Conference/Symposium on global constitutionalism and its limits

22 March 2024, castle, Nantes university

Convenors: Gaëtan Cliquennois (research professor, CNRS, DCS, Nantes University), Nicolas Huten (Nantes University) and Cristina Parau (University of Oxford)

Presentation

Traditionally and historically rooted in the Enlightenment and the American and French revolutions, 'constitutionalism' refers to form of democracy that entails "epidemocratic" principles like separation of powers, the protection of human rights and individual freedoms, and the rule of law, with a view to limiting the arbitrary power even of majoritarian governments. This democratic constitutionalism was created, conceived, and framed under liberalism. However, recently, what used to be liberal democratic constitutionalism seems to have mutated toward a disproportionate increase in the judicial power and legal professions who adjudicate rights and interpret the law with significantly unchecked discretion.

This evolution in many European States inures to what has been dubbed "global constitutionalism" that bids fair to transplant constitutionalism to the world's other legal systems, easily making it today's most influential philosophy of executive governance[1]. Global constitutionalism is typically defined as the rule of law and fundamental rights as implemented through the judiciary[2]. An academic consensus appears to have formed on the emergence of a strong correlation between the worldwide spread of democracy and the contemporaneous global expansion of judicial power[3]. This process is most conspicuous in the newest members of the European Union as well as the Council of Europe. Accession conditionality was used to exact adherence to certain supranational legal norms like the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, along with the adoption of the institution of the constitutional court[4]. The sheer number of East European countries that adopted this framework, which has superseded their legal traditions and the design and architecture of their courts, is astonishing[5].

This judicial ascendancy is, on the one hand, praised by scholars who stress the contribution of global constitutionalism to the spread of democracy, the rule of law, and human rights on a grand scale[6], but is criticised on the other hand by scholars who see an impetus toward juristocracy (defined as opposite to democracy *qua* government by the judiciary or court systems[7], and more broadly as a warping of normal democratic institutions to function in ways foreign to their legitimate remits[8]); together with other abnormal by-products like executive power dominance, *de facto* rule by private interests through philanthropic

[1] M. Loughlin, *Against Constitutionalism* (Cambridge, Harvard University Press 2022).
[2] A. Peters, 'Global Constitutionalism' in Gibbons, *The Encyclopedia of Political Thought* (John Wiley & Sons, 2015).
[3] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Harvard University Press 2004)
[4] W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, Oxford, 2012).
[5] C. Parau, *Transnational Networks and Elite Self-Empowerment: The Making of Judiciary in Contemporary Europe and Beyond* (Oxford University Press, 2019).
[6] T. Bingham, *The Rule of Law* (Allen Lane, London, 2010) 60–62 ; A. Peters, The Merits of Global Constitutionalism, 16 *Indiana Journal of Global Legal Studies* (2009), Article 2 ; J. Raz, '*The Rule of Law and Its Virtue' in The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford, 2009) 211.
[7] M. Kumm, 'Alexy's Theory of Constitutional Rights and the Problem of Judicial Review' in Klatt (ed.) (2012), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press) pp. 201-217.
[8] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Harvard University Press 2004) pp. 1-16; B. Pokol, *Juristocracy: Trends and Versions* (Századvég Kiadó, 2021).

foundations[9], and a labile interpretation of human rights[10]. Such an impetus is considered a threat to democracy and pluralism by letting empower itself a "revolt of the elites"[xxi]. More broadly, global constitutionalism tends to render the judicial branch a superpower bypassing legislators and the elected powers to render "democracy" what might be called (not without a tinge of irony) "authoritarian liberalism"[11]. Certainly, global constitutionalism so far has enhanced the power of judges, who have become "oracles of the regime's 'invisible constitution'"[12]. This implies that autonomous governments, *de facto* broken free of popular accountability, may enact, shape, interpret, implement, and review legal rules and determine its own legal liabilities[13]. The drift of democracy into "authoritarian liberalism"[14] may well be posited, in particular, of the strange state of emergency that was invoked *ex nihilo* for the pandemic and after terrorist attacks[15], and which, even more strangely, was never censored in general by the self-styled guardians of the rule of law, the judiciary and constitutional courts[16]. Such an evolution must also affect the theory and practice of human rights, some of which (such as the right to life and the right to health) look like being transmogrified, one fears, into "coercive rights" of the state, to the detriment of classic rights to be free. Any such mutant human rights risk being revisioned by the European Court of Human Rights and national courts and governments through the lens of the criminal law[17], – strangely improvised. Under this change, even fundamental rights may become overshadowed by this coercive aspect[18], that advances under the impetus of globalized

[9] G. Cliquennois, *European Human Rights Justice and Privatisation: The Growing Influence of Foreign Private Funds* (Cambridge University Press, 2020); G. Cliquennois and B. Champetier, 'The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War'? 22 *European Law Journal* (2016), pp. 92-126

[10] J. Waldron, 'The Rule of Law and the Role of Courts'. *Global Constitutionalism*, 10 (2021) pp. 91 – 105.

[11] M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe, op.cit.*

[12] M. Loughlin, *Against Constitutionalism* (Cambridge, Harvard University Press 2022).

[13] M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press, 2021).

[14] M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe, op.cit.*

[15] F. de Londras, *The Practice and Problems of Transnational Counter-Terrorism* (Cambridge University Press, 2022) ; D. Lock, F. de Londras and P. Grez, 'Delegated Legislation in the Pandemic: Further Limits of a Constitutional Bargain Revealed', *Legal Studies* (2023) pp. 1-39, doi:10.1017/lst.2023.25 ; S. Henette-Vauchez (2022) *La Démocratie en état d'urgence: Quand l'exception devient permanente* (Le Seuil, 2022).

[16]

[17] K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', 100 Cornell Law Review (2015) p. 1069, 2015 ; K. Engle, Z. Miller, D. M. DAVIS, *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016) ; L. Lavrysen and N. Mavronicola, *Coercive human rights: positive duties to mobilise the criminal law under the ECHR* (Hart Publishing, 2020) ; L. Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce' in Roberts and Zedner (Ed) *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth, Oxford University Press* (2012), pp. 135-156 ; L. Lazarus, 'Preventive Obligations, Risk and Coercive Overreach', in L. Lavrysen and N. Mavronicola (Ed), Coercive Human Rights – Positive Duties to Mobilise the Criminal Law under the European Convention of Human Rights (Hart Publishing, 2020), pp. 249-266 ; L. Lazarus, B. Goold and C. Boss, 'Control without Punishment: Understanding Coercion', in J. Simon, R. Sparks (Ed), *Handbook of Punishment and Society* (Sage Press, 2012), pp. 459 487 ; S. Malby, *Criminal Theory and International Human Rights Law* (Routledge, 2019).

[18] G. Cliquennois, S. Snacken, D. van Zyl Smit, 'The European human rights system and the right to life seen through suicide prevention in places of detention: Between risk management and punishment', 22 *Human Rights Law Review* (2022), ngab023.

constitutionalism and predominates over time through the proliferation of terrorist[19], pandemic[20], military, diplomatic[21], and economic[22] crises.

Global constitutionalism is also questionable for its impacts on the diversity of European legal cultures, constitutions, courts, and professional practices. The globalisation of constitutional courts may also be critically or positively reviewed in light of its potentiation of the influence of the Court of Justice of the European Union and the European Court of Human Rights on national constitutional justice[23]. It affects the ways decisions are delivered – (through the elaborate interpretive style of constitutional courts), –hence on the ways, even the possibility that citizens can access (notably through NGOs) and participate in constitutional justice.

Some aspects of this topic have been scrutinised by the legal literature; however, this conference aims to question the entire global trend, which has been under-researched up till now, but poses significant challenges to our societies.

Martin Loughlin (Professor, London School of Economics) "Imaginary Constitutions"

Abstract

Following its invention in the late-18th century, the written constitution quickly became a key symbol of modern political identity. Giving expression to its achievements, Thomas Paine explained that the written constitution signified the transition from a regime in which government is established 'over the people' to one that emerges 'out of the people'. A constitution is not an assortment of customs, practices and rules rendered coherent through some scholar's imaginative exercise in rationalization. It has a real existence and 'wherever it cannot be produced in a visible form, there is none'. It was never likely to be so simple. Since then, constitutions have been the subject of increasingly elaborate interpretative exercises. Most recently, however, a further turn in understanding constitutions has been taken. Legal scholars have begun to talk of the 'invisible constitution', meaning that it incorporates many principles and values not found in the text and sociologists and political theorists have invoked the term 'constitution' as a metaphorical expression of societal order. These innovations are now being built upon by constitutional scholars who are seeking to present accounts of the standing of the political constitution in the light of contemporary developments. This paper will offer a critical appraisal of these various developments and consider their significance in the European context.

[19] F. de Londras, *The Practice and Problems of Transnational Counter-Terrorism* (Cambridge University Press, 2022).
[20] A. Marciano and G. Ramello, 'Covid 19: how coercive were the coercive measures taken to fight the pandemic', 54 *European Journal of Law and Economy* (2022), pp. 1-4.
[21] N. Ronzetti (Dir.), *Coercive diplomacy, sanctions and international law* (Brill, 2016).
[22] A. Marciano and G. Ramello, 'Covid 19: how coercive were the coercive measures taken to fight the pandemic', 54 *European Journal of Law and Economy* (2022), pp. 1-4.
[23] G. Ulfstein, 'Transnational constitutional aspects of the European Court of Human Rights', *Global Constitutionalism* 10 (2021), pp. 151 – 174 ; W. Sadurski, 'Quasi-constitutional court of human rights for Europe? Comments on Geir Ulfstein', 10 *Global Constitutionalism* (2021), pp. 175 – 185.
[xxi] Lasch, C., *The Revolt of the Elites and the Betrayal of Democracy* (W.W. Norton & Company,1995).

Graziella Romeo (Associate Professor of Comparative Constitutional Law, Bocconi University): "The possibilities of legal interpretation in a global constitutional discourse"

Abstract

The evolution of global constitutionalism, with a significant focus on Europe, is a complex process that hinges on the development of a judicial discourse surrounding constitutional-like principles. These principles find application within the domains of both nation-states and international institutions, largely through judicial practice. This evolution owes its success to the adoption of specific interpretative techniques that highlight the pivotal role of values and principles as integral elements woven into the fabric of constitutional texts. Such interpretative approach did not materialize in isolation from the prevalent European constitutional culture. Across European continental courts, one can frequently observe a broad and continuously evolving interpretation of constitutional-like norms. This practice has served to shape the landscape of global constitutionalism.

While constitutional scholarship has extensively delved into the concept of global constitutionalism, it has paid limited attention to the methods of constitutional interpretation that have been employed to confirm the presence of a global framework of principles that transcend national boundaries. In this context, this contribution aims to bridge the discussion on global constitutionalism with that on constitutional interpretation. The aim is to underscore that both debates ultimately raise a fundamental critique of the contemporary understanding of the role fulfilled by constitutions as documents that encapsulate a contingent political will. In particular, the discourse on constitutional interpretation and the resurgence of positivist approaches echo the calls made by certain scholars in this field. They urge us to reconsider constitutions and constitutional law not merely as repositories of values and principles that guide the application of law by the judiciary, but primarily as instruments for governing the process of politics. Linking these two discussions is essential for comprehending the constitutional tensions underlying the development of supranational integration in Europe.

Alexander Somek (Professor, University of Vienna): "Transnational Constitutional Law and the Republican Split"

Abstract

The growing judicial enforcement of fundamental EU values by the CJEU transposes a core element of cosmopolitan constitutionalism to the separation of powers established in the Member States.

This core element is the peer review among nations. Already the Convention system, acting through the ECtHR, has overwritten the vertical authority of «We, the people» with a horizontal and transnational element. What the constitution is supposed to guarantee is longer under the autonomous control of participating countries. Rather, the judicial recognition of «consensus» among them along with the persistent benchmarking of the «minimal standard» can call for amendments to long-standing national traditions: Transnational constitutional law trumps its national counterpart.

Similarily, in the context of protecting the independence of the judiciary, the EU confronts national constitutions with supranational standards. The judicial body applies what it takes to be law based on an elaboration of «shared» values. This practice has been met with revulsion by governments that appeal to the spirit of their own constitutional system. Consequently, the European polity is split into two, namely, in the hegemonic group appealing to common European principles, on the one hand, and in their particularistic opponents, on the other, mustering, with varying success, the support of their national constituency. Cast in the terms of ancient constitutionalism, the EU is thereby turned into a «faction state» (Plato). The polity is founded on the constitutive disunity of contending groups. This is reminiscent of the situation—the split at the heart of a republic—to which ancient political philosophy and its Renaissance votaries tried to formulate a reply. Whether the Union will be able to come up with one of its own is difficult to foretell. It seems as though the aristocracy of shared values is perceived, from below, as the harsh and unremitting discipline of the European oligarchy.

Alan Greene (Reader, Birmingham Law School): "Hegemonic Constituent Power in a Global Context"

Abstract

This paper argues that constituent power—the power to create a constitution that is often assumed to be vested in 'the people'— is best understood as a manifestation of hegemony. Hegemony is the dominant power base in a given legal order which legitimates and reinforces this power through institutions, prevailing ideas, and culture. Hegemony does this not just through force but also through active and passive consent and understanding how this consent is constructed and maintained is imperative. Hegemony performs an important function in descriptively explaining legitimacy formation while not necessarily conferring normative legitimacy on the exercise of constituent power. As legitimacy and illegitimacy are both embedded in this notion of hegemonic constituent power, this allows constituent power to perform a legitimating function and its creative potential to be unleashed while still leaving space for critical contestation over how this power was exercised.

Applying this to the context of global constitutionalism, this paper argues that attempts to construct theories of constituent power vested in a 'global demos' to legitimate the status quo ex ante are doomed to fail. Instead, it is only through acknowledgment of the inherent illegitimacy of aspects of the current hegemony that this illegitimacy can be confronted. As constituent power will always be hegemonic, what matters is how this hegemony is constructed. Consequently, this paper argues that constitutionalism must take 'agonism' seriously in the context of the European crisis and this can only be done by ensuring a pluralist conception of the people that possesses constituent power.

Zoran Oklopcic (Associate Professor, Carleton University) "Liberal constitutionalism and the ideological foundations of actually existing liberal democracies"

Abstract

In the eyes of those who systematically examined the fortunes of liberal constitutionalism in the late 1970s, constitutionalism no longer existed as an important field of study. This is hardly surprising. To those worried about the capacity of constitutional governments to meet the challenges of the future, a doctrine preoccupied with how best to constrain the power of those governments could hardly seem relevant. What is striking, if perhaps not quite surprising, is the speed with which the doctrine that until the end of the Cold War languished at the margins of scholarly interests, came to be used as the ideological weapon in the hands of the ascendant professional-managerial class (PMC) which used it to justify the authority of quasi-aristocratic institutions that worked in their favour. While this was probably true in the 1990s and early 2000s, the extent to which the members of the PMC reap the same benefits from the language of constitutionalism today is an open question. Rather than an explicitly affirmed 'constitutionalism' what might contribute to the hegemony of the moral, political and economic outlook of the PMC is everything that contributes to the plausibility of that -ism: from piety-inducing ideals (such as the 'rule of law') and allegedly necessary doctrines (such as those that impute an unchangeable 'structure' to all liberal-democratic constitutions) to once-radical historical concepts (such as 'constituent power' whose main function today is to vainly praise the people's ability to radically transform the foundations of their social order) and facially liberal and democratic ideals (which can only be defended in an illiberal and undemocratic fashion) What might be sustaining the hegemony of professional-managerial class--to put it differently--is not the allure of constitutionalism itself but are the placating, demoralizing, mystifying, and (de)moralizing effects of visually striking metaphors, catchy slogans, verbal short-cuts, and seemingly technical terms of art.

Anna-Bettina Kaiser (Professor, Humbold University Berlin and Senior Jean Monnet Fellow, New York University) "The state of emergency laws and the total constitution?"

Abstract

The accusation of a total constitution is aimed at the excessive constitutionalization of political life and the narrowing of political processes. Decisions that should actually be entrusted to the democratically legitimized legislature are taken away from it under a total constitution with the argument that they are already constitutionally predetermined. In the end, it is the constitutional courts, so the suspicion goes, that make the decisive decisions. From this perspective, however, the constitutionalization of the state of emergency must prove to be particularly problematic. For if the decision on the state of emergency is understood as the incarnation of the political, then its juridification must appear both absurd and illusory. However, for historical reasons, the emergency constitution of the Basic Law is characterized by such a juridification of even the most exceptional situations. My contribution explains historically how this (partial) hyper-legalization came about and addresses the theoretical doubts about this decision. An analysis of the legal management of the Covid crisis in Germany will examine the question of whether the fears of the critics of the total constitution have come true.

Nicolas Huten (Assistant Professor, Nantes University) "The philosophical origins of the government of judges"

Abstract

If the globalization of constitutionalism clearly contributes to the increase in the power of judges who sit in the High Courts, it would undoubtedly be excessive to consider that it is the sole cause. Indeed, this "government of judges" is a phenomenon which seems inseparable from constitutionalism itself. The history of the philosophy of law shows in fact that most of the rights, freedoms or principles guaranteed in modern constitutions or in international conventions are the fruit of an evolution of the philosophy of law consisting of separating being from duty. These rights and freedom were thus conceived as abstractions based on reason alone independently of any reference to the evolving reality of human relationships and circumstances in political societies. Consequently, when it is up to them to apply them, high court judges can possibly refer to the reality of legal situations to assess their scope, but this does not allow them to base their decisions on classic legal reasoning to the extent where there is no philosophical correspondence between the two. Nor can they relate to a possible "intention of the legislator" because these rights and freedoms do not come from a single authority. In a way, judges thus find themselves "left to their own devices" to apply statements that cannot be applied within the framework of traditional legal reasoning. And as "nature abhors a vacuum", pressure groups can activate around the courtroom – or within it – with the aim of obtaining decisions favorable to their interests.

Scott Cummins (Professor, UCLA and Fulbright-Schuman Distinguished Chair at the European University Institute): "How Lawyers Attack Constitutionalism: The U.S. Case"

Abstract

The literature on democratic backsliding suggests that democracies collapse when legally crafty autocrats pit democracy against constitutionalism—weakening checks on unrestrained power. Although lawyers are essential to attacks on constitutionalism, necessary to provide legal legitimacy necessary for its success, their specific roles remain underexamined. This paper will look at how lawyers mobilize law against the rule of law, using the US case as an example. It does so through a study of the role of lawyers in the Stop the Steal campaign to challenge the results of the 2020 presidential election on behalf of Donald Trump. Its aim is to outline and conceptualize *antidemocratic legal mobilization*: showing how Trump lawyers deployed a suite of legal tactics, launched before the election and closely synchronized with a media campaign, designed to foment distrust in the election law system. It conceptualizes this mobilization in terms of discrete steps designed to undermine trust. As it shows, the ultimate goal of this mobilization was not to win on the legal merits, but to shape public opinion, misleading the public into believing that the system was broken and could only be fixed by invoking extraordinary authority to keep a president who lost in office. Building on the US case, the paper outlines a framework for analysis and agenda for comparative study of antidemocratic legal mobilization relevant to understanding the role of lawyers in backsliding democracies in Europe, with the goal of predicting and preempting autocratization.

Gaëtan Cliquennois (Research Professor, CNRS, DCS) and **Cristina Parau** (postdoc, University of Oxford), **Brice Champetier** and **Simon Chaptel** (PhD students, Nantes University) “On the ways the private sector (transnational elite networks and liberal private foundations) have influenced the adoption of the global constitutional model in Europe”.

Abstract

We analyse the trend towards constitutionalising European human rights justice through the influences exerted over the ECtHR by private interests. Such influence has been neglected by scholars up till now while advocacy and litigation efforts, combined with growing private participation in the reform of the ECtHR, have reinforced the constitutionalising process. First, philanthropic foundations and some of the NGOs they fund conduct research on the constitutionalisation of the European human rights regime, with a view to reinforcing their sway over the ongoing reforms. An outstanding recent study of the ECtHR's pilot judgment procedure by the European Human Rights Advocacy Centre (EHRAC) has assisted the ECtHR in developing and codifying standards related to this procedure. EHRAC has promoted the intense use of pilot judgments, which bring together groups of similar cases of human rights violations linked to structural and systemic legal issues. Such a proceeding favours the process of constitutionalisation of the ECtHR that is in position to select cases and to deliver effective landmark judgments that the pilot judgements which a similar effect to parliament passing a law. Moreover, pilot judgments, which require collecting many cases of the same nature and lodging them with the Court in an appropriate way, can only be litigated by only wealthy NGOs that are repeat litigants before the ECtHR. Secondly, the ECtHR in turn is now more dependent on the technical quality of the complaints lodged before it, therefore on the same NGOs whose collective complaints we analyse, as good technical quality underpins the selection of cases on which pilot judgments rest. Thus, NGOs' technical efforts go a long way toward rendering credible the calls by representatives of NGOs for European judges acting as juristocrats to guide them. This is part of a broader phenomenon of elite transnational networks reshaping the judiciaries of Europe.