Global Constitutionalism

Human Rights Democracy Rule of Law

Scholars Workshop: Challenges to Global Constitutionalism

WZB Berlin Social Science Center, Hardenbergstraße 32, 10623 Berlin, 9th Floor
5-6 July 2018

Workshop Programme

Thursday, 5 July 2018

14:00-14:15 Opening remarks

14:15-15:45 First panel

Zoran Oklopcic: In the beginning, there was a scene: (global) constitutionalism and the images of constituting

Commentator: Mattias Kumm

Qerim Qerimi: Construing Contemporary Cosmopolitan Constitution-Making: Immanuel Kant in the Twenty-First Century

Commentators: Andreas Føllesdal

15:45-16:00 Coffee break

16:00-17:30 Second panel

Emanuela Koskimies: The International Criminal Court and the Supranational Transfer of Sovereignty: Bringing Power back to focus

Commentator: Oona A. Hathaway

Nino Guruli: Articulated Governance in international Human Rights and International Humanitarian Law

Commentator: Paolo Palchetti

18:00 Dinner

The event is organized by *Global Constitutionalism* and sponsored by

CAMBRIDGE UNIVERSITY PRESS PLURI COURTS Center for Global Constitutionalism WZB

Friday, 6 July 2018

10:00-11:30 Third panel

Ruth Houghton and Aiofe O'Donoghue: Can Global Constitutionalism Be Feminist?

Commentator: Jeffrey Dunoff and Mattias Kumm

Tobias Berger: Global Constitutionalism and Comparative Political Thought: Towards an Inclusive Pluralism

Commentator: Patricia Springborg

11:30-11:45 Coffee break

11:45-13:15 Fourth panel

Maurizio Arcani and Stefania Ninatti: Exploring Counter-constitutionalism: The Backlash Effect of Constitutional Vocabulary of the European Court of Human Rights and the European Court of Justice

Commentator: Geir Ulfstein

Cédric M. Koch: The Populist Challenge to Global Constitutionalism: Dangers and Promises for the Global Order

Commentator: Andrea Liese

13:15-14:15 Lunch

14:15-15:45 Fifth panel

Mohamed S. Helal: The Constitutive Regime of the International System

Commentator: Jonathan Havercroft

Friederike Kuntz: On the Emergence of a New Constitutional Practice in Global Times

Commentators: Antje Wiener

15:45-16:00 Coffee break

16:00-17:00 Sixth panel

Albert Coddou Mc Manus: A critical account *of Ius Commune Constitutionale* in Latin America: an intellectual map of contemporary Latin American Constitutionalism

Commentator: Jeffrey Dunoff

Biographies of Workshop Participants

Maurizio Arcari is Professor of International Law at the University of Milan-Bicocca, School of Law. He has published in leading academic journals in the field of Public International Law, with a focus on Human Rights Law, International Security Law, Law of International Responsibility, and Law of International Natural Resources. He is the Editor-in-chief of the E-journal 'QIL-Questions of International Law', he sits on the advisory board of the 'Polish Yearbook of International Law' and on the editorial boards of the Italian journals "Rivista di diritto internazionale" and 'Diritti Umani e Diritto Internazionale'.

Tobias Berger is Junior Professor for Political Science with reference to the Transnational Politics of the Global South at the Otto-Suhr-Institute of the Freie Universität Berlin. He studied Political Theory at the University of Oxford (MPhil, 2010) and Politics & Development Studies at the School of Oriental and African Studies, University of London (BA, 2007). After obtaining his PhD from the Berlin Graduate School for Transnational Studies in 2014, he was a visiting fellow at the Department of Law and Anthropology at the Max Planck Institute for Social Anthropology in Halle (Saale, Germany) as well as a junior research fellow at the Institute for the Human Sciences in Vienna. His book on "Global Norms and Local Courts: Translating the Rule of Law in Bangladesh" was published with Oxford University Press in 2017. His broader research interests encompass international political sociology, state-society relations in the Global South, ethnographic methods, and the transnational politics of Southern Asia.

Jeffrey Dunoff is the Laura H. Carnell Professor of Law at Temple University Beasley School of Law. His research and writing focuses on public international law, international regulatory regimes, international courts, international organizations, and interdisciplinary approaches to international law. He has served as a Visiting Professor at Harvard Law School, as a Law and Public Affairs Fellow and Visiting Professor at the Woodrow Wilson School at Princeton University, a Senior Fellow at Humboldt University, and as a Visiting Fellow at the Lauterpacht Research Centre at Cambridge University. Among other activities, he serves on the editorial board of the American Journal of International Law, as a Member of the E 15 Expert's Group on the Functioning of the Multilateral Trading System, an elected member of the American Law Institute; and a Fellow of the American Bar Foundation. His publications include Interdisciplinary Perspectives on International Law and International Relations: The State of the Art (coeditor, with Mark A. Pollack, Cambridge University Press 2013); Ruling the World? Constitutionalism, International Law, and Global Governance (coeditor, with Joel P. Trachtman, Cambridge University Press 2009); and International Law: Norms, Actors, Process (with Steven Ratner and David Wippman, Aspen 2015), a leading textbook. Among other scholarly activities, he serves on the editorial boards of Global Constitutionalism, the Irish Yearbook of International Law, and a book series on The Politics of Transnational Law.

Andreas Føllesdal Ph.D., Professor of Political Philosophy, Faculty of Law, University of Oslo. Co-Director of PluriCourts, a Centre of Excellence for the Study of the Legitimate

Roles of the Judiciary in the Global Order. Principal Investigator, European Research Council Advanced Grant MultiRights 2011-16, on the Legitimacy of Multi-Level Human rights Judiciary. Ph.D. 1991 in Philosophy, Harvard University. He publishes in the field of political philosophy, mainly on issues of international political theory, globalization/Europeanization, Human Rights, and Socially Responsible Investing.

Nino Guruli is a Lecturer in Law and the International Human Rights Fellow at the University of Chicago Law School. She completed her PhD at the University of Cambridge in comparative constitutional law and national security. Prior to starting her PhD, she graduated from the University of Notre Dame Law School, after which she worked as a law fellow with the Constitution Project's Detainee Treatment Task Force in Washington, D.C. conducting legal and investigative research on U.S. policy and practice relating to detainees from the war on terrorism. She also worked as an intern for the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia, with the trial team prosecuting Radovan Karadžić.

Oona A. Hathaway is the Gerard C. and Bernice Latrobe Smith Professor of International Law and Counselor to the Dean at the Yale Law School. She is also Professor of International Law and Area Studies at the Yale University MacMillan Center, on the faculty at the Jackson Institute for International Affairs, and Professor of the Yale University Department of Political Science. She is a member of the Strategic Initiatives Committee of the American Society of International Law, Yale University's Provost's Committee on International Affairs, and the Advisory Committee on International Law for the Legal Adviser at the United States Department of State. In 2014-15, she took leave from Yale Law School to serve as Special Counsel to the General Counsel for National Security Law at the U.S. Department of Defense, where she was awarded the Office of the Secretary of Defense Award for Excellence. Professor Hathaway earned her B.A. summa cum laude at Harvard University in 1994 and her J.D. at Yale Law School, where she was Editor-in-Chief of the Yale Law Journal in 1997. She served as a Law Clerk for Justice Sandra Day O'Connor and for D.C. Circuit Judge Patricia Wald, held fellowships at Harvard University's Carr Center for Human Rights Policy and Center for the Ethics and the Professions, served as Associate Professor at Boston University School of Law, as Associate Professor at Yale Law School, and as Professor of Law at U.C. Berkeley. Her current research focuses on the foundations of modern international law, the intersection of U.S. constitutional law and international law, the enforcement of international law, and the law of armed conflict. She is a principal investigator on a recent grant awarded by the Hewlett Foundation to study cyber conflict. She has published more than twenty-five law review articles, and she is the co-author of "The Internationalists: How a Radical Plan to Outlaw War Remade the World" (with Scott Shapiro).

Jonathan Havercroft is Associate Professor in International Political Theory within Social Sciences: Politics & International Relations at the University of Southampton. He is a Senior Lecturer in Politics and IR at the University of Southampton. His research lies at the intersections of international relations and political theory. He has published work on the historical development and transformation of state sovereignty, 17th century and 20th century political philosophy, space weaponization and security, global dimensions of

indigenous politics and hermeneutics. His current research projects include work on the ethical dimensions of international norms, theories of political affect, and the role of agreement in democratic theory and practice. His book "Captives of Sovereignty" (Cambridge University Press, 2011) looks at the historical origins of state sovereignty, critiques its philosophical assumptions and offers a way to move contemporary critiques of sovereignty beyond their current impasse.

Mohamed S. Helal is an Assistant Professor of Law at The Ohio State University Moritz College of Law. Prior to that he was a lecturer-on-law at Harvard Law School where he obtained his S.J.D. and LL.M. degrees. He also taught International Criminal Law as a Visiting Assistant Professor at the Section Française of the Ain Shams University Faculty of Law and taught International Human Rights Law at the American University in Cairo. His experience in the field of public international law also includes many years of service as a diplomat and as an international civil servant. After serving on the Cabinet of the Secretary General of the League of Arab States during 2002 and 2003, he joined the Egyptian Diplomatic Corps and became a member of the Cabinet of the Minister of Foreign Affairs of Egypt from 2005 until 2009. In 2011 he joined the Bahrain Independent Commission of Inquiry (BICI) as the commission's legal officer and he also served as the legal counsel to the Deputy Minister of Foreign Affairs of Egypt for most of 2016.

Ruth Houghton joined Newcastle Law School as a Lecturer in September 2017. She previously worked as a Graduate Teaching Assistant and as a Research Assistant on 'Neo-Federalism' at Durham Law School from 2013-2017. Her PhD thesis "The Circumstances of Democracy: An Investigation of Global Constitutional Scholarship" was examined in January 2018. Ruth's current research spans global constitutionalism, theories of constitutionalism and democracy, as well as the participation of non-state actors in international law.

Cédric M. Koch is a PhD candidate of the Berlin Graduate School for Transnational Studies at the Berlin Social Science Center WZB. Prior to this, he received degrees in International Relations from University College Maastricht, Humboldt-University and Free University in Berlin and Potsdam University. He has published a co-authored chapter on Eurozone reform discourse in Germany as well as articles in peer-reviewed student journals on international political economy.

Emanuela Koskimies is a PhD Candidate and SYLFF (Sasakawa Young Leaders Fellowship Fund) Fellow at the University of Helsinki. She is also affiliated to the "New, Wars, Humanitarian Interventions and the Global Protection of Civilians" research project at Bath University. Her research interests cover the whole field of International Theory, with a special focus on transdisciplinary approaches to the study of international society. She has gained teaching experience in International Theory as well as Post-Positive Research Methodologies. She has been visiting fellow at several institutions, including the University of Liverpool's School of Law and Social Justice, the Center for the Politics of Transnational Law of the Vrije Universiteit Amsterdam, and the WZB Berlin Social Science Center, under the local supervision of Prof. Michael Zürn. Most recently, she has

contributed a book chapter to an edited volume published by Brill [Ekaterina Yahyaoui Krivenko (Ed), "Human Rights and Power in Times of Globalisation"].

Mattias Kumm holds a Research Professorship on "Global Public Law" and is Managing Director of the Center for Global Constitutionalism at the WZB Berlin Social Science as well as Professor of Law at Humboldt-Universität zu Berlin. He is also the Inge Rennert Professor of Law at New York University School of Law, which he joined in 2000. His research and teaching focuses on basic issues and contemporary challenges in Global, European and Comparative Public Law. He has taught at leading universities worldwide and has held professorial appointments at Harvard, Yale, and the EUI. He is on the Board of various international journals and professional societies and is founding Co-Editor in Chief of "Global Constitutionalism" (CUP). Kumm holds a JSD from Harvard Law School and has pursued studies in law, philosophy and political sciences at the Christian Albrechts University of Kiel, Paris I Pantheon Sorbonne and Harvard University.

Friederike Kuntz is a postdoctoral Researcher and Lecturer (Wissenschaftliche Mitarbeiterin) at the Center of Politics and Law at the Otto Suhr Institute of Political Science at Free University Berlin. Her research interests are in globalization of politics, law and governance in the past and present, including global constitutionalism; international and global political theory; history and theories of international relations and diplomacy. She defended her PhD thesis, entitled "Aporias: The International Relation, Interrelated Sovereigns, the Human Individual, and Power-Knowledge," in December 2015 successfully at the Faculty of Sociology at Bielefeld University. A version for publication is in preparation. She obtained her Magistra Artium in Political Science, Sociology, and Romance Philology/French in November 2006 from Johannes Gutenberg University Mainz.

Andrea Liese holds the chair of International Organizations and Policies since 2010. Her main research interests are international institutions and norms, international organizations, transnational human rights and development politics as well as governance in areas of limited statehood. She is principal investigator of the subproject D8 'Talk and Action'. How International Organizations Respond to Areas of Limited Statehood", which was part of the German Research Foundation sponsored research program (SFB 700) on "Governance in Areas of Limited Statehood." She also leads (together with Dr. Per-Olof Busch) the subproject 6 "Consideration of Expert Knowledge - International Public Administrations as Policy Experts", which is part of the German Research Foundation group 1745. Furthermore, she is member of the research group "The International Rule of Law – Rise or Decline?", funded by the German Research Foundation.

Alberto Raúl Coddou Mc Manus is Professor of Public Law & researcher of the Human Rights Centre at Diego Portales University (Santiago, Chile). He recently submitted his PhD thesis to the Faculty of Laws, University College London (title: "A Transformative Approach to Anti-Discrimination Law in Latin America"). He is co-author of the Chilean chapter of the "International Encyclopedia of Constitutional Law" (Kluwer 2011) and author of several publications in Spanish and English. He was also the editor-in-chief of

the “Annual Human Rights Report of Chile” (UDP 2013). He has taught Public Law and Human Rights in different universities in Chile, and has been invited as a teaching fellow to University College London and Universitat de Barcelona. His research interests are equality and anti-discrimination law, social rights, Latin American constitutionalism, and constitutional theory more broadly.

Stefania Ninatti is Professor of Constitutional Law at the University of Milan-Bicocca, School of Law. She has published in leading academic journals in the field of Constitutional Law with a focus on European Constitutional Law. She sits on the editorial board of the section on European Law of the Italian review “Quaderni Costituzionali”. She published two monographs: the first one was published by Publisher Giuffré in 2004 and is entitled “Giudicare la democrazia? Processo politico e ideale democratico nella giurisprudenza della Corte di giustizia”, while the second one was published by Publisher Giappichelli and is entitled “Ai confini dell’identità costituzionale. Dinamiche familiari e integrazione europea”.

Aoife O'Donoghue is Professor of International Law and Global Governance at Durham Law School. Aoife's research focuses on public international law with a specific interest in global governance and theory. Her current research centres on global constitutionalism, the legal structures which have developed within international law to regulate governance and feminist theory. Her monograph “Constitutionalism within Global Constitutionalisation” was published in 2014. Current projects include a monograph on tyranny and global governance, Women within the UN Secretariat and the Northern/Irish Feminist Judgments Project. She has worked at Durham since 2007, having previously held a post at NUI, Galway.

Zoran Oklopcic is Associate Professor at the Department of Law and Legal Studies at Carleton University. Oklopcic earned his SJD from the University of Toronto Faculty of Law and was MacCormick Visiting Fellow at the University of Edinburgh School of Law, Junior Faculty at Harvard Law School’s Institute for Global Law and Policy in Doha, Qatar, and a Hauser Global Research Fellow at the NYU School of Law. His work on national self-determination, constituent power, constitutional pluralism, agonistic democracy, global south constitutionalism, and the migration of constitutional approaches to secessionist challenges appeared in a number of reputed academic journals: from Leiden Journal of International Law, Canadian Journal of Law and Jurisprudence, and Transnational Legal Theory to Constellations, Global Constitutionalism, and Third World Quarterly, among others. His monograph “Beyond the People: Social Imaginary and Constituent Imagination” (Oxford University Press) is forthcoming in 2018.

Paolo Palchetti is Professor of International Law at the Department of Law of the University of Macerata (Italy). He is the director of the PhD programme in Legal Studies of the University of Macerata and was visiting professor in several universities (including Université Panthéon-Assas/Paris 2, Université de Nice/Sophie Antipolis, and Universidade Federal de Santa Catarina). He is co-editor of QIL—Questions of International Law, member of the Board of Directors of the "Rivista di diritto internazionale" and of "Diritti

Umani e Diritto Internazionale", member of the editorial committee of "International Organizations Law Review" and of "OXIO-Oxford Database on International Organizations". He has sometimes acted as adviser to the Italian Ministry for Foreign Affairs and was counsel of several states in international disputes before the International Court of Justice.

Qerim Qerimi is currently a Visiting Researcher and Professor with the Law and Development Research Group at the Faculty of Law of the University of Antwerp and a Professor at the University of Pristina in Kosovo. Formerly a research scholar at Harvard University and the Max Planck Institute for Comparative Public Law and International Law, he teaches Public International Law, International Law of Human Rights, International Organizations, and Comparative Law. Widely published, he has served on various advisory and expert capacities to such organizations as the European Union, the Council of Europe, USAID, DFID, UNDP, IOM, and the World Bank on issues related to constitutionalism, rule of law, and capacity-building in countries in transition. He is the author of "Development in International Law: A Policy-Oriented Inquiry", winner of the Society of Policy Scientists' Harold D. Lasswell Prize in 2012.

Patricia Springborg, Guest Professor and Researcher at the Centre for British Studies of the Humboldt University in Berlin, is a political theorist with a focus on history of the state, ancient and oriental, combining the methodologies of Begriffsgeschichte and contextual history. At the University of Sydney, the Free University of Bolzano, and on grants at the Woodrow Wilson Center, the Brookings Institution, the Wissenschaftskolleg zu Berlin, and St. John's College Oxford, she has undertaken 6 large research projects: 1) Hobbes, Metaphysics, Ecclesiology; 2) The Concept of Needs in Marxist Thought; 3) Early History of the State East and West; 4) Orientalism; 5) Mary Astell (1666-1731) political writings; and currently, 6) Antiquity transformation and Islamic Jurisprudence.

Geir Ulfstein is Professor of International Law at the Department of Public and International Law, University of Oslo and Co-director of PluriCourts – Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, University of Oslo. He has been Director of the Norwegian Centre for Human Rights, University of Oslo (2004-2008). He has published in different areas of international law, including the law of the sea, international environmental law, international human rights and international institutional law. He is General Editor (with Andreas Føllesdal) of two book series Studies on Human Rights Conventions (Cambridge University Press) and Studies in International Courts and Tribunals (Cambridge University Press). He is President of the Norwegian Branch of the International Law Association, Co-chair of the International Law Association's Study Group on the "Content and Evolution of the Rules of Interpretation" and is Vice-Chair of the Scientific Advisory Board, Max Planck Institute for Procedural Law, Luxembourg. He has been member of the Executive Board of the European Society of International Law (2010-2016). He will deliver one of the special courses during the Hague Academy of International Law's 2022 winter session.

Antje Wiener has held the Chair of Political Science, especially Global Governance at the University of Hamburg since 2009. She is a By-Fellow of Hughes Hall, Cambridge and has

been a Fellow of the Academy of Social Sciences since 2011. Before coming to Hamburg, she has taught in the USA, Canada, and the UK, where she held Chairs in International Studies at Queen's University Belfast and the University of Bath. In 2015, she was awarded an Opus Magnum Fellowship of the Volkswagen Foundation for research on the "Constitution and Contestation of Norms in Global International Relations". She has held numerous visiting fellowships at world-leading research institutions, including Stanford, Sussex, the New School, Victoria, Oxford, Cambridge, Toronto, Florence, the LSE and Edinburgh among others. In 2018, she is due to return to the Lauterpacht Centre for International Law at Cambridge as a Visiting Fellow. Her research centres on International Relations theory especially norms research, where her research addresses the normativity-practice nexus. She has served on boards of several leading academic journals and has been co-founding editor of Global Constitutionalism (CUP). Her work has been published widely in peer-reviewed journals including the European Journal of International Relations, the Review of International Studies, the Journal of International Relations and Development, Theory and Society, and the European Journal of International Law. Among her many book publications are three monographs: "European' Citizenship Practice: Building Institutions of a Non-State" (Westview 1998), "The Invisible Constitution of Politics: Contested Norms and International Encounters" (CUP 2008) and "A Theory of Contestation" (Springer 2014).

Abstracts of Workshop Papers

Maurizio Arcani and Stefania Ninatti

Exploring Counter-constitutionalism: The Backlash Effect of Constitutional Vocabulary of the European Court of Human Rights and the European Court of Justice

International and supranational Courts can be key players and promoters in the process of global constitutionalism. This is especially true at the European level, where the European Union Court of Justice (EUCJ) and the European Court of Human Rights (ECtHR) have contributed to the identification of the core concepts and values lying behind their respective legal systems and have enhanced an incremental process of constitutionalization in those same systems.

However, the constitutional slant of European supranational Courts may also have as a side-effect the triggering of a counter-constitutionalism discourse at the domestic level. In the present critical status of the process of European integration, the insistence by the two European Courts on the constitutional vocabulary may therefore generate a 'backlash effect' against their authority and the legal regimes they represent. This potential risk is well exemplified by the recent confrontation opposing the ECtHR and the Russian Constitutional Court (Anchugov and Gladkov case) on the issue of the deprivation of detainees' right to vote and in reference to similar confrontational cases involving the ECHR and the domestic courts of the UK (Hirst case). On the same score, the recent evolution of ECJ case law shows a marked change from dialogue to disagreement (or resistance), that may eventually end up, again, in unprecedented confrontational dialogue. In this regard, the breadth of this new constitutional interaction is revealed in an exemplary way by the 2012 Czech Constitutional Court judgment (Slovak Pensions) and 2016 Danish Constitutional Court one (Dansk Industri) on ultra vires review and by a series of cases more focused on the national constitutional identity review (German Federal Constitutional Court, 15/12/ 2015, Mr. R., German Federal Constitutional Court, 21/06/2016, OMT/Gauweiler, Hungarian Constitutional Court Decision nr. 22/2016, and last but not least, the Taricco case).

While light and shadow characterize the state of Europe nowadays, the role of national and supranational courts progressively emerges as a vivid laboratory where speculation on the fabric of European constitutionalization processes by and large is possible. Looking through the recent ECJ and ECtHR case law we can recognize both threads of dialogue and defensive hostility: this paper aims at analyzing the elements of tense disagreement in some exemplary decisions as possible contributions to the development of the unique supranational constitutionalism. Eventually, the paper presents counter-constitutionalism as a natural component of European constitutionalism's evolution.

Tobias Berger

Global Constitutionalism & Comparative Political Thought: Towards an Inclusive Pluralism

The legal landscape of global governance is rapidly changing. Shifts in the distribution of power, the proliferation of actors, and the multiplications of norms, rules, and institutions of transnational political orders have to lead to calls for rethinking the ways in which we think about both the constitution and the exercise of authority beyond the nation state. Pluralists like Nico Krisch have therefore argued that we need to "…capture the many forms of institutional influence which, though highly consequential, do no operate through formal, legal tools" (2017: 240-1). This line of pluralist thought in international legal scholarship has coincided with calls to pay closer attention to non-Western traditions of (legal) theorizing and to bring the unfamiliar formations of transnational authority that are not easily legible to the Western jurist's eye more into the focus of global constitutionalist analysis. But how can this be done?

To investigate non-Western approaches to Global Constitutionalism and thus develop a global perspective on democracy, human rights, and the rule of law, I argue that we need to avoid two twin dangers. On the one hand, it needs to circumvent the uncritical affirmation of Western superiority. Such affirmations are deeply engrained in contemporary legal and political theories, which locate the gravitational centre of global constitutionalism in Western Europe and North America and thereby tacitly elevate the political history of the West to the normative yardstick against which social and political developments in the rest of the world are measured. As post-colonial scholars have persuasively shown, this reduces non-Western legal practices and the intellectual resources that underpin them to pathological deviations from established Western models. On the other hand, however, the investigation of non-Western constitutionalism also needs avoid the equally uncritical reification of postcolonial difference, which simply perpetuate ontological distinctions between "the West" and "the Rest".

In this article, I develop an analytical framework that circumvents these two twin dangers and thus allows for the investigation of global constitutionalism from non-Western perspectives. By drawing on arguments from the emerging sub-field of Comparative Political Thought, and especially the works of James Tully, I develop a theoretical account of norm translations. This account serves as analytical tool to investigate the complex legal entanglements between the West and the non-West without reducing the latter to either a mere cliché of or a pathological deviation from the former. The empirical backdrop of this paper is the instigation of recursive translations of "the rule of law" as they unfold between European policy makers and villagers in rural Bangladesh.

Nino Guruli

Articulated Governance in International Human Rights and International Humanitarian Law

There are two key debates happening at two levels of public law. (1) At the international level, scholars are debating the relationship between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) in the post 9/11 global counter-terrorism conflicts. And (2) at the national level constitutional scholars across jurisdictions are debating the interaction between constitutional law and international law relevant to the conduct of national security operations domestically and abroad. Both debates are in part fuelled by the (perceived or real) upending of established distinctions between war and peace, between soldier and civilian, between citizen and foreigner. Much of domestic legal scholarship concerned with the question of how international law should interact with constitutional law in authorizing executive powers or empowering judicial scrutiny tends to begin with the constitutional institutional powers principles. Separation of powers tend to play a central role, often serving as a major preliminary (foundational) question which shapes how international law is used at the national level. This paper asks whether international humanitarian law and international human rights law have something to say about national institutional powers? There are basic rule of law justifications animating IHL and IHRL which are particularly relevant to reasoning about institutional powers.

Jeremy Waldron identified one key principle, that of articulated governance, which lies where the rule of law and separation of powers overlap. Are the values of clarity, promulgation, expectations and due process part of IHL? IHRL? And if they are, what does that mean for how we should think about the relationship between IHL, IHRL and constitutional institutional powers?

Mohamed S. Helal

The Constitutive Regime of the International System

This proposed paper is an interdisciplinary project that seeks to examine the normative foundations of the international system. Drawing on various scholarly fields, including international law, international relations theory, constitutional theory, and jurisprudence, this paper proposes a theoretical construct that I call the "Constitutive Regime of the International System," which provides an heuristic tool and an intellectual vocabulary to identify and interrogate the "foundations, limitations, and contestations of the principles and norms of political order."

Like many scholars of international law and international relations, this paper imagines the international system as a social collectivity. On the basis of this assumption, it argues that, like any social collectivity, the international system is predicated on a set of foundational norms that are constitutive of the collectivity. These norms reflect fundamental assumptions about the nature, composition, and structure of the social collectivity and about how that collectivity ought to be governed. At the global level, I call these foundational norms the Constitutive Regime of the International System.

This regime performs three constitutive functions. First, it identifies the constituent units of the international system. In other words, it determines the identity of the members of the international system and establishes the prerequisites of membership in the international system.

In other words, the constitutive regime includes the norms that determine whether the international system is composed of tribes, empires, nation-states or any other mode of organizing and governing human societies. Second, the constitutive regime articulates a theory of world order. Theories of world order determine the normative orientation of the system. It is the theory of world order that enables us to use adjectives like liberal, neoliberal, illiberal, imperialist, communist, fascist, Islamist, or Sino-centric to describe world orders. Indeed, in many instances, the distinguishing feature of a world order is not the identity of its constituent unit (i.e. city-states, sovereign states, empires, etc.), but the normative orientation of the system, which dictates the rules and policies that are implemented to govern relations between the constituent units. Third, the Constitutive Regime of the International System constitutes international law by articulating the secondary rules of international law, which establish the processes of lawmaking, law-enforcement, and dispute resolution in the international system.

This project will also investigate how the content of constitutive regimes is determined. It will seek to show how, like domestic political elites, the great powers of each historical epoch shape the content of the Constitutive Regime of the International System in a manner that advances their interests, reflects their values, and promotes their worldview. This means that as the identity of the great power changes, so will the content of the constitutive regime governing the international system. This makes this study especially pertinent at a time when the global balance of power is shifting due to the rise of non-western powers, which suggests that the coming decades could witness a shift in the content of those norms and principles of global political order.

Ruth Houghton and Aoife O'Donoghue

Can global constitutionalism be feminist?

Global Constitutionalisation offers a utopian picture of the future of international law. Its advocates suggest a governance system is emergent that will fill the gaps in legitimacy, democracy and the rule of law present in international law. The aim is to create a better global legal order, by filling these gaps with both normative and procedural constitutionalism, but, better for whom? Feminism has challenged the foundations of both international law and constitutionalism. It demonstrates that the design of normative structures accommodate and sustain prevailing patriarchal forms that leave little room for alternative accounts or voices. Both international and constitutional law's structures support the status quo and are resistant to critical and feminist voices. The question is whether it is possible for constitutionalism to change international law in ways that will open it to alternate possibilities. Feminist Constitutionalism aims to rethink and rebuild constitutional law to reflect feminist experiences and debates, to redefine its limits and refocus its ambitions, opening it to new concerns. To do this the paper will examine discourses on the rule of law, separation of powers and democratic legitimacy to query where feminist interventions are possible in normative structures. In particular, the paper will focus on the use of constituent and constituted power in classical constitutionalism and ask where feminist discourse can disrupt the complacency surrounding the potential for inclusion of all actors. Global Constitutionalism is not, up to the present, concerned with such questioning. It has been immune to questioning of its underlying aims or assumptions. This paper considers whether global constitutionalism, grounded in feminist discourse, could offer international law and global constitutionalism a new pathway. In does so by offering a manifesto which global constitutionalism can take to inculcate feminist concerns into its processes from the outset. Our manifesto for a feminist global constitutionalism and its seven demands are a starting point. The seven manifesto points are: women's place in setting the agenda, a move beyond Euro-centracism, a right to reject the paradigm or a part thereof, women present in writing and forming the constitution, substantive and not procedural engagement of women, real concern for the nexus between constituent and constituted power and the nature of democratic legitimacy and perhaps most critically, the right to revolt.

Cédric M. Koch

The Populist Challenge to Global Constitutionalism: Dangers and Promises for the Global Order

The surge of populist actors in liberal democracies presents a challenge to the liberal components of democratic states. Sometimes it represents an outright challenge to the constitutional order, targeting minority rights as well as the division and balance of power. Against this background, a key question is how populism relates to global constitutionalism. Scholars tend to perceive populists mainly as a threat to the normative principles underlying constitutionalism beyond the nation-state. In contrast, I argue that this view is too one-sided: Populist ideology highlights normative issues in the global order, which can be taken up and addressed politically in constitutionalism-enhancing as well as -undermining ways.

The recently advanced ideational theory of populism suggests a legitimacy and representation crisis in liberal democracies to explain the populist surge. I argue that this normative crisis is not limited to the domestic context: Analogous to the challenge at home, populism is fuelled by and targets aspects of international constitutionalisation which constrain national majoritarian decision-making and undermine notions of representation and democratic legitimacy. However, this does not necessarily suggest that populism spells doom for global constitutionalism.

While populists challenge the precedence of international law and the transnational rights codified therein over national majoritarian politics, this contestation can be compatible with global constitutionalist principles and norms: Populist contestation is based on the constitutional principle of popular sovereignty, illustrating a tension inherent in any constitutional system. In principle, these norms are reconcilable also in a constitutional order beyond the nation-state.

By applying the distinction between exclusive and inclusive variants of populism, I suggest that the dividing line instead lies in the proposed solutions to this clash between different elements of constitutionalism: 'Exclusive' populism advocates a global constitutional order limited by normative precedence of national popular sovereignty and by a non-pluralist conception of popular sovereignty. This populist variant thus has constitutionalism-undermining implications. In contrast, 'inclusive' populism advocates promoting the weight of popular sovereignty in the global constitutional order itself, which can be accommodated in ways which enhance global constitutionalism.

Hence, addressing this normative tension of global order is possible for populists (and non-populist governments confronting them) without uniformly undermining constitutionalism beyond the state. More generally, the surge of populism suggests that a process of politically balancing competing constitutional demands for legitimacy may be underway. Differentiating between legitimate normative deficits and anti-constitutionalist politics within populism thus is crucial both to halt the populist surge and to stabilise global constitutionalism.

Emanuela Koskimies

The International Criminal Court and the Supranational Transfer of Sovereignty: Bringing Power back to focus

Contemporary calls to supranationalism are most commonly framed within systems of decentralised global governance. Within the latter, rules emanate from different sources and are implemented by different institutional arrangements. Among existing international institutions, stands out the International Criminal Court (ICC), the world's first permanent court for the prosecution of international crimes. While states have traditionally jealously guarded their monopoly on criminal jurisdiction they have, exceptionally, delegated this function to the ICC, under the conditions established by the Rome Statute. In light of its outstanding authority, the Court offers a unique setting to reflect upon the supranational transfer of sovereignty. In particular, this paper critically engages with the popular view of the ICC as the cutting edge of a process of recharacterization of sovereignty as responsibility. It contends that the institutional architecture of the Rome Statute actually leaves the Court ill-equipped to break with a notorious pattern of hyper-protected sovereignty. However, while acknowledging that this state of affairs reflects the persistence of the state as the primary site of political authority and coercion, the paper invites caution about the straightforward invocation of a further move to supranational authority. In fact, once questions of delegation of political authority and coercive capabilities are allowed to resurface - in the midst of the prevailing legalist and managerial tones, no straightforward solution looms on the horizon. The debate is free to unfold in all its quintessentially political character, and the trajectory of sovereignty as responsibility to unravel in terms of ongoing struggles to resituate power, including the permanent possibility of its irresponsible exercise. From this perspective, the ICC clearly epitomises a tension that lies at the heart of the cosmopolitan project. On the one hand, cosmopolitanism seeks to go beyond the boundaries of sovereign states, so as to include rights and interests of individuals and global society as a whole. On the other, as long as the protection of rights is a goal of cosmopolitan governance, new instances of power arise, with sovereignty looming precisely as the juncture where rights and power meet. Hence, the paper concludes, the call for greater supranationalism should be mediated by a leap beyond the current limits of political imagination and the familiar, yet flawed, polis vs. cosmopolis dichotomy.

Friederike Kuntz

On the Emergence of a New Constitutional Practice in Global Times

In normative terms, global constitutionalization (or constitutionalization beyond the nationstate) is a hot topic in various fields of study. In taking a normative stance, however, scholarship commonly draws on an axiomatic model of 'the modern constitution', tracing its Urform to the late eighteenth century. In this paper, I argue that, in doing so, global constitutionalism buys into a blind spot. Analytically, it excludes practice as well as its constitutive force. Historically, it becomes insensitive to the remaking of constitutional practice at the global level as well as its effects. It is this latter dimension through which the paper seeks to contribute by advancing an understanding of 'the constitution' as effect of historical practice.

Based on an explorative comparison of 'modern' constitutional practice in the late eighteenth century and 'global' constitutional practice in the twentieth century, it argues that 'global' constitutional practice is characterized by a historically distinct pattern. In contrast to 'modern' constitutional practice, 'global' constitutional practice has dislocated the elements of 'the human' and 'government'.

In fact, 'global' constitutional practice has reversed primary responsibilities and accountabilities for human rights for it is humans, not governments, who are asked to take responsibility for their human rights. In the late eighteenth century, humans did appear to make governments responsible for administering and balancing their human rights so that each and all were simultaneously able to exercise these rights as well as to hold governments accountable. By contrast, in the twentieth century, governments did appear to make humans responsible for recognizing and enacting their human rights. At the same time, governments did gain considerable degrees of freedom from human rights, that is, governments are unbound from human rights.

The comparison draws on the Virginia Declaration of Rights, the Declaration of Independence, the Constitution of the United States of America, including the first ten amendments, the Declaration of Human and Citizen Rights, the first French Constitution, the UN Charter, the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the International Covenant of Social, Economic and Cultural Rights.

Alberto Coddou Mc Manus

A critical account of Ius Commune Constitutionale in Latin America*: an intellectual map of contemporary Latin American Constitutionalism*

In a recent editorial of Global Constitutionalism commenting on end of the 'West', it was stated that 'we should give up to the idea of a deep connection between constitutionalist ideas and geographical regions, countries or power constellations'. Allegedly, the commitment to constitutionalism, represented by the triad of human rights, rule of law and democracy, 'have long taken hold outside of the West'. In this scenario, scholars such as Armin von Bogdandy have focused their research towards Latin America, 'the region where the debate on the future of constitutionalism is debated with more intensity and urgency'.

Recently, several scholars on both sides of the Atlantic have been advocating for a concept with the ability to address 'a new legal phenomena' in Latin America: *Ius Commune Constitutionale in Latin America* (ICCAL). This academic endeavour attempts to give an account of the 'original Latin American path of transformative constitutionalism', comprising 'elements from various legal orders [national, transnational and international] which are united by a common thrust'. In particular, ICCAL relies on the idea that law bundles 'opportunity structures which may be used to advance a transformative agenda'.

In this work, I start by criticizing the main postulates of ICCAL and present the reader with a more precise intellectual map of Latin American constitutionalism. In the first part, I challenge the adjective 'transformative' within ICCAL's main academic products, highlighting the main deficiencies of this project. In the second part, I provide the reader with an intellectual map of contemporary Latin American constitutionalism that reflects better the main debates that are taking place in the region. Here, I will explain the similarities and differences between three constitutional currents or schools of thought: Latin American Neo-constitutionalism, New Latin American Constitutionalism, and Egalitarian-Dialogic Constitutionalism. Although every current addresses the relationship between law and social change, they differ greatly on the way in which it is articulated, that is, on the particular role that law and legal actors play in social transformation. These two parts question whether Latin American constitutionalism can be presented under a single label, questioning the theoretical and practical value of ICCAL for making a contribution to 'global constitutionalism', an idea that should critically acknowledge the relationship between constitutionalist ideals and geographical regions.

Zoran Oklopcic

In the beginning, there was a scene: (global) constitutionalism and the images of constituting

There are at least four ways to approach the concept of global constitutionalism: as (1) a theoretical concept—an alternative to a variety of pluralist approaches to juridical phenomena; (2) an empirical development—a visible trajectory that attests to the emergence of global, (quasi-)hierarchical order; (3) part of an ethical argument—beyond a sovereign people and towards a transnational demos, away from the principles of self-seclusion (consent of the governed) and towards the principles of otherinclusion (all-affected interests) or (4) as an ideological subterfuge—a dignified name for the strategically cherry-picked institutional aspects of neoliberal globalization; the latest in a long sequence of various conceptual ploys in the service of a predictably arrogant intellectual Eurocentrism. Though schematic, this distinction is nonetheless useful as it helps identify one important blind spot in the study of global constitutionalism, originating not in a particular disciplinary perspective, but rather, more broadly, in a trans-disciplinary way of looking at the scenes of constitution-making—oftentimes imagined as culminating in a foundational act of 'co-institution'.

While some scholars draw normative conclusions from the Latin roots of the word 'constitution'—arguing that it evokes a 'demand [that] those who are subject to a constitutional order co-institute it'—the lesson I draw from its etymology is different. Once understood as the combination three, not two components—as co- + in + statuere, not as co- + -instituere —the etymology of the verb 'to constitute' becomes a useful reminder of a nearly-forgotten, but theoretically far-reaching generic objective of all political acts of constitution-making: to make an order so it with-stands—by those who may (or may not!) end up being subject to the authority of its institutions. Anti-contractarian, nonfoundationalist and a-popular, this revisionist etymology gives rise to a transformative constitutional scenography: a new way of seeing, capable of provoking a radical departure from the established narratives of constitution-making, as well as from the prevailing understandings of constituent power, self-determination, popular self-government and majoritarian democracy.

Rethinking these foundational concepts of contemporary constitutional thought entails three things, in turn: (1) the revision of the inherited visions of political emancipation, (2) the expansion of the scope of imaginable institutional innovations, and—most importantly for the purposes of the workshop—(3) the acceptance of the dissolution of the organizing binaries of constitutional imagination: from civic—ethic, cosmopolitan—nationalist, or foundationalist—pluralist (to name few), to those which feature a particular understanding of global constitutionalism.

Qerim Qerimi

Construing contemporary cosmopolitan constitution-making: Immanuel Kant in the Twenty-First Century

A whole range of trends and events in contemporary global affairs are described more than ever before in cosmopolitan terms. More specifically, the processes that govern today's constitution-making are shaped by some measure of cosmopolitanism. The key question that this paper seeks to explore is the degree of presence and manifestation of cosmopolitan law ideals in contemporary constitution-making. Empirically, the number of constitutions that have changed in rather significant fashion includes more than half the countries of the world in recent decades.

At least 100 new constitutions were put in place since the fall of the Berlin Wall nearly three decades ago. There are several factual reasons that help explain this magnitude of change. One of the predominant reasons is system or regime change in such countries from Central and Eastern Europe to Indonesia and South Africa. New states also came into existence, thus dictating the conception of new constitutions (e.g., East Timor, Montenegro, Kosovo and South Sudan). Additionally, changes were by-products of specific local factors, such as in Bhutan, Hungary or Myanmar or, most recently, resulting from successive popular uprisings in Arab states (e.g., Morocco, Tunisia, Egypt, Jordan and Libya). The underlying emphasis of this inquiry is not so much on the transnational dynamics developed in the interplay of sovereign states with other actors and processes as much as on the internal dynamics of transnational norm-utilization and the influence and incorporation of cosmopolitan law precepts in domestic legal orders.

This paper identifies at least five major strands through which cosmopolitan law ideals express themselves in contemporary constitution-making, forming in turn the major cosmopolitan pillars that will be subject of discussion and analysis:

(1) the involvement of the international community in the design and drafting of constitutions;

(2) the incorporation of international law principles in constitutional documents;

(3) the use of international or comparative foreign models as a basis for constitutional design;

(4) the use of international law and foreign domestic law in constitutional interpretation; and

(5) the use of regional or international bodies of adjudication and their jurisprudence as a constitutionally mandated source of law.

These underlying moments, their meaning and ensuing implications will be explored against the distinct context of persisting claims for a global order based on, or modelled after, the universal precepts of human freedom and justice, on side, and centralized sovereignty, on the other.