



## The Legitimacy of Constitutional Adjudication and Governance Beyond the State Workshop 20 November 2017

Co-organised by ACCESS EUROPE and the Amsterdam Centre for European Law and Governance, University of Amsterdam  
Roeterseiland Campus

**Workshop description:** This one-day workshop examines the role of constitutional adjudication by European constitutional and highest courts and its legitimacy in light of institutional and ideological transformations of law associated with governance beyond the state. These transformations are usually thought to empower courts at the expense of other branches of government; to entrench the vested interests of ruling elites, and to expose democratic institutions of the nation state to the forces of untamed globalization. Scholars who study these transformations are usually critical of it; they disapprove of (neo-)liberal politics, which emphasizes rights and the rule of law over politics, and are suspicious of various projects of 'global' or 'cosmopolitan' constitutionalism, which seek to imbue governance 'beyond the state' with constitutional values. The EU is the most advanced example of such a structure that has come under this sort of critique.

The aim of the workshop is to enquire how national constitutional and highest courts have responded to these pressures of globalisation and Europeanisation, and how the legitimacy of their action in that regard should be assessed. The workshop addresses in particular whether national constitutional and highest courts can possibly address the democratic discontents of governmental structures 'beyond the state' and more broadly, globalization. The workshop also takes stock of the unique position of constitutional courts, which has hitherto been rather neglected in academic research. Finally, the workshop considers the lessons that the institutionalization of constitutional adjudication in the nation-state offers for the role of courts in governance structures beyond the state.

**Desired outcome:** The papers discussed in this workshop will form the basis for a special journal issue to appear in 2018.

**Participation:** Participation is by invitation only. Those interested in participating can contact Nik de Boer at [n.j.deboer@uva.nl](mailto:n.j.deboer@uva.nl) indicating their interest. All participants are expected to have read the draft papers.

## Setup and panels

8:30-9:00: Welcome

9:00-10:45 Panel 1: The legitimacy of constitutional resistance to European integration  
Chair: to be determined

Ana Bobić, D.Phil. Candidate at the Faculty of Law, University of Oxford; Post-doctoral researcher at the Hertie School of Governance, Berlin

**'Testing the usefulness of judicial constitutional conflict in the EU'**

Mattias Wendel, Senior Fellow and Lecturer at Humboldt University Berlin. In summer term 2017 and winter term 2017/18 he holds an interim professorship for Public Law and EU Law at Freie Universität Berlin

**'Constitutional transfers: Reflections on a proactive role for national constitutional courts in the EU'**

Nik de Boer, Postdoctoral Researcher, The Amsterdam Centre for Contemporary European Studies ACCESS EUROPE, University of Amsterdam

**'National Constitutional Courts' Review of European Law and its Democratic Legitimacy'**

10:45-11:00 Coffee Break

11:00-13:00 Panel 2: Legal expertise, politics and ideology  
Chair: to be determined

Christophe Majastre, Doctoral candidate, CReSPo, Université Saint-Louis–Bruxelles

**'Brokers and guardians of the state. The Maastricht-decision between disciplinary politics and the making of a (transnational) controversy'**

Matej Avbelj, Professor of European Law at the Graduate School for Government and European Studies in Kranj, Slovenia

**'Judicial Ideology and the New Constitutionalism'**

Jan Komárek, Professor of Law at the Centre of Excellence for International Courts, University of Copenhagen

**'European constitutionalism: Towards an 'ideology critique'**

13:00-14:00 Lunch

14:00-15:15 Panel 3: Beyond the national courts: Constitutionalism and constitutional adjudication by the ECJ and in global regimes  
Chair: to be determined

Jiří Přibáň, Professor of at the School of Law and Politics Law, Cardiff University

**'New Constitutionalism, or Societal Constitutionalism? On legality and power in global constitutional regimes'**

Christoph Krenn, Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg

**'Part of the problem and the solution? The ECJ as a constitutional adjudicator: prospects and limits'**

15:15-16:00: Roundup and conclusions

16:30-18:00: Lecture by Wojciech Sadurski, University of Sydney '**Constitutionalism and public reason'**

18:00 – 19:00: Drinks

19:00 – 22:00: Dinner

**Abstracts:**

**Testing the usefulness of judicial constitutional conflict in the EU**

Ana Bobić

Every time a national court with a constitutional mandate rejects an interpretation put forward by the Court of Justice, the academic commentary embarks upon a pessimistic journey, attempting to pinpoint how precisely the EU's legal order will deteriorate in this particular instance. Apart from focusing on the potentially negative effects of constitutional discord, the academic literature emphasizes the perspective of the Court of Justice by considering how constitutional courts affect the coherence and uniform interpretation of EU law. Conversely, the current proposal seeks to determine the extent to which constitutional conflict can be a constructive force. Specifically, it will seek to ascertain what value constitutional courts can add through their vigilant protection of national and supranational norms embedded into their constitutions. The analysis will be conducted at two levels, by looking at the reasons and consequences of constitutional conflict from an institutional and a substantive perspective. The recent controversy surrounding the decisions of the Court of Justice and the Danish Supreme Court (*Højsteret*) in *Dansk Industri* provides a perfect case study for testing the usefulness of constitutional conflict. The Danish Supreme Court refused the horizontal application of the principle of non-discrimination on grounds of age (and consequently a directive), as stipulated by the Court of Justice. Apart from these recent developments, Denmark provides a particularly interesting case study due to its strong tradition of majoritarian democracy. This has meant that constitutional review is met with little to no enthusiasm due to its perceived lack of democratic credentials; thereby providing a particularly relevant setting for an inquiry into the effects of constitutional conflict.

**National Constitutional Courts' Review of European Law and its Democratic Legitimacy**

Nik de Boer

Whereas in the national context the democratic legitimacy of judicial review is deeply contested, democratic concerns about constitutional courts' role in relation to the EU are much less prominent. Against the backdrop of a supposed EU democratic deficit, several scholars have instead maintained that the national constitutional courts protect the democratic autonomy of the Member States, put pressure on the EU to democratise, allow contestation over constitutional issues or ensure respect for national constitutional identities.

The paper adopts a more critical perspective and questions the democratic legitimacy of the national constitutional courts' role. Despite the EU's democratic shortcomings, the national constitutional courts' review of European law also raises a democratic concern itself. Like in the domestic context, it subjects the authority of political institutions to national constitutional law as interpreted by constitutional judges. Furthermore, the constitutional standards at the basis of such review are subject to reasonable disagreement: How the EU should be made more democratic and what respect for national constitutional identity requires, are questions that people will reasonably disagree about. Where national constitutional courts invoke national constitutional law against the EU, they thus risk constraining political decision-making on issues subject to significant political disagreement.

For these reasons, the paper argues that an account of the national constitutional courts' legitimate role in the EU context should better take into account the courts' comparative institutional legitimacy. The paper discusses the potential downfalls of the constitutional courts' role and questions that constitutional courts can be considered as better placed than other institutions to address the constitutional implications of European integration.

### **Constitutional transfers: Reflections on a proactive role for national constitutional courts in the EU**

Mattias Wendel

Globalisation has many faces. They can be of economic, cultural and technical nature. But they can also relate to law. One of these faces is the emergence of legal regimes beyond the nation state, a development which entails deep transformations of the law and what we understand of it. It is often assumed that these transformations lead to an essentially rights-based approach which empowers courts at the expense of other branches – parliaments in particular. According to this narrative, strengthening rights of individuals or companies at supranational, transnational or international level ultimately ends up in strengthening the courts as institutions. These concerns are particularly, albeit not exclusively, raised with regard to EU law and the European judiciary, including national courts in their function as European courts.

However, this assumption of a continuous juridification hardly applies to national constitutional courts. Rather, so it seems, this specific type of courts is increasingly struggling to hold its ground. This struggle is particularly apparent when it comes to constitutional courts which have traditionally held an eminent position in their domestic constitutional system, like the German *Bundesverfassungsgericht* or the Italian *Corte costituzionale*. While these courts were in the past able to capture most of their polity's core topics in terms of

national constitutional law, they now seem to lose grip on these matters. This is, above all, due to the fact that key policy issues more and more transcend the boundaries of the nation state and thus escape the scope of national constitutional law. Seen from this perspective, the significance of national constitutional courts is in decline.

This observation raises the question of what strategies could and should be pursued by national constitutional courts in order to cope with the said development. While classic answers (and classic case law) point to containment, separation and opposition as options, this contribution focuses on a more proactive strategy – a strategy that relies most notably on what might be termed *constitutional transfers*. While it is true that national constitutional courts are no longer in the position of fully translating most of the momentous policy issues into the language of domestic constitutional law, they can, where national constitutional law ends, initiate a process of transferring the legal know-how which is embodied in and by their respective constitutional order to the supranational level. The following contribution will focus on the core presumptions and types of such constitutional transfers, sketching a more proactive role for national constitutional courts in the EU.

### **Brokers and guardians of the state.**

### **The Maastricht-decision between disciplinary politics and the making of a (transnational) controversy**

Christophe Majastre

Unlike any other decision on the European integration by national constitutional courts, the so-called “Maastricht-decision” of the German constitutional court (GCC) has shaped the way the European Union (EU) is conceived as a political and legal space. The bulk of the literature in European studies focussed on the legal aspects of the decision or on its broader consequences on the organization of a European legal system – not least under the label of “constitutional pluralism”. Other authors focussed on the intellectual lineage of Maastricht. They underlined the influence of a “statist” stream within the German legal field on the wording of the judgement and stressed the role of Judge Paul Kirchhof as its author. Nevertheless, the accounts of the intellectual and political background against which the Maastricht-decision took place remain within a one sided – whether purely legal or purely intellectual/political – perspective.

Thus, the extant literature falls short of a genuine historicization of Maastricht, comparable to research on more remote decisions such as *Solange*. In this paper, I take a step towards an historicization of the Maastricht decision and argue that this can only be achieved by taking into account the different temporalities affecting various social spaces: the German political and intellectual space; the transnational building of a controversy around the juridical form of the European polity; and the legal field itself.

I contend that, by focussing on the positions legal actors occupy both within the legal field and within the broader public debate, it is possible to provide a better assessment of the significance of the Maastricht-decision within its historical context. I stress in particular the agency of such central figures as Paul Kirchhof and Josef Isensee. Based on the recollection of debates both within the legal field and in other arenas, including the political discourse, I

reconstruct the strategies these actors pursue in order to grasp control on the disciplinary politics of the field while, at the same time, reinforcing the position they hold as public experts. Thus, they act on one hand as “brokers” between legal discourses and, on the other, as guardians of an orthodox disciplinary vision within the field of law.

By recurring to these notions and positional analysis, we are able to demonstrate that the Maastricht-decision corresponds to one definite state in the evolution of the power balance within the German field of law, but also how it was able to circulate further within the transnational space and contributed to the making of a transnational controversy.

### **Judicial Ideology and the New Constitutionalism**

Matej Avbelj

In his opening memo, introducing a project on “New Constitutionalism”, Jan Komárek identifies, *inter alia*, “a lack of political-science oriented, quantitatively oriented research on constitutional courts in the EU.” It is submitted that this observation is fully justified and is shared by our own project on “The ideology in the courts: the influence of judges’ worldview on their decisions.” The project, carried out by a group of leading Slovenian constitutionalists, political scientists and economists, which has been supported by the Slovenian Research Agency, has three objectives: theoretical, applicative and normative. The project will first develop a multidimensional analytical model for assessing ideological profiles of the most senior members of the judiciary. The hence developed model will be, secondly, applied to the Constitutional Court of the Republic of Slovenia to assess the ideological profile of individual judges and to forecast the results of future court cases. Finally, in normative terms, the hence derived outcomes will be used to develop and to propose guidelines for improving the functioning of the Slovenian judiciary by strengthening fundamental court values, like independence, impartiality and responsibility of courts and individual judges. Last but not least, the project will also produce concrete institutional proposals for improving the appointment procedure for Constitutional Court judges and the system of appointments and promotions of judges in other courts to strengthen the legitimacy of the judiciary, which has come under strain by the developments of the New Constitutionalism.

The Amsterdam paper, however, will take a step back and examine the very concept of law that allows (or not) for raising the question of judicial ideology in the first place. It will be argued that there are two conflicting approaches to law with regard to the place and role of ideology in it and among lawyers (judges, in particular). One sees law as an objectivist and positivist system, which draws its authority from its form. The other conceives of law as an argumentative and discursive practice, whereby the authority of law and, particularly of the courts, is based on how convincing the arguments underlying the rulings are. The paper will theoretically dissect the two approaches and explain why the concept of law as justification is superior over its objectivist conception in descriptive, explanatory and normative sense.

### **New Constitutionalism, or Societal Constitutionalism? On legality and power in global constitutional regimes**

Jiri Priban

Theories of global societal constitutionalism open new conceptualisations of the structural coupling between politics and law and explore power structures evolving at global level and their various forms of constitutionalization. The modern state's paradox of constitutionalism as the permanent communication of political power through the medium of legality cannot be resolved by the claim that constitutionalism is just another name for the juridification of functionally differentiated sectors of global society completely dissociated from the power operations and asymmetries of constitutional politics. The constitutionalization of different sectors of global society is a process of increasing rather than limiting the power operations and their globalised legal forms regulating these sectors. The global systemic plurality of functionally differentiated society thus calls for theoretical reconsideration and reconceptualization of legality and power as communication codes of the globalised and structurally coupling systems of positive law and politics concurrently using and stretching beyond organisation of the constitutional sovereign state. This reconceptualization can be a truly radical contribution of the theory of societal constitutionalism to contemporary social theory of law and politics.

### **Part of the problem and the solution?**

#### **The ECJ as a constitutional adjudicator: prospects and limits**

Christoph Krenn

Critics of Europeanization and globalization who discuss the role of domestic constitutional courts often portray them as bastions for the protection of national identity and democratic self-government. In contrast, the European Court of Justice is generally described as the opposite: as an actor of Europeanization, promoting deregulation, advancing the market idea to the detriment of social objectives and contributing to the weakening of national democratic systems. The picture generally painted hence presents domestic constitutional courts and the ECJ as pulling in opposite directions.

In my presentation I will critically assess this picture. I will enquire whether and to what extent the ECJ can – at the present state of its development – not only be seen as an actor of Europeanization but also as addressing the problems European governance creates. For that purpose, I will focus on the ECJ's case law regarding austerity measures during the financial crisis and embed it into more broader developments regarding the ECJ's role and institutional and organizational design. I will argue that addressing the darker sides of supranational governance and Europeanization requires not only rethinking the role of domestic constitutional courts in the EU's constitutional system but also (further) strengthening the ECJ's constitutional role. Doing the former, my argument goes, will hardly work without doing the latter.