consequences at the domestic level. Focusing on the BITs between Colombia and France and Colombia and Israel, this paper aims to analyse the impact on the equality principle because of the discrimination of the domestic investors and the extremely favourable treatment to foreign investors. This problem also suggests reflecting on the asymmetrical relationship between developed and developing countries according to the new legal mechanisms embedded at the international investment law and at the constitutional law.

Guillermo Moro: "What Are We Doing in Europe Then?" Latin-American Lawyers and the Post-Colonial Construction of the Investment Protection Regime

Using as an analytical framework the old polemic between Carlos Calvo and Juan Bautista Alberdi in the 1860s, this presentation will explore the current role of Latin-American lawyers in the construction of the investment protection regime. In particular, the presentation will explore the colonial traits in the work of these lawyers, as it can be found in four intertwined areas of their practice: (1) Decision-making as arbitrators, (2) Drafting of BITs and other investment-protection instruments as policy advisors, (3) Writing of articles and commentaries as scholars, and (4) Advocating for investors or States in investor-State arbitrations as lawyers. The presentation will explore as well the possibility of alternative directions for Latin-American lawyers willing to engage in these areas of practice.

David Schneiderman: Investment Law's Formal and Informal Constitutional Empire

Law's methods continue to be preoccupied with protecting property and contract at both national and international levels via constitutional forms. To this end, capital-exporting states have been cementing their influence via new legal regimes, like international investment law. What is left unexplored is the extent to which new legal regimes have continuity with those in the past. To this end, the paper conjoins the notion of empire with the spatial relationship of core and periphery. Investment law constrains political capacity in the periphery as did imperial constitutional rule via informal means. Contemporary rule, however, is conducted in a more formal manner with the effect of making metropolitan interests appear to be separate from legal outcomes. By interrogating investment law through the lens of empire, the paper aims reconnecting law to politics in an age when constitutional formalities continue to proliferate.

Ximena Sierra: A (post)colonial approach: Colombia before the ISDS and the disputes over natural resources

Foreign investors have filed more than ten investment disputes against the Colombian State since 2016, claiming damages in the amount of about US $5,000 million. Fearing the threat of multi-million dollar awards, the rise in investor claims has resulted in "regulatory chill," causing Colombian authorities to refrain from acting in accordance with their constitutional obligations in addition to other international obligations. The paper aims (1) to problematize from a (post) colonial perspective the tension between the constitutional law and the investment law by examining the Colombian case and, specifically, the investor disputes launched in reaction to natural resource protections - and (2) to identify the colonial legacies at work that are embedded in the investment law and that continue to shape global North-South relations.

Federico Suarez: An empirical rethinking of the hegemonic concept of foreign investment in the Global South

The hegemonic concept of foreign investment embedded in almost 3.300 international investment agreements (IIA) implies that capital-exporting States have imposed its own perspective of development, which means that foreign capital is detached from welfare of the host states. The arbitral decisions taken within the international investment law and the financial outcomes derived from those decisions, show that such system is mainly addressed to provide a extremely favourable protection for private property rights of foreign investors, especially, to those linked to multinational companies and wealthy individuals from developed nations. On this regard, in order to rethink new methods and understandings of the international investment law, the paper aims to discuss the empirical outcomes that the hegemonic concept of foreign investment included at the IIA have been unfolded at the Global South, and how it has impacted on the development at the domestic level.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

57 NEW FRONTIERS OF CITIZENSHIP

The contours of citizenship are undergoing dramatic changes. On the one hand, the past decades have seen countries adopt increasingly flexible and liberal regimes, with the consolidation of EU citizenship, an increased toleration of dual citizenship and a growing commitment to anti-discrimination. On the other hand, many governments have recently taken an increasingly restrictive approach to immigration, especially by political and economic refugees. Bridging these two trends is a broader move towards the marketization of state membership: economic capital is becoming ever more important as a criterion for admission and inclusion in a state. Individuals on the ground respond to this new situation by becoming more strategic and instrumental vis-à-vis citizenship-granting states. The four presentations will discuss these transformations from multiple legal and sociological perspectives, offering an empirical and theoretical evaluation of the present state of nation-state citizenship.

Room:

FD101

Chair:

Martijn van den Brink

Presenters:

Ayelet Shachar
Yossi Harpaz
Dimitry Kochenov
Kristin Surak

Ayelet Shachar: The Marketization of Citizenship in an Age of Restrictionism

In today's age of restrictionism, a growing number of countries are closing their gates of admission to most categories of would-be immigrants with one important exception. Governments increasingly seek to lure and attract high-value migrants, especially those with access to large sums of capital. These individuals are offered golden visa programs that lead to fast-tracked naturalization in exchange for a hefty investment, in some cases without inhabiting or even setting foot in the passport-issuing country to which they now officially belong. In the U.S. context, the contrast between the "Dreamers" and "Parachuters" helps to draw out this distinction between civic ties and credit lines as competing bases for membership acquisition.

Yossi Harpaz: Citizenship 2.0: Dual Nationality as an Asset

This paper explores a key unintended consequence of the global shift towards greater toleration of dual citizenship: the creation of a new global opportunity structure of citizenship. Millions of people in Latin America, Eastern Europe and elsewhere in the global middle tier may now capitalize on European ancestry or ethnicity to secure a second citizenship from EU countries, while others strategically give birth in the U.S. to secure citizenship for their children. The second, premium nationality does not typically lead to emigration. Instead, it operates as "compensatory citizenship" that provides travel freedom, an insurance policy, global opportunities and even social status. The paper draws on extensive research that is presented in full in a forthcoming book. The project documents the rise of instrumental strategies that decouple nationality from residence and identity, and the emergence of a new attitude that treats citizenship as an asset.

Dimitry Kochenov: Citizenship's Unnecessary Future

The core features and effects of citizenship, such as racism, sexism and randomness disconnected from the holders' desires and desert, can no longer be accepted as possibly legitimate without any critical interrogation, posing the question of citizenship's future. Citizenships' key promises: equality, mutual respect and self-government, even if seemingly succeeding in select societies, potentially undermine its essence, which is the justification of randomized exclusion and the upholding of the status quo. Citizenship thus does not "improve": the result of its evolution can only be the opening of the Pandora's box of its basic relevance. Citizenship, while still glorified, emerges as entirely unnecessary in a context where its success can no longer be measured by delivering on the ethically and morally repugnant constituents of its essence: if we believe in the ideals it proclaims and apply those globally, citizenship is bound to perish.

Kristin Surak: The Marketization of State Membership

Citizenship by investment (CBI) programs, which grant citizenship in exchange for financial contributions to a country, have proliferated over the past decade. Where only Saint Kitts and Cyprus had formal programs in 2012, today they are found in more than ten countries. Based on three years of fieldwork, this paper dissects the challenges that emerge and how they are confronted when a sovereign function, granting citizenship, is marketized. Theoretically, it specifies the distinct properties of citizenship as a commodity and identifies the internal and external determinants of its value. Empirically, it traces how discretionary grants of citizenship in peripheral states and investment residence programs in core states conditioned the development of formal CBI schemes, and it specifies the role of geopolitical disparities, industry actors, and extra-territorial rights in this change. It concludes by assessing program outcomes and the complex ways that inequality structures the market.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

58 PUBLIC LAW AND BIOETHICS IN TIMES OF CHANGE. REFLECTION ON HUMAN RIGHTS CONCEPTS AND BIOMEDICAL ISSUES

Public Law encounters challenges with biomedical issues since mid- '80s - early '90s on several aspects. One of these aspect is to know whether Law or medical deontology should regulate biomedical issues. Indeed, the legislator was wondering whether he should take a position towards biomedical practises or let these issues be regulated by another kind of norms such as medical deontology, for instance. Nowadays, the medical practice still plays an important role. One of these aspect is also to know which field of Law should regulate biomedical issues. Should biomedical issues be regulated by Medical Law, Civil Law or Human Rights Law? One other aspect is to know if domestic Public Law is today inadequate to regulate biomedical issues in times of globalization. This panel will look at national and international law and will attempt to analyse how Public Law and Human Rights deal with biomedical issues.

Room:

Auditorio Card. Oviedo

Chairs:

Grainne De Burca

Presenters:

Maria Kalogirou
Enrique Santamaria
Judit Sandor
Laurie Marguet
Tanya Hernandez
Manon Altwegg-Boussac

Maria Kalogirou: Reproductive technologies – reproductive rights? Medically assisted reproduction in French and in Greek Law: Different concepts but same type of protection

Both French and Greek Law allow medically assisted reproduction. However, both jurisdictions differ considerably with respect to the methods they allow. For instance, French Law does not recognise surrogacy. In contrast, Greek Law allows surrogacy agreements providing that any financial agreement between the parties (the prospect parents and the surrogate mother) is excluded. The explanatory note of the first law establishes an "individual right to reproduction", which is also constitutionally protected. In opposition to Greek Law, French Law does not establish a "right to reproduction". Rather, legal methods of medically assisted reproduction in France fall under the protection of public health. This intervention attempts to demonstrate that even if surrogacy in Greece takes the form of an individual reproductive right, limitations imposed on its exercise do not differ from limitations imposed by public law on personal liberties on grounds of public order.

Enrique Santamaria: Genetic research on human biological samples (HBS). Old and new challenges for public and private law

Human biological samples constitute a precious source of genetic information for researchers looking to develop new treatments, diagnosis methods, or products to be sold on the market. The use of HBS in genetic research raises an innumerable amount of (bio)ethical and legal issues, including the requirements for the validity of the consent of the donor of the sample - the adequate level of protection of the personal data associated to it - and how to balance the different interests on the sample (personal, familiar and societal) and the protection of the fundamental rights of the sample donor. Furthermore, several different actors play a role in in the use of HBS (e.g. donors, hospitals, pharmaceutical companies, and universities, research ethics committees). Which law should govern these dissimilar issues and actors? This paper investigates to what extent the traditional public and private law instruments are enough to provide an answer to the issues raised by genetic research on HBS.

Judit Sandor: Legal Consequences of Genetic Textuality

Textuality of several genetic tests, genomic research and the possibility of genome editing will soon change the landscape of the existing ethical and legal norms relevant in the field of life sciences. While genome editing is still a new technology, its potential implications suggest that we have to reexamine a number of basic ethical principles and legal arguments that govern bioethics and law. The safety and accuracy of genome editing need to be improved substantially before it can be used in medical therapy, but it already poses many challenges to established positions in bioethical debates. The recognized dichotomies that used to serve as normative anchors, such as natural versus artificial, therapy versus enhancement, and somatic versus germline will become increasingly blurred. The presentation intends to draw the contours of a new legal framework that responds to the current challenges of genomic textuality.

Laurie Marguet: The change of the legal framework governing Surrogacy in France and Germany

France and Germany have a quite similar legal framework governing the human reproduction. On one side, birth control, abortion and medically-assisted procreation are allowed. On the other side, surrogacy is forbidden. Historically, France and Germany prohibited strongly surrogacy, even if, in both countries, the criminal-prohibition affects only the intermediary. For the surrogacy mother and the intended parent, the sanction will be a civil penalty: the contract is not valid. According to French or German Law, the surrogacy mother will be the mother of the child. For a time, French and German Laws managed, with these different kinds of sanctions, to prohibit surrogacy. But in time of globalization, it was impossible to stop the development of Law-shopping. Regarding to the Law of the Council of Europe and the evolution of the French and German court decisions, the question whether it is still possible today to prohibit at all, and in an efficient way the surrogacy remains.

Tanya Hernandez: ***Discussant***

Manon Altwegg-Boussac: ***Discussant***

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

59 POLITICAL PARTIES AND THE CONSTITUTION

In an era of populism, xenophobia and nationalism, there is a growing need to treat political parties as public law institutions. Political parties fundamentally affect the functioning of separation of powers in constitutional systems. They serve as intermediaries between the representatives and the people and as platforms for debating and shaping constitutional values. Yet, political parties are under-theorized and under-regulated in public law. The panel will address questions of constitutional design from a theoretical, historical and comparative perspective.

Room:

Auditorio P. Aylwin

Chair:

Julie Suk

Presenters:

Stephen Gardbaum
Sujit Choudhry
Tarun Khaitan
Rivka Weill

Stephen Gardbaum: Political Parties and Constitutional Values

This paper argues that among the most consequential institutional variables affecting how constitutional orders operate are two relating to political parties. The first is the nature of the political party system (multiparty, two party, dominant party), which influences the actual separation of powers regardless of the form of government enshrined in the constitution. The second is the method political parties use to choose their candidates for chief executive in a general election. This helps to determine how easy or difficult it is for an "outsider" candidate posing a risk to the values of constitutional democracy to capture a major party and smooth a path to power. And yet, despite the importance of political parties to the constitutional order in these and other ways, they are rarely viewed as proper subjects for constitutional design. Although perhaps understandable from a historical perspective, this is mostly mistaken from a contemporary functional one.

Sujit Choudhry: The Public Law Theory of Political Parties: Preliminary Notes from Bagehot and Dicey

Political parties are institutions that are integral to the functioning of constitutional democracy and should be conceptualized as public law institutions, alongside courts, executives, and legislatures. But political parties have been under-theorized in public law theory, which as a consequence possesses relatively few intellectual resources to understand, assess and propose a response to the current state of political party systems. A public theory of political parties can be built from two sources. First, it should be rooted legal materials and institutional practices, and offer an interpretive reconstruction of them which abstracts away from the particulars of how political party systems operate, to provide a critical standard which serves as a normative guide for assessing current practice. Second, it should be based on a careful rereading of the early constitutional theorists of parliamentary democracy – including Bagehot and Dicey.

Tarun Khaitan: Constitutionalising the Party: Protecting the State from the Party and the Party from its Base

In this paper, I will argue that democratic constitutions should seek to achieve two design objectives in relation to political parties: (i) Protect the state from capture by a political party - and (ii) Protect political parties from capture (by an autocratic leadership, wealthy donors or a narrow base). These design objectives are drawn from the value of democracy itself. With respect to the first objective, a regime where the party and the state are sufficiently fused cannot be described as a democracy because the fundamental democratic tenet requiring genuine political competition is breached. Regarding the second objective, a political party that is captured by a narrow base, an autocratic leadership or wealthy donors—I will argue—is bad for democracy. The paper will then discuss some design solutions that, depending on the context, could be deployed towards these objectives.

Rivka Weill: ***Discussant***

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

60 RIGHTS TO HEALTH, FOOD AND NUTRITION

Panel formed with individual proposals.

Room:

Sala Mediación

Chairs:

Bárbara Bertotti

Presenters:

Bárbara Bertotti
Leonardo Ribas
Thana de Campos & Mariana Canales
Rodolfo Figueroa
Rawin Leelapatana & Seksiri Niwattisaiwong
Paola Bergallo

Bárbara Bertotti: Brazilian unified health system: is it egalitarian to be gratuit?

The objective of this study is to verify from the legal and political levels and in the light of the principle of material equality, the possibility of establishing collection in the Brazilian Unified Health System–"SUS". The conclusions are: (i) legally, collection is possible, since gratuity is not a principle nor a guideline of "SUS", but rather comes from a purely political option. Furthermore, the Constitution authorize "other sources" of revenue to be used to finance the system - (ii) politically, the collection is convenient and timely, since, based on the reality of underfunding that the "SUS" is facing - which, however, does not stem from a real lack of resources, but from a legal unavailability of these, and it is not feasible to admit that people with financial conditions invest in the legal position of demanding from the Public Administration the provision of services by the "SUS" free of charge. However, a wide range of exemptions must be established.

Leonardo Ribas: Desertion, Resistance, Exodus and Civil Disobedience: "Enclosures" of the "common" in the human right to adequate, healthy and sustainable food in the context of imperial globalization

We will analyze the violation of the human right to food. This is a right whose most severe aspect of rape is hunger. Overcoming hunger is the second goal of the UN Agenda 2030. In 2018, Brazil returned to FAO's Hunger Map. On the other hand, according to the FAO, Brazil will be the largest exporter of agricultural products in the world until 2022. According to Ziegler, there is no shortage of food. The problem of hunger is the access. Food, today, is not a right but a commodity. The financial speculation of food is a new form of "enclosure" and one of the main factors for the growth of prices of the basic basket. The concentration of 85% of the food traded in the world, in the hands of only four companies, makes these agents have great political force. Against this authoritarian form of biopower, a common movement is emerging that, in its manifestations in the world forums, demand democracy and access to fundamental rights. Even if democracy is in an eventual context of death.

Thana de Campos & Mariana Canales: Global Health Governance, the centralization approach, and the principle of subsidiarity

Global health scholars argue that the WHO, as the central global health authority, should centralize and coordinate actions tackling global health threats like pandemics. We call this the centralization approach. This paper questions this approach. Specifically, by looking at Gostin and Rugger, the paper identifies the main problems of Global Health Governance to then discuss the reasons why they defend the centralization approach as the most adequate solution. The paper challenges their approach by introducing the idea of decentralization captured by the principle of subsidiarity. The paper argues that the principle of subsidiarity provides a more reasonable, efficient, and effective solution to the identified problems because it clarifies the different degrees of responsibilities that different global health stakeholders should bear in relation to a certain global health problem, while empowering local communities and also fostering a global culture of coordination and cooperation.

Rodolfo Figueroa: Justiciability of the Right to Health in Chile

The right to health is a Constitucional right in Chile. Even though this right is not protected by the Constitutional Action for Protection (the most frequently used form of tutela, recognized in Article 20 of the Constitution), the jurisprudence of the last 11 years reveals that courts are admitting Actions for Protection to secure this right. In some cases, the protection is indirect, but in several it is direct. In the last three years, the Supreme Court has admitted several cases, ordering the State to pay for very expensive medication, bypassing the legislation that regulates the access to health services. This paper analyzes the Chilean jurisprudence, in particular the recent decisions of the Supreme Court, and discusses the kind of model of justiciability of economic rights that the Supreme Court seems to be installing in Chile, and also discusses its potential impact in public policies regarding healthcare.

Rawin Leelapatana & Seksiri Niwattisaiwong: Legal and Economics Framework for Optimization in Drug Affordability

The discovery of new diseases is frequent and alarming. The health care sector is in continuous need of new drugs to counter these diseases. Drug companies face financial risks and significant costs in drug R&D, which may end in failure. The risks and costs create dilemmas for the drug makers - firms charge high prices for their products to make profits and recover all costs incurred from their failures. Regarding demand, affordability is an issue, as prices can be out of reach for most patients, thus undermining the objective of the ICESCR, which guarantees the rights of the public to equal access to the highest attainable standard of physical and mental health. The clash between consumers and producers in terms of drug pricing makes a good case for government intervention to increase total social welfare and establish a balanced approach to pricing regimes. This study assesses the impact of drug patent extensions and their constraints with an aim to maximise total social welfare.

Paola Bergallo: Shifting "shifting legal visions" in Argentine constitutional law

The transformation of Argentine abortion law in the last fifteen years provides an interesting terrain to explore an additional shift in Latin American "shifting legal visions": a shift towards pragmatic constitutional interpretation. Through the systematic revision of press coverage, interviews, court dockets, congressional transcripts, and civil society's documents, the paper seeks to unpack, first, the role of context and, more specifically, that of legislative facts and public policy assessments in judicial and congressional deliberations on the constitutionality of abortion. To that effect, the paper analyses the empirical and public policy dimensions of the interpretive turn in the Supreme Court decision in F., A.L. and in the recent hearings considering the constitutionality of a new abortion bill before the House of Representatives and the Senate. Secondly, the paper connects these ideational changes with a series of legal education and research strategies.

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

61 BOOK PANEL: NW BARBER, THE PRINCIPLES OF CONSTITUTIONALISM (OXFORD UNIVERSITY PRESS, 2018)

NW Barber is the Professor of Constitutional Law and Theory at Trinity College, University of Oxford. This panel will see leading scholars from different parts of the world discuss aspects of his most recent book, The Principles of Constitutionalism. The book explores the idea of constitutionalism itself, sovereignty, the separation of powers, the rule of law, civil society, democracy and subsididarity. It offers an integrated account of each of these values, seeking to put constitutionalism in its best light. It is a work of constitutional theory, but one delivering a systematic rendering of central ideas in constitutional thought which will be of interest and accessible to public lawyers around the world. On this panel, jurists from Canada, the United States, Hong Kong, Germany and Britain will reflect on elements of the book and probe the author on its more contentious claims. The author will reply to each before opening the floor for a half an hour's discusion.

Room:

A103

Chair:

Jeff King

Commentators:

Vicki Jackson
Cora Chan
Peter Oliver
Mattias Kumm

Reply to commentators:

Nicholas Barber

Panel Sessions II

Monday, 1 July 2019
15:25 - 17:00

62 TRANSFORMATIVE CONSTITUTIONALISM AND CONSTITUTIONAL PATERNALISM

What is the role of courts in transforming the constitutional order? Can courts promote and strengthen the democratic institutions? How do courts conduct a 'structural judicial review'? Supreme and constitutional courts are increasingly acting as guardians of parliaments, in their supposed interest, aiming at safeguarding a space of manoeuvre for representative actors. This trend can be regarded as "Constitutional paternalism": A slightly paradoxical notion, as, in many cases, Parliaments would be entitled with appropriate authority and powers to safeguard their position within the constitutional system, simply by exercising their powers. Panelists will explore challenges raised by these developments to the constitutional state: is constitutional paternalism a viable answer to the crisis of Parliaments and representative democracy? Does it violate or instead strengthen separation of powers? Does it rather foster popular distrust in representative democracy and strengthen populism?

Room:

Aquiles Portaluppi

Chairs:

Aileen Kavanagh

Presenters:

Michaela Hailbronner
Pietro Faraguna
David Landau
Yaniv Roznai
Samuel Issacharoff

Michaela Hailbronner: Defending democracy by protecting parliamentary rights

Many constitutional theorists have defended judicial action and activism in the interest of protecting "democracy" or the democratic process. Where courts set out to protect parliamentary rights and powers, this falls squarely within the ambit of such theories. And yet, in quite a few cases, courts act even where parliaments could, at least in theory, assert their own rights, thus raising the question if and when such judicial paternalism might be defensible. This paper takes up that question by looking more closely at the kind of deficiencies courts encounter in the democratic process, asking which kinds of situations might justify such constitutional paternalism.

Pietro Faraguna: Constitutional paternalism, crisis of parliaments and "techno-populism"

The crisis of parliaments is a common development in many constitutional states. Origins and causes vary in each local context, as well as reactions to the crisis. While the judicial response to these crises is often constitutional paternalism, the political reaction commonly led to the emergence of anti-system and/or populist parties. Particularly in Europe, populist parties succeeded to take over parliamentary majorities in many cases after years of technocratic governments. This paper will explore a theoretical contradiction emerging from these developments. On the one hand, populist parliamentary majorities attack the basic pillars of the separation of powers, by undermining the legitimacy of counter-majoritarian "technocratic" institutions, such as constitutional courts and independent authorities. On the other hands, neo-populist parties usually reject traditional political cleavages and eventually use technical expertise as a legitimizing source of their policy.

David Landau: The (Contingent) Obligation to Issue a Structural Remedy in Socioeconomic Rights Cases

This piece argues that courts in transformative contexts sometimes have an obligation to offer a structural remedy for widespread violations of socioeconomic rights. At the same time, the obligation is one that is contingent on a number of factors, most of which courts rarely seem to consider. The first is the scarcity problem, or the impact of one structural remedy on the court's capabilities and ability to issue others. This makes it important for courts to compare the gravity of different problems and their likelihood of success in confronting different kinds of problems. Second, courts should consider the effect of their interventions on the political system over time. In this sense, they should aim to undertake interventions that improve the functioning of the state, rather than undermining it. This piece will consider how judiciaries can be better designed and incentivized to consider these factors.

Yaniv Roznai: Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset

In 2017, the Israeli High Court of Justice (HCJ) decided two dramatic decisions: First, it invalidated a law based upon flaws in the legislative process. Second, it issued a nullification notice to a temporary Basic Law that - for the fifth time in a row - changed the annual budget rule to biennial one. While some have criticized these decisions as "undermining the balance between the three branches of government", I claim that the HCJ protected separation of powers, acting as guardian of the Knesset in its legislative and supervisory roles for improving the Israeli political-democratic system. Thus, by applying creative judicial mechanisms the HCJ was exercising a 'dynamic role'. This exercise of judicial activism, not in a traditional counter-majoritarian role of the court as guardian of individual rights but as guardian of the legislature in a conflict between the branches, resembles courts' activities in the Global South geared to protecting fragile democratic processes.

Samuel Issacharoff: *Discussant*

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

63 ARE CLASSICAL CONCEPTS OF CONSTITUTIONALISM COLLAPSING? REFLECTIONS ON THE CONTEMPORARY MUTATIONS OF CONSTITUTIONALISM

The mutation of Constitutional Law concepts is customary, especially in times of change. Their elasticity is widely discussed, sometimes in terms of resistance to those mutations, sometimes in terms of new challenges to be included. However, the movements within mutations are difficult to grasp. Indeed, they are either explicitly recognized and defended on a theoretical level (i.e., discourses on global constitutionalism), or sometimes the change occurs in a more invisible way (i.e., conditions of constitutional interpretation). No matter the ways these changes occur, classical constitutional concepts seem to be torn apart. Are these concepts indefinitely extendable? The purpose of our panel is to focus on these movements (coming from legal discourse, jurisdiction or philosophy of law) - on the way they operate and the way they justify/or not these conceptual changes - and on the nature of their consequences on discourses and principles relating to constitutionalism.

Room:

Auditorio A. Silva

Chair:

Mark Tushnet

Presenters:

Manon Altwegg-Boussac & Patricia Rrapi
Andras Jakab
Mattias Kumm
Andrea Abi-Nader
Laetitia Braconnier-Moreno
Stephen Gardbaum

Manon Altwegg-Boussac & Patricia Rrapi: Between liberal constitutionalism and new representations of constitutionalism: when constitutional concepts are swinging

Classical concepts of constitutionalism had to adapt to new realities, new challenges, new political demands. If terminology has remained quite similar, its meaning seems to have changed, sometimes implicitly. These conceptual attempts face epistemological choices that need to be of some interest and useful for constitutional knowledge. In that way, one constitutional concept could be extended, or defined differently, in order to inspire a new way of thinking or to shape another representation of the world.

Andras Jakab: The Nature of Constitutional Concepts

If we do not want to pretend that legal expressions have some kind of ontological ‘essence‘, then we have two (‘anti-essentialist‘) options: either (1) we should view their meanings as their role played in the constitutional discourse (description of the usual meanings of legal terms), or (2) we should recognize that the definition and re-definition of constitutional concepts are never just descriptions, but they are rather suggestions about their meanings which are consistent with our political preferences. The latter option, which I believe is nearer to the reality of constitutional discourses than the first one, means that there is an ongoing political struggle over who defines concepts and how, and concepts are viewed something like squares on a chessboard which can be occupied. Thus, when we ‘describe‘ the constitutional concepts we actually do not just describe them but rather implicitly prescribe a use which favors our political preferences.

Mattias Kumm: Continuity and Discontinuity in basic constitutional concepts: Three transformations

Andrea Abi-Nader: External actors in constitution making: does constituent power still have its place in constitutional theory

The concepts of “the people“, its constituent power and its sovereignty are fundamentals of the modern constitutional theory. The legitimacy of one constitution is based on the people‘s right in the elaboration and adoption of the supreme norm. Two historical events- the American and French revolutions- have contributed to the rise of this “bible“ of constitutional theory. Nevertheless History has knew multiple constitutional processes that do not abide by this universal dogma, and involve foreign actors- The purpose of our paper is to relate the discussions on the relevance of the classical concept of constituent power of the people, regarding its theoretical weaknesses (e.g. the impossibility in defining and delimiting a people..) or its applicability in the contemporary context (e.g. the internationalization of constitutional Law), thus justifying these cases of foreign interventions - and the reasons why this classic concept should be either abandoned or remodeled.

Laetitia Braconnier-Moreno: Rights of Nature or community right in new constitutionalism?

The Ecuadorian Constitution of 2008 and the one of the Plurinational State of Bolivia of 2009 recognized Nature as a subject of law. They indeed broke with the classical constitutional concepts, considered as “anthropocentric“, “ethnocentric“, and disconnected from social, cultural and territorial realities. Tribunals from different horizons established principles inspired of marginalized ethnic and cultural groups cosmovisionss, and reevaluated the constitutional mimetism that followed independencies of colonized territories. In the continuity of this new constitutionalism, “biocultural rights“ where affirmed. They suggested that living entities of nature are subjects of law, since they allow the existence of different cultures and forms of life. What are the cornerstone of this recognition and its practical consequences? Does it present the aim to preserve naturel elements independently of human communities rights to a healthy environment, for example?

Stephen Gardbaum: *Discussant*

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

64 AUTHOR MEETS READERS: HOW TO SAVE A CONSTITUTIONAL DEMOCRACY

Democracies are in trouble all around the world, with dangers of erosion not only in new and recently "consolidated" democracies, but in established democracies of long standing. How to Save a Constitutional Democracy provides an analysis of the mechanisms of democratic decline as well as some possible remedies in constitutional design. This panel will present critical commentary.

Room:

Auditorio Claro

Chair:

Tom Ginsburg

Commentator:

Roberto Gargarella

Discussants:

Francisca Pou Gimenez
Ran Hirschl
Michaela Hailbronner

Reply to commentator:

Aziz Huq

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

65 MEMBERSHIP AND EXCLUSION

The constitutional identity of a 'people' within a nation state can be affected by legal categories of membership and exclusion, as understood and applied by institutional actors: judicial, legislative and/or executive and others. Those categories may be informed by cultural norms, global developments and historical compromises. This research group will be a network for scholars exploring the ways in which constitutions can and do perform the role of defining community. This panel focuses on these issues from the perspective of a particular state (or sub-national level of governance) or set of states - from a comparative perspective, across time or space - or from philosophical, theoretical or doctrinal perspectives.

Room:

LLM94

Chair:

Octaviano Padovese

Presenters:

Amelia Simpson
Dorota Pudzianowska & Piotr Korzec
Octaviano Padovese
Fabian Steinhauer

Amelia Simpson: The inclusive potential of 'judicial power': Australian developments

Australia's tough stance on undocumented migration is well known. At their most extreme, these policies have seen thousands of asylum seekers, including children, languish for years in prison-like detention centres. Given their insulation from populist politics, Australian judges are uniquely placed to use their power to directly affect the course of government policy on migration and have done so in a number of tangible ways. This paper focuses on one particular judicial device that has served to humanise detained asylum seekers, even while it has often not vindicated their specific legal claims. That device, in its simplest terms, has been to define the 'judicial power' conferred by the Australian Constitution in a way that makes the ordering of punitive detention an exclusively judicial function. From this position the High Court of Australia, has been able to insist that the executive government has no power to engage in detention that can be characterised as punitive.

Dorota Pudzianowska & Piotr Korzec: "Undeserving" individuals and what does it tell us about the statelessness legal framework?

There is a category of 'undeserving' persons who are excluded from the mechanisms of prevention, protection and reduction of statelessness. They can be deprived of nationality and such action is not per se arbitrary and contrary to international law. Further, they may be excluded from protection as per Article 1 (2) (iii) of the 1954 Convention relating to the Status of Stateless Persons. Finally, their access to naturalization procedures (reduction) may barred when deemed to pose threats to public security or having criminal history - this is also non-controversial under international law. 'Undeserving' may not only be adults posing threat to public security but also minors, whose parents for example committed a fraud in naturalization procedures. What is the basis for singling out such a category of persons? Do securitarian considerations only undermine the consensus that statelessness is mala in se, as suggested by C. Batchelor, or is it already off?

Octaviano Padovese: Friend and Enemy in the age of rhetoric of crisis

The topic seeks to explore the meaning behind friend and enemy, not only at a superficial level, which it has been doing by scholars. Furthermore, this dichotomy is wrapped by a rhetoric of constitutional crisis. In my impression, the claiming of a constitutional crisis is only a label to a topic in which people has no certainty about what it means.

Fabian Steinhauer: Legitimation and "Gründungsbilder"

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

66 ANTIDISCRIMINATION LAW AND RELIGION: THEORIZING THE RELATION

An increasingly contested domain of public law involves conflicts between antidiscrimination norms and claims to religion and religious belief. Cases such as Masterpiece Cakeshop, Ashers Baking Company and Jews Free School have presented complex questions for courts. Despite differences in spatial geography, culture and religious traditions, and despite divergences in reasoning and result, there is a discernable modularity in how antidiscrimination law functions in these cases as a distinctive aspect of the rationality of the modern secular state. This panel explores this relationship in modern public law jurisprudence on three questions: First, how does the public/private divide in not only shape but is itself transformed in these conflicts? Second, how does the right to religious freedom relate to and underpin the reasoning in these cases? And third, how do the largely unarticulated grounds and justification of antidiscrimination law itself apply to the domain demarcated as "religion"?

Room:

D402

Chair:

Mark Graber

Presenters:

Ioanna Tourkochoriti

Peter Danchin

Lena Salaymeh

Ioanna Tourkochoriti: The Same-Sex Marriage Cake cases and the Forced Speech Argument

This presentation aims to contribute to the debates on the hard cases of balancing freedom of religion and enforcing antidiscrimination law. It will focus on Lee v. Ashers Baking Company where the UK Supreme Court held there is no discrimination in the access to goods and services where a bakery refuses to supply a cake iced with the message "support gay marriage". It will criticise the ruling focusing on the need to enforce antidiscrimination law in the access to goods and services by focusing on the social meaning of the need to enforce antidiscrimination law, the message that it sends. It will respond to the forced speech argument by comparing it with other cases of artistic expression. In all these cases, it is important to focus on the quality of the person refused the service or the good.

Peter Danchin: The Antinomies of Antidiscrimination Law and Religious Freedom

At the end of 2017, the highest courts in the U.K and U.S. heard arguments in two remarkably similar cases—Masterpiece Cakeshop and Ashers Baking Company—involving antidiscrimination claims against bakers who refused, on the grounds of their religious beliefs, to create customized wedding cakes supporting and celebrating same-sex marriage. Against the backdrop of English and American as well as ECHR religious freedom jurisprudence, this paper examines the arguments raised in the two cases and explores the antinomies as well as convergences in the reasoning in the two cases. In particular, it asks what these cases tell us about current understandings of the subject, object and justification of the right to religious freedom and its embeddedness in the problem-space of modern secular power.

Lena Salaymeh: Religion is secularized tradition: the case of Jewish and Muslim circumcisions in Germany

A distinctive feature of modern state public law is how it produces, rather than is preceded by, the category demarcated as "religion." This paper explores how secular legal reasoning, at a broad and abstract level, regulates Islamic and Jewish traditions by limiting them within the three nodes of individual belief, a divinely ordained legal code, and public threat, which may be termed the "secularization triangle." The secularization triangle signifies not the separation of state from religion - rather, quite to the contrary, the secularization triangle clarifies how state law construes (or rather misconstrues) traditions as "religions." Instead of accommodating traditions, states control religions. The article's case study is the recent controversy surrounding circumcision in Germany.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

67 CONSTITUTIONAL EXPERIMENTS IN LATIN AMERICA: THE QUEST FOR EFFECTIVE CONSTITUTIONAL ENTRENCHMENT MECHANISMS – PART 1

Latin America is often perceived as a region where the rule of law is unstable and the constitutions are frequently replaced. However, Latin America also offers a rich—and many times under-researched—history of institutional experiments seeking to enforce the constitutions to guarantee relevant democratic principles. Some of those experiments are novel, and some are adaptations of European or American constitutional ideas. This panel is part of a larger symposium that seeks to identify the conditions that explain the success or failure of those constitutional experiments by examining case-studies from Brazil, Chile, Colombia, Ecuador, Mexico, and Uruguay. This first part of the symposium will discuss case-studies focusing on particular entrenchment mechanisms of Colombia, Brazil, and Mexico.

Room:

Auditorio E. Frei

Chair:

Joel Colon-Rios

Presenters

Vicente F. Benítez-R
Karina Denari Gomes de Mattos
Mariana Velasco Rivera
Joel Colon-Rios

Vicente F. Benítez-R: The people as semi-guardians of the Constitution: Actio popularis and judicial review of amendments in Colombia

The Colombian Constitutional Court is famous because of the way it used the unconstitutional constitutional amendment doctrine to prevent the erosion of the Colombian democracy against the ambition of former President Uribe, who tried to be re-elected for a third time. This article tracks the roots of the Colombian unconstitutional constitutional amendment doctrine and shows that its development has been more nuanced and complicated than what the literature typically assumes. The author claims that the Colombian actio popularis–first introduced in Colombia in 1910—is the judicial mechanism that allowed the doctrine to rise, as the wide scope of that mechanism allowed the citizens to bring claims that allowed the judicial system to become politically consequential. Along with the fragmentation of the Colombian political landscape, the actio popularis contributed to pushing the Colombian courts to confront politicians and built its powerful judicial authority.

Karina Denari Gomes de Mattos: The civil society of public prosecutors: the constitutional path for the Brazilian Ministério Público's major role in group litigation

The Brazilian "Ministério Público" (MP) is an agency that aims to prosecute and monitor the enforcement of criminal law, and also to protect relevant collective goods, such as the ones included in consumer and environmental regulations. These last sorts of powers—established by the first time in the 1934 Constitution and consolidated in the 1946 Constitution—are uncommon from a comparative perspective. The trend in the 1970s and the 1980s was to strengthen these powers even more. Although at first glance someone could think that these atypical powers are useful for enforcing pushing principles and fundamental rights, I argue that the MP has weakened civil society associations and harmed their legitimacy by excluding and discouraging collective associations from getting involved in crucial litigation procedures, triggering political backlashes to NGOs. Thus, a promising constitutional entrenchment mechanism has partially harmed Brazil's constitutional democracy.

Mariana Velasco Rivera: The Political Sources of Amendment Difficulty. A Comparative Study between the United States and Mexico

The constitutional amendment mechanism of the 1857 and 1917 Mexican constitutions mimic Article V of the U.S. Constitution in important ways. The Mexican experiment, however, functioned very differently than its American counterpart. While the amending procedure in the U.S. has resulted in incremental, slow, informal constitutional change through a consequential and robust judiciary, the dynamics of constitutional reform in Mexico has resulted in frequent and fast formal constitutional change and a sidelined and weak pushing. This paper offers an account explaining the divergent paths of constitutional change in these two countries. The author uses a historical account to argue that amendment difficulty is not only explained by the way institutional rules are designed but mostly by the party system, political structure, and constitutional culture.

Joel Colon-Rios: ***Discussant***

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

68 THE GLOBAL PUBLIC LAW OF PRIVATE INFRASTRUCTURE

Infrastructures—physical, informational, digital—can have regulatory-type effects. These include requiring, preventing, channeling, enabling, and nudging particular human and social behavior. Infrastructures and their regulatory effects, in turn, interact, compete and are shaped by law. As infrastructures become ever more globally interconnected, new questions emerge regarding the governance structures that shape their regulatory functions. This panel, convened by the "InfraReg" project of NYU's Institute for International Law and Justice, addresses the role of global public law in enabling, structuring and regulating the development of infrastructures by private actors. The panelists will consider the various effects of public law on the promise, creation, operation, maintenance, repurposing, and repair of infrastructures. The panel will be structured as an open conversation and will leave plenty of time for engagement with the audience.

Room:

D401

Chair:

Benedict Kingsbury

Presenters:

Kevin Davis
Cecilia Garibotti
Nahuel Maisley
Alejandro Rodiles
Rodrigo Vallejo

Kevin Davis: The Effects of Corruption in Infrastructure Contracts

Cecilia Garibotti: Infrastructure (re)development in post-privatization Argentina

The neoliberal model adopted in Argentina during the 90s radically changed the role of the state in the provision of public utilities, inaugurating a new market-led model of infrastructure development. After the 2001 crisis, the model as theoretically conceived came to a halt which at the international level notably led to Argentina being the country with the most cases before the ICSID. In domestic politics, this meant that the need to continue to develop infrastructure to serve a growing population met the limits of a formal framework which was inapplicable in the books. Infrastructure development had to be reconfigured on a new foundation for which another "international" discourse became crucial. The place that was used in the past by the neoliberal speech came to be filled (at least partially) by the international human rights discourse. The argentine case serves to illustrate the tensions that arise from the clash of two dominating discourses at the international level.

Nahuel Maisley: Infrastructure as a Trump Card: Global Public Law and the Centrality of Infrastructure Development in Public Policy Debates

Global, national and local politics have been subject, lately, to a "turn to infrastructure". Irrespective of their place in the political spectrum (from 'the border wall' to 'the green new deal') and of the particular situation of their societies (from the U.S. and China to the third world), everyone insists on the urgent need of new infrastructures to secure prosperity. Taking the development of Argentina's public-private partnerships (PPP) regime as an example, this presentation explores the role of global public law in establishing infrastructure development as a trump card in public policy debates, taking primacy over other ideals, such as "rights" or "democracy".

Alejandro Rodiles: Transnational Infrastructural Initiatives and the Changing Paradigms of Law and Development

Transnational infrastructural initiatives (TII) can be described as the promotion, facilitation, and instrumentality of a series of related infrastructures across borders. While promotion and facilitation can often be traced back to states and regional organizations, and is basically carried out through diplomacy and public financing, the instrumentality-phase usually brings in the private sector as the key actor, and foreign investment plays a crucial role. TII, typically tied to the advancement of national interests and geostrategic projects, usually share a notion of development, which nevertheless varies significantly across time and space. Simplistically put, there is a perceived divide between value- loaded development ideas, which are attached to the functions of infrastructure, on the one hand, and a notion of infrastructure as economic development, on the other. However, this perception is full of problems and contradictions, which will be addressed in this presentation.

Rodrigo Vallejo: ***Discussant***

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

69 INTER-AMERICAN HUMAN RIGHTS

Panel formed with individual proposals.

Room:

LLM91

Chair:

Jorge Contesse

Presenters:

Victorino Solá
Walter Carnota
Gonzalo Candia
Juan Mecinas & Ricardo Uvalle
Jorge Contesse

Victorino Solá: ¿Carl Menger in San José de Costa Rica? Judges, interpretation and rights

The International Human Rights Law has sponsored a hermeneutic canon by virtue of which human rights treaties must merit special treatment in so far as they are presented as living instruments, whose exegesis has to accompany the evolution of the times and the conditions of current life. Such characterization in the Inter-American jurisprudence, raises attractive problems: ¿does the principle of evolutionary interpretation imply an authorization for the judges to set their imagination in motion and alter the guidelines of the Convention´s text, without going through the formal normative instances?, ¿instead, would not imply an empowerment to develop the legal decisions of the system in order to maintain its ability to respond to situations that the authors of the instrument did not have in view, but which involve issues essentially equal to those considered in that regulation, and require specific solutions, extracted from the values, principles and norms in force?

Walter Carnota: Evolution at the Interamerican Court of Human Rights: Right to health

The judicial agenda of the Inter-American Court of Human Rights has dramatically widened in the last few years. New social concerns now dominate its evolving case-law. Particularly, right to health cases have been relevant since 2015 onwards. Protection from disease began to appear as a key component of a new human rights narrative. This brand new line of cases poses significant issues regarding important policy areas such as social welfare and the role of the state in society.

Gonzalo Candia: Facing new challenges at the Inter-American Commission on Human Rights: The procedural delay as a substantive —and not only procedural— problem.

One of the main challenges confronted by the Inter-American Court of Human Rights today is the problem of procedural delay. In effect, the Commission has received such numerous applications over the last years, that the capacity of the system has become overwhelmed. The Commission has adopted several measures to resolve this problem since 2016. Most commonly, experts and practitioners refer the lack of human and financial resources as the main factor that explains this delay. This paper will present a different perspective. This work will claim that the problem of procedural delay is mainly related to this set of circumstances: (a) the growing tendency of the Commission to expand its area of work, and (b) the misreading of the admissibility requirements contained in Articles 46 and 47 of the American Convention on Human Rights. This paper will conclude that an institutional change of perspective will assist the Commission to move forward in these matters.

Juan Mecinas & Ricardo Uvalle: Mexican National Guard: Conventionality and public aims

We analyze the constitutional creation of the National Guard (NG) in Mexico. We study the constitutional amendment from a inter- American Human Rights perspective, because the NG would be integrated by military and naval police with a civilian as commander and we consider it is against the Interamerican Human Rights System . The fact that public security tasks would be under the scope of a military body may not only imply a threat to the constitutional State but also a risk for the population. In Montero Aranguren et al. V. Venezuela and in Cabrera García and Montiel Flores v. Mexico the Interamerican Court of Human Rights (ICHR) ruled that armed forces employment for security tasks should be limited to the maximum and respond to criteria of strict exceptionality to face situations of criminality or internal violence, given that the training received by the military forces is aimed at defeating the enemy and not at the protection and control of civilians.

Jorge Contesse: Ruling Through Advice: The Use of Advisory Jurisdiction in International Human Rights Law

Under the understanding that the Inter-American Court of Human Rights exerts a jurisdiction that articulates a common law of fundamental rights, the Court has recently turned to the use of its advisory jurisdiction to expand its reach. Through advisory opinions, the Court aims at binding not only those states that have ratified the regional covenant, but also those who have not ratified it, but are members of the regional political organization of states (the OAS), that is, countries such as Canada and the United States. My paper explores how a regional human rights court‘s use of its expansive advisory jurisdiction takes place in the context of the two universalist narratives at stake: one that claims the existence of a common, universal, law - and the other one that pushes for a universal ratification of legally binding treaties.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

70 TOWARDS A "BRICS-LAW" AND THE FUTURE OF GLOBAL GOVERNANCE

The current global governance debate, a debate supposed to prepare the establishment of a future global legal order, is facing challenges from legal pluralism, increasing regulatory complexity and constant change. A global legal order of the future must necessarily combine through the comparative method the often fragmented fields of public law that is to say constitutional and administrative law, both national and international. Additionally, it must also include and integrate in a coherent manner the fields of both international private and private international law (or conflicts of law). The present panel thus presents the cooperation between the BRICS countries (Brazil, Russia, India, China and South Africa) as a new model of global legal cooperation. The panel discusses the various advantages and disadvantages of the BRICS cooperation due to its slim institutional setting and more flexible legal framework by identifying a different area of law in which they can make a difference.

Room:

Sala Reuniones LLM

Chair:

Iris Eisenberg

Presenters:

Michel Levi
Alexandr Svetlicinii
Lilian Hanania Richieri
Rostam J. Neuwirth
Denis de Castro Halis

Michel Levi: The Future of Legislation in Regional Organisations

The European experience of a regional integration process influenced the creation of different kind of organizations with regional objectives. These organizations belong to an open regionalism model different to the European process because of the relation between objectives and mechanisms established in the foundational treaties. Foundational treaties are primary rules to define the extent and capacity for the creation of secondary legislation in regional organizations. Open regionalism is a kind of not focused to create common regulations or complex institutional frameworks. The paper will research on the new challenges and roles established for the legislation in regional organizations.

Alexandr Svetlicinii: The BRICS Countries and Their Cooperation in the Field of Competition Law and Policy

In the field of competition law, the international legal regime is virtually non-existent. Despite certain success of regional integrationist developments that led to a significant degree of harmonization and convergence of the substantive competition rules, their enforcement remains primarily national. Despite economic, political, and social differences amongst BRICS countries, the significance of competition policy in these globalized economies prompted a certain degree of co-operation and experience sharing. The presentation addresses the actual and potential contribution of the BRICS to overcoming or shifting the international fragmentation of the competition law. The overview of the current BRICS initiatives and cooperation should provide a better understanding of the BRICS approach towards the role of competition law, the substantive and procedural competition rules as well as the international enforcement cooperation.

Lilian Hanania Richieri: Promoting Creativity and Cultural Diversity in the BRICS in the Digital Age

This presentation will discuss the role that cultural and creative industries may play in helping the BRICS contribute to global governance in times of change, by focusing on international cultural cooperation among the BRICS and towards other countries. It aims at raising debate on the possible content of a future common BRICS agenda on culture, cultural diversity and the creative economy, founded on the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and taking full account of the challenges and opportunities brought by the digital economy with respect to cultural diversity.

Rostam J. Neuwirth: Towards a "BRICS-Law" and the Emergence of New Sources of Law

One of the most pertinent but equally difficult questions in law and about the nature of law is about its "sources". Given that law itself is a dynamic and contested concept, the question about sources is equally contested. In fact, a long time ago the warning was issued that "the term sources of law has many uses and it is a frequent cause of error". Most of all, are they sources of law immutable like the laws of nature presumably are? Second, if not, then what about new sources of law? The present paper will discuss the possible emergence of a new body of law covering the cooperation between the BRICS countries (Brazil, Russia, India, China and South Africa). In a second step, it will align the question of a possible emergence of BRICS Law as a sui generis international legal regime with the need for new sources of law to be considered, notably in times of rapid change and emerging technologies, which pose a fundamental problem for the integrity of law.

Denis de Castro Halis: ***Discussant***

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

71 INTERNATIONAL LAW OF GLOBAL ECONOMY IN TIMES OF CHANGE: MOVING PARADIGMS

Today international economic law would more than ever find itself in unsettling times. All the three pillars of international economic law are facing challenges. The long-lasting unsuitability of the WTO to keep on being a negotiation forum is well-known and now the Appellate Body is fading away. Turning to international investment law, a recurring theme is the backlash against investment arbitration. Monetary law is rapidly facing a change of paradigm, with the emergence of discussions surrounding Stateless currencies. More generally, the 'migratory crisis' is the occasion for questioning the functioning of supranational economic mechanisms and their participation in the problems raised by a development policy that may show its dark sides. This panel will explore the ongoing changing movements happening in international economic law. The guiding idea will be to show how crisis entails the transformation of classical paradigms of the law of Global Economy.

Room:

Auditorio P. Aylwin

Chair:

Hélène Ruiz Fabri

Presenters:

Henok Asmelash
Edoardo Stoppioni
Alain Zamaria
Janine Silga

Henok Asmelash: Regulating International Trade in the Age of Rising Economic Nationalism

This paper aims to test the adequacy of the non-adjudicatory compliance control mechanisms of the WTO to tackle the new challenges brought about by the rise in economic nationalism in the United States and elsewhere. The WTO survived similar past challenges due partly to its effective dispute settlement system. However, the dispute settlement system itself is now facing an existential crisis. The United States is holding it hostage by blocking the appointment of new Appellate Body Members. Unless Members find a way to break the deadlock soon, the Appellate Body will become defunct by December 2019. The eventual death of the Appellate Body will leave the WTO without its most effective tool to keep protectionism in check. This raises the question whether there are non-adjudicatory mechanisms that help the trading system fight the rise of protectionism. This paper will examine the extent to which such mechanisms help tackle the growing use of trade protectionist measures.

Edoardo Stoppioni: Critical Approaches to International Investment Law: Voicing the Needs for Change

This paper will investigate the changing structures of one of the traditional pillars of international economic law, investment law,using a critical approach to the topic. ISDS was first criticized by South American States, framing a political discourse denouncing the fallacies of the arbitral system. The discourse changed drastically when European States adopted similar reactions, framing their preoccupations in terms of conflict of norms with the EU constitutional system. But ISDS has also been the object of criticism from academia and civil society, as shown in the 2010 Public Statement on the International Investment Regime, recalling that State fundamental right to regulate. With this in mind, the paper aims at tracing the theoretical underpinnings of these contestation narratives using a post-colonial and neo-Marxist approach.

Alain Zamaria: Towards a Trustless Crypto-Monetary Order?

The development of cryptocurrencies appears as one of the most vivid challenges to money, another pillar of the international economic order. Bitcoin was meant not only to disrupt the payment industry but also to materialize the libertarian dream of "trustless" money created outside the reach of territorial governments and banks. The paper aims at critically assessing Bitcoin as a significant institutional and monetary project. Although Bitcoin is not widely used and far from being able to compete with any official currency, it still exhibits monetary features emphasized by its crisis. If supporters of Bitcoin predict that it could challenge the current international monetary order, the paper also examines the emerging central bank cryptocurrencies. Despite the illusion that they received a State's monetary unction, these sovereign cryptocurrencies defy the whole purpose of the Bitcoin by increasing the centralization trend, and granting more control to the states and central banks.

Janine Silga: Financial instruments in the EU external migration policy: Moving towards a generalised migratory conditionality?

Conditionality-clauses are a classical instrument aimed at changing the pure economic functioning of international trade law, to integrate in the economic texture non-trade values. In the in the EU context, a 'symbiotic' relation exists between the notions of 'conditionality' and human rights. However, in the context of the EU external migration policy, a new form of conditionality has emerged, which departs from its intrinsic connection with human rights. The EU migration policy was intended as a way to cooperate with Third Countries to reduce international migration to the EU. Behind seemingly contradictory forces pulling the EU Migration Policy between security concerns and human rights protection, the 'fight against irregular immigration' remains its core objective. This is especially clear when looking at the evolution in the use of EU financial instruments. This paper intends to critically analyse these policy developments, through the lens of conditionality.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

72 COMPARATIVE ELECTION LAW: CONSTRUCTING DEMOCRATIC REGIMES

Democracy does not implement itself - a society‘s commitment to govern itself democratically can be effectuated only through law. Yet once law appears on the scene, significant choices must be made in constructing any system of institutions designed to produce workable, democratic self-governance. This panel will address some of the foundational systems typically utilized by nations to build regimes of democratic self-rule, with special attention to two questions. First, what do choices about the legal structure of democratic regimes reveal about the underlying assumptions and preferences of the societies that make these choices? Second, how successful are the various regimes at implementing the foundational commitments of their respective societies? The papers presented by the panelists will be included as chapters in a forthcoming compilation, Comparative Election Law (Edward Elgar 2020), edited by the panel chair.

Room:

A102

Chair:

James Gardner

Presenters:

Yasmin Dawood
James Gardner
Michael Pal
Patricia Popelier & Jochgum Vrielink
Pablo Riberi

Yasmin Dawood: Constructing the Demos: Voter Qualifications, Participation, and Suppression in Comparative Context

In recent years voter qualification requirements have generated an immense amount of controversy. The debate is polarized. Critics contend that these requirements are intended to and have the effect of depriving people of their right to vote. By contrast, proponents of voter qualification requirements claim that these rules are necessary to protect the integrity of the vote. This paper sets out a theoretical framework for assessing voter qualifications. It then applies the framework to a wide array of voter qualification requirements, including citizenship, residency, minimum age, voter identification, voter registration, and rules applying to criminal conviction. It considers voter qualifications from a comparative perspective, drawing on the regulations found in a number of jurisdictions, including Australia, Austria, Belgium, Canada, France, India, Israel, Germany, South Africa, the United Kingdom, and the United States.

James Gardner: Conceptions of Politics in Comparative Perspective

All political systems begin with heterogeneity of opinion and, if functioning properly, produce unique, concrete decisions and policy choices. The different forms and practices of collective self-governance can usefully be conceived as different kinds of “treatment“ for the “condition“ of heterogeneity of opinion, and these different treatments can in turn produce substantially different kinds of politics. This chapter examines the familiar choice between winner-take-all and proportional electoral systems. It argues that these systems are not merely alternative and largely interchangeable systems of vote-counting. Rather, they rest upon different and incompatible assumptions about the nature and epistemology of the common good, the obligations of citizens, and the nature of representation itself. Moreover, the two systems produce very different kinds of politics: they make distinct choices about the institutional locus of dispute resolution and structure very different political experiences for both voters and representatives.

Michael Pal: Recognition and Protection of Political Rights

Author’s abstract not yet available. The paper will undertake a comparative examination of the types and content of constitutionally protected political rights across regimes to illuminate the conditions that different societies understand to be foundational to the construction of a successful regime of democratic self-rule.

Patricia Popelier & Jochgum Vrielink: A Constitutional Perspective on Electoral Gender Quotas

Countries around the world have witnessed a tremendous increase in women‘s numerical representation in Parliament. This has largely been attributed to the introduction of gender quotas in more than 130 countries world-wide. The 9 countries on top of the world classification of women‘s representation in Parliament, however, form a heterogeneous set, covering three continents, varying levels of economic development or egalitarian societal values, and representing democratic as well as authoritarian regimes. If, as has been claimed, ‘true‘ democracy implies gender parity, then this cannot be turned around: gender parity in Parliament does not in itself imply democracy. Authoritarian regimes may have a high proportion of women in parliament, whereas democratic societies may show a poor record in this respect. The link between gender parity and ‘true‘ democracy, then, is largely a conceptual one: what a ‘true‘ democracy is, depends on a society‘s portrayal of mankind, reflected in legal models of representation. In this presentation, we are interested in how democracy and women‘s representation are related in a conceptual way. More specifically, we are interested in models of representation underpinning democratic concepts, and what this means for the use and constitutionality of gender quota

Pablo Riberi: Theories of Representation

Author’s final abstract not yet available. Through an examination, from a comparative point of view, of systems of legislative representation, the paper will illuminate differing foundational conceptions of representation -- the function of representation, the nature of normatively good representation, and the qualities of good representatives.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

73 LAW AND TECHNOLOGY IN CONTEXT I

Panel formed with individual proposals.

Room:

Seminario 3

Chair:

Magdalena Jozwiak

Presenters:

Magdalena Jozwiak
Mário Barata
Ana Cristina Aguilar Viana & Lucas Saikali
Paloma Krõõt Tupay
José Lyon

Magdalena Jozwiak: Data is political

While data driven technologies, and notably AI, are promised to disruptively revolutionize fields as e.g. finance, law, insurance, HR, communication, transportation, political actors are remarkably silent on the implications of growing use of data in decision-making. The lack of politicization of AI is problematic. While individuals are disengaged and apathetic in safeguarding their data rights, the privatization of traditionally public law functions proceeds in many different domains based on data extraction by private actors. However, many choices currently made on how data is being used is normative in nature and will change the way the societies function, thus warrants some oversight and broader debate. This paper examines different avenues presented in literature, beyond user-centric approaches from the EU data protection and consumer laws, for public oversight of how data is used in algorithmic governance and bringing the society into the decision-making loop.

Mário Barata: Data privacy, terrorism, and the need to amend the portuguese constitution

In the last few years the Portuguese Legislative Assembly has passed legislation that regulates secret service access to telecommunication and internet data (i.e., identification, localization, and traffic data). However, the first attempt was declared unconstitutional by the Constitutional Court and the second attempt also faces a constitutional test. Notwithstanding the effort made by Parliament to consider the legal questions that were raised by the Court, the problem seems to reside in the wording of the legal precept which only permits access to communication data within the framework of a criminal procedure. Consequently, state activities of a more preventive nature linked to the fight against terrorism fall outside the scope of the only constitutional exception to the rule that forbids access to this type of information. Therefore, a constitutional amendment is probably needed to adapt to this challenge posed by twenty-first century life.

Ana Cristina Aguilar Viana & Lucas Saikali: Diamond blood: cyberdemocracy and social exclusion

The online world is increasingly in the daily life of society. Government entities are aware of this scenario and are gradually implementing online access and interconnection tools with citizens. The doctrine has been exalting the use of digital apparatuses. But, it is questioned how the transformation of the State in a digital government will not end up excluding citizens. In Brazil, there is a difficulty of access to computerized networks. The purpose of the essay is to examine this problem. The results show that the Brazilian Public Administration has implemented new electronic mechanisms. However, while some tools cannot be enjoyed by all, others can only be used by those who have a certain purchasing power. Brazilian government needs to be concerned with expanding broadband investments, and improvements in infrastructure before promoting substantial transformations in this sphere, as this will lead to greater social exclusion.

Paloma Krõõt Tupay: Estonia, the digital nation – reflections on a digital citizen‘s rights

The impact of digitalisation is on everyone‘s lips and mind. In Estonia, 99 % of public services are available online. 98 % of people submit their income tax return online, 99 % of health data is digitised. At parliamentary elections 2019, 44 % of the votes were cast online. As the Estonian president says: “Estonia is the only digital nation state“. Does rights‘ protection in a such country need a new approach? Does a digital society have to leave behind the principle ideas of private life and informational self-determination? I aim to propose possible answers to serve as a basis for further discussion. Only recently, after many years of civil service, where I lastly worked as legal advisor to the President of Estonia, I decided to dedicate myself fully to my academic career. Likewise, my approach aims to provide an overview of “e-Estonia“ in “sensu lato“, including its political and cultural roots. This allows for a better comprehension also of the respective legal regulations.

José Lyon: The dangers of legislative nostalgia: the application of received legal categories to new tecnologies

This paper explores how received legal categories can hinder regulation of IT technology, by analyzing the debate regarding Uber in Chile, where its legislator is currently discussing a new legal regulation of the services provided by transportation network apps. The Chilean case provides an illustrative example, given the tendency of the bill under discussion to assimilate these new activities to pre-existing legal categories, which belong to old regulatory schemes. From the Chilean experience, I will attempt to show the unsuitability of received legal categories through the analysis of the regulatory proposals of the draft bill that is being discussed.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

74 GENDER IDEOLOGY AND CONSTITUTIONAL DEBATES

The panel seeks to identify new and old constitutional arguments and framings over gender ideology, feminist and conservative legal mobilization experiences in European and Latin American countries.

Room:

LLM93

Chair:

Paola Bergallo

Presenters:

Mary Anne Case
Alicia Ely Yamin
Paola Bergallo

Mary Anne Case: Developments in the Demonization of "Gender Ideology"

When the Vatican first raised concerns about the use of the term "gender" in public law in the 1990s, it claimed to do so in defense of what its spokesperson, Mary Ann Glendon, then sought to describe as a more inclusive feminism. But Pope Francis has now alleged that "every feminism ends up being machismo in a skirt." With this evolution in mind, this paper will look at the recent opening of new fronts in the war on "gender" – geographic (from Donald Trump's U.S. to Bolsanaro's Brazil), educational (from Hungary's ban on gender studies to the French rejection of the ABCDs of Equality), and constitutional (such as the Bulgarian Constitutional Court's rejection of the Istanbul Convention because of its use of "gender").

Alicia Ely Yamin: Reframing Sexual and Reproductive Rights Battles

Sexual and reproductive rights (SRR) advocacy is usually framed as a struggle against patriarchal ideologies and gender stereotypes. I argue that this dyad needs to be expanded to include other normalized frameworks, such as the dominant androcentric economic paradigm and the biomedical paradigm, which act in synergy with patriarchal ideologies to create laws and public policies affecting women's SRR. Using case examples of how these synergies occur in different contexts, I argue that without such expansion, the SRR movement continually finds itself manipulated and trapped into a posture of resisting different hostile forces.

Paola Bergallo: Constitutional framings and the struggle to liberalize abortion in Latin America

Latin American controversies over abortion have undergone a process of legalization and constitutionalization that illustrates a change of the role of legality across a region historically identified for the pervasiveness of the (un)rule of law. This gradual transformation in the role of law and the constitutional framings can be observed in the recursive cycles of conservative and feminist legal mobilization moving from courts, to executive and legislative regulations. The paper offers a study of such cycles of reform in Argentina, Chile and Uruguay.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

75 CONSTRUCTING AND CONSTRAINING COURTS

Panel formed with individual proposals.

Room:

LLM92

Chair:

Iyiola Solanke

Presenters:

Iyiola Solanke
Scott Stephenson
Alessandro Ferrara
Ranieri Lima-Resende
João Andrade Neto
Mariana Rezende Oliveira

Iyiola Solanke: A Public Health Approach to Judicial Diversity

To reduce the burden of violence and unintentional injury WHO/Europe advocates the use of a public health approach. This requires evidence based action and multisectoral cooperation. It supports Member States by providing data on the burden and risks of injuries and violence - supporting evidence based policy making - improving capacity for prevention and services - and facilitating the exchange of knowledge and good practice. Can this approach also be used to tackle the violence of racism and promote judicial diversity? This paper will consider the potential for use of a multi-level approach to create greater judicial diversity in Europe.

Scott Stephenson: Constitutional Conventions and the Judiciary

Analyses of constitutional conventions seldom include those conventions that concern relations between the judiciary and the other arms of government. The focus tends to be on constitutional conventions that relate to the monarch, the executive, the legislature, their relationship to each other, and the relationship between different levels of government. This paper argues that an extensive set of constitutional conventions relating to the judiciary exist, and that an analysis of them reveals three insights about the nature of constitutional conventions and the nature of the judiciary. First, the judiciary‘s authority, independence and impartiality is predominantly secured by constitutional conventions. Second, the reliance on constitutional conventions explains the simultaneous strength and fragility of the judiciary. Third, it is not always or necessarily problematic for constitutional conventions to be modified or even destroyed.

Alessandro Ferrara: Legitimacy and Reasonability: Reflections on Judicial Review

Public law confronts pressure from legislatures and administrations that vow to reflect majoritarian orientations. Even formally unchallenged democratic institutions operate in a climate of popular impatience with procedural checks and balances. Hence the urgency of revisiting judicial review. In § 1, a “counter-counter-majoritarian“ defense of judicial review is outlined, based on L.R.Barroso’s attribution of a representational function to constitutional courts, on Rawls‘s liberal principle of legitimacy and on H.Lindahl‘s legal theory. In § 2, ways of reconciling F.Michelman‘s two views of a constitutional court‘s mandate – a) remedying “shortfall of consensus“ in the polity - b) remedying “occlusions of democratic agency“ – are discussed. In § 3, Rawls‘s standard of “the reasonable“ is shown to offer a new way of distinguishing a) legitimate ways of interpreting the meaning of constitutional provisions and b) non-legitimate ways of judicially transforming constitutional meanings.

Ranieri Lima-Resende: Separate Opinions in the Inter-American Court of Human Rights: Institutional and Individual Performances

The research is focused on the adjudicatory nature of the Inter-American Court of Human Rights and its model of deliberation. In principle, identifying a large amount of individual opinions and their argumentative use could intuitively support the conclusion that the Inter-American Court‘s decision-making process is institutionally outlined by aggregating the content of separate opinions. In order to confirm or refute this perception, the importance of individual opinions is analyzed through the quantitative performance of each category of judge (ad hoc and regular), as well as each type of adjudicative activity (judgments and advisory opinions). The quantitative data is also useful to better understand the explicit assimilation of separate opinions to the core reasoning of future cases. As a result, it has been possible to identify relevant aspects applicable to the main problem of whether individual opinions really matter to the Inter-American Court‘s decision-making process.

João Andrade Neto: The (mis)representation of constitutional courts‘ decision-making: do the people have a role to play in this mythological tragedy?

In this essay, I address the way legal theorists have depicted constitutional courts‘ decision-making. My goal is to throw light on problems posed by the absence of a proper role for the people in the figurative representation of constitutional argumentation. I shall categorize the depictions of constitutional courts found in legal theory as: an oracle speaking on behalf of the gods (Dworkin and Ost) - a character giving the audience a cathartic relief (Sunstein) - a deus ex machina unexpectedly resolving the story (Barroso) - or a chorus expressing what the main characters could not say (Alexy). As I demonstrate, none of these authors devote enough attention to the fact that in a democracy the people ought to play an active role in constitutional argumentation. I conclude that this lack of figurative representation has led to exclusionary normative models in which those affected by constitutional courts‘ decisions have only limited (if any) participation in the decision-making process.

Mariana Rezende Oliveira: Which democracy?: Questioning courts as democracy builders

Literature on democratization poses a strong emphasis on belief in constitutional courts as building tools for democracy. More recently, however, critical views of this correlation have been presented, especially regarding democratic consolidation. Hirschl questions the construction of a “Juristocracy,“ whereby the empowerment of the courts leads to a gradual shift from the legislative to the judiciary as the final instance of political decisions. Daly, on the other hand, questions the supposed efficacy of constitutional courts as tools of democracy building and consolidation, especially when qualitative evaluation is brought to the equation. Further on, underlying the defense of this tool as indispensable for a successful democratization process, there is a specific, non-neutral, paradigm of democracy, which leads to the promotion of certain tools, in detriment of others. In order to contribute to that debate, this paradigm is to be investigated, as proposed in the paper.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

76 THIRD WORLD AND DECOLONIAL APPROACHES TO CONSTITUTIONAL LAW

Papers in this panel will deal with Third World Approaches to Constitutional Law and with the Docolonisation of Constitutional Law. As understood by Amaya Alvez, in Latin America the Third World Approaches to Constitutional Law have been engaged with studying, for instance, how the titularity of fundamental rights has been widen as in Ecuador - how Bolivia can be seen as an exemplar of a plurinationalism, and how Chile's colonial past and the demands of indigenous peoples continue to be ignored. Papers engaged with the project of decolonising Constitutional Law will study constitutions in the context of the history of modern imperialism. In this way, they can deal with declarations of independence and constitutions adopted in the aftermath of Independence or Decolonization, and explore how those circumstances permeated them. They can also elaborate on the adoption of Eurocentric principles that marginalised indigenous normativities in Africa, America and Asia. And on how constitutions legitimise and resist neo-colonialism and internal colonialism today.

Room:

Seminario 2

Chair:

José Manuel Barreto

Presenters:

Germán Sandoval

Tatiana Cardoso Squeff

Jose-Manuel Barreto

Germán Sandoval: Constitution as Nationalism and Constitution as a Corporation: Decolonise and Dispense the Law

Constitutional engineering was part of the nineteenth century historical context in which liberalism and the structural axes of nation-states were built in Latin America. The epistemic dependence of the ex-colonies was manifested in the adoption by criollos and mestizos who got into power of enlightened ideas that turned the new political institutions into a copy of the European ones. Thus, Latin American constitutions were built as emancipatory and regulatory agendas within a specific vision of society. Nowadays, this phenomenon tends to be re-enacted and radicalized through public policies related to extractivism and the environment, along with the dictates of corporations, and in the background of the institutional weakness of Latin American states. In this context, dispensing the law and decolonizing the Constitution are two guiding scripts for Latin American projects in the 21st century.

Tatiana Cardoso Squeff: The treatment of women in a patriarchal society: The case of constitutional amendments in Brazil

Coloniality still plays a big role in Latin American societies. It is still possible to see the colonizers‘ thoughts and perspectives in the current order. Politics and lawmaking are usually dominated by men and exist within a very patriarchal society. Brazil, unfortunately, is an example. Two proposals to modify the 1988 Constitution that are pending before the Congress clearly suggest this coloniality. First ‘PEC 181‘, which may restrict women‘s access to their sexual and reproductive rights. And second ‘PEC590‘, regarding women´s participation in politics. While the first bill, which prohibits abortion in all cases, is being inserted at a fast-track-voting pace, the second, which points to securing women being proportionally represented in Congress, is almost being excluded from the debates. After 12 years, this bill has not yet been put to a vote. This scenario clearly shows that current Brazilian society still denies gender and sexuality claims, supporting the existence of a hierarchy that allows the continued imposition of violence. From a critical decolonial point of view, this proposal intends to draw attention to the danger/importance that legislation of this nature present to a true pluralist society, or, at least, to the awareness of such differences and to the engagement of dialogues among societies, that definably could not be denied anymore. From a critical decolonial point of view, this proposal intends to draw attention to the danger that legislation of this nature presents for a true pluralist society.

Jose-Manuel Barreto: The colonial and anti-colonial character of Colombian Constitutional Law

Exploring the colonial and anti-colonial character of Colombian Constitutional Law requires withdrawing our attention from the Constitution itself, and to look towards the moment in which the first constitutional texts were adopted when Colombia became sovereign state after independence from the Spanish Empire. This is the moment of the birth of the constitutional tradition in Colombia. The origin is here not only a first moment in history, but also a founding cause that constructed Colombian Constitutional Law and that, therefore, marked its identity.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

77 SOCIALIST LEGAL ORDERS

The papers consider the ways in which socialist legal orders differ from other forms of legal order, and the tensions that can arise when socialist and non-socialist legal orders interact.

Room:

D302

Chair:

Nicholas Barber

Presenters:

Cora Chan
Ruiyi Li
Ewan Smith
Anna Lukina

Cora Chan: Thirty years from Tiananmen: China, Hong Kong, and the ongoing experiment to preserve liberal values in a Leninist legal system

The 1989 Tiananmen Massacre marked China as an exception in the chapter of world history that saw the fall of international communism. The massacre crystalized the mistrust between China and Hong Kong into an open ideological conflict—Leninist authoritarianism versus liberal democracy—that has colored relations between the two since then. This paper tracks the hold authoritarianism gained over liberal values in Hong Kong in the past thirty years and reflects on what needs to be done in the next thirty years for the balance to be re-tilted and sustained beyond 2047, when China's 50-year commitment to Hong Kong's autonomy at international law expires. Still surviving (just) as a largely liberal jurisdiction after two decades of Chinese rule, Hong Kong is a testing ground for whether China can respect liberal values, how resilient such values are to the alternative vision offered by an economic superpower, and the potential for establishing liberal enclaves in a Leninist legal system.

Ruiyi Li: How to understand the organizational form of political power in China?

The argument that the principle of the distribution of powers in China is that the combination of discussion and execution was once the orthodoxy. It was deemed as the fundamental difference of the socialist constitution and capitalist constitution. But in practice, the power of legislation, the power of administration and the power of adjudicatory are distributed to different branches. The orthodoxy is challenged. However, the separation of powers seems not a choice, as it had been excluded by the former chairman of the Standing Committee of the National People's Congress officially. Neither that the combination of discussion and execution nor the separation of powers, what is it? In other words, the traditional theories do not fit for the case in China. Then how to understand the organizational form of political power in China? This paper will try to answer the question, based on the interpretation of Article 3 of the Constitution of China.

Ewan Smith: Legality and Socialist Legality

In Pham v. Secretary of State for the Home Department [2015] UKSC 19, the UK Supreme Court held that the refusal of the Vietnamese Government to recognise Minh Pham's nationality was not a decision "by operation of law." It did so by forming its own view on the meaning of socialist law. In doing so, it took an ecumenical approach to the relationship between the government and its judiciary. In fact, law and legality take on new and distinctive meanings in socialist jurisdictions with important implications for decisions like Pham. This paper draws the concept of legality into sharper relief engaging with new reserach on China and Vietnam in Fu, Gillespie, Nicholson and Bartlett's Socialist Law in Socialist East Asia.

Anna Lukina: Soviet Human Rights: an Oxymoron?

This presentation will focus on whether it is meaningful to speak of Soviet human rights. Firstly, I will argue that it is meaningful to speak of a distinctly Soviet conception of human rights and not just human rights in the Soviet Union. Based on Marxism, these rights differed from the more familiar 'Western' model of human rights in three respects: they were focused on collective rather than individual, socio-economic rather than political, and positive rather than negative rights. This was reflected in theoretical writings, Soviet Constitutions, and Soviet participation in drafting of international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Secondly, I will address the question of enforcement. Even though the Soviet Union's rhetoric on the international plane focused on enforcing rights, it was not matched by any public law systems of enforcement such as judicial review. This, in turn, impaired the effectiveness of the Soviet model of human rights in practice. Thirdly, continuing with the practical aspect of Soviet human rights, I will turn my attention to ubiquitous violations of these proclaimed guarantees – not only political but socioeconomic – in practice.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

78 EXERCISE OF RIGHTS OF PEOPLE WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN LATIN AMERICA

This panel critically analyzes problems of the exercise of rights of people with intellectual and psychosocial disabilities (hereinafter PD) in Latin American legal systems. We identify tensions between national regulations and obligations established by the Convention of Rights of People with Disability, and we make proposals to help the demand for equal recognition before the law of PD addressing needs for support and safeguards in decision making in different contexts of PD's lives. We assume that this is a central issue for the effectiveness of the rights recognized by the CRPD with respect to PD and for the fulfillment of the duty of promotion, protection and assurance of the enjoyment of their rights by the State. Its proper treatment will allow us to advance in the satisfaction of the promises of social inclusion and respect towards these people, contributing to the elimination of the forms of discrimination, exclusion and stigmatization of which these people are victims.

Room:

Seminario 1

Chair:

Pablo Marshall

Presenters:

Viviana Ponce de León
Paula Gastaldi
Pablo Marshall
Renato Constantino
Renata Bregaglio

Viviana Ponce de León: Electoral exclusion of people with intellectual, cognitive and psychosocial disabilities in Chile

Article 16 Nº 1 of the Chilean Constitution prohibits people with intellectual, cognitive and psychosocial disabilities (PICPD) who have been deprived of their legal capacity from voting. This paper critically discusses the rationale for this practice in light of Article 29 of the Convention of Rights of Persons with Disabilities and raises several questions. For instance, is conditioning the right to vote to any kind of capacity assessment legitimate? Have Chilean courts considered any cases related to the right to vote of PICPD? What role could PICPD themselves play in reforms to remove barriers to the right to vote? These questions become more pressing when viewed against the backdrop of widespread constitutional provisions depriving PICPD of the right to vote in Latin America. Adopting this view will contribute to a better understanding of the extent of discriminatory practices in the region. At the same time, it will also highlight constitutionally entrenched inclusive measures.

Paula Gastaldi: The right to vote of persons with disabilities: an analysis from the Social Model of Disability

Argentina has ratified the Convention on the Rights of Persons with Disabilities (Law 26,378), enshrining its comprehensive protection and establishing a "social model" when conceptualizing disability. This model abandons the system of substitution of decision-making, promoting autonomy and self-government. However, the Argentine Electoral Code (CE) excludes people with mental disabilities from the right to vote. In the decision H.O.F, dated 06/10/18, the Supreme Court of Justice (CSJN) understood that "the declaration of incapacity does not entail the automatic restriction to the right to vote, according to the social model of disability". The purpose of this paper is to analyse the reasoning of the CSJN and its implications when interpreting the CE, and to contrast this analysis with the philosophical-political principles that emerge from the protective norms and the social model of disability.

Pablo Marshall: Avoiding stigma and discrimination when providing inclusion, accessibility and support: the case of the right to vote of people with disabilities

This paper uses the critical diagnosis of access to the right to vote of people with disabilities (PD) and the recommendations that can be found to solve the problems that affect them, to analyse the tensions in the access of people with mental disabilities to citizenship. The electoral exclusion and the difficulties that the PD experience in practice when voting invite to think in terms of accessibility and support, on the one hand, and in changing eligibility rules, on the other. However, the concrete ways in which these policies materialize can generate new problems for PD in their relation to the political process. We must avoid the emergence of new problems through a better and more informed electoral regulation, but also we must realize the difficulties that inclusive measures, accessibility and support can generate for PD if these measures are not considered as part of transformative solutions that seek to eliminate varied and profound forms of discrimination and stigma.

Renato Constantino: Towards the end of disability-based paternalism?: Some thoughts over the concept of 'safeguards' in the recent Civil Code Reform in Peru on the legal capacity of persons with disabilities

Peru has recently modified its Civil Code to comply with the standards of the Convention on the Rights of Persons with Disabilities. Therefore, it eliminated any disability-based guardianship and replaced it with a system of supports and safeguards. The idea of guardianship is based on a paternalistic approach towards autonomy. Only a certain type of people would be able to be autonomous: the rational ones. Such rationality has usually been related to gender or race. Even though those perspectives have long been surpassed, such idea persists in the case of persons with disabilities. This paper will provide arguments for the elimination of disability-based guardianship. In order to do that, it is necessary to re frame the idea of autonomy in a disability-inclusive manner. This paper will analyze if the efforts of the Peruvian Civil Code in that way. It will be particularly important to see if the "safeguards" are compatible with a disability-inclusive idea of autonomy

Renata Bregaglio: Same rights and same duties: Criminal liability of persons with disabilities

The disability rights academia has held a long debate regarding the correct interpretation of legal capacity. Such debate has not been as long regarding one of the consequences of such capacity: criminal liability. Traditionally, persons with disabilities were not subject to regular criminal procedures. They usually were labelled as "unfit to stand in trial" and sent to psychiatric institutions. The notion of the social model of disability and the entry into force of the Convention on the Rights of Persons with Disabilities has challenged this idea, mainly due to the human rights violations related to involuntary hospitalization. This paper will try to provide an argument for a much restricted version of "non-imputability" for persons with disabilities that cannot be based only on the disability of the person.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

79 THE DOMESTICATION OF INTERNATIONAL CRIMINAL JUSTICE: CHILE AFTER THE "PINOCHET CASE"

Chile is one of the originating contexts of the burgeoning sociolegal field of transitional justice. Its trajectory in post-authoritarian truth, justice and reparations has regularly made international headlines. Twenty years after the 1998 "Pinochet case", the judicialization of transitional legacies in Chile's domestic courts and related policy debates, continue to generate challenging legal dilemmas relevant to the entire international criminal justice project. Domestic atrocity crime prosecutions meanwhile repeatedly confront remaining institutional and constitutional authoritarian enclaves, legacies of imperfect democratization. In this panel, protagonists and analysts of Chile's transitional justice trajectory will explore issues including the challenges presented by enforced disappearance, the constitutionality of inquisitorial system-era evidentiary rules in present-day atrocity crime investigations and the recent role of the Constitutional Tribunal in underwriting impunity.

Room:

Allende Bascuñan 2

Chairs:

Pietro Sferrazza

Francisco Bustos

Presenters:

Cath Collins

Daniela Accatino

Francisco Bustos

Pietro Sferrazza

Cath Collins: La Ropa Sucia Se Lava en Casa: Chile and the Domestication of International Criminal Justice

2018 saw the 20th anniversaries of the 'Pinochet case' and the Rome statute, both critical to post-WWII atrocity crime accountability. Post-1945 global governance architecture, the bedrock of the ICJ project, is however under siege. Some African states propose regionalised alternatives, making Latin America an object of interest: its decades-long transitional justice experience has produced uniquely exacting regional system standards and a proliferation of late domestic prosecutions. Chile has been part of this punitive turn, reinterpreting amnesty and prosecuting scores of former regime agents. Focusing on criminal, civil, and policy responses to disappearance, this paper argues that the resultant transliteration of international human rights principles into domestic prosecutorial practice, meshing political exigencies with normative justice imperatives, has been the most longstanding and important "Pinochet Effect" of all, offering object lessons for other latitudes.

Daniela Accatino: Los juicios por violaciones de derechos humanos en juicio ante el Tribunal Constitucional: una defensa de la constitucionalidad de las reglas de prueba aplicadas

The Chilean judiciary has gradually overcome various legal, political and cultural obstacles to achieve systematic prosecution of crimes against humanity committed by state agents during the 1973-1990 dictatorship. Recently, however, a new obstacle has arisen: defendants appeal to the Constitutional Tribunal, claiming that the criminal procedure used to convict them (a written, inquisitorial system since superseded by an adversarial system) violates constitutional rights. Although most of their arguments are weak and poorly structured, the most persuasive one has found support in some dissenting judicial opinions. This challenges legal rules limiting the freedom of triers of fact to assess evidence, allowing convictions based on indirect evidence or judicial presumption. This paper argues that this argument is fallacious and largely rhetorical and shows how the applicable rules are in fact compatible with the right to due process and the presumption of innocence.

Francisco Bustos: El Tribunal Constitucional como mecanismo (in)formal de impunidad

The recent Chilean experience of accountability, particularly the prosecution of direct perpetrators, has had to overcome various obstacles such as amnesty, statutory limitations, and the existence of a court addicted to the military regime. But, since 2015 the Chilean Constitucional Court began to emerge as a mechanism to obstruct the progress of human rights trials. This has been noted by the defenses, which have sent almost sixty cases to the tribunal. These cases have shown excessive delays, sui generis interpretations, a very low admissibility standard, and even interference with the faculties of the Chilean Supreme Court, being the most flagrant example the "Cerro Moreno" Case. This paper argues that this practice of the court, contradicting its resolutions of the 2005-2015 period, violates various international obligations, constituting a true mechanism of impunity, and will discuss the ways to overcome this.

Pietro Sferrazza: La búsqueda de las personas desaparecidas en Chile: reflexiones críticas

Among the ethical and legal problems that arise from the perpetration of crimes of enforced disappearance, one of the most pressing issues is the satisfaction of the need to find missing persons alive or to recover, identify and return their human remains to their family members. Nowadays, the problem of missing persons searching seems to appear more on the agenda of important international humanitarian and human rights bodies. Also, several States have implemented the search as a public policy. This paper will aim to diagnose the current search model in Chile and reflect critically on the possibility of implementing a humanitarian model that complements the search conducted by the courts.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

80 CONSTITUTIONAL THEORY: NEW AND OLD CHALLENGES

Panel formed with individual proposals.

Room:

Allende Bascuñan 1

Chair:

Martin Krygier

Presenters:

Brigitte Leal
Guilherme Scotti & Marcos Queiroz
Octaviano Arruda
Leonardo Cofre
Fernando Contreras
Martin Krygier

Brigitte Leal: Facing Up Fact Uncertainty: A Complexity in the Public Law Litigation Model

Oliver W. Holmes Jr. held that what matters in legal theorizing is what judges do in fact, not what judges should do in theory. The public law litigation model offers an example of this realist approach to judicial activity by illustrating how much of an unclear judicial behavior is given by fact uncertainty. I first identify the changing features of public law litigation. If traditional conceptions of adjudication see litigation as a bipolar, retrospective, self-contained, and parties-controlled mechanism, today's public law litigation is a multipolar, prospective, expansive, and judge-controlled type of judicial adjudication. In discussing how these changing features impact on our comprehension of fact uncertainty, I focus on the contrast between legislative and adjudicative facts. Finding and evaluating facts are directly related to the normative construction of State's duties of care. This consequence can be exemplified by uncertainty about facts in environmental law cases.

Guilherme Scotti & Marcos Queiroz: Fundamental rights as an aperture to the past: Dialogues between Ronald Dworkin and the post-colonial theory

The paper seeks an approximation between constitutional theory and postcolonial thought. It pursues elements for a legal hermeneutics that deals with the permanence of colonial violence. Fundamental rights in modernity are pictured, from Ronald Dworkin's theory, as the gateway to morality and, consequently, to history within the legal system. The consequences of this relation between morality and law for the constitutional hermeneutics are debated. Second, the postcolonial is defined, as well as what contributions it can offer to displace the hegemonic narratives about modernity. Postcolonial and constitutionalism are then collated in the sense of providing elements for an expanded and more democratic moral imagination of fundamental rights. Going back to Dworkin, the conclusion addresses what kind of moral responsibility we have in writing the legal novel when unjust suffering and silenced struggles for freedom and equality are raised at the center of constitutional history.

Octaviano Arruda: On Legal Interpretation: nomos, violence and romantic constitution

Since it was first noted "nomos" has sneaked to the West world in order to keep order in the earth. However, its meaning is very unstable. Robert Cover and Carl Schmitt disagree in its employing. If we travel back in time to "polis, we would find out that Socrates wanted to define nomos as a sharing. Thus we could battle the arguments from the Sophists. How could nomos be linked to our modern time and be present in the legal interpretation? In my hunch, nomos has been occulted in the form of law. Law can only exist together with violence, claimed centuries ago the French philosopher Blasé Pascal. So to speak, every form of law, including the constitution, carries normative violence. This paper seeks to explain how the the romantic constitution cannot survive without violence, a violence which is presented in the legal interpretation, which warps the original meaning of nomos as sharing.

Leonardo Cofre: Reconciling the is/ought divide in constitutional theory

This paper focuses on the question about the normative or descriptive character of constitutional theory. A constitutional study is normativist when we ask what the roles of a constitution ought to be, we choose between different institutions and processes, and we evaluate how well they perform for guaranteeing (specific) values. Conversely, a descriptivist view rejects universalism and idealism in constitutional theory and looks for the existing constitutional practices. By means of British constitutional debates, I argue that both normativist and descriptivist approaches are necessary, but neither can satisfy the constitutional theory's demands by itself. First, constitutional design is called to act in the real world, considering the circumstances of political societies where institutions are applied. Second, it is highly contested to say that a pure descriptive theory is possible. Then, a reconciliation in this divide is advisable. I present some ideas on how to conceive it.

Fernando Contreras: The problem of legalism: Lon Fuller's critique of HLA Hart's Rule of Recognition

An overlooked topic of the Hart-Fuller debate is Lon Fuller's critique of HLA Hart's rule of recognition. The core of Fuller's critique is that Hart's approach is "legalistic". The aim of this paper is to revisit this critique, explain what Fuller understands by "legalism", and argue that his claim has the potential of illuminating current discussions on a relevant dimension of judicialization of politics. Judicialization of politics involves both (i) the transfer of authoritative decisions of fundamental political questions and issues of public policy from the legislative to the judicial forum, as well as (ii) what some have called "the juridification of social life". My claim is that this latter dimension is an instance of "legalism". If so, and if judicialization of politics presents a challenge to contemporary constitutionalism, as some have argued, examining Fuller's account will provide a fresh perspective to analyze the range and scope of that challenge.

Martin Krygier: What's the point of the rule of law?

Section 1 characterises elements shared by most conventional accounts of the rule of law. Section 2 outlines five reasons not to start, still less to end, with them. The rest of the paper develops an alternative account. Section 3 suggests that we do better to start with consideration of the point, the telos of the rule of law, rather than with enumeration of purported elements, the anatomy, of it. Since the rule of law is typically seen as a response to a problem, often described as arbitrary power, the fourth section attempts to say what sort of a problem that is, and why it has so often been regarded as problematic. The fifth and sixth sections seek to explain why the metaphor of tempering power well captures some of the character of such a solution. Section seven sketches some expansive implications of that ideal. It suggests that it should be understood as an inherently social and political ideal, not merely an ideal for law.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

81 NATION-STATES AND SOCIETY FACING MIGRATION. ATTEMPTS OF DIALOGUE AND PROPOSALS PRO HOMINE FROM LATIN AMERICA.

One of the most relevant challenges in the government of migration arises from the necessity to coordinate public policies and initiatives taken by States and stakeholders. Migration alters the political map of the Latin-American region and creates tensions among the States involved in the reception of migrants. Therefore, the adoption of common and integral public policy on migration, capable of understanding and governing the phenomenon in its multiple dimensions is urgent. This panel contributes to a contextual, complex and wide understanding of migration in the region, since it offers instruments to understand the behavior of the Colombian state in relation to migration from the historical perspective - it studies the experiences and learnings from other countries and, at the same time, it offers useful insights for policy makers - finally, it debates the challenges and opportunities for the private sector brought by migration.

Room:

FD-101

Chairs:

Carolina Moreno

Gracy Pelacani

Presenters:

Juan Manuel Amaya Castro
Gracy Pelacani
Miguel Alejandro Malagón Pinzon
Carolina Moreno Velasquez
Anna Luisa Walter de Santana

Juan Manuel Amaya Castro: Colombian and the Venezuelan exodus: between a normative and international institutional managerialist approach

Colombia‘s response to the dramatic increase in the inflow of Venezuelans into its territory is characterized by idiosyncrasies. Geopolitical considerations play a big part in preventing the official construction of the Venezuelan refugee in the problematic terms that we have seen in other places. However, the Colombian government has been navigating a complex set of considerations. On the one hand, it has almost completely ignored in this policy development the reference to international instruments such as the Geneva Convention and the Cartagena Declaration. On the other hand, Colombia has practically open its borders and is pursuing a strategy of regularization. Even so, it is actively seeking whatever international, institutional and financial support it can get, and it seems very determined to maintain the international status of this “crisis“. This paper seeks to examine this approach from a comparative and historical perspective and to analyse it various implications.

Gracy Pelacani: Challenges and opportunities for a regional approach to migration in Latin America

In 2018, we witnessed an increasing effort by some Latin-American countries and international organizations to set the basis for a regional approach to manage the Venezuelan migration crisis and to coordinate national responses. However, despite the efforts, a regional approach seems not to be an achievable goal in the short term. This paper aims to explore the new opportunities for the development of a (real and effective) regional approach to migration in Latin America provided by the necessity to face and govern the increasing migration from Venezuela. Thus, it accounts for the initiatives taken so far to coordinate national migrations policies, and it looks at previous attempts to develop a common approach to migration in the region - it attempts to understand the reasons why the attempts of coordination seems not to be effective, to conclude with some proposals for the development of a real regional approach to migration in Latin America.

Miguel Alejandro Malagón Pinzon: A History of Migration in Colombia: 1850-1957

This paper intends to study the evolution of the Colombian immigration for a hundred-year period (1850-1957). In this period, we have two main proposals on the subject. The first one is of the radical Liberals, who, since the mid-19th century, developed in the country the ideal of “civilization vs. barbarism“ proposed by Domingo Faustino Sarmiento in Argentina. Our Liberals promoted the arrival of the white race to implement a whitening process and the removal of lower races as the indigenous and Africans. The second project is of the 20th-century conservatives that pursued the same ideal of racial improvement, but which also attended religious objective, and ended up with the coming of European Catholics as, for example, the Polish. Finally, with the military dictatorship of Gustavo Rojas Pinilla, immigration served to eradicate the undesirable Communist barbarians who inhabited the eastern plains of our nation.

Carolina Moreno Velasquez: The Venezuelan migration in the Current Colombian Context: A Challenging Balance between Centralization and Decentralization

How the State and its public authorities respond to social issues and to individual and collective needs of society is a key concern for Administrative Law. In relation to migration, national authorities are in charge of formulating and enforcing a national public policy, while local authorities are responsible for implementing specific programs to deliver goods and public services to attend migrant´s needs. In Colombia, we observe a defiance to accomplish a balance between this set of legal powers, and to articulate a comprehensive and coherent public policy capable of dealing with the challenges of the growing migration from Venezuela. Under these circumstances, this article explores the Colombian legal and institutional framework for migration to explain how public authorities are responding to the Venezuelan migration, and how Colombian public institutions balance their political, fiscal, and administrative powers to tackle the challenges and opportunities brought by migration.

Anna Luisa Walter de Santana: Business responsibility and migration: dialogues for the protection and promotion of human rights

Companies are fundamental actors in the protection of human rights and in the prevention of occupational risks originated by increased migration, although they do not have the same obligations of States to promote and protect the rights of migrants. According to the United Nations Guiding Principles on Business and Human Rights (UNGPs), the corporate responsibility to respect human rights includes both the duty to abstain from violating these rights and the adoption of positive actions to promote them. The article aims to discuss how companies should act to promote and protect the rights of migrants. First, it analyses the business responsibility to respect human rights, under the guidance of the UNGPs. Second, it analyses how companies should act with due diligence to prevent possible exploitations of their own migrant workers. At last, a transversal and multilevel dialogue between States, civil society and business is proposed for a greater protection and promotion of migrants.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

82 INNOVATIVE REASONING IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: FACING CONTEMPORARY HUMAN RIGHTS CHALLENGES

Human rights law faces new challenges, such as economic injustice and the lack of effective protection of economic, social and cultural rights, or violations by global business corporations and other non-state actors. The Inter-American Human Rights bodies are responding to these challenges by incorporating innovative judicial reasoning and interpretation methods. These methods, however, stretch international law norms in ways that risk producing a backlash against the decisions of these bodies and the effective protection of human rights. The panel addresses some of these innovative methods in a critical way, suggesting ways to improve their effectiveness within the boundaries of public international law.

Room:

D405

Chair:

Pier Paolo Pigozzi

Presenters

Andrés Felipe López
María Angélica Benavides
Álvaro Paúl
Soledad Bertelsen
Pier Paolo Pigozzi

Andrés Felipe López: Empresas y derechos humanos en el Sistema Interamericano

Business corporations can and do violate all kind of human rights all over the world and Latin America is not the exception. Businesses‘ social and economic power had overgrown the legal structures that regulated them. In response to this situation, and although the Inter American Human Rights System passive jurisdiction is limited to states, the Court and Commission have recognized direct obligations correlative to the rights protected in the American Convention over businesses and other non-state actors - expressly declared the violation of human rights by those non-state actors - and ordered or recommended reparations measures that suppose the direct involvement of businesses that negatively impacted the rights of the victims. This jurisprudence deserves to be studied in order to evaluate its effectiveness, if it is part of the mandate of this regional system of human rights, and understand the reasoning that lead these organs to allocate direct human rights obligations on businesses.

María Angélica Benavides: La buena fe en la interpretación judicial internacional de los derechos humanos

Good faith is a principle that guides all international law. The Vienna Convention has incorporated it for every moment of the life of the treaty. The rule of interpretation contained in Article 31 binds every interpreter. In terms of international jurisdiction in the field of Human Rights, this rule requires the judge to consider the particularities of the societies bound by the treaties. In this case, good faith is not a mere reference to a fundamental principle of International Law. It obligates the judge to a conduct that is the basis or assumption in the act of applying the rule of said article. The paper will refer itself to a possible absence of good faith in the application of those methods by the International Court of Human Rights, resulting in judicial activism. In this case, the presentation will refer to the Lagos vs. Peru judgment.

Álvaro Paúl: Dos visiones del control de convencionalidad

The Inter-American Court of Human Rights developed a doctrine called conventionality control (CvC). In general terms, this doctrine is somewhat similar to the idea of judicial review of legislation. According to the Court, CvC requires domestic judges and other bodies of States parties to the American Convention on Human Rights (ACHR) to depart from domestic legislation that runs counter to the ACHR or the Inter-American Court‘s interpretation of it. Many scholars contend that the application of CvC should be carried out even if the domestic bodies that apply it have no constitutional power to do so. Others have a more restrictive interpretation and consider that domestic bodies would have to apply it to the extent of their power, according to their national constitutions. Apparently, the latter interpretation is gaining wider support, which is desirable, because only this reading would be compatible with the principles of international law, and possibly accepted by all member States.

Soledad Bertelsen: La referencia al derecho local en la jurisprudencia de la Corte Interamericana de Derechos Humanos

In recent years, the Inter-American Court of Human rights has incorporated the reference to domestic law in its decisions. This approach might look for an inter-jurisdictional dialogue between local and supranational courts. It is not clear, however, whether this practice has any influence in the reasoning of the Court or whether the Court would arrive at the same conclusions without any reference to domestic law. On the other hand, the methodology used by the Court has flaws, such as (1) comparing norms of different rank, (2) superficially comparing the texts of the norms without looking at how the countries apply them, and (3) omitting from the comparison many of the member states of the Inter-American system. The paper suggests domestic law might have a more active role in the reasoning of international human rights courts, and proposes some changes to the Inter-American Court methods based on the practice of the European Court of Human Rights.

Pier Paolo Pigozzi: *Discussant*

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

83 NEW SOCIAL CHALLENGES FOR PUBLIC LAW

Panel formed with individual proposals.

Room:

Auditorio CAP

Chair:

Andrea Cristina Robles Ustariz

Presenters:

Felipe Bravo
Fulvio Costantino
Mariana Lucía Burgos Jaeger
Seksiri Niwattisaiwong & Rawin Leelapatana
Andrea Cristina Robles Ustariz
Klaus D. Beiter

Felipe Bravo: Consumer law from a public law outlook

The purpose of this paper is to outline the rationale for consumer policy-making from a public law outlook. While regulation of consumer markets is usually seen as a matter of civil law, consumer policy-making is part of public law, and its regulatory objectives and instruments are mainly based on public law remedies, and not private law principles. The paradigm shift from civil law to public law allows the regulatory authorities to have a greater diversity of intervention options, without the usual constraints and objections based on private law. In this scenario, regulatory objectives in consumer law can be accomplished using ex ante and ex post intervention strategies. This paper proposes a framework of standards and policy tools for regulation on consumer markets, based on supply and demand-side remedies – that is, interventions affecting suppliers' behavior or consumption through consumer decision-making – reviewed from a public law perspective.

Fulvio Costantino: New wine and old wineskins. Sharing economy between global platforms and local regulations.

The idea that the innovations of the so-called sharing economy should not be regulated seems to have been overcome. The real issue, however, is who should discipline these new phenomena and under what conditions. Until now, the adoption of local regulations has prevailed over supranational or national ones. Can this be the best solution, or will a global approach be indispensable on the horizon?

Mariana Lucía Burgos Jaeger: The end of the interdiction for disability in Peru: a blow to the legal paternalism

The exercise of fundamental rights by people with psychosocial and intellectual disability has increased in the last decades by reaching new scenarios where it was unthinkable before that they could be assumed as capable fundamental rights holders on an equal basis with others. This shift began with the civil rights movement by the 60´s in the Global North, but just recently has started in other countries like Perú, that until a few months ago maintained a legal restriction that denied a person with disability the full exercise of his or her owns rights. In September of 2018, this shift took a leap with the substitution of the interdiction, a legal provision contained in the Civil Code that limited the full recognition of impaired people legal capacity. We will try to discuss in this article, how a paternalistic system justified this measure that is still affecting today their rights exercise due to social resistance, and which are the bases of this change.

Seksiri Niwattisaiwong & Rawin Leelapatana: The Karma of 'being disabled' in Thailand: the tension between religious belief, law, and economics

In Thailand, disability is believed among some sectors of society as an outcome of past 'Karma'. Feeling ashamed that disability is a consequence of bad karma, a great number of parents refuse to register their children with special needs to the registrar, making the latter unable to obtain several benefits enshrined in the Persons with Disabilities Empowerment Act (PDEA). A belief in bad karma, in consequence, spurs the incompatibility between the PDEA and the Convention on the Rights of Persons with Disabilities (CRPD) to which Thailand is a state party. This incompatibility exacerbated by the belief in bad Karma, in turn, precipitates economic loss directly and indirectly. This paper examines the extent to which the concept of Karma exacerbates the tension between religious belief, law, and economics with respect to the matter of people with disabilities in Thailand. Its data is collected through interview method.

Andrea Cristina Robles Ustariz: The obsolescence of human beings in the era of globalization 4.0: the "big short" for human capital through the lifelong learning principle

The automation and the artificial intelligence are reducing the demand for human labor, just as happened in each of the industrial revolution. Despite the global projects to get equaility and to cut poverty: the places left free by the machines and robots will be occupied just by the more qualified people. The paper begins with this prior reflection about the current conceptions of "progress" and "development" from the economic and legal approaches, and if they have identical or opposed goals. Then, in front of the characteristic of the new wave of the industrial revolution: the "globalization 4.0", which are the legal instruments that we can use to make a bet in favor of human capital? Is the "lifelong learning" principle one of them? In the same way, how can we use the main economic constitution postulates like the social function of the property and enterprise, the economic sustainability and the State as the director of the national economy?

Klaus D. Beiter: Where Have All the Scientific and Academic Freedoms Gone? And, What Is 'Adequate for Science'? Crucial Guidance on the Interpretation of the Right to Enjoy the Benefits of Scientific Progress and Its Applications

Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights protects the right of everyone to enjoy the benefits of scientific progress and its applications (REBSPA). While this provision's interpretation has not been a focus of attention in the past, this is changing. A danger lies in construing this provision as entitling states to comprehensively regulate the field of science, at the expense of scientific and academic freedom. Scientific or academic freedom rather than state regulation guarantees creativity and innovation in the field of science for the benefit of society at large. This paper seeks to guide all those tasked with interpreting Article 15(1)(b) – specifically, the UN Committee on Economic, Social and Cultural Rights. Relying on the notion that a science system must be 'adequate for science', the paper concludes with a set of twenty-two recommendations on how the REBSPA should be construed so as to duly respect scientific and academic freedom.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

84 COURTS AGAINST OR IN FAVOR OF DEMOCRATIC DECAY?

In constitutional theory, judicial authorities are supposed to work as the last defense against aggressions to democratic institutions and fundamental rights. Political practice has shown that such presupposition can be sound in some opportunities but flawed in most of the cases. The first decades of the 21st century revealed serious challenges to constitutional democracy, in a way that made academics, public authorities and civil society groups hope that courts can control the rising of authoritarianism. However, are judges and tribunals the proper forum to defend democracy? Or, on the other way around, can judicial authorities contribute to democracy decay? Have the judicialization of politics poisoned tribunals‘ proper role in liberal democracies? This panel aims at debating possible answers to these questions, relying not only on Constitutional Law lens, but also on empirical data and comparative analyses of different jurisdictions.

Room:

R510

Chair:

Emilio Meyer

Thomas Bustamante

Presenters:

Emilio Meyer & Mariana Oliveira

Diletta Tega

Tom Daly

Estefânia Barboza & Adriana Inomata

Conrado Mendes

Thomas Bustamante & Evanilda Bustamante

Emilio Meyer & Mariana Oliveira: Moderating Powers? Military and Judges in Brazilian Undemocratic Revival

Even though a lot has changed since 1891, it is still a regular invocation in political debates to treat the military and the courts as moderating powers. This proposal intends to recover and criticize such ideas. Going back to the Brazilian dictatorship of 1964-1985, it will explore how militaries interfered with judiciary power in order to avoid any kind of rebellion. Under the Brazilian Constitution, the tense line between civilian and military will show that to restrict political activities from such branches is a difficult task. Back to now, the proposal will unravel how both militarization and judicialization of politics will overlap in Bolsonaro‘s term. This work will analyze signs of the “weak democracy syndrome“ in Brazil, considering its middle income status, and focusing on a critical approach on courts and the military as actors that can work to destabilize, rather than consolidate, new democracies and their endeavor to overcome an authoritarian past and avoid its return.

Diletta Tega: The Italian Constitutional Court in-politics

The Italian Constitutional Court (ICC) presides over vital ganglia of democracy: the admissibility of abrogative referenda - the validity of electoral law - the resolution of conflicts among State‘s powers. On the second point, in 2014 the ICC took arguably the most controversial decision of its recent history, inducing a shift from a majority-assuring system to an almost purely proportional one, which is the background of the current political situation. Concerning referenda, a long-standing case-law gives the ICC wide discretion in allowing popular consultations, often with powerful political effects. While most of these decisions are matter of a sharp debate, the general perception is that the ICC is an authoritative and not-politicized body. Nevertheless, Italy is a case in point that, however independent and well-meaning a constitutional tribunal may be, its action is not sufficient to guarantee a well-functioning democracy and insulate it against the risks of populism.

Tom Daly: The Mutation of Juristocracy in the Context of Global Democratic Decay

When Ran Hirschl decried ‘juristocracy‘ in the mid-2000s the transfer of power worldwide from representative institutions to judiciaries seemed unstoppable. Today, that global trend appears to have hit a wall: courts have been delegitimised or diminished by governments from the USA to Israel to Poland – even worse, they are viewed as having aided the deterioration of democratic rule. However, look more closely and expansive judicial power has simply mutated in the face of perceived threats to liberal democracy. The Indian Supreme Court has sought to build institutional capital against the Modi government through its rights jurisprudence. The gaze has shifted to lower courts as democracy defenders in Poland and the USA. In Europe, courts are at the centre of pushback against the Polish government. This talk will analyse these recent developments and discuss how they fundamentally alter longstanding debates on judicial power.

Estefânia Barboza & Adriana Inomata: The Brazilian Judiciary Under Attack

In the last elections an openly authoritarian President was elected. As a candidate, he already presented all the evidence of an autocratic behavior, and after elected, in his first months of government, Bolsonaro is presenting a series of measures that show the establishment of a “democratorship“ in Brazil. This work will analyze several evidences that demonstrate the risk that Brazil can also become another dictatorship of the XXIst century, that is using an autocratic legislation and constitutional amendments to cover an authoritarian government. The process of defeating democracy and spoiling its institutions is gentle and gradual, masked by legal-constitutional instruments. In this context of crisis, the Judiciary can be a containment dam of conservative confrontations against fundamental rights. But do the Brazilian Constitutional Democracy have emergency clauses to protect this branch? Or the Judiciary without unwritten guardrails for its protection will be defeated?

Conrado Mendes: Judicial collaborationism in the guise of “classic separation of powers“

The Brazilian Supreme Court faces the starkest challenge to its authority since the country’s transition. The challenge is manifold and includes: traditional court-domesticating package of authoritarian regimes (flooding the court with apologists of the regime, either by expanding the number of seats or by retirement measures) - threats of non-compliance - threats of reactions by the legislative body through constitutional amendments - aggressive public speeches against the court’s decisions. The corrosion of the court’s authority, however, does not spring only from exogenous forces and ideological disagreement, but also from endogenous fractures of ethics and procedures, which are arbitrarily manipulable by individualist actors. The current president of the court has announced that the institution has to rescue the classical separation of powers and help finding agreements. This paper intends to reconstruct these moves and interpret it in light of an idea of judicial collaborationism.

Thomas Bustamante & Evanilda Bustamante: Barroso‘s Theory of Constitutional Legitimacy: A Critical Approach

Justice Roberto Barroso is one of the most influential judges in Latin America. In this paper, we challenge his theory of constitutional legitimacy. Barroso believes that the legitimacy of constitutional adjudication stems from three different functions performed by courts. First, courts play a counter-majoritarian role - second, a representative role. Although judges lack votes, they are better positioned than legislatures to interpret the will of the people because they are motivated by reason, rather than interests. Third, courts can break the political inertia and lead society. Although these powers should be used sparingly, courts can act as an “enlightened vanguard“ and push history forward. We argue that none of these claims is justified and that Barroso‘s own reasoning is no different in quality from the ordinary practice of elected politicians. Barroso‘s theory of judicial legitimacy has facilitated an unprecedented politicization of adjudication and a serious threat.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

85 THE PEOPLE IN CONSTITUTION-MAKING AND -CHANGING

Panel formed with individual proposals.

Room:

D404

Chair:

Sophie Weerts

Presenters:

Aya Fujimura-Fanselow
Sophie Weerts & Clarissa Valli Büttow
Jamil Civitarese
Gabriel Negretto & Mariano Sánchez-Talanquer
Alan Greene
Juan Diego Galaz

Aya Fujimura-Fanselow: Citizen-led inquiries as a form of resilience in the global and national order: opportunities and challenges

In this paper I will provide an overview of the characteristics of "citizen-led inquires," also called "unofficial truth projects" or "civil society truth commission initiatives," including their normative framework - key aspects in which they differ from official truth commissions - and some of the underlying factors why they are created. I will use three case studies: the Greensboro Truth and Reconciliation Commission, the North Carolina Commission on Inquiry, and the Poverty Truth Commission in Scotland to analyze opportunities and challenges presented by these inquiry processes. I will relate the topic to the theme of the ICON-S conference by addressing whether these commissions partly respond to increasing popular distrust in government, identified as one challenge that is being faced by public law and whether they represent resistance in the global and national public law order.

Sophie Weerts & Clarissa Valli Büttow: Constituent Power 2.0

The notion of constituent power is one of the conceptual cornerstones of constitutional law. It is rooted in the constitutional legal theory of the beginning of the 20th century. More than hundred years later, the political and social environment has deeply changed. The fourth industrial revolution generates new democratic practices in terms of participation and constitution-drafting. Recently, new experiences have still flourished all around the world, and especially in Europe and in the Global South. This paper aims to present these new technological developments and to analyze their effects in the framework of the constitution-making. The question of participation will be analyzed through the use of new instruments – algorithms – and tools – apps. One the other side, the question of constitution-drafting will be addressed through the issue of the authors and material sources of law, which are made accessible through digital data platform.

Jamil Civitarese: Constitutional Design and the Optimal Level of Deliberation in a Society

Deliberative democracy is a project that has strong normative implications for constitutional design, but its procedural nature leads to preoccupations about how fundamental rights might be ensured. Rawlsian perspectives highlight the importance of core principles that deliberation cannot override, while Habermas defends that an optimal procedure leads to an endogenous observation of minorities rights. In this paper, I present a game-theoretical model to analyze whether variations in the costs for deliberation and heterogeneity in society might cause welfare enhancements. If there are no minorities – all groups have the same probability of being non-majoritarian in an important issue – lower costs of deliberation always increase social welfare. Nonetheless, if there are minority groups, it is not possible to ensure they will not suffer from distortions in the deliberation process led by elites unless costly Rawlsian consensus rules are enacted.

Gabriel Negretto & Mariano Sánchez-Talanquer: Constitutional Origins and Liberal Democracy: The Impact of Elite Cooperation and Mass Participation

This paper examines the impact of different modalities of constitution-making on democratic regimes. It argues that the dispersion of power that makes possible elite cooperation not only facilitates the creation of legal limits on state action but also provide opposition parties and citizens alike with the means to make institutional constraints on executive power and civil liberties effective. We also propose that the effect of inclusive constitutional agreements should be larger during the critical early years of life of the new constitution, when the balance of power among the political forces that created the constitution tends to remain stable. We find support for these arguments using an original global dataset on the origins of constitutions adopted or implemented under democracy between 1900 and 2015 and a difference-in-differences design of quantitative analysis that allows us to isolate the differential impact of certain features of constitution-making on liberal democracy.

Alan Greene: Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom

This paper argues that parliamentary sovereignty's assimilation of constituent power—the ultimate power in a legal order to create and posit a constitution— has stultified the development of British constitutional law. The result is a deeply ideological, as distinct from oft-heralded pragmatic, constitutional structure that is incapable of confronting the systemic challenges the UK currently faces. By conceptualising a more antagonistic relation between the Crown in Parliament and 'the People' by questioning the democratic credentials of the former, this paper contends that the UK constitutional order can be re-invigorated. This re-appraisal, however, also requires the interrogation of the notion of 'the People' in the UK constitutional order itself.

Juan Diego Galaz: The right to resist: changing the paradigm from the obligation to obey, to the right to participate

It will be argued that the right to resist can be considered as a non-institutional device of constitutional correction in cases of disagreement. In general the right to resist must be understood from the paradigm of participation and not from the paradigm of obedience. The constitution is a way that citizens have both to constitute and regulate power. Secondly, disagreement is enough for this right to emerge and it could be invoked for all of those who share the disagreement. Third, the right to resist is founded in the right of participation and therefore it must be considered as a characteristic element of the current constitutional dialogue and not the 'last resort'. Two objections to this position must be addressed. Fourth resistance and rebellion are differentiated. While rebellion seeksto break with the existing constitutional pact, the resistance seeks to correct the current constitutional pact. Finally, some ideas will be advanced about legitimacy, democracy and resistance.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

86 CONSTITUTIONAL POLITICS IN LATIN AMERICA

Panel formed with individual proposals.

Room:

Sala Juicio Oral

Chair:

Andrés Pavón Mediano

Presenters:

Nilo Rafael Baptista de Mello & Vanessa Cristine Cardozo Cunha

Andres Pavon Mediano, Diego Carrasco & Diego Pardow

Andres Vodanovic

Karina Denari Gomes de Mattos & José Ribas Vieira

Bruno Camilloto

Nilo Rafael Baptista de Mello & Vanessa Cristine Cardozo Cunha: Brazilian Public Law Reactions to the Conservative Wave: Reaffirming constitutional values

Consubstantiating the conservative world wave (Huntington, 1991), in the wake of left wing President Dilma's impeachment, in 2016, the rise to power of the right wing set the course to changes in public law that threaten hard earned democratic and liberal values. In Brazil, new legislation and court's interpretations portray the conservative values penetrating society. This paper suggests public law in Brazil, on the other hand, show reactions to this wave, reaffirming constitutional principles related to human rights and human dignity. This study analyzes two relevant aspects of Brazilian public law: 1) the 2015 Civil Procedure Code, based on constitutional principles and guaranties (Câmara, 2016) - 2) the Supreme Court's counter-majoritarian performance in cases where it reaffirms human dignity by preserving constitutional individual rights (Barroso, 2012, 2015). As a result, it is suggested Brazilian public law has been reacting to conservative ideas, reaffirming the constitution.

Andres Pavon Mediano, Diego Carrasco & Diego Pardow: Estimating judicial ideal points in the Chilean Supreme Court's public law chamber

By estimating the ideal points for the Justices of the Chilean Supreme Court (public law chamber, period 2009-2018), this research attempts to identify coalitions inside the Court and provide a measurement to predict the justices' behavior. To this end, we followed Martin & Quinn (2002)'s method for studying the U.S. Supreme Court, applying an IRT model that allows to generate judges' ideal points via a MCMC method to fit a Bayesian measurement model of ideal points for judges. The Chilean Supreme Court composition is substantially less stable than its counterparts in the U.S. or Europe, its workload is significantly higher and the rate of split decisions is considerably lower. Thus, the Court's design poses challenges to study covariate effects on split decisions. The flexibility of this specification, to provide answers to different questions in the Chilean context, is discussed.

Andres Vodanovic: Legitimacy of the Constitution and legitimacy of judicial review: the Chilean case

Academic debates on judicial review usually focus on issues such as the democratic deficit of the judiciary or the capacity of legislatures and courts to protect fundamental rights. Often unaddressed is the question of whether the legitimacy of the constitution itself impacts the legitimacy of judicial review. Of course, this debate generally takes place in countries where the legitimacy of the constitution is uncontroversial. But this is not universal. I will address the link between the legitimacy of the constitution and the legitimacy of judicial review by focusing on the Chilean case. The case is interesting because in Chile both the Constitution and the Constitutional Court are challenged in its legitimacy. Constituent process carried out in 2016 provides useful data to assess the link between both. I will analyze the reports of the process, in order to find whether the objections against the Constitutional Court are or not linked to the legitimacy of the 1980 Constitution.

Karina Denari Gomes de Mattos & José Ribas Vieira: Measuring Judicial Compliance in the 21st Century: critical thoughts on contemporary literature and Court's initiatives

Due to the development of new sets of decision-making strategies and the increasing presence of Economic, Social and Cultural Rights in Constitutions, especially in Latin America, legal and political science researchers shifted their attention to investigate and measure the social, public and private bodies compliance with judicial decisions. We mapped three historical waves in the judicial compliance field of study: the start in the 1960s focused in the United States jurisdiction - the expansion in the 1990s and 2000s to monitor the domestic compliance to International Courts decisions, and more recently - after the 2000s –targeting the Global South Courts on structural litigation. Based on the literature review, this paper claims that clear and rigorous methods are central for judicial compliance measure in the comparative constitutional law scholarship and presents best-practices that can guide future works in the field and courts institutional initiatives for judicial compliance.

Bruno Camilloto: The branches of government and the Brazilian crisis of democracy: a case of Dilma Rousseff impeachment (2015-2016)

Latin American democracy has been through critical moments lately. The ex-president Fernando Lugo was impeached in 2012 in Paraguay. More recently, the Venezuelan President, Nicolás Maduro, convoked a Constituent Assembly election. In this context, Brazil also has been in crisis, especially after 2014 when it happened the elections to choose the President of Republic. Despite the crisis are concerned between Executive and Legislative branches, I will argue that there is another principal actor in this scenario: the Judicial branch. Despite that democracy crisis in Brazil is a political problem between Executive and Legislative, I suppose that the Judiciary has contributed to increasing the political crisis, especially when it exceeds the principle of the balance between the branches of government. To show my hypothesis I will present the argument that the political crisis in Brazilian has had a decisive contribution from the Judiciary because it has been broken the Rule of Law.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

87 NUEVOS RETOS DE LA CONSTRUCCIÓN DE LA DECISIÓN ADMINISTRATIVA Y SU CONTROL JUDICIAL

Panel formed with individual proposals.

Room:

Sala Mediación

Chair:

Hector Santaella

Presenters:

Irit Milkes
Ramon Huapaya
André Saddy
Christian Rojas
Guillermo De la Jara

Irit Milkes: Abnegación del Derecho y el control judicial de la decisión administrativa en el derecho Colombiano

Judicial review of administrative action has always been central to the study of comparative administrative law. It focuses mainly on the extent and scope of judicial review, as well as on the standards devised by judges to carry out such a task in different legal systems around the globe. (Colombia)

Ramon Huapaya: Control judicial de la decisión administrativa (PERU)

Judicial review of administrative action has always been central to the study of comparative administrative law. It focuses mainly on the extent and scope of judicial review, as well as on the standards devised by judges to carry out such a task in different legal systems around the globe. (PERU)

André Saddy: Control judicial de la decisión administrativa (BRASIL)

Judicial review of administrative action has always been central to the study of comparative administrative law. It focuses mainly on the extent and scope of judicial review, as well as on the standards devised by judges to carry out such a task in different legal systems around the globe. (BRASIL)

Christian Rojas: Metodologia de control y metodología direccional para la adopción de decisiones administrativas

As the Administrative State grows more complex and assumes different faces and scopes of action, judicial review ought to evolve to understand and account for such new realities by introducing standards of review that both grant administrative agencies flexible action margins but retaining the last word in policing the legality of said actions.

Guillermo De la Jara: Nuevos Retos de la Construcción de la Decisión Administrativa y su Control Judicial

Presentar una visión crítica de la excesiva amplitud que se ha pretendido dar por ciertos servicios públicos de naturaleza fiscalizadora al alcance de la presunción de legalidad de los actos administrativos dentro de los procedimientos administrativos sancionadores, a fin de limitar el alcance del control jurisdiccional de éstos

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

88 DEMOCRATIC CHANGE OR DEMOCRATIC DISSOLUTION? THE POPULIST CHALLENGE TO LIBERAL CONSTITUTIONALISM

After being celebrated in the ‘90s as the “the only game in town“ or the “final form of human government“, liberal democracy is nowadays facing a deep crisis that has become a major concern in public law. Several constitutional systems worldwide are confronted by the upsurge of populist/nationalist movements. In Europe, migratory flows, economic crisis and Brexit are showing the weakness of the EU framework – even questioning the supranationalist project – but also challenging traditional categories of constitutional law, such as “sovereignty“ and “people“. On the other side of the Ocean, both the election of President Trump and the crisis faced by Latin American states are generally considered as symptoms of the creeping deterioration of democratic values. The proposed panel discusses the features that are triggering distrust in liberal democracy focusing on the rise of populism/sovranism in Western countries/democracies and investigating the causes/outcomes of this phenomenon.

Room:

A103

Chair:

Lorenza Violini

Presenters:

Luca Pietro Vanoni & Benedetta Vimercati
Arianna Vedaschi
Fernando Londoño
Nicholas Hatzis
Javier Couso Salas

Luca Pietro Vanoni & Benedetta Vimercati: Identity Politics and the Rise of “New“ Populisms/Nationalisms in Europe

One of the most tricky challenge posed by identity politics to modern liberal democracies stems from the fact that constitutional theories, such as multiculturalism or supranationalism, do no longer seem to be capable of fixing the conflicts that arise in our pluralistic societies. Social groups increasingly believe that their identities—whether national, religious, ethnic, gender, etc.—are not receiving adequate recognition in the public square. Whenever these requests for identity‘s recognition cannot find places and tools whereby make their voice heard, they may lead to forms of populism and nationalism. The present paper, after a theoretical focus on the identity issue, aims to investigate the origin of populisms/nationalisms within the EU and to address the following questions: how can constitutionalism, especially European constitutionalism, face the challenges involved in the nexus between identity politics and populism? How can identity be used to unify and not to divide?

Arianna Vedaschi: Revocation of Citizenship as a Counter-Terrorism Measure: A Dangerous Weapon of the Populist Rhetoric

Populism uses people‘s common sentiments and desires to gain votes. In a world threatened by international terrorism, what desire is more common than demand for security? And what equation is easier than the one between foreigners and terrorists? Hence, populist governments are (dangerously oversimplifying and) identifying aliens with national security threats, conflating immigration measures and counter-terrorism law. Italy is a major example of this trend. Recently, a law even allowed public authorities to strip naturalized Italian citizens of their nationality if they commit terrorist crimes. Thus, the identification between non-citizens and terrorists is exacerbated. The analysis of these measures and, more generally, of the overlap between immigration and counter-terrorism will lead us to ask ourselves whether some basic categories of constitutional law – people, citizenship – are changing, turning the traditionally unifying nature of constitutionalism into a foreclosing one.

Fernando Londoño: Common sense versus best knowledge: two faces of punitive populism in the XXI century

The current clash between the various forms of populisms, on one hand, and constitutionalism and the rule of law, on the other, can be correctly described as a crisis of liberal democracy or as a clash between people‘s common sense and some sort of best knowledge, embedded in traditional frameworks and institutions (elites), as shown by the French gilets jaunes crisis. Using this consideration as a starting point, the paper will focus on the criminal law doctrine, with its theoretical system and highly analytical adjudication method. In the last decades, this traditional legal framework has been stressed due to two agents of punitive populism: legislators and judges. On the other hand, the victims‘ new role (victims are trying to “regain“ its role in the criminal conflict) is stressing the whole criminal doctrine, not just from the outside, but from the inside (by scholars). The result is a mix of reasonable and dangerous proposals and attitudes, whose assessment is becoming urgent.

Nicholas Hatzis: Populist Speech and Representative Democracy

One of the striking features in the recent populist turn in different parts of the world is that countries with very different political histories and constitutional arrangements became vulnerable to populism. The paper suggests that there are patterns of thinking which characterise populism, and that those patterns are present in all recent examples of populist political speech. It argues that the main victim of populist ways of thinking and populist political speech is representation, and, specifically in the context of the constitutional architecture of liberal states, parliaments. Governance through parliament implies recognition of complexity and limitations. Populist rhetoric, irrespective of its ideological content, denies both complexity and limitations, extolling the virtues of the people as immediate decision-makers through mass politics. The “people“ is,thus, presented as an omnipotent political actor which is beyond the limits imposed by the established constitutional order

Javier Couso Salas: Evaluating National and International Strategies Dealing with the Crisis of Constitutionalism and the Rule of Law in Latin America

A sudden crisis of constitutionalism has developed in many corners of the democratic world. While some observers confuse the latter with a crisis of democracy, the situation can be better characterized as a clash between “naked“ democracy and constitutionalism. If democracy is conceived as linked to constitutionalism and the rule of law, this clash won‘t exist, but it might be fruitful to distinguish between popular self-determination and mechanisms that constrain the will of the majority for the sake of fundamental rights. In my presentation I‘ll identify how has this crisis unfold in Latin America, mapping the ways in which constitutionalism and the rule of law have come under attack. I‘ll then analyze the different strategies that liberal democrats have developed to confront this scenario focusing on domestic/international strategies of defending constitutionalism and the rule of law, arguing that international strategies are ineffective without the contribution of domestic ones.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

89 SOCIO-ECONOMIC RIGHTS 2.0: OLD QUESTIONS, NEW APPROACHES

The Colombian Constitutional Court has a long trajectory in the protection of Socio-Economic Rights. The Court has protected these Rights through Constitutional Review (Tutela and C-Cases). This practice has generated an intense academic debate on at least the following issues:(i) the definition of the justiciable content of rights in a context of deep socioeconomic inequalities, poverty and transition - (ii) the adequate institutional design of the judicial intervention on Social Rights - (iii) the type of judicial remedies and its efficacy in local contexts of institutional weakness - (iv) the potential democratic character of some of these remedies - (v) the uses of international law in local decisions - (vi) recent changes in judicial doctrines in a global context of populism and democratic regression. The panel will gather academic projects in different stages, based on diverse methodological approaches, that respond to some of these issues regarding Socio-Economic rights.

Room:

A101

Chair:

Esteban Hoyos-Ceballos

Presenters:

Jose Toro
Natalia Angel-Cabo
Antonio Barboza
Henrik Lopez
Esteban Hoyos-Ceballos
Tatiana Alfonso

Jose Toro: How international development institutions approach socio-economic rights: the strange case of World Bank's ICSID

International investment arbitration is at crossroads with socio-economic rights. IIA is a fragmented regime where foreign investor could claim compensation for damages because the regulatory capacity of the State. Since the International Covenant of Economic Social and Cultural Rights entry into force an increasing set of standards creates a realm of global constitutional governance. This paper goal is to find international legal ways to connect the IESR advocacy and ICSID investment arbitration. In that way it tries to develop a set of global legal standards to be applied by arbitrators as a part of a transnational legal order that balances the discretionary interpretative power of the arbitration community and the necessity to protect people rights. In such a fashion the paper analyzes World Bank perspective regarding rights and economic development and examines how the IESR global set of rules are part of a transnational legal order that constrains the power of arbitrators.

Natalia Angel-Cabo: Garbage, Courts and Political Struggles: socioeconomic rights enforcement in emerging global cities

This paper examines the role that cities play for the enforcement of social rights in the South, through an empirical study of the outcomes of a landmark dialogical justice case of the Colombian Court: the waste pickers' case (T- 291/09). This case sought to ensure livelihoods for hundreds of waste pickers affected by the closure of the major dump in Cali, ordering municipal authorities to design a public policy on waste-pickers through a participatory process involving different actors. Although the paper defends dialogical justice approaches, it also illustrates its working challenges at the municipal level. The waste pickers' case presents a story of limited enforcement, backlash, capturing of the waste pickers' voices and, in general, of the inability of the Court to mediate the 'dialogue' among stakeholders. By contrasting the waste pickers' case to other cases, the paper draws attention to overlooked challenges that are present in intermediate cities for SERs enforcement.

Antonio Barboza: How to combine structural and individual litigation: the case of the Right to Health in Colombia

Colombia Constitutional Court has protected the right to health through two type of decisions. The first is the result of individual litigation and the judicial remedy consist in ordering the provision of health care to litigants. In these cases, the health care service demanded may be very expensive and not previously financed by administrative authorities. In the second type of decisions, the Court identifies structural health system failures and looks for extending the effects of his decision beyond the litigants. In these cases, the Court orders to administrative authority measures that fix the failures of the health system that causes the violations of right to health, and the Court monitors orders compliance. I argue that this coexistence is problematic and the progressing the fulfillment of the structural order should limit the role of the Court in the first type of cases, especially when it is not possible to universalize the health service demanded in the short term.

Henrik Lopez: Resilience and protection of social rights in Colombia

In recent decisions, the Colombian Court has used the concept of resilience to define the vulnerability condition of a person. State protection duties would only activate when the person, among other conditions, has a low resilience. That is, when the person cannot assume their needs by itself or with the help of third parties. By applying that concept, the relation between state protection duties and the person shifts from a right centered to an assistance relation. Under the first, everyone has a right to be protected by states and vulnerability activates special protection duties. Under the second, only vulnerable persons can demand state protection. Social rights, in the first model, are understood as ordinary state duties, while in the second, they are understood as extraordinary duties. In the first model the person should be empowered, but in the second the state aim is the empowerment of the community. It´s a shift from an individualistic-rights to a collective-rights approach.

Esteban Hoyos-Ceballos: The limits of the idea of meaningful engagement in the jurisprudence of the Colombian Constitutional Court

In recent years, the Colombian Constitutional Court has introduced the idea of meaningful dialogue (or meaningful engagement) as a remedy for the protection of Social Rights. The new notion has been introduced particularly in cases that involve the right to education. This paper develops a critical perspective against this new constitutional jurisprudence following the development of the concept of meaningful engagement in the South African Constitutional Court, in cases like Olivia Road and Joe Slovo. Specifically, the paper questions the Colombian Constitutional Court for (1) the type of cases in which it has proposed the remedy - (2) the conditions that the Court has established for the dialogue - (3) the absence of monitoring and supervision mechanisms. And in general, because this meaningful dialogue has little potential to effectively protect economic and social rights. Particularly, when the new notion is used as a stand-alone remedy

Tatiana Alfonso: Property rights in the midst of the transition: Interventions of the Colombian Constitutional Court in property rights

The action of the CCC in the past 10 years has expanded to some areas of the law that are not usually under the lenses of constitutionalists such as civil law. Given the transitional context created by the Law of Victims and Land Restitution in 2011 and the peace agreement between the government and the FARC, the Court has intervened in policy areas directly related to property rights over land. This paper analyzes how the Court has shaped and redefined property relations through the revision of policies through which people can have access to the land. The analysis of the decisions of the CCC shows that constitutional jurisprudence is changing the historical balance between social actors regarding access to land and tenure security over land. The article depicts and describe the state of property rights over rural lands, identity the interventions of the Court and construct a framework to understand how distribution and legal certainty are put in balance in the constitutional review.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

90 DERECHOS Y CAMBIO SOCIAL: DESAFÍOS PARA LA INCLUSIÓN

At the current time, we live in a context where several changes are taking place: different relationships between people, and between people and the state - new recognition of individuals and societies - new media, among others, creating new demands and asking for solutions. All these changes are complex and impact Law, requiring a different paradigm to give responses from a diverse perspective. This new vision of law requires the construction and reevaluation of principles and concepts that enhance these changes, including all the "newness" for juridical protection. This panel will address this challenge shifting the paradigm, deepening in the idea of solidarity, inclusion and explaining one particular example, indigenous rights. The analysis will be made from an interdisciplinary vision: Philosophy, Law and Political Science.

Room:

D303

Chair:

Carolina Salas Salazar

Presenters:

Margot Aguilera Ormeño

Carolina Salas Salazar

Katherine Becerra Valdivia

Taeli Gómez Francisco

Margot Aguilera Ormeño: El rol de la solidaridad como principio integrador del Derecho en las sociedades del siglo XXI

What is the role of solidarity in current legal systems? What are the challenges of Law in modern societies? Solidarity, as a legal principle, has been studied as a value of the Social Rule of Law model, however, we can expand its role as an essential principle of Law. The foregoing allows us to respond to the challenges presented by the Law before the reality of 21st-century societies, those that present high degrees of inequality, new ways of building social relations, and a marked tendency towards individualism. Because of this, it is important to analyze and reconsider the basic concepts and fundamental pillars of Law, so that it can face the challenges posed in an appropriate manner.

Carolina Salas Salazar: Inclusión social como desafío para las sociedades democráticas en Latinoamérica

Law, as an instrument of regulation of social life, must consider current social phenomena in order to generate responses consistent with the model of democratic society that governs us. However, in Latin America in general, and in Chile in particular, there are profound social and economic inequalities due to poverty and the great asymmetry in the distribution of income, which has resulted in high rates of social exclusion, disintegration, and fragmentation of these societies. Likewise, we observe a strong process of cultural and social diversification, which entails important challenges for these political systems. Thus, life in society implies a duty of solidarity that is expressed in the need to attend these social inequalities? Is the concept of social inclusion an effective tool to response these inequalities?

Katherine Becerra Valdivia: Reevaluando el impacto de los movimientos sociales indígenas para incluir derechos colectivos en Latinoamérica: entre actores políticos fuertes y nuevos aliados

Why do some countries in Latin America have strong protections of collective rights of indigenous people and others do not? What is the role of indigenous mobilization to enhance the protection of collective rights? According to several authors in the field of Law and Social Sciences, the primary factor that has created the successful inclusion and implementation of collective rights in several legal instruments is indigenous mobilization. However, this relationship is not straightforward if it observes what happens in diverse countries of the region. I argue that indigenous mobilization is a factor to consider in some cases, but it is not necessary and sufficient to protect collective rights. To have an impact in the level of inclusion of collective rights the mobilizations need to be a robust national political actor to influence the system or if it is not strong enough, it needs to have the support from other anti-systems movements or political parties to make changes.

Taeli Gómez Francisco: ***Discussant***

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

91 THE ALGORITHMIC STATE: CONSTITUTIONAL AND ADMINISTRATIVE LAW CHALLENGES

Data-driven technology, artificial intelligence and machine learning are reshaping the relationship between citizens and the states. AI and ML are increasingly employed in public and private decision-making, even though these systems are regarded as black boxes by both public authorities and citizens. Constitutional and administrative legal principles were developed throughout the times for governments of men and not machines. How does algorithmic decision making fit within these legal frameworks? This panel offers new insights on the role of constitutional and administrative law in the "algorithmic state". This panel explores in particular (i) the role of the state in cyberspace as user, superuser, and regulator - (ii) how the use of algorithms fits within the duty to give reasons and explain decisions taken by public bodies - (iii) the need to develop or reinterpret the principle of good administration - (iv) and the legitimacy of "robot-law" from a legal pluralist perspective.

Room:

D304

Chair:

Antonia Baraggia

Presenters:

Amnon Reichman
Andrea Simoncini
Angelo Golia
Sofia Ranchordas

Amnon Reichman: The Role of the State in Cyberspace

In what way is the term "cyber" distinct from anything digital? And how should we think about the role of the state in "cyber"? This paper puts forward a provisional definition for "cyber", and proceeds to analyze the three distinct roles the state plays in the cybernetic domain: user, superuser and regulator. It then proceeds to focus on one role – the regulator – and outlines the different axes through which cyber may be regulated. Each axis raises its own challenges (within a given jurisdiction as well as transnationally), but offers some opportunities. The paper concludes with highlighting the importance of maintaining alignment between these axes, in order to avoid unintended interference.

Andrea Simoncini: Why Are You Doing This to Me? The Duty to Give Reasons in the Algorithmic Era

EU law states "the obligation of the administration to give reasons for its decisions". This echoes a rule of law principle common to many constitutional traditions and conditional to fundamental rights related to powers interfering with personal freedom (for example, as concretised in the right of access, judicial review, nondiscrimination, self-determination). The increasing trend of asking algorithms to take decisions affecting personal rights (either in the private or public sphere) is deeply changing the legal reasoning on the limitation of powers. This paper would like to explore the existing global constitutional law principles on algorithmic decision-making. It inquires whether these principles are effective in tackling new challenges coming from deep-learning algorithms where "causation" is replaced by "correlation", therefore when we use no humanly comprehensible reason for decisions.

Angelo Golia: Public and Private Regulation in Robot Technology: A Legal Pluralist Perspective

Robot/AI technologies raise several questions regarding the tenets of modern legal theory. One of the challenges coming from them concern the legal conceptualization of overlapping/competing forms of regulation, with different sources of legitimacy, procedures and institutions: 1) 'hard' regulation of politically legitimated (i.e. public) actors - 2) 'soft' regulation of private and hybrid actors. Contrary to other fields (e.g. corporate codes of conducts), the interface of these forms of regulation in the AI/robotics field have hardly been studied through the lenses of legal pluralism. Based on institutionalist and systems theory approaches, this paper aims to fill this gap, and argues that standardization and 'soft' regulation processes in the AI/robotics field are increasingly building proper legal systems and that the related interrelations/clashes with politically legitimated law should be managed through conflict-of-laws approaches.

Sofia Ranchordas: Algorithmic Decision-Making and Good Administration

The principle of good administration requires public authorities to carefully prepare their decisions, be transparent and accountable, offer access to information, and be able to explain their decisions.The growing use of algorithms as a supporting or decisive tool for administrative decision-making is nonetheless changing the relationship between citizens and the state.This is often explained by two elements: (i) algorithms are "black boxes" - (ii) the underlying technology is provided by private tech companies that protect the disclosure of algorithms with trade secrets, determine to a certain extent the content of public services, and are likely to influence how public values are protected.Drawing on existing case law from different jurisdictions, this paper explores the meaning of the principle of good administration in the algorithmic state. It inquires into the need for new principles of good administration that enhance the transparency and ethics of algorithmic decision making.

Panel Sessions III

Tuesday, 2 July 2019
08:20 - 09:55

92 PROPORTIONALITY, US CONSTITUTIONAL LAW, AND "RIGHTS AS TRUMPS?"

Even as proportionality has cemented its status globally as the dominant approach to adjudicating constitutional rights claims, the United States remains an outlier, its rights jurisprudence heavily influenced by a rival conception of "rights as trumps". In November 2018, Jamal Greene carried the case for proportionality into the heart of the US legal academy with his Harvard Law Review Foreword titled "Rights as Trumps?". Greene argues that, while "we take rights seriously enough" in the US, when we reduce constitutional principles to rigid rules, "we do not take them reasonably enough." Proportionality, he argues, is better adapted to deciding politically charged rights claims in a pluralistic and polarized democracy. HLR Forewords are widely read and often become landmarks of legal scholarship - Greene's could change the conversation on rights review in the US. This panel brings together a wide-ranging set of responses to the Foreword, with its author serving as discussant.

Room:

Aquiles Portaluppi

Chair:

Jud Mathews

Presenters:

Vicki Jackson
Carlos Bernal Pulido
Francisco Urbina
Jamal Greene

Vicki Jackson: Law, politics, and proportionality

This paper is likely to explore the relationship(s) suggested by Jamal Greene's paper between judicial doctrine and political polarization, as well as the capacity of judicial decisions and judicial doctrine to shape decisions by public and political actors. Jamal also writes, "proportionality at its best helps us to see when a dispute is better resolved through politics than through juridification." I may comment on the relationship of this idea to approaches to deference to political judgments on facts, and on values. Finally, this paper may explore arguments in support of Greene's paper that are grounded less on the impact on political discourse and decisionmaking and more on a conception of the role of courts as places of justice and a skepticism about having courts reach for articulation of "rule", rather than allowing general rules to emerge from multiple contextualized decisions.

Carlos Bernal Pulido: The normative necessity of proportionality

In "Rights as Trumps?" Greene argues that proportionality is better suited for adjudicating US constitutional rights claims than a Dworkinian, categorical approach, because proportionality is more transparent, more predictable, and better able to accommodate complex rights collisions in a pluralistic society. This paper grounds Greene's proposal with a stronger theoretical claim, namely, the normative necessity of proportionality. A variety of reasons can justify a migration of proportionality to a new context, but the common denominator across the different migrations is that proportionality is normatively necessary for the adjudication of constitutional rights. This paper develops that argument, identifying the values -- deriving from constitutionalism, deliberative and representative democracy and the rule of law -- that judges should pursue in adjudicating constitutional rights, and explaining why proportionality achieves those values at the highest level.

Francisco Urbina: Proportionality and the world of enemies

A major thread running through "Rights as Trumps?" is its focus on whether proportionality or a categorical approach to rights can best serve a polity's capacity to live up to a political commitment of the first order: the commitment of citizens of a pluralistic liberal polity to live together in peace and mutual recognition. The paper discusses two mechanisms by which proportionality may achieve this: (1) by lowering the stakes of constitutional rights adjudication and (2) by acknowledging the rights of different parties. I explore the conditions under which the first mechanism is achieved, focusing on two issues: the relation of proportionality to precedent, and the existence of "single case issues". I next question whether proportionality offers meaningful recognition of both parties, focusing on different ways proportionality discourse deflates rights. The paper concludes that differences between the categorical approach and proportionality are smaller than Greene's piece conveys.

Jamal Greene: ***Discussant***

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

93 EUROPEAN PUBLIC ORDER IN TIMES OF CHANGE

The European Court of Human Rights (ECtHR) has declared the European Convention on Human Rights a constitutional instrument of European Public Order (EPO). This claim suggests that the Convention is built on common understandings and approaches to human rights. Moreover, it seems that EPO can change over time. This panel will be asking what these common understandings are now and whether the claim of common EPO is still valid in times of change. The panellists will first revise their approach to EPO and see if there is a coherent vision of such order from the bench of the ECtHR. Then the panel will proceed with three case studies. First, the panelists will look into whether there is common understanding of vulnerability and see how it can shape EPO. Then the panel will consider if the modern threat of terrorism had an impact on EPO. Finally, we will see if EPO spreads outside the borders of Europe through regulating military interventions by European states.

Room:

Aquiles Portaluppi

Chair:

Wojciech Sadurski

Presenters:

Kanstantsin Dzehtsiarou

Vassilis Tzevelekos & Dimitrios Kagiaros

Michael Lancaster Steiner & Antal Berkes

Rumyana Grozdanova

Kanstantsin Dzehtsiarou: European Public Order in Times of Change: View from Strasbourg

The European Court of Human Rights (ECtHR) has used European Public Order (EPO) in over 100 judgments. This number shows that its deployment is not a coincidence and the Court takes EPO seriously. At the same time, in none of these judgments the Court has explained what EPO actually means and how it can be conceptualised. The Court‘s references to EPO are often inconsistent and highlight various aspects of its meaning. If the ECtHR has an ambition to shape and regulate EPO it needs to clarify its understanding of this complex abstract notion. This presentation will analyse 17 interviews with the judges of the ECtHR. The judges were asked what is EPO and what their role is in shaping this order. The judges also commented on whether EPO changes over time and how these changes are reflected in the ECtHR judgments. The most illustrative answers will be discussed and placed in the context of the ECtHR‘s case law.

Vassilis Tzevelekos & Dimitrios Kagiaros: Assessing the Impact of Vulnerability on European Public Order in the Case Law of the ECtHR

The paper seeks to assess the legal effects of ‘vulnerability‘ in the case law of the Grand Chamber of the European Court of Human Rights (ECtHR) and how vulnerability co-shapes European public order. By assigning vulnerable status to certain categories of individuals, such as migrants, detained persons and minors, the ECtHR has been able to increase the scope of positive obligations of contracting parties, to relax the application of admissibility criteria, or to determine whether the negative dimension of a right has been violated. This special status of the vulnerable applicant in the Convention system is in need of further analysis. By identifying the use of vulnerability in the Court‘s Grand Chamber, the paper tracks the impact of vulnerability on the advancement of human rights protection in Europe and discusses how ultimately this can inform our understanding of a burgeoning European Public Order.

Michael Lancaster Steiner & Antal Berkes: Exporting the ECHR Public Order outside Europe: the European Convention of Human Rights as the Applicable Law of Peace Missions

The paper seeks to assess the legal effects of ‘vulnerability‘ in the case law of the Grand Chamber of the European Court of Human Rights (ECtHR) and how vulnerability co-shapes European public order. By assigning vulnerable status to certain categories of individuals, such as migrants, detained persons and minors, the ECtHR has been able to increase the scope of positive obligations of contracting parties, to relax the application of admissibility criteria, or to determine whether the negative dimension of a right has been violated. This special status of the vulnerable applicant in the Convention system is in need of further analysis. By identifying the use of vulnerability in the Court‘s Grand Chamber, the paper tracks the impact of vulnerability on the advancement of human rights protection in Europe and discusses how ultimately this can inform our understanding of a burgeoning European Public Order.

Rumyana Grozdanova: Secrecy as Counter-Terrorism: How should the European Court of Human Rights respond?

The extensive growth in bi- and multi-lateral intelligence gathering, processing and information sharing has become one of the most enduring legacies of the events of 9/11. What can, by now, be described as entrenched ‘information intoxication‘ of security agencies has not only resulted in operational changes within the intelligence community but has also led to significant modifications within traditional judicial procedures. In recent years, secret intelligence evidence is increasingly being heard behind closed doors in the United Kingdom and the Netherlands. What this paper proposes is to critically assess key aspects of these developments with reference to the jurisprudence of the European Court of Human Rights. It will be argued that the regularised use of secret intelligence evidence and the damaging constitutional impact of excessive judicial deference in counter-terrorism cases endangers the existing European Public Order and may, to an extent, have already altered it.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

94 THE INSTITUTIONS OF CONSTITUTIONAL DEMOCRACY

This panel explores the institutions of constitutional democracy, ranging from courts, to legislatures to electoral commissions. The paper presenters explore the nature of those institutions, how they are working and how they might be made to work better.

Room:

Sala Mediación

Chair:

Lorenza Violini

Presenters:

Eneida Desiree Salgado
Alexei Trochev
David Schneiderman
Michael Pal
Mark Tushnet

Eneida Desiree Salgado: Institutional powers, institutional players: the judicial branch walks into the electoral arena

In constitutional democracies, the legislative branch establishes electoral rules. In Brazil, proportional representation has led to a lower house composed by multiple political parties, which has impaired the conditions for a deliberative formulation of electoral rules. Electoral accountability tends to correct parliamentarian conduct and the multiple interests represented in parliament confer democratic legitimacy to laws. Furthermore, a list of institutional actors (including minority parties) can challenge the constitutionality of electoral rules. Notwithstanding, the judicial branch has drastically interfered in electoral disputes by either laying down general and abstract rules, disregarding the law, or allegedly enforcing constitutional principles. As for immediate effects, judicial decisions such as the one that modified the electoral financing system have undermined predictability, interfered directly with the conditions for competition, and changed political balance.

Alexei Trochev: Judicial Clientelism and Decay of Democracy in Post-Soviet States

My key theoretical contribution is in the analysis of clientelism outside election-related politics. It is about the exercise of collective judicial autonomy in clientelist authoritarian regimes. Working through these intra-judicial clientelist sub-networks allows judicial chiefs to protect their clients, provide them with "modernizing" benefits and exercise collective judicial autonomy from the rulers-patrons more generally. This is why we see many post-Soviet leaders publicly blame judicial chiefs, whose fates the former totally control, for collective recalcitrance and "corporate solidarity." Yet the mainstream theories of judicial politics have yet to explain both blaming of and behaving of seemingly pliant judges.

David Schneiderman: Reviving Parliamentarism in an Era of Illiberal Executives

If liberal constitutional theory has long been preoccupied with the problem of concentrated executive power, it seems as if citizens in many constitutional democracies today do not worry themselves about such matters. This paper revisits concerns about the concentration of executive power, via both personalization and populism, with a view to reviving parliamentary accountability and responsibility. Reflecting upon the constitutional thought of Schmitt and Weber, and drawing upon a small set of country studies, the paper aims to revive a pluralist conception of parliamentary democracy where no one person, alone, governs.

Michael Pal: South Asian Fourth Branchs

While institutions are clearly not a sufficient guard against decline, many definitions of democratic decline focus on institutional degradation and the curtailment of independent checks on executive or at times legislative authority. This article argues, generally, that independent, non-partisan, and constitutionally protected election commissions must be regarded as a key component of constitutional resilience in the face of potential decline. With particular regard to South Asia, it claims that despite cross-national variation on important institutional features of election commissions, there is an identifiable "South Asian model" for the fourth or democracy branch. I include India, Pakistan, Sri Lanka, Bangladesh, Nepal, Bhutan, the Maldives, and Afghanistan within the country case studies. The article points out the strengths and weaknesses of the South Asian model and draws out the lessons for the separation of powers, constitutional design, and election administration.

Mark Tushnet: *Discussant*

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

95 EU ANTI-DISCRIMINATION LAW IN TIMES OF CONTESTATION

After the European Union initially developed anti-discrimination norms on nationality and gender as protected grounds under the commercial rationale of the common market, two Equality Directives followed in 2000, one focusing on race and ethnic origin, the other covering religion, sexual orientation, disabilities and age. Eighteen years after the adoption of these Directives, we gather the scholars contributing to a recent book published by Hart (U. Belavusau and K. Henrard, eds., 2018) to reflect on their limits and prospects, and revisit the rise of EU anti-discrimination law beyond gender. Protection against discrimination has only become more pressing and at times contested during the economic and refugee crises, and amid rule of law backsliding. EU anti-discrimination law has, thus, reached its age of maturity - its eighteenth birthday - in confusing times, which nonetheless brings opportunities that will be reflected upon in presentations during this panel.

Room:

D404

Chair:

Dr León Castellanos-Jankiewicz

Presenters:

Dr Uladzislau Belavusau
Prof. Dimitry Kochenov
Dr Mathias Möschel
Dr Beryl ter Haar
Dr Alina Tryfonidou
Dr Aleksandra Gliszczynska-Grabias

Dr Uladzislau Belavusau: A bird's eye view on EU anti-discrimination law: the impact of the 2000 equality directives

The year 2000 marked the birth of EU anti-discrimination law as a field with the adoption of two Equality Directives. They extended the prohibition of discrimination to five additional grounds and expanded the material scope of equality. Having reached its eighteenth birthday in the year 2018, EU anti-discrimination law deserves an exploration of its achievements and prospects. This paper zooms into these twin Directives, as well as on the new grounds of discrimination planted therein, namely race and ethnicity, religion, sexual orientation, age, and disability. It first outlines the genesis of EU anti-discrimination law, which is followed by a discussion of major normative and practical themes emerging in EU anti-discrimination law after 2000 such as the personal and material scope of the Directives, new forms of discrimination and mechanisms to counteract discrimination, including the proceduralization of EU anti-discrimination law.

Prof. Dimitry Kochenov: When equality directives are not enough: taking issue with the missing minority rights policy in the EU

The Union endorses discriminatory practices of Member States by taking 'culture' at face value, even when this implies disregarding the spirit of the EU Equality Directives and when national regimes of minority protection conflict with internal market rules. It is problematic that the Union is inconsistent in either quashing national minority protection or weighing in with the Member States punishing minorities for being different under the pretext that only majority culture is protected by constitutions. It would appear that the EU does not consider minority protection as a value, thus depriving the matter of any systemic importance. This will have to change in the interests of both minority protection and the internal market: belonging to a minority should not disqualify EU citizens from non-discrimination guarantees on the basis of nationality upon return to their Member State of origin, notwithstanding the European Court of Justice's regrettable stance in Runevič.

Dr Mathias Möschel: Eighteen years of the race equality directive: a mitigated balance

As opposed to what was feared or hoped before its implementation, the Race Equality Directive did not lead to an important amount of case law and falls short of challenging widespread racism in many domains that are isolated from constitutional equality provisions. This contribution maps the successes of this instrument by considering the positive attributes of its text, the expansive interpretations that the CJEU has given it, and national case law. Secondly, it will analyze its failures by looking at general limitations, then at the CJEU's restrictive interpretations, and finally at some problematic interpretations at the national level. Lastly, an attempt to identify potential areas to which EU law applies (such as family reunification and headscarf bans), and in which this instrument could and should be invoked, will be conducted. To conclude, despite encouraging case law, the Directive will be seen as not yet having addressed the structural issues of racism in Europe.

Dr Beryl ter Haar: EU age discrimination law: a curse or a blessing for EU youth policy?

The position of young persons in the labour market has been a concern of the EU since the 1950s. The attention to this group has resulted in a widespread field of policy actions. Characteristic of these initiatives is that they acknowledge the vulnerable position of young persons in society, particularly in the labour market. These initiatives identify young persons as a group for whom special measures need to be taken to correct their unequal position. As such, Member States are encouraged to adopt affirmative measures with regard to young persons. However, these measures are at odds with the EU's non-discrimination regulations, which are based on the idea of formal rather than substantive equality. Although the EU's age discrimination provision includes a margin for justifications, it is expected to have a limiting effect on the EU's Youth Policy. The aim of this contribution is to test this hypothesis.

Dr Alina Tryfonidou: The impact of Directive 2000/78 on the protection of LGB persons and same-sex couples from discrimination under EU law

This paper will have as its aim to assess the impact of Directive 2000/78 on the protection of LGB individuals and same-sex couples from discrimination under EU law. It will analyse the 2000 Directive, aiming to demonstrate how it has improved the position of LGB persons and same-sex couples under EU law but, also, to highlight its shortcomings. It will, moreover, consider whether the gaps in protection left by the Directive are satisfactorily filled by other instruments and, in particular, by the EU Charter of Fundamental Rights which, in its Article 21, prohibits discrimination on, inter alia, the ground of sexual orientation. Finally, it will be examined whether other pieces of EU legislation which may come into force in the future will be able to cover these gaps. The paper will not merely seek to analyse the above legal instruments, but it shall also focus on critically assessing the judgments in which the ECJ has offered an interpretation of these instruments.

Dr Aleksandra Gliszczynska-Grabias: ***Discussant***

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

96 INTEGRATING SOCIAL SCIENCE AND NORMATIVE LEGAL APPROACHES TO COMPARATIVE CONSTITUTIONAL LAW

Social science epistemologies and methods are now a well-established part of comparative constitutional law scholarship. From quantitative research on the longevity of written constitutions to qualitative research on populist constitutionalism, the field has benefitted from a growing range of empirical social science perspectives. Little thought to date, however, has been put into how best to integrate social science research with normative legal scholarship. This panel seeks to begin a conversation about this issue. Theunis Roux's paper argues that, by synthesizing the insights of empirical political science and normative legal theory, the field can generate practical advice on how constitutional judges should approach their mandate. Niels Petersen next provides a sympathetic critique of empirical scholarship on constitutional design. Finally, Emanuel Towfigh analyzes the role digitalization and quantitative methods play in shaping legal scholarship.

Room:

Auditorio A. Silva

Chair:

Joana Mendes

Presenters:

Theunis Roux

Niels Petersen

Emanuel V. Towfigh

Theunis Roux: Comparative Constitutional Decision-making: An Interdisciplinary Research Agenda

Almost everyone in the field of comparative constitutional law is in favor of interdisciplinary law/social science scholarship. But there have been very few attempts thus far to examine how such research should proceed in practice. Is true interdisciplinary synergy possible or is it more a question of using the insights of each discipline to test the blind spots of the other? This paper explores this question through a case study of the potential benefits of interdisciplinary scholarship on constitutional decision-making. The point of such research, the paper argues, must ultimately be to understand what constitutional judges committed to liberal-democratic constitutionalism can do to promote this ideal in the context in which they find themselves. By synthesizing the insights of empirical political science and normative legal scholarship, the field should be able to say more than 'be strategic', on the one hand, or 'be principled', on the other.

Niels Petersen:Empirical Research in Comparative Constitutional Law: A Bird's Eye View

In recent years, we can observe a turn to more empirical research in comparative constitutional law. This research is being conducted both by legal scholars and by political scientists. The paper has a two-fold aim. First, it gives an overview of the state of the art of empirical research in comparative constitutional law. It focuses on two main areas – the study of constitutional design, on the one hand, and research on judicial decision-making in the domain of constitutional law, on the other. Second, it provides a critical assessment of this scholarship. In particular, it argues that most of the studies on constitutional design do not adequately address the issue of unobserved variable bias. While these studies are still valuable in order to advance empirical research within comparative constitutional law, they should not be used without caution as possible basis for policy recommendations.

Emanuel V. Towfigh: Digitalization and Empirics: What's in the Stars for Legal Scholarship and Legal Education?

If law is about governing behavior, then the digitalization of all avenues of life will deeply impact the law, legal profession, and ultimately legal scholarship and education. This is not only due to the fact that current law is challenged by new products and services or by powerful new non-state actors with most effective means to influence behavior on their hands - but more profoundly the way we think about law, the mechanisms it applies and the way public and private actors influence behavior will be deeply impacted by the mass individualization digitalization enables. Individualized contracts or election campaigns, social credit systems and automatization of legal services all have repercussions on the law itself and what we will mean by 'law' in the not-so-distant future. Many of those innovations are based on empirical approaches, and lawyers will need to be qualified to understand these, not only to be apt professionals but to play their role in upholding the rule of law.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

97 LIBERALISM, AUTHORITARIANISM AND THE TASKS OF CONSTITUTIONAL THEORY: MAKING SOVEREIGNTY POPULAR AGAIN?

Liberal constitutionalism has become increasing unpopular and authoritarian. It has become unpopular in the sense that many are turning away from it, not least the electorate. But it has also become unpopular in a deeper theoretical sense, self-consciously turning away from the concept of popular sovereignty, even eschewing the foundational supports of sovereignty altogether. Liberalism purports to abjure these foundations, distorting the meaning of what is 'popular' but at the same time becoming more authoritarian in its own practices and prescriptions. The purpose of this panel is both critical and constructive. It aims to examine the shortcomings of the liberalist treatment of populism and to expose the authoritarian elements within liberalism. It will also consider the conditions under which popular sovereignty, notionally still a central category of contemporary constitutional thought, might again become symbolically efficacious and institutionally consequential.

Room:

LLM91

Chair:

Michael Wilkinson

Presenters:

Margaret Martin
Zoran Oklopcic
Eugénie Mérieau
Samuel Tschorne
Michael Wilkinson & Alexander Somek

Margaret Martin: Reckoning with the Liberal Self

In order to understand the current calls for censorship, we must turn to the assumptions that comprise what political philosopher Charles Taylor calls the "social imaginary", the way in which liberal ideas have shaped the way we think of ourselves. Once we see the explanatory power of these assumptions, we can understand why the call for censorship is voiced in such an urgent and confident manner - but it is also apparent that the confidence is misplaced, as it springs from nothing more than an ideology. To fully understand the rise of this pro-censorship liberal ideology, one must begin with an understanding of liberalism in its pro-speech form. Liberalism, as a political doctrine that seeks to secure a degree of liberty for diverse groups of people, is deeply unstable. We can then see how it gives rise to an authoritarian strain of the doctrine, which aims at homogeneity of belief. It is this doctrine that is implicated in the call for censorship - it prizes liberty in name alone.

Zoran Oklopcic: Beyond Populism: Liberalist Projections and Quotidian Constitutions

Debates in constitutional theory have become increasingly preoccupied with populism. While most contemporary constitutionalists have a highly critical attitude toward populism—identifying it as the main cause of the 'erosion' of the rule of law or democratic 'decay'—others are more sympathetic. Though highly contestable, both camps take the existence of populism for granted. This presentation proceeds from two assumptions that go against this unstated consensus: (1) Like all political concepts, populism has polemical implications - (2) Like all polemical concepts, populism is a concept that must be staged, in two senses. It hinges on a dramatized depiction of our overall sociopolitical situation. More importantly, populism is a concept that acts as a stage prop. Painted in dark colours, populism's function is to make liberal democracies look better. Rather than an existential threat, populism is a rhetorical distraction from other, potentially more fruitful questions.

Eugénie Mérieau: Towards a theory of Dual Constitutionalism: Constitutional Reason of State, Prerogative, and France's Authoritarianism

A foundational dichotomy in Public Law is that of Rule of Law and Rule by Law, sometimes marking a distinction between liberal-democratic and authoritarian States. Against such essentialism, this paper argues that within a given State, the constitutional order is characterized by coexisting layers of liberal-democratic and authoritarian norms. This constitutional dualism is structured along a multidimensional axis. The Constitution grants or denies protection depending on the individual, the subject-matter, the time, and the place. These fault-lines fluctuate according to the workings of reason of State and the practice of sovereignty. Based on a critical reading of French constitutional history from the French Revolution until the Yellow-Vests Movement, this paper documents the operation of dual constitutionalism in the French context. It suggests that Rule of Law and Rule by Law are two sides of the same coin – constitutionalism being a process of both inclusion and exclusion.

Samuel Tschorne: Chile's "constitutional problem": a matter of popular sovereignty

Near three decades after Chile's return to democracy its constitution remains a source of persistent unease. It is not only that the constitution was approved during an oppressive and murderous dictatorship after a fraudulent plebiscite but, via a series of mechanisms usually called "authoritarian enclaves", the constitution has thwarted reform of key political and economic policies. On this account, even as the political order it constitutes increasingly resembles a formal democracy, it will not become a substantial democracy, ie. one that allows government to truly pursue the interests of the many. I argue in this paper that this can only be understood from the demands of popular sovereignty. Paradoxically, to explain why the constitution has, nonetheless, proved to be so resistant to attempts at wholesale reform one has to understand that it has come to be unintendedly endowed with democratic credentials by the leading Chilean democratic political parties and leaders.

Michael Wilkinson & Alexander Somek: Unpopular Sovereignty?

Popular sovereignty was presented in modern constitutional discourse as a mode of collective action. It was supposedly manifest in the power to create, control and dismantle the constitution of governments. Important strands of contemporary constitutional theory, notably legal constitutionalism and deliberative democrac, have taken leave of this tradition. They have severed the connection between sovereignty and action. What remains of popular sovereignty are dispersed networks of deliberation and the principle of 'all affected interests', underscored by Lefort's idea of the 'empty place of power'. The very concept of sovereignty has become unpopular. This contribution aims to re-establish the link between popular sovereignty and action by examining sovereignty's emancipatory telos, its majoritarian mode of operation and its dependence on citizenship.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

98 TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: CHALLENGES IN DARK TIMES

This proposal focuses on the challenges for a Transformative Constitutionalism (TC) in the current political and social scenario of Latin America, where countries have witnessed the reversal of longstanding democratic gains and new authoritarian threats. The Brazilian case is an example and has shown the urgency of developing new strategies in public law, for the strengthening of democracy and to advance the guarantee of human rights and social justice. The Colombian TC, vindicated by ICCAL as a new path to the Latin American context of exclusion and inequality, provides the basis for this discussion, which will involve the following themes:1) resilience strategies to protect constitutional orders and courts from authoritarian attacks - 2) strong constitutionalism and the role of the judiciary in the TC - 3) alternative instruments to strengthen democracy and the influence of private entities in protecting rights - 4)"Unconstitutional State of Affairs" and dialogical judicial activism.

Room:

LLM93

Chair:

Vera Chueiri

Presenters:

Patricia Perrone Campos Mello

Jorge Roa

Danielle Pamplona & Anna Luisa de Santana

Katya Kozicki & Bianca van der Broocke

Patricia Perrone Campos Mello: Resilience strategies of constitutional courts before authoritarian regimes: The Brazilian case

There are signs that democracy in Brazil may be at risk. Democratic setbacks do not only occur by taking power through the use of force. They can also occur through the election of populist leaders who promote normative changes which weaken the democratic regime. Constitutional courts are very important agents in stopping these initiatives, but they may put their very existence at risk when doing so. The present essay has the purpose to investigate and propose resilience strategies to protect constitutional orders and constitutional courts from authoritarian attacks. It is divided in three parts. In the first part, I examine the signs of democratic backslides in Brazil. In the second part, I address the institutional conditions that favor or undermine democratic backslides. In the third part, I propose strategies to increase the democratic resilience.

Jorge Roa: The role of the judiciary in the Transformative Constitutionalism

This paper aims to demonstrate that Transformative Constitutionalism (TC) requires the prevalence of strong constitutionalism over the weak. The TC updates the meaning of the term "judicial activism" to exclude certain types of judicial decisions that a standard theory would consider activists. At the same time, TC defends that the ordinary judicial function must have an activist content in a context marked by exclusion and inequality such as exists in Latin America. In the same way, TC subscribes the thesis according to which judges are considered as argumentative representatives of excluded persons or groups. These people or groups go to court to obtain protection of their rights. The TC supports the direct access mechanisms of citizens to the courts because it recognizes the role of civil society organizations and NGO's in the protection of constitutional rights. Finally, the TC supports the function of the courts to restore the balance of powers in hyper-presidential contexts.

Danielle Pamplona & Anna Luisa de Santana: ICCAL' strategies for strengthening democracy

The proposal is to use the theoretical contribution of the Ius Constitutionale Commune in Latin America (ICCAL) to strengthen democracy in order to address a specific problem: the influence of private entities in weakening the state's capacity for protection and promotion of rights. The influence of private entities subverts the democratic regime on two fronts: by weakening the processes turning them into uncertain tools and by making certain the outcomes of such processes, invariably aligned with the interests of these private entities. The theoretical contribution of ICCAL is used here to provide a basis for the use of alternative instruments to control conventionality and the application of the horizontal effectiveness of human rights (which it also advocates) but which better fit the characteristics of the problem, such as statocentrism or the lack of a binding instrument that would establishe adequate conduct for private entities.

Katya Kozicki & Bianca van der Broocke: "Unconstitutional state of affairs", judicial activism and transformative constitutionalism

The expansion of the judicialization of politics in the Global South's democracies has brought with it a significant development, the spread of "structural reform litigation". These court cases involve the continuous and widespread violation of social rights of less favored groups, whose solution requires the creation of new remedies that differ from the ordinary ones. Such injunctions of reform of government policy and institutions are complex and open the possibility of a dialogical approach, which can legitimate this non-judicial role. One of these novelties is the Unconstitutional State of Affairs. It was developed by the Colombian Constitutional Court, in the context of the transformative constitutionalism that takes place in that country, and has recently been brought to the Brazilian jurisprudence. Thus, what we intend to discuss in this paper is the perspective of a dialogical judicial activism in Brazil, on behalf of the social transformation, from the trial of ADPF 347/2015.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

99 CULTURAL HERITAGE AND ITS LAW IN TIMES OF CHANGE

This multidisciplinary panel addresses how times of change affect cultural heritage legislation and therefore public law, including administrative and constitutional law. Recent examples in the news are used as case studies. The democratically mandated Brexit may have crucial consequences for the free movement of goods especially with regard to the illicit trade of cultural property. The EU and how its directives and regulations interact with Member States' rules on the export of cultural property also have a role to play in this discussion. Moreover, international law plays a crucial role in protecting cultural heritage sites, but long standing political changes may affect how cultural heritage law operates in times of military occupation and in areas of contested sovereignty. Panelists will therefore adopt a comparative perspective and multidisciplinary examination of governmental actions, art history and law.

Room:

FD-101

Chairs:

Lorenzo Casini

Sabino Cassese

Presenters:

Clizia Franceschini

Anna Pirri Valentini

Ted Oakes

Clizia Franceschini: The Role of the United Nations in Times of Political Change: the case of Jerusalem's Cultural Heritage Law

The role of UN Institutions within the process of implementation of a multi-level safeguard for the protection of cultural heritage seems to be extremely difficult. International law offers protection of cultural heritage and cultural objects, both in terms of places of worships and minorities whose identity is threatened. A prime example of such protection can be found in Jerusalem, a gigli contested territory where long standing political changes have deeply affected the cultural heritage legal framework. The sea of international norms on the protection of heritage sites and minorities during armed conflict and occupation (IHL and IHRL) is a well rooted branch of international law, but hardly integrated at a national level in extra-ordinary situations. This paper explores new perspectives from the joint liaison of international, regional and national rules on the protection of world heritage sites and in areas of contested sovereignty.

Anna Pirri Valentini: Shaping the European Union's Control over the Export of Cultural Properties: from National to Supranational Legislations and Viceversa

The attempt to detect a European cultural patrimony and to shape a European cultural identity is in part exercised by the control of the export of cultural properties. Such control happens both between Member States and between Member States and third countries. Over time The European Parliament has approved (e.g. in the TFUE and in the EU Regulation n° 116/2009), a series of norms meant to regulate the international circulation of cultural heritage. What inputs over others have exerted a stronger influence on the communitarian legislator and the EU's determination of the final outcome of European control over the export of cultural properties? Is it possible to detect some categories of cultural property export at the supranational level that were already present in the national Member States' legislations?

Ted Oakes: Borders and Brexit: Moving Cultural Property between Britain, Ireland and the European Union

The EU has brought about unprecedented freedom of movement for Europeans. Such freedom of movement for people has also facilitated the movement of cultural property across borders. This in turn has presented unique problems including the abuse, by individuals and organizations, of open-borders to (clandestinely) move materials from one jurisdiction to another. This paper will examine the impact of European borders in the illicit trade of cultural property in light of the (expected) United Kingdom withdrawal from the EU. In particular, this paper will spotlight the complex border between Ireland and the United Kingdom on the island of Ireland itself. Has this arbitrary border, which has been a continuous security headache for both States, allowed individuals and organizations to avoid restrictions in one jurisdiction by easily moving materials to another? How could the British withdrawal from the EU impact the movement of cultural property in Ireland and in the EU more broadly?

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

100 RULE OF LAW CHALLENGES IN A TIME OF CRIMINAL JUSTICE CRISIS THEORETICAL AND CONSTITUTIONAL ISSUES 3

A series of three panels will explore some of the central challenges to the idea of the rule of law in the face of contemporary criminal justice. Tying criminal justice and state punishment to the rule of law has been traditionally understood as a necessary feature of modern liberal democracies. Contemporary criminal justice, however, seems to challenge many of the central features that rule of law thinking attributes to state action: it is selective, and not universal, the content of the rules applied are complex and thus not always easy to grasp, and administered by a variety of agents acting under very different frameworks. In the face of this reality, can criminal justice be reconciled with the rule of law? What issues arise out of these tensions? What roles do international human rights and constitutional law play in maintaining the rule of law?

Room:

Seminario 3

Chair:

Javier Wilenmann

Presenters:

Benjamin Berger
Rocío Lorca
Andrea Galante
Alex van Weezel

Benjamin Berger: Jury Nullification, Constitutional Pluralism, and Indigenous Reconciliation

Jury nullification occupies a curious, but assiduously protected, position in the fabric of Anglo-North American public law. Canadian criminal law has always conceded the jury's power to refuse to convict an accused, even though the law as applied to the evidence would seem to command conviction. The power of jury nullification is thus a disturbance in our conventional understanding of principles of legality in public law: that a duly passed law that is not unconstitutional has legal force. But what happens when we additionally take seriously the deep normative, cultural, and political pluralism that characterizes this community that populates the jury? In the wake of two contentious recent verdicts involving Indigenous victims in Canada —the Stanely and Khill verdicts—, the paper uses the Canadian case to explore how we might think about the constitutional role of jury decision-making, and jury nullification in particular, in colonial constitutional orders.

Rocío Lorca: What makes impunity a problem? Considerations on legality and international punishment

The International Criminal Court is aimed at ending the impunity of serious human rights violations and this role has been used as a response to criticisms raised against it. But what is it meant by impunity here? And is the Court fit to fight against it? In this paper I try to answer these questions by looking into our ideas of impunity and into the mechanisms through which courts of law fight against it. I argue that working at their best, courts of law contribute to ending impunity by applying the criminal law in such a way that it restores or enhances the experience of equality before the law whenever it is threatened by abuses of power or patterns of discrimination. As a consequence, punishment does not play a primary role in ending impunity. Instead, what is more crucial is sustaining equality and formal justice against privilege and brute power.

Andrea Galante: Retroactivity in criminal adjudication: The flexibility-foreseeability dilemma

In balancing flexibility with foreseeability in criminal adjudication, two fundamental state duties (security and freedom) collide. At first glance, the legality principle in criminal law requires maximum foreseeability but, also in order to optimize inter alia deterrence, effective criminal law and justice requires flexibility in the application of law. Domestic and international courts have to deal with this tension. Separation of powers and the role of the judiciary are at the heart of the debate on adjudicative retroactivity. In this context, two techniques have been deployed to face the flexibility-foreseeability dilemma: prospective overruling and mistake of law. This presentation questions how various courts within Europe, paying also attention to the European Court of Human Rights, view and manage the flexibility-foreseeability dilemma in the context of judicial retroactivity.

Alex van Weezel: Bad Times for Legality Concerns in Criminal Law

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

101 CONSTITUTIONAL PREAMBLES: AT A CROSSROADS BETWEEN LAW AND POLITICS

This panel focuses on the role of preambles in constitutional law and politics, especially in times of change. Its springboard is Professor Justin Frosini's important 2012 book, Constitutional Preambles at a Crossroads between Politics and Law. Panelists will explore one or more of the book's themes, and their continuing salience in light of scholarship and events since 2012, such as the illiberal turn in constitutional politics and the aftermath of the Arab Spring. The panel will include Professor Frosini's response to panelists.

Room:

D304

Chair:

Donna Greschner

Presenters:

Ebrahim Afsah
Ghazaleh Faridzadeh
Pablo Riberi
Donna Greschner
Justin Frosini

Ebrahim Afsah: Symbols of Assertion and Rejection: Islamic Constitutional Preambles

Constitutions are often likened to the 'rules of the game' in a polity. This deceptively simple metaphor contains three constitutional functions: it settles what kind of 'game' is being played - it defines how it is played, and it describes who the players are and why they play. Comparative constitutional law is most comfortable with the exegesis of the 'what' and 'how:' differences between forms of government and normative restrictions. In contrast, foundational questions of 'who' and 'why' are harder to encompass with the standard tools of the discipline, thus ignoring symbolic assertions often found in preambles. But these foundational myths are particularly important for societies undergoing rapid change - societies where the concept and practice of modern statehood remains an ill-fitting, sharply contested transplant. This presentation looks at the 'usable past' presented in constitutional documents that posit Islam as defining who may participate in public life and why

Ghazaleh Faridzadeh: The Iranian Preamble: A Narrative of Passion and Revolution

Are [preambles] truly non-operative?" With this question, Prof. Frosini begins his book on constitutional preambles. It is not surprising that the preamble of the Iranian constitution, as the world's longest preamble, holds particular fascination for Frosini. With fourteen different sections, each with a separate title, the preamble covers most controversial issues of the country, e.g. the reasons for the Islamic revolution, the foundations of an Islamic government, the role of women in society, the freedom and dignity of mankind, the rejection of bureaucracy born out of an autocratic governments. However, the relevance and legal value of the Iranian preamble is a matter of dispute. This presentation provides a historical analysis of the function and legal status of the Iranian preamble considering its interpretive dynamics for transforming the country's political arena.

Pablo Riberi: The Formal Character of Preambles and the Political

What is the formal character and which is the political relevance of a preamble? It is widely understood that preambles deserve maximum attention, as their content reveals definitions, objectives and core values of the constitutional orders involved. My opinion, however, goes the other way. I argue that it is, instead, because of the form - because of their formal nature- that preambles are essential constitutional pieces. At least it looks like this for those of us who foster a theoretical-political outlook toward the Pouvoir Constituant's decision making process. In short, the existence, connection, and justification of the Constitution, the State and the derived legal order, are precisely the epitome of the preamble´s formal character. The conceptual and the practical implications of such category is also another profile that will be developed and brought to discussion by the panel.

Donna Greschner: Constitutional Preambles and Everyday Politics

This presentation will use the scholarship regarding constitutional preambles, especially Professor Frosini's work, to explore preambles in ordinary statutes. Why and when do preambles appear in legislation? To what extent are insights about constitutional preambles applicable to statutory preambles? Can statutory preamble support important public law and constitutional principles, particularly principles that need buttressing in an age of illiberal democracies and "democratic decay"? In addressing these and related questions, the primary case study will be the Canadian federal experience.

Justin Frosini: ***Discussant***

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

102 PERSPECTIVES ON ADMINISTRATIVE LAW

Panel formed with individual proposals.

Room:

Seminario 2

Chair:

Robert Siucinski

Presenters:

Verónica Pelaez, Antoine Claeys, Marta Franch & Juan Carlos Pelaez

Robert Siucinski

Ana Luiza Calil

Leonardo Ferrara

Verónica Pelaez, Antoine Claeys, Marta Franch & Juan Carlos Pelaez: Administrative Law as an Anticipatory Law

GENERAL SUBJECT: ADMINISTRATIVE LAW AS A ANTICIPATORY LAW I.Presentation Anticipatory law represents legal certainty, but this conception in administrative law is not very common, even it seems unknown. However, it shows that it is necessary to let behind the traditional function of the law as a "reactive law" and move forward to anticipatory law. "Reactive law" should be the exception, only when you can not anticipate the infraction of the legality or the violation of the human rights or the damage, the principle of responsibility will contribute to restore the legality. This vision in administrative law avoids disputes and litigation and promotes ways to use this law to create value, to build peace and to make more human the law. II.Specific subjects Anticipatory law and prevention of damages. Anticipatory law and alternative dispute resolution methods in Colombia. Prevention and proceedings in french administrative law. Administrative procedure: a prevention technique.

Robert Siucinski: Services Conference as an Example of Convergence of Administrative Procedural Law

The paper present the services conference as one of the forms of conducting administrative proceedings. The starting point is to present an institution shaped in the Italian procedural law in the light of its administrative system and its evolutionary transformations. The paper involves a comprehensive analysis of the services conference in the context of the competence of public administration authorities, the procedural guarantees enjoyed by parties to the proceedings and decisions that may be taken in the course of the services conference, as well as the legal possibility of their change. One of the assumptions of the paper is the possibility of recognition of the services conference as a kind of a resultant of proceedings in a form of hearing, and the mode of co-operation between the bodies. As a result, should lead to present prospects and opportunities to adapt the institution of the services conference in the Central European countries.

Ana Luiza Calil: The multiple meanings of Administrative Procedure: a case study of BRICS

This article demonstrates that administrative procedure can have different meanings and contents depending on the legal order analyzed. In order to achieve this conclusion, a research on the legal rules of BRICS was made as a case study. The administrative procedure is an institute of recent development, not only in BRICS but also in major part of States, which was consolidated from the need to contain the authority of the Public Administration and to guarantee certain rights to the civil society. The hypothesis is analyzed through the study of the codification movements of administrative procedures and its evolution, specially after the APA in USA. The first part of the article is dedicated to this general historical perspective. In the second part, a comparative analysis of the BRICS countries (Brazil, Russia, India, China and South Africa) is carried out to identify the various contents for the institute in those legal systems, proving that there are several relevant differences.

Leonardo Ferrara: Transformations of the Authority-Liberty Paradigm in Europe

On the European continent, administrative law is often seen through the lense of the relationship between authority and liberty. This is a relationship that is accepted as its own paradigm in the description of the laws of each nation, and which also seeks to reimpose itself as an interpretative model of reference for EU law. The current relevance of the authority-liberty pairing seems, however, to be the fruit of the crisis of the liberal-democratic orders rather than the expression of their intrinsic characteristic. The paper first examines the main deficits of the rule of law in the European context. Eventually, it critically reflects on the autority-freedom opposition and it finally proposes a different paradigm in which the individual (and/or the person) is the base of public power.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

103 LATIN AMERICAN CONSTITUTIONAL REFORMS AND CONSTITUENT PROCESS IN TIMES OF POPULISM

Constituent processes and constitutional reforms in Latino America has been used in a practice known as abusive constitutionalism, which consists of employing this mechanism to eliminate or restrict aspects related to constitutional democracy, such as rule of law, division of powers, protection of rights and presidential term. Simultaneously, these processes have been presented within the framework of populism, a concept understood as the use of ideas for traditional politics renewal aiming to generate an abrupt rupture through the fight or corruption, the search of real democracy through a charismatic leader of an extreme ideology. Some of the topics are: how had these processes had been used in Latin America in the era of populism? How can they be understood as abusive constitutionalism? What has been the role of constitutional courts? What is the constitutional hard core that must be defended in order not to petrify the Constitutions and allow constitutional changes in transitional times?

Room:

D303

Chairs:

Yaniv Roznai

Sabrina Ragone

Presenters:

Iris Marin
Gonzalo Ramirez-Cleves
Maria Cielo Linares
Jairo Néia Lima
Neliana Ramona Rodean
Amilcare D'Andrea

Iris Marin: Consensus or polarization? constituent power versus populism

The Constitution is a political agreement, an expression of the constituent power, oriented towards guaranteeing human rights and limiting power. Constituent power is the embodiment of the People, made of all the members of a political community who, having the same rights, create the Constitution. The Constitution does not erase diversity but instead allows coexistence based on minimum consensus. Hence, both the Constitution and constituent power are incompatible with populism and the violent imposition of one group's vision over the others. This logic has not been followed throughout Colombia's history, but the 1991's Constitution has been the most authentic expression of constituent power to this day. Despite this fact, attempts to manipulate the Constitution using populist strategies have been noticed, seeking to nurture violence and polarization. The Constitutional Court has obtained a leading role in solving political differences in order to solve this tension.

Gonzalo Ramirez-Cleves: Towards a taxonomy of the use of constitutional reform and the constituent power in Latin America in the era of populism

Many of the recent processes of constitutional making and constitutional reform in Latin America have been framed in the so-called populism era. Thus, since the constituent process of Venezuela in 1999, the constituent assembly of Ecuador (2008) and the Constitution of Bolivia (2009), profound modifications have been made based on a proposal to strengthen social human rights, environmental issues within the framework of pluralism. However, in these same countries, as well as in Colombia, Nicaragua and Honduras, constitutional reform was used to allow presidential re-election and thus consolidate popular leaders with ideologies of left or right that falls within the framework of populism. The paper will analyze the use of the constituent processes and the constitutional reform, to make a taxonomy of the ways of using these mechanisms and thus verify if they comply with common patterns and what may be the aspects that differentiate them.

Maria Cielo Linares: Unconstitutional constitutional amendment: hyper presidentialism, indefinite re-election and democratic system

The proliferation of populist governments has generated the multiplication of hyper-presidentialist regimes that encourage constitutional reforms to gradually concentrate the power and slowly erode the democratic system. According to their vision, people would lose their track and capacity for sovereign action without a strong and eternal figure-leader. Understanding that the constitutional amendments should be studied taking into account the historical, political and social circumstances where they occur, this paper will be based on the 2012 proposed Argentinian constitutional reform, which would be probably discussed next year depending on the presidential elections of this year, to support i) the ontological foundations of a democratic constitution, ii) that the protection of democracy as part of the machine room fundamental for the guarantee of fundamental rights, and iii) the need for strong courts able to protect the constitution and democracy from unconstitutional reforms.

Jairo Néia Lima: How unamendable is the Brazilian Constitution? Lessons from the past and guidelines for the present after 30 years of unconstitutional constitutional amendments

The Brazilian Constitution specifies substantive limits to amending power, however, it does not expressly authorizes the competence of judicial review of constitutional amendments. This fact was not an obstacle for the Supremo Tribunal Federal (STF) to assume such jurisdiction. In order to understand how the Supremo Tribunal Federal interpreted the unamendable clauses in the last 30 years, we developed an empirical research and collected all its decisions on the (un) constitutionality of constitutional amendments. There is an urgent importance on that issue since the new presidential government proposed a constitutional reform on pension rights, which, if approved, could be subject to judicial review in the STF. Based on a quantitative and qualitative survey, this paper demonstrates the level of judicial interference on the amending power in Brazil and indicates how the STF will protect the unamendable clauses if it follows its own precedent rulings in the next cases.

Neliana Ramona Rodean: Electoral system – a lifeboat to constitutional changes in Latin America

Each constitution contains a "grundnorm" concerning the modern representative democracy, a model of political representation based on periodic elections, carried out under conditions of equality and freedom. The presence or absence of express constitutional provisions on the electoral system, with its different position in the system of sources of law, has effects on constitutional revision because each review should enhance the implicit or explicit limit to the constitutional revision represented by the democratic form. The substantial feature of the electoral law is drawn by the founding principles of the legal system, in relation to the influence it makes to the functioning of fundamental mechanisms in the form of state and the form of government, avoiding backslidings and constitutional changes of illiberal matrix or systems based on overconstitutionalism. In this perspective, this investigation explores the Latin American experiences in comparison with some European system.

Amilcare D'Andrea: Participatory democracy in the Constitution of the Bolivarian Republic of Venezuela and the "undue external influence"

In recent years the focus of comparative legal scholarship has been increasingly attracted to Latin America as a living laboratory for the development and implementation of innovative constitutional systems. The recent Constitution of the Bolivarian Republic of Venezuela is an experimental and fascinating constitutional text, striking a fundamental balance between energy, ecology, economy and glocal, counterhegemonic, control of democratic processes. The clear contradiction between these elements and the political crisis in Venezuela undermines the pursuit of the social and environmental objectives dictated in the constitutional text. The extraterritorial financial powers and rules leaves local political authorities without instruments and not sufficient means to face the constitutionals problems, influencing the horizontal control of the powers of the "liberal tripartition", above all following strong social reforms or nationalization policies. This is answered, by necessity or will of power, with abusive constitutionalism and leaderism that risks impoverishing the strong constituent participatory processes.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

104 CONSTITUTIONAL CHANGE AND DEMOCRACY IN LATIN AMERICA

Different episodes of constitution making and constitutional reform in Latin America have brought to the center of public debate the need to rethink the traditional conceptions through which participants in the field of public law have historically approached the problem of constitutional change in its relation to democracy. What makes constitutional change democratic? Can public law realistically contribute to the democratization of constitutional politics in Latin America? What kind of constitutions are necessary to promote effective democratic participation at the level of fundamental political decisions? What risks does the practice of constitutional change pose to the advancement of democracy? Combining theory and empirical research, the participants in this panel will approach these questions through the detailed analysis of different episodes of constitutional change in countries like Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, and Venezuela.

Room:

D402

Chair:

Nicolás Figueroa García-Herreros

Presenters:

Helena Colodetti & Christian Schallenmüller
María Cristina Escudero & Claudia Heiss
Rodrigo Espinoza
Nicolás Figueroa García-Herreros
Gerardo Ballesteros de León
Johanna Cortés Nieto

Helena Colodetti & Christian Schallenmüller: Constitutional Change as "Ordinary Politics": The Misfortunes of a Semi-rigid Constitution for Brazilian Democracy

This paper uses Ackerman's distinction between ordinary and extraordinary politics to understand processes of constitutional change in Brazil. We intend to highlight the insufficiency of Ackerman's model for a country with a semi-rigid constitution, extensive social rights provisions, and a reluctant democratic political culture. We discuss the impairment of Brazilian democratic deliberation and its consequences both for constitutional politics and the protection of social rights. The paper also explores the causes of the Constitution's loss of normativity: lavish constitutionalization of economic and social provisions, relatively flexible processes of constitutional amendment, and the deleterious features of the political and electoral system. The article concludes that ordinary politics migrated to formal channels of constitutional reform, disfiguring the essence of the Brazilian Constitution and putting in jeopardy the republican pact established after the dictatorship cycle.

María Cristina Escudero & Claudia Heiss: Failed Constitutions: Winners and Losers in Chile's Constitutional History

This paper analyzes the main episodes in Chilean history that have led to establishing a new political order, understood as "constituent moments" (Ackerman 1991, Frank 2010). We emphasize the political projects of the losing side during the critical junctures that resulted from these intense political struggles. Identifying the losers in constitutional history, we argue, is key to illuminate the tensions that triggered each of the winning proposals that determine the political history of the country. Following Bruce Ackerman's notions of constitutional dualism and constituent moments, as well as Pablo Ruiz-Tagle's proposal to divide in five different "republics" the history of Chile, we analyze the main political projects defeated in the country's constitutional history.

Rodrigo Espinoza: Protecting Rights or Hindering Political Participation? Constitutional Rigidity and the Crisis of Representation in Consolidated Democracies

The purpose of this article is to refute one of the most important arguments of liberal theory: that rigid constitutions produce positive effects on democracies. As opposed to liberal theory, this article proposes the following hypotheses: (1) that constitutional rigidity has a positive effect on electoral competition - but, (2) also a negative impact on political participation. Additionally, (3) the imbalance between electoral competition and political participation, as an effect of constitutional rigidity, produces a crisis of political representation. In order to asses these hypotheses, this study will be focused on the experience of post authoritarian Chile.

Nicolás Figueroa García-Herreros: Constitution Making and the New Latin American Constitutionalism

The New Latin American Constitutionalism (NLAC) claims that the constitution making processes of Venezuela, Ecuador, and Bolivia were significantly influenced by the revival of the classical revolutionary theory of the constituent power that took place in Colombia in the early 1990s. This article rejects the NLAC's defense of the revolutionary model by challenging their inadequate interpretation of the Colombian process. The Colombian experience should be understood as a mixed process in which the logic of the revolutionary constituent power was softened, first, by a dynamic of compromise and negotiation between a plurality of actors that, second, tried to rely on the principle of legality to engineer a more democratic constitution making process. This has been ignored by the theorists of the NLAC. However, these characteristics were of fundamental importance to avoid the forms of abusive constitutionalism that later emerged in the region, especially in Venezuela and Ecuador.

Gerardo Ballesteros de León: Las constituciones locales como fuente de interpretación de la constituciones nacionales: El caso de Jalisco, México

In federations such as Mexico, the citizens of the different states that composed the union find themselves significantly constrained by the National Constitution when they wish to enact structural changes to their local constitutions. These limitations question the legitimacy of constitutional arrangements and pose a serious challenge to the practice of democracy in federal states. Taking as an example the recent proposals to set in motion a constitution making process in the State of Jalisco (Mexico), this article explores the difficult relations between the national and local levels of government when it comes to the problem of constitutional change.

Johanna Cortés Nieto: *Discussant*

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

105 CONSTITUTIONAL EXPERIMENTS IN LATIN AMERICA: THE QUEST FOR EFFECTIVE CONSTITUTIONAL ENTRENCHMENT MECHANISMS – PART 2

Latin America is often perceived as a region where the rule of law is unstable and the constitutions are frequently replaced. However, Latin America also offers a rich—and many times under-researched—history of institutional experiments seeking to enforce the constitutions to guarantee relevant democratic principles. Some of those experiments are novel, and some are adaptations of European or American constitutional ideas. This panel is part of a larger symposium that seeks to identify the conditions that explain the success or failure of those constitutional experiments by examining case-studies from Brazil, Chile, Ecuador, Mexico, and Uruguay. This second part of the symposium will discuss case-studies focusing on particular entrenchment mechanisms of Ecuador, Uruguay, and Chile.

Room:

A101

Chair:

Joel Colon-Rios

Presenters:

Johanna Fröhlich
Andrea Katz
Sergio Verdugo
Joel Colon-Rios

Johanna Fröhlich: The rhetorical straitjacket of constitutional amendment rules in Ecuador

The article challenges the way the history and practice of the constitutional amendment rules in the Ecuadorian Constitution of 2008 has been understood by scholars. The conventional explanation posits that imposing strict limits to the constitutional reform procedure – such as referring to the fundamental structure of the State or grant ex-ante review power to the Constitutional Court – could posit a paradigmatic change in the Constitution‘s stability. However, I argue that none of this is not a significant restriction in practice. The Ecuadorian Constitutional Court‘s jurisprudence on constitutional reform does not seem to be coherent, and the corresponding constitutional rules remain as mere rhetorical norms until today.

Andrea Katz: “La Suiza de América“: Uruguay‘s Experiment with Popular Democracy under the Constitution of 1918

In Latin America, the drafters of early nineteenth-century constitutions were skeptical of implementing republican forms of government. Uruguay was an exception. Under the Swiss-educated reformist José Batlle y Ordóñez (1904-07, 1911-15), the groundwork was set for a new constitution that would bring about a secular democratic republic. Indeed, the 1918 Constitution replaced a conservative and centralist constitutional system with a regime of participatory democracy. This article advances a new interpretation of Uruguay‘s participatory democracy and argues that, despite the brief endurance of the 1918 Constitution, participatory democracy may be an effective mechanism for constitutional entrenchment where it helps to create popular support for the rule of law and institutional stability.

Sergio Verdugo: The Chilean 1925 Supreme Court Doomed to Fail

The Chilean 1925 Constitution established the power of judicial review of legislation for the first time in Chile‘s history. Nevertheless, under the 1925 Constitution, the Supreme Court never used its power to enforce relevant democratic values against legislators in high-profile cases. The constitutional experiment failed, and Chile‘s legal system was a sort of “legality without courts“ (Faúndez 2010). The conventional explanation argues that the Chilean legalistic culture of that time was apolitical and formalistic, but little work has focused on the incentives that judges had at that time. I claim that the narrative of judicial apoliticism served to justify, and perhaps to persuade, the Supreme Court‘s choice not to intervene in politics, but this account is insufficient to explain judicial behavior fully. More attention needs to be given to the institutional weaknesses of the judiciary and the political instability that existed at that time.

Joel Colon-Rios: ***Discussant***

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

106 THE RANDOM SELECTION OF RULERS? IDEAS FOR THE REFOUNDATION OF MODERN DEMOCRACY

The vertical architecture of democratic systems diffuses the representation of the interests of the electors and prevents the accountability of the representatives. Many have proposed sortition as a democratization strategy. However, its possible institutional design has not been sufficiently studied from a constitutional perspective. This panel offers a look at sortition from four points of view: 1. A descriptive approach to the constitutional proposals of sortition, from mini publics to the most ambitious reforms of the legislative branch. 2. A position that defends sortition, based on the inclusion of minorities and the democratization of access to government. 3. A critical view of its democratic credentials in the legislative sphere, and its suitability in other areas and stages of the political process. 4. A discussion of the utility of sortition in the selection of judges and the incorporation of citizens in the administration of justice.

Room:

LLM92

Chair:

César Vallejo

Presenters:

César Vallejo
Andrea Celemín
Felipe Paredes
Felipe Rey Salamanca

César Vallejo: El azar como elemento fundacional y necesario del sistema democrático

Due to the special conditions of modern states, with their enormous geographical and demographic dimensions, their institutional complexity and the heterogeneity of citizen interests, it is impossible to materialize an ideal democracy in which "everyone can govern". Therefore, we must opt to achieve another ideal of democracy: to design a system in which "anyone can govern". Hence, a return to the classical origins of the Greek democratic experience is justified. This task begins with the introduction of randomness in the selection processes of legislators and governors. This measure would have immediate positive effects, such as correcting the perverse practices of the electoral system and guaranteeing the authentic representation of the interests of political minorities and other traditionally excluded sectors.

Andrea Celemín: ¿El sorteo como mecanismo para la conformación de instituciones políticas debilita la democracia representativa?

This presentation takes a critical approach to the possibility of shaping parliaments through a lottery system instead of traditional elections to solve the so-called crisis of representation. My proposal emphasizes the adverse effects of sortition in the democratic legislative model. However, I also discuss the possibility of including sortition within stages of the democratic process, such as the determination of the political agenda, or the horizontal and vertical accountability of parliamentarians. Incorporating this mechanism into the practices of congresses could improve their functioning and increase their democratic quality.

Felipe Paredes: ¿Podría la selección aleatoria de los representantes mejorar la democracia?

Recently, we have seen renewed interest in sortition, as a way to improve the quality of representative democracy. Several pros and cons of this mechanism of selection have been analyzed. Sortition could help resolve the problem of the lack of representativeness - however, sortition presents problems that limit its potential. The main drawback would be the impossibility of setting accountability mechanisms to make this kind of representatives responsible for their performance. For these reasons, while we must rule out the complete disappearance of the elected representatives, the inclusion of randomly selected representatives could be an important element to consider in the institutional design of a representative democracy. More specifically, a percentage of parliamentarians could be elected by sortition, or a chamber of parliament for randomly selected representatives could be established.

Felipe Rey Salamanca: El sorteo y la justicia constitucional

There is a solid theoretical literature that discusses both the democratic credentials and the shortcomings of the use of random selection as a mechanism to shape political bodies. Many institutional innovations, from deliberative polls to citizens' assemblies, are currently being implemented around the world. However, both the literature and the new institutional designs usually refer to the legislative and executive branches of government. Academics rarely discuss novel uses of the lottery in the judicial branch, particularly in constitutional aspects. In this paper, I consider whether it would be appropriate to use the draw in specific constitutional domains. I discuss, among other alternatives, the use of a lottery to select judges and cases, the use of deliberative polls by courts, the articulation of mini publics with judicial instances, and the combination of elected and randomly selected political bodies to amend constitutions.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

107 INEQUALITY, INSTABILITY AND CONSTITUTIONALISM

The increasing problem of economic inequality is linked to a number of serious socio-political issues, including populism, distortion of political communication even in advanced democracies, corruption, and market instability that threatens the social order in complex ways. This panel explores the relationship between economic inequality, the rule of law, and constitutionalism from various angles. Each paper is broadly concerned with the the way in which central ideas, doctrines or practices in constitutional law are affected by, and may seek to address, the problems of economic inequality.

Room:

Auditorio E. Frei

Chair:

Jeff King

Presenters:

Tarunabh Khaitan
Jeff King
Colm O'Cinneide
Julie Suk
Richard Holden

Tarunabh Khaitan: Political Insurance for the (Relative) Poor: How Liberal Constitutionalism Could Resist Plutocracy

Fair value of equal political liberties is a key precondition for the legitimacy of a regime in liberal thought. This guarantee is breached whenever a group is consistently locked out of power. Given the convertibility, subtlety, and resilience of power, gross material inequality—produced by neoliberal economic policies—effectively locks the relative poor out of political power. Neoliberal democracies, sooner or later, become plutocracies. This is a concern not only for liberal political theory but also for liberal constitutionalism. The usual objections to a constitutional concern with gross inequality and plutocracy provide useful design instructions, but do not rule out the constitutionalisation of egalitarian and anti-plutocratic norms. This paper clarifies how the whole panoply of legal and political constitutional measures— drawn from liberal constitutional thought and worldwide practice —could be marshaled to effectively promote material equality and prevent plutocracy.

Jeff King: Inequality, Instability and the Rule of Law

This paper is a component of a broader project on the social dimension of the rule of law. It is widely known that inequality can produce social effects that place strains on the rule of law - corruption, political tension or strife, rule by decree, and so on. The question in this paper is whether this tension is accidental or intrinsic. In other words, does a severe amount of economic inequality necessarily result in an erosion of rule of law principles? If the answer were yes, it would be surprising, for the rule of law is employed centrally by neoliberal thinkers. This paper will argue against them that there is an all but necessary connection between severe instances of economic inequality and violations of the rule of law. Grave inequality itself is incompatible with the rule of law not mainly because it produces corruption and social unrest, but especially because it creates relationships of dependence and arbitrary power that are anathema to rule of law values.

Colm O'Cinneide: Plugging the Gap: Material Inequality and the Liberal Constitution

It is possible to identify, across the history of twentieth century constitutional thought, two emerging lines of thought as to how liberal constitutionalism should respond to the challenge of material inequality. One is to accept that constitutionalism cannot and should not attempt to engage with the material inequality challenge, but should instead acknowledge its inherent limits and confine its ambitions to acting as a neutral referee for the robust political contests that inequality brings in its wake. The second is to generate new constitutional norms by using liberal constitutionalism's normative resources to push back against material inequality. This paper argues that the second approach is superior because it recognises the need to incorporate a social dimension into the partially-autonomous functioning of constitutional systems, and the way that alternative, less equality-friendly values may fill any gap left by the absence of such a social dimension.

Julie Suk: Constitutional Prohibition and the Destabilization of Gender Inequality

In the United States, the Prohibition Amendment is widely regarded as a constitutional mistake that was rightfully corrected by the repeal amendment thirteen years later, and the experience of the Prohibition period (1920-1933) is often taken to demonstrate the failures of using law, particularly constitutional law, to transform social norms. This paper challenges that conventional view. It demonstrates that the women's movement for Prohibition sought constitutional changes which had the effect of reducing the sources of women's subordination. While Prohibition did not last, many of the other reforms that were facilitated by the women's Prohibition movement did – a higher age of consent (16 in almost every state by 1920), married women's right to their own earnings, female reformatories and women's prisons. The actual history of the Prohibition movement thus challenges prevailing American views about the relationship between constitutionalism and social transformation.

Richard Holden: ***Discussant***

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

108 REGULATING THE ECONOMY I

Panel formed with individual proposals.

Room:

Seminario 1

Chair:

Paula Ahumada

Presenters:

Andrea Cristina Robles Ustariz
Julian Barquin
Alexandr Svetlicinii
Paula Ahumada
Krzysztof Krzystek
Francesco Farri

Andrea Cristina Robles Ustariz: Euro, dollarization and bitcoin: no place for monetary sovereignty?

The paper departs from the conception of "sovereignty monetary" since a teleological approach, which implies to conceive this supreme power in base on its objectives. The core of this research is to compare the three case studies (euro, dollarization and bitcoins) answering three questions: 1. Who has the sovereign power to regulate the currency? 2. How is the decision-making process? and 3. Which are the main social implications of that kind of currency regulation? Through the answers of the these questions, we will realize how the "monetary sovereignty" has mutated into a "currency sovereignty", which means a change in the "telos" of the power: the currency, essentially a mean of the society to simplify the trade exchanges, turns into an end by itself. Therefore, we might conclude that the jeopardize of the sovereignty is not regarding who is exerting it but why it is exerted for.

Julian Barquin: FinTech regulation: Can States actually achieve it? Limits and challenges from a Uruguayan perspective

Financial Techonology has disrupted financial systems globally, dramatically changing the current banking paradigm, and regulatory agents lag behind its constant growth and development. The paper explains how FinTech affects financial regulation from a Public Law perspective. Uruguay stands out amongst Latin American countries due to its developed technological connectivity and a responsive regulator, with a diversity of FinTech issues being legislated in recent times. Analysing its case, therefore, represents an opportunity to consider whether it is pertinent for the State to actually regulate this technology and its limits to do so, both from a legal and a practical perspective. Finally, the paper considers the largest challenges facing FinTech regulation in the forthcoming years.

Alexandr Svetlicinii: Levelling the playing field: time to reconsider the treatment of China's state-owned undertakings in EU competition law?

The economic rise of China, and especially its global initiatives such as Belt and Road Initiative and Made in China 2025 have led to the increased presence of the state-owned enterprises (SOEs) on the global markets. In the field of competition law, the scholars have already exposed a number of challenges posed by the SOE acquisitions for application of the traditional competition law tests deeply rooted in the traditions of the free market and corporate legal personality. The present paper builds upon the ongoing research on the conceptual and procedural challenges raised by the corporate acquisitions and commercial practices of the Chinese SOEs under EU competition law. It will address the following issues : (1) application of the traditional antitrust tests to the commercial conduct of the SOEs - (2) application of the merger control rules to the concentrations involving the SOEs - (3) reliance on antitrust enforcement including the extraterritorial application of competition law.

Paula Ahumada: Money and Sovereignty: The Chilean Case in the Twentieth Century

Recent historical events make Chile a good case study to approach alternative understandings of money governance and compare it to the neoliberal one, for which the State plays mainly a supervisory role over the financial system. In particular, I intend to revisit its relationship to sovereignty by studying the socialist government of Salvador Allende (1970-1973). The Chilean road to Socialism considered the banking and credit system to be strategic for their social revolutionary endeavours and had a successful beginning. By the end of the first year of government, along with the nationalization of copper, more than 90% of the banking system was under state control. The tragic ending of this so-called socialist experiment is well known, but its lessons in terms of money governance have been neglected. Analyzing the Chilean experience of money governance may help understand money's relation to the political and constitutional order, and challenge the orthodox view of its 'nature'.

Krzysztof Krzystek: Shifting Merger Policy in Mobile Telecoms – a Foreshadowing of the Emergence of the Common European Electronic Communications Market?

The paper presents the evolving approach of the European Commission on mobile telecoms mergers. In recent years, various mobile telecoms mergers were reviewed and an explicit alteration in EC's decision-making can be noticed, despite no changes to the merger regulation. The paper conducts a case-by-case analysis of key aspects of these decisions in order to establish insight into the EC's thinking in view of future mergers. Moreover, it tries to ascertain how does the new practice fit into the process of creating the Common European Electronic Communications Market and how does the new policy include the transnational aspects of the European market. Is it encouraging consolidation, or hampering the emergence of European champions? Finally, the paper elaborates on the apparent use of merger law as tool for increasing competition and regulating markets, similar to sector-specific regulations, while conventionally it should be used to protect competition already present in a given market.

Francesco Farri: Tax sovereignty in times of change: is the state still "useful" to the tax system?

The challenge for the tax system of the Third Millennium is to identify forms of imposition of global and digital wealth that, on the one hand, be effective and, on the other hand and at the same time, may respond to the democratic principles of the consent to taxation and to the redistributive function of taxation. On this point, the paper will formulate some reflections and practical proposals and it will identify which are the aspects of the State experience that continue to remain necessary in the new global and IT context in order to be able to configure taxation projects that be centered on the good and the growth of the person and of the social aggregations in which one lives. These aspects can be considered as the measure in which States and their tax sovereignty are still "useful" to taxation also in times of change of public law.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

109 LAW AND TECHNOLOGY IN CONTEXT II

Panel formed with individual proposals.

Room:

Allende Bascuñan 2

Chair:

Mikolaj Barczentewicz

Presenters:

Jan Podkowik
Magdalena Jozwiak
Judit Sandor
Mayu Terada
Ryszard Piotrowski
Mikolaj Barczentewicz

Jan Podkowik: Accountability in the robotic era. Towards new effective remedies to protect individuals?

In recent times a widely discussed topic is the development of new technologies, collectively referred to as artificial intelligence (AI). This term covers various technologies constructs: blockchain, algorithms, Big Data, etc. The rules of their operation are not fully recognized so far, and impede the feasibility of designing a new legal architecture, including the rules of legal liability for human rights violations caused by or associated with AI. One could observe a tendency to restrict human accountability. It poses serious threats to the preventive purpose of legal liability itself. In my presentation, I will discuss two elementary issues. First of all, the recommended regulatory framework, and in particular the adequacy of so-called soft law and self-regulation mechanisms. Second of all, model principles of responsibility at the stage of designing, deployment, implementation and application of AI technologies.

Magdalena Jozwiak: Giving reasons: incompletely theorized agreements and incompletely explainable machines

In certain cases it is easier to agree on an outcome of specific dilemma than on the rationale behind such outcome. This idea of 'incompletely theorized agreements' allows explaining how the societies manage to govern themselves despite the deep divisions on certain points – only the most crucial parts of the social contract need to be accepted while on certain points it is enough to agree to disagree. Sometimes the outcome of deliberation is intuitive and it is enough to claim 'I know it when I see it', as famously stated of pornography by the US Supreme Court Justice. The paper discusses this idea in the context of the nature of decisions made by the AI-based systems. The legitimacy of human decision-making is confronted with the coded nature of AI, where 'intelligent agents' interpret data and learn from it to achieve specific goals without human intervention. The non-intuitive nature of non-explainable machines poses a dilemma to legal theories of legitimacy.

Judit Sandor: Harmful Inference

We live in a world where governments, in making their policy decisions, increasingly rely on big data and their interpretation by artificial intelligence (AI). AI makes data combing and analysis more effective than ever before: it can help to make inferences from existing data, and these inferences can be grounds for making assumptions from the available data. For individual citizens, on the other hand, it is increasingly difficult to protect their personal data and defend themselves from various unwanted biases in the interpretation of those data. While the data protection regime of the European Union and its interpretation by the European Court of Justice provide some defence for the rights of the individuals, it does not protect them sufficiently from the harmful inferences that could be made from the existing data. The current data protection regime seems to be unprepared for the fourth industrial revolution of which automated data analysis is an essential part.

Mayu Terada: Progress of Artificial Intelligence (AI) Technology and Transformation of Public Law

The idea of nation-state and eventually the way of public law is changing in various ways with new technology such as artificial intelligence (AI). Utilization of artificial intelligence is rapidly spreading to various media used by ordinary consumers and home environment that have IoT devices. At the same time, administration and the judiciary section are also starting to try to utilize AI technology and, in some cases, decision-making process is expected to be replaced by AI. Such progress in artificial intelligence technology may change the traditional public law framework to a regulatory framework based on AI-based architecture. Based on the progress of AI technology and its utilization, this paper analyzes the time of change with arising (or expected) risks when AI cannot solve the problem or misuse the data and so on, and confirms the importance of public law, its functions to form a framework to prepare measures to divert such risks over the long term.

Ryszard Piotrowski: The impact of new technologies on democracy: new human rights and the reinterpretation of separation of powers

The rapid development of IT technology has made it imperative that a constitutional and international dimension be imparted to the right which stipulates that no legislative, executive and judicial prerogatives may be ceded to software or AI contraptions and that key state-level decisions must be made by humans according to the new maxim "habeas potestatem humanam". The right to personal inviolability needs to be reinterpreted. Given the potential threat of interference in a person's mind without that person's consent, it is imperative that constitutions and international law proclaim the principle of "habeas mentem". But if artificial intelligence were to make decisions, then it should be properly equipped with value-based criteria. Those establishing the criteria for autonomous choices to be made by neural networks and algorithms will wield a new kind of power – the power to impact the awareness of good and evil. Lest such power breed a new totalitarianism, it needs legitimisation, compliance with human rights, transparency, control and countervailing.

Mikolaj Barczentewicz: Using AI to predict outcomes of cases in UK public law

Artificial intelligence (AI) has the potential to transform both the practice of law and academic reflection on law. However, the technology is still at a very early stage and there are signigificant limitations on what can be achieved. In this paper, I will briefly sketch the state of the art of applications of machine learning to predicting outcomes of court cases, chiefly in Canada and in the United States. I will then focus on the challenges of this kind of research in UK law (like access to texts of court judgments). Finally, I will discuss the "proof of concept" project I developed on predicting case outcomes in a small area of UK public law.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

110 PRIMERO RÍOS, DESPUÉS MONTAÑAS Y AHORA LA AMAZONÍA: DERECHOS DE LA NATURALEZA EN PERSPECTIVA COMPARADA

In the last few decades, challenges that may reconfigure our relationship with our environment and the "things" that are part of it have burst onto the scene. Recent legislative and case-law precedents have recognized the legal rights of the Whanganui River and Taranaki Mountain in New Zealand, the Ganges River in India, the Atrato River and the Amazon region in Colombia. This tendency arises from an "ecocentric" approach that is based on a fundamental premise: humans do not possess the relationship with the earth - instead, humans are the ones who belong to the planet, not in terms of property, but as one part of the whole. In this panel we want to interrogate key features of the legal person model adopted in each of the mentioned cases and explore the challenges posed by those features in the local context - the efficacy of the models adopted to protect nature as legal entity - new approaches to the protection of the planet from climate change with strategic litigation cases.

Room:

D302

Chair:

Juan Camilo Herrera

Presenters:

Felipe Clavijo-Ospina
Tatiana Alfonso
Juan C. Herrera
Natalia Castro
Juan Ubajoa

Felipe Clavijo-Ospina: Nature rights in perspective: beyond the ecocentric theory and the biocultural rights (Derechos de la naturaleza en perspectiva: más allá de la teoría ecocéntrica y los derechos bioculturales)

In the paper I interrogate the key features of the legal person model adopted in each of the New Zealand, India and Colombian cases and explore the challenges posed by those features in the local context. I argue that, although there are obvious contextual differences, there are interesting commonalities in the recognition of rivers as legal persons across the three models, which might herald the emergence of a (loose) transnational concept of legal rights for rivers. Legal person models are typically presented as indicative of an 'ecocentric' tendency in the regulation of natural resources, in which nature is the subject rather than the object of rights. However, the New Zealand, India and Colombian cases are 'culturally located', in the sense that river rights are a consequence of the recognition of the (human) rights of indigenous and tribal peoples as river communities. The efficacy of rivers as persons will depend on strong institutions, governed by humans, to enforce river rights

Tatiana Alfonso: Who is going to help us now? Challenges of implementation in the new environmental rights (¿Y ahora quién podrá ayudarnos?. Los desafíos que plantea la implementación de los nuevos derechos de la naturaleza)

In the last decade, we have witnessed how courts in different parts of the world, have ruled in favor of the protection of the nature. The most celebrated and so-called innovative decisions regarding these protections are those that have declared that nature is not a thing but a person with legal standing. In this paper, I focus on two of these rulings in Colombia to understand what are the possibilities of effectiveness of the judicial orders. The first one is the Atrato River ruling by the Constitutional Court - the second one, is the Supreme Court ruling on the Amazon. While both rulings have been recognized as the same type of decision in which nature is now a holder of rights, the mechanisms designed in the rulings to assure the effectiveness are radically different. According to collective action theories, I analyze how the way in which the litigation was structured and the recipients of the remedies ordered have an impact on the implementation of the rulings.

Juan C. Herrera: Hacking the Law: Do "things" have rights?" ("Hackeando el sistema jurídico: ¿tienen derechos las "cosas"?)

One of the Renaissance's great contributions was to place humans at the center of the universe. Leonardo da Vinci's Vitruvian Man is a graphical indication of this way of thinking. His drawing illustrates the spirit of an age that wanted to relocate the axis of the universe, no longer on a superior being, but on the symbol of an apollonian European white male as the center of everything. For the legal conceptualization of what a "person" is, the anthropocentric characteristic or that of the human being as the measure and center of all things would seem exclusive. In the "periphery" of the traditional centers of thought (India, New Zealand or Colombia), alternatives are being considered with a simple and powerful formula focused on remembering that everything is connected. My intervention in this panel will problematize the extension of certain "fundamental or human" rights to "things" which are not human.

Natalia Castro: Climate change litigation and protection of collective entities (Litigio en cambio climático y protección de entidades colectivas)

In the last decade, judicial actions pursuing climate change mitigation and adaptation measures have exponentially increased. Among other reasons, this phenomenon is explained by the imminent threat of global warming and the civil society distrust in political response. In these circumstances, climate change litigation has become a powerful tool to achieve compliance with human rights and environmental obligations. However, climate change lawsuits face several obstacles. In particular, local judges may decide whether individuals, NGOs and state agencies have standing to sue when the interest of collective entities, such as the future generations and the nature, are at stake. Recent case law shows a major shift in the way that standing to sue is evaluated. This paper analyzes this role and the progressive protection of collective entities without legal personality as a legal response to the challenges posed by climate change.

Juan Ubajoa: The legal personality of nature and its elements versus the constitutional duty to protect the environment (La personalidad jurídica de la naturaleza y de sus elementos versus el deber constitucional de proteger el medio ambiente)

The work aims to analyze two different aspects of Constitutional Law. On the one hand, the concession of legal personality to nature, in general, and to its elements, in particular, by part of the Colombian High Courts. On the other hand, the constitutional duty to protect the environment found in articles 8, 79, 80 and 95-8 of the Political Constitution Colombia of 1991, which has been extensively discussed by the Constitutional Court and that it falls on the entire State apparatus and all of the people. The analysis tries to demonstrate that the aforementioned concession is absolutely inadequate to protect the natural environment and its components and that, on the contrary, the aforementioned duty constitutes the legal entity to develop and promote the safeguarding of the environment and its elements.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

111 "GOLD-PLATING" AND LAW MAKING - AN EU LEGAL SPACE ODISSEY

EU Institutions often claim that national governments often pass extra regulation, piling their own regulative purposes on top of EU goals, in excess of the requirements set forth in Brussels: this is labelled "gold-plating." The purpose of this panel is to analyse this phenomenon, discussing how to assess "gold plating", assessing the inefficiencies and wrongdoings entailed, the possible reaction by the EU, through the principle of sincere cooperation, and to identify legal drafting techniques to prevent red tape arising from gold plating both at EU and national levels. If national governments use EU legislation as a means to impose their own agendas, it blurs the purposes and goals of the EU legislation and of the EU itself. In the legal galaxy that is the EU, the fight against excessive burdening and for a sincere implementation of EU law by Member State should occupy a central role in academical discussion.

Room:

D401

Chair:

Patricia Popelier

Presenters:

Raquel Franco
Manuel Cabugueira
Rui Lanceiro
João Tiago Silveira
Patricia Popelier

Raquel Franco: Gold plating and Law Making I – The overload menace

The concept of Law qua information entails a basic idea about communication between citizens and their governments. In an era of overflowing information, law is no exception to this phenomenon. Laws should be operative, both adequately pursuing their goals and simple to understand and comply with. Multiple reasons justify why laws do not always accomplish their goals: excessive burdening is but one. This scenario becomes more significant when one takes into account the transposition of EU Directives into national legislations. EU Institutions claim that national governments often pass extra regulation, piling their own regulative purposes on top of EU goals, in excess of the requirements set forth in Brussels: this is labelled "gold-plating." The purpose of this presentation is to assess the inefficiencies and wrongdoings entailed therein, particularly unnecessary administrative and financial costs and the elimination of a desirable level playing field between Member States.

Manuel Cabugueira: Gold plating and Law Making II – The last RIA

In the framework of the EU legislation, the claim for "gold plating", i.e., that claim that a Member State pass extra regulation, piling their own regulative purposes on top of EU goals, is not easy to assess. Both the political reasons and the actual impacts may not be simple to identify and even less simple to estimate. When looking to a possible "gold plating" situation, questions must be raised regarding: national sovereignty, individual, national and supranational political objectives and behaviours - national regulatory practices, standards and objectives - neutrality and the impact on welfare and competitiveness of countries - regulatory transparency and the relation between regulator and regulated in a multilevel regulation framework. Aware of this difficulties, our objective will be to discuss how to assess "gold plating?" and what might be the role of the Regulatory Impact Assessment (RIA) methodology in this analysis.

Rui Lanceiro: Gold plating and Law Making III – The EU force awakens

The principle of sincere cooperation can be broadly recognised as one of the basic building blocks of European integration because it allows the creation and maintenance of mutually loyal relations between the Member States and the EU. It guarantees the recognition of general duties of respect, assistance, articulation, and non-contradiction – of coherence of action – between all the public entities covered by the EU legal order, both at the national level of Member States and at the supra-national EU level. This paper will analyse the phenomenon of gold plating in the light of the principle of sincere cooperation. When Member State legislators, while transposing EU law into national law, pass extra norms, guidelines and procedures, in excess of the EU set goals, it is moving away from an effective implementation of EU law. In that way, gold plating can be seen as a breach of sincere cooperation duties allowing a reaction from the EU.

João Tiago Silveira: Techniques to avoid red tape resulting from gold plating: may the force be with us

Gold-plating occurs when the national transposition of a directive/execution of an EU regulation goes beyond what is requested to comply with it. Different options from EU members may lead to gold plating and therefore it may assume different forms. In fact, it does not have always a negative result. For example, it may have the effect of reducing red tape if an administrative procedures is streamlined further than requested. However, in many cases gold plating is present when administrative burdens not required by EU law are set forth at national level in result of its transposition or execution. On the other hand, legislative evaluation instruments are used by a relevant number of States and such tools are often aimed to assess the costs of new administrative burdens. This presentation is aimed to identify techniques to prevent red tape arising from gold plating both at EU and national levels and to discuss how legislative impact assessments may be improved to detect it.

Patricia Popelier: ***Discussant***

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

111 INTERNATIONAL LAW AND HUMAN RIGHTS

Panel formed with individual proposals.

Room:

Allende Bascuñan 1

Chair:

Samantha Velluti

Presenters:

Francisco Lobo
Sanja Dragic
Sejal Parmar
Klaus D. Beiter
Samantha Velluti
Violeta Besirevic

Francisco Lobo: 'Here Be Dragons': Mapping the Legal Contours of Jus Cogens in International Law

For all the debate that the topic of jus cogens has prompted in international law in the past decades and currently at the UN International Law Commission, it is astonishing how little international scholars have relied on elementary notions of legal theory and legal philosophy, a tendency which has only started to recede in recent years. This theoretical inquiry purports to be another modest step in the right path of reconciliation between legal theory and international law. After defining jus cogens and providing a theoretical scaffolding drawn from elementary works on legal theory, the household jus cogens prohibition of genocide is analyzed in light of such notions. As a result, jus cogens norms are characterized both as primary rules of behavior and as secondary rules of change for legal production, constituting an international public order that serves as a tool for international law to safeguard human security.

Sanja Dragic: Civil Society under Attack: Investigating the 'New Norms' Deployed to Fight Back

Space of civil society in domestic orders is constantly shrinking. At the core of the battlefield is foreign funding. Domestic legislation is restricting actors' 'political activities' when funded by 'foreign sources'. Human rights community with its uncritical faith in human rights law has interpreted right to freedom of association so as to encompass the right to foreign funding, and even responsibility to donors. Domestic governments are invoking arguments of sovereignty and self-determination, but are dismissed as illegitimate excuses. In times of change international law is not a neutral observer. It is used and abused. How has the phenomenon of 'shrinking space' influenced international law? Are the new norms reinvigorating public international law or simply justifying the old structures? Is the zeitgeist of the time - the uncritical faith in human rights, actually part of the problem? Is faith preventing constructive dialogue with the 'evil governments'?

Sejal Parmar: Guarding the Guardians? The evolving role of the international human rights system in protecting journalists and the media

This paper addresses international responses to some of the most pressing global threats to the exercise of freedom of expression in the digital age: attacks on individual journalists and upon the media as an institution. Against the backdrop of heightened levels of violence and online harassment of journalists, as well as the public vilification of the media by populist leaders across the world, this paper critically examines the recent approaches of UN Charter-based human rights bodies, notably the Human Rights Council and its Special Procedures mechanisms, to such physical and rhetorical attacks. It traces the evolution and takes stock of the significance of relevant Human Rights Council resolutions, particularly those dedicated to the "safety of journalists" which have been adopted since 2012, as well as the responses of relevant Special Rapporteurs to specific individual cases, including that of Jamal Khashoggi which has gained worldwide attention.

Klaus D. Beiter: More than a Battle of Acronyms: GATS, TRIPS, and FTAs Wreaking Havoc in Education in Africa – ETOs as an Antidote?

There is a real danger that education will be moved from international human rights to international trade law. The WTO's GATS Agreement makes education a tradable services. Its TRIPS Agreement obliges WTO members to provide for strict copyright protection. GATS-plus and TRIPS-plus free trade agreements (FTAs) enhance trade liberalisation and compel even stricter copyright protection. This paper warns of the havoc in African education that commodifying education will wreak. It identifies as a vital component in reviving human rights – including education – as an effective legal category, the notion that human rights must be recognised to give rise to extraterritorial state obligations (ETOs) under international law. These are obligations of states, in certain circumstances, to respect, protect, and fulfil the human rights of those beyond their territory. The discussion will identify typical ETOs safeguarding the right to education in the international trade context.

Samantha Velluti: The Extraterritoriality of EU Law and Human Rights in Times of Change

The paper looks at the extraterritorial human rights effects produced by the laws and conduct of the EU in the area of trade. Extraterritoriality has become a complex and multidimensional legal problem. This complexity is due to the lack of clarity and legal certainty concerning the criteria as to when states and increasingly international organisations have a duty to protect beyond their borders and, if so, the nature and delimitation of such obligation. In the EU context new questions about extraterritoriality and human rights arise due to a series of further complex questions about the EU, the relationship between the EU and International (human rights) law and the position and justiciability of human rights within the EU legal framework. The paper aims at identifying and examining the human rights obligations that the EU is bound by and whether it is possible to define them as positive obligations and, more specifically, as extraterritorial due diligence duties.

Violeta Besirevic: What future for Human Rights? Accommodating Human Rights Claims in International Investment Arbitration

Human rights and investment law seem not to stand at odds with each other as it was previously thought. The recent developments show that human rights considerations in international investment arbitration could be invoked either as a state defense or an investor's rights. There is a heated debate going on regarding the issues of whether investors' rights included in investment treaties are human rights and whether a host state can use human rights as its defense to justify regulatory measures affecting the investment. In this presentation, I will assess pigeonholing human rights considerations in international investment arbitration from the human rights law perspective with an aim to show that while human rights can justify the host state legitimate right to adopt regulatory measures to protect human rights, the investor's rights are not human rights although some rights granted to the investors in the investment treaties tend to echo human rights.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

113 GENDER EQUALITY AND POLITICAL PARTICIPATION

Panel formed with individual proposals.

Room:

Auditorio CAP

Chair:

Beverley Baines

Presenters:

Marjo Rantala
Dmitry Kurnosov
Bernardo Campinho
Rostam J. Neuwirth
Bárbara Bertotti & Ana Cristina Viana
Beverley Baines

Marjo Rantala: Courts and non-discrimination law: Reinforcing or challenging gender norms?

The dominant understanding of ‘gender‘ in law is harmful. Through analysis of practices of infant genital modification, this paper shows how law strengthens sex dichotomy and maintains hierarchical gender order. The practices discussed are female genital mutilation, ritual male circumcision, and so-called normalising genital surgery of intersex children. Regardless international human rights norms and national penal codes, children are exposed to violations of bodily integrity as their genitalia can be altered due to their culture. Law fails to recognise children as individuals if their bodies do not comply with the cultural understanding of male and female sex. Building on Judith Butler‘s theory, however, this paper explores law‘s potential to challenge oppressive gender norms. Accordingly, the paper advocates for non-discrimination law provided that feminist (legal) theory is taken seriously. ‘Sex‘ should be denaturalised, open to future articulation, not least in court practices.

Dmitry Kurnosov: Ensuring Gender Equality in Parliaments: The Hidden Opportunities of Electoral Law

Although it has been decades since women gained the right to vote in most societies, they are still underrepresented in decision-making bodies. Women have over a quarter of seats in just 66 out of 193 legislatures of the World, according to the Inter-Parliamentary Union data. The most common approach to ensuring gender equality is the introduction of quotas for parliamentary candidates. Yet, this solution can have an unintended effect of preventing the establishment of Feminist parties. My paper argues that an alternative option is to use the opportunities in proportional electoral systems, used in majority of countries. These systems usually provide bonuses, which translate in extra parliamentary seats. They either grant an additional advantage to the winning party or offset regional disparities. I will argue that such bonuses can also be used to enhance gender equality in parliament. Such a measure would mostly affect major political parties, thus giving it a synergistic impact.

Bernardo Campinho: Maternity, gender and the effectiveness of women‘s human rights in the Brazilian constitutional system: the contributions of the convention and the CEDAW committee

This paper seeks to understand motherhood as a relevant gender issue in shaping women’s human rights, taking the norms of protection against discrimination on grounds of pregnancy in Articles 11 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as a starting point for affirming a fundamental right to obstetric care, seeking to understand it as an instrument to combat violence and discrimination against women in reproductive health, delimiting how this right has been interpreted and applied in the experience of higher courts in Brazil, confronting it with the constitutional predictions on women’s social rights and the legal frameworks of women’s reproductive health, and outlining how the decisions of the CEDAW committee in the cases Alyne Pimentel da Silva v. Brazil and Elizabeth de Blok et al. The Netherlands can contribute to broadening the protection and enforcement of this right in the judicial sphere.

Rostam J. Neuwirth: Non-Binary Gender and Binary Legal Thinking: The Birth of a New Legal Mindset?

The Babylonian Talmud states that “The one Law has become two laws“ – a saying probably caused by an increasing number of disputations among legal scholars. During the 18th century, science also changed its theoretical understanding of gender from a “one-sex“ to a “two-sex“ model and henceforth “one sex became two sexes“. Today, however, there are several jurisdictions, like Canada, Germany and Austria, where courts have begun to legally recognize a non-binary conception of a so-called third gender. Based on the ruling by the Austrian Constitutional Court in June 2018 and other cases, the present paper therefore asks to what extent “two laws“ are now on the verge of becoming “three“? This paper understands “three laws“ as referring to a possible the trend toward a gradual deviation from a purely binary mode of reasoning in line with bivalent logic in law and in life. Put briefly, it speculates to what extent it forebodes the (necessity for the) birth of a new legal mindset.

Bárbara Bertotti & Ana Cristina Viana: The third sector and the promotion of women‘s political participation in Brazil

The paper aims to analyse the Third Sector and its link with the promotion of women’s political participation in Brazil, by the case of “Institution politics by.from.for women“. Created in 2015 as a research project at an University, it has been transformed in a non-lucrative association in 2018.It’s an initiative of women who wish to broaden women’s political participation in all its plurality and diversity, in spaces previously occupied by men. Among the activities carried out by the Group are: Courses of Initiation to Political Training for Women (regular and summer school) and Research Meetings held with the theme of gender. The preliminary results are: (i)the candidacy of two students for positions of elicitation - (ii)one student assumed the women’s rights directorate in the Paraná state government - (iii)the network made by the students promotes a socialization and connection that helps propagate the idea of feminine empowerment -(iv) partnerships with other groups.

Beverley Baines: Women‘s equality rights times three

This paper explores three concepts - federalism, gender and diversity - that might frame the campaigns to constitutionalize women’s equality rights in Canada. Organized women participated in three such campaigns between 1980 and 2008. The campaigns ended with three virtually identical declarations of equality, one each in the Canadian Charter of Rights and Freedoms, the Constitution Act 1982 and the Quebec Charter of human rights and freedoms. However the women’s campaigns that produced them are distinguishable. On the one hand, different women’s organizations - national, indigenous and Quebec - took primary responsibility for each campaign. On the other hand, these women’s organizations singled out different entities - national, indigenous and multicultural - that opposed their equality-seeking. The puzzle I identify is how to conceptualize diversity - indigenous and multicultural - in this context which is conventionally framed by the concepts of federalism and gender.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

114 THE JUDICIALIZATION OF POLITICS AND JUDICIAL DEFERENCE

Panel formed with individual proposals.

Room:

D405

Chair:

Vanice Lirio do Valle

Presenters:

Marina Bonatto & Leonardo Cabral
Vanice Lirio do Valle
Clemente José Recabarren
Nadja Lirio do Valle Marques da Silva Hime Masset
Guy Seidman & Gary Lawson

Marina Bonatto & Leonardo Cabral: Does Judicial Activism still matter in Brazil?

Despite the broad range of rights protected in Brazilian Constitution, allied with the important role that the Judicial Power has performed in their protection and promotion, Brazil is actually facing a scenario of growing conservatism in the democratic institutions. Hate speech increased and fake news spread, which combined configure real menaces to the rights related to equality and liberty, especially of those who are already marginalized and least represented in the Executive and Legislative branches, and even a threat to democracy itself. Because of that, the discussion about the bounders of the Judiciary performance is coming up over again, which leads us to question: Should the Judiciary take the lead in the protection of this rights that are being constantly questioned and attacked by conservative groups in power in order to avoid setbacks and the future collapse of our democracy?

Vanice Lirio do Valle: Judicial deference towards administrative choices in the social rights realm

The Brazilian 1988 Constitution is grounded in social rights provided with immediate efficacy, bringing intense judicialization and deep judicial intrusion on administrative choices. The research question is whether judicial deference to administrative choices in public policies can contribute to grant equality in the effectiveness of social rights. The argument pro deference relies in two considerations: 1) judicial review requires objective criteria in order to prevent subjective appreciation to the ruling, and the risk of inequality and subversion of distributive concerns inherent to public policies - and 2) deferential judicial review benefits from the institutional capacity that is recognized to the Executive branch. The Brazilian scenery brought the false impression that, as means to enhance human dignity, those rights can be properly grant by judges. That misconception contributes to devaluate the political process in which social rights are design in its content and addressees.

Clemente José Recabarren: Judicial review as deference to our constitutional lucidness

This paper addresses Waldron‘s treatment of the pre-commitment analogy (PA) in Law and Disagreement. First, I shall argue, against Waldron, that the PA captures a crucial feature of constitutional activity, which is its institutional lucidness. Constitutional processes can be described as institutionally lucid in three dimensions: sociological, legal and historical. The basic claim is that this lucidness justifies the deference our legal system owes to the constitution and that judicial review of legislation instantiates that deference. An additional reference to Waldron helps to precise the scope of the argument. Waldron correctly criticizes the PA grounded in the “abstraction“ and “ambiguity“ of constitutional rights. However, on this point, he misses the enemy. The problem he identifies is not of the entrenchment, but of a technique to formulate rights. A technique that is defective precisely because it does not entrench anything properly speaking.

Nadja Lirio do Valle Marques da Silva Hime Masset: Participation as a criterion for deference in Brazil

The increase of human rights judicialization in Brazil at the end of the 20th century has led to an ever more intense intervention of the Judiciary in public policy choices, effectively shifting the decision-making process from the Executive to the Courts, in turn hindering proper policy-making, as more often than not judicial decisions do not converse with administrative choices. With this in mind, we propose a deference-based model that does not impede the analysis of administrative decision’s merit, while also stimulating better institutional practices, both in the Executive and Judiciary branches. We also suggest that, in the specific subject of public policies, public participation must be included among the criteria for judicial deference, so as to ensure public interest is respected.

Guy Seidman & Gary Lawson: What is Deference: An Introduction and Call for Collaboration

Deference is a pervasive concept in American law, yet remains surprisingly under-analyzed. While Chevron v. NRDC, Inc. (1984) which prescribes judicial deference to agency interpretations of statutes has become the most cited Supreme Court case of all time, neither the Court – nor Black‘s law dictionary – have ever defined deference in full. In an effort to begin fill the gap in the conceptual and comparative literature on deference Prof. Gary Lawson of Boston University and I have recently completed writing a book on this topic for Oxford University Press. My proposal is double: first, to preset the main points of our analysis at the icon-s conference - the second, since we realize that deference exists and operates in many legal systems, we wish to call on colleagues from other countries to cooperate with us on a proposed second volume – Deference in Comparative Law Perspective.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

115 THE MULTIPLES DIMENSIONS OF MIGRATION IN LATIN AMERICA: CHALLENGES, PROPOSAL AND DEBATES

The Latin-American region, at present, is facing important political changes and new challenges related to migration government. In this scenario, this panel aims at exploring some of the relevant debates raised from the necessity to face the challenges posed by migration in the region and to identify alternatives for an adequate migration government, by exploring aspects that are wrongly considered as secondary, but which are those that have a fundamental impact in the government of migration. Therefore, the papers that compose the panel investigate: the subtraction and restitution of minors in relation to the rights of the victims of domestic violence - the efforts to create a regional governance of migration, its challenges and failures - the challenges that imply the necessity to develop a comprehensive migration policy, and how the law works as an instrument of social transformation and empowerment for non citizens in situation of vulnerability.

Room:

Sala Reuniones LLM

Chair:

Juan Manuel Amaya Castro

Presenters:

Alexandra Castro Franco:

María Teresa Palacios Sanabria

Carolina Moreno Velasquez & Gracy Pelacani

Alexandra Castro Franco: The bittersweet efforts for a regional governance of migration in Latin America

The concept of migration governance implies a wide range of agreements, debates and discussions on migration, which aim at finding common answers to this phenomenon. Conscious of this, the countries of the Latin-America region did multiples efforts to set common guidelines for the management of migration and for the protection of the rights of migrants and refugees. Nevertheless, the process results are bittersweet if we contrast the range of commitments, agreements, declarations with their level of implementation. States usually disrespect their commitments due to political interests, questioning the tenor of the commitments assumed and the effectiveness of regional organizations of which they are part. The present paper tries to go over the development of regional migration governance with the aim of highlighting the challenges that exist in the process of conformation of commitments on migration capable of overcome political swings and be respectful with migrants' human rights.

María Teresa Palacios Sanabria: Migration government with a focus in human rights: a challenge for Colombian regions

Colombia has been considered along history has a country of origin of migration. However, due to the migration from Venezuela, the country is facing a new reality being the main country of destiny for Venezuelans. This change supposes that the Colombian State has to adapt to the situation and to develop with urgency a comprehensive legislation on migration. The Congress should set the coordinates of the migration policy. However, it is also important to consider the reality of the different regions of the country. This essay aims at reflecting on the necessity for Colombia to adopt a comprehensive regulation on migration with a focus on human rights and that consider the particularities of the diverse geographical areas that experience migration. The aim is to reflect on what is necessary to manage migration in an organized, secure way that is also respectful of individual rights, being this the only way that migration can be understood as a true opportunity of development.

Carolina Moreno Velasquez & Gracy Pelacani: Legal empowerment of the migrant population: instruments for social transformation

At present, Colombia is a territory characterized by being a country of destination of high migration flows. Most of this population finds itself in a situation of manifest vulnerability and social exclusion. This amounts to a de facto obstacle to an effective access and enjoyment of rights and to a very limited participation in the diverse contexts of society construction. Considering the restrictions posed by formal-legal mechanisms in the access of rights, it is necessary to explore other channels in order for the law to become an accessible and available instrument for vulnerable migrants. The paper aims at analysing the diverse legal and no legal instruments available for an effective integration empowerment of vulnerable migrants and for the social transformation of their situation. It explores the use of mechanisms as strategic litigation, pedagogy of rights, brigades of social and legal services, street lawyering, among others.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

116 WHAT DOESN'T KILL IT MAKES IT STRONGER? THE RESILIENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM IN AN AGE OF BACKLASH

The panel investigates the resilience of the Inter-American human rights system in the context of the ongoing backlash against human rights. By bringing together both scholarly and practical perspectives on the current challenges faced by the Inter-American human rights system, the panelists will discuss potentials and limits of various conflict management techniques.

Room:

Auditorio P. Aylwin

Chairs:

Alexandra Huneeus
Silvia Steininger
Ximena Soley

Presenters:

Silvia Steininger
Ximena Soley
Marie-Christine Fuchs
Judith Schönsteiner

Silvia Steininger: Harder, better, faster, stronger: Conceptualizing the institutional resilience of international courts

In times of an alleged backlash against international courts, understanding how courts might overcome and manage such challenges becomes crucial. Human rights courts, in particular, operate in a climate of heavy criticism, precarious funding, and state withdrawal. Yet, they remain surprisingly resilient in the face of those attacks. Embedded in their institutional environment, one can observe various attempted coping mechanisms such as strategic deference, judicial dialogue, and major structural reform processes, but also the implementation of sanctions, and the need to draw red lines in situations of democratic backsliding. In this presentation, I propose a conceptualization of resilience by combining institutionalist theories, regime theory, and socio-ecological studies, carving out the factors, mechanisms, and instruments, which might make human rights more resilient to extraordinary critique.

Ximena Soley: Defusing tensions in the Inter-American system: beyond formal institutional structures

The analysis of backlash against international human rights tribunals has often centered on two actors: the tribunal in question and 'the state' – most often understood as a monolithic entity. This approach is problematic to the extent that it ignores the multiplicity of actors that participate in constructing (and challenging) a court's authority: the ecosystem in which the international tribunal is embedded. To better understand the manner in which criticism against the IACtHR is managed and processed, I shall first offer a map of the inter-American ecosystem, broadly outlining the different roles that its actors have played. Specific instances of state backlash will then be analyzed taking this ecosystem into account. Ultimately, although courts may adopt specific judicial strategies to deflect criticism, their resilience in the face of pressure owes much to the strength of the ecosystem that has grown around them

Marie-Christine Fuchs: Fighting back the backlash through dialogue and cross-fertilization – The Inter-American human rights system and its facilitators

The presentation will focus on fighting back the backlash in the inter-American system of human rights through a multi-dimensional dialogue between member states and regional human rights systems and a cross-fertilization between constitutional and regional court's jurisprudence and the role of think thanks and international cooperation in facilitation this dialogue and cross-fertilization.

Judith Schönsteiner: Against closed-room diplomacy: Selecting judges and commissioners in the Inter-American human rights system

This paper will discuss the selection mechanism of judges and commissioners in the Inter-American Human Rights System. This mechanism shows considerable democratic deficit, but also provides only few guarantees regarding the human rights expertise and commitment of candidates. The selection process still obeys, partly, the logics of closed-room diplomacy. While candidates nominated to the OAS General Assembly nowadays undergo expert and civil society scrutiny, the nomination processes at national level continue to lack transparency. Thus, conflicts of interest, excessive deference to States or other interest groups, as well as lack of expertise cannot be excluded. Here, using as a case-study the Inter-American Commission's selection process 2019, the argument is made that meritocracy and transparency have to improve in the national nomination processes in order to maintain the quality of human rights protection in the Americas.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

117 EL IUS COMMUNE Y LO COMÚN DE LA CRÍTICA. CONSTITUCIONALISMO TRANSFORMADOR Y EL ESPACIO JURÍDICO LATINOAMERICANO

This panel reviews the emergence of the Ius Constitutionale Commune en América Latina (ICCAL). The first two presentations will begin discussing the concept of ICCAL from the doctrinal, jurisdictional, critical and normative point of view in order to identify the disagreements and the challenges that the project presents. The other two interventions will develop the Latin American legal space from the perspective of the role and impact of the Inter-American Court of Human Rights. In this part, the panelist will explain why this particular tribunal can be considered an example of transformative constitutionalism. Furthermore, the last intervention will introduce some fresh perspectives related to the principle of subsidiarity and its relation to the full effectiveness of fundamental rights in the different countries of the region.

Room:

A102

Chair:

Armin von Bogdandy

Presenters:

Miriam Lorena Henríquez Viñas
Ana Micaela Alterio
Cecilia Medina Quiroga
Juana Acosta

Miriam Lorena Henríquez Viñas: Tres triadas sobre el concepto Ius Constitutionale Commune Latinoamericano

The paper reviews the literature and work of scholars whose works expressly refer to the term "Ius Constitutionale Commune en América Latina" (ICCAL) and treat it to express their understanding, to link it with other themes or to manifest their critique. Of this study it is possible to affirm three triads that express the meanings, disagreements and challenges from which the notion of ICCAL is accepted, that is to say its use has been generalized, although it is not exempt from criticisms. Thus, the meanings and disagreements converge in understanding ICCAL as a concept that describes the novel doctrinal, jurisdictional and human rights norms contained in different sources of law, which favors the formation of a Latin American common law in a gradual way. As a conclusion, the main challenges for the consolidation of the concept are set out.

Ana Micaela Alterio: En la búsqueda de lo común del Ius Constitutionale Commune Latinoamericanum

This presentation critically examines the concept of Ius Constitutionale Commune Latinoamericanum (ICCAL) as a phenomenon of judicialization of politics at the regional level. To problematize its "common" character and based on the assertion that constitutional law is political, some features of the ICCAL are analyzed: (i) the ideology that inspires it, (ii) the theory in which the concept is supported and (iii) the institutional arrangement that sustains it. Under the understanding that every constitutional project is inextricably linked to an institutional design that carries it out, the commitment to a jury-centered model, anchored in the interpretation that the Inter-American Court of Human Rights makes of the rights recognized as universal is criticized. Proposing, in contrast, a sense of the common according to which the system is based on deliberative and egalitarian procedures that can strengthen the democratization of the region.

Cecilia Medina Quiroga: El impacto transformador de la Corte Interamericana de Derechos Humanos

My intervention will analyze some of the most significant developments in the case law of the Inter-American Court since the entry into force of the American Convention. Therefore, I will focus on the gross and systematic violations of fundamental rights in relation to the idea of transformative constitutionalism in the region. The role of the Court's work in interpreting the content and scope of the obligation to guarantee the rights established in the Convention has changed and nowadays is transformative for the region. However, the task of building up democracy, the rule of law and human rights values in the states of the region is still far from complete.

Juana Acosta: La subsidiariedad desde la mirada del Ius Constitutionale Commune en América Latina: ¿desaparición o renacimiento?

Against the common understanding under ICCAL, rather than being an obstacle, the principle of subsidiarity can be a tool for a better and more effective protection of human rights. This re-understanding rescues the true meaning of this structural principle: rather than preferring national jurisdictions to international bodies, the principle seeks to find what is the right level of protection. This right level should be determined under flexible criteria to identify the degree of intensity of its application, and States should not have identical treatment. This criteria should include, (i) the political will and legitimacy that the State has given to human rights bodies - (ii) the strength of its domestic institutions -particularly the judicial branch- - (iii) the ability of civil society to influence the decisions of the State - (iv) compliance, and (v) the adequacy and effectiveness of the normative framework to protect human rights.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

118 COURTS UNDER EXTREME PRESSURES

Panel formed with individual proposals.

Room:

LLM94

Chair:

Ana Beatriz Vanzoff Robalinho Cavalcanti

Presenters:

Ana Beatriz Vanzoff Robalinho Cavalcanti
Francesco Biagi
Daniel Capecchi Nunes
Marcin Szwed
Roberto Machado Filho & Paula Pessoa
Wojciech Brzozowski

Ana Beatriz Vanzoff Robalinho Cavalcanti: Activism or Self-restraint: the role of Courts in Democratic Transitions and the case of Brazil

Courts are notoriously influential in the consolidation of new constitutional regimes. However, their expected behavior changes depending on the nature of the transition. Negotiated elite transitions have Courts assume an activist posture early on, when there is a political legitimacy vacuum. Revolutionary transitions see Courts apply self-restrain in early years of a strong, legitimized political class. In all scenarios, Courts are expected to be more activist in the presence of a legitimacy vacuum. The Brazilian 1988 transition into democracy challenges this pattern. While there is an ongoing debate on the nature of the transition as negotiated or revolutionary, the Supreme Court practiced fierce self-restrain in the early days of slight political legitimacy. This paper analyzes the causes and diagnostics of the double-edged political vacuum Brazil experienced in the first phase of its New Republic, and what it can teach about the role of Courts democratic transitions.

Francesco Biagi: Constitutional Adjudication in North Africa and the Middle East following the "Arab Spring": Reforms, Challenges and Perspectives

One of the most significant trends following the "Arab Spring" was the emergence and strengthening of constitutional courts. The aim of this paper is to discuss whether these bodies have acquired or not the potential to place adequate checks on the executive branch and thus contribute to the democratization processes in a more effective way compared to the past. In order to do so, I will first identify the main reasons why constitutional courts before the Arab Spring rarely acted as counter-majoritarian bodies. I will then discuss the major novelties introduced by the recent constitutional reforms in the field of constitutional adjudication, and I will analyze the role played by constitutional courts during the transition process. I will show that despite profound differences, some of the challenges Arab courts are currently facing are similar to the challenges faced by European constitutional courts in the past century after the fall of the respective authoritarian regimes.

Daniel Capecchi Nunes: Democracy's Destruction from the Inside: authoritarian rings and the role of constitutional interpretation in democratic backsliding

The main purpose of this article is to demonstrate that in scenarios of democratic backsliding, changes in constitutional interpretation can be as serious as constitutional amendments. Those interpretative changes do not have to be a result of an abrupt break down, but they may be related to the recovery of non-official meanings and parallels practices that circulate and determine the functioning of certain autocratic institutions, specially in scenarios of recent transition, like those of Latin America countries. In other words, the interpretative deconstruction of democracy does not have to be initiated from the outside, by a permeabilization of narratives of populist groups outside the State, but they can start from within. Metaphorically, it will act like a hidden virus, which takes advantage of a moment of special weakness to attack. In case, the fragilization of the institutions would be the milestone for the outbreak of interpretative changes.

Marcin Szwed: How to substitute a dysfunctional constitutional court? The case of Poland

One of the first reforms undertaken by the party "Law and Justice" after the victorious parliamentary elections in Autumn 2015 in Poland was aimed at destabilization of the Constitutional Tribunal. As a result of the mix of legislative and factual actions, since the end of 2016 the Tribunal is de facto unable to carry out its duties effectively and independently. Consequently, the need arose to look for alternative mechanisms of protection of human rights and the rule of law. The paper will discuss both the national (e.g. pro-constitutional interpretation of law, diffuse constitutional review) and international (proceedings before the ECtHR and CJEU) mechanisms used or proposed in Poland for that purpose and will critically assess their effectiveness. Emphasis will be put on the role of international courts in safeguarding the rule of law. The conclusions may be relevant not only in the context of Poland, but also many other "illiberal democracies".

Roberto Machado Filho & Paula Pessoa: Political Parties in Turbulent Times: What Role for Constitutional Courts?

The rise of authoritarian populist governments has posed a threat to the long held assumption that democracy has become the only game in town. In an article for the Journal of Democracy, Foa & Mounk, have described that support for democracy has been falling and political scientists have sounded alarms on the how democracies might die. In a more cautious tone, Pippa Norris and Ian Shapiro, in their most recent books, have acknowledged that while the threat cannot be dismissed, it is not yet possible to discard the thesis of democratic consolidation. Tradition parties, they argued, can respond to the populist challenge by adapting their own programmes, while retaining respect for core constitutional principles. Party competition, however, has rarely been the subject of analysis in constitutional law. Following Nicholas Barber's thesis on the constitutional role of political parties, this paper aims to identify how constitutional courts can foster party competition.

Wojciech Brzozowski: The Constitutional Court as a Constitutional Zombie: Another Lesson from the Polish Crisis

It is sometimes argued that in order to prevent liberal democracy from decay, the role of the constitutional court may need to be strengthened so that it could successfully confront the populist government. But do we actually realize how much damage can be done when instead of defending the constitutional order the court becomes actively involved in supporting such a government? The paper aims at providing a concise explanation of the changes which have occurred in the functioning of the Polish Constitutional Tribunal since 2016, when it was subject to a hostile takeover by the parliamentary majority. As evidenced by a number of cases, the Tribunal is now much more likely to follow the expectations of the political branch of government than to prevent democracy from further backsliding. This sudden transformation from the most important ally of the rule of law into one of its most powerful enemies makes the metaphor of a constitutional zombie disturbingly accurate.

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

119 GLOBAL BUST, AFRICAN BOOM? AFRICA'S MARCH TOWARDS DEMOCRACY AND MULTILATERALISM

Scholarship and global indices of democratic governance have warned of the future of liberal democracy, sparking concerns of a 'crisis' or 'retreat', especially in democracy's traditional bastions. Multilateralism has also faced unprecedented resistance and reversal, with Brexit and Trumpism. However, democracy and multilateralism, while presented as experiencing a global decline, are experiencing a relative boom in Africa. Recently, many African countries have seen peaceful democratic transitions to power, courts and other independent institutions have held political institutions to account and Africa is establishing the largest free trade area in the world. While challenges remain, Africa seems to be bucking the global crisis of democracy and multilateralism. This panel will explore the domestic and continental forces, mechanisms, public law norms and institutions that explain the emergence of the continent from the posterchild of authoritarianism to the face of democratic transitions.

Room:

Auditorio Claro

Chairs:

Iyiola Solanke
Adem Abebe

Presenters:

Adem Abebe
Charles Fombad
Horace Adjolohoun
Janine Silga & Iyiola Solanke

Adem Abebe: African economic integration, constitutionalism, democracy, good governance and the role of civil society

As Africa moves towards enhanced economic integration, this will have implications to frameworks for the promotion of constitutionalism, democracy and good governance. Civil society organisations that have been at the forefront of the promotion of democracy and constitutionalism will therefore have to think through ways of integrating issues of continental trade with these values. In addition to exploring the interaction between economic integration and constitutional values, this paper will consider whether and how civil society contributed to the emergence of multilateralism in Africa and the extent to which they can contribute to its sustenance.

Charles Fombad: Transforming Constitutions and Constitutional Rights

This paper will consider the contribution made by constitutional law to the emergence of multilateralism in Africa, and the role of constitutional authority is developing democratic legitimacy.

Horace Adjolohoun: The Role of the Judiciary

The Judiciary is the fourth branch of government yet its role in constitutional change is rarely examined. In this paper I explore the action of courts and the consequences of judicial decisions for the recent emergence of democracy and multilateralism in Africa.

Janine Silga & Iyiola Solanke: Comparing multilateralism in Africa and Europe

Can multilateralism in Africa be compared to multilateralism in the EU? TO what extent will it differ in, for example, its approach to migration and development? This paper will present the main aspects of the EU migration/ development nexus and consider how regional integration in Africa can adopt the same or different philosophy and policies. Can such policies prevent the return of authoritarianism and promote multilateralism?

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

120 CONSTITUTIONAL DEMOCRACY IN EUROPE

This panel explores the state of constitutional democracy in Europe, both with respect to the European Union and particular European states, most notably Hungary and Poland. Authors are concerned with democratic deficits, populism and the general crisis of constitutional democracy that appears to be engulfing the world.

Room:

A103

Chair:

Sujit Choudhry

Presenters:

Antonia Baraggia & Matteo Bonelli
Timea Drinoczi & Agnieszka Bien-Kacala
Paul Blokker
Kim Lane Scheppele
Grainne De Burca

Antonia Baraggia & Matteo Bonelli: Rule of Law Conditionality and Constitutional Democracy Crisis in Europe

Within the global crisis of constitutional democracy, the cases of democratic backsliding in EU member states are peculiar for their systemic impact on the EU integration project as a whole. The existent mechanisms deployed to deal with the crises in Poland and Hungary, including Art.7, have proved to be little effective. In light of these flaws, the Commission put forward in May 2018 a proposal for a Regulation that would allow for the suspension of EU funding in case of 'generalised deficiencies' in national rule of law systems. The proposal aims to introducing the tool of conditionality – already used by the EU in the financial assistance and structural funding systems – also within the rule of law field.

Timea Drinoczi & Agnieszka Bien-Kacala: Constitutional Democracy in Hungary and Poland

Constitutional democracies in Hungary and Poland have turned into illiberal systems. Certain non-legal reasons for effective successful transformation to an illiberal state, such as the emergence of populist rhetoric and morality, the clear lack of political self-restraint, and the inability or unwillingness of the people to form a strong and capable civil society, or to raise their voice against extreme views or resist an aggressive and clearly unfounded political campaign, could have been pre-determined and influenced by the historical and socio-psychological particularities of the nations in question. The historically- and psychologically-determined national and constitutional identities of Hungarians and Poles might not be apt to nurture liberal constitutionalism in the long term.

Paul Blokker: "Populist Constitutionalism: A Disease or a Symptom"

There are two prevalent ways of approaching the populist phenomenon. The first, perhaps most widely embraced view, is to perceive populism as a 'disease', 'deviation', or 'pathology' of existing democracy. A second view understands contemporary 'neo-populisms' rather as one particular instance of a rather profound, complex, and long-term set of transformations of democracy. Where we stand on this matter is of great importance, as the feasibility and potential success of our responses and solutions depend on our description of the problem. The paper discusses the two positions, their diagnosis of the predicament of constitutional democracy, and the potential solutions endorsed.

Kim Lane Scheppele: ***Discussant***

Grainne De Burca: ***Discussant***

Panel Sessions IV

Tuesday, 2 July 2019
10:30 - 12:05

121 DIALOGIC CONSTITUTIONALISM II

Panel formed with individual proposals.

Room:

Sala Juicio Oral

Chair:

Daniel Bogéa

Presenters:

Nicola Lupo
Teresa Nascimento
Daniel Bogéa & Pablo Holmes
Antonio Maués & Breno Magalhães
Manuelita Hermes Rosa Oliveira Filha

Nicola Lupo: About constitutionalism and parliamentarism: when Constitutional Courts need the legislator

The paper aims at investigating which effects derive on the role of Constitutional Courts from the increasing difficulty shown by the legislator, in contemporary pluralistic societies, in balancing and implementing constitutional rights. Originally seen as anti-majoritarian bodies, Constitutional Courts were often conceived as negative legislators and forms of judicial scrutiny on the activity of the legislator. This explains why, once the legislator loses its capacity to set some kind of regulation of constitutional rights, it becomes more difficult for Constitutional Courts to play the role they have been conceived for. This brings Constitutional Courts to try to establish forms of direct dialogue with the legislator and in some cases even to protect the role of the Parliament. The paper will consider examples taken from the recent activity of the Italian Constitutional Court and will reason on the respective evolution, in continental Europe, of constitutionalism and parliamentarism.

Teresa Nascimento: Concrete review in Portugal as a case of weak-form judicial review

I focus on the Portuguese system of concrete review as a case of weak-form review. The dichotomy between weak-form and strong-form judicial review reports on the availability of doctrinal or formal mechanisms that either allow courts to defer the last word on constitutional interpretation to the legislature or empower the political branches to claim such power. Against this backdrop, I propose a new reading of the Portuguese system of concrete review. When the constitutional controversy arises in concrete disputes, the Portuguese system enshrines a diffuse model whereby every court can disapply unconstitutional laws, subject to appeal to the Constitutional Court. The rulings delivered by the Court only produce inter partes effects, unlike those produced under abstract reviews. Although this creates a complex system, it also provides for an intricate mechanism which allows dialogic exchanges between the judiciary and the legislature on complex matters of constitutional interpretation.

Daniel Bogéa & Pablo Holmes: Dialogue or Symbiosis? An evolutionary approach to interbranch dynamics

Dialogue is an influential metaphor in constitutional theory. In this paper, we reassess the different ways in which scholarship has been advancing the dialogic approach either to describe the interactions between judicial institutions and other actors or to develop normative theories on the proper role of courts in deciding in a cooperative manner. We argue that, even though the dialogue model has important insights, some of the premises it draws from deliberative democratic theory makes the use of the metaphor rather inadequate to describe judicial institutions and their political landscape. We propose an alternative approach from an evolutionary paradigm, based on the metaphor of symbiosis, to address the institutional development of courts as a relational process of association with other political actors. In order to contrast our approach with the dialogue model, we use the example of the relationship between Brazilian political parties and the Federal Supreme Court.

Antonio Maués & Breno Magalhães: Patterns of judicial dialogue between national courts and the Inter-American Court of Human Rights

Comparative study of how the Supreme Courts of Argentina, Brazil, Mexico and the Constitutional Court of Colombia have reacted to the “control of conventionality“ doctrine of the Inter-American Court of Human Rights. The analysis uses the following variables: the meaning of constitutional provisions about the reception of international norms by domestic law - the status of international treaties of human rights in domestic law - the direct effect of international provisions - and the use of consistent interpretation by courts. The study discovered the following patterns of judicial dialogue between these courts: constitutional clauses opening to international law leads to a change of judicial posture from resistance to engagement or convergence - the constitutional status of international treaties of human rights reinforce their normativity in domestic law and its direct effect - the use of consistent interpretation favors a posture of engagement of the national courts regarding the IACtHR.

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Manuelita Hermes Rosa Oliveira Filha: The use of the European Court of Human Rights and the Inter-American Court of Human Rights precedents by the Brazilian Federal Supreme Court: a preliminary data research

This preliminary data research aims to provide a study of the existence, the role and the impact of the cross judicial fertilization between the Brazilian Federal Supreme Court and the Inter-American Court of Human Rights and of the European Court of Human Rights. The objective is to understand the judicial interaction among the Courts and the hole played by the use of the precedents. The comparative law has an impact on the conviction of the members of the Court. It is necessary to create an interpretative common culture among the Latin-American countries in order to provide a real integration based on an effective judicial dialogue. The Latin-American ius commune depends on dynamic jurisdictional dialogue to look to each other‘s jurisprudence. In conclusion, it was shown that the Brazilian Federal Supreme Court has been opened to the reception of foreign precedents to protect the fundamental rights and strengthen democracy. These constitutional provisions right effectively meet the role of exchanging solutions in order to create a network of persuasive authority.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

122 THE STATE OF CONSTITUTIONAL DEMOCRACY: OBSERVATIONS

This is a schmooze style panel that will explore developments in constitutional democracy over the past several years. Panelists will initiate a conservation with the audience in short (5-7 minute) presentations. Then audience members will be invited to share their reflections on the state of constitutional democracy in regimes or parts of the whole they are familiar with. Our goal is to begin the project of creating an inclusive community of younger and senior scholars interested in national, regional and global problems of constitutional democracy

Room:

D304

Chair:

Mark Graber

Roundtable featuring:

Michaela Hailbronner
David Law
James Fowkes
Antonia Baraggia
Mathias Moschel
Tom Ginsburg

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

123 THE AMERICAN CONVENTION ON HUMAN RIGHTS AT 50

This panel explores some of the main developments and challenges that the American Convention on Human Rights —Latin America's most important human rights treaty— faces as the treaty turns fifty, in November 2019. The American Convention was adopted at a time when other major international treaties, e.g., the Vienna Convention on the Law of the Treaties, and also a few years earlier the major human rights International Covenants, were shaping the then nascent law of international human rights. Fifty years after the adoption of the American Convention, the legal and political landscape of Latin America has gone into many directions: the endurance of the silent Cold War conflicts, the eruption of bloody dictatorships and civil wars, and the adoption of new constitutions, which granted the American Convention (and human rights law, generally) an enhanced legal status in domestic jurisdictions.

Room:

LLM94

Chair:

Jorge Contesse

Presenters:

Cecilia Medina
Eduardo Vío
Antonia Urrejola
René Urueña
Alexandra Huneeus
Juana Acosta

Cecilia Medina: Women's Rights in the Inter-American Human Rights System

Having followed for many years the inter-American system for the promotion and protection of human rights, I will attempt to present the substantial development of the protection of women's human rights in the Inter-American system and particularly in the Court since the Convention entered into force and the impact it has had at the domestic level of States parties to the Convention.

Eduardo Vío: The role of the Inter-American Court of Human Rights

My presentation will analyze how the evolution of the Inter-American Court of Human Rights as the fundamental human rights tribunal in the Americas. The Court has handed down key decisions, pushing for change at the domestic level and creating a community of rights and constitutionalism across Latin America. The Court must face different types of challenges and the American Convention's anniversary is an excellent moment to take stock of the Court's influence on human rights law and the challenges that lie ahead.

Antonia Urrejola: The role of the Inter-American Commission on Human Rights

My presentation examines the role of the Inter-American Commission on Human Rights. The Commission has become a key actor in the promotion and protection of human rights in the Americas. It has effectively held states accountable and has had to endure significant obstacles. As the American Convention turns 50 it is critical to reflect on the challenges and opportunities for the Commission, its relationship with states, the Court and civil society.

René Urueña: Reclaiming the Keys to the Kingdom: Evangelicals, Legal Activisms, and Human Rights in Latin America

Christian Evangelicals are a growing political and social force in Latin America. Most recently, conservative Evangelical movements used strategic litigation and lobbying before international human rights institutions to undermine basic LGBTI achievements, such as same-sex marriage, and other demands for equal rights. Several commentators thus speak of an imminent showdown between human rights protections and Christian Evangelism in the region, which would mirror similar conflicts elsewhere in the world. This paper questions this narrative, by exploring the origins and evolution of Evangelicals in Latin America, and their approach to key human rights issue of their time in three different moments and places: Chile in the 1970's, Colombia in the 1990's, and Costa Rica in the 2000's.

Alexandra Huneeus: When Illiberals Embrace Human Rights

While some contemporary populist leaders of Europe have been quick to shun human rights institutions, other populist governments in Europe and Latin America openly embrace the concept of human rights - some even accept the practice of courts reviewing domestic legislation under human rights treaties. The illiberal uses of human rights law point us both to the symbolic power human rights has in Europe and Latin America, as well as to the limits of human rights doctrine as an instrument for the construction of a particular liberal political order. The study will use empirical case studies of legal battles in Europe and Latin America to explore whether or not human rights can remain coherent and legally effective when unmoored from liberal political thought and practice.

Juana Acosta: ***Discussant***

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

124 LA JUSTICIA CONSTITUCIONAL EN TIEMPOS DE CAMBIO EN AMÉRICA LATINA

Constitutional courts in Latin America have gradually become key players in the region‘s politics. Certain Latin American countries have been labeled as hybrid regimes that use a sort of authoritarian or abusive constitutionalism. The Venezuelan example invites us to think on how to prevent judges from becoming mere pawns of their regimes. Countries like Mexico or Brazil have elected governments that invite us to think of the role of judges during election processes or during transformative announcements that may come with a populist discourse. Countries with mature judicial review experiences, like Costa Rica and Colombia, provide useful lessons for other courts. The role of the Inter-American Court of Human Rights is also relevant regarding the questions above, for example it has been questioned for not distinguishing the deliberative difference between the democratic processes that preceded decisions that were brought to trial in countries such as Uruguay.

Room:

Auditorio A. Silva

Chair:

Roberto Niembro

Presenters:

Roberto Gargarella
Ana Micaela Alterio
María Francisca Pou Giménez
Roberto Saba

Roberto Gargarella: Diálogo constitucional para democracias en problemas

Ana Micaela Alterio: La Suprema Corte de México: entre lo viejo, lo nuevo y lo transformador

María Francisca Pou Giménez: Cortes latinoamericanas: democracias dislocadas y la agenda de igualdad, libertad y pluralismo

Roberto Saba: Justicia Constitucional y Cambio Social

On 2013, Argentina‘s “Democratization of Justice“ reform sought to neutralize the blockade of the Government‘s decisions for the achievement of a justice system that reflected popular will. After Macri´s victory, the last two judges proposed by the Administration stated that their rulings would be deferential towards the will of popular representatives. On 2018, Justice Zaldívar, the newly elected Chief Justice of the Mexican Court, declared that “judges should listen to the social demand to end the inequalities that hurt Mexico. As Judges, we can and should promote the necessary structural changes in order to achieve a fairer and more egalitarian society.“ From these perspectives, this lecture will present different models of constitutional judges, arguing in favor of a judge‘s profile as distant from the radical deferential thesis as the one that defends a judge that is compelled to ground their determinations on personal valuations of justice.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

125 MIGRATION AND CITIZENSHIP

Panel formed with individual proposals.

Room:

LLM91

Chair:

David Abraham

Presenters:

Martín Canessa Zamora & Tomás Pedro Greene Pinochet
Zachary Elkins
Jhuma Sen
María Elisa Zavala Achurra
Paula Almeida & Gabriela Hühne Porto

Martín Canessa Zamora & Tomás Pedro Greene Pinochet: Blind states and invisible people: the sovereign denial to protect immigrant population

In recent times, many states have chosen to remain blind to immigrant‘s rights, denying them constitutional protection, with the excuse of exercising their sovereign rights. This paper analyses the issue of immigrant‘s constitutional protection from a compared perspective between Chile and the US. It delves into the differences between both Constitutions, the recourses granted by them, and the jurisprudence of both countries‘ Supreme Courts (including Chile‘s Constitutional Tribunal). It argues that, even though there are substantial differences between them, there are common grounds that make some immigrants invisible to constitutional protection. In both countries, excessive deference is given to the Government in immigration issues. Finally, we argue that the exercise of sovereignty, under the rule of law, is only legitimate if it respects fundamental and human rights of all persons. Immigration law and policies should be subject to strict scrutiny from Courts.

Zachary Elkins: In Defense of Birthright Citizenship

How can we build unity within ethnically heterogeneous states? Scholars debate the effects of consociational powersharing institutions, such as federalism and proportional electoral systems. We focus on a different realm of policy: citizenship laws. The question is whether countries with more inclusive citizenship laws are better able to garner the loyalty of immigrants and other indigenous minorities than are restrictive ones. We combine data about citizenship laws in national constitutions with attitudinal data from cross-national surveys, leveraging both cross-sectional and over-time variation. Our cross-sectional analysis suggests that minority respondents—and especially more recent immigrant groups—in countries with jus soli citizenship are more likely to express national pride than are minority respondents in countries with more restrictive citizenship laws. A case study of the Baltic States also suggests the impact of citizenship laws.

Jhuma Sen: In the shadow of Partition: Legislating and Adjudicating Citizenship in India

The paper interrogates the legal construction of citizenship in the Indian republic between 1950 and 1955 when claims to citizenship was primarily regulated, contested, negotiated and accommodated within the constitutional framework of ‘domicile‘ and a deadline bound ‘migration‘ enframed in the Indian Constitution. While British India’s ‘Partition’ and the consequent state formation determined the issue of ‘legal belonging‘ which was articulated in the language of the constitution, the judicial determination of citizenship became complex and courts consequently had to determine the many meanings of ‘migration‘ and ‘domicile‘ to comprehend the complexities of legal belonging and an assortment of methods from probing the evidentiary value of official documents to prodding the litigant‘s ‘intention‘ to stay, were used to adjudicate and establish legal belonging.

María Elisa Zavala Achurra: In Times of Massive Movement of People Across Borders: An Analysis of the Evolution of the Concept of ‘Sovereignty‘ and ‘Refugee‘

While an increasing amount of states are closing their borders, fighting to defend their sovereign territory, massive amounts of people migrate abroad. Currently, the concept of ‘sovereignty‘, which has traditionally included the power of states to control and close their borders, has been called into question when confronted with other principles of international law. Particularly, this happens when sovereignty clashes with human rights that could allegedly be violated if certain migrants are rejected in a state‘s frontiers. When a migrant can be qualified as a refugee, states usually open their frontiers with ease. This makes sense because many states are parties to the 1951 Refugee Convention, or are nonetheless bound by a customary norm that they did not oppose to. However, when a migrant does not meet the criteria to be a refugee, but could be classified as a ‘climate refugee‘, the human rights of the latter do conflict with states‘ sovereignty to close their frontiers.

Paula Almeida & Gabriela Hühne Porto: Rethinking the Sources of Public International Law in Times of Change: The Governance Potential of the GCM

Classical international law is inadequate in providing solutions for the challenges posed by an increasingly globalised world. This is because global governance does not fit easily into the structures of classical, inter-state, consent-based models of international law. Indeed, the sources of classical international law are unable to respond to most regulatory challenges deriving from global public goods (GPG). Since the protection of human rights may be considered the most prominent GPG, this research will focus on the need for structured cooperation mechanisms involving a legal regime for international migration. It will examine the governance potential of the UN Global Compact on Migration (GCM) – a soft law instrument –, which supposes its possibility to prescribe actionable commitments going beyond soft law cooperation framework. This example indicates that the line between the domestic and the international is increasingly blurred and that a new public law might be emerging.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

126 THE STATE OF CONSTITUTIONAL DEMOCRACY: DIRECTIONS

This will be a schmooze style discussion of the directions for thinking about and research into constitutional democracy. Panelists will speak for no more than 5-7 minutes than the floor will be open for the audience to make their own contributions. We are particularly interested in gaining diverse perspectives on constitutional democracy research for a forming working group dedicated to constitutional democracy. We hope all that attend are prepared to think and share their research understandings and experience as citizens in diverse regimes.

Room:

D402

Chair:

Tom Daly

Presenters:

Heinz Klug
Mattias Kumm
Rosalind Dixon & David Landau
Vicki Jackson
Sujit Choudhry
Marcela Prieto Rudolphy

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

127 MULTI-ACTOR GLOBAL GOVERNANCE AND HUMAN RIGHTS

The panel aims to explore traditional state-centered and alternative, more informal and non-bureaucratic, global governance modes (including but not limited to: network-based governance, experimentalist governance, polycentric governance, and metagovernance) which are applied to regulate activities of state and non-state actors. Participants will discuss to what extent various global governance approaches may be engaged and complement each other in promoting the realization of human rights in the context of multi-level and multi-agent social, economic, political and legal relations. They will address the most topical and controversial issues of governance relating to sustainable development, migration, business, health, poverty, decent standard of living, and global justice.

Room:

Auditorio Claro

Chair:

Gráinne De Búrca

Presenters:

Elena Pribytkova
Alicia Ely Yamin
Maria Varaki
Karen Solveig Weidmann
Claire Methven O'Brien

Elena Pribytkova: Governance for Human Rights and Sustainable Development

The paper explores global governance and accountability modes required for realizing human rights and reaching the SDGs. One often believes that if the human rights agenda presupposes, to a greater extent, traditional hierarchical, top-down, and state-centered governance, then the sustainable development agenda looks for rather alternative non-hierarchical, bottom-up, and polycentric institutional solutions. The paper will critically analyze this position and demonstrate that diverse traditional and innovative approaches to governance and accountability should be integrated and balanced in order to create new and modify the existing multilevel and multi-actor institutional architectures indispensable for the realization of human rights and the achievement of the SDGs.

Alicia Ely Yamin: Democratizing Global Governance to Advance Health Rights and Global Justice

In the face of obvious limitations of being bounded by the nation-state in terms of ethical responsibilities and legal accountability of states and non-state actors that operate across the globe, it is imperative to extend the social contract to the trans-boundary activities of states, and private entities under their effective control. Some proposals for global health governance suggest variations on strengthening global government through existing global institutions. I argue broader network-based, experimentalist governance structures likely will be more democratic and nimble in addressing global inequity. Giving examples of proposals, I assert such an experimentalist and networked model of governance and advocacy calls for different funding, different organizational structures, different institutional mandates and different power relationships between North and South.

Maria Varaki: The UN Global Compact on Migration - a blueprint for multilateral global governance?

The recent refugee ‘crisis‘ that reached its peak during 2015-16 paved the way for the adoption of the UN New York Declaration for Refugees and Migrants. This first step was followed by a two year period of negotiations and consultations in two fronts - one on responding to the refugee crisis and the other one on formulating a common managerial scheme for safe orderly and regular migration. Within this context, the current contribution questions the significance of the Global Compact on Migration as a non-legally binding document and explores its potentials as a political platform of commitment - In particular the paper examines the normative effect of this multidimensional exercise and tries to shed light on its impact for the future of multilateral global governance.

Karen Solveig Weidmann: Intrinsically Binding Norms as Trailblazers for Change

Intrinsically binding norms are non-legally binding norms which due to their specific normative design develop a high degree of effectiveness. They can be true drivers for change, as shown by the example of the UN Guiding Principles on Business and Human Rights: They were - fundamental in shaping the concept of “corporate responsibility to respect human rights“ - induced change in the behavior of non-state actors, and - found their way into national laws (e.g. French Duty of Vigilance Law). And the major paradigm shift they represent might one day be incorporated into public international law. However, the concept of intrinsically binding norms does NOT change the dichotomy between law and non-law. Extending the notion of law towards the inclusion of extra-legal normative activity would mean diluting the important role of law. Intrinsically binding norms and law interact in many ways, which can best be analyzed in a pluralist understanding of today‘s global regulatory framework.

Claire Methven O’Brien: Polycentrism, Experimentalist Governance, and the Future of Business and Human Rights Regulation

The terminology of polycentrism has been used to justify the ‘soft law‘ UN Guiding Principles on Business and Human Rights over a potential ‘hard law‘ business and human rights treaty. In parallel, an emerging literature seeks to answer critics of human rights treaties, on grounds of their failure to drive compliance, with reference to the experimentalist global governance thesis under which human rights treaties are effective when viewed as “dynamic, participatory, two-way systems“. This paper will analyse and contrast the polycentric and experimentalist governance theses, their insights and limitations. It will explore the bearing of each on current discussions concerning the choice between the UNGPs and a business and human rights treaty, and how they might be combined in an “experimentalist“ business and human rights framework convention, while in closing endeavouring to situate these in broader current discussions on possible relationships between neoliberalism and human rights.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

128 FRONTIERS OF LAW AND DEMOCRATIZATION

This panel will examine the role of law in democracy building or "democratization". The panel will critically examine a number of legal questions in this field: how do we define the relationship between democracy and democratisation in the legal context? How do we practically democratize constitution-making in the present-day? What opportunities do internet platforms provide for participation in democratic constitutionalism, and how do such platforms affect constitutional rights? What are the opportunities and risks for popular participation in constitutional interpretation in the era of the network society? The panellists will bring a variety of interdisciplinary perspectives to the intersection of law and democracy, including sociology, anthropology and philosophy. The presentations will consider contemporary legal issues raised by democratisation, crowd-sourcing and use of digital tools. The discussion will explore the frontiers of law and democratisation, as an emerging field.

Room:

Sala Reuniones LLM

Chair:

Glenn Patmore

Presenters:

Glenn Patmore
Felix-Anselm van Lier
Antoni Abat i Ninet
Carlos Bernal

Glenn Patmore: Defining Democracy and Democratisation: A Legal Critique

The dominant developmental democratisation literature is limited by its focus on developing countries, and relatively circumscribed explanation of how democratisation occurs. In response to these limitations, the paper offers an alternative conception of democracy, drawing upon the political process model. Here, democracy is a regime establishing a set of legal relationships between government and subjects. Those relationships feature participation and protection which are relatively broad, equal, categorical and binding. Democratisation, in turn, refers to the movement towards these legal relationships. The model addresses gaps in the dominant democratisation literature by providing a theory applicable to developing countries and well-established democracies, as well as explaining how democratisation occurs in the legal context.

Felix-Anselm van Lier: An Ethnographic Analysis of a "Digital Pouvoir Constituant": Proposal for a Qualitative Research Framework

Whereas previously elites and experts controlled constitution-making, recent processes, such as in Iceland and Chile, suggest that digital tools have the capacity to bring "the people" back into the equation. Scholarship in this field has largely remained normative in its outlook. While there is a growing body of quantitative research in constitution-making, detailed qualitative analysis of the practical implementation of such processes is still missing. This paper puts forward an ethnographic framework for tech-driven constitutional reform. Such an approach focuses on who makes use of digital tools, as well as why and how - their place in the overall process vis-à-vis traditional law-making institutions - and how the will of a "digital pouvoir constituant" becomes embedded in a new constitutional framework (or not). Such an analysis will allow for new insights into the democratising potential and limitations of an emerging "digital pouvoir constituant".

Antoni Abat i Ninet: Crowdsourcing for Constitutional Interpretation

Well aware of the reservations of Aristophanes, Plato, Aristotle and Montesquieu to the participation of the people in the judiciary and the reflections of Hamilton and Madison on judicial review, this paper advocates the need of updating and contextualising their opinions in the era of the network society. The paper adopts a historical methodology and reviews several examples of popular participation in constitutional interpretation. It also employs experimental philosophy to work out the possibility of crowdsourcing including le pouvoir constituent dérivé, i.e. giving direct constitutional interpretation to the people. The paper further addresses the opportunities and risks that this method poses in the present-day. In order to minimise the risks, the last part of the paper analyses the substantive, formal, technical and temporal limits of the practice of crowdsourcing constitutional interpretation.

Carlos Bernal: Constitutional Crowdsourcing and Constitutional Rights

This paper assesses how constitutional crowdsourcing, that is to say, the participation of the people in democratic constitutionalism by means of Internet platforms, impacts constitutional rights. Constitutional crowdsourcing gives rise to opportunities and challenges in this area. It opens-up fresh possibilities for the exercise of democratic rights by individuals and groups previously excluded from democratic deliberation, political expression and decision-making. However, at the same time, these kinds of strategies create risks to freedoms and equality. The protection of constitutional rights in these processes depends on assessing such risks and minimizing them.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

129 JUDICIAL REVIEW OF LEGISLATIVE PROCESSES

In recent years, there has been an increasing trend for courts around the world to review legislative processes and not only outcomes, and an emerging body of comparative constitutional scholarship has arisen to study this practice. This panel contributes to this growing scholarly focus by exploring various dimensions of the phenomenon. It considers judicial review of legislative processes in four jurisdictions: Israel, the United Kingdom, South Africa, and the European Court of Human Rights. It addresses the empirical questions of how judicial review of the legislative process impacts legislative behavior and what are its costs, benefits, and consequences, as well as the normative one of its justification. It also analyzes one common doctrinal area for process review: the proportionality of legislative interference with rights. Finally, the panel looks at judicial review not only of the lawmaking process but also of the internal procedural rules of legislatures.

Room:

Auditorio E. Frei

Chair:

Stephen Gardbaum

Presenters:

Ittai Bar-Siman-Tov
Stephen Gardbaum
Aileen Kavanagh
Patricia Popelier

Ittai Bar-Siman-Tov: The Impact of Judicial Review of the Legislative Process on Legislative Behavior

Recent scholarship reveals a fascinating cross-national phenomenon: courts around the world are increasingly turning their attention to reviewing the legislature's enactment process. The emergence of this global procedural trend in the case law of national and international courts has sparked a budding and vibrant debate in legal scholarship, which has traditionally focused only on substantive judicial review. However, a crucial question in this debate has not been explored yet: how does judicial review of the legislative process impact legislative behavior? This paper presents an empirical study that begins to fill this important gap. It reports findings from an extensive multi-method empirical study that explored whether, to what extent, and in what ways the introduction of judicial review of the legislative process influenced the Israeli Parliament's behavior in enacting omnibus legislation.

Stephen Gardbaum: Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa

Recent South African jurisprudence has pushed the boundaries of judicial review of legislative processes. Culminating in two 2017 cases, the Constitutional Court has engaged in increasingly robust oversight of various types of legislative procedures: not only the lawmaking process itself, but also internal National Assembly rules, especially those relating to its other key function in a parliamentary democracy of holding the executive politically accountable. This paper explores the justification for these steps, in terms of the separation of powers and rule of law. Although there is a certain tension between these two, which underlies the traditional norm of judicial non-intervention, in the contexts in which these cases were decided, they increasingly came together. Special separation of powers and rule of law problems called for special remedies. Acknowledging the type of political process failure involved requires an extension of Ely's theory of judicial review.

Aileen Kavanagh: The Promise and Perils of Process Review

When courts evaluate whether legislation complies with constitutional rights, they sometimes engage in 'process review', namely, an evaluation of whether the legislature confronted rights-implications during the legislative process and, if so, to what extent. The promise of 'process review' is that it gives legislatures room to deliberate about rights in a democratic forum, whilst ensuring that the courts pay this deliberation due respect. But the perils are manifold. Judges may be ill-equipped to evaluate the sufficiency of the legislative process. And canny legislators may manipulate a practice of judicial respect by simply going through the motions of talking about rights in proportionate terms, whilst reneging on them in practice. Viewed through the lens of recent UK cases concerning rights, this paper navigates the tensions between the promise and perils of process review.

Patricia Popelier: Procedural Rationality Review After Animal Defenders: A Constructively Critical Approach

The European Court of Human Rights has developed a noticed practice of procedural rationality review. This implies that the Court considers the quality of the decision making procedure to assess the proportionality of government interference in human rights. In Hatton, the Court held that where it is for the national authorities to balance interests in complex topics, it can still examine the decision making process to ensure that they carried out a careful balancing exercise. In ADI, the Grand Chamber seems to take a new turn, raising urgent questions regarding the method and consequences of procedural rationality review. The ADI ruling was repeated in subsequent judgments, with Ognevenko v Russia being the most notable one. By contrasting ADI with Ognevenko, the presentation points out how the Court makes itself vulnerable for accusations of double standards. It identifies rules of thumb to serve as guidelines for a more consistent usage of procedural rationality review.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

130 WHITELASH: UNMASKING WHITE GRIEVANCE IN THE AGE OF TRUMP

The law prohibiting discrimination sits within the constitutions of many legal systems around the world. This law traditionally focuses on individual actions and behaviour. Smith speaks to the conference theme of public law in a time of change by arguing in his book on Trump and his supporters, that the election of an explicit bigot to the US Presidency should be recognised as a collective act of racial discrimination by Trump voters. He raises the question of what acts should count as discrimination – why only acts by individuals when collective acts both poison and provide the backdrop to individual acts of discrimination? His questions are not limited to the USA. in the UK, it has been convincingly argued that the sub-text for the referendum vote in favour of Brexit was strongly influenced by racism. Equality law scholars from the UK, Brazil and the United States will comment upon how anti-discrimination law should respond to these new challenges.

Room:

D401

Chair:

Iyiola Solanke

Presenters:

Terry Smith:
Thiago Amparo:
Audrey MacFarlane
Tanya Hernandez

Terry Smith: Whitelash: Unmasking White Grievance in the Age of Trump

That Trumpism is born, at least in part, of reactionary racism seems inarguable from data compiled since the 2016 U.S. presidential election. Law, however, looks at discrimination differently than other disciplines, inferring a discriminatory motive where an actor proffers an implausible explanation for his decisions. Smith employs frameworks from U.S. antidiscrimination law to argue that white voters' embrace of Trump bears familiar hallmarks of discriminatory intent. This observation is not without practical consequence, for although voters believe their candidate preferences are a matter of personal choice, Smith argues that when voters cast a ballot, they are not acting as individuals but rather as state actors. Voters are therefore bound by antidiscrimination norms as surely as a duly elected government. White voters' failure to abide these norms, Smith contends, carries with it legal consequences that vitiate, if not nullify, their racially discriminatory electoral choices.

Thiago Amparo: ***Discussant***

Audrey MacFarlane: ***Discussant***

Tanya Hernandez: ***Discussant***

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

131 BOOK ROUNDTABLE ON ADVISORY OPINIONS: CARISSIMA MATHEN, "COURTS WITHOUT CASES" (HART 2019)

This panel will be structured as a roundtable discussion on a recent book about advisory opinions in Canada: Carissima Mathen, "Courts Without Cases: The Law and Politics of Advisory Opinions" (Hart 2019). This book offers the first detailed examination of the role of Canadian courts, since 1875, to act as advisors alongside their ordinary, adjudicative role. This extraordinary function raises many questions about the judicial role, the relationship between courts and those who seek their "advice," and also about the relationship between law and politics. Panelists will comment on the book and the author will respond to comments. All will then engage in a conversation about the book's contributions to our learning in public law.

Room:

Auditorio P. Aylwin

Chair:

Richard Albert

Presenters:

Ran Hirschl

Margot Young

Jeff King

Amelia Simpson

Yasmin Dawood

Carissima Mathen

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

132 COLLECTIVE DECISION-MAKING IN CONSTITUTIONAL REASONING

The aim of this panel is to critically analyse the ways in which different collective decision-making mechanisms that are common in liberal democracies (e.g., public hearings and voting rules), and the values that underpin such mechanisms (e.g., 'public deliberation' and 'democracy'), influence the assessment of the constitutionality of legislation. By focusing on collective decision-making mechanisms and values, this panel hopes to provide some insights to improve constitititutional control procedures in liberal democracies.

Room:

LLM93

Chair:

Virgilio Afonso Da Silva

Presenters:

Génevieve Cartier
Tania Busch
Rodrigo Kaufmann
Pablo Grez
Cristóbal Caviedes

Génevieve Cartier: Administrative Deliberation and the Constitution

The respective roles of courts and administrative authorities in assessing the legality of public action affecting constitutionally protected interests and values has been strongly debated in common law jurisdictions. In Canada, the Supreme Court articulated a methodology allegedly meant to ensure rigorous constitutional protection of fundametal rights 'while at the same time recognizing that the assessment [of that protection] must necessarily be adjusted to fit the contours of what is being assessed and by whom' (1 SCR 395 par. 4). I want to explore the justification for 'adjusting' the assessment of constitutionally protected rights to 'what is being assessed and by whom' in the light of principles of deliberative constitutionalism and democracy. I also want to see whether the administrative state is a legitimate site for deliberation about fundamental interests and values to take place.

Tania Busch: Audiencias Públicas y su Impacto en las Sentencias del Tribunal Constitucional Chileno

This paper analyses public hearings in the Chilean constitutional court. Public hearings—which open the constitutional process to civil society—are a recently incorporated institution in Latin American constitutional jurisdictions that lack a sufficient theoretical assessment. According to the literature, the aim of public hearings is to expand deliberation within constitutional jurisdictions and, in this way, democratize them. This research analyzes the impact of public hearings on the Chilean constitutional court's judgments. The Chilean case is studied in light of the research regarding Latin American experiences. The objective is to determine whether public hearings have impacted the way in which judges ground their judgments.

Rodrigo Kaufmann: Democracy as Legitimacy: The German Understanding of the Democratic Principle

This paper is divided into two parts. The first part claims that the democratic principle, a core element in modern constitutionalism, has a complex structure. It suggests that one way of describing such structure is by differentiating two sets of conceptual dynamics within the democratic principle. These conceptual dynamics refer to, on the one hand, legitimizing the exercise of political power, and on the other hand generating decisions that ground the exercise of political power. The second part draws on the understanding of the democratic principle presented in the first part to analyze its reconstruction by the German Constitutional Court. The core claim is that the main categories by which the democratic principle is legally operationalized are constructed as legitimatory, obscuring the second dimension inherent to it: the production of political power.

Pablo Grez: The UK Parliament Joint Committee on Human Rights ('JCHR') before Convention Rights: Contradictory Pressures

This paper identifies three conceptions of human rights legislative scrutiny and explores how they may respond to the different pressures that the JCHR faces. These conceptions are: a legalistic and court centered approach, a focus on constitutional deliberation, and the idea of constitutional construction and development. The pressures flow from the UK Parliament's decision to domesticate the European Convention of Human Rights by means of the 'Human Rights Act 1998' ('HRA'). There is ambiguity in the HRA, as the government placed an expectation on Parliament to comply with Convention rights, yet preserved parliamentary supremacy. Pressures for compliance with Convention rights demands a legalistic and 'court-centered' approach. By contrast, a focus on parliamentary sovereignty may fit better either with the idea of constitutional deliberation or that of constitutional construction and development. This paper assesses these conceptions against the JCHR's working practices.

Cristóbal Caviedes: The Core of the Case for Supermajority Rules in Constitutional Courts

This paper develops a baseline argument or 'core case' for the use of supermajority rules in constitutional courts to declare legislation unconstitutional. My core case only applies to jurisdictions with 'strong' systems of constitutional adjudication, and only to constitutional courts that allow public dissent and that actually take a vote. My core case is grounded on four arguments: first, supermajority rules increase constitutional courts' collective accuracy according to the Condorcet Jury Theorem - second, supermajority rules promote deliberation among judges - third, supermajority rules increase constitutional courts' public reputation - and fourth, supermajority rules protect the constitutionality of statutes. The rest of the paper addresses some possible objections and comments against my core case.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

133 GLOBAL CONSTITUTIONALISM IN CRISIS?

Global constitutionalism is now facing two major intertwined challenges: the global rise of populism followed sometimes with sighs of democratic backsliding, on one hand, and the global south critique, which doubts the compatibility of the liberal vision of global constitutionalism to countries that do not share the Western conception of rights, on the other hand. This panel situates most of these debates within the ambit of Proportionality, which has been the most powerful doctrinal feature of global constitutionalism, and examines to what extent it is equipped to deal with these challenges.

Room:

A102

Chair:

Jaclyn Neo

Presenters:

Moshe Cohen-Eliya & Iddo Porat
Kai Möller
Gila Stopler
Jamal Greene

Moshe Cohen-Eliya & Iddo Porat: Proportionality in the age of Populism

Proportionality is the most successful case of constitutional migration and is often conceived to be a powerful signal of global constitutionalism, with the US standing as almost the sole exception to this phenomenon. Recently, Jamal Greene argued that proportionality is a better doctrinal candidate than the categorical approach to tackle the current challenges in US constitutional law. We argue, contrary to Greene, that proportionality may not be the best doctrinal candidate in the US taking into consideration the dramatic populist shift in the US. We wish to make a more general point about the use of proportionality in the new global age of populism. The rise of populism, and the increasing signs of democratic backsliding across the globe, require the employment of a more categorical approach, that better serves the purpose of red-lining and the enhancement of the democratic process.

Kai Möller: Defending liberal constitutionalism in times of crisis

A convincing response to the challenges to global constitutionalism posed by populism and increasing polarisation must include an improved, and therefore more forceful, account of the values underlying liberal constitutionalism. This, however, is easier said than done. The discussion about global constitutionalism and proportionality has reached the preliminary conclusion that proportionality is essentially a test of reasonableness or public reason. This, however, seems to merely shift the focus from one abstract concept (proportionality) to another (reasonableness/public reason). In my paper, I will claim that we can move towards a clearer and more appealing account of proportionality-based rights adjudication by focusing straightforwardly on the moral values of equality and liberty and their proper interpretations. To this end, I will rely on Ronald Dworkin's work on human dignity and its two sub-principles of objective importance and personal responsibility.

Gila Stopler: Semi-liberal Constitutions

The paper will claim that the dominance of liberal constitutional analysis in the theorization of global constitutionalism has adverse effects on human rights in semi-liberal constitutional settings. After introducing the conceptual category of semi-liberal constitutionalism the paper will describe the problem of shaping and interpreting normative commitments in a semi-liberal constitutional regime. I will argue that an insufficient awareness to the nature of semi-liberal normativity coupled with the use of open-ended proportionality tests may result in skewed reasoning by both courts and policy makers trying to resolve human rights conflicts in semi-liberal constitutional regimes. The application of liberal rights reasoning in semi-liberal settings neglects the power differentials inherent in such systems and tends to over protect the rights of some at the expense of the rights of others.

Jamal Greene: ***Discussant***

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

134 DISPUTATIO MEDIEVALE: ¿UN GIRO LIBERAL EN LA IGLESIA PARA APROXIMARSE A LA RELACIÓN ENTRE LA RELIGIÓN Y EL ESTADO?

The panel will discuss Julio Alvear Téllez's book, entitled "La Libertad de Conciencia y de Religion. El Problema de su Fundamento (Marcial Pons, 2013, Madrid)." The debate will focus on whether the Catholic Church has experimented a liberal turn in its understanding of the relationship between Religion and the State. The debate will be in Spanish.

Room:

Seminario 3

Chair:

Sergio Verdugo

Presenters:

Julio Alvear Téllez
Joseph Weiler

Julio Alvear Téllez: Presentation of the book's argument

Joseph Weiler: Comments on the book's argument

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

135 POPULISM AND DECISION-MAKING PROCESS: BETWEEN REPRESENTATIVE BODIES AND JUDICIAL AUTHORITIES

Populism can be (also) defined as a pathology of representative democracy. Once in charge, the attitude of anti-élites movements is to constantly refer to the will of the people as their policies‘ primary source of legitimation. One of the victims of this trend is the decision making process. Whilst statute law plays a marginal role in populist regimes and the number of the executive‘s decrees increases, the use of direct democracy instruments as referendums rises dramatically. At the same time, if populist movements may be rather skeptical against non-majoritarian actors, namely courts and independent agencies, considered expression of the so-called establishment and key players before the risk of a rule of law backsliding, they may appear better equipped than legislatures to tackle systemic, intricate issues and to respond to the claims raised by petitioners to advocate their interests and the interests of their groups.

Room:

LLM92

Chair:

Benedetta Barbisan

Presenters:

Omar Makimov Pallotta
Paolo Bonini
Benedetta Barbisan

Omar Makimov Pallotta: Populism and direct democracy: an instrumentalist approach to constitutional law?

Usually, the strong connection – emphasised by Max Weber – between social and institutional pluralism on one hand and consociational democracy on the other hand is deliberately left out by populist forces in power. Those movements generally tend to consider referendums as a key tool to give back power to people and, thus, to boost direct democracy at the expense of the representative one. Far from being just a political option, the anti-representative approach of populist regimes ends up being a real constitutional strategy. As a matter of fact, we can define this strategy as an “instrumentalist approach“ to (constitutional) law: since liberal constitutionalism has led to a sidelining of people‘s will, the Constitution – irrespective of its writtenness or rigidity – must be amended in order to restore a proper balance between direct and representative democracy.

Paolo Bonini: A Judicial-Oriented Decision-Making Process as the Essence of Populism

The decision-making process is under stress all around Europe. The aim of this paper is to demonstrate the influence of the current explicit criticism against representative democracy on the slipping of power from politics into judges. By means of an analysis of the most updated italian case-law of the Court of Cassation and the Constitutional Court, we can infer that in Italy – a civil law system – a parallel decision-making circuit exists. In fact, this slipping towards a judicial-oriented decision making process is enforced by the same essence of populism. In fact, the latter is based on the idea of the failure of both the Parliament and, generally, of the representative democracy institutions. In conclusion, the paper aims at offering a fair overlook of the slipping of the decision making process from politics into judges in a civil-law system as Italy.

Benedetta Barbisan: Courts Like Medieval Parliaments in the Crisis of Political Representation

In the current crisis of representation, when we vote less, are less inclined to enrol in political parties and politics resounds with the sound of anti-political parties - in times when public problems are so complex that representatives are increasingly more and more incapable of engaging, let alone solve, them most notable issues of our societies - in communities where uncertainty is a powerful individualizing force, judicial power may become the depositary of the hopes for justice that seems to constitute the kernel of political representation today. In constitutionalist settings in which individual petitions submitted to the judiciary are the symptom of a common grievance, special judicial techniques may be devised to enable courts to address general issues laying behind individual appeals. In this respect, two experiences seem particularly relevant: the acciòn de tutela implemented by the Constitutional Court in Colombia and the pilot judgment procedure of the ECtHR.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

136 THE RISE OF MEMORY LAWS IN TIMES OF CONTESTATION

In recent years, memory laws have been adopted by governments to forward political agendas. The most recent provisions are often at odds with democratic values because they perpetuate official narratives, use exclusionary devices and engage in transnational memory wars. This panel will focus on the emerging practice of using the past as a political instrumentality through public law. It will challenge the traditional framework of punitive and non-punitive memory laws to account for the anti-establishment character of contemporary political contestation. Further, we will address the role of law in articulating or denying important events such as genocide. We will also take a comparative approach by examining cases from Western Europe, the post-Soviet space, Turkey and Latin America. Finally, the panel will offer new insights into the relationships between historical memory, democracy and the rule of law.

Room:

Seminario 2

Chair:

Dr Uladzislau Belavusau

Presenters:

Natalie Alkiviadou
Grazyna Baranowska
León Castellanos-Jankiewicz
Aleksandra Gliszczynska-Grabias
Ioanna Tourkochoriti

Natalie Alkiviadou: Memory, remembrance and reconciliation: words that matter: a glossary for journalism in Cyprus

In 2018, the OSCE issued a document entitled 'Words that Matter: A Glossary for Journalism in Cyprus'. It contains over 50 words used by Greek Cypriot or Turkish Cypriot media which are considered by the drafters to be potentially damaging to reconciliation efforts. On most occasions, the explanation of problematic usage resulted from the offence caused to the 'other' community (in most cases offence caused to Turkish Cypriots). In only a handful of the words did the issues of negative stereotyping and incitement to discrimination constitute the motivation for amending language. Since the glossary was an initiative led by an international organisation, its dilution of historical facts such as the internationally recognised invasion is troublesome. This paper will critically analyse the glossary and assess the extent to which such reconciliation initiatives may hamper free speech, memory and remembrance.

Grazyna Baranowska: Turkish and Russian memory laws in comparative perspective

The proposed paper analyses and compares two well-known memory laws: Article 301 from the Turkish Penal Code and Article 354.1 from the Russian Penal Code. Turkey and Russia are pursuing a memory policy of contestation of two widely accepted facts about the past: the Armenian genocide and World War II. The two provisions have several similarities. Most importantly, memory laws usually protect memories of the victims of state-sponsored crimes (such as Holocaust denial laws), but Article 301 and Article 354.1 'protect' the memory of undemocratic regimes. The dominant narrative in both cases denies serious state sponsored atrocities, and both criminalize statements contradicting this narrative. Additionally, Article 301 and Article 354.1 are used to limit freedom of expression and censor criticism, and as such are in violation of rule of law norms. This is happening in similar political and social contexts, as both Turkey and Russia are undergoing comparable changes.

León Castellanos-Jankiewicz: The resurgence of amnesties in Latin America: between remembrance and renewal

Latin American countries have recently enacted or considered amnesty laws to pardon persons convicted of crimes stemming from internal armed conflicts and gang violence. The most prominent development has occurred in Colombia, where the amnesty law of 2016 covers guerrilla fighters and military personnel who were involved in the conflict between FARC and the Colombian government. In Mexico, the newly elected president has promised amnesties to forcibly recruited gang members. These trends run counter to constitutional, legislative and judicial developments in the region and contrast highly with the jurisprudence of the Inter-American Court of Human Rights (Barrios Altos, 2001). This contribution surveys the international legal rules applicable to amnesties in these rapidly changing societies to determine the lawfulness of the Colombian and Mexican measures. It concludes that, with their emphasis on restoration, reparation and reconciliation, these amnesties cannot be deemed unlawful.

Aleksandra Gliszczynska-Grabias: Legal and political deployments of memory in Central and Eastern Europe

Simultaneously, as nationalistic and populist forces gained power in Central-Eastern Europe (CEE) and the new statehood based on national myths and identity had to be reestablished, it emerged that the European, Holocaust-centered "duty to remember" could be easily rejected and replaced by other, nation-focused narratives. In this paper, I will analyse and discuss the reasons, mechanisms and consequences of the recent implementation of legal and political discourse regarding the past that situates the crimes and sufferings of titular nations on the pedestal of memory, particularly in CEE states. Overall, these techniques instrumentalize the common consensus over the Holocaust as the core element of European identity. In particular, I will focus on interrelations between the decline of the rule of law and liberal democracy in CEE, on the one hand, and the implementation of the so-called memory laws, on the other.

Ioanna Tourkochoriti: Should the law regulate historical memory?

This paper focuses on states' attempts to outlaw the denial of historical facts and the impact that this can have upon expressive freedoms. It compares the prohibition of the denial of the Rwandan genocide with the prohibition of the denial of crimes against humanity in Europe. It also discusses the obligatory forgetfulness imposed in Ancient Athens after the in 401 B.C. In Rwanda, the government has forbidden the denial of the 1994 genocide to legitimize its authority. In Europe, bans on denying the holocaust are dictated by irrational elements in the collective consciousness: a feeling of guilt. In Ancient Athens, the democrats imposed forgetting past misfortunes, a wilful amnesia. Rwanda and other European states impose obligatory remembrance. Ancient Athens instituted forgetfulness. All of these attempts are based on a wrongful use of government power. They are close to imposing official versions of the truth and can have detrimental consequences upon expressive freedoms.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

137 JUDICIAL METHODOLOGY AND DECISION-MAKING I

Panel formed with individual proposals.

Room:

Seminario 1

Chair:

Dean Knight

Presenters:

Sebastian Lewis
Dean Knight
Elena Drymiotou & Beverley Baines
Raquel Sarria & Jose Miguel Rueda Vásquez
Anthony Tonio Borg

Sebastian Lewis: Can equity constrain the power of Constitutional Courts to invalidate the application of potential unconstitutional statutes?

The power of Constitutional Courts (CC) to invalidate the application of statutes when their application leads to unconstitutional results, resembles the equitable power of certain courts to correct problems of under-inclusiveness. Equity has historically followed two routes: correction and interpretation, which have been historically conflated due to St German. The conflation disappears when it is clear that the normative work behind equity is achieved by correction. Under this light, the corrective jurisdiction of CC to invalidate statutes follows a very similar pattern than corrective equity - it depends on a higher norm (ie, the Constitution) providing the grounds to defeat an inferior norm (ie, a statute). The invalidatory power of CC can thus be considered equitable - if this is so, it shouldn't be unconstrained. Contrarily, it ought to be limited by adjudicatory ways pertinent to remedying a problem of legislative foresight leading to unconstitutional results

Dean Knight: Contextual review: the instinctive impulse and unstructured normativism in judicial review

Contextual review is a style of judicial method that has increasing currency within Anglo-Commonwealth judicial review of administrative action. Its hallmark is the rejection of doctrinal or categorical methods to guide judicial supervision (such as the scope, grounds or intensity of review methods that have dominated the framework for judicial intervention). Under contextual review, judges assess the circumstances in the round without any doctrinal scaffolding to control the depth of scrutiny - in other words, intervention turns on an instinctive judicial impulse or overall evaluative judgement. In this paper, I identify and explain the various instances where this method is deployed in judicial review in England and Wales, Canada, Australia, and New Zealand. I also evaluate the efficacy of this approach to review, especially against rule of law standards. Its increasing popularity is a worrying turn, in part because its reliance on unstructured normativism undermines the rule of law.

Elena Drymiotou & Beverley Baines: Equal protection as inclusive political participation and judicial review

We propose a new approach to judicial review of equal protection, one that offers vulnerable minorities more inclusivity than the prevailing American doctrine of suspect classifications. Building on Dr. Drymiotou's original theory of the Right to Equal Democratic Belonging in a Democratic Society, we explain that her concept of institutionalized political disadvantage has two distinct functions in the analysis of equal protection cases. First it provides a criterion for analysis of the scope of the right to equal belonging. A finding of institutionalized political disadvantage would establish a prima facie violation of this right and compel judges to ask if the restriction of the right is justified in a democratic society. At this justification stage, the second function of the criterion shifts the judicial lens to the political institution, responsible for the prima facie violation. This function would call judges for considering the representation and participation of the vulnerable minority in the relevant political institution. The greater the disadvantage of the vulnerable minority in the political institution, the more rigorous judicial review should be.

Raquel Sarria & Jose Miguel Rueda Vásquez: Judicial activism and the Rule of Law: an institutional paradox?

There are scholars who defend that judicial activism is a necessary mechanism to overcome the current social inequalities. According to them, the lack of political will and the institutional blockades, it is sufficient justification for judicial activism. However, there are no studies about the impact of judicial activism on the Rule of Law. For this reason, we are analyzing what is the relationship between judicial activism and the Rule of Law. To answer this question, we set two objectives: 1) to classify activism according to its impact on the Rule of Law and 2) to explain the types of impact according to whether judicial activism consolidates or weakens the Rule of Law. In this paper, we argue that judicial activism depends on a weak Rule of Law but its claims depend on strong institutions to solve structural social problems. In other words, judicial activism implies a weak Rule of Law but its promises of change demand strong institutions.

Anthony Tonio Borg: The Perils of Positivist Thinking in Public Law

This contribution examines the perils encountered in Maltese jurisprudence in the past fifty-five years since Independence , of giving too literal interpretation to constitutional provisions, creating problems and bizarre decisions in the process . The most serious incident in this regard was the disregard of constitutional supremacy in 1974 by amending the supremacy clause in Malta's Constitution. The author examines several Maltese cases underlining the faults in, and perils of, such thinking.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

138 LA JURISDICCIÓN CONSTITUCIONAL EN LA CONSTRUCCIÓN DE LA CONVENCIONALIDAD DE LOS SISTEMAS NACIONALES LATINOAMERICANOS

The current Latin American Constitutions have a common past, in many aspects, and, in addition, they try to have a Constitutional State. Consequently, importance has been given to the jurisdiction for the construction and effectiveness of the aspirational models of the regulations of the national systems. If we think that these systems are linked to international systems for the protection of human rights, this produces a process mediated between the normative and the democratic. The present table aims to develop a critical analysis around 4 central points. Beginning with the countermajoritarian objection - to continue with the limits that can be created in the generation of an open government model, to subsequently make the exhibition of the transformations suffered in the system of sources - and, finally, the interception of judicial work in the conventional and constitutional developments of Latin America will be addressed.

Room:

D302

Chair:

Diego Dolabjian

Gonzalo Ramírez

Presenters:

Carolina Machado Cyrillo da Silva

Luz Eliyer Cárdenas Contreras

Pablo Sebastián López Hidalgo

María Lorena González Tocci

Edgar Hernán Fuentes Contreras

Carolina Machado Cyrillo da Silva: Gobierno Abierto, participación popular y el Poder Judicial en el Estado Constitucional

The open government represents a new paradigm for public management insofar as, unlike traditional vision, it recognizes and strengthens the various voices of society in the construction of the Public Administration. By increasing transparency, the open government allows society to have more access to information before being held solely by the bureaucratic apparatus and by political leaders, thus reducing the asymmetry of information among these actors. However, the institutionalization of channels, spaces and participative methods for the systemic organization of social participation is fundamental. Thus, access to information – enabled by transparency – and the opening of spaces and mechanisms of citizen's incidence in public policies become prominent elements. The objective of the investigation is to present, from the institutional dialogues, how the implementation of the open government practice can improve the decision-making standards of the judiciary.

Luz Eliyer Cárdenas Contreras : La evolución en el sistema interamericano de la doctrina del margen de apreciación

This document portrays the reception of the doctrine of the National Appreciation Margin in the jurisprudence of the Inter-American Court of Human Rights, also characterizes each of the thematic in which the use of the margin of appreciation proceeds or is prohibited. The preparation of the research is based on the theory of MAN developed by the ECHR, because it can considered as your production site. Under this understanding, the margin of appreciation is observed as a transregional theory of the law of human rights. The work consists of three parts, the first of which will respond to the enunciation of the theory of law of legal transplants, to explain the application of the Margin of Appreciation doctrine, in principle,foreign to the ISHR, then the Margin of Appreciation will be addressed in the ECHR and the reception of the latter will be incorporated into the the ISHR, and it will be finalized with the reflections that the investigation.

Pablo Sebastián López Hidalgo: El problema de la dificultad contramayoritaria en la Corte Constitucional ecuatoriana

The purpose of thi paper is to contribute to the debate on the counter-majoritarian difficulty or countermajority objection attributed to the judges, trying to build a satisfactory response in democratic terms regarding the judicial review. It will be provided with an analysis of the most relevant ideas, betting on a contextual defense of the judicial review that allows us to avoid the most incisive criticisms. By means of an approximation to the application of the principle of proportionality in the Ecuadorian Constitutional Court as a legal instrument that may be relevant in order to demonstrate a degree of rational and controllable intervention of the jurisdictional body over the work of the legislator and the Executive, it will become evident that special relationship between the main actors of the democratic game announcing that the dreaded countermayoriti difficulty is a problem absent in Ecuadorian constitutionalism.

María Lorena González Tocci: Alcances, eficacia y autoridad del precedente constitucional

In Argentina, a growing tendency has been noted to recognize precedent of a sort, particularly when formulated through a long course of decisions pronounced by the highest court of the land on constitutional matters. In this article, I will examine the role that precedents plays in constitutional decision-making in Argentina, one of the Latin American countries that follows most closely the United State model of judicial review, and how the Supreme court in Argentina is affected by earlier decisions on point particularly in the field of constitutional law. The basic idea is that, in order to give firmness and certainly to the constitutional values enunciated by the highest courts, it is necessary to establish a solid and compulsory body of case-law, or jurisprudence, formed by a continuous link of cases. Because like cases should be decided alike, and following established precedents helps keep the law settled, furthers the rule of law, and promotes both consistency and predictability.

Edgar Hernán Fuentes Contreras: Del Estado Constitucional al Estado Convencional de Derecho. El proceso de trasformación de los modelos jurídico-políticos, en el contexto Ius Constitutionale Commune en América Latina

A state and normative perspective of peace involves, without a doubt, the observation of the Rule of Law as a strategy and mechanism to achieve it. For this reason, the promise of overcoming a state of war, both nationally and internationally, has led to the rule of law has taken various approaches, including the Legal State and the Constitutional State. However, the links generated between the Constitutions and the international law of human rights, especially in the Latin American context, allow us to notice an initial configuration of what can be called: Conventional State of Law. In that sense, the current work will focus its efforts on establishing the budgets that allow us to understand this state model within the framework of the Latin American constitutional ius commune.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

139 REGULATING THE ECONOMY II

Panel formed with individual proposals.

Room:

Allende Bascuñan 2

Chair:

Sebastián Soto

Presenters:

Sebastian Soto
Ana Luiza Calil
Nikolaos Vagdoutis
Stephane Braconnier
Adilkhan Turekhanov
Angelo Jr Golia

Sebastian Soto: Constitutional balanced budget clauses: past, present... and future?

Ten years ago, the Euro-crisis had deep consequences on the economies and quality of life. The crisis also had an impact on the constitutional texts of several countries in the EU through the incorporation of different kinds of constitutional balanced budget clauses and other budgetary constraints. This trend is not new - before the European experience, most states in the US had similar clauses in their constitutions. Now, this has extended beyond Europe to several countries which have amended their constitutions in line with this trend. The paper will briefly describe the current debate regarding these clauses, focusing on the experiences of Germany, Spain, Colombia, and Brazil. Then, it'll analyze the efficacy as well as the positive and negative aspects of this constitutional trend. Finally, it'll conclude that these reforms have some risks if they are not accompanied by the establishment of rules and institutions necessary to maintain a healthy fiscal policy.

Ana Luiza Calil: Public Planning as a tool for innovation in public sector

Public planning as an administrative function has been neglected in legal studies in recent years. The gap is due to the fact that there was a movement of ascent of the institute in the XX century, with its link to the Welfare State, and its subsequent fall, at the end of the century, in as a consequence of the prevalence of liberal ideals. The fall, however, did not imply in its disappearance. The hypothesis defended in this work, therefore, is that the administrative function of state planning, under the lens of the 21st century, lends itself to the rationalization of public action and leads to innovation. In this context, planning is inserted as a stage of the public policy cycle, focused on the economic-social development of the State, and structured through norms defining plans and policies. Law, planning and development comprise a triangular relationship of complementation, allowing the interaction of legal and extra juridical elements in the conduct of administrative action.

Nikolaos Vagdoutis: Social rights constitutionalism through the concept of the economic constitution

This paper explores the concept of the economic constitution as it was developed in the Weimar Republic by Hugo Sinzheimer and Franz Neumann as a way to democratize the level of economic production by putting an end to the "anarchy" of economic freedom and by providing "the possibility of some form of state and social intervention into the natural course of economic activity, that is, into the condition of economic freedom" (Franz Neumann). Moreover, it shows the complementarity between the Weimar political constitution and its economic constitution. After this analysis, the paper asks whether we should conceive social rights constitutionalism through the concept of the economic constitution and whether this would be helpful in protecting both the economic/social and the political constitution against the "total market thinking"- as Alain Supiot has put it- that prevails in the EU.

Stephane Braconnier: The economic freedoms facing social and economical crisis : the example of France

The theme of economic freedoms and crisis governance points to the wider issue of state intervention in the economy. In France in particular, the 20th century was marked by State domination of the economy at the expense of freedom. However, in a way, the 21st century has given birth to a more even balance of power between the State and the market. Indeed, economic freedoms appear as a crisis prevention tool which the public authorities have a duty to protect, in their role as a regulatory State.

Adilkhan Turekhanov: The Eurasian Economic Union (EAEU): new actor in International Law and sources of EAEU Law

Eurasian Economic Union is an International Organisation of regional international integration that has international legal personality and established by the Treaty on the Eurasian Economic Union concluded May 29th, 2014 in Astana, Kazakhstan. The Law of the EAEU consists of the Treaty on the Eurasian Economic Union - international treaties within the EAEU - international treaties of the EAEU with a third party - decisions and dispositions of the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council, and the Eurasian Economic Commission adopted within their powers. According to the Treaty on the EAEU the Court is a permanent judicial body of the Eurasian Economic Union. Applicants to the Court: Member States, Bodies of the EAEU, Economic entities of the EAEU Member-States and third States, Employees of the Bodies of the EAEU, Individual entrepreneurs.

Angelo Jr Golia: Transnational Economic Actors and Legal Pluralism: 'Constitutional Disobedience' as an Instrument for the Internalization of Human Rights into Economic Legal Systems

Part I of the paper analyses the relationship between domestic systems and transnational economic actors adopting a legal pluralist framework. It argues that the human rights responsibilities of transnational enterprises and economic regimes must be understood as an internalization/institutionalization of socio-political demands - possibly conveyed by State systems - by the legal systems of transnational economic actors. Part II develops these analyses using 'constitutional resistance' doctrines as a case study. It argues that instruments such as the Calvo and the 'constitutional substitution' doctrines, distinctive of Latin-American constitutionalism, may be used towards the sources through which transnational systems flow, namely international economic law. Such use of 'constitutional resistance' doctrines could be an effective instrument of ius-generation, inducing significant changes in the structures/processes of economic globalization.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

140 CONSTITUTIONAL SHOCKS AND TRANSITIONS I

Panel formed with individual proposals.

Room:

FD-101

Chair:

Fred Felix Zaumseil

Presenters:

Luis Claudio Martins de Araujo
Vera Chueiri
Ebrahim Afsah
Yuvraj Joshi
Zoé Vrolix & Christian Behrendt

Luis Claudio Martins de Araujo: Constitutional resilience in democratic societies

It is not simple to define the elements that must be considerate to build a resilient constitution. However, there are some aspects that should be observed to deal with problems, overcome obstacles or resist to adverse situations, finding solutions to overcome adversity in a constitutional system. Thus, the constitutional longevity does not come just from formal procedural decisions, but rather, it must be built on a proposal that serves the interests of the collectivity, guided by a democratic order and considering a dialogue based on respect and tolerance. Moreover, constitutional longevity is related with the inclusion of the community in the constitutional design and the plasticity to be adapted to new social issues. Consequently, the resilience of a constitution in democratic societies, depends on the openness to a rational dialogue among members of the community, increasing permanently the legitimacy and respect of the constitution, in a continuous process of recognition.

Vera Chueiri: Democracy, constitutionalism in times of crisis: the impeachment as a trap to turn a parliamentary coup into a regular constitutional procedure

Democracy is a fugitive condition or opened process and thus amenable to disruption and renewal. Democracy is not just a form of government or set of institutions but rather a moment marking the practice of politics itself. Radical democratic politics is oriented towards the contestation of prevailing regimes. On the other hand, Constitutionalism is understood to avoid arbitrariness by designing mechanisms that determine who can rule, how, and for what purposes. It puts limits on democracy by means of separation of power, protection and enforcement of fundamental rights etc. This relation between democracy and constitutionalism operates in different ways in times of crisis to defend the ongoing structure of democratic constitutionalism. The use of impeachment as a coup - as recently happened in Brazil- undermines democracy and constitutionalism. This paper aims at discussing the impeachment as a trap to turn a completely unconstitutional procedure into a regular constitutional one.

Ebrahim Afsah: Faith, Rationality and Legal Method: Islamic Public Law and its Role 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 externally imposed but inescapable modernisation process. At the heart of that systemic failure is the lack of an effective public law, as Western legal transplants have not worked and indigenous normative and organisational models based on religious tradition have proven elusive. The adoption of Western models –through both colonial coercion but also deliberate choice – has been accompanied by demands for ‘sacred law‘ of to play a role in the modern constitutional and bureaucratic edifice of the state. This has created numerous common points of friction when the bounded rationality of a ‘sacred law‘ clashes with the comprehensive rationality of the modern, corporatist state. This tension is ultimately a reflection of the failure to accept the methodological prerequisites of modern public law, not least international law.

Yuvraj Joshi: Racial Transition in US Equality Cases

This article explores how the idea of racial “transition“ shapes the United States Supreme Court‘s racial equality cases. It examines major affirmative action, voting rights, and desegregation decisions in terms of their understanding of transition — including the racial past that the nation is transitioning from, the racial future that it should transition toward, and the form and trajectory that transition should take. The article demonstrates that a number of legal debates about race and racism are best understood as debates about racial transition. It further argues that the Supreme Court needs a more holistic and historically and socially situated account of transition if it is to facilitate a move away from racial wrongdoing.

Zoé Vrolix & Christian Behrendt: The production of legal provisions in period of emergency

It happens that unforeseen circumstances can disturb states‘ daily-life and create situations of emergency to which authorities must respond expeditiously. These situations can be due to several factors. One can think of emergencies caused by natural factors, security concerns or by economic reasons. In order to deal with these unexpected changes and to react as quickly as possible, States often set up specific legislative procedures which deviate from the usual ones. In that respect, it‘s not uncommon that the distribution of competence between the Legislative and the Executive Powers and the Judiciary, as it is enacted in the Constitution or other legal texts, is temporarily reshaped. Our paper addresses these specific procedures and their evolution in recent decades, both in Belgium and in other countries. It could be easily adapted in order to fit into a panel dealing more generally with emergency situations or a similar topic.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

141 RAZONAMIENTO JUDICIAL Y EL CONTROL DEL PODER

Panel formed with individual proposals.

Room:

Allende Bascuñan 1

Chairs:

Magistrado Eloy Espinosa-Saldaña

Cristián Villalonga

Presenters:

Cristian Villalonga

André Saddy

Miguel Saltos, Andrés De Gaetano & Federico Acheriteguy

Benjamin Gajardo

Abraham Bechara

Magistrado Eloy Espinosa-Saldaña

Cristian Villalonga: Analizando el modelo de juez racional. Reflexiones sobre la teoría de la jurisdicción en el neoconstitucionalismo

This article asserts that new-constitutional thought, both in its more sophisticated theory (e.g., Alexy and Dworkin) as in its receptions in Spain, Italy, and Latin America, has been built on the grounds of a fictitious model of the judge. In an analogy to the well-known allegory of the rational legislator written by Carlos Santiago Nino, the article reviews the main attributes of this model: persuasiveness and correctness in reasoning, non-delegated political representation, the capacity to rebuild the legal system consistency, interpretation of the community´s moral sentiments, and impartiality. Such attributes would provide normative sustain to an increasingly active role of constitutional courts in the public sphere. Although fictions are common in political and legal theory, the article sustains that a naïve reception of that theoretical scaffolding can imperil democratic regime and the rule of law.

André Saddy: El concepto de apreciatividad en el Derecho administrativo: analogías y diferencias con la discrecionalidad administrativa

This article aims to demonstrate the existence of four, and not three, forms of subjectivity or public autonomies. Besides the freedom of configuration, the administrative discretion in a technical and legal sense, and the margin to freely appreciate open-textured legal concepts, the "apreciatividad administrativa" also exists. The paper argues that the theory of the diverse margins of administrative freedom does not correctly account for the existence of all possible administrative behaviors, that is, it does not treat the subjectivity or public administrative autonomy enabled by non-voluntary legal sources, which derives from the content of the Law, the flaws of the legal system and the exercise of the function, normally reporting to non-deontic actions. Therefore, the proposal is to theorize on the "apreciatividad administrativa".

Miguel Saltos, Andrés De Gaetano & Federico Acheriteguy: Hibridación y convergencia de los sistemas de control: del poder constituyente al juez constitucional

Kelsenian model is characterized as a concentred constitucional review model wich is in charge of a special judge with a legal regulated competence. In contrast, the American model grants higher discretion to the controllers, leaving to judges the self attributed monopoly of the constitutional review and the construction of its rules. We are attending to an expansion of constitutional courts competitions, and an universalization of constitutional justice, which tends to weak the contradiction between the American and the Kelsenian constitutional review model. This represents a process of mutual hybridization and convergence of the constitutional review models, produced by the transformation of their rules and its historical characteristics. The jurisprudential transformation of the rules of constitutional review models is an attribution or an excess of the constitutional judges competences?

Benjamin Gajardo: Jueces y democracia: rescatando la idea de imparcialidad judicial, hacia una justificación normativa de la autoridad dialógica

The impartiality idea in judicial matters rests in the deepest of our institutional compressions in relation to the judicial configuration. This notion has served as a justificatory basis to articulate our judicial practices, organization and, in general, for the functionality of the judicature. The following research is based on a critical position, stating that the idea of impartiality is based on an elitist nature, which was assimilated -not discussed- into the foundational periods of our Latin American constitutional system. This has contributed to the construction of a judicial power distanced from the social problems, and a self-understanding of being an actor outside the democratic debate. In this context, the idea of impartiality needs to be rescued, in order to achieve a judicial power committed to democracy, particularly a deficit democracy like ours. This exercise implies a normative justification of a dialogical authority

Abraham Bechara: La carga de la argumentación jurídica, como modelo de adjudicación especial de los derechos fundamentales

In times of the constitutional State, the burden of making a legal argument is the third element of the adjudication model. The author will review this theoretical proposal following the principled theories that were built in the European postwar context by the German, Italian and Spanish constitutional courts, comparing their jurisprudence with the Colombian Constitutional Court. The Colombian Court is the model for the Latin-American context, as it has received the German theories from the perspective of Alexy, and because in the cases of authentic interpretation of the Constitution, the Court has succeeded to build its own model for the Colombian legal system.

Magistrado Eloy Espinosa-Saldaña: La labor de los tribunales en la tutela de los derechos de los sectores más vulnerables: una aproximación a la luz de la jurisprudencia del Tribunal Constitucional peruano

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

142 GLOBALIZATION OF PUBLIC LAW: INNOVATIONS AND TRENDS OF PUBLIC LAW

This panel analyzes the most recent manifestations of the globalization of public law. Globalization is understood as a process which enhances interactions and interdependencies among different juridical regimes and which is implicated in transforming the processes and practices of law production. Experts, transnational networks of knowledge sharing, best practices, indicators, social movements, among other phenomena, are nowadays leading forces of law production, which does not mean that traditional processes of law generation have disappeared. Against this backdrop, how are processes of globalization transforming national and international public institutions? What are the new centers of public law production and dissemination? What are the rationales (logics) that animate and guide the new public law arrangements and institutions?

Room:

D405

Chairs:

Diana Valencia-Tello

Johanna Cortes Nieto

Presenters:

Helena Colodetti

Juan David Duque Botero

Hugo Andres Arenas Mendoza

Diana Carolina Valencia-Tello & Johanna Cortes Nieto

Helena Colodetti: Instrumentalizing International Law: the Principle of Consistent. Interpretation and the Creation of the European Union Constitutional Block

The article explores how the European Court of Justice (ECJ) has instrumentalized international law in order to secure its constitutional agenda. It argues that the mediation of internal and external orders has been dominated by a constitutional logic. The fact that international integration is depended on domestic dynamics is not new. However, the EU shows is that the openness to an international legal scenario relies on the 'constitutional surplus' that is generated either by the inclusion or the exclusion of international law. In order to assess this interest–based internationalization, the paper deals with the principle of consistent interpretation (PCI). It shows how the PCI provides the malleability necessary to articulate the openness (or closure) of the EU legal system without having to deal with the formal repercussions of direct effect. The article explores the challenges that such loose application presents for the EU quasi-federal scheme.

Juan David Duque Botero: Investment Protection Treaties and Regulatory Cooperation in the Context of Public Procurement

Free trade and tariff advantages have paved the way to new contents that were not included in international trade agendas initially, but which have become central to negotiations nowadays. Foreign financing of public and strategic projects, judicial review and administrative regulation are new phenomena which have effects that transcend national boundaries. The social market economy based on free competition and deregulation are the ideal scenario to propose new global administrative and economic schemes. International organizations such as the WTO and the OECD have introduced concepts such as the "global administrative law" or the "single global economy", which deserve to be analyzed from the perspective of public procurement as a fundamental tool of the State to fulfill public purposes. This paper aims to analyze regulatory aspects favorable to globalized interest, as well as solutions to conflicts in spaces that generate greater security and promote foreign investment.

Hugo Andres Arenas Mendoza: Conventionality Control in the Colombian Council of State's Case Law in Cases of Tort Claims against the State for Extrajudicial Executions

This paper analyzes the conventionality control (judicial review conducted in the light of Inter-American human rights standards) undertaken by the Council of State of Colombia (the supreme administrative tribunal) in cases of extrajudicial executions or "false positives." In particular, it focuses on cases in which the tribunal adjudicates controversies involving tort claims against the State. The study examines how the parameters dictated by the Inter-American Court of Human Rights have been incorporated into Colombian case law.

Diana Carolina Valencia-Tello & Johanna Cortes Nieto: Disciplining Public Procurement Law. The OECD in Colombia

Public procurement is one of the main tools that States rely upon for policymaking. Public spending managed through public procurement plays an important role in fostering the national economy and promoting human and physical capital formation. Furthermore, it is instrumental in distributing resources and opportunities within societies. In recent years, the Colombian public procurement system has undergone drastic modification aimed at improving transparency, accountability and participation. Recommendations and standards have been provided by international bodies such as the OECD, which has also supported policy design, development and implementation in the context of Colombia's admission procedures. Against this backdrop, this paper examines the role of the OECD in the production of national public procurement regulations, the mechanisms through which this agency interacts with local legal arrangements, the difficulties of the process and progress made.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

143 THE PUBLIC AND PRIVATE DIVIDE IN THE DIGITAL WORLD: WHAT ROLE FOR PUBLIC LAW?

The increasing tension between the private/public divide in the digital world requires a multi-dimensional analysis. Rui Lanceiro and Francisco Duarte explore this from transnational governance, advancing the concept of corporate states as new transnational entities, challenging their epistemic legitimacy, impact on democracy and the limits of self-regulation. Vasiliki Kosta continues from the fundamental rights' perspective, by analysing the EC's proposal for a regulation on terrorist content online, discussing the use of internal market legislation as a burden-shifter from public to private parties. Raquel Franco advances an economics' analysis, on how intelligent nudging and AI are potential game-changers in behaviour economics. Domingos Farinho and Ricardo Campos propose a comparative review of the regulatory frameworks concerning social media platforms in Germany, Portugal, France and Italy, extracting key conclusions on their private/public roles. Sofia Ranchordas will discuss.

Room:

D404

Chairs:

Rui Lanceiro
Domingos Farinho

Presenters:

Rui Lanceiro & Francisco Duarte
Vicky Kosta
Raquel Franco
Domingos Farinho & Ricardo Campos
Sofia Ranchordas

Rui Lanceiro & Francisco Duarte: The Rise of "Digital States" in International Law

The paper analyses the role that international law plays on the regulation of transnational digital companies, such as Facebook, Google or Twitter. Through their unique position as transnational platforms, result of their unique know-how and dominion over their markets, they developed globalized norm-like standards, creating complex quasi legal orders in virtual border-less areas which are formally private, but increasingly perceived as public. Each of the classic state powers can be found, in some way, in these companies which have been, so far, exempt from traditional accountability mechanisms duties of due process and respect of human rights, representing an unprecedented challenge to institutional democratic accountability. By looking at Facebook as a case-study, an argument is made that international law must quickly overcome the dogma of statehood and tackle new state-like entities which do not formerly qualify as states, to avoid disastrous consequences for liberal democracies.

Vicky Kosta: Online content regulation through internal market legislation: The proposed Regulation on preventing the dissemination of terrorist content online

The Commission recently proposed a Regulation which aims to lay down uniform rules to prevent the misuse of hosting services for the dissemination of terrorist content online. Its subject matter amounts to an interference with freedom of expression to the extent that it brings within its scope speech protected under the EU Charter of Fundamental Rights and the ECHR. The Proposal has already sparked considerable controversy and triggered debate on its fundamental rights implications as regards freedom of expression but also other fundamental rights. If adopted, it will constitute a remarkable internal market legislation providing for a harmonised restriction of fundamental rights, with the aim to combat terrorism. This paper will investigate the proposed Regulation, focusing especially on the fact that, as an internal market instrument, it shifts an important share of the responsibility for addressing the problem of dissemination of terrorist content online to private parties.

Raquel Franco: Will robots make you happier? Behavioral informed policies, intelligent nudging and feedom of choice

The central claim in behavioural economics is that humans do not behave like machines, do not have standardized patterns of behaviour and do not always act in their best interest. This has opened the door for the usefulness of nudges - soft techniques designed to prompt behavioural changes seen as beneficial. Nudges are already in place in several areas of our life, but AI has the potential to make them better informed and potentially more effective and efficient. Also, robots can be designed to mould human behaviour in particularly convincing ways. On the other hand, this opens the gate for abuse and misuse and calls the sirens on the potential for manipulative policies that limit our freedom of choice.

Domingos Farinho & Ricardo Campos: The legal regulation of social networks across Europe

Virtually all areas of everyday life are influenced by the transformation of the world into a digital world and one of the most affected is the public sphere. With the emergence of the internet, the public sphere, previously organized around television and printed journalism, is now structured around social networks. An immense regulatory challenge arises because social networks have a specific legal status: private but opened to the public. The possibilities go from no regulation but inevitable if uncertain self-regulation to severe public regulation. A combination of both has come to be known as regulated self-regulation. The present paper aims to understand how some of the EU jurisdictions (Germany, Portugal, France and Italy) are dealing with the regulation of social networks, especially in the context of the clash between fundamental rights such as the right to privacy, reputation and good name, freedom of expression and freedom of the press, as well as freedom of enterprise.

Sofia Ranchordas: ***Discussant***

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

144 AUTHORITY, RESPONSIVENESS AND DEMOCRATIC CHECKS: THE CHALLENGES OF PUBLIC LAW IN THE NEW CONSTITUTIONAL LANDSCAPE

The current era is marked by growing distrust of democratic institutions and traditional issues of public law become relevant again. These include limits on power, controls over the authority's decisions and the criteria under which the authority is accountable to the population. This panel will discuss them in theoretical and dogmatic levels. In the first place, there will be three papers that will refer to the need to reformulate the general theory of Administrative Law, in such a way that it manages to contain the overflows of authoritarian governments. We will try to answer how to articulate a system of control of the administration that is also capable of allowing it the flexibility it requires to control those of market actors. Linked to the above, the fourth paper will analyze the degree of autonomy that public law should recognize to the armed forces. Finally, the fifth paper will examine the compatibility between social protest and law.

Room:

A101

Chair:

Viviana Ponce de León

Presenters:

Guillermo Jiménez
Matías Guiloff
George Lambeth
Pablo Contreras
Daniel Mondaca

Guillermo Jiménez: Bureaucracy and resistance to authoritarianism

This presentation explores the extent to which bureaucracy can be a site of resistance to authoritarianism in contemporary public law. Liberal legal thought has traditionally viewed administrative agencies and the executive branch as a source of threats to public liberties and rights. While legislatures and courts are equated to democracy and law, administrative institutions are sometimes linked to technocracy and authoritarianism. When we think in terms of checks on arbitrary power we usually imagine judges and courts. In contrast to these ideas, however, this presentation examines bureaucracy as a tool to resist populist authoritarianism. I suggest that bureaucratic organisations are a key component of the rule of law ideal. Well understood they serve ideals of deliberation, rationality and incremental change. I claim that the erosion of bureaucracy in contemporary neoliberal governance has facilitated the emergence of authoritarian populism.

Matías Guiloff: Los límites de la responsividad

In the current context, where more and more authoritarian governments in the world, it is urgent to have an Administrative Law that can control these governments. From the theoretical perspective, this task seems urgent, inasmuch as, for the most part, theories on the control of state administration tend to be at one of the following extremes. One theory is that the administration should be as bound as possible, in such a way that it does not threaten this freedom. A second theory conceives the administration as a space to advance in the satisfaction of society's demands, where the administration should be left with the greatest possible margin of action, so that it is effective in the satisfaction of these demands. The question that arises then, is how to achieve a theory that recognizing the administration's margin of action necessary to implement the law and be sensitive to social demands, allows in turn to control the eventual outbursts it commits?

George Lambeth: Financial Stability and Risk Regulation. A Normative assessment of unelected power as a limit case in Public Law

Financial Stability and Risk Regulation. A Normative Analysis of a Neglected Regulation in Developing Countries There is a paradoxical nature in financial regulation. The same institutions and activities that allow the possibility of development of markets are those that generate the conditions for the instability and inherent fragility that would produce the next global crisis. I will argue that legal systems and the theory of public law have not provided a proper response especially when financial regulation abnegates its role in controlling markets. It is by renouncing to provide a normative account that financial regulation, especially in developing countries, are left with a fragile institutional answer for these threats. Such a diagnosis would also help to critically approach to pressing concerns for the public law and for the role that risk and instability play in similar areas such environmental regulation, immigration, and energy regulation, all critical to the Global South.

Pablo Contreras: "Obedientes y no deliberantes": fuerzas armadas, autonomía y control democrático en Chile

The presentation will examine the level of autonomy and democratic subordination of the Armed Forces under Chilean law. To this end, it will review the constitutional evolution of the obedience and non-deliberation clause with respect to the Armed Forces. Considering those changes, the presentation will conceptualize the obedience and non-deliberation clause, in a compatible interpretation under the Chilean constitutional and democratic regime. Based on this, the normative and functional autonomy of the Armed Forces will be analyzed under the legal system.

Daniel Mondaca: Derecho y protesta social: una tensión irresoluble

The presentation will examine the tension produced by the encounter between constitutionalism and social protest, and how this tension appears upon problematizing the recent doctrine of social protest. There is an irreducible distance between these two phenomenons, due to the fact that social protest exists outside of the borders of legal normativity, hence, the legal system appears insufficient to process social protest as a socio-political phenomenon. In order to illustrate this main argument, it will expose the frailty of free speech clause as a cornerstone for social protest, as well as the tensions between both the individual and collective elements that constitute acts of social protest.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

145 COMPARATIVE ADMINISTRATIVE LAW: ASSESSING THE STATE OF THE FIELD

Comparative Administrative Law (CAL) has a venerable history stretching back to the nineteenth century and beyond. Over the last ten years, interest in the field has further intensified. The last decade has seen new monographs, new research handbooks (with more on the way), the organization of conferences, the creation of chairs focused specifically on CAL, as well as an increase in inter-disciplinary and inter-doctrinal linkages. The latter include research connecting CAL to comparative constitutional law, comparative policy analysis, global administrative law, international economic law, law and development, public administration, regional integration, and state formation, just to name a few areas. This panel, organized as a roundtable with significant audience interaction expected, will reflect on the last ten years as well as potential future directions in terms of geographical scope, methodologies, institutions, and research linkages with other fields, among other topics.

Room:

A103

Chairs:

Peter Lindseth
Mariana Prado

Roundtable featuring:

Yoav Dotan
Mariolina Eliantonio
Cheng-Yi Huang
Jud Mathews
Joana Mendes
Giulio Napolitano

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

146 NEW APPROACHES TO ENDURING PROBLEMS IN PUBLIC LAW

Panel formed with individual proposals.

Room:

Auditorio CAP

Chair:

Carolina Cardenas

Presenters:

Beke Zwingmann
Maíra Almeida & Carlos Bolonha
Gustavo Buss
Ricardo Cruzat Reyes
Gisela Ferrari

Beke Zwingmann:Domestic versus foreign affairs – an outdated dichotomy?

Traditionally, governments enjoyed exclusive competence over foreign affairs and parliaments were reduced to holding them to account 'after-the-fact'. However, one of the consequences of the increasingly globalised world of the 21st century is that decisions made in the international context impact far more on a country's domestic. This challenges the classic dichotomy of 'domestic' versus 'foreign' affairs which leads to a parliament losing its traditional role as the key forum for debate and decision-making. With its decisions on the European Stability Mechanism, the German Constitutional Court seemed to have tried to halt that trend by using the Parliament's budgetary control powers to limit the Government's foreign policy prerogative. However, this paper will argue that the cases illustrate precisely why the traditional theoretical framework is flawed and will explore how a more radical change could result in greater accountability and thus decrease popular distrust of government.

Maíra Almeida & Carlos Bolonha: Is Thin Rationality Review a possibility in the Brazilian Administrative State?

This paper aims to present a discussion about the forms of agencies decision's Judicial Review . Jacob Gersen and Adrian Vermeule, disagreeing with most of legal academy and some lower court argue that decisions making under uncertainty can provide the agencies good reasons to depart from a rigid view of rationality. This view, called Thin Rationality Review presents an empirical data that shows that the Supreme Court has been deferring to the agency's challenges in absolute terms and textual support to demonstrate that it has been sensitive to the agency's decision-making limitations under uncertainty in its ongoing jurisprudence. The authors provide a careful description of the agency's rational decision-making under sub-optimal decision conditions. Is this the best perspective? If so, can it be adopted on Brazilian Administration, once the new government agenda includes privatization and regulation?

Gustavo Buss: Judiciary protagonism in the context of authoritarian governments

This paper intends to address the issue of judiciary protagonism in the specific context of the rise of ultra right discourse in politics. It will assess the role of judiciary when challenged to confront executive orders or legislation in face of its constitutionality. The relevance of the proposed paper resides on its affirmation of a strong judiciary as a way to achieve an effective protection of minorities interests. When the bureaucratic political machine is coopted by antidemocratic and authoritarian players, the role of elected representatives of minority groups is undermined. If the regulation issued by the elected political body aim to alter or eradicate constituted rights, a simple deferral by judicial instances to such decisions - deemed "political" - can be questioned. The idea of checks and balances must impose to the judiciary the legitimacy to properly examine executive orders and legislation and to suppress them when opposed to constitutionally protected values.

Ricardo Cruzat Reyes: Regulating through litigation: the nature of regulatory rulings

The study of the relation between Courts and regulation usually focuses in determining the extent to which Courts can review technical decisions dictated by administrative agencies. However, there is another phenomenon that requires attention, which is the establishment of specialized tribunals with jurisdiction over economic regulation. Particularly since some of those tribunals, are empowered to dictate general measures and regulations on economic sectors. These rulings, which usually originate in adversarial proceeding before the tribunal, constitute a new source of economic regulation that has not yet been subject to deep analysis. We shall try to establish the nature of these rulings in order to determine if there is any constitutional or legal tool to control their issuance and content. Specifically, we will discuss whether these rulings should be considered an administrative act or a proper judicial decision by reviewing their main elements and distinctive characteristics.

Gisela Ferrari: The Migration of Constitutional Ideas in Latin America: Dynamics, Underlying Assumptions, and Possible Improvements

Certain features of judicial borrowing in Latin America point to a search for an external source of authority to sort out constitutional and human rights issues. Within the context of an increasingly globalised constitutional law, references to foreign and international courts surely make sense, but if the goal is to truly improve the quality of decisions and to find better solutions collectively, it is worth reflecting on potential reasons behind the judges' method and eagerness to embrace the borrowing trend. In turn, the findings may point to ways to strengthen the practice. Thus, the paper will first pinpoint certain characteristics, patterns and dynamics of judicial borrowing in the region, to then consider how they play out in practice by analysing the influence of the ECtHR in Argentina. Lastly, it will draw from postcolonial theory to explain some aspects of the Latin American approach to borrowing, and build from it to suggest ways to improve the practice.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

147 THE ROLES OF THE PEOPLE IN LAW AND POLITICS

Panel formed with individual proposals.

Room:

R510

Chair:

Andres Biehl

Presenters:

Mauricio Wosniaki Serenato
Michael Da Silva & Daniel Weinstock
Sarah Burton
Hoai-Thu Nguyen
Andres Biehl, Francisco Urbina & Rodrigo Perez de Arce

Mauricio Wosniaki Serenato: A bet on the people: strong democracy and weak constitutionalism in the context of constitutional democracies' tensions

The work aims to present a justification for the need to democratize the Constitution, within the perspective of weak constitutionalism, developed by Professor Joel Colón-Ríos. The assumption is that the relations between constitutionalism and democracy in modern constitutional democracies are most in favour of the limitations on the exercise of popular sovereignty. The proposal of a weak constitutionalism is presented as a possible way to redefine this balance putting the people to directly deliberate about the fundamental decisions of the Constitution and taking It away from Courts and Parliament. In order to proceed to this theoretical justification, we take separately the institutional and rights themes of the Constitution. Each one deserves a specific explanation about the need of popular participation in its essential definitions. Also, we try to think in constitutional designs that would make this proposal effective, drawing on some Latin American constitutional experiences.

Michael Da Silva & Daniel Weinstock: Domestic Democratic Majorities and International Constraints: The Case of Language

The failure to protect majority cultures has formed the basis of a persistent challenge to democratic institutions in recent years. International law particularly is sometimes framed as an unjustified threat to democratic majorities in domestic states and their desire to protect their cultures. This work examines whether the charge that international law fails to protect majority languages in particular is apt. The loss of language in cases where there is no injustice are often typified by lacks of a clear sense of who contributed to that loss and of justified coercive measures to remedy the issue. This work addresses whether the charge that international law contributes to this loss is apt, whether international law should protect such languages, whether it should play a role in remedying any attendant issues due to the role international law is supposed to play or commitments in its 'inner morality', and whether existing international law can remedy any of the attendant issues.

Sarah Burton: Locating The People: Non-Resident Enfranchisement and National Identity in a Globalized World

This article uses a debate on non-resident voting to expose unexpected contours in the larger divide between global and local values. The Supreme Court of Canada held in Frank v Canada (Attorney General), 2019 SCC 1 that disenfranchising certain non-residents violated the Canadian Charter of Rights and Freedoms. I argue that the opinion is driven by a disagreement on national identity, in which the constitutional status of non-resident voters is emblematic of broader questions on how to treat borders in a globalized world. Non-resident voting offers a compelling case study in how these competing worldviews contrast, but also intermingle in unexpected ways. Thus, the majority cosmopolitan stance is surprisingly patriotic, while the dissent's call for national sovereignty is bolstered by foreign law. These insights highlight the nebulous nature of national identity arguments, and offer lessons in bridging the seemingly insurmountable divides in this ongoing debate.

Hoai-Thu Nguyen: Redefining the notion of 'free and fair' elections in the digital age

A basic principle of democracy is that elections must be 'free and fair'. Freeness implies the absence of coercion or undue influence in electoral choices, while fairness means equal participation rights for voters and those to be voted. While this definition remains imperative in the 21st century, elections are increasingly affected by the rise of technology and social media. Facilitated access to information promotes citizens' (equal) participation in democratic processes. At the same time, voters can, through the manipulation and individual targeting of information and in the absence of proper campaign regulations in the online sphere, be influenced in a much more unregulated manner than was possible before. In light of this, this paper will first review the notion of 'free and fair' elections in some EU legal systems, before suggesting a broader definition of these principles to also include the free formation of political will without undue manipulation in the online sphere.

Andres Biehl, Francisco Urbina & Rodrigo Perez de Arce: Voting as Ritual: an Account of the Communal Dimension of Elections

This article explores elections from the perspective of ritual theory. Elections have a significant ritual dimension that is often neglected in mainstream sociological and legal accounts of voting. We analytically apply the category of ritual to understand elections as regulated repetitive collective actions that configure a social temporality and a spatiality. We explore how this perspective help us understand both the visible effects of elections (the efficacy of norms) through its invisible effects (e.g. social cohesion). By stressing the communal dimension of elections we finally discuss three popular debates in election studies that are crucial for liberal democracies: (a) the paradox of participation, i.e. we have little incentive to vote but low participation increases the value of our vote, (b) electronic voting, and (c) mandatory voting. A ritual understanding of voting is useful for theoretical discussions (a) as well as for empirical literature on participation (b, c).

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

148 DEVELOPING INTERNATIONAL LAW AND INSTITUTIONS

Panel formed with individual proposals.

Room:

Sala Juicio Oral

Chair:

Danielle Rached

Presenters:

Danielle Rached
Francisco Lobo
Pablo José Castillo Ortiz & Carlos Closa
Nikos Vogiatzis
Elisabetta Morlino
Valentina Volpe

Danielle Rached: Authority in the Global Health Governance

The Westphalian sovereigntist scheme is inherently deficient to provide for non-voluntary international coordination. The level of compliance that the handling of global public goods may require is hardly delivered by such a scheme. Globalization, and its intense densification during the last half-century, inflicted a serious crisis in that mainstream scheme. With the gradual shift of centers of power and decision-making to transnational fora and institutions, the paper analyses the global health arena through lenses of the World Health Organization, which is responsible to promote the highest possible level of health to the world's population, and the Bill and Melinda Gates Foundation, the private philanthropic institution turned into one of the most important players in global health. The paper problematizes the leadership role of the WHO in a crowded global health governance context.

Francisco Lobo: Empire Strikes Back: Comparative Notes on Evolving Conceptions of Western Imperialism

Is the U.S. an empire? This paper will apply the 'concept/conception' analytical distinction to the notion of empire, in order to compare evolving conceptions of the concept throughout some of its instantiations in Western history (from the Athenian Empire to the Macedonian, Roman, Spanish, British, and American Empires). My working definition of empire will comprise the ideas of 'civilization', as developed by M. Ignatieff, and of the 'Nomos of the Earth', coined by C. Schmitt. The foremost features of the American Empire are its informality and its reluctance to embrace its nature. Informality was first developed by the modern European empires in order to harness private initiative and the free movement of capital. Informality in the American Empire is mirrored by its selective attitude towards international law and institutions. Reluctance results from Americans seeing their values as 'natural', 'self-evident', and universal. Yet, it is still preferable to international anarchy.

Pablo José Castillo Ortiz & Carlos Closa: Integration Clauses in Latin-American and Caribbean Constitutions

In the last decades, new or amended national Constitutions in the Latin American and Caribbean countries have started to include 'integration clauses', which anchor at the national level the commitment of these States with regional integration. This article makes a comprehensive study of such integration clauses in all Constitutions in the region, using the theory of imperfect contracts as analytical framework. The paper analyses dimensions such as the clauses' political principles and their geographical scope. We show that integration clauses reflect diverse political projects for the region and the richness of subregional idiosyncrasies, which crystallize in a mosaic of overlapping integration experiences. However, at the same time, variation with regards of integration clauses in national constitutions results in different degrees of completeness of the provisions, which points at a still imperfect articulation between the national and supranational levels.

Nikos Vogiatzis: Margin of appreciation and subsidiarity: The Strasbourg Court post-Protocol 15 ECHR

As of March 2019, two states have not yet ratified Protocol 15 ECHR. When that Protocol enters into force, the Convention's Preamble will be amended and a reference to the margin of appreciation and subsidiarity will be included therein. It is well-known that notions of subsidiarity and deference have generated substantial attention over the last years - the question of the legitimacy of the Strasbourg Court has emerged as a widely debated topic. The Copenhagen Declaration (April 2018) serves as further evidence of this claim. This paper will argue that i) Protocol 15 will have implications for the Convention system - ii) albeit not in the direction that some critics of the Strasbourg Court might have anticipated, since it will leave the ECtHR in a relatively strong position despite the amendments in the Preamble - iii) yet it will also incite the Court to provide clearer definitions on the margin of appreciation, as well as on its relationship with European consensus.

Elisabetta Morlino: The power of the purse: the law of international organizations between social development and economic interests

International organizations has undergone dramatic changes in the last thirty years -the most relevant one being the development of rules governing their relationships with individuals. This body of public law should allow the organizations to face global challenges, such as development and social justice. Does this body of rules effectively fulfil these objectives? Does it instead achieve other goals? Does the content of these rules suggest that the process through which they are shaped and the objectives pursued in practice respond to other kind of interests, namely economic interests of the states financing the organizations? The paper explores the dynamics underlying the development and implementation of the law of international organizations, arguing that the interplay of economic interests among states, which in many ways still carries the traces of the colonial past, has determined both the emergence of this body of law as well as its contents and shortcomings.

Valentina Volpe: The United Nations and Democracy Promotion. The Importance of Being Earnest

Democracy has become a concept readily identifiable with the UN in relatively recent times. It was only at the end of the Cold War that democracy promotion entered at the fore of UN-driven global activities. The UN institutional and legal framework remained, instead, fundamentally unaffected by the post-1989 events, creating a discrepancy between the unchanged organization's founding values, membership requirements, and general structures, and its progressively more intense pro-democratic global projection. The paper firstly analyzes the approach of the UN towards democracy before and after 1989. It then focuses on the view of democracy both as a "universal value" (democracy as an end) and on the view of democracy as an instrument (democracy as a means). The 3 basic axioms – democracy for peace - human rights - and development – will be analyzed from both a theoretical/empirical point of view. In the conclusion, attention will be paid to the "importance of being Earnest" for the UN.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

149 THE POWERS OF LEGISLATORS AND LEGISLATION

Panel formed with individual proposals.

Room:

Sala Mediación

Chair:

Vanessa MacDonnell

Presenters:

Giovanni Piccirilli
Maciej Pisz
Ivan Sammut
Martijn van den Brink
Vanessa MacDonnell

Giovanni Piccirilli: A Gesetzesvorbehalt for the European Union after the Treaty of Lisbon? The impact of the new category of "legislative acts" on the concept and aims of legislation

The Lisbon Treaty introduced a category of legal acts of the EU specifically qualified as "legislative". After 10 years of practice and case law of the CJEU it is possible to analyse the consequences of this innovation both in the system of secondary law and in comparison with the traditional role of the (parliamentary) legislation at State level. The study of the legislative acts is a good test to measure the degree of parliamentarisation of the EU, considering the position of the EP in the legislative procedures and the involvement of the National Parliaments. The ultimate aim of the research is to investigate whether the introduction of "legislative acts" in the EU could have led to develop the entire heritage of the "lex" of the Member States, with specific regard to those of civil law tradition. In particular, whether it may have implied a specific significance in relation to fundamental rights, as it is foreseen by the continental understanding of parliamentary legislation.

Maciej Pisz: Challenges in the area of the sources of law in contemporary Polish constitutional law

The aim of the paper is conducting the analysis of the issue of new challenges in the area of the sources of law in contemporary Polish constitutional law. The above-mentioned analysis is currently particularly important from the point of view of Poland and its systemic and political practice. In this regard, it is necessary, among other things, to consider whether there is a need in Poland for systemic changes within the institution of acts of executive organs with the effect of a statute (e.g. in order to implement the EU law)? At the same time, it is worth to consider the introduction into the Polish law of the organic law. Moreover, it is worth to consider if the Polish legislator – parallel to the systemic changes within the area of the sources of law – should carry out systemic reform the legislative process aiming at its optimization as well as to improve the system of governance and the system of mutual relations between the parliament, the government and the president.

Ivan Sammut: In times of change – the evolution and the democratization of the European Union's agencies as the 'fourth' branch of government

Increasingly, the EU's legislature is conferring implementing powers on European Union agencies. The process of 'agencification' has intensified significantly since the early 1990s not only in respect of the numbers of EU agencies operative in the EU but also in terms of the powers conferred on them. Insofar, and despite the absence of a legal framework on EU agencies in the Treaty, EU agencies have become an established part of the way the EU operates and the functional need for the EU to resort to agencies is held to be 'beyond question'. EU agencies increase the administrative capacity at EU level and improve the effectiveness of the EU administrative governance through technical expertise, allowing the Commission to focus on its 'core tasks'. However, the fourth branch of government may suffer from proper democratic supervision. This paper seeks to discuss the ongoing evolution of EU agencies and their democratic credentials considering the above arguments.

Martijn van den Brink: Justice, Legitimacy, and the Authority of Legislation within the European Union

What are we to make of the authority of the EU legislature? EU lawyers have questioned the significance of legislative decision-making. This article challenges these views and argues that the EU legislature must enjoy adequate freedom to shape EU law with the general interest in mind. Institutional accounts that seek to curtail the authority of legislation tend to rest upon 'content-dependent' conceptions of political legitimacy, according to which the legitimacy of a decision depends on its moral qualities. Such conceptions overlook reasonable disagreements on justice and rest upon an overly optimistic (pessimistic) view of the Court (the legislature). The article argues for a content-independent conception of legitimacy, which speaks in favour of the EU legislature. The authority of legislation deserves wider recognition among EU lawyers for reasons of political legitimacy and because the EU legislature is better positioned to decide in the general interest.

Vanessa MacDonnell: Quasi-Constitutional Legislation and Constitutional Pervasiveness

In this presentation I suggest that the study of quasi-constitutional legislation provides a fruitful new way into the discussion of how the Constitution influences ordinary law. When it comes to statutes, there is a natural tendency to focus on constitutional compliance to the exclusion of questions about how else the Constitution might influence statute law. But of course, the Constitution does influence legislation in myriad ways. In the Supreme Court of Canada's jurisprudence on the application of the Charter to administrative decision-making and to the common law, for example, the Supreme Court has explained that the "spirit" or "values" of the Charter shape the development of these areas of law. In the same way, the spirit and values of the Constitution shape legislation. I argue that quasi-constitutional legislation is best understood as a manifestation of the pervasiveness of constitutional norms and values in our legal system, and that this pervasiveness is salutary.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

150 CHANGING PUBLIC LAW THROUGH CULTURAL HERITAGE

Countries may delimit their own conceptions of "national cultural patrimony" according to their cultural sensibility, historical narratives and political strategies. This multidisciplinary panel examines how specific categories of new and emerging cultural heritage may affect the laws which purport to regulate the cultural interest in property. Fashion, for example, is a new and emerging category of cultural heritage. Classifying film as cultural heritage presents issues of copyright and freedom of expression. The destruction of cultural sites and monuments may or may not be allowed by cultural heritage and public law. How do these phenomena affect and change cultural heritage law and public law more broadly?

Room:

Aquiles Portaluppi

Chairs:

Lorenzo Casini
Sabino Cassese

Presenters:

Evgeniia Volosova
Felicia Caponigri
Mariafrancesca Cataldo
Gabriela Atucha Rossi

Evgeniia Volosova: Soviet Cinema in Changing Post-Soviet Copyright Law

In this paper I will analyze how the legal status of films produced in the Soviet Union changed after the collapse of the country and what effects that change has for Soviet film as cultural heritage today. While Soviet films are a significant part of the cultural heritage of the independent states which emerged after the collapse of the USSR, they also represent a potential source of income for Russia and recently established countries in the Soviet bloc. Since the fall of the Soviet Union the copyright status of Soviet films has been controversial. This paper confronts and compares Soviet film copyright policies with those later established in the successor states within a historical context. Can copyright law protect or frustrate the appreciation of Soviet films as cultural heritage in the future?

Felicia Caponigri: Fashion, Design and the Future of Cultural Heritage Law

Fashion and design are increasingly viewed as a part of our culture and cultural heritage. Notwithstanding this increased acceptance and promotion, however, the legal classification of fashion as cultural property, a part of cultural heritage, is undervalued by current fashion law literature, cultural heritage law and public law more broadly. How are we to address the unique needs of a fashion object when it is of public interest under the law? What do we do when the alteration or destruction of a fashion object, which exists as a private property, would be against the public interest? How do we reconcile the immaterial aspects of a fashion object with its material aspects in the public interest? Using a comparative law methodology focused on Italy and the United States this paper seeks to answer such questions by presenting, through fashion and design, a new understanding of cultural heritage law and, by extension, a new understanding of public law.

Mariafrancesca Cataldo: The (Public) Law of Cultural Heritage in the face of Terrorism and Diplomacy

In the last few decades terrorist groups and the Islamic State have attacked cultural heritage not only during armed conflicts but also in ordinary contexts. The paper seeks to examine the international relations during the reconstruction of damaged cultural sites and monuments. Sovereign States have been addressing their foreign policies on cultural heritage's protection by increasing multilateral cooperation in order to rebrand their role within the international scene. What role should cultural heritage play in reconstruction processes? What role should public law play within the fragmented cultural heritage regulation which results from multilateral cooperation? Do we need a global governance to deal with these security issues? This paper aims to answer these questions by focusing on the role of Russia in the reconstruction process of Palmyra after the Islamic State's attack and on the role of France in Mali's cultural heritage.

Gabriela Atucha Rossi: Intangible Cultural Heritage and its Protection in Chilean Law

Is the notion of intangible cultural heritage (ICH) included in Chilean legislation? Why is it important for Chile to have specific laws that regulate and protect ICH? UNESCO has promoted the recognition and appreciation of the ICH through the "Convention for the Safeguarding of the ICH", ratified by Chile in 2009. This Convention defines ICH and establishes a series of objectives regarding its protection, respect, and raising awareness of the importance and reciprocal acknowledgement at a local, national, and international level. This paper seeks to analyze Chilean legislation and answer the question of whether ICH in the UNESCO Convention is applicable and integrated into Chilean legislation.

Panel Sessions V

Tuesday, 2 July 2019
16:50 – 18:25

151 THE UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT DOCTRINE

Panel formed with individual proposals.

Room:

D303

Chair:

Eduardo Moreira

Presenters:

Atagun Mert Kejanlioglu
Ondrej Preuss
Eduardo Moreira
John Dinan
Katy Sowery

Atagun Mert Kejanlioglu: The "people" as an obstacle to an effective unconstitutional constitutional amendments doctrine: Lessons from Turkey

A constitution does not only organize the separation of powers within a state but also protects inalienable rights and freedoms of individuals. Yet, when it comes to amending constitutions, the "people" may – seemingly – correct all wrongs. Even the unconstitutional constitutional amendments doctrine is based on delegation theory that takes the "people" as the main holder of constitution-making power. However, populist leaders also refer to the same principle while pushing for their constitutional agendas that could undermine fundamental rights and are very willing to use referenda as a legitimizing tool. Thus, this paper will argue that this approach to unconstitutional constitutional amendments doctrine feeds the populist rhetoric rather than putting an effective barrier to abusive constitutionalism. It will illustrate this thesis by using the two latest Turkish constitutional amendments to suggest that the discussion should rather focus on developing a new understanding of the "people" as constituent power.

Ondřej Preuss: The Eternity Clause – Lessons from the Czech Example (recent developments)

My paper presents lessons from the Czech example of the so-called "Eternity Clause," i.e. a legal standard declaring certain principles, values or specific constitutional provisions to be unalterable and irrevocable. That the Eternity clause is a practical instrument has already been proved by the Czech Constitutional Court in its famous "Melčák" decision. However, recent developments show that the Czech Constitutional Court is no longer open to such a "radical" approach. Nonetheless, it still seems that the court is prepared to defend the values of liberal democracy, just not in such a spectacular way. It is therefore more up to the political actors or the people themselves to use Eternity Clause arguments to protect liberal democracy and its values in the region of Central Europe.

Eduardo Moreira: The Implicit Limits of Constitutional Amendments

The study of ways to amend a constitution was never an easy question, overall considering the different political traditions and constitutional choices. Besides the clear formal limits to restrain a constitutional amendment, there are othe possibilities, that differs by nature and constitutional stability, such as: temporal limits, material limits and circunstantial limits. Those options changes in every constitutional choices and time to time. Nevertheless, the doutrinary approach reveals some important accomplishment in protecting an essential forms of every constitution. Those implicit limits have an arreay in common, even if not writting they are the last defence against the overacting of political power (in form of parlament or presidential). This seminar examines the fortitude of those implicit limits to amend a constitutional when they are challenged. This study will offer a constitutional comprative approach.

John Dinan: The Unconstitutional Constitutional Amendment Doctrine in the American States: State Court Review of State Constitutional Amendments in the U.S.

I examine the degree to which the unconstitutional constitutional amendment doctrine has been employed in the American states. One purpose is to identify the occasions and reasons why state courts have invalidated amendments and to show that rulings have focused on inaccurate ballot language, multiple subjects, procedural violations, violations of federal law, and subject-matter violations. However, and this is the paper's second purpose, notably absent are state court cases employing the unconstitutional constitutional amendment doctrine, in the sense of invalidating amendments for violating state constitutional provisions or principles. The paper's third purpose is to explain why American state courts have not embraced the unconstitutional constitutional amendment doctrine in a way that has been embraced by courts in other polities. A key explanation is found in the strength of the popular sovereignty doctrine and role of the public in approving constitutional changes in the U.S.

Katy Sowery: Unconstitutional Constitutional Amendments: the case of the European Union

This paper explores 'unconstitutional constitutional amendments' within the EU. This is a topical issue given both the challenges to the 'constitutional equality' of Member States from the economic crisis, and the rule of law crisis across Europe. One could question whether fundamental constitutional ideas such as State equality and the rule of law are of such weight as to operate as limits to future amendments to the Union legal order. Such ideas highlight unsettled questions about the nature of the EU legal order. Are the Member States 'the masters of the Treaties'? Or is there a role for European Court of Justice to enforce (and perhaps to recognise) substantive limits to amendment? The paper thus captures the political reality of EU amendment. It challenges the idea that 'hard' public law concepts of 'unconstitutionality' can address seemingly intractable political problems. Indeed, the current crises are rooted in concerns over sovereignty, national identity, and economics.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

152 COURTS AND CONSTITUTIONS IN AUTHORITARIAN REGIMES

From Latin America to Africa to Asia, questions about the role of courts and constitutions in authoritarian regimes has become all the more urgent since the turn of the 21st century. This panel explores different problems faced by new democracies with a background of an authoritarian or a dominant political party in power. Some problems concern the challenges faced by judges and constitutional designers in the face of consolidated political power. Others concern how powerful incumbents themselves use constitutional strategies to entrench power. Different comparative perspectives will be offered along theoretical, empirical, and historical lines.

Room:

D303

Chair:

Mark Tushnet

Presenters:

Samuel Issacharoff
James Fowkes
Yvonne Tew
Po Jen Yap

Samuel Issacharoff: Courts and Intralegal Oppression

In the 21st century, elected authoritarians excel at capturing the poorly cabined intralegal powers of the state to consolidate power and to increase dependence of an expanding gyre of the population on direct connections to the beneficence of the incumbent regime. The challenge to the courts is much more likely to be structural not individual and concerned with governance not rights. This paper will develop a methodology of judicial democratic intervention using three key judicial mandates as guideposts. The three are the Basic Structures doctrine from India, the Certification Decision from South Africa, and the Colombian denial of a third term to President Uribe. Taken together these decisions preserve the permanent need for accountability to independent sources of power such as the judiciary, structural protections against excessive entrenchment of majoritarian power, and the preservation of political competition against the lock up of state authority by the power of incumbency.

James Fowkes: Dugard's Question: South Africa, Latin America, and Judicial Complicity in Evil Regimes

Independent judges seldom challenged, and often supported, the injustices of apartheid. South Africans have long attributed this to judicial positivism or formalism, a belief tracing back to a 1972 article by John Dugard. Dugard's article was brave politically but flawed factually, not least in accepting positivism as an explanation for judicial behavior under National Socialism when Germans had long rejected this argument. Clearing things up matters partly because Dugard's argument affects South African legal culture to this day. But in addition, the confidence in the German parallel, together with other chauvinisms, has prevented South Africans from looking to other examples, including strong parallels to the judiciaries of the (semi-)authoritarian states of Latin America. Does the shared interest in transformative constitutionalism today have its roots in shared past experiences of judicial complicity in evil?

Yvonne Tew: Courts in Transition: Judicial Empowerment in Malaysia and Singapore

What is the role of courts in evolving constitutional democracies in Asia? How can courts in dominant political party systems assert judicial power? In states with a history of consolidated political power, judicial deference or dialogue with the political branches can only go so far. I argue in support of an empowered role for courts in these contexts through judicial assertions of power. Courts can assert power by exercising judicial review to strike down legislation or by assuming a power to invalidate constitutional amendments. Courts can also manifest judicial power through strategic assertiveness, such as Marbury-style strategies in which courts lay the foundations for future political confrontations. The key feature these judicial approaches share is that they are aimed at strengthening, not restricting, judicial authority. I draw on two recent decisions issued by the Malaysian apex court as examples of strategic judicial empowerment.

Po Jen Yap: Authoritarian Regimes and Courts in Asia

I examine authoritarian regimes in relation to the political power configuration that is central to how autocracy is practised within their systems. First, Dominant Party Democracies have been ruled by the same dominant political party since the nation's independence. Although there are regular and free elections, the hyper-incumbent ruling party can reconfigure electoral rules to stave off the opposition. Next, in Independent Military Democracies, the military is an independent branch of government, leading to oscillation between martial and civilian rule - even after civilian rule returns, the military retains a veto defending its core interests. Finally, in Communist Regimes, elections are a sham, and all levers of state power are subjected to the singular control of the Communist Party. These three regime types are not exhaustive of all authoritarian regimes, but they are the predominant ones in Asia. I explore the constitutional role of the courts in these three regime types.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

153 CHALLENGES TO FREEDOM OF EXPRESSION I

Panel formed with individual proposals.

Room:

Sala Mediación

Chair:

Cristian Román

Presenters:

Cristian Román
Cherian George
Fritz Siregar
Uriel Silva
Magdalena Jozwiak

Cristian Román: #Twitter and @Administration (Government)

This paper analyzes the use of Twitter by the organs of the Administration (Government), which it calls institutional Twitter. For this purpose, it addresses the fundamentals of the use of institutional Twitter, its legal nature, the limits to its use and the legal nature of the tweets published therein.

Cherian George: Authoritarian contagion: the impact of Western disinformation laws on media repression in Asia

Global concern about disinformation has been exploited by authoritarian states as an opportunity to enact new censorship laws and engage in repression of independent media. European democracies' legislative moves in response to the disinformation threat have been cited by less democratic states to justify more sweeping legislation. Singapore, for example, is expected to introduce new laws after a policy debate that referred extensively to recent moves in Western Europe, such as Germany's new internet enforcement law. This paper analyses authoritarian regimes' discursive use of legal precedents set by democracies. These politically-motivated citations are usually selective and misleading, ignoring democratic jurisdictions' checks and balances. Such discursive practices contribute to authoritarian contagion effects waves. Regimes may be imitating one another, or at least taking advantage of the general climate of "democratic recession" to engage in more repressive behaviour.

Fritz Siregar: Disinformation and Black Campaign on 2019 Indonesia Election – Freedom Speech vs Protect Election Process

Social media shifts how people campaign during election. Although campaign in social media did not always end up in a good way, since election participants could possibly use social media to boost up black campaign. Black campaign could take shape as hate speech or disinformation. We learned from India, Brazil and Philippine's election. However, combating disinformation and black campaign also relate to protection on freedom of speech from person and also political party/ presidential pair that involved in the election. The ability to campaign is protected right for election participant. The election process also need to be protected because it may lead people undermine electoral process, if the Indonesia Election Supervisory Board failed to response disinformation on election that has been spread out. In the mean time, needs to balance its conduct to protect people's right to be informed about election and ensure that the spread of disinformation shall not harm electoral process.

Uriel Silva: From the mask to the hologram: on political representativeness and sovereign legitimacy after fake news

On modern democratic discourse, the core of State legitimacy is popular sovereignty, and this is based on the concept of political representativeness, in which the basis of citizen identity is established (Bernard Manin) and the idea of "people" is produced (Chantal Mouffe). Considering the political fake news and its effect on elections (on India, the United States, France, Brasil), the premises of auditory democracy (Manin) can have imploded itself, as result of the dissipation of holographic information. Consequently, it is possible to question whether the discursive core of sovereign legitimacy has deteriorated. Or rather, could the rise of a post-democratic state be affirmed? Or would it be a metamorphosis for a new form of political representation and legitimacy? This study proposes a legal-theoretical investigation of popular sovereignty, legitimacy, identity and representation on the search for clues to characterize the representativeness after fake news.

Magdalena Jozwiak: The development on the EU approach to online privacy and brief history of online content moderation

As demonstrated by the leaks of Facebook's content moderation manuals, online platforms govern the speech published via their services pursuant to sui generis set of norms that aligns perfectly neither with the US nor with European standards for what constitutes legitimate expression. Such expression norms underwent significant changes from the moment of the inception of social media as such. Thus, the question arises how different forces might shape the online public discourse. The decision on where to place the boundaries of public discourse is eventually a normative one, requiring a judgment about the priorities of a given community. The assumption here is that the strengthening the protections for privacy online in Europe might be a factor for shaping social media community norms on a global scale. It will be tested through the development of the historical perspective on content moderation in parallel with the policy changes within the EU.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

154 CRIME AND PUNISHMENT I

Panel formed with individual proposals.

Room:

Sala Reuniones LLM

Chair:

Ike Chianaraekpere

Presenters:

Maksim Karliuk
Ike Chianaraekpere & Azubike Onuora-Oguno
Herlambang P. Wiratraman
Daniel Pascoe & Andrew Novak
Marcin Szwed

Maksim Karliuk: Against "Punishment"

The issues surrounding the institution of punishment have been brought to a new light with rising popular distrust in government. The question must be raised why we believe that it is permissible for the state to punish those who engage in certain form of behavior. It is argued in this paper that even if those who break the law are responsible for their actions, the idea that it is permissible for the state to punish is fundamentally flawed, and even the term 'punishment' should not be applicable. The idea is not new, as the term 'punishment' was dropped from the Criminal Code at the inception of the Soviet Union for some time. However, simply eliminating the term altogether and replacing it with something different does not solve the substance of the problems associated with it. It is argued that not only the term 'punishment' goes fundamentally beyond the legitimate purposes of criminal law, but also that the practice itself of punishing for breaking the law must cease to exist.

Ike Chianaraekpere & Azubike Onuora-Oguno: Charting A New Course in Sexual Violence Prohibition and Protection in Nigeria: A Need To Reappraise Public Law Jurisprudence In Nigeria?

The emergence of insurgence in the North East of Nigeria exacerbated the worrisome state of sexual violence-related-crimes jurisprudence in Nigeria. Prior to this era, it was believed that one in three female children in Nigeria experiences a sexual violence related incident before the age of 16. Municipal law on what constitutes sexual violence is limited in scope, relating to securing convictions on the offence of rape. The paper argues that with the changing state of public international law and the redefinition of offences like sexual violence, prospects of improving the experience of survivors of sexual violence exist. Bringing into context decisions and policy documents from international law judicial bodies, the paper will examine their influence on Nigerian laws. It will also advocate for a new paradigm in the teaching of international law in Nigeria to reflect the developing and new discourse. It is premised on a qualitative survey of Nigerian laws related to Sexual Violence.

Herlambang P. Wiratraman: Criminalising Justice: The use of law on 'ideological stigmatisation' for attacking human rights movement in Indonesia

Ideological stigma, especially 'communism', has been still taking place significantly in the country in Indonesia's New Order. This relates to 1965 massacre against member of communist party and its sympathiser. Such stigmatisation has been used also into the justice system, especially by using the court for attacking human rights groups, individuals, or those who defending rights. Even, the stigma had been effectively used to suppress human rights activism, especially dealing with two most risky human rights violation issues in decentralised Indonesia: anti-corruption and opposing excessive natural resources exploitation. The paper takes the latest and most controversial case of Heri Budiawan als Budi Pego vs. The State of Republic of Indonesia in Banyuwangi (2017). This case departs from the role of public authorities who had been using 'communist article' under Indonesia's Penal Code for the first time since its enactment, especially targeting environmental defenders.

Daniel Pascoe & Andrew Novak: Longitudinal Constitutional Trends in Clemency since Sebba (1977)

The starting point for comparative legal research on executive clemency is Leslie Sebba's 1977 journal article in Criminal Law & Criminology comparing clemency mechanisms around the world. Subsequent scholarship tends to have only considered executive clemency in comparative perspective over a limited number of jurisdictions, or in relation to death penalty cases only. However, since Sebba published his results, based on data from the mid-1970s, there have been significant political and legal changes around the world. More than 70 national constitutions have gone into force since 1970. Sebba considered the constitutional provisions of exactly 100 different jurisdictions, whereas in 2019 there are 193 UN member states. This paper dissects Sebba's main findings and attempts to update these based on the authors' 2019 data, consisting of an exhaustive global survey of constitutional provisions on executive clemency. The authors ask the question: are Sebba's findings still relevant today?

Marcin Szwed: Personal liberty v. positive obligations of the state – limits of preventive detention of dangerous offenders

The paper will discuss the problem of post-sentence preventive detention of dangerous offenders, primarily from the perspective of the collision between the need to respect the personal liberty of individuals and the positive obligations of the state to protect public order and the rights of others. The ECtHR in the most recent case law accepted the use of post-sentence preventive detention provided that it is limited to persons of "unsound mind" and is executed in the therapeutic environment. However, in practice both these conditions are unclear: the ECtHR has never defined, even in outline, the term "unsoundness of mind", while the involuntary therapy of offenders with non-psychotic disorders is ineffective. Consequently, the ECtHR's jurisprudence does not give precise answer as to what are the limits of preventive detention. The paper will address this issue in the light of the contemporary human rights standards as well as the Polish experiences with post-sentence detention.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

155 DEBATE! IS THERE A REGIONAL IUS COMMUNE IN LATIN AMERICA?

The term Ius Constitutionale Commune en América Latina (ICCAL) is an initiative coined by scholars who have been documenting, conceptualizing, and comparing the development of Latin American public law for more than a decade. It encompasses themes that transcend national borders and legal fields, involving constitutional law, administrative law, general public international law, regional integration law, fundamental rights, and investment law. For its critics, however, this project is the latest expression of competing agendas within the Latin American legal space. Its supposed strong Eurocentric and judicial inclination may present a normative straitjacket to the pluralist historiographies of the region, thus neglecting constructions from below. Moreover, conceptual, epistemological and democratic limits may blind the ICCAL project and hinder it from presenting a full account of Latin America‘s public law(s).

Room:

Auditorio A. Silva

Chair:

J.H.H Weiler

Presenters:

Arturo Villagran
Ximena Soley
Alejandro Rodiles
Juan C. Herrera

Arturo Villagran: A Human Rights´ Tale of Competing Narratives

A human rights´ tale of competing narratives explores the different human rights narratives at play within the context of the Inter-American System today. On the one hand, it analyses the universalistic narrative of Ius Constitutionale Commune and, in the other, the less explored story of member states resisting compliance with Inter-American decisions. This paper shows that the prevalence of the unidirectional and institutionalist narrative of Ius Constitutionale Commune may also contribute to the current challenges experienced within the Inter-American System. Member states have rebelled in recent times against this universal approach. However, the Inter-American institutions continue to be nonresponsive to this backlash. This paper argues that rather than treating states as entities to be kept under strict surveillance and mistrust, the Inter-American System should be changed and reimagined through dialogue and a deeper consideration of domestic contexts of member states.

Ximena Soley: Struggles within the Human Rights Field: The Matter of Real and Supposed Competing Narratives

The ICCAL project builds, in large part, on inter-American human rights treaties and their application and interpretation by the main regional human rights organs: the Commission and the Court. Thus, an important part of the critique raised against this project is directed toward the activities of such institutions. In this intervention I will break down some of the points of critique, namely: the nature and extent of anti-state bias on behalf of the Commission and Court (i) - the characteristics of resistance and backlash within the inter-American system (ii) - supposed lack of responsiveness of the system‘s organs toward state contestation - and (iii) how this purportedly has contributed to the challenges faced by the regional human rights system.

Alejandro Rodiles: The ICCLA Project: Latin American Public Law or Global Public Law in Latin America?

ICCLA is portrayed as the common public law of the region that emerges, somehow spontaneously, through judicial dialogue among the Inter-American Court of Human Rights (IACHR) and Latin American national courts. I question this assumption, arguing that it is an academic project centered on a German conception of European constitutionalism (Gemeineuropäisches Verfassungsrecht). For this, I trace the ideological and theoretical genesis of this project until its current manifestations, which reveal more a transregional academic dialogue than a Latin American legal practice. There are, for sure, some features of a regional judicial dialogue. However, I doubt that these reveal a pluralistic conversation. Instead, it seems to denote more a monologue promoted by the IACHR. This, in turn, raises serious doubts about the emergence of ius commune in Latin America.

Juan C. Herrera: Transformative Constitutionalism: An Original Latin American Understanding of Public Law

The constitutionalization of international law and the internationalization of constitutional law are deeply interrelated. It is therefore consistent, from a Latin American perspective, to turn to categories such as “ius commune“, “regionalization“, “Inter- Americanization“ or other synonymous terms to describe this process. Some “neo-formalist“ concerns have been raised against transformative constitutionalism and its expansive effect on the dissemination of constitutional law in the region. For example: (i) the originality of the idea - (ii) its fostering of judicial activism - (iii) its supposed cherry picking methodology - (iv) the type of judicial dialogue - and (v) the conventionality control doctrine. My intervention in this debate will demonstrate the misunderstanding of the critics and their preconceptions about the transformative constitutionalism that shape the emergence of an original Latin American understanding of public law.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

156 INTERNATIONAL ECONOMIC LAW AND TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA I: FRAMING THE ISSUES

Two deep shifts have transformed the legal, political, and economic landscape of Latin America in the course of the last decades. On the one hand, the region has witnessed the emergence of a transformative constitutionalism in the form of a dense network of materials, institutions, and communities of legal practice whose interactions have given rise to a veritable Ius Constitutionale Commune en América Latina. On the other, Latin America has been subject to an equally dense network of trade and investment agreements as well as governance practices of international financial institutions, amounting to a regional complex of international economic law norms. Inevitably, both frameworks are increasingly interacting, thereby triggering conflicts, synergies, and unintended consequences. This panel examines the interactions between transformative constitutionalism and international economic law in the region, and explores the resulting challenges for human rights and democracy.

Room:

D304

Chair:

Armin von Bogdandy

Presenters:

Rene Uruena
Paulina Barrera Rosales
Judith Schönsteiner
Franz Christian Ebert

Rene Uruena: International Economic Law in the Inter-American Legal Space: Domestic Review and the Fair and Equitable Treatment Standard

This paper explores the "Inter-American legal space" as a metaphor of legal hierarchy, as a social performance, and as geographical representation. It then situates the disciplines of international economic law in it, focusing on the fair and equitable treatment standard of foreign investment law. In this context, the contribution argues that domestic constitutional review is an ideal site to develop a theory of weights that provides a normative criterion to appropriately reconcile investment protection, democracy, and human rights in a framework of transformative constitutionalism.

Paulina Barrera Rosales: All Subjects Considered: the Role of Indigenous Peoples in the Relationship between the Ius Constitutionale Commune en América Latina and International Economic Law

Latin America is characterized by diversity and its indigenous peoples are no exception: According to the ECLAC, in 2010 around 45 million persons from 826 different indigenous peoples lived in the region. In order to approach the relationship between the protection of human rights in the region and international economic law (IEL), taking into account the different cosmovisions of development from Latin American indigenous peoples becomes crucial. In order to avoid imposing Western interpretations of those rights to such peoples, it is vital to acknowledge the epistemological differences between the mainstream perspective and theirs. The concept of the Ius Constitutionale Commune en América Latina (ICCAL) is particularly useful for this purpose, since it affirms the interconnection of elements from various legal systems in the region. In this regard, an internal dialogue among these different conceptions within ICCAL, and between ICCAL and IEL is arguably needed.

Judith Schönsteiner: Business and Human Rights: Just a "Soft" Transformation?

This paper looks at how international standards on business and human rights (B&HR) are beginning to shape national policies and regional human rights law in Latin America. It gives examples taken from national action plans on B&HR that try to implement the UN Guiding Principles on Business and Human Rights (2011), and also considers relevant reports and cases of the Inter-American System of Human Rights, and the impact of the OECD Guidelines for Multinational Enterprises. In doing so, it shows a considerable harmonization of standards, which begin to impact domestic regulation while the presence of binding instruments that embody obligations for companies is only incipient. State obligations on B&HR, however, are clearly defined, although a binding treaty is still far away. Thus, to what extent does the transformation towards increased corporate accountability for human rights violations take place at the international level? To what extent (if at all) does it occur domestically?

Franz Christian Ebert: International Financial Institutions and Transformative Constitutionalism in Latin America: The Case of the World Bank

The social impact of international financial institutions in Latin America is ambivalent and highly controversial. This Paper engages with the World Bank from the perspective of transformative constitutionalism, as understood by the Ius Constitutionale Commune en América Latina project. It proceeds in three steps. Based on an overview of how the World Bank's activities in the region have evolved over time, the paper identifies, first, key tensions with the objectives and principles of the aforesaid constitutionalism. Drawing on a public law approach as an analytical framework, it examines, next, key instruments through which the Bank exercises authority and impacts policy-making in relevant areas. On this basis, several options are explored which could reduce the identified tensions and potentially facilitate a rapprochement between the World Bank's instruments, on the one hand, and the objectives and principles of transformative constitutionalism in the region, on the other.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

157 CONSTITUTIONAL FOUNDATIONS

The panel considers the foundations of constitutions - the rules that must be parts of a constitutional order, and the consequences of including rules in the foundations of the state. The identity of the state as social institution will be considered, the role of popular sovereignty examined, and the significance of a state's founding document surveyed.

Room:

LLM94

Chair:

Vanessa Macdonnell

Presenters:

Rivka Weill

Peter Oliver

Nicholas Barber

Rivka Weill: We the Territorial People: Popular Sovereignty as a Territorial Concept

Scholars generally write about popular sovereignty in terms of the expression of the people's will alone. They do not treat territory as part of the definition of popular sovereignty. My work on Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide published in the Cardozo Law Review reveals that popular sovereignty is a territorial concept. In this paper, I argue that the overwhelming majority of world constitutions are not terribly concerned with immigration or emigration of people. They are also not concerned with the redrawing of borders alone. Rather, constitutions treat the combined challenge of withdrawal of citizens with territory as a revolutionary act in the Kelsenian sense. Such an act requires a new constitutional beginning by both the seceding and the remaining populations. The article thus explores the meaning of popular sovereignty as a territorial concept protected from constitutional change from within the system.

Peter Oliver: Canada's 'Constitution Similar in Principle to that of the United Kingdom': A Sustainable Jurisprudence of Constitutional Principles

Unwritten constitutional principles often find their place into Canadian constitutional law via their supposed foothold in the part of the Preamble to the Constitution Act, 1867 that refers to 'a Constitution similar in principle to that of the United Kingdom'. Principles such as judicial independence, democracy, federalism, constitutionalism and the rule of law, and protection of minorities have been derived from the preamble in this way. This paper looks through over a hundred years of Supreme Court of Canada case law in order to determine what that preambular phrase has meant over time. It then proposes a reading of the Preamble and constitutional principles that is attentive to text, case law, principles and an evolving Canadian context: a sustainable jurisprudence.

Nicholas Barber: Fundamental Rules of Constitutions

The paper considers whether the nature of the state as a particular type of social institution has any necessary implications for the content of the rules of state constitutions - so, whether there are any rules that must be included in the constitution because of the nature of the state. It argues that there are some rules, including rules that identify the point of the state and some rules relating to constitutional change, that all states must possess. These are the foundational rules of the state, and cannot be altered if any state is to remain an instantiation of this type of social form.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

158 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.

Room:

D402

Chair:

Jaclyn Neo

Presenters:

Diego Werneck Arguelhes
Jaclyn Neo
Thomaz Pereira
Fernando Muñoz
Or Bassok

Diego Werneck Arguelhes: Transformative constitutionalism, institutional failure, and judicial populism

The traditional debate on judicial activism focuses on what judges do with their power - in contrast, this paper focus on how they talk about their role (i) under a constitution that is perceived as having "transformative" ambitions, and (ii) in context of rising populist politics. While we tend to think of courts as either victims of or obstacles to populist politicians, recent constitutional developments in Brazil suggest a different possibility: constitutional judges can seize an anti-establishment political momentum to present themselves as representing the true interests of the People. By focusing on the failure of representative institutions, certain varieties of discourse on transformative constitutionalism might have actually empowered judges to adopt a populist vocabulary themselves and and present themselves as speaking for the people.

Jaclyn Neo: Constitutional Amendment in Southeast Asia: Theory, Practice, and Reflection

The subject of constitutional amendments has attracted significant attention in comparative constitutional law and theory. There remains however a lack of attention to how Southeast Asian jurisdictions have engaged in the practice of constitutional amendment. This gap is particularly striking as constitutional amendment, and not judicial interpretation or even legislative revision, has been the primary mode of constitutional change in many Southeast Asian countries. This article examines constitutional amendment practices in several Southeast Asian countries, arguing that the practical flexibility has been crucial for these countries to change their constitutions in a "legal" manner, especially since amendments are often seen as legitimate because they purportedly re-indigenize and reclaim the countries' constitutions from their colonial roots.

Thomaz Pereira: Constitutional Amendment in Latin America: Theory, Practice and Design

One of the core issues for Constitutional Theory is justifying why constitutional law is superior to ordinary legislation. This fundamental question must be answered both in regard to the Constitution as originally enacted, and in regard to any constitutional amendments. In what concerns constitutional amendments, any answer that intends to go beyond a strictly formalist answer and address issues of legitimacy must present: (i) a theory of the special authority of the constitutional amendment power in relation to ordinary legislators, and (ii) an analysis of the actual practice and design of constitutional amendment rules that discusses if they can actually be justified or not. This article examines the design and the practice of constitutional amendment law in several Latin American countries arguing that, in some cases, there is a mismatch between theory and reality.

Fernando Muñoz: Dictatorship, neoliberalism, and natural law: constitutionalizing the concept of discrimination in Chile (1973 – 1980)

As the concept of discrimination acquired increasingly acquired social meaning and political legitimacy, many have deemed necessary to include it, define it, and employ it in constitutional and other fundamental legal documents. The conceptual history of discrimination can be fruitfully approached through the study of constitutional and other legal materials with the aim to find in them concrete contexts of employment of this concept that we can arrange diachronically, in order to give us an idea of its variations through space and time. In this presentation, which is a first step in this perspective, I will explore a paradoxical and counterintuitive process: the constitutionalization of the concept of discrimination during the civic-military dictatorship led by Augusto Pinochet, a process that shows how the constitutional definition of a concept hinges on the particular set of political and social forces that stands behind a specific constitutional text and its continuous application.

Or Bassok: The Schmitelsen Court: The Question of Legitimacy

In recent years, a new creature has emerged on the institutional landscape: the Schmitelsen Court. This Court is the end-product of a combination of the positions presented by Hans Kelsen and Carl Schmitt in their famous debate during the Weimar years on "Who is the Guardian of the Constitution?". The Schmitelsen guardian is a court thus fulfilling Kelsen's vision of the constitutional court as the guardian of the constitution. However, it possesses the mission, the means to achieve it, and the source of legitimacy that Schmitt envisioned for the president as the guardian of the constitution. After establishing these theoretical points, I proceed by examining how the Schmitelsen Court model manifests itself in three case studies: the American Supreme Court, the Israeli Supreme Court and the European Court of Human Rights.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

159 ADMINISTRATIVE LAW AND AUTOMATED GOVERNMENT DECISION-MAKING

Several recent events have renewed debate in Australia about whether existing administrative law principles and institutions are fit-for-purpose in the modern era of technology-assisted government decision-making. The most controversial is the Commonwealth Government‘s use of technology to identify possible social security overpayments and generate notices requiring individuals to explain why they do not owe a debt, known as ‘robodebt‘. In 2017, the Government announced plans to automate visa processing - an area which has caused controversy and generated the bulk of judicial review cases for several decades. And in 2018 the Federal Court found that a computer-generated notice informing a taxpayer of the amount of their debt was not a ‘decision‘ for the purposes of administrative law. This panel will explore the implications of these, and other, technological developments for administrative law, and ask how the law can adapt to the modern realities of government administration.

Room:

LLM91

Chair:

Janina Boughey

Presenters:

Maria O'Sullivan

Katie Miller

Janina Boughey

Maria O'Sullivan: Automation: Developing Technological Procedural Fairness

This paper explores the implications of automaton for procedural fairness and the ways in which procedural fairness can be developed to deal with technological developments. Automation raises concerns for this administrative law area because it is not clear whether decision-makers in charge of automated systems will be able to sufficiently understand the highly technical information which have been used in an automated decision and to communicate that to the affected person (the ‘explainability‘ problem). Another debated area is how to draw the boundaries of automation. Will there be some decisions where there needs to be a ‘human in the loop‘? Further, given that provision of an oral hearing is a central component of the procedural fairness principles in Australian law, how does that interact with automation? Can a machine give an applicant a ‘hearing‘?

Katie Miller: Back to Basics: Who “decides“ in automated government decision-making?

This paper considers simple issues rendered complex by the automation of decisions traditionally made by human government officers. The paper will explore three fundamental questions about an automated decision: what is the “decision“ - who makes it - and when is it made? The answers to these questions have consequences for whether such decisions are amenable to review by Australian administrative law. The paper will consider recent case law regarding what constitutes a “decision“ - and the role of concepts of “officer of the Commonwealth“ and a “decision“ in grounding the jurisdiction of courts to engage in judicial review of government action.

Janina Boughey: Proving legal error in an age of Automated Decision-Making

This paper examines how the various, traditional ‘grounds‘ of review—or categories of legal errors that decision-makers commonly make—are affected by the automation of administrative decision-making. It argues that automation has the potential to significantly decrease, and even eliminate, several common kinds of legal error that human decision-makers make. However, the recent Australian examples show that, without careful human oversight in the design process, the rate of certain kinds of errors—particularly those associated with the fairness of decisions—may dramatically increase - and other legal errors may become impossible for applicants to prove in judicial review proceedings.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

160 COMPARATIVE IMPEACHMENT: REMOVING EXECUTIVES

All presidential systems and many parliamentary systems have mechanisms for removing executives who have committed crimes or are incapacitated. These mechanisms vary widely, with important consequences for the political system. Recent experience in South Africa, South Korea, Pakistan, Korea, and Brazil shows that removal by impeachment is not uncommon, nor necessarily problematic for the system as a whole. This panel will explore recent cases to understand when removal mechanisms are used—and abused.

Room:

Auditorio Claro

Chair:

Tom Ginsburg

Presenters:

Aziz Huq & Tom Ginsburg

Yoav Dotan

Juliano Zaiden Benvido

Aziz Huq & Tom Ginsburg: Removing Presidents: A Comparative Exploration

What happens when a president is deemed to be so politically unpopular as to endanger the country? In the United States, the conventional understanding is, in a word, nothing. The result is that the constitutional system, as conventionally understood, dooms us to keep an unpopular president until the full term is fulfilled. It does not have to be this way. Neither the historical understanding of impeachment nor the text determines that we need to interpret the constitution in the way that we have. And comparative experience shows us that a well-functioning democratic order can be consistent with other ways of doing things. Lower barriers to removal need not bring political instability. Other countries approach the problem of runaway or unpopular chief executives, including elected presidents, in very different ways. This paper explores the comparative experience of removing presidents around the world.

Yoav Dotan: Impeachment by Judicial Review: Israel's Odd System of Checks and Balances

This paper focuses on a doctrine that the Israeli Supreme Court has developed since the early 1990s under which the Court removes officeholders from their position by ordinary judicial review proceedings. Although this doctrine is not founded on any formal constitutional settings, nonetheless it has had a significant influence on the relationships between the judiciary and the political branches, as it was the basis for the removal of several major political figures — including ministers and top bureaucrats — from office. This practice of 'impeachment' by judicial review is unique to Israel, and has hardly been studied in the comparative literature. It is, however, extremely common and influential in Israeli constitutional and political life. In this Article, I describe the development of this practice by the Israeli Supreme Court and its influence on the relationships between the courts and politics in Israel. I also provide a critical evaluation of the doctrine.

Juliano Zaiden Benvido: Behaviors Matter: Dilemmas and Side-Effects of the Brazilian Supreme Court's Behavior during President Dilma Rousseff's Impeachment

In 2016, Brazil experienced the second presidential impeachment since the transition to democracy in 1985. It followed, in many respects, the pattern Pérez-Linãn had previously described as typical in Latin America for such an outcome: weak military, strong media coverage, popular protests, and loss of support in Congress. Yet Pérez-Linãn does not go much further in connecting impeachments to particular behaviors of the judicial system. In President Dilma Rousseff's impeachment, the Supreme Court clearly transformed itself from a simple arbiter of the game into one of the central players of the game. It was, though, strongly engulfed by the political crisis and saw its authority increasingly questioned, especially during the 2018 national elections. Drawing from the Brazilian case, this paper explores the dilemmas of activism and self-restraint of Supreme Courts during such traumatic moments. It also questions how such behaviors can shape the Court from that moment on.

Sabrina Ragone: ***Commentator***

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

161 CHALLENGES TO CONSTITUTIONAL DEMOCRACY IN LATIN AMERICA

This panel explores the challenges to constitutional democracy in Latin America. Some papers are country specific, focusing on Brazil or Venezuela. Others look at more general problems in the region associated with human rights law or constitution making.

Room:

A101

Chair:

Ana Micaela Alterio

Presenters:

Luisa Netto
Jorge Contesse
Joshua Braver
Raul Sanchez-Urribarri
Ana Micaela Alterio
Tarunahb Khaitan

Luisa Netto: Brazil: At risk of becoming an Illiberal Democracy?

Internal and external challenges are leading to a growing distrust in democracy, giving room to regimes pushed by various populists, which fulfill in some scale the characteristics of illiberal democracies - constraints on rights, press control, disregard of minorities, concentration of power in the Executive, elimination of political opponents. In Brazil, Bolsonaro presents himself as someone who can communicate directly with the people and ensure their will is translated into public policies. His official measures demonstrate a conservative authoritarian tendency - impregnating the public policy with religious belies, politically incorrect, intolerant and confrontational moral agenda. The paper proposes an assessment of Brazilian institutional situation to discuss whether Bolsonaro's government guidelines coincide with characteristics of the so-called illiberal democraies and how this can affect global constitutionalism considering the growing populist belt worldwide.

Jorge Contesse: "Human Rights Law and Constitutional Democracies in Latin America"

My paper explores the expansion of human rights law as a feature of domestic constitutional law in a context of democratic decay. It discusses the particular case of "Latin American international law," which combines a distinctive monist tradition of international law with a strong and recent adoption of constitutional review. The question I seek to address is: what can we learn from a case of enhanced monism that has (nonetheless?) rendered a dramatic democratic erosion? Is there a causal relation or is it just a coincidence? More generally, what does this exploration tell us about the future of constitutional democracy? The paper examines the ways in which the Inter-American Court of Human Rights takes stock of, and interacts with, domestic law. Specifically, it looks at recent articulations of that interaction, such as the notion of "judicial dialogue" and the development of a kind of Latin American common law of rights and constitutionalism.

Joshua Braver: ExtraOrdinary Adaptation: Popular Constitution-Making in Post-Cold War South America

Populist leaders define the people as one part of the population that is unbound by law to create new authoritarian constitutions. I examine all instances of popular constitution-making in post-Cold War South America to argue that through the "extraordinary adaptation" of old institutions the "people" may include everyone. Rather than opening a legal void, in extraordinary adaptation, the revolutionaries win democratic elections and then repurpose the old institutions by bending and re-interpreting their rules. The repurposing is principled: the revolutionary exhausts all other legal channels, openly acknowledges the violation to seeks popular vindication, and concedes enough to the opposition so that it may begrudgingly acquiesce to the new constitution. I show how populists in Venezuela and Ecuador established authoritarian constitutions through lawless and exclusive constitution-making while Colombia and Bolivia managed to avoid the same fate by through extraordinary adaptation.

Raul Sanchez-Urribarri: High Courts and Autocratic Consolidation: The Venezuelan Supreme Court under Nicolas Maduro's Rule (2013-2018)

This article discusses the role of high courts in the context of a political transition from competitive authoritarianism towards full autocratic rule. What are the roles of high courts in processes of authoritarian consolidation? Why, and under what conditions, would authoritarian rulers employ high courts to consolidate their rule and entrench their power? What advantages – if any – would a politicized, dependent, illegitimate high court afford a consolidating authoritarian regime?

Ana Micaela Alterio: *Discussant*

Tarunahb Khaitan: *Discussant*

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

162 THE RELATIONSHIP BETWEEN CONSTITUTIONAL DEMOCRACY AND A JANUS-FACED CIVIL SOCIETY

Courts and civil society are indispensable elements for the development of democratic constitutionalism. Indeed, they often work hand in hand to place strong checks with the government. Nevertheless, the rise of populism demonstrates another dimension of civil society. This panel aims to explore the dynamics between courts, civil society, and constitutional democracy. In her paper, Chang focuses on how the constitutional court and civil society in South Korea and Taiwan have placed their checks with the government and whether the constitutional court and civil society have –or have not– collaborated with each other. By contrast, Lin indicates that without correct and sufficient information, and genuine understanding and deliberation, civil society may have the potential to undermine democracy. Finally, Shaw argues that the concept of militant democracy is not the ideal starting point for safeguarding democracy in Taiwan when facing China's threat.

Room:

Auditorio E. Frei

Chair:

Wen-Chen Chang

Presenters:

Wen-Chen Chang
Chun-Yuan Lin
Yung-Djong Shaw

Wen-Chen Chang: Constitutional Court and Civil Society in Constitutional Governance: South Korea and Taiwan in Comparison

Courts and civil society are indispensable elements for the development of democratic constitutionalism. The functions that courts and civil society may provide for constitutional governance, and most importantly, the interactions between courts and civil society, have recently attracted attention from comparative constitutional studies. This research is aimed at understanding the ways that courts and civil society in both South Korea and Taiwan have functioned and how their performances may have impacted constitutional governance. Specifically, this research is focused on how the constitutional court and civil society in South Korea and Taiwan have placed their checks with the government and whether the constitutional court and civil society have –or have not– collaborated with each other, and what have been the perceptions of each other's functions and the relationships between them.

Chun-Yuan Lin: When democracy becomes its own enemy—the problems of 2018 Public referendum in Taiwan and possible proposals

Taiwan enforced the Public Referendum Act in 2004, however, it has been criticized as "birdcage act" because of its high threshold. The Act was undergone a significant revision in 2017 and boosted 10 proposals for a public referendum in 2018. Yet It not only exaggerated the existing social conflicts and distrust, but also invited criticism to human rights and the he democratic deficit of referendum. This article focuses on the issues regarding to topics, process of mobilization, review and debates, effects of same-sex marriage related referendum topics, inquiring into the complex issues of discrimination, religious involvement and democratic deficits of public referendum. The development of 2018 referendum indicates that, without correct and sufficient information, and genuine understanding and deliberation, public referendum may have the potential to undermine democracy.

Yung-Djong Shaw: Countering "sharp power": First thoughts on a theory of constitutional security

Recent years have seen China projecting its political and economic might around the world. Using foreign aids, investment projects and the lure of its vest domestic market as leverage, China is capable of distorting the public opinion and democratic process of a foreign state. This author argues that the concept of militant democracy is not the ideal starting point for building safeguard mechanisms against "sharp power." Inspired by Neo-republican understanding of freedom as nondomination, this author proposes the idea of constitutional security as an alternative. By emphasizing the importance of preventing deterioration of existing constitutional standards, the idea of constitutional security can serve as the theoretical basis of a comprehensive safeguard mechanism against sharp power.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

163 TRANSITIONAL JUSTICE: THE NEW CHALLENGE FOR MEXICO

For several years, Mexico has experienced a phenomenon of large-scale violence, marked mainly by forced disappearance, torture and massacres of the civilian population and, with this, serious violations of human rights. The crisis of violence and its consequences have not been addressed by the institutions and ordinary mechanisms of justice, and the design and implementation of a transitional justice policy has been discussed only in recent months. Transitional justice applies when you move from an authoritarian regime to a democracy or when you go from a state of civil war to one of peace. However, in the case of Mexico, transitional justice finds its root in serious human rights violations that afflict the country. A public policy of transitional justice for Mexico should clarify the facts that caused the violence and identify those responsible, reduce impunity, repair the victims for the damage suffered and rebuild the social fabric, as well as prevent the repetition of the facts.

Room:

Seminario 3

Chair:

Irene Spigno

Presenters:

Luis Efren Rios Vega

Juan Francisco Reyes Robledo

Paloma Lugo Saucedo

Luis Efren Rios Vega: Justicia transicional y la jurisprudencia de la Corte Interamericana de Derechos Humanos contra Mexico en los casos de desaparición forzada de personas

In some Latin-American countries, included Mexico, violence and enforced disappearance are an endemic problem . What should States do in order to prevent this gross human rights violation? Alongside its contentious competence, the IACtHR have started to deal with this problem under a human rights paradigm, developing an important case law on this issue. However, the IACtHR has dealt with enforced disappearance in Mexico identifying three different periods and types: enforced disappearances with a political background, enforced disappearance mainly related to drug trafficking – committed by individuals, enforced disappearance committed by State agents but not under a political paradigm. Thus, this paper will deal with the IACtHR jurisprudence in cases in which enforced disappearances are addressed underlining the importance this case law has in connection with the transitional justice process Mexico is living.

Juan Francisco Reyes Robledo: Justicia Transicional en México: Contexto, Experiencias y Retos

The recent phenomenon of violence in Mexico, mainly due to the so-called “war on drugs“ declared in 2006, has impacted in several senses the justice system in Mexico. From the adoption of a large number of constitutional amendments to the unsuccessful transformation of national and local government agencies, the authorities from all orders and branches of government have tried to deal with this issue through a variety of mechanisms and processes. However, one of the questions which has been ignored in all these reforms is that relating to transitional justice. This article deals with the challenges that potential Transitional Justice mechanisms will have to face in its implementation in Mexico, taking into account the particularities of the public security conflict in the country. Moreover the proposal presented by the actual government will be put under discussion.

Paloma Lugo Saucedo: Femicidio en México. Diez años después del caso Campo Algodonero (González y otras)

It is indisputable that Mexico is experiencing an unprecedented wave of violence and serious violations of human rights. In addition, that country has historically been marked by the severe crisis it faces concerning to violence against women, and specifically to femicide. Although, for almost 10 years, since the judgment issued by the IACtHR, in the Cotton Field case (November 16, 2009), sat down the foundation for the Mexican state in its duty to prevent, sanction and eradicate violence against women, the truth is that to date there remain many concerns to evaluate a significant progress in the matter. Thus, this paper aims to analyze the good and bad practices developed by the Mexican state as of the issuance of the judgment, to determine the significant progress in fulfilling its duties derived from its commitment as a state party to the American Convention of Human Rights and compliance with the decisions of the Court.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

164 CURRENT CONTROVERSIES IN EUROPEAN LAWMAKING

Panel formed with individual proposals.

Room:

Seminario 2

Chair:

Zsolt Szabó

Presenters:

Robert Siucinski
Marta Morvillo
Martijn van den Brink
Zsolt Szabó
Ute Lettanie

Robert Siucinski: Common European Heritage of Administrative Procedure

EU still has not adopted a legally binding act regulating administrative proceedings before its all authorities. It brightly contrasts with a long tradition of codification of administrative procedure in the vast majority of EU member states. Furthermore, nowadays we have to deal with a new wave of codifications. It arrives not only to countries with well established achievments like Spain and Portugal in 2015, but extends on those usually reluctant to that kind of provisions. French Code of relations between administration and the public was finally adopted after decades of debates, as an effect of the case law, scholarly pressure and a few proposals. The analysis of factors which led to current state of affairs requires therefore the extensive use of comparative and historical method. However, the results of research can have a crucial importance for understanding of EU administration and may be used in future for amelioration of procedural side of rising global administrative law.

Marta Morvillo: From contestation to accountability in EU pesticides regulation: the case of glyphosate

Science-based regulatory determinations largely escape political-democratic and legal accountability mechanisms, their technical complexity representing an obstacle for most non-specialized accountability fora (i.e. courts and parliaments). In this context, the renewal of the authorization for glyphosate represents a worth-exploring case, being meaningful from two perspectives: firstly, it exposes the limits of the EU's approach to risk regulation, based on a strict separation between scientific and policy considerations. Secondly, it provides insights as to how traditional accountability mechanisms can be transformed and adapted so to cope with technical complexity. Having sketched the relevant EU legal framework, the paper recounts the different phases of the saga before mapping the different mechanisms activated to hold decision makers to account, and provides an assessment of such mechanisms and of their potential for enhancing the accountability of EU pesticides regulation.

Martijn van den Brink: Legislative Interpretation within the European Union: The Challenge of Legislative Intent

If the central purpose of interpretation is to show respect for the authority of the EU, how should those faced with the task of interpretation interpret European Union legislation? This article rejects purposive interpretation as it implausibly assumes the EU legislature acts solely with the intention to realise a set of substantive purposes, thereby ignoring that the legislative plan includes the legislative rules posited in the text of its acts. It also dismisses theories of interpretation that argue for a literal reading of legislative text. Instead, the article argues that the object of interpretation should be the intended meaning of the EU legislature, which the interpreter can discern by placing legislative text in the context in which the legislature expressed itself. The shortcomings of existing theories of legislative interpretation within the EU and the strength of the alternative presented here are illustrated by examples from the case law of the EU Court of Justice.

Zsolt Szabó: Parliamentary committees of inquiry and rights of the opposition

The paper focuses on the mandatory initiative of the parliamentary minority (opposition) to set up a parliamentary committee of inquiry, as designed for the first time in Germany by the Weimar Constitution. This model was later adopted by some new democracies of Europe such as Albania, Kosovo, Lithuania, Portugal, Slovenia - in Hungary it was abolished in 2014. However, evidence from experience shows that due to a lack of effective legal guarantees, this legal institute functions properly only in Germany. Either no inquiries are launched, or a formal setup of a committee is followed by ineffective non-activities. A key issue is therefore the availability of inquiry rights for the parliamentary opposition during the entire inquiry procedure, and not just at the initial phase. The presentation looks at the legal background and practice of the mandatory minority initiative in the above countires and also at the possible reasons why parliamentary inquiries fail.

Ute Lettanie: The ECB's Performance under the ESM Treaty on a Sliding Scale of Delegation

Two opposing theories explain the European Central Bank's (ECB) far-reaching powers: principal-agent and trusteeship. This article situates both theories on a sliding scale of delegation, with agents on one end of the spectrum, and trustees on the other. Applying this new perspective to the European Stability Mechanism (ESM) allows us to understand how the ECB, positioned on the agent side of the scale by the ESM Treaty, slides towards the trustee side in practice. This way, the article identifies a problem: the ECB assumes a 'zone of discretion' that is not captured by the control mechanisms, thereby disregarding an essential feature of delegation. This conclusion is confirmed by the legal boundaries of delegation established in the Meroni doctrine. These findings become increasingly important with the long term aim to incorporate the ESM in the EU legal order.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

165 SISTEMA DE JUSTICIA Y DESAFÍOS PARA LA PROTECCIÓN DE LOS DERECHOS

Panel formed with individual proposals.

Room:

Seminario 1

Chair:

Lautaro Ríos

Presenters:

Diego Gamarra
Francisco Bustos
Lautaro Ríos
Ariana Macaya
Gaspar Jenkins Peña y Lillo
Carolina Vergel

Diego Gamarra: Decisiones constitucionales sobre especificación de derechos. Contribuciones para un modelo más comprometido con la democracia

The tension between democracy -as self-government- and human rights -as demands for limits on government- still causes insomnia to constitutionalists. That "dilemma" is particularly clear when judicial review and the entrenchment of rights in rigid constitutions are discussed. In previous papers, I have argued that (i) formal constitutions are justified exclusively if their rigidity derives from the best democratic procedure available –which also means it should be relatively easy to achieve- and (ii) judicial review contributes the perspective of the case but it is only acceptable if democratic principle and the whole institutional design are seriously considered by judges. Anyway, said grounds are necessary but not sufficient to defeat the counter-majoritarian difficulty. Decisions specifying rights are indeed constitutional, therefore, they should be also defined under an intense democratic procedure. I hereby intend to propose alternatives involving citizens in said decisions.

Francisco Bustos: El Estatuto de Roma de la Corte Penal Internacional y su empleo por parte de los tribunales chilenos (1998-2018)

The 20 years of the Rome Statute make it possible to reflect on the influence it has had on Chilean judicial practice in the investigation, prosecution and punishment of crimes against international law. Although the Rome Statute, by express provision is not applicable for cases that occurred prior to its validity, and the Chilean ratification only took place in 2009, this instrument has had a great influence on national doctrine and jurisprudence, especially for the Supreme Court, when accounting for the concepts of the general and special part of International Criminal Law. Coinciding with the ruling of the Inter-American Court of Human Rights in the case "Almonacid Arellano v. Chile", the Rome Statute has begun to emerge as an instrument of great importance for various decisions of the Chilean courts. In this way, we will review some judgments and jurisprudential lines that, under their influence, have allowed us to deal with crimes against humanity in a better way.

Lautaro Ríos: El Principio Fundamental de Inexcusabilidad Resolutiva

Es un principio fundamental en el ejercicio de una potestad, aquél sin cuya presencia ésta deja de funcionar. En mi opinión, son principios fundamentales en el ejercicio de la potestad jurisdiccional, la juridicidad, la congruencia y la inexcusabilidad resolutiva. La ausencia de cualquiera de ellos en el conocimiento y resolución de un asunto jurisdiccional le deja privado de valor y de eficacia. En esta reflexión abordaremos este último principio, no sólo por su importancia decisiva para resolver efectivamente un asunto judicial sino también por la trascendencia que le ha reconocido nuestro sistema político chileno al otorgarle rango constitucional (Art. 76-C. Política). La inexcusabilidad resolutiva consiste en la obligación que la Constitución impone al juez de decidir derechamente el conflicto o asunto que, siendo de su competencia, le ha sido sometido, debiendo resolverlo conforme a las leyes que lo regulan y, en su ausencia, de acuerdo a las demás fuentes jurídicas aplicables.

Ariana Macaya: Internacionalización del Derecho Constitucional y Judicialización de la política: el impacto del Sistema Interamericano de Protección de Derechos Humanos en la resolución de controversias socio-políticas en Costa Rica

The importance of the Constitutional Chamber of the Supreme Court of Costa Rica in the resolution of the main controversies that affect the country, from the presidential re-election to the debate on equal marriage, reveals a tendency towards the judicialization of politics. This phenomenon has taken on a new dimension by integrating a new actor into the system: the Inter-American Court of Human Rights. If, until a few years ago, the constitutional judge was considered the ultimate referee of political and constitutional conflicts, the internationalization of constitutional law has meant that more and more disputes are decided on the inter-American scale. This article will look through three examples - the case of IVF, therapeutic abortion and equal marriage – in order to analyze this phenomenon and its impact on the Costa Rican constitutional model.

Gaspar Jenkins Peña y Lillo: La Acción de No Discriminación a la Luz de la Tutela Judicial Efectiva. Un Examen Práctico

This work critically reviews the procedure established by Statute N 20.609 to solve claims on arbitrary discrimination, in the light of the material parameters that effective judicial protection right entails, specially regarding the practical outcomes of judicial activity. Thus, we have concretely examined the process, through an extense judicial analysis mainly focused in lower courts opinions, aiming to ascertain the effectiveness of this action, the manner arbitrary discrimination claims are judged, the context in which the legal conflict takes place and/or the impingement of rights, as well as the using of the available legal means to solve the problem. With this work we aim to assess the virtues and deffects of such action and especially the legal limitations that bind the judge when properly solving a discrimination case.

Carolina Vergel: Tecnología y derechos sexuales y reproductivos

The sexual and reproductive rights agenda represents one of the most promising and threatened fields in the fight for the full emancipation of women and against the discrimination of the LGBTI. The research proposal inquires the role of the internet of things', in particular of the digital technology and the web app, in guaranteeing and exercising sexual and reproductive rights, with particular emphasis on the situation of women (including, of course, lesbians and trans). The research aims to map the kinds of tools that have been proposed to guarantee those rights (e.g., about sexual education or apps that can provide some help in cases of sexual violence), and then it analyses its uses and the gender and sexual representations, along with their constitutional challenges.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

166 AUTHOR MEETS READERS: DEMOCRACY, CATEGORY POLITICS AND ANTI-DISCRIMINATION LAW

The law prohibiting discrimination sits within the constitutions of many legal systems around the world. This law traditionally focuses on individual actions and behaviour. Hernandez speaks to the conference theme of public law in a time of change by articulating the new challenges which anti-discrimination law must tackle, and how it must change – or not change - if it is to do so effectively. She focuses in her book on the elevation by policy makers and legislators of a new category of 'mixed-race' victims of discrimination. She considers whether this apparent extension of the protection from discrimination is in fact a retrenchment from the fight against discrimination, and the consequences of this. Hernandez writes in the American context but her questions are not limited to the USA. Readers from the United Kingdom, Brazil and the United States. will comment upon how anti-discrimination law should respond to these new challenges.

Room:

LLM92

Chair:

Iyiola Solanke

Presentator:

Tanya Hernandez
Audrey Macfarlane
Thiago Amparo
Terry Smith

Tanya Hernandez: Multi-racials and Civil Rights: Mixed-Race Stories of Discrimination

Audrey Macfarlane: *Discussant*

Thiago Amparo: *Discussant*

Terry Smith: *Discussant*

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167 RISE AND FALL OF CONSTITUTIONS: PROMISES AND CHALLENGES

Modern society has turned the Constitution into a privileged locus of political struggle, as the conquest of constituent power came to be imagined as an irresistible and magic-like social force capable of purging a polity of all its vices. The rise of a Constitution is often portrayed as a time of hope and promise. Its depictions, both intellectual and imagined, are those of a new political dawn. And yet, more often than not, constitutions fail to deliver on its chant of redemption. Through a comparative analysis of the birth, growth and life of the 1975 Greek Constitution, 1988 Brazilian Constitution, 1997 South African Constitution and the 2014 Egyptian Constitution we will try to answer the following two questions: "what challenges do constitutions face at inception" - and "what forces lead to constitutional decay"? The countries chosen are meant to serve as snapshots of discrete constitutional moments in states with a tradition of institutional instability.

Room:

Auditorio P. Aylwin

Chair:

Ghazal Miyar

Presenters:

Ghazal Miyar
Bruno De Sousa Rodrigues
Eirini Tsoumani
Mohamed Abdelsalam

Ghazal Miyar: Out of the Frying Pan? South Africa's Constitutional Inadequacies

The South African Constitution of 1997 was developed in the aftermath of decades of oppression and gross violations of human rights norms. It was an instrument which was globally commended for its structural integrity and its ability to unite a deeply torn and damaged society. After 22 years, the previously oppressed community of South Africans have awoken from the enchantment of a dream built on with the words of their oppressors at the cost of their dignity and lives. As Rawls has described, there can only be harmony once the society has a unified conception of justice where the people are guided by similar values. And yet, there is no tribute paid to the values of black South Africans, nor has the constitution been able to satisfactorily compensate them for the sufferings which they have endured. This paper will assess the constitutional provisions which were meant to provide these reliefs and how (if at all), it was able to do so. And where it failed, why?

Bruno De Sousa Rodrigues: Brazil: constitutions in times of trouble

The 1988 Brazilian constitution was enacted in the aftermath of the military dictatorship that ruled Brazil until 1985. For the first time in the Republican history of Brazil, the illiterate were allowed to vote for the Constitutional Assembly. The document drafted was an outcry against the years of dictatorship, promising both democracy and social inclusion. Indeed, for its strong commitment to social rights, the 1988 Constitution came to be known as the "Constituição Cidadã" (Constitution of Citizens). After 99 amendments, the Brazilian constitution has celebrated its 30 years facing its most severe crisis. Against an unpopular government, a formal presidential system behaved as parliamentarian one. The impeachment of Rousseff invoked controversy and many have qualified it as an informal vote of no confidence. and the imprisonment of Lula da Silva has eroded the confidence of a considerable part of the population in the institutions brought to life by the 1988 Constitution

Eirini Tsoumani: Rationality ruptures in austerity Greece and the Role of the Constitutional Judge

According to mainstream conceptions of the European sovereign debt crisis, a series of corrective rationality measures capable of regularizing a crippled economy, suffice to get countries out of their financial impasse. Policies need to transcribe into legal terms an economic and political discourse that supposedly outlines an exit from the economic recession. This rational mechanism of transcription is not always linear. Focusing on the constitutional judge, we draw on the case of austerity to demonstrate that the rational, forecasting function of the mechanism of the transcription of the political discourse into legal terms is not always possible. Through his competence to interpret the Constitution, the judge can refute the rational mechanism of transcription prognosis. Is the Greek Constitution capable of implementing the different interpretations offered by the judge and did the judge manage to save the Greek constitution from challenges of the sovereign debt crisis?

Mohamed Abdelsalam: Do Egyptian Judicial Practices Constitute the Major Force to Protect the Rule of Law

The 2014 Egyptian Constitution was drafted after the fall of the Muslim Brotherhood as an amendment to the 2012 Constitution but did not meet the expectations of the public who revolted against two regimes in less than four years for its existence. The fundamental principles of the Constitution affirm the rule of law, constitutional democracy, protection of human rights, and distributions of power. However, there were many challenges regarding the implementation of several promising constitutional articles and the judiciary played a major role in processing this implementation. As such, the tangled relationship between constitutional principles and the rule of law influenced the legal development of a rights framework in Egypt tremendously and incited the emergence of a diversified body of jurisprudence in the interpretation and practice of constitutional rights. The question which requires attention is: what is the role of the judge in this implementation process?

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168 BEYOND CAKE-BAKING : FREEDOM OF EXPRESSION, FREEDOM OF RELIGION AND EQUALITY AFTER MASTERPIECE CAKESHOP AND ASHERS BAKING COMPANY

Two recent cases, Matsterpiece Cakeshop v. Colorado [US] and Lee vs. Ashers Baking Company [UK] present, in stark terms, the potential clash between the commitment to equal protection (and antidiscrimination), and the commitment to free speech (and freedom of religion). In both cases the apex courts sided with the bakers (and thus de facto or de jure upheld their claim not to engage in what they saw as compelled speech), but the reasoning and the judicial strategy of the two courts for managing the conflict differs greatly. Moreover, each decision raise serious concerns in terms of its justification, coherence with principles underlying constitutional jurisprudence, and potential impact on speech and equality alike. The panel will closely examine these decision, critically analyze the reasoning of the two courts (and the courts below), and reflect on the potential significance of the decisions in the US, the UK, and transnationally.

Room:

Pedro Lira

Chair:

Mattias Kumm

Presenters:

Amnon Reichman

Kai Möller

Menaka Guruswamy

Amnon Reichman: Expressive Commerce, Anti-Discrimination and Freedom of Association: Lessons from the Old Common Law

This paper examines the 'cake-bakers' cases by situating them in a larger framework governing expressive commercial activities. The paper closely examines the contours of identity-related "expression" in the market-place (by critically examining the reasoning of Lee v. Asher Baking Company), and its relation to freedom of religion. It then proceeds to analyze the potential clash with principles of anti-discrimination, and concludes with unpacking the overarching freedom of association individual (moral agents) enjoy. The paper re-introduces the common law doctrine of common callings as a way to conceptualize (and legally organize) the potential clash of the opposing claims, and reflects on the purchase of this doctrine at the constitutional levels in the UK, the US and other liberal democracies (as they confront less-liberal belief systems).

Kai Möller:Religious Objection, Compelled Speech, and Compelled Acts

The paper starts with an acknowledgment of the force of the argument, relied on by the UK Supreme Court in Lee v. Ashers Baking Company, that it would be incompatible with freedom of expression to compel a person to express a certain view, such as support for same sex marriage. It examines the rationale for this argument and asks whether or to what extent this rationale applies not only to expression but to acts more generally, such as the acts of selling a wedding cake to a gay couple or selling wedding cakes that will be used to celebrate same sex weddings.

Menaka Guruswamy: Equal Protection, Justice and Speech

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169 THE POSSIBILITY OF REGIONAL CONSTITUTIONALISM IN ASIA

Recent decades have witnessed the discussion and debate on the possibility of regional constitutionalism around the world, such as the Global South constitutionalism and the North American constitutionalism. Given Asia's ethnic, linguistic, religious, and cultural mosaic, however, whether there will be regional constitutionalism in Asia seems to be more problematic. This panel endeavors to provide a tentative answer on this puzzle. Yeh analyzes this question from three perspectives: tradition and transplant, transition and institution, and globalization and competition. Lin takes a more modest stance, suggesting that a dialogic model of judicial review may be one common ground despite the diversity of constitutionalism in East Asia. Finally, Su articulates Taiwan's chequered development of transitional justice, another buzzword of constitutionalism in East Asia given the region's horrible history of rights protection.

Room:

A102

Chair:

Jiunn-Rong Yeh

Presenters:

Chien-Chih Lin
Yen-Tu Su
Jiunn-Rong Yeh

Chien-Chih Lin: Dialogic judicial review and its problems in East Asia

Recent decades have witnessed the emergence of regional constitutionalism, such as North American constitutionalism or Global South constitutionalism. Instead of arguing whether there is a model of East Asian constitutionalism, this article takes a more modest stance, suggesting that a dialogic model of judicial review may be one common ground despite the diversity of constitutionalism in East Asia. Although the current literature on dialogic judicial review has concentrated primarily on common law jurisdictions in the West, the application is by no means so limited. Dialogic judicial review not only straddles the common law/civil law divide but also bridges the gap between the West and the East. In fact, the political environment in East Asia has provided fertile soil for the growth of dialogic judicial review for two interrelated reasons: the persistence of authoritarian regimes and the rampant political attack against the judiciary, even in democracies.

Yen-Tu Su: Transitional Justice and Political Compromise in Taiwan

Transitional justice in Taiwan is criticized for being too late, slow and timid by some, and too disruptive, vengeful and polarizing by others. The politicization and polarization of transitional justice are of particular concern to many students of Taiwan politics. Rather than resulting from direct negotiations and mutual agreements between the elites from the two political camps, the political compromise Taiwan has over transitional justice only gradually reveals its dynamic state over time. The case of Taiwan, in other words, exemplifies a long-term, incremental, an intermittent attempt to improve on a compromised state of bounded transitional justice through the rough and tumble of partisan competition. This approach of majoritarian muddling through is not just a more feasible second-best, but also holds the potential to outperform other less majoritarian and more conciliatory alternatives in dealing with the lingering past of authoritarianism in Taiwan.

Jiunn-Rong Yeh: Regional Constitutinalism: Asia in Focus

The rise of Asia has had tremendous impacts on the rise and fall of regional geopolitical powers in the region and in the globe as well. Three angles are presented to analyze Asia: tradition and transpalnt, transition and institution, and globalization and competition. Special attention is paid to the formation of regional constituional dialogue among Constituions, state governments, courts, civil societies, and other public and private entities in the region. This study is aimed at investigating the analytical framework and theoretical undertakings of regional constitutionalism as applied in Asia. It is directed to a contextual analysis of Asian constitutional jurisdictions, aiming at forming a model of typology reflecting the dynamics of contemporary Asian constitutional development. The last focus is placed on the context of (dis)integration in the region and ints corresponding constituitonal undertaking, forming the features and arguing for the nature of Asian constitutionalism.

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170 LAW AND VIOLENCE: STRUCTURAL ENTANGLEMENTS OF PUBLIC/EU/ PUBLIC INTERNATIONAL LAW

Rather than focussing exclusively on how public law and regulation, at both the domestic and transnational levels, has or ought to respond to exogenous shocks, crisis and shifts, this panel instead examines the structural violence inhered in Public Law's substance and form and the (re-) production of that violence. Bringing together scholars from different legal disciplines, the panel will discuss both the heterogenous forms of violence- whether 'locked-in'/produced by public law- and the varying temporalities of violence- whether reproducing imperial strategies or imagining new horizons of violence. In problematising the discursive and material presumptions and pretensions of public law at its different levels, the panel tentatively hopes to reveal a greater complexity in the question of 'how far can public law go in responding to' and perhaps begin to identify some of the endogenous problems of public law.

Room:

Allende Bascuñan 2

Chair:

Eva Nanopoulos

Presenters:

Maria Tzanakopoulou
Maria Ioannidou
Tanzil Chowdhury
Eva Nanopoulos

Maria Tzanakopoulou: Market Discipline and the Constitution

This paper argues that the constitutional identity of Europe has come to be imbued by the constant threat of violence inherent in the idea and practice of market discipline. Central to this configuration is the absence of a European transfer union that would redistribute wealth from richer to poorer states. A notable feature of the constitutional architecture of Europe, and of the EMU in particular, is that Member States enter into negotiations with markets individually rather than on the basis of a common European bond. In turn, the market is free to coerce states into fiscal discipline against the background of a constant threat of increase in interest rates. Implicit, therefore, in this architecture is the Union's handing over to the markets the power to exert violence upon individual Member States. This paper asserts that the violence of market discipline has become an integral, structural component of the European constitution and examines the significance of this development.

Maria Ioannidou: Digital Markets and Structural Violence: the role of competition law

Various concerns have been raised about the impact of AI and the need to imbue ethics and legitimacy in AI design. This paper adopts a novel lens to review the problems associated with data collection and AI decision making in digital markets. It relies on Johan Galtung's theory of structural violence, which has been very influential in a number of fields. Section II discusses the 'structural violence' theory and identifies those attributes that are relevant in the context of digital markets. Section III then discusses the characteristics of digital markets that may be perceived as expressions of structural violence. Section IV questions whether competition law is an efficient tool to address such problems. One suggested solution is the "responsive" remodelling of competition law enforcement, informed by Ayres and Braithwaite's theory of responsive regulation – and the subsequent development of this theory to embrace restorative justice considerations.

Tanzil Chowdhury: Continuities of Empire in UK Public Law

The governance of the British empire was a staple of constitutional law text books of antiquity. In classic textbooks, a chapter on the 'Laws of Public Administration' would sit alongside a chapter on 'India and the Self-governing Dominions.' More recent treatment of the legacies of empire have examined the centrality of imperialism in the thought of constitutional scholars that are central to public law teaching today. However, empire rarely, if at all, enters the imagination of contemporary UK public law. The implication is that UK public law is thought to have epistemologically broken from its imperial legacies, initially oriented toward a nation-state centered constitution and then to the transnational constitution that incorporates the UK's membership of various supranational organisations. This paper counters the 'break' from imperialism and begins to sketch out some of the continuities of empire in UK public law, focussing on the war powers prerogative and BOT constitutionalism.

Eva Nanopoulos: *Discussant Paper: Theories of Legal Change*

The discussion paper will link the three papers together by thinking about different conceptualisations of public law and processes of legal change. It will contrast idealist approaches with readings drawn from historical materialism, as a theory that allows us to account for the heterogenous forms and varying temporalities of violence that cut across legal structures, including by tracing legal change to changing configurations of capitalism as a social order. Such insights also allow us to examine both the false contingencies and false necessities that are encoded into the law and hence the potential and possible pathways for progressive change.

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171 CONSTITUTIONALISM, DEMOCRACY AND CONSTITUTIONAL CHANGE

The recent wave of populist leaders employ an array of means to erode democracy in a legal, gradual and incremental process. One mechanism at the service of those leading the process is formal constitutional change. Populist leaders reject 'intermediaries between the people and themselves', thereby often turn directly to the people in course of executing their agenda. Also, they often limit the power of the judiciary and simultaneously engage in court-packing. What is a legitimate exercise of 'the people', how can we ensure the legitimacy of popular mechanisms, such as constituent assemblies, and can popular mechanisms override formal constitutional procedures? Also, how should we respond to threatened, pressured or packed courts that have legitimated anti-democratic constitutional changes? And should we construct a new judicial role that would be tailor-maid to face challenges to judicial independence in populist times of democratic erosion? This panel discusses these challenges.

Room:

Aquiles Portaluppi

Chair:

Francisca María Pou Giménez

Presenters:

Kim Scheppele
Richard Albert
Rosalind Dixon & David Landau
Yaniv Roznai & Tamar Hostovsky Brandes

Kim Scheppele: The Fictional Legitimation of Constituent Assemblies

For more than two centuries, the constituent assembly has been the classical way for government to begin again on a new ground of legitimation. However, in an age of democratic backsliding, new autocrats are hijacking the form of constituent assemblies without the slightest intention of generating public consent. We need a critical theory to assess when constituent assemblies do real legitimation work and when they are just covers for autocratic concentration. I show how our present theory is actually a theory of first constituent assemblies in a particular location. I propose that we use a different theory for assessing second and third and later constituent assemblies in a particular place. A later constituent assembly cannot displace an earlier one unless its democratic pedigree of the second is stronger than the first. Constitutional democracy embeds a normative one-way ratchet.

Richard Albert: Discretionary Referendums in Constitutional Amendment

The results of recent referendums around the world have concealed an important similarity among many of them: they were not constitutionally required. For example, the UK Constitution does not require a referendum to authorize Brexit nor does the Colombian Constitution require one to ratify the FARC peace pact. Yet in both cases incumbents felt compelled to forego the settled rules of constitutional change in order to bring their reform proposals directly to the people. This is not a rare practice: leaders have often had recourse to referendums by choice rather than obligation as part of a larger strategy to legitimate a major constitutional change. I draw from various non-obligatory referendums to develop a typology of discretionary referendums in constitutional amendment. I examine why constitutional actors use discretionary referendums and situate their use against the backdrop of an increasingly observable phenomenon in democracies: the circumvention of formal amendment rules.

Rosalind Dixon & David Landau: Abusive Judicial Review: Courts Against Democracy

Both in the US and around the rest of the world, courts are generally conceptualized as the last line of defense for the liberal democratic constitutional order. We show that it is not uncommon for judges to issue decisions that instead intentionally attack the core of electoral democracy. Courts around the world, for example, have legitimated anti-democratic laws and practices, banned opposition parties to constrict the electoral sphere, eliminated presidential term limits, and repressed opposition-held legislatures. We call this: 'abusive judicial review'. Would-be authoritarians at times seek to capture courts and deploy them in abusive ways as part of a broader project of democratic erosion, because courts often enjoy legitimacy advantages. This paper gives examples of abusive judicial review from around the world, explores potential responses both in domestic constitutional design and international law, and asks whether abusive judicial review is a potential threat in the US.

Yaniv Roznai & Tamar Hostovsky Brandes: Democratic Erosion, Populist Constitutionalism and The Unconstitutional Constitutional Amendments Doctrine

Populist leaders recently abuse formal constitutional change procedures, in order to erode the democratic order. The changes, are very often, gradual, incremental and subtle, and, when examined in the context of an ongoing process, may prove to be part of a democratic erosion process in which the whole is greater than the sum of its parts. While the doctrine of 'unconstitutional constitutional amendments (UCA) may seems as a useful tool against abusive constitutionalism, we demonstrate why in the context of democratic erosion it faces three significant limitations rooted in: incrementalism - total constitutional replacement - and court-packing or judicial capture. These three characteristics of populist constitutionalism severely undermine the utility of the UCA doctrine. We thus propose a new theory of judicial review of constitutional amendments within the context of democratic erosion and abusive constitutionalism, in order to tackle or at least relax these challenges.

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172 LA CONSTITUCIONALIZACIÓN DE LA TEORÍA DEL DERECHO

The workshop seeks to generate a dialogue about the possibility of building a theory of law according to the new political and constitutional framework. A legal theory focused on the strengthening and defense of the social and constitutional State. In the construction of this theory mistakes are made, as starting from the constitutional literalism, or an epistemological reductionism that ends up transforming moral or political concepts into legal norms by the mere fact of being in the Constitution. This is not only a theoretical but a political task. Legislative and judicial legitimacy crisis requires the construction of conceptual tools that make feasible the defense of the Rule of Law. A constitutionalized theory of law is imperative, as the dialogue around the sources of law, the concept of standards from the principles, their application, interpretation and balancing, the incorporation of the constitutionality block, for an effective defense of the constitutional State.

Room:

D302

Chairs:

Milton César Jiménez Ramírez

Sergio Iván Estrada Velez

Jorge Ernesto Roa Roa

Presenters:

Juan Carlos Ospina

Guillermo Otalora Lozano

Fabian Salazar

Diana Maria Molina Portilla

Carolina Valencia Mosquera

Alejandro Gomez Velasquez

Juan Carlos Ospina: La constitucionalización transitoria del derecho

After a long and painful armed conflict, the Colombian State signed a Peace Agreement with the oldest guerrilla in the continent. This historic step required incorporation into the Constitution of those aspects that make the compliance of the agreement feasible and of others that seek to endow it with permanence and prevalence. In 2017, thirty-one transitory articles were incorporated into the Constitution, as well as four transitory paragraphs, and four ordinary provisions were modified. Elements were added to guarantee the rights of the victims of the conflict and to provide stability to the essential elements of the agreement, suggesting the existence of a Constitution for the transition. The purpose of this document is to account for the legal elements that support the constitutional proposal for the transition and to determine those elements that, supposedly transitory, will permanently influence the legal system.

Guillermo Otalora Lozano: Razones de principio y razones de política en la Corte Constitucional de Colombia

In 1967, Ronald Dworkin proposed a distinction between principle and policy arguments. Policy arguments refer to general objectives related to the welfare or well-being of the community. Reasons of principle, in contrast, refer to requirements of justice, fairness or another dimension of political morality. The Constitutional Court of Colombia has recently made decisions founded mainly on reasons of policy. In 2018 the Court restricted the scope of a prohibition on employers to dismiss pregnant women, on the premise that this prohibition is counterproductive to women's participation in the labor market. In another case, the Court held it was unreasonable to adopt an order protecting the right to education of rural students who took four hours to get to their school. Using these cases as examples, I propose a typology of policy reasons and discuss the conditions under which this kind of reasons may be legitimate or illegitimate in a judicial decision.

Fabian Salazar: El estándar de reparación integral: Más allá de las graves violaciones de Derechos Humanos

(i) The explanation of the components of integral reparation, according to UN Resolution AG60-147 (restitution, compensation, rehabilitation, satisfaction and non-repetition) - (ii) its application in the field of international human rights law - and (iii) its uses in the jurisprudence of the Council of State, cases of direct reparation, and its potential in other areas of law, within the framework of the constitutionalization process.

Diana Maria Molina Portilla: El impacto del constitucionalismo en la teoría social y económica de los derechos humanos en Colombia

With the entry into force of the 1991 Constitution in Colombia, the traditional system of sources of law changed, not only in the prevalence of the constitutional text and the judicial control of constitutionality, but also in the preponderant role of the jurisprudence of the Constitutional Court in determination the new fundamental rights, minimum essential content and the limits to the exercise thereof. This is the impact of constitutionalism on the theory of fundamental rights that has become more evident when judicial decisions are about social and economic rights, for example: health, education and environment healthy. This paper seeks to explore this relationship between constitutionalism and the theory of fundamental rights, as well as the analysis of the variations in the concept and the foundation of economic and social rights.

Carolina Valencia Mosquera: Educación al servicio del constitucionalismo "De cómo hacer cosas con la constitución y no desfallecer en el intento"

The absence of materialization of popular sovereignty is not an exclusive issue of contemporary constitutionalism, but has been present in the historical becoming of constitutional law - in its early, ancient and medieval manifestations, and in each of the phase of constitutionalism. While in the ancient, medieval constitutions and in some stages of constitutionalism, no express reference is made to popular sovereignty, it is estimated that the elements that determine it concur in these constitutional events under the dual vocation of resist and participate, proper to constitutional law, which is tried to accredit through a strategy of historical and deductive analysis. Finally, the need will be raised for universities, in consideration of their teleological nature, to contribute, through processes of popular literacy in constitutional culture, to the real and effective realization of popular sovereignty.

Alejandro Gomez Velasquez: ¿Separación con colaboración? Una propuesta en favor de la colaboración armónica entre poderes en los Estados contemporáneos

It is well established that the separation of powers is an essential structuring principle of the contemporary states, yet the importance of collaboration between powers has received significantly less attention in the literature. Whereas the separation of powers is necessary to limit the abuse of power, collaboration between powers is equally important because this increases the efficiency of the state. As such, separation of powers is a necessary but not sufficient condition for branches of contemporary states to achieve collective and democratic action. Indeed, collaboration of powers is a principle that is present in the constitutions of all contemporary states, whether explicitly stated or not. Intuitively, separation and collaboration are in conflict, but my article argues that constitutions can concurrently serve as instruments that limit, constrain and control political power and that coordinate and empower collective and democratic action.

Panel Sessions VI

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173 JUDICIAL METHODOLOGY AND DECISION-MAKING II

Panel formed with individual proposals.

Room:

Allende Bascuñan 1

Chairs:

Eneida Desiree Salgado

Presenters:

Eneida Desiree Salgado, Renan Guedes Sobreira & Erick Kiyoshi Nakamura

Kenny Chng

Shucheng (Peter) Wang

Sebastian Lewis

Carolina Alves das Chagas

Eszter Bodnar

Eneida Desiree Salgado, Renan Guedes Sobreira & Erick Kiyoshi Nakamura: A menace in robes: judicial populism, democratic constitutionalism in jeopardy

The appeal to the people's feelings or the "public opinion", disregarding constitutional principles and rules, is something frequent in American – and now even in European – politics. The dissatisfaction with the political representation and the distrust and disillusionment with liberal democracy are triggering the rise of political populism. In Brazil, the populist discourse reached another branch: in the name of morality, judges of the Federal Supreme Court of Brazil ignore constitutional explicit rules and, allegedly, decide "fairly". Using a language of exception, the Supreme Court dismantled constitutional parliamentary prerogatives: no freedom of speech, no freedom from arrest. Under a moralistic fury, judges are ignoring constitutional checks and balances and their distance from the democratic field. Using broadcast communication and social media, the members of Brazilian Federal Supreme Court are overtaking political leaders and presenting themselves as the Nation's saviors.

Kenny Chng: A Theory of Precedent in Constitutional Interpretation in Singapore

Judicial precedents in constitutional law raise unique stare decisis considerations which have been the subject of a well-developed body of literature, especially in the context of US Supreme Court constitutional precedents. Yet, despite being a constitutional democracy with a common law heritage akin to the US, little attention has been paid in Singapore to the question of the proper judicial approach towards constitutional precedents, and little effort has been made to engage this significant body of literature. This paper aims to remedy these gaps – to discern the principles that Singapore judges have thus far applied in their considerations of constitutional precedents, to engage with the insights of US case law and academic commentary on the proper approach to stare decisis in constitutional law, and to synthesise these principles and insights into a useful framework that can guide and shape principled stare decisis analysis in Singapore constitutional law.

Shucheng (Peter) Wang: Judicial documents as a robust basis for judicial decision-making by China's courts

This article is to examine why and how judicial documents have been playing an auxiliary but crucial role in adjudication by China's courts. This leads to proposing a grey theory of judicial documents that explains why the judicial document, which exists in a grey area without an explicit legal basis, is suitable for China's legal regime, and how it is able to be referred to effectively by judges in adjudication. Moreover, it investigates the extent to which the judicial document enables the court, under the dual leadership of the next higher level court and the local Party committee, to respond to the higher-up political authorities swiftly and efficiently, and in particular how this resolves subnational diversity and political differences between localities. Finally, given the CCP's effort to build up an instrumentalist legal system, the judicial document has been able to adapt well to China's authoritarian regime and has demonstrated great political resilience.

Sebastian Lewis: Should precedents bind or persuade? The pros & cons

The effect a past judicial decision produces over the legal system is a question of importance not only for public law but for law in general. Determining whether a past decision should bind or persuade future courts is a political rather than a legal choice: nothing in law's nature requires a specific option. In this paper I identify the values the binding model of precedents seeks to uphold: inter alia, to protect legitimate expectations, equality before the law and stability to the legal system. I argue that though these are sound values, the binding model entails a means (stare decisis) disproportionate to its ends. It is disproportionate because it places a heavy burden on judges (ie. to adjudicate & give law, which are conceptually different activities, and I articulate why). This, in turn, may conflict with two fundamental values: the adjudicatory independence of judges and the principle of separation of powers. I argue why the persuasive model is a bettter solution

Carolina Alves das Chagas: The Perils of Judicial Avoidance: on deciding not to decide and the Rule of Law

In today's democracies, the importance and influence of constitutional decisions are indisputable. What sometimes comes across less visible is how influential courts also are when they avoid a decision. Judicial avoidance is a common practice all around the world. Jurisdictions use different techniques, at different moments, with a common aim: delaying a decision on the substance. This paper wants to explore the importance of providing a normative framework for judicial avoidance. It defends that the legitimacy of the courts will only be strengthened once these avoidance practices are also exercised in compatibility with the Rule of Law. For that, it will start by identifying the avoidance techniques used in different jurisdictions, but focusing mainly on the Brazilian Supreme Court. Then, the downsides of a pragmatic approach will be analyzed. In conclusion, the advantages of a normative approach will be fostered.

Eszter Bodnar: The Use of Comparative Law in the Practice of the Supreme Court of Canada: A Quest for Methodology

Constitutional courts worldwide increasingly rely on comparative constitutional jurisprudence to both frame and articulate their position on a given constitutional question. Beside the legitimacy question, critics mostly focus on the methodology problems: cherry-picking or even misuse of comparative law may endanger the whole function of comparative constitutional reasoning. This paper gives an analytical overview of the case law of the Supreme Court of Canada, a 'comparative constitutional powerhouse' (Hirschl), from the very beginning until our days. By the textual and contextual analysis of all foreign law citations, it aims to identify patterns in the case law to understand the background, motivations, and forms of the use of comparative law. Finally, the paper makes steps to provide the judges with applicable methodological standpoints to enhance transparency in the comparative constitutional reasoning.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

174 CONSTITUTIONAL SHOCKS AND TRANSITIONS II

Panel formed with individual proposals.

Room:

FD-101

Chairs:

Oya Yegen

Presenters:

Cristian Eyzaguirre & Ventura Charlin
Davide Zanoni
Nikolaos Skoutaris
Timothy Waters
Ayesha Wijayalath
Oya Yegen

Cristian Eyzaguirre & Ventura Charlin: A Century of Constitution-Making Processes in Latin America: An Inclusiveness-Based Comparative Analysis (1917-2016)

Our research project surveys all the constitution-making processes that took place in Latin America from 1917 to 2016 in order to determine their level of inclusiveness. A novel aspect of this study is that it distinguishes between two types of inclusiveness, procedural and effective, and therefore, it provides a more in-depth assessment of the degree of inclusiveness during the constitution-making processes. We found that although most constitution-making processes can be described as procedurally inclusive, only few of them met minimal democratic conditions - consequently, most constitution-making processes could not be described as effectively inclusive. On the other hand, we also identified a relationship between higher procedural inclusiveness and higher democratic conditions. Finally, both procedural inclusiveness and democratic conditions have gradually risen through the years, particularly in the last decades.

Davide Zanoni: From legal certainty to legal resilience? New paradigms of legal transition in contemporary risk society

Social acceleration significantly impacted on law in terms of social needs and demand of new regulation. In particular, it plays a double interaction in the realm of constitutional law: it affects, on the one hand, the traditional concepts of legal certainty and legality since it demands new attitudes about the nature and sources of law. On the other, it requires to come to terms with the evolving temporality of law-making which has become a new topic in constitutional law i. e. a modern form of normativity to be defined and regulated. We are witnessing indeed the spread of legal theories (the "flexible droit" à la Carbonnier or the "democratic experimentalism" à la Sabel&Simon) aimed to design a different institutional framework capable of dealing with the requirements of a high-speed and risk society. Are these new paradigms in full compliance with the rule of law meant as a constitutional principle? The paper tackles the question.

Nikolaos Skoutaris: On Brexit and Secession(s)

The present paper aims at understanding the complex relationship between Brexit and secession by focusing on three aspects. First, it compares Article 50 TEU with constitutional provisions that allow for secession. Second, it explains the constitutional framework concerning the possible independence of Scotland and reunification of Ireland. Third, it discusses why a solution to the 'Irish border' conundrum that would entail a much closer relationship of this region with the EU than the rest of the UK should be seen as a pragmatic solution that protects the fragile balance struck by the Good Friday Agreement rather than as an annexation of Northern Ireland to the EU. As such, the chapter is a testament to the intertwined nature of the European constitutional landscape and the compound EU polity even in an area such as the one that deals with the withdrawal of a State from an international organisation - an area where States are supposed to possess almost unfettered autonomy.

Timothy Waters: Partitioning Kosovo: Moral and Practical Grounds for Redrawing State Borders

Recently, proposals for revising the border between Kosovo and Serbia have been floated. Major outside actors have consistently opposed territorial revision. They fear contagion to Bosnia and Macedonia, worry about violence, and oppose drawing borders on an ethnic basis. These objections are reflexive, but how real are they? This paper examines an alternative narrative about territorial revision: that it might enable normalization of relations between Serbia and Kosovo and more efficient internal governance within Kosovo, without jeopardizing Serb enclaves in the south. Above all, the dominant view is disengaged from the demographic underpinnings of the crisis. The legal and moral basis for NATO's 1999 intervention and Kosovars' own independence points to the plausibility of viewing territorial revision not as a problem, but a solution. It is precisely by engaging with how borders and identity are related that the lines of this crisis are most likely to be resolved.

Ayesha Wijayalath: The 2018 constitutional coup of Sri Lanka: the role of the judiciary and the constitutional culture

Sri Lanka, throughout its political history, oscillated between dark periods of democratic abuse and its attempts to regain a more balanced constitutional culture. In October 2018, Sri Lanka was plunged into an unprecedented constitutional crisis when the President attempted to remove the Prime Minister and then moved to prematurely dissolve parliament. This reversal of democratic gains and the legality of the executive action were brought before the final arbiter: the judiciary. The paper focuses on the role of the judiciary in particular and the resilient constitutional culture at large. It argues that the 2015 democratic transition and the constitutional reform that followed, empowered judicial independence and produced a democratic, rights-based constitutional culture that reinvigorated Sri Lanka's core commitments to democracy and the rule of law.

Oya Yegen: Turkey's Switch to Presidential System: Presidentialism à la Turca or Latin-American style of presidentialism?

This article focuses on the switch from parliamentary to presidential system in Turkey. The 2017 constitutional amendments were introduced after a failed coup d'état and were approved by a referendum, held under a state of emergency. Its supporters have argued that it is a uniquely designed government system while its critics have argued that the transformation would produce a "Latin American-style" or "executive" presidential system. This study, disregards systemic features that are presumably characteristics of parliamentary and presidential systems and examine the recently introduced system in terms of executive-legislative relations. The study achieves two goals. First, it investigates how the executive-legislative relations changed as a result of constitutional changes. Second, it examines to what extent the presidential style in Turkey is similar to what Cheibub et. al. (2011) define as Latin American breed of presidentialism defined by strong executive lawmaking power.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

175 RIGHTS IN HARD TIMES

This Panel intends to analyse, in a comparative perspective, the problem of the protection of fundamental rights in several legal systems. This protection is suffering from serious limitations in many countries, also due to the global economic crisis. Panelists will deal with the role of legislation and the Courts of justice. In particular, the growing intervention of judges can raise risks in terms of democratic balance but, in several cases, has brought about stronger guarantees in favour of individual and collective rights.

Room:

D405

Chair:

Bernardo Giorgio Mattarella

Presenters:

Marco D'Alberti
Francesca Pileggi
Diana Maria Castano Vargas
Peter Lincoln Lindseth

Marco D'Alberti: Citizens' Rights and Public Administration: A Comparative Perspective

Francesca Pileggi: Pros and Cons of Judicial Intervention

Diana Maria Castano Vargas: The Inter-American Court of Human Rights

Peter Lincoln Lindseth: *Discussant*

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

176 THE EVOLUTION OF PUBLIC LAW IN TIMES OF DEMOCRATIC TRANSITION: SOUTH AFRICA AND BEYOND

The conference theme recognises the 'myriad of new challenges' public law is facing around the globe. This context reflects high levels of corruption and maladministration - stunted efforts to realise the human rights project - and challenges in participatory democracy – particularly in states in transition to democratic government. As such, established public-law doctrines and principles have been forced to adapt to respond to these shifting politico-legal realities. This panel explores the dynamic and adaptive role that domestic and international public law principles, values and doctrines play in building and consolidating democracy, with particular focus on the South African experience. The panellists will explores these issues, each focusing on particular doctrines of domestic or international public law, to revisit what we understand by concepts such as justice and doctrines such as the separation of powers as tools for better government and thus enhanced individual liberty. .

Room:

A103

Chair:

Hannah Woolaver

Presenters:

Raisa Cachalia

Hannah Woolaver

Lauren Kohn

Raisa Cachalia: Exploring the Relationship between Violent Protest and Procedural justice in South Africa's Democratic Transition

This presentation explores the democracy-supporting role that procedural values such as participatory governance, impartiality and justified public decision-making, play in the process of consolidating peace and democracy in South Africa. The argument is made in the context of the high levels of violent protest action that have plagued the country in recent years, which is destabilising, illegitimating and constitutes a significant threat to the democratic and constitutional health of South Africa. Outcomes of recent studies in the area of social science are drawn on, suggesting that an increasing number of citizens feel that resorting to violence is the only effective means of ensuring that government will listen to them - 'citizen articulation of procedural injustice' in interactions with the state. It is argued that public decision-making which takes sufficient cognisance of procedural principles is enhances legitimacy and more peaceful resolution of societal conflict.

Hannah Woolaver: Democratic Participation and the Separation of Powers in Treaty Making in South Africa and Beyond

The domestic allocation of responsibility for the treaty-making is a significant question of the constitutional separation of powers, determining whose voice is accounted for in the state's conduct of its foreign relations. Certain States, including South Africa, have sought to augment democratic participation in the exercise of their foreign relations by giving a role for the legislature and even the judiciary in the State's treaty-making power. The South African developments will be set out and compared with examples from different jurisdictions, drawing out global constitutional developments in re-allocating aspects of treaty-making authority away from the executive. It considers how international law takes account of these constitutional developments, if at all. It concludes by considering possibilities for change in this area, particularly to augment protection for domestic separation of powers and democratic participation in treaty making in South Africa and beyond.

Lauren Kohn: "Reconceptualising the Separation of Powers: Arguments for the Formal Constitutional Recognition of a Fourth Branch of State, "the Integrity Branch""

The South African Constitutional Court has emphasised the significance of our 'uniquely South African model of the separation of powers'. But this does not account for 'ombud-like' institutions such as the Public Protector, and Human Rights Commission, and the National Prosecuting Authority. These bodies exercise vital public powers and functions and serve as 'checks' against abuses of state power. But they too need checking. There is thus is a disjuncture between the arguably anachronistic conception of the separation of powers, and the actual exercise and checking of power in our modern system of government. The considers recent case law of the Court to illustrate the impact that these institutions are having – but without the requisite guiding and legitimating framework. What is needed is the formal constitutional recognition of a 4th branch of state, the 'Integrity Branch,' to ensure enhanced effectiveness of these institutions and the overarching democratic project.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

177 Pluralismo Jurídico y Desafíos para el Estado

Panel formed with individual proposals.

Room:

LLM93

Chairs:

Diana Valencia-Tello

Presenters:

Cristian Montero
Sergio Estrada
Gerardo Enrique Vega
Hernán Correa-Cardozo
Diana Valencia-Tello

Cristian Montero: Derecho Administrativo en tiempos de transformaciones: breves notas sobre la ciencia administrativa como ciencia directiva

ADMINISTRATIVE LAW IN TIMES OF TRANSFORMATIONS: BRIEF NOTES ON ADMINISTRATIVE SCIENCE AS A SCIENCE DIRECTIVE The text seeks to describe succinctly, for the purpose of the understanding of administrative science as a directive science, various modifications in some of the traditional budgets of administrative law. To this end, the author analyzes three specific topics: 1) the administrative procedure and the plurality of values and interests - 2) the challenges that scientific-technological progress imposes on the Law and, 3) the construction of the guarantor and regulatory State. Keywords: Administrative law, directive science, administrative procedure, scientific and technological advances, guarantor status and regulation

Sergio Estrada: La Constitucionalización de la Teoría jurídica en el marco del Estado social y constitucional de Derecho

The paper will deal with the relevance and need to generate a large space for constitutional discussion in Colombia that can be replicated in other contexts with which the same problems are shared and which can be called a NATIONAL JURISPRUDENT ASSEMBLY in which concertation takes place. of the basic aspects that a legal theory must have according to the political reality and the legal practice. In democracies in crisis due to the little legitimacy of the parliamentary body, power can not be limited by law - a general theory of law is required and, especially, a principial theory that recognizes in the principles prevailing legal norms over the other norms, that condition their validity and limit the exercise of any expression of power coming from the legislative, executive or jurisdictional body

Gerardo Enrique Vega: La desarmonía normativa provoca inestabilidad en el derecho público y afecta derechos de las personas

The lack of harmony between the law and both the constitutional and the treaty-based order leads to certain considerations about the current Public Law. Empirical evidence shows structural, functional and legal disagreements. By applying discordant norms coming from the aforementioned disagreements, it causes adverse impact on human rights, Public Law, the legal relationship between the State and individuals. The causes of these disturbances have an external origin, understood as those derived from the evolution of humankind, and an internal origin, inferred from the uses, customs and idiosyncrasies of each Nation. The aforementioned causality is based on the state normative action when it dispenses with the rights and guarantees of individuals. Therefore, the legal order must be examined by adapting its contents to national constitutionalism, humanist treaty-based order and the community integration rules, considering the interests of the different social points of view.

Hernán Correa-Cardozo: Los límites del constitucionalismo a la democracia directa: El caso del plebiscito para el Acuerdo de Paz en Colombia

The Colombian Government decided to pass under a referendum the peace accord with the former FARC. Even though the Government's main objective was giving democratic legitimacy to such agreement, the citizens rejected it. The aftermath was an intense and creative process to mitigate the political and juridical effects of the people's decision. In addition, even today many citizens, stakeholders, and political parties use the "no argument" as a political tool to refuse further legal development of peace accords. The paper intends to fulfill two main goals: describing the constitutional formulas that softened the legal consequences of political decisions, and evaluating how constitutionalism works as a mechanism of balance between giving proper consequences to democratic actions and decisions, and protecting constitutional rights interfered by armed conflicts.

Diana Valencia-Tello: Pluralismo Jurídico. Análisis de tiempos históricos

Legal pluralism has dominated most historic times. Even though modern legal systems initially sought to centralize political and legal power in the nation-state, on the grounds of the supremacy of the law and the formal equality among citizens, the necessary search for justice and material equality brings back legal pluralism within the state. It is crucial to study legal pluralism in our societies, as many times we will find diverse legal bodies that do not coordinate and that overlap amongst themselves. Also, being aware of the existence of several valid normative bodies can help us to be more open to other perspectives, enabling dialogue and collaboration among those normative orders, for the search of common goals.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

178 LITIGATION AND REPRESENTATION IN THE PUBLIC AND PRIVATE SPHERES

Panel formed with individual proposals.

Room:

R510

Chairs:

Sofía Ferrara

Presenters:

Eli Bukspan
Sofia Ferrara
Ranieri Lima-Resende
Ricardo Cruzat Reyes
Barry Solaiman
Diogo Alves Verri Garcia de Souza

Eli Bukspan: Business and Human Rights in the New Era: Class Actions and Public Class Actions' Fund as a Missing Link

My paper describes the class actions' mechanism and the activities of the Class Action Fund in Israel, while analyzing its broader normative and theoretical applications and its "contribution" to the erosion of the distinction between public and private law, as well its relationship with the phenomenon of corporate human rights responsibility. The Israeli Fund finances class actions that have "public and social importance" in regards to their submission, and is almost a world precedent, and therefore can be seen as a kind of "laboratory" for some of the normative issues that can be used in other legal systems. In addition, the article discusses the connection between class actions and the international discourse on human rights and corporations – led by the "Protect, Respect and Remedy" framework in the 2011 UN Guiding Principles on Business Human Rights and the 2014 "Accountability and Remedy Project" initiative.

Sofia Ferrara: Corporate governance of State-owned enterprises

State-owned enterprises (SOEs) have always been an issue for national legislators. Their regulation is conflicted between liberalization on the one hand and the need for public affairs to have more stringent rules on the other. Despite this difficulty, however, SOEs play an important role in the market, especially in key public services (thanks to which States are able to retain control of a sizeable part of their domestic economy). This paper examines the problems relating to the regulation of SOEs, especially considering that good governance of SOEs is critical to ensuring a positive contribution to the efficiency and competitiveness of national and international economies. Moreover, when the State plays the role of market regulator and competitor in a domestic market, it is essential to guarantee fair competition and a level playing field between the SOEs and private enterprises.

Ranieri Lima-Resende: De Facto Quasi-Regulatory Agencies in Brazil: A Case Study on the Truckers' National Blockade

The analysis is focused on the national blockade of truckers which strongly affected Brazil between 21 and 31 May 2018, and its direct repercussions on the regulatory agency's behavior. To solve this crisis, significant part of the government's bargaining involved the participation of the National Agency of Terrestrial Transport (ANTT), which was responsible for the regulation of the minimal pricing policy for freight transportation throughout the country. However, the highly unstable regulations adopted by the Agency in just a few days have demonstrated the fragile autonomy of the entity, as well as revealed its de facto quasi-regulatory performance. The same perspective seems applicable to other Brazilian agencies, when analyzed the aggressive institutional pattern adopted by the Presidency, the Ministry and the Judiciary on regulatory issues, in order to weaken the agencies' independence and legitimacy.

Ricardo Cruzat Reyes: Regulating through litigation: possible advantages

Some specialized tribunals with jurisdiction over economic regulation are empowered to dictate general measures on economic sectors, thus regulating directly through rulings that usually originate in adversarial proceedings. This offers a chance to evaluate the convenience of using proceedings with the form of a trial for regulatory ends. This paper explores the following possible procedural advantages of such a system: (i) affected parties could provide relevant arguments or data in support of their preferred policy and refute the positions of others in a public discussion - (ii) this process might prove to be more transparent and subject to stronger control from affected parties than when the administration regulates - and (iii) the rationale behind a chosen policy might also be better explained and justified in the ruling than it usually is when administrative agencies establish or modify economic regulations.

Barry Solaiman: The Fallacy of Lobbying Transparency: Towards a New Conception of Regulation in Democratic Politics

Many jurisdictions are witnessing significant growth in regulations concerning the lobbying of politicians in government and parliament. While lobbying is central to democracy, it is available mainly to those with significant resources and is often the most effective means of influence. Unchecked, it corrodes trust in public institutions. This paper argues that transparency regimes are inadequate for dealing with the underlying concerns surrounding lobbying. An analysis of those regulations reveals three problems. First, the laws often lead to little meaningful transparency. Second, there is little political will for supporting lobbying regulators. Third, the current regulations ignore other approaches that might be more effective in restoring public trust. Thus, ideas are mooted for a new approach to regulation which accounts for the nuances inherent in insidious forms of corruption common to lobbying practices.

Diogo Alves Verri Garcia de Souza: The limit of the public interest and the state agent's privacy before the State

This work seeks to deal with the privacy of the public agent from the point of view of the State's protection, aiming to discuss the extent which the veil of private life can be mitigated in the name of the public interest, particularly if considered agents who work in sensitive activities, such as public security, intelligence and anti-corruption. In order to do so, our analysis starts from a special justification of the legal relation between the State and its agents: the special subjection relations, originally found in nineteenth-century German law and developed in the current doctrine of Spanish-speaking countries, as well (with lower academic production) in Brazil. On the basis of such relationships, a greater intensity is justified in the legal relationship between the State and its agents when compared to the bond established with its citizens in general. Thus, we seek to conclude whether a greater restriction on the privacy of state agents is possible.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

179 ENVIRONMENTAL PROTECTION IN COMPARATIVE PERSPECTIVE

Panel formed with individual proposals.

Room:

Sala Juicio Oral

Chair:

Pasquale Viola

Presenters:

Justine Bendel

Juan Sebastián Villamil Rodriguez & Manuel Fernando Quinche Ramirez

Thuany de Moura Costa Vargas Lopes

Ignacio Urbina

Shazny Ramlan

Pasquale Viola

Justine Bendel: Access to international courts and tribunals in environmental disputes: towards public interest litigation?

This paper focuses on the requirements attached to the entry into international litigation and their impact on environmental litigation. It responds the questions 'who can bring a claim, and will any international tribunal accept it?'. The paper explores the potential transformation of interstate dispute settlement from being exclusively bilateral towards a procedure allowing public interests to be defended, in the enforcement of international environmental law. It aims at refuting the hasty assertion that international courts and tribunals have too narrow rules on standing to respond to environmental disputes. Therefore, in this paper I will analyse the notion of public interest in international law, its stakeholders and its legal implications for international adjudication in order to clarify the developments made by the judicial institutions and their impacts on environmental litigation.

Juan Sebastián Villamil Rodriguez & Manuel Fernando Quinche Ramirez: Civil Rights, Political Representation and Environment: The regressive effect of the decisions of the Constitutional Court of Colombia

Recently, the Constitutional Court of Colombia has taken a more restrictive approach in relation to the rights it concedes to the people under its jurisdiction. A regressive tendency has gained strength inside the Court, that is taking a second look to topics which have been settled long time ago. The right to self-determination of the people has suffered the most in this context, as well as the legal protection of the environment. People in the regions of Colombia have lost their saying when it comes to definition of the future of their closest environment, rulings such as those related to the popular consultation have striped the citizens of towns, where mineral extractions are planned, off their right to participate in the public sphere. By limiting this form of referendum the Court has not only restricted the political rights of these people, but has also deprived them of the right to democratically resist projects that can incide negatively in the satisfaction of their rights.

Thuany de Moura Costa Vargas Lopes: Environmental Democracy and Human Rights in Times of Political and Economic Crisis in Brazil

The current Brazilian Constitution highlighted the democratic principle, including instruments of popular participation, also in matters related to the environment. The balanced environment was elevated to a collective right with the inclusion of sustainable public policies, combining the economic, social and ecological conception to the development. However, amid the political and economic crisis that plagued Brazil during President Dilma Rousseff's impeachment process in 2016, there were government issues that hit specific sectors of the country, as in the case of the environment. Since then, the new governments have made changes in public policies under the justification of political pressure and reduced spending. Thus, the present paper will address the importance of environmental democratic order, making the environmental achievements remain, as well as new achievements are achieved in favor of society and in honor of human rights.

Ignacio Urbina: Environmental Law Enforcement in the US and Chile: A Comparative and Functional Review

This work reviews two environmental enforcement systems, the Chilean and the American, from a comparative-functional perspective. After reviewing hundreds of cases, the study revealed that in Chile there are important deficiencies at the policy level, which are then reflected in the result of particular cases. On the other hand, the American enforcement system shows no deficiencies at the policy level, but when it comes to practice, it is not possible to discern if policies are actually--and correctly--applied in particular cases. This is relevant because any fair reading of the major US environmental statutes suggests that penalties should incorporate explicit assessments of the respective penalty factors. This raises rule of law and transparency concerns. At the end, by way of conclusion, it is suggested that both the Chilean and the US environmental enforcement systems would be better if they adopted specific strengths of the other.

Shazny Ramlan: God in Indonesia's Environmental Constitutionalism: An Untapped Resource in Times of (Climate) Change?

Indonesia, an archipelagic nation-state, faces multiple environmental challenges, including climate change. In the search for solutions in public law, the significance of religion in Indonesian constitutional jurisprudence and politics led to the realisation that constitutional arguments can be made on the basis of religion to enforce environmental rights and duties – a phenomenon already observed in other Muslim-majority countries. This paper thus proposes the crafting of (1) practicable arguments based on the right to religious freedom and a 'religious values' exception to the exercise of constitutional rights under the Indonesian Constitution, and (2) a normative argument of an 'eco-theology' presumption in Indonesian constitutionalism. Thereafter, the paper evaluates these arguments' plausibility in light of existing (and comprehensive) legal frameworks, complex realities surrounding religion-state relations, and the praxis of Islamic environmental law in Indonesia.

Pasquale Viola: Post-development Paradigms from a Constitutional Top-down Approach: An Outline on Some Relevant Environmental Experiences in Asia and AfricaComparative and Functional Review

Environmental issues are pervasive challenges for the international community, involving scientific, as well as political and legal aspects. Several studies explored the attitude of the environmental protection to be a phenomenon at the confluence of constitutional law, international law and human rights. In one hand, this global trend try somehow to reconcile the North-South divide, on the other, it amalgamates the autochthonous legal traditions, trying to find universal and 'one-size-fits-all' solutions. This approach produces an essential question in 'Times of Change': what is the role of constitutions in the 'Anthropocene' era? This paper intends to highlight and analyse constitutional law patterns for the protection of the environment, exploring the constitutional systems of the UN Member States in a top-down and holistic approach. The analysis will focus on the concept of 'environment' as set in the examined constitutions, in particular in African and Asian legal systems.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

180 REFORMING THE CHILEAN CONSTITUTIONAL COURT: THE COMPLEX VOYAGE OF THE EXPERTS COMMISSION - DISCUSSION PANEL

This discussion panel explores the work conducted by a group of 16 constitutional academics and think tank researchers. Through January until May of 2019, this group conducted an in-depth analysis of the Tribunal Constitucional, in aspects such as composition and selection process of their judges, institutional functioning, exercise of its powers, institutional conflicts with the Congress and the Supreme Court, sentence effects, challenges of the regionalization process to its powers, among others. This group emerges in the middle of an important but polarized political debate in Chile during the last year around the role of the Tribunal Constitucional in our democracy, and the many institutional tensions that it's action causes. Besides analyzing the final document it would be part of the discussion some aspects regarding the methodology of the work, the relation of the group with the key players of the reform and the impact of Comparative Constitutional Law.

Room:

D404

Chair:

José Francisco García

Presenters:

Gastón Gómez
Miriam Henríquez
Patricio Zapata
Arturo Fermandois

Gastón Gómez: Chair of the group of experts, Presentation of the group's findings and proposals

Miriam Henríquez: ***Discussant with particular consideration of the Constitutional Court powers***

Patricio Zapata: ***Discussant with particular consideration of justice's eligibility requirements and selection process***

Arturo Fermandois: ***Discussant with particular consideration of the impact of comparative constitutional institutions and experience in the group´s reform proposals***

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

181 CONSTITUTIONAL ASYMMETRY IN MULTINATIONAL FEDERALISM

Federal systems, and multi-tiered systems in general, are in a permanent modus of change as a response to tensions between diversity claims and integrity requirements. These tensions are most extreme in multinational systems. In scholarship, constitutional asymmetry has been identified as a tool for multinational conflict management. At the same time, constitutional asymmetry is distrusted for threatening legitimacy and stability. The paradox of constitutional asymmetry, then, is that it simultaneously contains the seeds for stability and instability of multinational systems. In this panel, we discuss the link between asymmetry and multinational systems - we address the risks inherent to constitutional asymmetry - and we apply this to multinational systems world-wide, and to the European Union in particular.

Room:

Auditorio CAP

Chairs:

Patricia Popelier

Presenters:

Maja Sahadžić
Erika Arban
Pieter Van Cleynenbreugel

Maja Sahadžić: Constitutional asymmetry vs. legitimacy and stability

Constitutional asymmetry is closely linked to the multinational multi-tiered systems. One of the concerns linked to this is that constitutional asymmetry affects legitimacy and stabilty in these systems. Hence, the purpose of this paper is to conceptualize legitimacy and stability under this specific frame of reference and to answer whether constitutional asymmetry indeed aftects two concepts. In the first place, this paper builds the dynamic concepts of legitimacy and stability to better fit the multinational multi-tiered systems with asymmetrical features. In the second place, the paper uses the indicators of constitutional asymmetry against the main features of legitimacy and stability in these systems. Along the way the paper compares potential drawbacks in legitimacy and stability between asymmetrical multinational multi-tiered systems and multi-tiered systems that do not display asymmetrical features.

Erika Arban: Constitutional Asymmetries in Italian Regionalism

Italy is a profoundly asymmetrical state, following a longstanding tradition of fragmentation that almost 160 years of unification have only partially mitigated. This presentation focuses primarily on constitutionally entrenched asymmetries, in particular the differences between ordinary and special/autonomous regions and the so-called differential regionalism, allowing ordinary regions to negotiate with the central government additional forms and conditions of autonomy in specific subject matters. Other elements of de jure asymmetry relate to the constitutional recognition of an autonomous status to the sole provinces of Trento and Bolzano and to the presence – in certain regions only – of metropolitan cities as autonomous levels of local government. As a conclusion, the presentation speculates on potential (positive and negative) developments of the increasing asymmetrical trajectory of the Italian constitutional framework in a struggle to accommodate unity and diversity.

Pieter Van Cleynenbreugel: Asymmetry as a way to move forward with multi-tiered integration? Constitutional asymmetries in the European Union

The European Union is a unique multi-tiered organisation aimed at integrating the economic and political systems of its diverse Member States. Originally set up around symmetrical governance principles, the extension of competences and enlargement of territories comprising the EU, differences in vision about how far the EU should go, have increased. To overcome those differences without discontinuing the European integration process, the EU framework has acknowledged different ways for differentiated or asymmetrical integration, without completely overhauling the EU's overall symmetrical features. This paper categorizes the different types of asymmetries prevailing in the current EU constitutional framework and sets out to explain their co-existence and role in the current stages of the EU integration project. This allows us to map the opportunities and limits the current EU constitutional framework poses.

James Gardner: *Discussion*

The panelist will discuss the hypotheses on constitutional asymmetry and multinationalism introduced by the chair: (1) Constitutional asymmetry emerges from political asymmetry. (2) Multinationalism, in the form of variations in identity, is not the exclusive but a determining factor for constitutional asymmetry. (3) The correlation is stronger when the divide based on identity is reinforced with congruent political asymmetries of another nature. (4) Privileged status is attributed to identity markers rather than territory-based entities. (5) Factors that facilitate symmetrisation or further asymmetrisation processes are, amongst others, the presence of competing national groups, the presence of non-competing non-distinct groups, the dynamics of strongly divided fragmenting states, internal dynamics created by asymmetries.

Panel Sessions VI

Wednesday, 3 July 2019
08:20 – 09:55

182 BOOK LAUNCH PANEL: "RECONCILING INDIGENOUS PEOPLES' INDIVIDUAL AND COLLECTIVE RIGHTS PARTICIPATION, PRIOR CONSULTATION AND SELF-DETERMINATION IN LATIN AMERICA" (JESSIKA EICHLER)

Categorical divisions between indigenous individual and collective rights regimes underlie international human rights law and its vernacularisation. Similarly, internal power struggles, vulnerabilities and intragroup inequalities go unnoticed, leaving persisting forms of neo-colonialism, neo-liberalism and patriarchalism untouched. Integrating legal theoretical, political, socio-legal and anthropological perspectives, this book disentangles indigenous collective regimes by including women's, elderly or young people's rights, alongside intergenerational, intersectional and minority claims. Being relevant to indigenous collective rights, the piece is informed by indigenous rights to prior consultation and participation as inherent to self-determination constituting both an absolute norm and as transcending legal regimes. Self-determination also facilitates resistance enabling indigenous cosmovisions to materialize in the light of persisting patterns of epistemological oppression. Despite its focus on Bolivia, the Andes and Latin America, developments in the African and European human rights systems are considered.

Room:

COM103

Chair:

Dimitry Kochenov

Presenters:

Jessika Eichler

Jose-Manuel Barreto, Luiz

Luiz Guilherme Arcaro Conci

Felix-Anselm van Lier

Jessika Eichler: ***Author***

Jose-Manuel Barreto, Luiz: ***Discussant***

Luiz Guilherme Arcaro Conci: ***Discussant***

Felix-Anselm van Lier: ***Discussant***

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

183 POLAND'S CONSTITUTIONAL BREAKDOWN - BOOK DISCUSSION

The panel discusses Wojciech Sadurski's book, entitled "Poland's Constitutional Breakdown" (Oxford University Press, 2019). The book explores the way the erosion of democracy has taken place in Poland since 2015 due to the actions of the Law and Justice Party (PiS). The arguments of the book seek to contribute to the literature on populist backsliding and illiberal democracy. The discussants and the author will debate the book's arguments.

Room:

Aquiles Portaluppi

Chairs:

Rosalind Dixon

Book discussants:

Samuel Issacharoff
Martin Krygier
Tom Gerald Daly
Sergio Verdugo
Marek Zubik

Book author:

Wojciech Sadurski

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

184 CHALLENGES TO FREEDOM OF EXPRESSION II

Panel formed with individual proposals.

Room:

Sala Reuniones LLM

Chair:

Mary Anne Case

Presenters:

Bruno Silva
Herlambang P. Wiratraman
Cynthia Juruena & Renan Guedes Sobreira
Mary Anne Case
Anderson Luis da Costa Nascimento
Javier García

Bruno Silva: Case Brown v. Plata: mass incarceration in California

In this article, it is analyzed the phenomenon of mass incarceration and its pernicious consequences in the prison system of California. In this bias, it is sought to understand the punitive expansionism and its destructive effect in the American prison system, notably Californian, exteriorized by a massive incarceration and chronic structures failures in the penitentiary system, starting from the paradigm inaugurated by modernity that radically changed the social, economic relations and power in American continent, making comparison with Brazilian prison reality. In that way, it is uncovered the influential elements in the crisis of the penitentiary system of the state of California, verified in the late twentieth and early twentieth century, which opened the scourges of the American penitentiary system, seen as a degrading space and generator of systemic violation of the inmates' rights. Finally, it is proposed to alter radically this scenario, through the adoption of effective and etiological measures, non-popular and non-electoral, to humanize the prison or at least to this reach tolerable standards.

Herlambang P. Wiratraman: Disciplining Free Expression and The Rise of Authoritarianism in Indonesia

Discourse of authoritarianism in Indonesia's 20 years post Soeharto has been rising. The discourse has been shaped by the role of the state which had been involving in hijacking democracy and silencing free expression. While on the other side, stronger supporter of a conservative and anti-pluralistic brand of political Islam which increasingly open repression and disempowerment of political opposition. Heufers (2017) calls as authoritarian populist, while Power (2018) emphasized on Jokowi's authoritarian turn and Indonesia's democratic decline. I would argue differently in adding their works, which I call as neo-authoritarianism in Indonesia. These affect to human rights situation in the country, although in the early years of Reformation changed dramatically from one of cautious optimism to something which currently may be described as desperate. This paper unravels the turn of authoritarianism from the specific cases related to free expression, academic freedom and press freedom.

Cynthia Juruena & Renan Guedes Sobreira: Fake Democracies: Democracy Undermined by Fake News

Occidental democracies had been consolidated after the II World War, and have been reasonably stables since that time. However, technological advances allowed the rise of new ways of democratic participation, demanding a revision of current theoric and structural categories. Internet became an useful tool of social participation in many countries, but also the closest enemies of democracy have been updated by Internet. Social medias allow the massive and fast sharing of informations, being able to damage the democracy by the spread of fake News in electoral campaigns. One of the main elements for the healthy democratic environment, the access to high quality informations, is undermined by fake News. The investigation's object, through the hipothetical-deductive method, is how to treat the menaces caused by fake News in electoral periods - rethink the structure of democracy in order to suppress or reduce the effects of this new threat, is fundamental for the Public Law in changing times.

Mary Anne Case: Sexualized Speech About Religion in the Jurisprudence of the European Court of Human Rights

This paper claims that whether or not speech about religion is sexualized is a very good predictor of whether the European Court of Human Rights will allow it to be restricted or punished under national law. Thus, for example, the recent controversial case of E.S. v. Austria involved the suggestion that Mohammed was a pedophile, Wingrove v U.K. that St. Teresa of Avila imagined orgies with the crucified Christ and another woman, Otto Preminger Institute v. Austria that Mary the mother of Jesus was a slut, I.A. v. Turkey that "Mohammed did not forbid sexual relations with a dead person or a live animal." By contrast other negative statements about religion (e.g. that Christian anti-semitism led to the holocaust) are more often held to be protected speech.

Anderson Luis da Costa Nascimento: The case Adler v board of education of New York City: Judgment of the Supreme Court of the United States, Mccarthyism and its correspondence to "school without party" in the political proposal for Brazilian education

The paper discusses an important case by the Supreme Court of the United States of America. The decision in 1952 confronts the post-World War II external and internal political-social problems, as well as, in material respects, issues concerning the individual rights of free expression, the exercise of professorship and free belief. As for the formal aspects, the analyzes on open standards, the sovereignty of the States and the limits of the state power. The Supreme Court Judgment resulted in the dismissal of 378 elementary and middle school teachers, only in New York City, for reasons of their political beliefs, in a period considered by a true "witch-hunt "and stemming from "McCarthyism" initiated by Senator Joseph H. MacCarthy. The case will be analyzed in that historical context, in the procedural unfolding until the judgment by the SCOTUS, its consequences and the correspondence with the movement of the "school without party", a political proposal for Brazilian education.

Javier García: The Public Law against the propagation of extremist discourses. Challenges to freedom of expression and learning from the European experience

The social networks of the Internet have multiplied the impact in society of discourses of an offensive and hurtful nature, increasing the concern regarding hate speech. The paper asks a series of questions based on the doctrine on the subject and the legal responses, both normative and jurisdictional, that have been adopted by some European countries, such as Germany and Spain, in which a repressive approach is chosen, as well as supranational institutions such as the European Commission and the Council of Europe, which propose alternative measures. Finally, as a relevant aspect, a normative and action approach of the public authorities, national and international, is proposed, which will face the new challenges of extreme discourses from the protection of human rights. It is proposed to give greater emphasis to the objective dimension of freedom of expression, as well as to incorporate content of a prestational nature, from which rights derive to positive actions.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

185 INTERNATIONAL ECONOMIC LAW AND TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA II: TRADE AND INVESTMENT (DUPLICATE)

Since the 1990s, Latin America has seen the emergence of a transformative constitutionalism in the form of a dense network of materials, institutions, and communities of legal practice related to human rights. This constitutionalism, which has given rise to a veritable Ius Constitutionale Commune en América Latina, is in constant interaction with international economic law. Trade agreements and investment protection treaties can conflict with a variety of constitutional provisions. Similarly, awards by investment tribunals can limit the policy space for advancing human rights, as provided for by the Pact of San José and the constitutions in the region. Conversely, some of these agreements have been subject to scrutiny by local constitutional courts. This panel explores the intersections between transformative constitutionalism and international trade and investment law in Latin America, emphasizing the challenges that this presents for democracy in the region.

Room:

LLM94

Chair:

Magdalena Correa Henao

Presenters:

Gustavo Prieto
María Angélica Prada-Uribe
Federico Suárez Ricaurte
Pedro A. Villarreal

Gustavo Prieto: Cortes Constitucionales, Constitucionalismo Transformador y la Creación de Principios Comunes sobre Inversión Extranjera en América Latina (Constitutional Courts, Transformative Constitutionalism and the Creation of Common Principles for Investment in Latin America)

In recent years, new judicial interactions are taking place in the global legal arena, when constitutional adjudicators enter into contact with international investment law and its Investor-State Dispute Settlement System. Such interactions have shown how constitutional judges currently deal with problems beyond the borders of the state, where national systems feel pressure not only from international investment regimes but also from different transnational epistemic communities. In this line, this paper explores the new frontier of judicial interactions between national legal systems and international investment law. It thereby argues in favour of an active role by constitutional courts for the construction of regional public standards aligned with the objectives of transformative constitutionalism.

María Angélica Prada-Uribe: ICCAL desde abajo: ¿democracia popular o protección internacional de la inversión? (ICCAL from Below: Popular Democracy or International Investment Protection?)

This paper seeks to understand whether the international investment regime (IIR) has become an obstacle to the democratic principle enshrined in Latin America's Ius Constitutionale Commune (ICCAL). In order to do so, it will shift the focus of analysis from the regulatory conflict between the transnational (IIA) and national (State) scales to the study of bottom-up instances of resistance to the IIR in the region. By shifting the research lens to the bottom (or the local scale), this paper shows that the IIR is opposed by social and popular movements for promoting an extractivist development model in Latin America through the misappropriation of their right to decide upon their own territories. In response, local communities have framed their resistance in democratic terms, demanding the recognition of their constitutional right to participate in all decisions concerning the development and exploitation of their natural resources above the protection of foreign investment.

Federico Suárez Ricaurte: Interés público capturado por inversionistas extranjeros en Colombia (Public Interest Captured by Foreign Investment in Colombia)

The international legal order has a contradiction at the core of its operation. There is a differential treatment regarding the protection of property and investments depending on the kind of actors concerned by the taking or limitation of property. Under international investment law, multinational companies cannot easily be expropriated, directly or indirectly, by their host state. When this occurs, multinational companies can claim substantial compensation. By contrast, local communities, which are often themselves adversely affected by multinational companies and international investment law, can be expropriated at the slightest amount of reparation. The broad argument of the paper will be demonstrated by cases taken from foreign direct investment projects in natural resources exploitation in Colombia.

Pedro A. Villarreal: La bifurcación del derecho en México: (Des)Integración económica norteamericana y constitucionalismo transformador latinoamericano (North American Economic (Dis)Integration and Latin American Transformative Constitutionalism: The Bifurcation of Mexican Law)

The proliferation of preferential trade and investment agreements in Latin America has led to the multiplication of rules aimed at both lowering barriers to trade and promoting foreign direct investment. At the same time, the concept of Latin American transformative constitutionalism fosters a set of normative goals, namely human rights, democracy and the rule of law. It underscores the transformative role played jointly by the Inter-American Human Rights System and by domestic constitutional law in the region. The paper focuses on the North American Free Trade Agreement (NAFTA), and its envisaged successor, the United States-Mexico-Canada Agreement (USMCA), in order to examine how they have, and might further shape the Mexican legal system. An instrument-focused perspective will allow for a deeper analysis of the relationship between the implementation of preferential trade and investment agreements and the pursuit of the normative goals of transformative constitutionalism.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

186 CRIME AND PUNISHMENT II

Panel formed with individual proposals.

Room:

Seminario 3

Chair:

Daniel Pascoe

Presenters:

Daniel Pascoe & Andrew Novak
Melinda Rankin
Erika De Wet
Aua Balde
Mariana Cantu
Verónica Undurraga

Daniel Pascoe & Andrew Novak: Best Practice in Executive Clemency Regulation

Based on recurring themes throughout their recent edited volume on comparative and empirical approaches to executive clemency, in this paper the authors discuss several best-practice recommendations aimed at states and sub-national jurisdictions considering a review of their constitutional and legislative provisions on clemency. Previous examples of best practice recommendations include a requirement for transparency, a right to judicially review clemency decisions, constitutional provisions that allow for the input of relevant experts outside the political class, a functional bifurcation of executive clemency and legislative amnesty powers, clemency for innocence being recommended by a special post-conviction body, and enhanced procedural standards for capital cases. Nevertheless, within this paper the authors aim to take a fresh look at this topic, guided less by the existing literature and more by the findings of the edited collection's preceding chapters.

Melinda Rankin: Extending the 'system' of international criminal and humanitarian law in response to organised violence: The case of the Commission for International Justice and Accountability (CIJA)

The Commission for International Justice and Accountability (CIJA) investigate and prepare case briefs for war crimes, crimes against humanity and allegations of genocide in Syria and Iraq, which, as non-state actors, remains a source of controversy. The arguments outlined in this article are broadly two-fold: First, this article argues that CIJA have attempted to extend the system of International Criminal and Humanitarian Law (ICHL), because they are willing to use the law - adhere to standards - and conduct probationary 'acts of recognition' to solve the problem of impunity in response to organised violence and 'new wars'. Second, the article argues that while innovation is not key to extending the system of ICHL, CIJA attempted something new in that they: conducted large-scale systematic investigations, criminal linkage analysis, and have prepared a number of case briefs against suspected senior leader, in the midst of large scale violence and war.

Erika De Wet: How Did We Get Here? An Overview of the Rise and Demise of the International Criminal Court's Relationship With the African Union and its Member States

The contribution traces the tenuous relationship between the International Criminal Court (ICC) and the member States of the African Union. Subsequent to the adoption of the ICC Statute in 1998, 34 African States initially joined the ICC. However, what started out as a positive relationship generating several self-referrals, deteriorated visibly as of 2009. The contribution outlines and assesses some of the key developments that arguably contributed to this downward spiral. In so doing, it suggests that an inconsistent referral policy by the United Nations Security Council, ill-conceived prosecutorial policies on the part of ICC Prosecutor, as well as inadequate oversight by the Assembly of State Parties, played into the hands of some African leaders who personally had much to gain from weakening the credibility of the institution on the continent. It also suggests stronger regional ownership of international criminal prosecution as a way to improve the relationship.

Aua Balde: The International Criminal Court Prosecutorial Approach to Preliminary Examinations: Change or Continuity?

Much criticism has been voiced in regard to the ICC Prosecutor discretion in the selection of situations and cases during the Preliminary Examinations (PE). In fact, while ICL substantive norms seems to have stabilised following the adoption of the Rome Statute, procedural law however, is an ever-evolving area of ICL. This paper proposes to make an assessment of the prosecutorial discretion during PE and assess whether and to what extent such an approach have changed overtime. It is argued that prosecutorial approach sought to overcome criticism by changing its strategy over the years. It is also further argued that such change was only possible because of the framing of the Rome Statute which is embedded with vague terms allowing for flexibility and discretion to the Prosecutor.

Mariana Cantu: The Presence of Discretionary with Legal Interpretation: The Lack of Space of Public Claim in Criminal Matters in Risk Societies

This article is a result of total disrepute with the substantial alteration of the dogmatic concepts inherent in criminal matters, which distort its primary mission, which is the minimum intervention. Fundamentals inherent in public outcry that alone justify pre-trial detention go directly against the precautionary principle in the risk society. The legislative abyss in which the term "public order", inserted in art. 312 of the Brazilian Criminal Process Code, has long been synonymous with a prison arrest warrant, although it may prove to be incompatible with criminal procedural protection. The great gap is in the absence of a control under the judicial decisions, which are based on subjectivism, without observing the real objective of criminal law, which is not the general security, but the imputation of a fact punishable to a person by limits imposed by established constitutional principles. Key words: risk society - judicial interpretation - justification - criminal law.

Verónica Undurraga: Translating empirical evidence into constitutional idioms

In previous papers I have examined how the use of the principle of proportionality has made it possible for constitutional courts to use a common, familiar legal terminology to address and rely on the public health evidence that demonstrates the lack of any dissuasive effect of criminal sanctions for abortion. Approaching constitutional courts using a combination of the empirical evidence and its translation into constitutional language has enormous potential. For this paper, I would like to further develop this line of research by exploring whether criminal/restrictive laws on abortion, as applied on the ground, can meet the requirements of the rule of law.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

187 "AUTHORITARIAN CONSTITUTIONALISM" - AUTHORS MEET CRITICS

Editors and Authors of "Authoritarian Constitutionalism, Comparative Analysis and Critique" (Edward Elgar Publishing, 2018) edited by Helena Alviar Garcia and Günter Frankenberg will discuss the book and respond to critique. The contributions to this book analyze and submit to critique authoritarian constitutionalism as an important phenomenon in its own right, not merely as a deviant of liberal constitutionalism. Accordingly, the fourteen studies cover a variety of authoritarian regimes from Hungary to Apartheid South Africa, from China to Venezuela, from Syria to Argentina, and discuss the renaissance of authoritarian agendas and movements, such as populism, Trumpism, nationalism and xenophobia. From different theoretical perspectives the authors elucidate how authoritarian power is constituted, exercised and transferred in the different configurations of popular participation, economic imperatives, and imaginary community.

Room:

Auditorio CLARO

Chair:

Eugenie Merieau

Gunter Frankenberg

Helena Alviar García

Presenters:

Günter Frankenberg

Helena Alviar Garcia & Michael Wilkinson

Eugénie Mérieau

Roberto Gargarella

Norman Spaulding

Dennis Davis

Günter Frankenberg: Authoritarian Constitutionalism – Coming to Terms with Modernity's Nightmares

The article introduces and analyzes authoritarian constitutionalism as an important phenomenon in its own right, not merely a deficient or deviant version of liberal constitutionalism. Therefore it is not adequate to dismiss it as sham or window-dressing. Instead, its crucial features – executivist technique of governing, participation as complicity, power as property and the cult of immediacy – are related to the basic assumption that authoritarian constitutions are texts with a purpose that warrant careful analysis of the domestic and transnational audience.

Helena Alviar Garcia & Michael Wilkinson: Neoliberalism as a Form of Authoritarian Constitutionalism

This chapter proposes to include in the term Authoritarian Constitutionalism the set of provisions that fix neoliberal orthodoxy as the only policy choice available to public officials. It opposes the justification that economic policy should be protected from political deliberation and argues that constitutionally enshrining the agenda of fiscal austerity, free trade, export led growth and the protection of foreign investment is a form of authoritarianism. Authoritarian liberalism captures the combination of politically authoritarian forms of governing in defense and pursuit of economically liberal ends. It is a phenomenon often associated with periods of economic crisis, such as the recent Euro-crisis. This chapter suggests, however, that authoritarian liberalism is less exceptional than normal. The two texts provide examples from the Latin American and European contexts.

Eugénie Mérieau: French Authoritarian Constitutionalism and its Legacy

This chapter links Monarchic Constitutionalism to Bonapartism and Gaullism as forming part of a French tradition of "authoritarian constitutionalism". It argues that the first Bonapartism (1799-1814) laid the foundation for Monarchic constitutionalism (1814 – 1848) which in turn did so for the second Bonapartism (1848 – 1870) and for Gaullism (1958 – 1969). It focuses on 'constitutional moments' and the question of constituent power, examining the initial 'constitutional octroy' following a coup, and, in the cases of Bonapartism and Gaullism, the use of plebiscite to legalize what could anachronistically be called today 'unconstitutional' constitutional revisions.

Roberto Gargarella: Authoritarian Constitutionalism in Latin America: from Past to Present

This chapter examines the influence of authoritarian constitutionalism in Latin America. Mainly focused on the "founding period" of regional constitutionalism (1850-1880), the paper claims that, in spite of the fact that authoritarian constitutional lacks today most of the influence that it used to have, it continues to represent a powerful force within regional constitutionalism. The author suggests that the vast majority of Latin American Constitutions continue to organize their "structure of powers" according to an imperfect and unstable liberal-conservative model - and also that this flawed structure allows a recurrent re-emergence and occasional re-invigoration of authoritarian impulses within regional constitutionalism.

Norman Spaulding: States of Authoritarianism in Liberal Democratic Regimes

This chapter examines the relationship between authoritarianism and liberal democratic constitutionalism from a distinctive vantage. Even among quite sensitive treatments of "hybrid" and "dual state" regimes – regimes that combine authoritarianism with features of liberal democratic institutions and practices – there remains an air of surprise at their stability, repressive measures are generally described as occurring in spite of the liberal democratic institutions and practices, not because of them, and attention rests almost exclusively with the "sham" appearance of liberal democratic institutions and practices in these regimes, not the appearance of authoritarianism in liberal democratic states. Authoritarianism, in short, is persistently framed in the negative space of democratic constitutionalism.

Dennis Davis: Authoritarian Constitutionalism – The South African Experience

The history of constitutionalism in South Africa reveals the manner in which law reinforced the governance of the authoritarian regime of Apartheid South Africa, while at the same time created a space for litigation strategies which, at the very least, tempered the excesses of Apartheid rule. The paper shows that the ambiguous history which preceded the introduction of the 1996 Constitution influenced the drafters of the Constitution into a commitment to constitutional as opposed to majoritarian democracy. The paper proceeds to caution against the liberal claim that constitutionalism can be equated democracy .In this way, the authority of the Constitution reduces the potential for other forms of politics. It does so by assuming a position of hegemonic authority ,thereby preventing a debate aimed at the construction of a society which differs from the normative framework as set out in the constitutional text.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

188 TIMES OF CHANGE?: VIEWS FROM POLITICAL THEORY

At the 2017 and 2018 annual conferences of the Society in Copenhagen and Hong Kong respectively, members and friends of the Political Constitutional Theory (PolCon) network organised panels subtitled 'A View from Political Theory'. In order to maintain continuity and to pinpoint the particularity of the network's research agenda, the subtitle has been retained for ICON-S 2019 in Santiago, especially as political theory cannot be said to be over-represented in the contributions presented at the conferences. The panel includes contributions that deal with "change" in terms of thematic focus as socio-political phenomena as well as potential paradigm shifts in the study of constitutional phenomena.

Room:

LLM91

Chair:

Panu Minkkinen

Presenters:

W. Elliot Bulmer
Massimo Fichera
Katariina Kaura-aho
Panu Minkkinen

W. Elliot Bulmer: Civic Republican Constitution Building in Tuvalu

Drawing on the author's own experience as a constitutional advisor in the South Pacific island of Tuvalu, this paper examines an important but overlooked element of the civic-republican constitutionalism: its concern for civic virtue. The first part of the paper advances a theoretical argument to show that in the civic republican understanding, a constitution does not merely regulate institutions of government, but is also an instrument of ethical community building. The second part relates this to constitution-building practice, showing how Tuvalu's recent constitutional review tried to declare and protect civic virtues by: (1) the establishment of a national religion - (2) the constitutional recognition of a Charter of Values and Responsibilities with scope to limit rights - and (3) a requirement of 'active participation in community life' as a precondition for being eligible to vote. These are all antithetical to liberal constitutional values, but not to civic republican ones.

Massimo Fichera: A Theory of the EU Judiciary in an Age of Constitutional Change and Populism

The paper focuses on the role and functions of the EU judiciary in the self-preservation and self-perpetuation of the EU legal order. The EU judiciary's pivotal task has traditionally been that of approving or rejecting change - acting either as a driver of transformation or as a constraint. However, it is possible to devise, at least in the case of the EU, a form of change that eludes the above-mentioned binary code. Moreover, what function does the EU judiciary have - if any - in shaping the legal culture of a transnational space? The paper examines some key case studies from the past and the present, showing the extent to which and the constraints under which it is possible to analyse the 'change' performed by the EU judiciary in the development of the EU by focusing simultaneously on the EU judiciary's 'preserving' and 'creative' nature.

Katariina Kaura-aho: The Aesthetics of Politics

The paper takes as its starting point the idea that society and the political order are aesthetically organized, and that politics takes place on an aesthetic level. Aesthetics here refers to emotional and cognitive sensibility and to the imaginative sphere. The paper interprets political exclusion in current legal-political contexts as an aesthetic question. Following Rancière, struggle against marginalization means resistance to the prevailing aesthetic 'distribution of the sensible' determining parts, positions and shares in society. The subversive effect of politics is its contestation of the aesthetic ordering of legitimate modes of political action, depoliticization of identities of political actors, and privatization of political spaces. Furthermore, politics can utilize diverse artistic, aesthetically effective theatrical and performative strategies. It can consist, for example, of non-verbal embodied action, poetic speech, or take the form of political storytelling.

Panu Minkkinen: Seats of Power: Ethnographies of Constituted Space

Kim Lane Scheppele defines constitutional ethnography as 'the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape'. The aim of the paper is to develop this provisional definition further into a more focused approach analysing the ways in which power is experienced as the 'lived detail' of a constituted space. Individuals namely experience the constitutional arrangements under which they live as spatial contours within which they negotiate their relationships to power and domination. What do these spatial contours, understood now as the containers of our lived experiences, tell us about the constitutional arrangements themselves? How can the 'lived detail' of constituted space be studied? Particular attention will be paid to the potential of three ethnographic perspectives: auto-ethnography, sensory ethnography, and visual ethnography.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

189 ROUNDTABLE: JUDICIAL APPOINTMENTS IN A COMPARATIVE PERSPECTIVE II - THE KAVANAUGH CONFIRMATION AND BEYOND

The judicial appointment procedure is understood as a key feature in the design of any constitutional democracy. Since judges determine the meaning of the constitutional text and exercise the (stronger or softer) power of judicial review, the control over the composition of the bench caries significant political, economic and legal consequences. Who appoints judges vested with constitutional powers, pursuant to which procedures, and subject to what forms of review or approval – are all significant questions, as a matter of political practice and theory. The Kavanaugh confirmation in the US and developments in other jurisdictions in liberal and less liberal constitutional democracies call for reflection on the state of the art. The roundtable will address these questions, consider the main challenges facing the appointment procedures in selected jurisdictions, and debate the lessons that may be learned from these developments [NOTE: This is the Second Part of the Roundtable]

Room:

Auditorio A. Silva

Chairs:

Mark Graber
Amnon Reichman
Vanessa MacDonnell

Presenters:

Michaela Hailbronner:
Discussant – Judicial Appointments: The German Perspective

Amnon Reichman:
Discussant – Recent Developments in Israel

Discussant:

Sanford Levinson
Carissima Mathen

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

190 WHAT DO WE MEAN BY "TRANSFORMATIVE CONSTITUTIONALISM" IN LATIN AMERICA?

Over the past decades, Latin America has gradually become a key player for the present and future of public law. Particularly the regionalization of constitutional law and the internationalization of constitutional law that are occurring in this region demonstrate relevant elements for comparative studies between regional and domestic systems. In our panel we will discuss some of the key developments that shape the emergence of an original Latin American path. This path consists of elements from various legal orders that are united by a common thrust, namely transformative constitutionalism, and linked to the project of a Ius Constitutionale Commune en América Latina (ICCAL). This enterprise links national and regional case law related to the American Convention on Human Rights, other inter-American legal instruments, the corresponding guarantees of national constitutions and the constitutional clauses that open domestic legal orders to international law and regional integration law.

Room:

LLM93

Chair:

Armin von Bogdandy

Presenters:

Sabrina Ragone
Cecilia Medina Quiroga
Javier Couso
Juan C. Herrera

Sabrina Ragone: Latin American Transformative Constitutionalism Through the Prism of European Constitutionalism

This contribution will address Latin American transformative constitutionalism approaching it through the categories of European constitutionalism. It will focus mainly on the role of supreme, constitutional and international courts as actors of transformative constitutionalism using the parameters and tasks traditionally allotted to constitutional adjudication. The main examples of such focus will be the Colombian Constitutional Court and the Inter-American Court of Human Rights as significant cases in the region, with references to other relevant courts. The comparative perspective adopted in the talk will contribute to foster a dialogue between European and Latin American scholars, promoting dialogue and mutual understanding.

Cecilia Medina Quiroga: The Battle of Rights and Transformative Constitutionalism

Based on my personal and professional experiences, I will briefly present the origin and development of the principles of respect for fundamental rights and democracy in the Inter-American system. Latin America has several lessons to share with other regions in order to fight against cross systematic violations of human rights. The joint venture between the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights is one example. The transformative constitutionalism of the current times relays on the progressive understanding of the American Convention and national constitutions. After 31 years of the publication of my book "The battle of HUMAN rights," I will focus on what has been transformative and what remains unchanged. This will allow me to share some pros and cons related to the contemporary debates about this relevant issue.

Javier Couso: Transformative Constitutionalism: Evaluating Constitutional Strategies to Materialize Social Justice in Latin America

Transformative constitutionalism has captured the imagination of progressive scholars throughout Latin America, due to its promise to bridge the gap between socio-economic justice and constitutionalism, a gap that has been particularly large in this region (where constitutionalism has traditionally lived side-by-side with gross economic inequality). The very sustainability of democratic constitutionalism is at risk –due precisely to the inequalities that the contemporary global economic order promotes within most countries—, the notion of a constitutional theory and practice that addresses the latter is attractive. The question of how, exactly, can constitutionalism contribute to the transformation of the economic structures that condemns large segments of society to an unequal access to the benefits of growth, remains polemical. I'll explore different attempts currently in display in Latin America that aim to materialize the ideals of a transformative constitutionalism.

Juan C. Herrera: The Taxonomies of the Latin American Corpus Iuris or How National Constitutions in the Region Open some Windows and Doors in favor of Regional Integration

Since the end of authoritarian regimes in Latin America several states of the region have amended or replaced their constitutions. One of the main characteristics of this wave of "new" constitutions concerns those norms that reshaped the understanding of supranationality. The constitutional clauses that open statehood in favor of fundamental rights and regional integration are the examples that represent the openness of windows and doors vis-à-vis supranational standards. For my Ph.D, I studied the 36 constitutions of the Americas in order to organize the taxonomies of the continental corpus iuris. Therefore, I will present the conceptual framework that allowed me not only to define Latin American supranational clauses but also to classify their levels of openness towards regional integration. This aspect is crucial for the stability and the future of both commune and transformative law in the region.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

191 CONSTITUTIONAL PRESENT CHALLENGES

The relationship between constitutionalism and democracy is now one more time challenged in Brasil. The rise of the new government model with authoritharian and antiliberal features put at risk many accomplishment of the 1988 constitutional system. One of the main reasons is that our pillars of democracy were not well prepared to avoid presidential overpower. The resilience and endurance of constitution in the times of authoritarians' threats will be the focus of the first panel. The alternative judicial methods for indians and non-regular situations is the subject of the second panel. The analyses of the new statutes and the cause and possible consequences of the new brazialian government will be discussed for the third panelist. The chair and fourth panelist will highlight the forms of democracy and bring the lack of a militant democracy in the brazilian constitution and the weakness of brazilian concern with inclusive democracy. Both risks can result in constitution dangers.

Room:

Seminario 2

Chair:

Eduardo Moreira

Presenters:

Luis Claudio Araujo
Cristina Gaulia
Rodrigo Brandão
Eduardo Moreira

Luis Claudio Araujo: Judicial Review and Constitutional Longevity

With the rise of a new constitutionalism, mostly in the Twentieth century, it is remarkable the global expansion of judicial review, developing the idea that the Judiciary branch has the power to say the last word on moral and political issues, affecting the democratic principle. Notwithstanding, constitutional longevity does not come just from formal procedural judicial decisions, but rather, it must be built on a democratic order. Consequently, it is not simple to solve this apparent conflict between judicial power and democracy to support a constitutional longevity. However, taking into consideration that judicial decisions are developed in light of constitutional matters, constitutional longevity depends on the rules established by judges related with the community inclusion in the constitutional design, rewriting permanently the meaning of the constitution. Thus, this dialogical perspective brings the balance among democracy, juridical strength and constitutional stability.

Cristina Gaulia: The Itinerant Justice in Brazil: judges helping people to become citizens

The brazilian Constitution of 1988, the so called "Citizen Constitution", created a new jurisdictional formula to bring Justice to people: the Itinerant Justice.From its constitutional cradle to the streets, rivers and slums, judges are building a new way of enforcing citizenship by meeting the people where they live, and in doing so, finding out what Justice they need. This new concept is being developed by a group of judges who realizing the the lack and fragility of citizenship in Brazil, due mostly to the social inequality inherited from the long lasting slavery system, are now working to change this social reality The stories of people who at old ages do not have a birth certificate and/or of couples who live a life together but do not have the money and/or the information needed to get married, are examples, between many others, that the Itinerant Justice helps to bring into light .These experience are the moto to make brazilian judges think about their real role in Society.

Rodrigo Brandão: The challenges faced by fundamental rights and democracy in the Jair Bolsonoaro Government

Jair Bolsonaro's election as President of the Republic raises concerns regarding setbacks for the protection of fundamental rights and democracy in Brazil. In two months of government, measures have been presented or adopted that confirm such concerns, such as the following: Monitoring of NGOs, decrees' notably extend the right to the possession of firearms, the transfer of FUNAI (National Indian Foundation). Its potential implementation is questionable for a number of reasons, three of which will be highlighted: First, the highly fragmented Brazilian political system - secondly, the free press - finally, the Judiciary. The phenomenon underway in countries like Hungary and Poland, where democracy has degenerated almost as fast as it has been consolidated, is not unacknowledged. Since Brazilian democracy is also very young and fragile, there is no solid liberal culture that either imposes an insurmountable obstacle, to the advent of an authoritarian regime.

Eduardo Moreira: The Defense of Constitutional Democracy

The relationship between constitutionalism and democracy is now one more time challenged in Brasil. The rise of the new government model with authoritharian and antiliberal features put at risk many accomplishment of the 1988 constitutional system. One of the main reasons is that our pillars of democracy were not well prepered to avoid presidential overpower. The lack of a militant democracy constitutional clauses and the weakness of brazilian concern with deliberative democracy can result in the constitution dangers. The new governmet also is openly against inclusive democracy. This presentation will investigate the types of democracy - representative democracy - deliberative democracy - inclusive democracy - militant democracy and thyranic mesures - to hightlight what is at risk and what can be done to gathering democratic experiences and features help to preserve and avoid the authoritarian results in the constitutional system of 1998. The folowing panelists will develop this theme.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

192 MATICES DEL CONTROL CONSTITUCIONAL DE LA LEY

Constitutional law scholars around the globe are used to classify legal systems according to the way judicial review works. They are classified according to e.g. the possibility of abstract/concrete control of norms or the existence of a (de)centralized system of review. The more detailed configuration of a system is often not taken into account sufficiently. Yet, knowing the "shades of grey" helps to enhance the understanding of a specific legal system as well as of the classifications used. A closer look often unveils surprising facts and sometimes even anomalies. In this panel, we want to focus on such small, sometimes decisive, sometimes surprising characteristics of judicial review. Examples from different continents will allow to discuss the bigger question in comparative law on how to deal with (the necessary degree of) generalization without reducing comparison to a mere "some things are the same, some are different".

Room:

LLM92

Chair:

Uladzislau Belavusau

Presenters:

Mathias Moeschel
Maria Bertel
Andreas Th. Mueller
César Landa

Mathias Moeschel: Diffuse Constitutionality Review in Germany

This contribution provides a more nuanced view about the German model of constitutionality review which is traditionally classified as belonging to the centralized "Kelsenian" model, in which a constitutional court has the monopoly over such review. This Kelsenian model is juxtaposed to the United States' model of diffuse judicial review where any judge can exercise constitutionality control. However, in the past there existed instances where ordinary judges were allowed to review the constitutionality of statutes under Weimar and in West Berlin. And even today, in certain cases ordinary courts can declare statutes unconstitutional if they are pre-constitutional or statutes from former Eastern Germany. Moreover, at the state level courts can also review the constitutionality of state laws. In other words, the German model of centralized constitutionality review is not as pure as one might suspect at first glance.

Maria Bertel: Quorums as the decisive point on the scales?

In my contribution I will focus on quorums of Constitutional Courts. They are mostly not laid down in constitutional provisions, but in organic laws or in ordinary laws. Yet, they can be decisive. After providing an overview of selected cases, I will illustrate the problem with the example of the Peruvian Constitutional Court. This Court has seven members. Whereas for regular cases a simple majority is necessary in order to find a decision, for some types of cases the majority is five votes out of seven. This can be explained by the history of Peruvian democracy, as increased quorums were a tool of controlling the Constitutional Court during Alberto Fujimoris presidency. The question is therefore, which lessons we can draw from the Peruvian example, especially in times of democratic backlash. Do increased quorums express a special consensus? Or are they complicating decision-taking and weakening Constitutional Courts?

Andreas Th. Mueller: Self-restraint of the European Court of Justice vis-à-vis national constitutional courts – The demise of judicial activism?

For many, the European Court of Justice has become the epitome of judicial activism. In recent years, however, some scholars have diagnosed a shift to a more deferential attitude of the Luxembourg Court. This contribution will put the thesis that the Court has matured into a new era of self-restraint to the test, in particular in its relationship to national constitutional courts. In fact, there are relevant indications for such a development, notably regarding a) the "respect of national identity" clause, b) the realignment of the division of labor between the EU and Member States courts as regards fundamental rights and fundamental freedoms as well as c) the alliance the European Court of Justice appears to offer to national constitutional courts in contrast to international courts and tribunals outside the EU legal protection system. The analysis calls for a nuanced, and reluctant, answer regarding the purported end of judicial activism on the part of the Luxembourg Court.

César Landa: The Mixed System of Constitutional and Conventional Control in Peru

The Constitutional Court and the Supreme Court of Peru have been incorporating conventionality control, by virtue of the clause of openness towards international treaties and decisions related to human rights. Against this background of constitutional pluralism I will discuss the effectiveness of not only the condemnatory judgments of the IACHR towards the Peruvian State, but above all, the binding effect of judgments rendered to third countries, and the compliance with them in Peru in order to better protect human rights. This multilevel constitutionalism has its progresses and setbacks which led to an atypical model of constitutional justice in Peru, within the so-called network Constitution

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

193 COERCIVE HUMAN RIGHTS LAW: THE IMPACT OF THE ECHR ON DOMESTIC CRIMINAL LAW (ENFORCEMENT) AND PROCESS

Traditionally, we would tend to think of human rights as protecting those facing the sharp edge of the criminal justice system. The European Court of Human Rights (ECtHR) has, however, hot on the heels of the Inter-American Court of Human Rights (IACtHR), infused the European Convention on Human Rights (ECHR) with duties to mobilise criminal law (enforcement) towards the protection, and redress for violation, of rights. The organizers of the proposed panel are editors of the book 'Towards a Coercive Human Rights Law? Positive Duties to Mobilise the Criminal Law under the ECHR' (forthcoming). The proposed panel will allow the co-organizers to present the main findings from this edited volume, as well as to explore outstanding issues for future research, such as the domestic implications of the ECtHR's coercive human rights jurisprudence. To this end, the organizers have invited key scholars in this area to further explore such implications on policing, prosecution and adjudication.

Room:

Seminario 1

Chairs:

Natasa Mavronicola
Laurens Lavrysen

Presenters:

Laurens Lavrysen & Natasa Mavronicola
Liora Lazarus
Corina Heri
Mattia Pinto

Laurens Lavrysen & Natasa Mavronicola: Critical issues within, and arising out of, the ECtHR's coercive human rights doctrine

This paper presents some of the central findings emerging out of the authors' forthcoming edited volume 'Towards a Coercive Human Rights Law? Positive Duties to Mobilise the Criminal Law under the ECHR'. The presentation will cover: - some of the key theoretical starting points and wider context as discussed in the book (e.g. criminal law theory and the anti-impunity agenda in human rights law) - - specific angles on the development of coercive duties in human rights law (e.g. transitional justice) - - specific rights (e.g. the right not to be subjected to torture and the right not to be subjected to slavery, servitude or forced labour). The paper will identify the different strands in the authors' normative stances on the risks and opportunities raised by coercive human rights law, with a view to informing further debates on future case law developments. Finally, the paper will identify remaining gaps in the literature in order to encourage further research in this area.

Liora Lazarus: Coercive human rights beyond the criminal law

Much of the recent discussion around coercive human rights has tended to focus on the way in which protective duties result in a sharpening of the criminal law or a greater push for criminalisation. This equation between coercion and the criminal law is too narrow, however, and loses sight of a significant and pernicious territory in which coercive overreach is at risk. This paper considers how protective human rights obligations also potentially result in the civil law liability of criminal justice agencies, a factor which in turn reshapes the way in which these agencies operate. These duties place considerable pressure on policing institutions to act pre-emptively to avoid human rights breaches, or even civil liability. The shift then is towards a more risk averse criminal justice system which views itself as bound by human rights to act preventively. In this territory, where inscrutable claims of future risks are at stake, the risk of coercive overreach is high.

Corina Heri: Vulnerability-based coercive obligations as an impetus for more victim-oriented perspectives

The European Court of Human Rights relies on the concept of vulnerability to provide special protection to certain persons and groups under various provisions of the European Convention on Human Rights, including the prohibition of torture and inhuman and degrading treatment in its Article 3. This presentation will interrogate the premise that vulnerability-based reasoning not only provokes a shift in perspective when it comes to coercive obligations, emphasizing the rights of victims, but that it creates a certain minimum content of protection that must be provided under domestic law. It will explore the Court's use of vulnerability in formulating coercive obligations, along with whether the result of this process can be considered synonymous with a victim-oriented perspective, and evaluate how this affects States' discretion with respect to the decision to enact and apply domestic criminal-law provisions in particular contexts.

Mattia Pinto: Sowing a 'culture of conviction': what shall domestic criminal justice systems reap from coercive human rights?

This paper assesses the potential implications of the ECtHR's positive duties to mobilise the criminal law on domestic criminal justice systems. It shows that the Court tends to present criminal accountability as indispensable to protect human rights. This approach may foster a 'culture of conviction' at the domestic level whereby punishment is seen as the end to pursue whatever the cost. While the jurisprudence currently refers to the duty to punish as an obligation of means, increased concern with the efficiency of the criminal system in preventing crime is leading the Court to consider whether adequate punishment has been imposed. Such uncritical invocation of conviction and punishment might in practice encourage limitations to due process rights, harsher punishments and wider powers of arrest and detention. Conversely, criminal justice reform initiatives, directed at reducing unnecessary criminalisation and implementing alternatives to prison, are totally neglected.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

194 HATE SPEECH IN THE DIGITAL ERA: A COMPARATIVE ANALYSIS

Hate speech is one of the greatest problems of contemporary societies. In this sense, the multicultural and heterogeneous nature of contemporary societies has increased the tensions related to the coexistence of people with very different backgrounds, that have been faced with an extraordinary incapacity in promoting tolerance, both at the institutional level and at the social level. Moreover, the so called "great regression" attacks the fundamental values of pluralist democracy generating the effect of "brutalization of public discourse". It is a generalized "barbarisation" of social customs and conventions that contributes to the strengthening and spreading of a "culture of disrespect" towards the "other". In addition, in the digital era haters are protected by a screen and by a halo of irresponsibility justified by privacy. In this "liquid" and "barbaric" context, how can the problem of hate speech be addressed? The aim of this panel is to address this problematic.

Room:

D302

Chair:

Luis Efren Rios Vega

Presenters:

Irene Spigno

Elisa Bertolini

Palmina Tanzarella

Irene Spigno: How to deal with hate speech? A comparison between constitutional models

These are hard times for freedom of expression. Internet has changed many of the rules of the democratic game, posing new challenges to old issues. The constitutional debate has focused on determining the constitutionality of measures that, limiting freedom of expression, are aimed at protecting other fundamental values endangered by hate speech. Should constitutional systems tolerate hate speech and allow its dissemination? The answers that the comparative constitutional experience offers to this question can be systematized in "constitutional models", understood as a synthesis of the main legislative and jurisprudential solutions provided in each state context, which identifies different "resistance thresholds" . The presentation will focus on four "constitutional models" in order to identify which one may represent an appropriate answers to manage the rapidity of the changes generated by Internet.

Elisa Bertolini: Hate Speech, Fake News and Populism: the Dark Side of Social Networks

The Internet, SNs in particular, has altered the usual pattern of protection/limitation of freedom of speech, because has maximized the potential of this freedom. Recently, the freedom of speech has been put under strain, because of the spreading of fake news/hate speech, intertwined with the rise of populism throughout Europe. The interplay between fake news/hate speech and populism undermines the democratic legal order. In this context, freedom of speech has to be balanced with the protection of democracy. However, any possible national legislation aiming at sanctioning fake news and hate speech on social networks' platforms seems to require the cooperation and intervention of the social platforms, raising concerns, mainly related to the enforceability. The German law, which provides for a notice and take down system within 24 hours, offers a tentative solution to the issue, though seeming not to properly focus on the transitional character of net, demanding a transnational approach

Palmina Tanzarella: Hate Speech On Line in the European Context

In the European Context the spreading of hateful ideas is considered a serious threat for democracy and the respect of human dignity. After the Second World War the European countries launched a battle against all forms of discrimination, also through the adoption of anti-hate speech regulations. At the supranational level, the European Institutions follow the same pattern. Since that period the protection of freedom of expression is at the stake. Initially considered as the right that help the consolidation of democracy, nowadays it is perceived as a danger. The arrival of the digital era has complicated the framework even more. Internet come along with the purposes to free the world of the information - quite soon it has shown the downsides linked with the anonymity and the speed of the online interactions. Therefore, many new questions arise at a European constitutional level: How to regulate the phenomena? How to enforce the law? How to cooperate with the SNs companies?

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

195 A NEW DAWN FOR THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION IN EU LAW?

This panel aims at discussing a number of recent developments in the way in which the Court of Justice of the European Union understands and applies the principle of effective judicial protection. This principle (together with the principles of equivalence and effectiveness) functions as a limit to the national procedural autonomy of the Member States. However, its relationship with the twin principle of effectiveness is still subject to some debate. This topic will be discussed by Chiara Feliziani. The very nature of the principle of effective judicial protection and its 'constitutional' role will be tackled by Matteo Bonelli. A third question is linked to relationship between effective judicial protection and proportionality review, which is examined by Giuliano Vosa. Finally, Mariolina Eliantonio will discuss the role of the principle of effective judicial protection in the context of composite administrative procedures.

Room:

Allende Bascuñan 2

Chair:

Mariolina Eliantonio

Presenters:

Chiara Feliziani
Giuliano Vosa
Matteo Bonelli
Mariolina Eliantonio & Paul Dermine

Chiara Feliziani: Principle of effective judicial protection: something new at the horizon?

Originally, when the European Economic Community was founded, the principle of procedural autonomy was one of the main rules regulating the relationship between the Community itself and Member States. While this principle is formally still in force, it has been the object of an interesting evolution which has happened in parallel to the evolution of another and complementary principle, the principle of effective judicial protection. The CJEU has often referred in combination to the two principles. Lately, however, the ECJ has referred to the principle of effective judicial protection in a new and broader sense. The paper is aimed at analyzing this most recent Luxemburg jurisprudence and, in particular, the case European Commission v. Republic of Polonia, C-619/18, in order of understand if this case law represents the beginning of a new season in the story of the principle of effective judicial protection.

Giuliano Vosa: Effective Judicial Protection against 'Technical' Law-making: The Case for Proportionality and the European Central Bank at the European Court of Justice

In reviewing legal acts adopted in the context of the financial crisis, the European Court of Justice has often resorted to proportionality. However, in general, a softened review seems to apply, as law-makers are left with a margin of political discretion which is the broadest where their normative choices – yet touching upon sensitive political interests – qualify as most 'technically' complex. It is assumed that proportionality links with a 'culture of justification' as alternative to a 'culture of authority' in the exercise of public power. The paper outlines the fundamentals of the 'culture of justification' with which proportionality is infused. Furthermore, it analyses two judgments delivered by the Court of Justice concerning the activity of the European Central Bank in the context of the crisis – namely, Gauweiler and Weiss, and it highlights the peculiar ontology of law that transpires from these judgments and tests its consistency with the 'culture of justification'.

Matteo Bonelli: The evolving nature of the principle of effective judicial protection

The principle of effective judicial protection (EJP) has traditionally been understood as a 'procedural' principle, used as a standard to assess national procedures applicable when individuals claim a right deriving from EU law. The EJP became part of EU primary law with Lisbon. This recognition has stimulated an evolution led by the CJEU. In several recent landmark decisions, the Court has made reference to the principle of EJP and operationalized it in quite different fields. The decisions of the Court and the changes in EU primary law are transforming EJP from a procedural into a more 'substantive' principle, of a constitutional nature. First, EJP is now a fundamental right under Art. 47 Charter. Second, EJP operates as a more structural principle, closely connected to the rule of law. Here the relevant provision is Art. 19(1) TEU. This paper aims to map the on-going evolution of the principle of EJP and to reflect on how recent Court's decisions are transforming its nature.

Mariolina Eliantonio & Paul Dermine: The evolution of the principle of effective judicial protection in the context of composite administration

The paper aims at analysing the understanding and application by the European Court of Justice of the principle of effective judicial protection in the context of composite administrative proceedings. Recently, the Court has had to adjudicated on a case which arose in the context of the new Banking Union set up following the Eurozone crisis and which concerned the question of the exact division of tasks between the ECB and the national authorities, and its implications in terms of judicial review. Is the Court's jurisdiction exclusive and total, englobing the preparatory acts adopted at the national level, or is it split between the Court and national judiciaries, depending on the author of the act at stake? The court revisited in its ruling the long-standing Borelli case law and shed new light on the division of competences between national and European courts when shared execution of EU law is at stake.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

196 RELIGION IN THE CRISIS OF CONSTITUTIONAL DEMOCRACY?

This panel examines the complex relationship between religion and democracy from the lens of democratic crisis. Drawing from developments around the world, panelists engage with recent scholarly attention on democratic degeneration, which has brought to fore crucial questions about the relationship between constitutional democracy and other social forces that may be in opposition to its underlying values. As religion is one such major social force, panelists will interrogate the role of religion in the crisis (or not) of constitutional democracy, raising questions that include how religious narratives can be used to undermine constitutional democracies - how religious claims can be seen as legitimate within certain types of constitutional democracies - whether the crisis talk presumes a liberal secular order - and furthermore whether the scholarly claim of crisis coheres with the internal perspective of the people - and why that may pose further problems for constitutional change.

Room:

COM103

Chair:

Moshe Cohen Eliya

Presenters:

Gila Stopler
Jaclyn L. Neo
Peter Danchin
Manoj Mate
Tarun Khaitan

Gila Stopler: The Role of Religion in the Democratic Crisis in Israel

The relationship between religion and the state in Israel has always been fraught with difficulties. While Israel perceives itself, and is perceived by many, as a liberal democracy, the thick, albeit partial, establishment of orthodox Jewish religion in the state, together with the state's partly religious raison d'etre and self-understanding, defy this perception. Moreover, the coupling of religious ideology with nationalistic fervor following the 1967 occupation of the territories has enabled religious nationalism to become a major driving force behind the democratic crisis that Israel has been experiencing in recent years. Religious forces are taking advantage of the inherent weaknesses of Israel's semi liberal constitutionalism and of the current democratic crisis to buttress the power of religious nationalism and of religion in general and to dismantle liberal rights protections and the rule of law.

Jaclyn L. Neo: Religion and Democratic Contestation in Mixed Constitutions

The need for relative or even strict autonomy between state and religion has often been contended to be a necessary condition for democratic government. This position however is tenuous in religious societies where religion is not only an important identity marker but one that animates political and social action. The constitutional system in many such societies therefore tends to be mixed, rather than secular. This means that the constitution accommodates both secular and theocratic aspects of government. Under such conditions of mixed constitutionalism, democratic space is likely to be dominated by strong contestations between secularists and theocrats. While this may be seen as creating a crisis in constitutional democracy, some may argue to the contrary that this is itself a manifestation of a vibrant democracy. This paper examines these positions and proposes that mixed constitutions require a framework of mutuality in order to preserve accommodative constitutional democracy.

Peter Danchin: Article 2 of the Egyptian Constitution and the "Crisis" of Constitutional Democracy?

In the wake of the 2011 revolution that toppled the Mubarak regime, an intense site of legal and political contestation was Art. 2 of the Egyptian Constitution and the statement that the principles of the Islamic shari'a are the "main source" of legislation. What is the history of this provision and its normative implications for Egyptian constitutional democracy? In examining recent jurisprudence of the Egyptian Constitutional Court, this paper interrogates a central paradox that on the one hand the shari'a has taken on distinctly secular liberal characteristics and sensibilities under Egyptian law, while on the other the Constitution gives it such extensive, anxiety-inducing, public power. How can both positions be possible in the same constitutional order? The paper argues that Art. 2 should be read neither as an attempt to secularize Islamic law nor subvert secular authority, but rather as a reflection of Egypt's embeddedness within the problem-space of modern secular power.

Manoj Mate: Beyond the 2019 National Elections: Secularism and the Future of India's Constitutional Democracy

This paper analyzes how the continued drift toward religiosity in Indian politics poses a challenge to secular democracy in India. The article traces the rise of the Bharatiya Janata Party and how the Supreme Court and Election Commission have acquiesced to ongoing erosion of secularism. Since its victory in 2014, the BJP continues to deploy religious rhetoric in elections, and has enacted policies targeting religious minority groups leading to a surge in violence and oppression. It then analyzes how religious nationalism is being deployed in the 2019 elections, the likely strategy of opposition parties, and assesses both political and legal strategies for restoring secularism in India's democracy.

Tarun Khaitan: ***Discussant***

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

197 FEMINIST CONSTITUTIONALISM IN LATIN AMERICA

The eruption of feminist constitutionalism in the academy is fairly new and it has not been significantly developed in the Spanish-speaking constitutional doctrine nor in the Latin American constitutional academic debate. The approach of feminist constitutionalism goes beyond the analysis of the constitutional or public precepts from a gender perspective. Feminist constitutionalism promotes a new understanding of the relation between gender and constitutional law at a critique and amendment of constitutional law. In this sense, it requires not just to rethink classical legal subjects from new perspectives, but also to propose new subjects, to introduce new questions and to have active participation in the challenge of encouraging a change of focus in the constitutional debate.

Room:

FD-101

Chair:

Lieta Vivaldi

Presenters:

Barbara Sepulveda Hales
Lieta Vivaldi
Melisa Sol Garcia
Catalina Lagos

Barbara Sepulveda Hales: The legal construction of women's citizenship

The legal construction of women's citizenship is examined here by analyzing their legal status in general, in correlation to their social situation in Chile. The specific legal status of women as subjects of law, in particular of citizens, is different from men, which complies with the normative standard of hegemony. While women have achieved minimal civil and political rights, the persistent legal manifestations of their discrimination through arbitrary exclusions, the reproduction of gender stereotypes in legal norms and a biased application of the law could be understood as part of a constitutive logic of public law that reproduces the lower legal status of women. Modern constitutional theories fail to find a satisfactory response to the specific phenomenon of gender discrimination in the exercise and ownership of citizenship. Progress and setbacks are identified as a result of the historical shift of a gender perspective in the construction of legal subjects in constitutional law.

Lieta Vivaldi: Contentious objection in the interruption of pregnancy in Chile: a right threatened by the State

The name of the presentation is currently: "Contentious objection in the interruption of pregnancy in Chile: a right threatened by the State", but the first word should be "Conscientious" and not Contentious. So I would appreciate if you amend the name to "Conscientious objection in the interruption of pregnancy in Chile: a right threatened by the State".

Melisa Sol Garcia: The Need for a feminist approach on the Argentinian Constitution: equal opportunities in the workplace

In Argentina, the lack of opportunities for women in the workplace is notorious in several aspects. Although the Magna Carta guarantees the right to social work and the right to equality, in several cases it does not translate in real consequences - its application is in many times detrimental to Women, it does not provide the same system of solution to conflicts between parties, and the State's intervention is minimal. In this paper I will address the situation that women experience regarding their job opportunities - regardless of the extent in which certain rights are guaranteed in the normative, in the practice, they are not really granted. For instance, a woman receives a lower salary than a man for the same task and female athletes are discriminated. I will specifically analyse, the '2003 FUND WOMEN INEQUALITY -with EMPRESA FREDDO' case which is an example of a judicial decision that established affirmative actions.

Catalina Lagos: Law 20.609: An useful tool for women? Analysis of the Chilean Law against discrimination from a gender perspective

In Chile, in July 2012, the Law 20.609 which establishes measures against discrimination, was approved. Few years after its publication this article analyses, with a gender perspective, whether the definition of discrimination, the measures contemplated in the Law - to prevent and protect those who suffer discrimination, to punish those who are responsible and, eliminate it - are effective or not protecting women. The study of the recommendations given to Chile in 2018 by the Committee on the Elimination of Discrimination against Women (CEDAW), allows us to conclude that women suffer different and complex ways of discrimination that have not been addressed. A revision of the Law and last years jurisprudence in relation to the 'non-discrimination action' established in the Law - particularly cases of discrimination on sexual grounds - considering the particularities of the discriminatory phenomena that affect women in Chile, shows that it is an insufficient tool to protect women.

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Wednesday, 3 July 2019
10:30 – 12:05

199 PUBLIC LAW PATHOLOGIES

Public law is aimed at setting up the structures where social life takes place and shapes itself. Public law certainly cannot be just anything or purport to do things in any form, yet it is not clear what are its ethical, social, individual and political constraints. Is the law constrained to be consistent with itself and its history? Is the law constrained to be consistent and attentive to every member of the society it rules? What happens when law works in a context that challenges the consistency of its demands or its aims? How can public law provide space for conflicting ethos and demands? In this panel we address these issues by looking into different spaces in which Public Law runs into trouble when trying to regulate a certain realm of public life. The aim is to try to illuminate the ethics, the ethos, the limits and possibilities of Public Law.

Room:

Allende Bascuñan 1

Chair:

Rocío Lorca
Emily Kidd White

Presenters:

Alberto Coddou
Pablo Marshall
Rocío Lorca
Emily Kidd White

Alberto Coddou: Mapping Public Law: a critical account of Ius Commune Constitutionale in Latin America

Public law is obsessed with mapping. However, without a critical account of how mapping is produced, pathologies emerge. Global Constitutionalism´s editors, commenting on the end of the 'West', stated that 'we should give up to the idea of a deep connection between constitutionalist ideas and geographical regions, countries or power constellations'. In this scenario, several scholars focus on Latin America, 'the region where the debate on the future of constitutionalism is debated with more intensity and urgency', and advocate for a concept with the ability to address 'a new legal phenomena': Ius Commune Constitutionale in Latin America. This endeavour attempts to give an account of the 'original Latin American path of transformative constitutionalism'. Here, I critically address the main postulates of ICCAL and present a more precise intellectual map of Latin American constitutionalism.

Pablo Marshall: The social and the individual in disability juridification

This paper analyses the way in which models of disability in social theory are incorporated in the process of legal regulation. It focuses on the late process of juridification of disability that has followed the CRPD (2011) which adopts the social model of disability. Most developing countries have recently undertaken the task of giving legal regulation to disability and for that they have had to face the need for a conceptual framework. It is affirmed that despite the relevance of the discussion on disability models, juridification limitations make impossible to capture the social complexity involved in the exclusion processes affecting people with disabilities. That results in that, even where regulation attempts to capture the social model, individual intervention (i.e. through an antidiscrimination law regime) takes precedence over social transformation (i.e. welfarist mechanisms of support for independent living).

Rocío Lorca: Do public legal institutions need to show moral integrity? The case of hypocrisy

Does the state need to have a moral standing to exercise public authority? Is this standing vulnerable to the charge of hypocrisy? The paper explores these issues, arguing that it is at times necessary for the state to claim a sort of moral standing in order to exercise its public authority, particularly where it engages in blaming practices such as punishment. However, the required standing is not equivalent to the moral standing that individuals need to blame or claim authority over others. Certain objections may not apply to the political relationship. Hypocrisy seems to be a kind of objection that is not appropriate for the political relationship as it is not based on reciprocity. Yet there is a strong intuition that suggests that when public authority is inconsistent and thus acts hypocritically, its actions may not be legitimate. How can we make sense of both the nature of the political relationship and the expectations we may have over the integrity of law and public agencies?

Emily Kidd White: The Public Law Vice of Hypocrisy

Let me answer like the man in the story, "I must decline the soft impeachment." Randall Jarrell, A Note on Poetry, 1940. Assumptions about human nature undergird public law values, like equality, liberty, and dignity. Setting these assumptions to light exposes public law values to various forms of political critique, some of which fall under the broad heading of hypocrisy (where a good is publically claimed, though perniciously, even purposely, unrealized). This paper analyzes the various argumentative forms of the charge of hypocrisy that are raised against invocations, and interpretations of public law values. In describing one form of hypocrisy, the paper draws upon the work of C.B. Macpherson and the relation between theoretical justifications for political rule and claims about human nature. The paper argues that while some forms of the hypocrisy charge might apply to any speaker, there is a particular iteration that is uniquely applicable to the structure of public law values.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

200 CONSTITUTIONAL MOMENT IN JAPAN: ITS CONTEXTUAL AND UNIVERSAL CHARACTERS

When Prime Minister Shinzo Abe came into power in 2012, he officially announced the agenda of constitutional amendment on Article 9. His project aims at recognizing the constitutional status of the Self-Defense Forces (SDF), which were formally prohibited by Section 2 of Article 9. Furthermore, during the process of proposing amendments, the Liberal Democratic Party, i.e. the ruling party, also attempted to restore the SDF's capacity of engaging in international coalition, which was termed as "collective war power." However, after the general election of the House of Representatives in 2017, the LDP has slowed down its pace to promote the amendments. This panel includes four papers to analyze and delineate the trajectory of constitutional amendment in Japan. It attempts not only to articulate the peculiar background, mechanisms, politics, and history of constitutional amendment in Japan, but also the universal phenomenon between populism and constitutionalism.

Room:

Auditorio CAP

Chair:

Richard Albert

Presenters:

Keigo Komamura
Mayu Terada
Cheng-Yi Huang
Masahiro Kinoshita

Keigo Komamura: Constitutional Amendment as a Political Compensation for Democratic Defect: Prime Minster Shinzo Abe's Challenge and its Paradoxical Effects

Every constitutional projects are products of context because constitutional law is law of the nation. Political leaders also have their own dreams, interests and fetters of communities or family. Those peculiar traits make constitutional project contextual. However, I would draw not contextual concerns but more universal lessons from what's going on in Japan around Prime Minister Abe's constitutional amendment. These years, a number of political crises happened under the Abe administration. Every single one of these crises would lead to resignation of Ministers or Prime Minister if they happened before. But the Abe administration is still powerful. Why? It is partially because of a force of numbers he got in the Diet. On the other side, his project of constitutional amendment itself shall be another source of his power. Democratic defect of the administration probably would make up its illegitimacy by touching the highest source of legitimacy of the nation, the Constitution of Japan.

Mayu Terada: Unique and Universal Problems about the Proposal Process of Constitutional Amendment in Japan

There are variety of national constitutional amendment procedures and it is difficult to say what is normal or rapid procedure. It would eventually all depend on who is initiating the reform, which is a universal feature. Japan's Constitution has an article that sets out how to amend the constitution and it sets up a more difficult procedure for constitutional amendment than for normal legislation process. However, Article 96 of the Japanese Constitution does not prescribe any procedures to amend the constitution. Thus, regarding the amendment procedure, the referendum law was passed on May 14, 2007. The referendum law has several problems, such as the lack of provision of the minimum voting rate. Even if the proposal for constitutional amendment is made, there are still doubts and procedural problems with the referendum process which is written in the Referendum Law, and this is a unique and universal problem of guarantee of proper procedures for constitutional amendment.

Cheng-Yi Huang: "Imposed People" and Political Leverage of Constitutional Amendment in Japan

The right-wing advocates for constitutional amendment in Japan frequently argued the post-WWII Japanese Constitution was imposed by the GHQ (i.e. the Supreme Commander of the Allied Powers). Since Prime Minister Abe Shinzo came into power in 2012, the Liberal Democratic Party ("LDP") has been borrowing the currency of "imposed constitution" to bolster its agenda of constitutional amendment. This article tries to argue that the LDP's strategy for constitutional amendment has two prongs: first, it functions like a populist campaign rather than a genuine constitutional commitment - second, electoral payoffs provides leverage for Abe to advance its own strategy of political economy, e.g. to enhance its control over bureaucrats, business and the media. Article 9 is a natural jump starter for the LDP to arouse the sense of national pride or national identity among Japanese citizens. In this vein, the politician pronounced for the citizens, claiming the supremacy of the "people."

Masahiro Kinoshita: Economic Reform as a Constitutional Moment: Japanese Constitutional Economic Design After World War II

Constitutional protection of property has been considered as an essential element of liberal democratic constitution. However, since economic power is easily converted into political power, the protection of property has an aspect which contravenes democracy and political equality. Redistribution of wealth always involves a risk that governmental power would be abused. Thus, the constitutional design of property determines the success of democratization. Post-WWII economic reform in Japan is a good example to explore the constitutional design of property. After WWII, the drastic economic reform was implemented based on the idea that the concentration of wealth impedes democratization. Such economic reform was a constitutional moment just like an enactment of Constitution. This paper deals with two major questions: first, how the Japanese economic reform was justified under the post-WWII constitution - second, how the Japanese legal system could avoid the risk of abuse of redistribution.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

201 COMPARATIVE PUBLIC LAW AND INTERNATIONAL INVESTMENT LAW REFORM

Contemporary international investment law is facing challenges which have been labelled as the 'backlash' against international investment law. Three main tensions may be identified in contemporary investment law: contractualism vs unilateralism - economic rationality vs political rationality - flat world image vs diverse world image. As a result of the identified tensions, international investment law is undergoing a process of reform. This panel wants to contribute to the reform discussion of international investment law by making the claim that the reform discussion needs to be informed by the study of systems of domestic investment law and policy: the study of domestic investment laws becomes as important as the new field to be developed, that of comparative investment law. This discussion raises an even broader issue, namely on the more general relationship between domestic law – and the comparative law methodology – with international law.

Room:

Auditorio P. Aylwin

Chair:

Gráinne de Búrca

Presenters:

Peter Lindseth
Joanna Jemielniak
Georgios Dimitropoulos
Maurizia De Bellis
Damilola Olawuyi

Peter Lindseth: Theorizing Backlash: Supranational Governance and International Investment Law and Arbitration in Comparative Perspective

Theoretical understandings of the backlash against international investment law and arbitration can benefit from examining analogous dynamics in supranational governance more generally. Two features characterize both systems: the delegation of regulatory power to functional pre-commitment agents beyond the State - and the persistence of constitutional legitimacy in State-level principals. In these circumstances, the 'agency-cost problem' is aggravated in two ways that find surprising support in the literature. Global administrative law, for example, comes close to rationalizing a system of 'agents without principals' by bracketing whether any legitimating connection between the two is possible. Pluralist-constitutional theorists, by contrast, cast pre-commitment agents as representatives of a global constitutional order, thus rationalizing a 'principal-agent inversion'. Either way, a break occurs in the 'power-legitimacy nexus' thus leading to backlash.

Joanna Jemielniak: Lessons from the Battlefield: Comparative Analysis in Interpretation of Legal Instruments for Investment Relations

A notable part of criticism of the existing ISDS regime is based on the claim that arbitration, developed for the purposes of addressing commercial disputes, is not fully adequate for the public law-based investor-state controversies. In recent years the discussion of the perils of personal, institutional and procedural synergies between international commercial arbitration (ICA) and investor-state arbitration has been intense. However, a question may arise whether parts of experience acquired in the practice of ICA may be reconceptualized for the purposes of the reformed field of investor-state dispute resolution. Comparative analysis has been widely described as fundamental to the practice of ICA to the extent unparalleled by any other legal field. The paper explores to what extent the famous arbitral 'comparative mindset', intrinsic to ICA, can be employed in addressing investment disputes, and what are its limitations in interpreting instruments which regulate investment relations.

Georgios Dimitropoulos: National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform

The growing tendency among States to terminate their international investment agreements and/or replace them with domestic laws may be understood as a reclamation of national sovereignty vis-à-vis international institutions. The article develops a typology of moves to reassert sovereignty in international investment law, distinguishing: (a) an isolationist reassertion - from (b) an international reassertion - and in turn from (c) domesticating reassertion. International investment law and its reform needs to be informed by research into domestic systems of governance in order to better conceptualize the ways in which international law principles are implemented alongside and through the use of domestic legal instruments. The article also identifies the ways in which domestic and international law co-exist and mutually influence each other with a view to the substantive and procedural law reform of the investment regime.

Maurizia De Bellis: International Investment Law and EU Law: Conflicts, Compatibility, and Theoretical Paradigms in Recent Trends

International investment law has for long developed as a pluralistic system, that has been studied and explained through different theoretical approaches. In the last decade, and most notably in the last years, conflicts between international investment law and EU law have emerged. After several conflicts between intra-EU BITs and EU law emerged (such as the still pending Micula saga), in the Achmea ruling the Court of Justice argued that the investor-State arbitration clause contained in the Netherlands-Slovakia BIT was incompatible with EU law. On the contrary, with the Opinion 1/17 delivered on 29 January 2019, Advocate General Bot considered the court system tasked with the resolution of investor-state disputes under the CETA to be compatible with EU law. What reasons underline these different approaches? And what can these diverging solutions suggest both for the understanding and for the reforms of international investment law?

Damilola Olawuyi: Local Content Policies and their Implications for International Investment Law

The rise of local content requirements and policies (LCRs) in resource rich countries across the world, especially in Africa and the Middle East, presents a classic example of the complex tensions between economic rationality and political rationality in the domestic-level implementation of international investment law. While LCRs could provide a tool for governments to generate economic benefits for the local economy, LCRs may be incompatible with international trade and investment treaty obligations. This study develops a profile of the critical intersections and trade-offs between domestic level LCRs and international investment law. It demonstrates how inappropriately designed and implemented LCRs could result in a misalignment of a country's fiscal policies and sustainable development goals, and may ultimately serve as disincentive to foreign investment. It then identifies innovative legal strategies to reform and address these misalignments and inconsistencies.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

202 NEW COMMITMENTS IN INTERNATIONAL TRADE AGREEMENTS? AN EXAMINATION OF CHILEAN NEGOTIATIONS

International trade negotiations have become an important forum for the formulation and implementation of new rules, with implications within and outside trade arena. Since the implementation of the WTO agreements and the rise of preferential trade negotiations new topics have arisen within trade negotiation, ie. intellectual property, labor or environmental standard, and recently, topics such as digital trade or gender-trade related aspects. These proliferation of new topics, and how they are being dealt with by governments in their external relations have impact on their internal regulations and laws. Therefore, this panel pretends, through the examination of Chile´s new agreements, to review how developing economies are negotiating and implementing new regulations within four topics: services, intellectual property, gender and digital economy. This will allow us to understand the way in which international negotiations are shaping domestic regulations on new areas.

Room:

R510

Chairs:

Dorotea Lopez

Felipe Muñoz

Presenters:

Javiera Caceres, Dorotea Lopez & Felipe Muñoz

Dorotea Lopez & Felipe Muñoz

Felipe Muñoz, Dorotea Lopez & Bradly Condon

Fabiola Zibetti, Javiera Caceres, Dorotea Lopez & Felipe Muñoz

Javiera Caceres, Dorotea Lopez & Felipe Muñoz: Gender inclusion in Chilean free trade agreements

Chile is well-known for its aggressive open trade policy, which has evolved to comprehensive international instruments. Lately, Chile has become pioneer in the inclusion of gender-perspective into trade agreements by the addition of gender-related chapters into FTAs with Canada, Uruguay, and Argentina, and in the Pacific Alliance work. We analyze declarations and legal texts to look into the motivations and impact of gender inclusion. Their non-binding characteristics -not subject to dispute resolution mechanisms- suggest that their inclusion reflects governments political will, with no or little legal or economic relevance. Nevertheless, they may become stepping-stone towards a gender-oriented trade policy.

Dorotea Lopez & Felipe Muñoz: Services Dimension in the Pacific Alliance

The Pacific Alliance pragmatism has led to the subscription of some commitments and the implementation of various cooperation programs between member countries, without the need to incorporate them into a single package. The main purpose of this article is to answer two questions: Whether the Pacific Alliance countries had given a better treatment on services liberalization to its developed countries partners (EU and US) than amongst them? How could the Pacific Alliance members' services liberalization commitments at WTO and FTA converge to a single agreement? This article reviews the trade in services aspects of the PA members. First, we review the existing commitments on services liberalization of the Pacific Alliance members in the World Trade Organization (GATS). Second, studying the commitments on member's Free Trade Agreements, particularly with the US and EU comparing them with those amongst them. Finally, an agenda on services liberalization for the PA is proposed.

Felipe Muñoz, Dorotea Lopez & Bradly Condon: The New Rules on Digital Trade in Latin American Regional Trade Agreements

The rise of information and communication technologies is changing productive structure and trade relations worldwide. As stated by the WTO "digital innovation is creating new products, new markets, and creatively disrupting our old brick-and-mortar economy. These digital technologies promise to transform global trade by reducing search and information costs, by creating new sources of comparative advantage, and enabling new players to emerge". Digital trade has transformed the way products and services are exchanged, arising new challenges for countries, which policymakers need to tackle in order to benefit from this new conditions for their development. This paper reviews how new trade negotiations in Latin America had deal with Digital Trade. We look in particular those commitments included within the Pacific Alliance economies, ie. Chile, Colombia, Mexico and Peru, in order to identify the way in which these countries are facing the challenges derived from digital transformation.

Fabiola Zibetti, Javiera Caceres, Dorotea Lopez & Felipe Muñoz: Intellectual Property commitments in the Pacific Alliance

The Pacific Alliance, a regional integration scheme conformed by Chile, Colombia, Mexico and Peru has become one of the leading regional processes in the region. Based on a pragmatic agenda, its objective id to enhance economic integration amongst member countries, and face the challenges of trade and development, particularly those coming from the Asia Pacific region. Although being stated as the most important regional trade agreement within the Americas in the present century, the Pacific Alliance´s work on intellectual property has been minor, as opposed to treaties such as CPTTP where IP become the core of the negotiations . For instance, its Trade Protocol do not have a IP-related chapter, and the working group on IP has based it work on patent cooperation schemes. This paper analyze the Pacific Alliance work on Intellectual property, looking into the legal and political economy behind the lack of advances within this area.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

202 THE FUTURE OF SOCIAL AND ECONOMIC RIGHTS

Panel formed with individual proposals.

Room:

D405

Chair:

Luigi Bonizzato

Presenters:

Alessandro Liotta
Diana María Molina Portilla
Maria Clara Conde M. Cosati & Luigi Bonizzato
Pedro Hartung
Joao Guilherme Walski de Almeida
Aneta Tyc

Alessandro Liotta: Can we prevent technological development from blowing up social rights? A tax law perspective

The aim of this proposal is to identify the problems deriving from the use of digital platforms and find out whether tax law might give a solution to such problems. If, on the one hand, technological innovation has incontrovertibly improved our lives, on the other hand it has affected the weakest part of the population and exposed it to social exploitation, since the level of employment in certain productions has plummeted (from the manufactory industry to the booksellers). In addition, the use of digital platforms by MNEs has played a pivotal role in avoiding the application of tax provisions, which has resulted in a significant loss in terms of revenue for the National Budgets and has shrunk the Welfare State. In this respect, what can tax law do? Does international tax law have a social aim (like domestic tax law: e.g. the Italian Constitution explicitly mentions the social purpose of direct taxes)? The paper will explore the initiatives at OECD and EU level aimed at tackling phenomena of profit shifting through digital means and verify if they are capable of protecting the Welfare State and social rights and contribute to reduce the current intolerable level of economic injustice.

Diana María Molina Portilla: Constitutionalism impact in theory of social and economic human rights in Colombia

With the entry into force of the 1991 Constitution in Colombia, the traditional system of sources of law changed, not only in the prevalence of the constitutional text and the judicial control of constitutionality, but also in the preponderant role of the jurisprudence of the Constitutional Court in determination the new fundamental rights, minimum essential content and the limits to the exercise thereof. This is the impact of constitutionalism on the theory of fundamental rights that has become more evident when judicial decisions are about social and economic rights, for example: health, education and environment healthy. This paper seeks to explore this relationship between constitutionalism and the theory of fundamental rights, as well as the analysis of the variations in the concept and the foundation of economic and social rights.

Maria Clara Conde M. Cosati & Luigi Bonizzato: Right to law expectation: Old debates, conceptions, new times and state and institutional arrangements

Although it has been the theme visited and revisited, since pension and social security reforms have already occurred in Brazil and in other countries, in more than one moment of their contemporary history, the present study gains strength with the new pension reform presented by the Brazilian Executive Power in 2019. New and complex norms make up the mentioned Amendment in the Brazilian Constitution of 1988, in wich acquired right remains expressly guaranteed. From a deductive and analytical method of some particularities of the Brazilian reform, this text will restart the subject of acquired right, but mainly the expectation of the right, that for a long time has been defended not like a right, but rather an expectation. But the study will have as its central objective finding points for criticism and debate, in relation to which the expectation may not be a mere changeable factual situation, but also a right to be discussed and guaranteed by the State and its institutions.

Pedro Hartung: Taking Children‘s Rights Seriously in Brazilian Public Law: the absolute priority of children‘s fundamental rights and best interests

Article 227 of Brazilian Constitution expressly provided that the fundamental rights of children must be guaranteed by the State, society and families with “absolute priority“, as well as stated by the CRC/UN that the best interests of the child shall be a primary consideration. However, studies in Brazilian public law are silent on analyzing this constitutional provision, even though children are at the center of very important constitutional debates, such as the prohibition of homeschooling, compulsory vaccination and medical treatment against parents‘ beliefs and damages from institutionalized alternative care. This present article aims to deepen this debate through the lens of proportionality, especially with regard to the child’s full capacity to evoke constitutional rights, despite their limited autonomy - to their fundamental right, and its horizontal effect, to absolute priority of their rights and best interests - and also to their fundamental right to equality and solidarity

Joao Guilherme Walski de Almeida: The right to strike as the “first right“

The right to strike is a human right. As history shows us, strikers, labour unions and social movements have often been criminalized, and this leads to a statement of the obvious. In current times – the times of uber, austerity and hyper-vigilance –, people have had a great amount of rights taken away, such as labour rights, social security and privacy. At the same time, society has new demands, generated by aspects such as gender violence, economic disparity and racial inequality, that can be perceived in private relations, between workers and companies, but also results from the lack of public policies that originally aim to change these disparities, and because of this, the right to strike is essential. This paper will analyze the right to strike as the “first right,“ or, in other words, the one that makes it possible for the people to recover lost social rights, according to the research of Roberto Gargarella, who states that protests are vital for democracy.

Aneta Tyc: The Situation of Migrant Domestic Workers from the Perspective of the Protection of Labour Rights

Migrant domestic workers are estimated at approximately 11.5 million persons worldwide. European women are being replaced in their household chores by immigrant women, e.g. from Africa, Asia and Eastern Europe. The paper focuses on human labour rights of domestic migrant workers, especially from the point of view of the typology which divides international standards concerning labour as a matter of human rights into four groups: rights relating to employment (eg. the prohibition of slavery and forced labour) - rights deriving from employment (eg. the right to social security, the right to just and favourable conditions of work) - rights concerning equal treatment and non-discrimination, and instrumental rights (eg. the right to organise, the right to strike). The aim of this paper is to reveal insufficient effectiveness of human labour rights according to the above-mentioned typology. Thus, the author will concentrate on the issues of modern slavery, hyper-precarity and discrimination

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

202 THE RELATIONSHIP OF THE CONSTITUTION WITH THE PAST

We typically treat constitutions as codifying a break with the past, subjecting existing and future legislation to the constitution. In reality, however, constitutions have a more complex relationship with the past. This panel will discuss how the relationship of the constitution with the past affects constitutional interpretation, constitutional identity and dialogue between the branches of government. The discussion will be conducted along theoretical, historical, empirical and comparative lines.

Room:

A102

Chair:

Yvonne Tew

Presenters:

Jamal Greene & Yvonne Tew
Rivka Weill
Mattias Kumm

Jamal Greene & Yvonne Tew: Comparative Approaches to Constitutional History

In recent years, academic and judicial discussion of "originalism" has obscured both the global prevalence of resorting to historical materials as an interpretive resource and the impressive diversity of approaches courts may take to deploying those materials. This chapter seeks, in Section B, to develop a basic taxonomy of historical approaches. Section C explores in greater depth the practices of eight jurisdictions with constitutional courts or apex courts that engage in constitutional review: those of the U.S., Canada, Germany, Australia, India, Hong Kong, Malaysia, and Singapore. Because our selection of cases aims to be illustrative, we do not attempt to draw firm conclusions about the global use of constitutional history. Still, the qualitative evidence that follows hints at what might well be universal within constitutional judging: (1) the significance of history broadly understood, and (2) the limits on history's reach into contemporary rights conflicts.

Rivka Weill: The Theory and Practice of Constitutional Savings Clauses

Some constitutions use savings clauses to shield laws that have been in force prior to their adoption from judicial review - thus, fostering a unique dialogue between representative bodies and courts. They state that existing laws shall remain valid even if inconsistent with the constitution. Scholars view this phenomenon as esoteric, appearing in African or Caribbean countries alone. But this phenomenon is widespread, covering both civil law and common-law countries. Over the years, countries have used such provisions to shield discriminatory religious and gender practices, the death penalty, criminalization of homosexual relationship and even slavery. This puzzling phenomenon should have spurred discussion, yet there is no literature offering a comprehensive theoretical and comparative framework. Savings clauses suggest that constitutional development is more evolutionary than typically suggested. This article offers a taxonomy of savings clauses and the motivations for their adoption.

Mattias Kumm: ***Discussant***

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

203 COMPARATIVE PERSPECTIVES ON THE EMPIRICAL STUDY OF JUDICIAL BEHAVIOR

Although initially developed in the U.S., the empirical study of the judicial behavior has flourished in many jurisdictions. Studies on topics such as the attitudinal predictors of judges' behavior, judicial coalition formation, and strategic behavior, are already frequent around the world. This panel seeks to broaden our understanding on how judges behave in different jurisdictions and institutional settings, exploring from courts of last resort to administrative tribunals. We welcome multidisciplinary approaches, where lawyers, economists, political scientists, and other scholars, contribute to explain the drivers of judges' decision-making in different areas of law. We want to explore to what extent new empirical finding and methodological approaches in the field are helpful to explain judicial behavior in different jurisdictions.

Room:

Sala Juicio Oral

Chairs:

Diego Pardow
Alvaro Bustos

Presenters:

Diego Pardow & Flavia Carbonell
Alvaro Bustos & Pablo Bravo-Hurtado
Andres Pavon & Diego Carrasco

Diego Pardow & Flavia Carbonell: Searching for the "Median Judge": A Study of Coalition Formation in the Third Chamber of the Chilean Supreme Court

This work adapts the traditional methodology of dissent analysis for approaching to the judicial behavior of the Chilean Supreme Court between 2009 and 2013, particularly its Third Section –i.e. public law chamber. Although the high proportion of unanimous decisions (90% of the total) and the huge workload (500 cases per judge) generate limitations, our analysis finds robust coalitions in an environment of variability with over 10 different compositions per year in the same court. Within this period, the behavior of the court seems dominated by the coalition of justices Pierry, Carreño and Araneda, who form the majority when the court splits. Regarding the dissenting justices, the first part of the period features an opposition with Brito, and the second with Muñoz. Whereas both justices appear in a solitary position as the minority, Pierry seems to behave as a "median justice".

Alvaro Bustos & Pablo Bravo-Hurtado: Explaining difference in the quantity of cases heard by courts of last resort

While civil law courts of last resort review up to 90% of appealed cases, common law courts hear as few as 1% of the same petitions. This study postulates that these different policies can be explained by a comparatively larger commitment from common law courts of last resort to judicial law-making rather than judicial uniformity. While law-making courts need to hear few cases to update the law, uniformity courts require a large number of cases to maximize consistency in the lower courts' interpretation of the law. We show that the optimal number of hearings increases with an increment in the courts' concern for uniformity. We also show that if hearing costs are linear then the hearing policies of all courts can be classified in only two types. We also predict important changes in hearing policies when the number of petitions increases and we find that hearing rates and reversal disutility operate as two ways in which a legal system can achieve a given level of judicial uniformity

Andres Pavon & Diego Carrasco: Uneven powers in even-numbered courts: The impact of asymmetric tie-breaking power on judges' behavior

The behavior of judges in asymmetric tie-breaking power conditions has been barely studied empirically. Most courts are designed as an odd-numbered panel where –theoretically– each judge hold the same probability of deciding the court's outcome. Accordingly, less attention has been given to the behavior of judges in even-numbered panels where votes' weight is –by design– distributed unequally among judges. Based on an original database on votes in non-unanimous decisions by a Chilean administrative tribunal formed by 4 judges where its president hold tie-breaking power, this research test whether differences in votes' weight among judges explain judicial coalition formation, while controlling for the judges' ideological preferences. In doing so, the study enhance our understanding of the institutional determinants of the judicial decision-making.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

204 POPULISM, FEAR OF THE PEOPLE AND CONSTITUENT POWER

This panel will explore both the constructive and destructive aspects of constituent power through the prism of populism and 'fear of the people'. Is the perceived rise in 'populism' a real threat to constitutionalism or merely a manifestation of a fear of the democratic potential of The People? To what extent do please to the constituent power legitimate radical constitutional reform and to what extend is this creative or merely destructive? Papers will approach these questions by examining the role of constituent power in secession movements, feminist perspectives on constituent power and formation of 'the people', and the populist movements seen in the United States and across Europe. Is constituent power necessary to ensure a vibrant, responsive, and democratic constitutional order? Or do claims to constituent power and 'the will' of a narrow, homogenous conception of 'the people' legitimate constitutional destruction ?

Room:

D404

Chair:

Alan Greene

Presenters:

Sarah Kay

Ruth Houghton & Aoife O'Donoghue

Oran Doyle

Sarah Kay: Populism, Fear of the People and Constituent Power

2018 has continued a trend of movements emerging from the grassroots, representing people claiming to be marginalized, in order to topple what they describe as an untenable status quo. Events such as Brexit and the Trump administration, have brought to light egregious dysfunction of our democratic institutions and judicial systems. They drove wedges between the press, judges and in general anything associated with human rights and the electorate. As a result, those of us inclined to propel those values are trapped between respect for democratic representation and the need to defened entrenched institutions. In the battle to win against populism, an argument in favor of human rights as providing an efficient remedy will be presented - the chance is taken on the large portion of the population that is not as actively involved in politics as populists being informed of the necessity of human rights as a barrier.

Ruth Houghton & Aoife O'Donoghue: "She cuppeth the lightning in her hand. She commandeth it to strike": Imagining constituent power in feminist science fiction

Feminist utopias, presented in speculative fiction, are rarely read or considered as political or legal treatises. Science fiction provides feminists with a testing ground just as More‘s fictional island in the South Atlantic or Morris‘ future society have done before them. This paper advocates reading feminist utopian visions as depicted in science fiction as a starting point for global constitutionalist debates on constituent power. Placing feminist utopias at the centre of our analysis, we consider how constituent power is reimagined and what these reimaginings offer those seeking a feminist global constitutionalisation.

Oran Doyle: Constituent Power and Secession

This paper will critically analyse the role that constituent power-- or claims to the constituent power-- plays in secessionist movements. This paper contends that when constituent power is conceptualised as ‘the people’, we lose any analytical tools to grapple with the problem of secession. However, if we think about alternative conceptions of constituent power we can avoid this analytical vacuum and think more critically about the legitimacy of secessionist movements.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

207 FISCAL FEDERALISM, TERRITORIAL INEQUALITIES AND EQUALISATION MECHANISMS: A WORLDWIDE OVERVIEW

This panel will explore both the constructive and destructive aspects of constituent power through the prism of populism and 'fear of the people'. Is the perceived rise in 'populism' a real threat to constitutionalism or merely a manifestation of a fear of the democratic potential of The People? To what extent do please to the constituent power legitimate radical constitutional reform and to what extend is this creative or merely destructive? Papers will approach these questions by examining the role of constituent power in secession movements, feminist perspectives on constituent power and formation of 'the people', and the populist movements seen in the United States and across Europe. Is constituent power necessary to ensure a vibrant, responsive, and democratic constitutional order? Or do claims to constituent power and 'the will' of a narrow, homogenous conception of 'the people' legitimate constitutional destruction ?

Room:

A103

Chair:

Lorenza Violini

Presenters:

Erika Arban
Claudia Marchese
Horacio Guillermo Corti & Francisco Javier Ferrer
Mauricio Conti
Mariana Canotilho

Erika Arban: Federalism and socio-economic asymmetries

Reconciling diversity and social cohesion is a common concern in constitutional studies, one that has often been resolved by resorting to federal forms of government. Economic inequalities can also prompt the choice of federalism. The goal of this presentation is to offer a preliminary theorization of economic asymmetries in public law and identify how federal constitutions can balance their unifying role while curbing economic inequalities. By embracing a theoretical and normative approach, the presentation explores how certain federal-based mechanisms running both horizontally and vertically (fiscal federalism being an example) could be better employed to help reconcile socio-economic differences. I propose a two-prong argument: first, I recommend taking economic inequalities more seriously. Next, I claim that the principle of (federal) solidarity represents the legal foundation on which richer or economically successful regions can be required to help poorer regions.

Claudia Marchese: Fiscal federalism and economic inequalities: a comparative analysis of the European area

This presentation focuses upon the relationship between fiscal federalism and economic inequalities in the european area, with a particular attention to the functioning of financial equalisation mechanisms. At first, I will highlight how the stricter butgetary rules adopted during the economic crises in Europe have contributed to an increase of the economic differences among territories of the same State. To solve this problem the intervention of the central State has become fundamental both in regional States and in federal States, despite the attempt to give responsabily to local authorities as well. In fact, the central State has the task to guarantee the economic unity and a common standard of protection for fundamental rights. At this point, I will compare the equalisation mechanisms adopted in various european States and their functioning with the aim to identify which one could be considered a suitable instrument to face the problem of the economic inequalities.

Horacio Guillermo Corti & Francisco Javier Ferrer: Fiscal federalism in Europe and Latin America

The conference will attempt to describe how the system of fiscal federalism functions in times of crisis, comparing the european experience with that of Latin America. In particular, it will focus on the diverse tools used to achieve equilibrium in an unstable system, simultaneously guaranteeing that the exercise of fundamental rights be equitable in the entire affected territory. To that end, it will analize the financial coordination systems and distributive principles of public budgets at all levels of government, exposing the most severe problems facing the taxing and spending authorities.

Mauricio Conti: Public debt and financial calamity: the fiscal irresponsability and the drama of federalism in Brasil

In Brasil the publication of the Fiscal Responsability Law in the year 2000 tried to led the brasilian public finance to new directions, as evidenced by the introduction of the responsible financial management regime whose aim was to promote an adjustment in the public finance of the federated entities. Nevertheless, the fiscal crisis - that has struck the Country since 2010 - led to the use of techniques of “creative accounting“: these techniques have distorted the public finance and the existing rules concerning the budgetary managment. The result has been the financial collapse of various States in the Federation, thus causing problems of financial insolvency. Various federated States have suspended payments and have declared the “state of financial calamity“, so trying to obtain financial aid from the central government. This presentation analyses these problems and the current financial situation in Brasil.

Mariana Canotilho: ***Discussant***

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

208 PARTICIPATORY DEMOCRACY: A SUITABLE SOLUTION TO COPE WITH THE PUBLIC LAW CHANGES

The panel aims to analyze the principle of participatory democracy, from the perspective of both constitutional law and administrative law, identifying it as a useful and necessary principle in order to cope with the new challenges posed by public law and the change of legal systems and, particularly, with reference to EU countries. In the absence of dialogue between administrators can a solution be found in the instruments of participatory democracy? In Italy participatory culture is very low and the law on administrative procedure does not provide for advanced participation tools. We will look at the enforcement of participatory rights in regulatory processes by the administrative court and also by the laws of local authorities that, by adopting highly evolved participatory tools, show the gaps in national legislation. Neither the recent introduction of public debate has solved these problems, since it has a very low application field, unlike the French model.

Room:

Sala Mediación

Chair:

Anna Giurickovic

Presenters:

Giorgia Crisafi
Nicola Berti
Martina Condorelli
Anna Giurickovic

Giorgia Crisafi: The evolution of the principle of participatory democracy at the international and European level

In this paper I will follow the evolution of the principle of participatory democracy. Indeed, especially in the last decades, more and more attention has been paid to ensure the adoption of instruments of participatory democracy, first of all by supranational provisions - international and EU. Thus, the Rio De Janeiro Declaration provided for the states‘ duty to encourage the participation of interested citizens, at different levels, in decision-making procedures - thus, the Aarhus Convention established the criteria concerning the modalities and timing, in observance of which the participatory processes must be implemented. Although the EU emphasized its favor towards an expansion of participatory dynamics both with reference to general policies and, more specifically, with reference to environmental policies, it merely states the principle, but does not specify the implementation models for the principle itself.

Nicola Berti: Participatory practices in the governance of the territory in EU

Urban planning has seen a significant paradigm shift in recent years. From a public function limited to the regulation of building volumes, it has become an overall “territorial management“, in which local communities have assumed a new centrality. This has led to the need for decision-making processes to be guided by the concerned population, in order to direct public authorities in a self-represented development direction. A requirement that clashes with a legal system that considers public participation exclusively in the form of ex post observations about already taken decisions. This gave the opportunity to experiment new spontaneous forms of participation, which in some cases have found acceptance in urban planning laws. Participation has thus become an ex ante constraint for the public decision maker. The contribution aims to make a survey of the most interesting experiments that can be identified in the European legal area, in order to draw useful “de jure condendo“ hints.

Martina Condorelli: Participation and democratic legitimation of independent authorities in Italy: myth or reality?

In the nineties, legal scholars have argued that allowing a broad participation in the regulatory procedures undertaken by independent authorities could have compensated their lack of democratic representativeness and legitimation : the legislator followed suit, by widening the application of the participatory rights beyond the scope of what the Italian procedures act prescribes (art. 13 l. 241/ 1990). The analysis of the relevant case-law however shows that participation is still only seen as a tool to acquiring a broader knowledge of the subject matter, while its role in settling conflicts between interests, using different knowledges in a collaborative manner, is largely ignored. Furthermore, Italian administrative courts tend to exclude those who participate in defense of general interests from the judicial process, arguing their lack of standing, therefore strongly reducing the scope and impact of participatory rights.

Anna Giurickovic: From the “democratic crisis“ to the “participatory democracy“: the new Italian “public debate“ and the French “débat public“ as an inspiring model

In this paper I identify, in the tools of participatory democracy, a suitable solution for the resolution of administrative conflicts, in systems characterized by a strong crisis in the political-electoral circuit and, in general, by the lack of trust in democratic institutions which are no longer adequate to solve the challenges of modernity. Therefore, the traditional procedural instruments of weighting among the interests are no longer adequate, especially in environmental matters, where the evaluations entrusted to the P.A. are not eligible as neutral instruments, but determine relationships characterized by the information asymmetry. In such a context the key word is participatory democracy, as evidenced by the international and EU guidelines. France has been a pioneer in participatory matters - Italy, on the other hand, is a country with a weak participatory culture. I will analyze the flaws of the new Italian-style public debate by comparing it with the French model.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

209 CAN PUBLIC LAW RESEARCH BE SCIENTIFIC?

When we do research in public law, what is it that we do? What is it exactly that sets research in public law apart from other legal disciplines, methodology wise? Given that a (if not the) key reality regulated by public law is the political, on the one hand, one has to wonder whether conceiving public law as an autonomous realm might incidentally carry us away from what actually gives coherence to any sensible approach to it. On the other hand, the dynamics characterizing the political, and hence the object of study of public law, beg the question: On what grounds can we claim to study the law that regulates the political without submerging ourselves in the political ourselves? And more importantly, can we provide sufficient rationality to the legal study of the political? If we cannot do so, then our field can easily find itself on the verge of becoming a pseudoscience.

Room:

D304

Chairs:

Miriam Henriquez

Presenters:

Eduardo Aldunate
Maria S. Pardo
Pablo Gres
Octavio Ansaldi

Eduardo Aldunate: Constitutional law as science: a proposal of some minimum conditions

Given the multiplicity of schools and currents of thought within constitutionalism and in political science and political thought in general, is it possible to develop a common terminology that contributes to our mutual understanding in the field of constitutional law? Can we build a common ground in terms of concepts, of a language or a vocabulary that allows us (if only) to pretend that we are doing something that can be called science? Or are we, as scholars, bound to be nothing more than just citizens with the ability to develop a higher level of discourse, which nonetheless does not permit to be contrasted or trusted in order to consider us as a "scientific community"? The paper will examin this questions and suggest a set of alternatives to tackle them, by way of proposing a number of (minimun) conditions that should allow us to talk about something like "the science of constitutional law".

Maria S. Pardo: Philosophical cherry picking in the construction of constitutional concepts

Drawing on philosophical studies seems to be a common practice among researchers specializing in public law, particularly in constitutional law. Since the constitution decides (or serves as a basis to decide) on the fundamental political issues in a State, it is often argued that the understanding of such issues requires to examine its foundations, thus leading our research into the field of philosophy. But how do we discern which philosophical works or doctrines are relevant for our research? And with which methodological tools do we face these philosophical studies? The purpose of the paper is to reflect on these questions, with special emphasis on the way in which constitutional scholarship draws upon works on philosophical concepts that also happen to be constitutional terms. To do so, I use the notion of human dignity as a "case study", in order to illustrate the meaning and possible implications of these reflections by reference to a specific concept.

Pablo Gres: Materialist dialectics and constitutional form

The purpose of this paper is to develop the foundations of a critical dialectical research method for constitutional theory. To achieve this purpose, we will ground this research on the philosophy of internal relations and the contemporary theory of historical materialism. As a starting point, we argue that the object under study in the social (and legal) sciences cannot be conceived as an isolated and static thing. On the contrary, the object is always an aspect of the interconnected and dynamic whole. We will also claim that dialectics is very useful when studying the legal phenomenon and particularly constitutional issues, because it allows us to become aware of the fact that the "legal form" cannot be isolated from the general social formation. Finally, using abstraction, we will try to identify a set of elements that will allow us to conceive the constitution as a political category that echoes the capitalist social formation.

Octavio Ansaldi: Trust and mistrust as opposing approaches in constitutional law research

This paper uses the concepts of trust and mistrust to describe two antagonistic manners of approaching and analyzing constitutional matters. Conditioning the whole subsequent research process, these basic ideas usually imply fundamental differences in the way the corresponding research results will be sought. It is therefore necessary to consider them from the standpoint of its methodological influence on the way constitutional law as a disciplinary field with its own (scientific?) purposes is conceived. Assuming that constitutional law deals with the problem of the political, one should specifically reflect on how the efforts in our field are permanently determined by the researcher's position within the trustful/mistrustful spectrum, and to that extent, how these efforts can be conducted in accordance with the requirements that its object -the political- demands. Consequences for interdisciplinary work and for the definition of a research ethos derive from these questions too.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

210 THE FRONTIERS OF PUBLIC LAW

This panel displays papers dealing with issues that are at the frontiers of public law today. The first issue is compliance with judicial rulings and the different structures and strategies courts can (and in fact do) utilize to increase compliance, particularly in the context of constitutional courts. The second issue is the appropriate judicial posture towards foreign and national security affairs in a world where policy-making in those matters is constantly becoming both more administrative (i.e. led by administrative agencies) and individualized. The third topic is the tool of "court packing," which has become extremely relevant recently in countries as diverse as Turkey, Venezuela, and the US - what is the difference between each instance? Can we define clearer limits for the practice of packing? The final paper discusses more broadly the issue of constitutional norms or conventions. It explores how they change through time and what relevant players can do if they wish to better defend (or weaken) constitutional conventions. The panel seeks to illuminate common themes raised by the different papers and enhance our understanding of the perils and promises of courts in public law and the still largely mysterious role of constitutional conventions and norms.

Room:

A101

Chair:

Oren Tamir

Presenters:

Vicente F. Benitez-R.
Elena Chachko
Joshua Braver
Oren Tamir

Vicente F. Benitez-R.: 'Neither the sword, nor the purse': Judicial design and (non)compliance of constitutional court's decisions

Compliance with its judicial decisions is a crucial feature for any constitutional court that aims to be consequential or, at least, respected. Just having an independent constitutional court is not enough if its rulings are constantly ignored, defied, circumvented or overridden. Nevertheless, securing compliance is not an easy task, particularly when dealing with decisions adverse to the interests or preferences of powerful actors. Why would a strong ruler be willing to implement a decision that thwarts key governmental decisions if courts have no means to enforce their judgements? My paper claims that certain de jure constitutional arrangements can raise the costs of noncompliance and, correlatively, contribute to the implementation of constitutional court's decisions under certain circumstances. More specifically, certain formal powers endowed to courts can help to garner the support of certain allies which could be instrumental to guarantee the implementation of their opinions.

Elena Chachko: Administrative Foreign and Security Policy

A growing number of U.S. foreign and security measures in the past two decades has targeted individuals. These individualized measures have largely been carried out by administrative agencies. The paper examines this administrative foreign and security policy phenomenon with two main aims. First, it documents the individualization trend, the administrative mechanisms that have facilitated it, and the judicial response. Second, the paper examines how administrative foreign and security policy integrates with the President and the courts. It illuminates the President's role as chief executive and commander-in-chief, and the applicability of the influential concept of Presidential Administration in the foreign and security realm. It also informs our understanding of the role of courts in foreign and security policy, by rendering more foreign and security action reviewable in principle, and providing a justification for judicial review.

Joshua Braver: Court-Expansion in the U.S. and Abroad

This paper gives an overview of all instances of Supreme Court expansion in the U.S. and compares them cases of court-expansion abroad. I argue that the all seven U.S. statutes changing the size of the court have all sought to improve court-performance that nonetheless benefit one political party. The rules for when such changes were acceptable were widely known and accepted by both political parties. Hence, there is no historical precedent for today's partisans of court-packing. Drawing from the cases of Turkey, Hungary, and Venezuela, I argue that court-expansion abroad is not analogous to current partisan proposals in the United States and that the role of court-packing in the establishment of semi-authoritarian regimes has been greatly exaggerated. Just as advocates of court-packing are wrong to cite U.S history, so too are opponents incorrect to draw parallels with court-packing outside the United States.

Oren Tamir: Primitive Law for Grown Ups, or: How to Do Things With Constitutional Norms

Constitutional norms or conventions are usually thought of as what H.L.A Hart famously called "primitive law" (and, similarly, Bentham called "traditionary law" which, for him, is meant for "barbarians"). The reason for this seems clear: In contrast to law, constitutional norms and conventions lack "secondary rules" and an apparatus within which they can be institutionalized as they arise in a decentralized (often unexpected) fashion and are often not enforced by courts. In this paper, I challenge this view and argue that constitutional norms and conventions do in fact have "secondary rules" by which they are recognized, changed, and adjudicated. I further argue that the acknowledging this opens up previously unexplored possibilities about ways to assist in the creation and stabilization of constitutional conventions and norms or, conversely, in the process through which they are changed or eroded. The discussion has implications for outstanding debates about the resiliency of constitutional democracy which of late turned to emphasize the role of constitutional norms.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

211 LA CONSTITUCIONALIZACIÓN DE LA TEORÍA DEL DERECHO (II)

The workshop seeks to generate a dialogue about the possibility of building a theory of law according to the new political and constitutional framework. A legal theory focused on the strengthening and defense of the social and constitutional State. In the construction of this theory mistakes are made, starting from the constitutional literalism, or an epistemological reductionism that ends up transforming moral or political concepts into legal norms by the mere fact of being in the Constitution. This is not only a theoretical but a political task. Legislative and judicial legitimacy crisis requires the construction of conceptual tools that make feasible the defense of the Rule of Law. A constitutionalized theory of law is imperative, as the dialogue around the sources of law, the concept of standards from the principles, their application, interpretation and balancing, the incorporation of the constitutionality block, for an effective defense of the constitutional State.

Room:

D303

Chair:

Milton César Jiménez Ramírez

Sergio Iván Estrada Velez

Presenters:

Olga Carolina Cardenas Gomez & Milton César Jiménez Ramírez

Maria Cristina Gomez Isaza

Abraham Bechara Llanos

Sergio Ivan Estrada Velez

Olga Carolina Cardenas Gomez & Milton César Jiménez Ramírez: Políticas Públicas y Democracia Deliberativa

Public policies have been interested mainly in the design of tools to identify the best decisions in the field of government management. On the side of deliberative democracy, studies have focused on the analysis of discussion procedures. However, they have a common element: the importance of the actors on decision making. The objective of this paper is to analyze the interaction between ideas, actors and institutions in public policies from application of deliberative democracy, as the mechanism for legitimizing the management of political-administrative authorities. Research starts from the premise deliberation allows us to moderate the power of the government, and correct some of the situations of democratic disorders, through a dialogical control that requires accountability, transparency and publicity about decisions that affect the lives of citizens, as well as effective participation in the elaboration of public policies, as an expression of self-government.

Maria Cristina Gomez Isaza: La hermenéutica del dolor y los criterios para interpretar el derecho con sentido de reconciliación

Hermeneutics as an art of attributing meaning, in the specific case of legal hermeneutics, has constructed rational criteria of interpretation of law whose purpose is to reproduce authority. These criteria have given rise to an idea of truly unique justice captured by an abstract entity that is the State. This rationality, rightly identified in the rule of law and with reasonableness in the constitutional state, has favored the subjects who demand judicial proceedings and those responsible for administering said justice, the feeling that this is the exclusive property of a single subject . There is another feeling of justice in the so-called transitional justice: the truth in the reality of war is not rational and its content is emotional, its object is to approach the reconstruction of an amorphous truth and relative to the pain of loss and of feeling of revenge - the truth, that is not the exclusive property of who is right, is constituted in an end to achieve reparation.

Abraham Bechara Llanos: La carga de la argumentación jurídica: un caso especial de interpretación y adjudicación de los derechos fundamentales

The burden of legal argumentation, is one of the three elements of the model of ponderative adjudication of the right, in times of democratic constitutional State. Our objective with this work is to show, as has been the jurisprudential treatment of the Constitutional Court of Colombia, has been given this argumentative-interpretative device, as a complement to the extended or integral model of the application of fundamental rights. Especially from the comparative constitutional perspective, look at how the notion has been constructed in the contexts of the Constitutional Courts: German, Italian and Spanish. In the areas of establishing the distinctive features of the model of the burden of rights in Colombia, not only from the theoretical reception, but from a true appropriation of the concept and the procedural aspects of it, in the judgments of constitutionality and guardianship, generating a model for the entire Latin American context, from the influence of the Alexyana proposal.

Sergio Ivan Estrada Velez: Hacia una asamblea nacional jurisprudente

The paper will deal with the relevance and need to generate a large space for constitutional discussion in Colombia that can be replicated in other contexts with which the same problems are shared and which can be called a NATIONAL JURISPRUDENT ASSEMBLY in which concertation takes place. of the basic aspects that a legal theory must have according to the political reality and the legal practice. In democracies in crisis due to the little legitimacy of the parliamentary body, power can not be limited by law - a general theory of law is required and, especially, a principial theory that recognizes in the principles prevailing legal norms over the other norms, that condition their validity and limit the exercise of any expression of power coming from the legislative, executive or jurisdictional body.

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

212 COMPARATIVE ADMINISTRATIVE LAW DYNAMICS: DIVERSITY, IDENTITY, AND TECHNOLOGY IN MULTI-LEVEL GOVERNANCE

Administrative law is intimately bound up with multilevel governance, whether within or beyond states. This panel will examine, from a comparative perspective, how administrative law confronts multilevel governance from the perspective of the diversity of governmental units as well as the instruments and technologies available to deal with that diversity. The challenge, of course, is not simply functional -- what technologies or legal instruments are most appropriate in circumstance. Rather, the challenge is often also deeply political and cultural, in which history and identity weigh heavily on the origins of internal diversity, and administrative law must be sensitive to that political-cultural and historical context. The papers on this panel thus seek to explore, from several distinct perspectives, the complex interface between diversity, identity, technology, and administrative law in multilevel governance.

Room:

D402

Chair:

Carlo Columbo

Presenters:

Janina Boughey
Geneviève Cartier
Juan Carlos Covilla Martinez
Mary Liston
Giorgio Mocavini
Jud Mathews

Janina Boughey: Technology-Assisted Decision-Making and Administrative Law

Governments around the world are increasingly using technology to assist in making administrative decisions, and even to replace human decision-makers. In many cases this is entirely uncontroversial, allowing governments to make decisions faster and with greater consistency and accuracy. However, in some situations the use of technology has been controversial. It has resulted in unfair processes and outcomes and has reduced the ability of administrative law institutions to provide meaningful oversight of government decision-making. This paper will examine and compare how administrative law institutions and principles have applied and adapted to technology-assisted decision-making in Canada, Australia and the UK. In particular, it considers whether recent divergences in the development of the principles of fairness and reasonableness in the three jurisdictions has had an effect on the extent to which courts can meaningfully review the lawfulness of automated administrative decisions.

Geneviève Cartier: The Dual Nature of Canadian Administrative Law

Canada is a federal state of common law tradition. In the 'bijural' province of Québec, however, that tradition applies to public law only, because private law is of civil law tradition. Thus, in theory, the common law tradition of public law is uniform across Canada, since Québec's difference relates to private law only. I will argue that the coexistence of civil law and common law traditions in Québec affects the uniformity of public law in Canada. More precisely, conceptions of law and legal reasoning, institutions, and particular understandings of the separation of powers in Québec share similarities with French legal traditions, suggesting a possible spill-over of the civil law tradition onto the common law. This suggests, in turn, that the relationships between Canadian and Québec administrative law may have to be approached through a comparative law lens.

Juan Carlos Covilla Martinez: Soft Law to Align Local Governments

Soft law can be more effective in aligning local governments than using traditional methods like plans. Two contexts help to explain the superior efficacy of soft law instruments. The first is when local authorities adopt successful policies suggested by the public authority with the intention of imitating them. The second is when a local authority feels constrained by lack of funding and thus cannot feasibly exercise their powers. In an intergovernmental relationship, a non-traditional method works better than a traditional one when it takes advantage of budget cuts to adopt a soft law instrument. It is worth noting, moreover, that the challenge of alignment discussed in this paper arises in any country with decentralized authorities (federal systems, regional systems and even unitary-decentralized systems). The same problem in all such systems, in which local autonomy is asserted by local authorities in a State.

Mary Liston: Judicial Review of Indigenous Decision-Makers in Three Administrative Law Jurisdictions

Indigenous decision-makers have long been part of the public law of three common-law jurisdictions: Australia, Canada and New Zealand. Each has needed to confront their colonial legal history, rectify historic wrongs, and try to define a new and better relationship between Indigenous peoples and the state in which they are located. This paper examines how each jurisdiction has confronted this challenge in terms of judicial review in administrative law. It examines the initial conception of the legal status of Indigenous authorities in the nineteenth century, how later cases followed or rejected this initial conception, and how current jurisprudence is struggling to reject harmful propositions from the past or extend helpful bridges to a better future. This paper seeks to learn how related legal systems have treated Indigenous decision-makers - more importantly, it also hopes to ensure that any 'borrowings' across these jurisdictions are sensitive to crucial similarities and differences.

Giorgio Mocavini: Algorithms in Administrative Procedures: Insights from Italy

The use of algorithms by public authorities is increasing all around the world, with the aim to improve the quality of services delivered to citizens and to take more effective public decisions. The algorithms can help doctors in medical exams, assist students at school, manage and evaluate careers in public and private sectors, contrast online threats, provide solutions in case of natural disasters. At the same time, however, they reduce the discretionary powers of public administrations and questions and doubts arise on transparency and openness of the algorithmic systems. The paper describes the most important developments of the use of algorithms in the Italian experiences of regulation and administrative procedures.

Jud Mathews: ***Discussant***

Panel Sessions VII

Wednesday, 3 July 2019
10:30 – 12:05

213 IMPLEMENTACIÓN DEL ACUERDO DE PAZ CON LAS FARC-EP EN COLOMBIA. ASPECTOS CONSTITUCIONALES Y SOCIOLÓGICOS

The Peace Agreement between the Government and the FARC-EP was signed in Bogotá at the end of 2016. After the signature and the decision related with the implementation procedure ("fast track") the Constitutional Court carried out the constitutional review of the constitutional reforms, laws and decrees for the implementation of the Agreement. Among the most important aspects of the review were decisions related to the special jurisdiction for peace, which would judge the most atrocious crimes committed during the conflict - the political participation of ex-combatants - the legal value of the agreements and aspects related to the peace in the territories, including the indigenous territories. The panel will analyze the constitutional and sociological aspects of the implementation of the Peace Agreement in Colombia with the special participation of Constitutional Court Judge Antonio José Lizarazo who participated in the Court in these decisions.

Room:

Auditorio E. Frei

Chairs:

David Landau

Joel Colon-Rios

Presenters:

Magistrado Antonio José Lizarazo-Ocampo

Gonzalo Ramirez-Cleves

Iris Marin-Ortiz

Laetitia Braconnier-Moreno

Marcos Criado-De Diego

Magistrado Antonio José Lizarazo-Ocampo: Jurisprudencia constitucional sobre la Jurisdicción Especial para la Paz (JEP)

The Peace Agreement signed by the Government of Colombia and the FARC-EP Guerrilla in 2016, foresaw the establishment of the Special Jurisdiction for Peace - SJP (Jurisdicción Especial para la Paz - JEP). The SJP is a specialized transitional justice mechanism that offers the perpetrators of grave crimes the possibility of accessing "restorative sanctions", when recognizing their responsibility in the commission of the crimes, telling the whole truth, contributing to victim's reparation and offering guarantees of non-repetition. The SJP was implemented through a constitutional amendment, as well as a Statutory Law. The Constitutional Court has defined the constitutional limits to the SJP Statutory Law in the Decision C-080/2018. This presentation will expose the main judicial problems that the Constitutional Court had to face in order to guarantee a stable and lasting peace in Colombia, based in the full respect of the Constitution.

Gonzalo Ramirez-Cleves: La participación en política de los ex miembros de la guerrilla de las FARC. Análisis de la Sentencia C-027 de 2018

In a constitutional reform (Legislative Act 03 of 2017) the Congress regulated the most important aspects related to the participation in politics of the former members of the guerrilla. The Constitutional Court made the review of this reform in decision C-027 of 2018. Among the most relevant aspects of the amendment is the possibility that ex-combatants, even those who have committed atrocious crimes, could participate in politics, creating five seats in the Senate and five seats in the House of Representatives - the granting of a political party and the financiation of it, the possibility that this political party use the public media and that the political party have representatives within the jurisdictional body that deals with the organization and monitoring of the elections (National Electoral Council). The paper will analyze the most important aspects of the ruling and the criticisms that were given about this decision.

Iris Marin-Ortiz: El derecho a la paz y el valor jurídico de los Acuerdos de Paz

Colombian Constitution recognized the Right to Peace in 1991. Peace is both, an individual and a collective right. As an individual right, its holders are all human beings. As a collective right, its holders are peoples and communities affected by war. Then, a Peace Agreement (PA) should be demanded not only by those who signed a PA , but also by the holders of the Right to Peace. Additionally, peace has a negative and a positive component. Negative peace is related to the end of the armed conflict and peace-keeping process. Positive peace is related to the comprehensive protection of Human Rights, conditions for development and reduction of inequality. How can this characterization of the Right to Peace contribute to defining juridical nature –or not- of the Final Agreement signed by the Colombian Government with the guerrilla FARC? The Colombian Constitutional Court addressed this topic when studying the constitutional amendment about juridical value of the PA (AL 02/17).

Laetitia Braconnier-Moreno: Diálogos entre justicia local y justicia constitucional para la paz en Colombia. Caso "El control del territorio", Guardia indígena de Tacueyo, Cauca

Abstract: The purpose of this presentation is to highlight relations between local normativity and constitutional evolutions, and in the case of Colombia, how indigenous justice became a source of law for the constitutional order for the peace. Indeed, the 1991's Constitution integrated the legal pluralism - furthermore, in 2016 stated a transitional justice process to put and end to the internal armed conflict. This socio-juridical panorama allowed that on February 6, 2019, an emblematic trial led by indigenous Nasas authorities took place in Tacueyo, in the North of Cauca. In this trial were judged eight indigenous members of an illegal armed group, for having entering an indigenous territory with weapons. We will analyse transfers and discords between community and constitutional jurisdictions, and how can local practices constitute ways of resistances, in addition of culturally adapted alternatives to institutional mechanisms of transitional justice.

Marcos Criado-De Diego: Acceso a la Justicia en territorios de guerra después de la Paz: El caso de Guapi, Cauca

Colombia has been characterized as a heterogeneous Sstate with lack of fundamental citizen rights and institutions in many parts of the territory that have suffer the main consecuences of war and illegal economies. In these territories justice is not principally supply by state legal system and institutions, but conflicts are solved by armed illegal groups and community ethnic customs and authorities. Farc guerilla disarmament and demobilization caused an authority vacuum that needs to be filled by the state as a part of peace-building process. As a result of a fieldwork carried out in black country communities in Guapi, South Cauca, we will describe an analyse conflicts management and resolution procedures that are taking place in the field after peace accord and we will ask about the possibilities of building an integrated local system of justice.

Tanya Hernandez: ***Comentarista***

V ICON·S Governance

The Presidency

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Chang, Wen-Chen
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Kingsbury, Benedict
Koenig, Matthias
Kosar, David
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Mehta, Pratap Bhanu
Mendes, Joana
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Möllers, Christoph
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Shany, Yuval
Siegel, Reva
Smith, Rogers
Solanke, Iyiola
Stewart, Richard B.
Tega, Diletta
Torchia, Luisa
Uitz, Renata
van Aaken, Anne
von Bogdandy, Armin

VI Services

VENUE

The 2019 ICON·S conference will be held at:

» **Casa Central**
Faculty of Law
Extension Center
Faculty of Communications
LLM Building
Pontificia Universidad Católica de Chile, Santiago

Plenary sessions will take place at the Extension Center, Campus Casa Central, Pontificia Universidad Católica. Coffee and lunch breaks and the opening reception will take place at the Foyer of the Extension Center. Parallel sessions will take place at the classrooms of the LLM Building, the Faculty of Law building, as well as adjacent buildings. For map, see p 142.

REGISTRATION

Registration is located at the Foyer in the Extension Center. See the map on p 142.

TRANSPORTATION

Pontificia Universidad Católica is located at Universidad Católica station of the local train (called Metro). The station is part of Linea 1 (red line).

When you arrive at the airport, you may take a taxi to get to the city center or the University. A taxi journey from the airport to the Faculty of Law takes approximately 30 to 45 minutes and costs around CLP 25.000 – 30.000. Taxis in Santiago accept cash, and do not take credit or debit cards. Most taxi drivers do not speak English. If you wish to commute by taxi, you are recommended to carry with you the above-mentioned address of the conference venue as well as the address of your hotel.

ATTENDANCE CERTIFICATES

Certificates verifying your attendance at the Conference will be included in your conference package, which you will receive upon registration.

CATERING

There will be coffee breaks as indicated in the schedule on p 8-10. On tuesday a light lunch will be provided at Plaza Central, Extension Center. On wednesday a light snack will de providad at Plaza Central, Extension Center. See map on p 142.

ATM

ATMs are located in the unpaid area of Universidad Católica station.

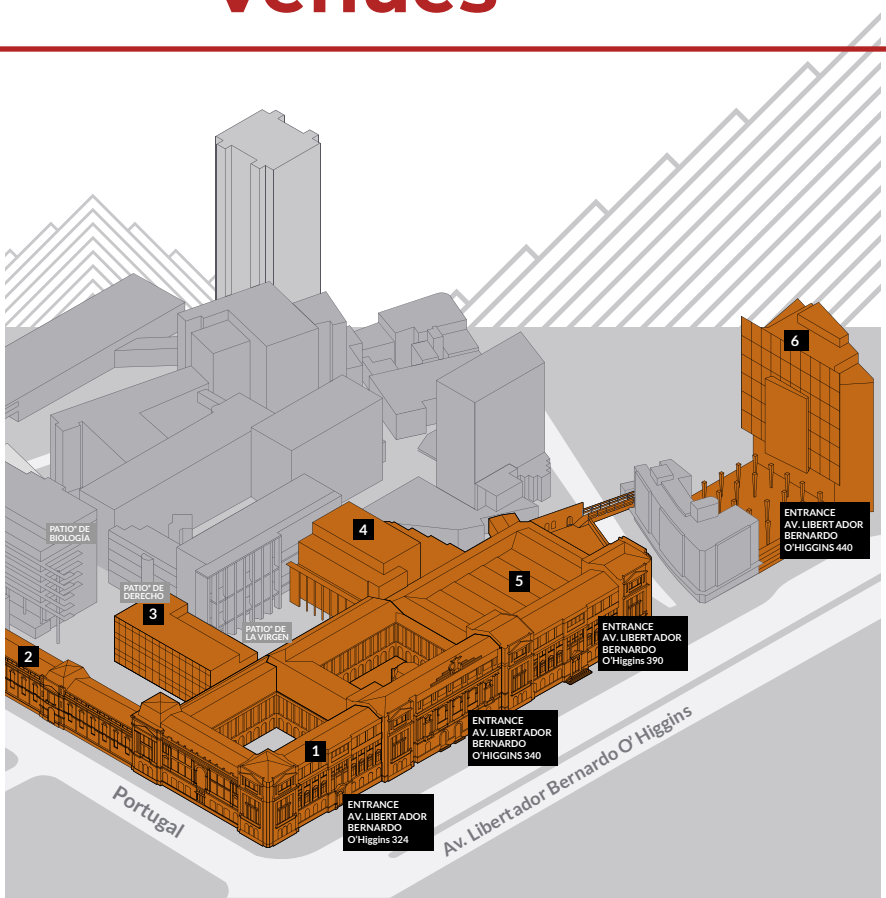
SUPERMARKETS

Nearby supermarket can be found at Portugal 56 (Unimarc, opening hours: 9am-9pm) and at Portugal 112 (Santa Isabel, opening hours: 8:30am- 10pm).

EMERGENCY SITUATIONS

Should you find yourself in an emergency situation with no immediate help available, you can call an ambulance by dialing **131**, the firefighters by dialing **132** and the policemen by dialing **133**.

VII Map of Conference Venues



*Patio referes to an outdoor seating area

Casa Central Campus Directory

1 Casa Central Building

PATIO DE LA VIRGEN

A101-103 Rooms, 1st Floor
Auditorio C. Oviedo, 1st Floor
Auditorio E. Frei, 1st Floor
Auditorio P. Aylwin, 1st Floor
Pedro Lira, 1st Floor
Auditorio C. Silva, 1st Floor

2 Casa Central Building

PATIO DE BIOLOGÍA / PATIO DE DERECHO

D302- 304, 3rd Floor
D401- 405, 4th Floor

3 Faculty of Law

Allende Bascuñán 1, 3rd Floor
Allende Bascuñán 2, 3rd Floor
Aquiles Portaluppi, 2nd Floor
Sala CAP, 3rd Floor
FD-101, 1st Floor
R510, 5th Floor
Sala Juicio Oral, 3rd Floor
Seminario 1, 3rd Floor
Seminario 2, 3rd Floor
Seminario 3, 3rd Floor

4 Faculty of Communications

COM103, 1st Floor

5 Extension Center

Auditorio Fresno, 1st Floor
Plaza Central, 1st Floor

6 LLM Building

LLM91 -94, 9th Floor
Sala Reuniones LLM, 9th Floor

VIII Participants

A

Abat i Ninet, Antoni
Abdelsalam, Mohamed
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Abi-Nader, Andrea
Abraham, David
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Acheriteguy, Federico
Acosta, Juana
Acunha, Fernando
Adamski, Dariusz
Adjolohoun, Horace
Afsah, Ebrahim
Aguilar Viana, Ana Cristina
Aguilera Ormeño, Margot
Ahumada, Paula
Albert, Richard
Aldunate, Eduardo
Alfonso, Tatiana
Alkiviadou, Natalie
Almeida, Eliane
Almeida, Maíra
Almeida, Paula
Alterio, Ana Micaela
Altwegg-Boussac, Manon
Alvarado, Claudio
Alvear Téllez, Julio
Alves das Chagas, Carolina
Alves Verri Garcia de Souza, Diogo
Alviar, Helena
Amaya Castro, Juan Manuel
Ambroggio, Federico
Amicarelli, Bruno Paolo
Amparo, Thiago
Andrade Neto, João
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Ansaldi, Octavio
Araujo, Luis Claudio
Araújo, Marcelo
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Arcaro Conci, Luiz Guilherme
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Arruda, Octaviano
Asmelash, Henok
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Ávila, Lorena
Avila Romero, Jhonathan
Azhar, Zahra

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Baines, Beverley
Balde, Aua
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Barboza, Estefânia Maria de Queiroz
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Design: Comunication Department Pontificia Universidad Católica de Chile Faculty of Law

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