Comparative Aspects on Constitutions: Theory and Practice

Tuesday 29 June – Thursday 1 July 2010

ABSTRACTS

DAY ONE: Tuesday 29 June

9.00 Registration

9.30 Welcome: Professor Avrom Sherr, Director, Institute of Advanced Legal Studies

Theme 1: Conceptualisations of the Purposes of Constitutions

9.45 Keynote Speaker:

Professor Christoph Möllers, Professor of Public Law, Humboldt University, Berlin

Chair: The Rt Hon the Lord Hope of Craighead, KT

11.00 Coffee

11.15 Workshop 1: Constitutions/Constitutionalism General

Colm O’Cinneide, University College London

Steering the Ship of State: Fundamental Rights, State Power and Janus-Faced Constitutionalism

Constitutions serve multiple purposes, being expected to discharge a range of symbolic, norm-setting and structuring functions. Within this array of expectations, one particular function has come increasingly to the fore: strong assumptions now exist that constitutional systems should protect individuals against state abuse, in particular by establishing mechanisms for securing the protection of individual rights. No modern constitution is complete without a resonant list of fundamental rights guarantees, while
transnational quasi-constitutional systems such as the EU are often criticised as half-formed on the basis that they lack a convincing ‘rights dimension’. The infiltration of rights into the mainstream of constitutionalism might seem alien to Kelsen and ludicrous to Schmitt, but has become perhaps the pre-eminent trend of our current constitutional era. (Epp, Stone Sweet, Schmitt.)

The protection offered to rights by contemporary constitutions is widely understood (at least in Anglo-American liberal constitutional theory) as involving the imposition of negative constraints on the exercise of state power. Rights are conceptualised as a form of immunity, which when applied by courts insulated against the tidal surges of democratic contestation serves to protect the ‘negative liberty’ of individuals against the power of the state. Rights protection therefore is often viewed as perhaps the ultimate embodiment of power-constraining ‘negative constitutionalism’, by both enthusiasts and sceptics alike.

However, when one examines how rights are conceptualised and protected in constitutional practice, a more variegated picture emerges. To begin with, the role played by constitutional courts in protecting rights is very different than is suggested by the metaphor of ‘blocking’ state action. Courts may restrict the legal avenues through which state power is exercised, but rarely completely dam its flow: public authorities may be forced by the exercise of rights review by courts into using alternative legal routes or attempting to mobilise a political override, but the exercise of state power is redirected or diverted, not paralysed.

Furthermore, the relationship between the exercise of state power and the manner in which constitutional rights are protected in constitutional systems is also more complex than a ‘negative constitutionalist’ analysis suggests. While the constitutional rights jurisprudence of the US Supreme Court tends still to be structured (at least nominally) around the idea of rights as immunities, the approach adopted in the fundamental rights jurisprudence of European courts (including the quasi-constitutional ECHR and EU frameworks) is much closer to the ‘priorisation’/’balancing’ analysis developed by Robert Alexy. In other word, rights tend by and large to be treated as norms which should receive suitable priorisation in how state power is exercised, whose application is balanced against other public interest consideration by means of overt or occasionally hidden form of proportionality analysis carried out by courts undertaking a mixture of political and legal decision-making. (Stone-Sweet.)

As a result, rights protection in European constitutional systems is best conceptualised not as involving the restriction or nullification of state power, but rather as a mechanism to ensure that the exercise of this power is ‘steered’ or ‘orientated’ in a rights-friendly direction. The shift this represents from the immunities approach often generates discomfort amongst commentators wedded to Dworkinian liberal philosophy, as it appears to abandon the idea of ‘right as trumps’. (Letsas.) However, the emerging European approach avoids the conceptual dichotomy between collective and individual well-being which underpins the immunity analysis: the process of rights ‘orientation’ is better able to recognise and accommodate the value of collective state action.

In addition, the ‘orientation’ approach is more compatible with constitutional approaches that recognise constitutional right as having both a subjective and an objective dimension, such as that adopted in German constitutional law. It also is more accommodating of the concept of state ‘positive obligations’ which has transformed the terrain of international human rights jurisprudence over the last two decades.

Taken together, the concept of objective norms coupled with the recognition of positive obligations has given a ‘positive’ dimension to constitutional rights jurisprudence, whereby the exercise of state power is both steered and enabled towards rights-friendly goals. For example, states are increasingly required to take positive steps
to protect groups against discrimination, both under the ECHR and/or as a result of the application of domestic constitutional norms. In addition, state action in this field is actively enabled, with the existence of objective rights norms and positive obligations often clearing the way for states to legislate in favour of affirmative action and other forms of interventionist strategies.

Constitutional rights jurisprudence therefore increasingly adopts a ‘negative’ and a ‘positive’ face: elements of both negative and positive constitutionalism are combined in the stance rights frameworks adopt towards the expression and exercise of state power. This ‘Janus-faced constitutionalism’ finds its widest expression in the recent ‘transformative’ right jurisprudence of the Latin American, South African and Indian courts, which aims to orientate the exercise of state power across almost the full spectrum of public functions towards giving substantive effect to a multi-faceted and extensive catalogue of rights.

However, this jurisprudence also illustrates the difficulties that lie latent within the ‘orientation’ conceptualisation of rights. For all its narrowness of focus and hostile stance towards the collective dimension to state action, the ‘immunities’ approach can at least rely on the tropes of liberal individualist philosophy to define its scope and reach. The ‘orientation’ approach is underpinned by a wider vision of human flourishing (T.H Green, Rex Martin), but consequentially lacks a clear sense of its limits, as demonstrated by the uncertain and shifting scope of positive obligations in the ECHR jurisprudence, or the potentially unlimited scope of elements of the Indian constitutional rights jurisprudence.

Furthermore, the orientation approach still relies on top-down judicial control to steer the exercise of state power towards its desired ends: while, as argued above, it is an exaggeration to argue that courts exercise a veto power when applying rights, a judicial hand remains on the tiller. The orientation approach has a healthier relationship with the collective dimension of state power, but still remains uncomfortable with popular sovereignty and the constituent power vested in the people by democratic theory.

Finally, the orientation approach, through its adoption of both negative and positive stances towards the exercise of power, may offer more than it can deliver. It generates the expectation that a comprehensively just legal and political order will come into being through the guiding influence of constitutional norms. However, legal norms in general lack the capacity to deliver on this promise. Furthermore, constitutional rights norms in particular are either too narrow in their scope to deliver on the promise of comprehensive justice, or else if interpreted too widely will cut across alternative accounts of justice and thereby may disappoint or enrage as much as they deliver. In an era dominated by ordo-liberalism (Somek), the orientation approach lacks the capacity to deliver on its promises, even if it may ameliorate some of the worst excesses of the ordo-liberal state. Constitutions are now expected to protect fundamental rights through the steering of state action to rights-friendly aims, but they appear likely to always fall short of fulfilling this purpose.

Dr Antonios Platsas, University of Derby

Principles as Comparative Denominators of Constitutions

Constitutions are living creatures, living organisms, which define the operations, the duties and the powers of the government in a given system of law. At the same time they may also define the rights of the individuals inter se and vis-à-vis the government itself. When these organisms are compared one perceives the matter as a particularly
complicated task in addition to the fact that comparative constitutional law is one of the least explored areas of modern comparative law. Constitutions in different jurisdictions operate under particularly diverse realities. So it is possible that the same constitutional letter from one jurisdiction to another does not result in the same constitutional reality. At the same time, one is not always sure as to how can comparisons of constitutions be viable. How can one compare the laconic nature of the US Constitution with the more plethoric nature of the Austrian Constitution? As stated, it is a truism that comparative constitutional law is at best at an embryonic stage in what we generically call the subject of ‘comparative law’. There are many reasons for this, the most significant being historical in nature, i.e. modern comparative law, as this conventionally started in 1900, engaged itself with a very different area of law, comparative contract law. Things are slowly changing and the interest in comparative constitutional legal studies seems to be increasing. The question for us to consider then is how to compare constitutions? Compare what therein? Would it be possible for us to compare the Rule of Law in the UK with the Rechtsstaatsprinzip of German constitutional law? Even so, would such comparison be desirable and legitimate? We could compare legal provision but most importantly we should compare legal principle. The author proposes that at a meta-level there is a minimum level of correspondence of principle from one jurisdiction to another. Our comparisons then should be principle-ist. Nonetheless, it is understood that such correspondence of principle is not necessarily one that suggests substantive or ideological correspondence of the matter, even though –equally– one could detect some degree of correspondence amongst constitutions in the Western world for a number of reasons. But our starting point is not to identify similars. Our starting point is not even one to identify differences. Doing so would mean that our agenda would be one of predisposed expectations, especially considering that the comparative method allows us to find similarities and/or differences in our comparables. Our starting point is to compare and contrast constitutions on principle. This being the case, the author will forward the thesis that at the very least constitutions can be compared on the basis of constitutional legal principle e.g. the rule of law principle (irrespective of how, where and when this applies), the social justice principle, the principle of democracy (if applicable, i.e. if present in the comparable constitutions), the administrative structure of the state principle (e.g. centralised, federal, semi-federal), the form of governmental system (e.g. parliamentary, presidential, semi-presidential), the adherence to human rights principle, the principle of proportionality in the operations of the administration and so on and so forth. It will be concluded that not all these principles can be found in all constitutions, but where these can be found, these can act as particularly useful initiators for our comparisons.

11.15 Workshop 2: Socio-economic rights protection

Paul O’Connell, University of Leicester

The Death of Socio-Economic Rights

Over the last decade constitutional courts in India, Canada and South Africa (which have traditionally been viewed as progressive and broadly pro-socio-economic rights courts) have issued judgments which are fundamentally at variance with the meaningful protection of socio-economic rights. Drawing on the experiences in these three countries, and others, this paper will argue that this jurisprudential turn can be understood as a de facto harmonisation of constitutional rights protection in the context
The various national courts, although dealing with idiosyncratic domestic constitutional provisions, have nonetheless articulated analogous conceptions of fundamental rights; which are atomistic, “market friendly” and more broadly congruent with the narrow neo-liberal conception of rights, and consequently antithetical to socio-economic rights.

Finally, it will be argued that this view of rights has now become well established as the hegemonic view, and that the pre-eminence of this view, notwithstanding apparently contrary developments at the level of international human rights law, signals “the end”, in substantive terms, for the prospect of meaningful protection of socio-economic rights.

Dr Oliver Gerstenberg, University of Leeds

Negative / Positive Constitutionalism, “Fair Balance,” and the Problem of

Human rights create negative obligations for the state—duties not to interfere with free speech, life, liberty, property, and occupation. On this function there is general agreement. But much more controversial is the question of the extent to which human rights also create positive obligations for the state, especially obligations to protect and to promote human rights, and to what extent those obligations are justiciable, if they exist. In the context of the ECHR—a constitutional instrument of European public order(1)—the ECtHR emphasized that the Convention does not merely oblige the higher authorities of the Contracting States themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels. The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected. (2)

The extension of positive obligations is far-reaching. Virtually all the standard-setting provisions of the ECHR now have, in terms of their requirements, a dual aspect, positive and negative, within an essentially judge-made legal system. Thus, in order to ensure that Convention Rights are not “theoretical or illusory but [...] practical and effective,” the Court has begun to recognize socio-economic rights, such as the right to free legal aid, and also the horizontal effect of the Convention, according to which the state becomes responsible for violations between individuals because there has been a failure in the legal order.

Yet positive obligations remain controversial because of their implications for judicial role and capacities and because of familiar concerns with “juristocracy”(3) and democratic self-governance. The standard worry is that a norm cannot count as properly “constitutional” without being turned over to judges for enforcement and without judges having to strike a “fair balance [...] between the competing interests of the individual and of the community as a whole.”(4) By the method of fair or just balance—or, indeed, of proportionality—the Court is required, at a first stage, to assess the relevancy of public-interest justifications invoked by the state (for action or non-action) and, at the second stage, to assess the appropriateness of the state’s attitude. Here the Court must examine the importance of the public interest at stake and of the right at issue and the state’s margin of appreciation. But the standard objection is that the method of fair balance is irrational given the inherent contestability of standards and that it leaves the judges with a hapless choice between under-constitutionalization of the legal order.
(debasing the currency of rights and the international rule of law) and over-
constitutionalisation (proliferation of fully justiciable constitutional rights exacerbating
basic questions about democratic self-governance and provenance).

In a contribution to the debate about negative and positive constitutionalism,
Cass Sunstein proposes a distinction between “pragmatic” and “aspirational”
conceptions of constitutions. American pragmatists, Sunstein suggests, tend to select
principles for constitutionalisation that “would be a sensible part of an enforceable
constitution containing the important institution of judicial review,” that is, with an eye
to the question of “[h]ow will courts interpret this provision, in fact”. European
aspirationalists, by contrast, think of constitutions “as expressive of a nation’s deepest
hopes and highest aspirations;” and “many authors of international documents and
constitutions do not think much about questions of enforcement and attempt instead to
set out goals or aspirations.”(5) Drawing on Sunstein’s distinction, Michelman argues
that “overdependence on the judiciary can ground a situationally valid, moral objection
to putting into your constitutional law something that moral ideal theory tells you should
be there.”(6) There is a—Rawlsian liberal—case for including socioeconomic
commitment in constitutional law, resting on the idea of a “constitutional regime,” which
“everyone who is both rationally self-interested and socially reasonable may be expected
to endorse.” But exclusion may nonetheless be the correct choice as a matter of non-
ideal political morality, “but only if judicial review occupies a certain, special place in
the society’s legal culture.” The ideal-theoretical Rawlsian moral case for inclusion
would, however, survive the test of real-world conditions, as Michelman concludes, if a
norm could “be placed off limits to judicial enforcement without impeaching its status as
law,” thus leaving compliance judgments concerning fulfilment of abstract constitutional
commitments by ordinary law to purely political forums and to open-ended political
debate in the wider public.

In departure from an understanding of constitutionalism as either exclusively
“pragmatic” or “declaratory,” in this paper my interest lies in reconstructing from extant
legal practice a judicial understanding of “fair balance” and of coordinate
constitutionalism, which holds out the promise of reducing the tension between judicial
review and democratic self-governance. This understanding does not cast the Court as
“supreme”—as the quasi-sovereign penultimate designer of democracy. Rather, if you
don’t want courts to be in the position to define the meaning of “fair balance” for all, the
allow parties to the conflict themselves to participate in how constitutional norms are
being defined. Coordinate constitutionalism focuses on how different legal orders and
principles interact over time, without hierarchy or final decider. As the paper proposes to
elaborate, the Court exerts a forum-creative role by imposing, in realm after realm, on
actors themselves the task of developing mutually acceptable understandings of
constitutional norms. For example, within the conflict between privacy and free speech,
much depends on whether the defendant (who invokes her right to privacy) is herself a
public figure and whether the conflict can thus be “returned” to the public. Other
examples can be found.

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Notes

* Note that this is an abstract only, at an early stage. The idea of “coordinate
  constitutionalism” sketched below is drawn from Charles F. Sabel / Oliver Gerstenberg,
  Constitutionalising an Overlapping Consensus: the ECJ and the Emergence of a Co-
  ordinate Constitutional Order, European Law Journal (accepted paper, forthcoming
  2010).

(1) ECtHR, Loizidou v. Turkey (1995), par. 75.
(2) ECtHR, Assandidzé v. Georgia, Judgment of 8 April 2004.
Dr Murray Wesson, University of Leeds

Constitutionalis
ing the Welfare State

The extent to which constitutions should reflect the values and institutions of the welfare state has gained prominence in recent years with discussion focusing particularly on the issue of constitutional social rights. Nevertheless, a great deal of debate and uncertainty remains. At least three questions are apparent. Firstly, there is the question of whether constitutionalising the welfare state is desirable at all. Secondly, assuming that such a development is desirable, there is the question of the form that it should take. Thirdly, assuming that some degree of justiciability is accepted, there is the question of the manner in which the judiciary should give effect to the resulting social guarantees. This paper concentrates primarily on the second and third questions. It takes as its starting-point the social rights proposals of the UK Joint Committee on Human Rights (JCHR). These constitute an innovative example of how to entrench social rights given that the JCHR recommends the inclusion of additional wording to circumscribe the role of the courts. The JCHR’s proposals are also strongly influenced by the case-law of the South African Constitutional Court. While there is much to be said for providing the judiciary with clear guidelines, the JCHR’s reading of the South African case-law is overly restrictive. Furthermore, the Constitutional Court’s case-law has itself been subject to criticism, much of which has been advanced in light of the general comments of the United Nations Committee on Economic, Social and Cultural Rights. After considering this debate, the paper seeks to develop the current approach of the Constitutional Court. What is envisaged is the application of a variable standard of review that is clearly tied to certain key principles. On this model, social rights function not as rights to substantive benefits as such but rather as triggers for forms of accountability that would not otherwise be available and which may crystallise into substantive entitlements in a given case. Of course, it is likely to be argued that the key objection to this approach is that it does not do justice to the status of constitutional social rights as rights, which means that the approach is either flawed or social rights should be protected in some other form e.g. quasi-justiciable principles. These objections are taken up in the last part of the paper where it is argued that they are unpersuasive.

12.45 Lunch

14.00 Workshop 3: Political/legal constitutionalism

Professor Colin Harvey, School of Law, Queen’s University, Belfast

The ‘Political Constitution’ of Northern Ireland

The aim of this paper is to examine constitutional developments in Northern Ireland since the adoption of the Belfast/Good Friday Agreement 1998 (and its
endorsement in referendums held in Ireland, North and South, on 22nd May 1998). The objective is to locate these trends within a broader discourse of political/legal constitutionalism in these islands, and one which can accommodate and recognise the particular societal circumstances of a jurisdiction marked by sharp and ongoing ethno-national division.

This will provide further elaboration of the argument that the debate in and about Northern Ireland – as a site of continuing British-Irish co-operation and contestation – sheds light on constitutional practices across these islands. I have argued elsewhere that events in 1998 were constitutive in both political and legal senses – and I want to explore further the merit of this argument, elaborate on it and seek to defend a version of the thesis that there is an extra-conventional ‘political constitution’ of Northern Ireland which was preceded by a definite constitutional moment with transformative intent. The paper is in four parts.

First, I outline what is meant by ‘political constitutionalism’ in this specific context. The focus is on the ‘political constitution’ in its extra-conventional sense – the interest is not principally in formal legal standards or institutions, but in the essentially political principles which appear to be embedded in, and animate, the process of constitutional practice. Many of these have gained formal legal recognition, but the question addressed here focuses on what precedes or constitutes this formal practice. Is this a practical example of a constitutive moment, anchored within the ‘political’, which confronts a model of constitutionalism in the UK which struggles to recognise or accommodate this fact? This therefore moves beyond discussions of legal and/or political accountability to explore the extra-conventional principles which operate as a direct challenge to practice (and how constitutional moments are forgotten, lost and absorbed), as well as those which appear to have become embedded.

Second, I explore how constitutionalism in Northern Ireland is constructed by participants in the constitutional process (judges, lawyers, politicians, community and voluntary sector) and the scholarly community. Northern Ireland remains a contested constitutional space. How the debate is framed has significant implications for conclusions reached and practical proposals made. What does this contestation over ‘framing’ suggest?

Third, I chart the process since 1998 (in historical context) under the terms of the above analysis and perspective. The intention is to ‘test’ the argument that there are extra-conventional practices and standards which are evident in constitutional engagements in Northern Ireland. The paper will therefore examine the Belfast/Good Friday Agreement, the St Andrews Agreement and the Hillsborough Castle Agreement (as well as related legal/political developments).

Fourth, what lessons, if any, might be learned from this exercise in protracted constitutional practice in and about Northern Ireland? If the argument is that something of constitutional significance (in an extra-conventional sense) has been ‘constituted’, what is its nature and how does it relate to or challenge conventional practices?

Professor Cesare Pinelli, Sapienza University, Rome

The combination of negative with positive constitutionalism and the quest of a ‘just distance’ between citizens and the public power

The paper’s aim is to elucidate the specific combination of the democratic principle (positive constitutionalism) with the rule of law (negative constitutionalism) resulting from the post-II World War European Constitutions.
That combination didn’t consist in melting together the universal suffrage and the majority rule with the classical version of the separation of powers and the rule of law. Such solution was insufficient to take account of the failures of parliamentarism in continental Europe, not less than of the evils of totalitarian regimes. While the latter demonstrated inter alia the public power’s capability of blurring the public/private divide through interferences into the individual conscience, the former proved its incapability in coping with democracy and the effective protection of citizens rights. For the European Constituent Assemblies, the ‘concreteness’ of totalitarian regimes vis-à-vis ordinary citizens was of course the main threat to be avoided, which was possible through restrictions of the public power’s abuses. But this was not a good reason for going back to the ‘abstractedness’ of the old parliamentarism. Those Assemblies tended therefore to give further meaning both to negative and to positive constitutionalism, in search of what might be called a ‘just distance’ between public power and citizens.

The principle of human dignity was recognized with the aim of signalling the ‘never more’ with respect to totalitarianism, but also of enhancing the relational dimension of individual identity, which was connected with the emphasis placed on social rights. Accordingly, parliaments and administrations were called to enforce constitutional provisions concerning these rights through interventions in the economic sphere, contrary to the XIX century’s constitutionalism which prevented the State from interference into the social and economic realms. Furthermore, a sophisticated version of the rule of law was introduced through the introduction of constitutional review of legislation, thus overriding the myth of parliamentary sovereignty and, at the same time, tending to ensure effective protection of fundamental rights. Finally, the separation of powers principle acquired further dimensions at the vertical and at the horizontal level, with the aim of countering the formation of monolithic power through the diffusion of a pluralistic version of democracy.

These changings characterized the Constitutions of post-totalitarian countries, marking a watershed with the past in their approach to constitutionalism. Given their uninterrupted democratic traditions, the United Kingdom and, to a lesser extent, France, maintained instead the previous balance between negative and positive constitutionalism. Even in these countries, however, a recent cycle of constitutional reforms has introduced institutions and devices tending partly to converge with those before mentioned.

After having exposed the main features of the conjunction of positive and negative constitutionalism as envisaged in post-totalitarian countries, the paper inquires into whether and to what extent the British and French recent developments might be seen as further examples, in a different historical context, of the quest of a ‘just distance’ between public power and citizens.

Dr Fergal Davis, University of Lancaster

*The (Im)Pure theory of Extra-constitutionalism: uniting Kelsen and Tushnet?*

In seeking to determine the role of constitutions this paper will apply the theories of Kelsen and Tushnet on the role of ‘law’ in securing the rights of citizens in times of ‘emergency’. Kelsen’s ‘pure theory’ will be outlined and compared with Tushnet’s ‘extra-constitutionalism’. Ultimately, both theories assert a restrictive function for the judiciary and a suspicion of juridification. It will be argued that the declaration of incompatibility contained within the Human Rights Act, 1998 is compatible with the arguments of Kelsen and Tushnet in that it returns the issue of rights enforcement to
parliament rather than ensnaring the judiciary in political controversy. To that end, the declaration of incompatibility provides protection of citizens from abuse of state power while effectively securing government by the people. The rights of the citizen can best be secured through the political and the constitution ought to provide a context within which the political process should be free to operate.

14.00 Workshop 4: Constitutional development

Professor Wim Voermans, Professor of Constitutional and Administrative Law, Faculty of Law Leiden University, The Netherlands

Constitutional Reserves and Covert Constitutions

Most constitutions around the world resist amendments by simple majorities. In this way they try to protect the basic constitutional structure of a country’s system of government against whimsical change. They do so by setting procedural constraints on constitutional amendments (qualified majorities) or substantive ones, e.g. by requiring that some subjects or issues can only be settled by way of a constitutional amendment (constitutional reserves). This contribution studies the phenomenon of these constitutional reserves in various constitutional systems. It elaborates the concept of a constitutional reserve and assesses its effects. On that note it looks into the question whether or not rigid constitutions and constitutional reserves typically trigger the bypassing of laborious constitutional amendment procedures, resulting in ‘covert’ constitution building. In conclusion, the contribution discusses – in more general terms – the advantages and disadvantages of constitutional reserves and questions whether a theoretical framework would be helpful for constitutional practice.

Catherine Dupre, University of Exeter

Time: The Forgotten Dimension of European Constitutionalism

The 20th century has demonstrated that codified constitutions are a very effective tool for rebuilding a lasting peaceful and democratic political order after dictatorships and totalitarianism in Europe. As a result of the various political transitions, codified constitutions are now well understood and, particularly since the post-communist period, they also tend to follow a remarkably harmonised model. This paper argues that there is, however, one dimension of constitutions that remains little understood, namely time. Encouraged and inspired by the writing of F Ost, P Häberle and S Kirste, the paper endeavours to explore further the little noticed temporal dimension of European constitutions and tentatively identifies three phases in the construction of this temporality.

The paper starts by highlighting the centrality of time for codified constitutions and argues that since they were first adopted in the 18th century, they have created human and political time by moving away from the divine temporality of law, which characterised the Ancien Regime. Through the first codification, human beings started to control and construct their destiny as citizens by choosing their political regime and enshrining it in codified form. The next defining moment of constitutional time took place after the Second World War and can be characterised by a negative construction of the future, as exemplified by the ‘never again’ constitutionalism of the 1949 German Basic Law, which was largely followed by other constitutions adopted after dictatorial
and totalitarian regimes in Europe. Finally, the paper argues that we have moved into a new phase of constitutional time since 1989. The key difference, it is suggested, lies in the ways in which the future is conceived and constructed by constitutions: we are moving from a negative (never again war and totalitarianism) and singular (only liberal democracy in a capitalist economy) future to one that has become uncertain, open and plural.

For each of these different phases of constitutional temporalities, the paper considers the features of constitutional past, present and future and, drawing on a range of constitutional provisions from across Europe, it identifies the key constitutional mechanisms and devices that characterise a particular temporality. As such the paper offers a new theoretical perspective on the purposes of constitutions for the 21st century, i.e. the creation and protection of human time.

Stefano Barrazza

_Sailing Democracy in the Stormy Seas of Global Constitutionalism_

If the Aristotelian definition of man as a “zoôn politikôn” has been proved true through the continuous emergence of social groups and their subsequent evolution into more complex social and political organizations in history, it remains to be understood if the foundational rules of societies share a common normative language.

The path that leads to democracy, the decision-making form around which most modern societies evolve, has frequently crossed the way and experienced the transition from power-related normative structures to the establishment of the rule of law and fundamental rights, from old to modern constitutionalism.

This essay argues that the encounter between democracy and constitutionalism allows societies to develop institutions and to secure fundamental rights in a way that is more efficient and stable than what we might expect from democracy alone. In fact, as the studies of D.S. Lutz and S. Huntington demonstrate, constitutional democracies do not suffer the effects of counter-waves of democratization and steadily develop even where other shapes of democracy fail.

Furthermore, the modern tendency towards societies characterized by increasing complexity and interconnection shows that constitutionalism achieves a double effect: it provides the tools to transform the weak will of individuals into the rational and strong will of a nation (J. Elster) and, at the same time, it creates a common language through which societies can rise to the challenges posed by globalization, social and economical rights and political power, as C. Sunstein and D. Grimm wisely note. Are we finally entering the age of global constitutionalism, where constitutionalism alone could reach and transform the basis of democracy worldwide? The recent experiences of constitution-making in Africa, East Europe and Asia suggest that a positive answer is round the corner, provided that constitutionalism proves able to respond to the needs and aspirations of individuals, while showing the way to the people.

15.30 Tea

16.00 **Workshop 5: Post-communist constitutionalism**

Davit Zedelashvili, Central European University, Budapest

_The Problems and Promises of Legal Constitution_
The paper enquires into the debate between political and legal constitutionalism. It tries to bring a new perspective of this debate, by highlighting fundamental ground of disagreement, latent in conflicting positions. It is contended, that crucial difference between the two positions, shall be traced in their relation to history.

Firstly, paper analyzes political constitutionalism as elaborated in the scholarship of Martin Loughlin, comparing to constitutional theories of legal positivism and so called Diceyan orthodoxy in Britain. It is argued that all of these theories are for political constitution, providing for legally unconstrained political sovereignty. The only difference between them is the relative role of legal form, in discharging state authority. Fundamental assumptions for all these theories are the same: The primacy of right over law, political right as the source of law, and the enlightening ideal of historical progress.

The paper continues with the discussion of constitutional legalism, often understood as legal constitutionalism. It is argued that constitutional legalism shares fundamental features with political constitutionalism, as its understanding of rule of law, is the rule of liberal principles of political morality. Law in constitutional legalism is devoid of its independent content; it is essentially political. Furthermore, constitutional legalism in line with political constitutionalism is animated by the idea of historical progress.

Having said this, essay continues with contemporary attempts from legal theory, to challenge political constitution. It is suggested that only in the theory of David Dyzenhaus, does one find legal constitution. Dyzenhaus claims that state is both constituted and restrained by immutable principles of legality. Principles of legality, also referred as “inner morality of law”, are inherently legitimate, independent of any external source. Principles of legality are ahistorical, and they do not stem from political right. Dyzenhaus contends that legal constitution of sovereignty is present already in the philosophy of Thomas Hobbes.

Essay closes by suggesting, that such interpretation of Hobbes is highly problematic, if not impossible. The groundbreaking turn of Hobbes’s philosophy, which lays the foundations of modernity, is in his affirmation of the primacy of right over law, priority of liberty over obligation. In all major expositions of his political philosophy, Hobbes himself was making clear the foundational importance of this distinction, and was warning against “promiscuous” mixture of Jus and Lex. If one takes out from Hobbes, the primacy of right over law, then he seems indistinguishable from ancient philosophers.

Dyzenhaus may have strong arguments against political constitution, but the promises of his legal constitution are problematic to be fulfilled within Hobbes’s philosophy, and within the horizon of historical epoch Hobbes founded.

Gábor Attila Tóth

*From Uneasy Compromises to Democratic Partnership: The Prospects of the Central European Constitutionalism*

The Central European countries have been constitutional democracies for two decades. They were created by the political and constitutional transition of 1989, which was based upon the acknowledgment of fundamental rights and the rule of law. Timothy Garton Ash has argued that the peaceful, negotiated regime changes in Central Europe established a new model of non-violent revolution. The year 1989 became the major historical reference point for this kind of change. However, more than twenty years later,
in the light of antidemocratic, authoritarian and intolerant tendencies, it is far from clear whether the negotiated revolution is a story of success or failure. This paper first outlines the constitutional and political background of revolutionary transition. It shows that uneasy compromises with members of the ancien régime were an unavoidable part of the peaceful transition. Nevertheless, the achieved constitutional structures and rules do not prevent political communities from realising the full promise of democracy. Second, this analysis attempts to explore, through the use of examples, how the century-old historical circumstances, the social environment, and the commonly failed practice of constitutional institutions interact. The goal of this section is to highlight some of the differences between universal principles and local peculiarities, focusing particularly on the constitutional features of presidential aspirations, the privileges of churches and certain ethnic tensions. The way the authorities apply the constitution is not detached from place and time, since those authorities possess culturally and historically predetermined knowledge and premises. Thus, we can say that antidemocratic, authoritarian and intolerant political and legal tendencies are embedded in the past and present of political communities. Finally, the paper argues that the chances of success of liberal democracies depend significantly on extraneous factors. It seems that Hungary is in a more depressing and dangerous period of its history than for example Poland. The future of Central European constitutional democracies relies on the actions of people in the countries concerned and the commitment of Western societies.

William Partlett, Law Clerk on the United States Court of Appeals for the Eleventh Circuit

The Dangers of Constitutional Politics in Democratization: The Post-Soviet Experience

This paper will explore a critical normative question at the intersection of constitutional theory and democracy promotion: To what extent should preexisting institutions and laws structure the process of constitution-making in countries trying to draft and ratify new democratic constitutions? For many theorists of “revolutionary constitution-making,” the answer to this question is “very little.” Adherence to preexisting legal norms and institutions in the process of constitutional drafting, they warn, unduly limits the people’s naturally unbounded sovereign power to create a new constitutional order. The only way the people can fully exercise their sovereign right to establish a constitution, they argue, is through irregular mechanisms - such as referendums and constitutional conventions – that will allow the people to directly express their newly-found sovereign power.

Eastern European constitutional drafters did not follow this advice. In fact, rather than calling for referendums and constitutional conventions, they did just the opposite: they drafted their post-communist constitutions within the framework of preexisting institutions and constitutional rules. Despite criticism from many theorists of revolutionary constitution-making, this “legal” form of constitutional change has led to legitimate constitutional democracies.

Many post-Soviet constitutional drafters did follow this revolutionary advice. The people’s exercise of their sovereign right to extralegal constitutional creation, however, did not lead to robust constitutional democracy. Instead, extralegal mechanisms of constitutional adoption helped undermine a process of negotiated constitutional change by allowing post-soviet presidents to seize power in the name of the people. Russia lies at the center of this story. After two years of “legally” negotiated
constitutional reform, the president - claiming to embody the unbounded sovereign will of the people - suspended the existing constitution and dissolved the Parliament. Soon after, he ratified his own personally-drafted constitution in a national referendum. This form of revolutionary constitution-making soon spread to other post-Soviet republics, including Belarus, Kazakhstan, and Armenia.

This use of the language and mechanisms of revolutionary constitution-making to reassert dictatorship by post-Soviet presidents vividly demonstrates the dangers of a theory of constitution-making that glorifies the unbounded sovereign power of the people in the creation of a new democratic constitution. It also suggests that constitutional theorists should focus more clearly on the role that preexisting institutions and rules – even ones tainted by association with a prior regime – can play in constraining constitution-making. Otherwise, liberal constitutional theorists risk unwittingly enabling constitutional dictatorship by allowing opportunistic elites to cloak the reassertion of dictatorship in the language of constitutional theory.

16.00 Workshop 6: Constitutional development: II

Dr Asem Khalil, New York University and Birzeit University
Constitutionalism in Palestine: From a Basic Law to a Text-Based-Institutional Practice, and Backward

Drafting a Basic Law for the Palestinian Authority, established following Oslo Accords, was a long and hard process. The output of this process was a Basic Law that is rightly considered one of the most ‘liberal’ constitutions in the Arab world. The Basic Law adopts basic elements of constitutionalism, in a similar way to contemporary states in the new era of constitutionalism during the 1990s.

Although deemed temporary for the interim period, the Basic Law was endorsed in a context of political instability and legal uncertainty – while agreement on final stats was not reached with Israel. The satisfaction that accompanied its entry into force in 2002 vanished soon. The Basic Law indeed occupied marginal place in the Palestinian political system and the rules and institutions introduced by it did not affect internal decision making immediately.

The Basic Law – originally deemed a temporary and transitory constitutional text – was treated with time as a real ‘constitution’ that actors often cite and increasingly refer to when conflicts arise with regards to their competing prerogatives and mandates. This transformation in the place and role of the Basic Law can be partially explained by the changes that occurred in the Palestinian Authority itself – such as the creation of the office of prime minister in 2003 – or the changes in persons holding certain offices – such as the election of Mahmoud Abbas in 2005 and the victory of Hamas in legislative elections in 2006. Both changes gave the Basic Law a reinvigorated role.

In this paper, however, I will argue that the transformation of the Basic Law and its role is indicative of a transformation in constitutionalism in Palestine: the Palestinian Authority passed to a different level of constitutionalism, i.e. from a constitutional text to text-based institutional practice. This passage has consequences over the Basic Law, the Palestinian Authority, and the future of Palestine.

The apparent failure of the Basic Law in providing a valid tool for resolving internal political conflicts, I will conclude, is not the result of adopting principles of constitutionalism; rather it is explained in part because of the constitutional text, inadequate and distorted. The main reason, however, for this reality is the reversed
process that was put in motion: establishing a ‘liberal democracy’ before statehood, and under occupation.

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**Vimalen Reddi, Commonwealth Secretariat**

*The “best loser system” in Mauritian Constitution: Reconciling group rights in a multicultural democracy*

This paper will examine the recognition of group rights in Mauritius, a former British Colony and a multicultural democracy. It will focus on the “best loser system”, as a unique feature of the electoral system over the past 50 years, which was formulated as a constitutional guarantee to ensure fair and adequate representation of communities in the national assembly, and intended to qualify the principle of majority rule. Thus, Section 3 of Schedule 1 of the Constitution of Mauritius requires that every candidate for election at any general election declares his community, while Section 5 (1) of Schedule 1 reserves 8 seats in the National Assembly for candidates from certain communities who have not been returned in the election as members to represent constituencies. This paper will thus attempt to evaluate the merits and success of the best loser system against its stated objectives and the more contemporary legal and political challenges, amid criticisms that it does more to exacerbate existing communal differences and hampers the process of nation building.

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**DAY TWO: Wednesday 30 June**

**Theme 2 – Transplants, Irritations, Migrations, Harmonization**

9.45  **Keynote speaker:**
**Professor Cheryl Saunders, Laureate Professor, University of Melbourne**

**Chair:** Professor Dawn Oliver

11.00  **Coffee**

11.15  **Workshop 1: Transplants and the Development of International Constitutional Standards**

**Dr Konrad Lachmayer, University of Vienna**

*Between Power and Transparency: The Migration of Constitutional Ideas in an International Constitutional Network*

1. “International Constitutional Law” Perspective

In times of legal globalisation, constitutional law must be seen in a perspective that goes beyond the state. Transnational and international constitutions are emerging.
The process of constitutionalization of the European Union provides as example well as the constitutionalization of international law more generally. The migration of constitutional ideas is in many cases enhanced by international actors, like the UNDP, the IMF or the World Bank (Rule of Law activities). Yet, the comparative perspectives of constitutional law also have to be seen through the lens of international law. New constitutional concepts are created and developed through the comparison between domestic constitutional law and international standards of constitutional law. The European Court of Human Rights serves as an example.

Two aspects of this international migration of constitutional ideas shall be analysed: limited information and the role of power.

2. Limited Information

The comparison of constitutional concepts requires information - information about the legal provisions, court judgements, interpretation standards, cultural dimensions, linguistic connotations and so on. The concepts of collecting and re-creating international standards of constitutional ideas often fail because of a lack of information and transparency. A data collection involving too many countries will not be going along the complexity of the domestic phenomena. The paper argues that a re-organisation of comparing strategies is unavoidable in international organizations.

3. The Role of Power

The migration of constitutional ideas is neither a neutral instrument that establishes best practices, nor a simple support for “under-developed” countries. The role of power determines the application of constitutional concepts in various contexts in international law. Constitutional-making is often more an international competition for constitutional influence than a choice of the best concepts. (South-African constitutional law might be an exemption). The paper argues that a critical reflexion is necessary to uncover the purposes of constitutional comparison in international law.

Allan Tatham, Péter Pázmány Catholic University, Budapest

In the judicial steps of Bolívar and Morazán? Supranational Court Conversations between Europe and Latin America

The issue of judicial dialogue and constitutional migrations is as much a part of processes between courts of regional organisations as it is between national courts or national and regional courts. This paper will explore such issues between the Court of Justice of the European Union (“CJEU”) and Latin American regional courts from the perspectives both of institutions and case-law. In this research, the judicial frameworks of regional organisations in Latin America are particularly relevant since they tend to follow (to varying degrees) those provided for (now) in the Treaty on the Foundation of the European Union.

This paper will consider the impact of the “constitutional” case-law of the CJEU on EU law supremacy and direct effect on the decisions of the Central American Court of Justice (“CCJ”) and the Court of Justice of the Andean Community (“ACCJ”). However, any optimism of complete emulation clearly needs to be tempered with consideration of the local conditions that may make Latin America less receptive to supranational judicial activism in regional integration than Europe.

The study proceeds from briefly setting out the legal aspects of the EU model of integration, before moving to identify the main factors which led to the selection of Latin
American regional courts and to outline the background to integration in the two sub-regions, mindful of the fact that this has occurred and continues to occur within the overall framework of Latin American integration. In addressing the CCJ and ACCJ, a short history and sketch of their jurisdiction is given before examining the impact of the migration of the integrationist activism of the CJEU on regional judicial institutions in Latin America.

11.15 Workshop 2: National Constitutions and International Legal Standards

Professor Guillaume Tusseau, Professor of Public Law at Sciences Po Law School, Member of the Institut universitaire de France
The Interpretation of National Constitutions by International Judges

In this paper, I intend to assess some major changes in contemporary constitutionalism. Whereas our modern concept of constitution, as it results from John Marshall and Hans Kelsen’s views, is that of a supreme norm which entrenches the basic values of a political community, international legal actors no more seem to really care about the special “dignity” of constitutions. As examples mainly drawn from national legal orders and from the caselaw of the European Court of Human Rights and the European Court of Justice evidence, we are witnessing a global disqualification of State constitutions. They frequently yield to other norms and are overtly criticized and disregarded by international actors. New forms of constitutions, constitutionalisms, and constitutionalizations have appeared, which contribute to the emergence of a global constitutionalism. The paper then elaborates on the basic features of the new mode of legal reasoning that pervades what I call, in a broad sense, “constitution-talk”. Global constitutionalism thus appears as an iterative and collaborative enterprise implying national, infranational, supranational and transnational legal actors. Human rights, the rule of law and similar principles offer the shared grammar for this ongoing form of legal practice. As a consequence, value-balancing is spreading as the fundamental reasoning tool. Legal arguments are increasingly substantial and universal, and move away from the previous pattern of parochial authority-arguments. Ending with more critical speculation, I suggest that this form of legal rationality may be meant to meet the demands of conservative western legal activism.

Dr Theodore Konstantinides, University of Surrey

The aim of this paper is to explore the relationship between national constitutions and international legal standards through a study of the implementation and application of EU law in the Member States. It will attempt, in particular, to provide a critique of case law where Member States have used the concept of constitutional identity as a means of derogating from their EU law obligations. It will further discuss how EU ‘constitutional identity-encroaching acts’ have been subjected to close scrutiny by national courts. In light of this identity retention trend, the paper will make an inquiry into the concept of constitutional identity and discuss the national courts’ mandate in the European legal order vis-à-vis the constitutionality of EU law and the place of the European constitutional order within the framework of national constitutional settlement.
Dr Anneli Albi, University of Kent  
*Global Financial Governance Meets National Constitutions: The Latvian Constitutional Court’s IMF case and Iceland’s Icesave referendum*

While in the past, the global financial governance seemed distant from constitutional issues, the two worlds have recently come to head-on collision. In Latvia, the Constitutional Court has ruled against government pension cuts required by the IMF and the EU as part of their bailout package. The Court found that the drastic 70% cuts breach the constitutional right to social security and the principle of rule of law. Approximately 9,000 pensioners had lodged complaints with the constitutional court. In Iceland, the country’s President announced a national referendum on the international commitments under which Icelandic taxpayers have to compensate the lost Icesave savings to the UK and the Netherlands. The compensation would amount to 10,000 GBP per each Icelandic citizen. The President invoked the constitutional provisions on the people as the ultimate source of power.

The paper starts by exploring these cases, and subsequently goes on to raise some broader issues surrounding the legitimacy of global financial governance. While governance in recent decades has increasingly shifted to the global level, the texts of the national constitutions predominantly operate within the paradigm of sovereign state. There is nascent research on the effects of the broader phenomenon of global governance on the national constitutions; however virtually no research has hitherto been carried out on the national constitutional implications of global financial institutions such as the International Monetary Fund (IMF). However, the financial crisis that began to unravel in 2008 has exposed the dramatic impact that such global financial institutions have on the quality of life and exercise of powers within nation-states. This poses two novel challenges for the constitutional frameworks: (a) how to legitimise the power of such institutions; and (b) how to balance the interests of the international creditor community with those of the national citizens and voters.

12.45 Lunch

14.00 Workshop 3: Comparative Law and Constitutional Transplants into National Constitutions

Dr Eoin Carolan, University College Dublin  
*Diffusing Bad Ideas: what the migration of the separation of powers means for comparative constitutionalism*

This focus of this paper will be on the way in which the basic tripartite conception of a separation of powers theory has been transplanted into a range of quite different constitutional orders with a view to considering what that experience means for the general project of comparative constitutional studies.

The basic proposition from which this paper will proceed is that there ought to have been a number of substantial obstacles to the migration of this tripartite theory of the separation of powers. First of all, the tripartite theory assumes a certain allocation of institutional functions which is not reproduced in many of the jurisdictions which have nonetheless adopted it. Secondly, contrary to the conventional view of it as a valuable
tenet of liberal constitutionalism, the separation of powers theory in fact presents an inadequate and potentially damaging vision of constitutional governance. These criticisms of the theory are more fully articulated in my recently-published monograph on “The New Separation of Powers” (OUP, 2009). This paper would not substantially reproduce that work. It would rather set out these criticisms in outline form and then proceed to consider in more detail the issues raised by the tripartite theory’s success in overcoming such obstacles in its migration across constitutional boundaries.

This will necessitate an examination of a range of literature from the fields of psychology, sociology, political science and network theory about the diffusion and of information and ideas amongst individuals and societies. These include the work of Rogers, McNeill and Godin on diffusion of ideas. It will be argued that the migration of the separation of powers across different constitutional systems in spite of its clear limitations could potentially be explained by several of the findings of such studies. These include:

- That individuals are more likely to respond positively to simplistic and easily understood concepts rather than more complicated ideas which are nonetheless objectively superior.
- That vague and broadly defined ideas are more likely to command public or political support than specific propositions.
- That the prior adoption of ideas by some individuals makes subsequent adoption of it by others more likely as it makes such ideas psychologically more attractive.
- That certain actors in a network can have a decisive influence on the diffusion of ideas throughout that network.
- That the diffusion of ideas can be hindered by the existence of well established orthodoxies which thereby increase the costs of adopting any new ideas.

The paper will examine the implications of these studies for comparative constitutional studies. In particular, it will consider whether the experience of the spread of the separation of powers raises concerns about the utility of comparative constitutionalism. It will ask whether the migration of ideas ought to be encouraged if the ideas which migrate are more likely, for example, to be overly simplistic, reiterations of orthodox doctrine, or the product of the influence of an academic or political elite. In the alternative, it will also consider the lessons which might be learnt from the diffusion of the separation of powers for the way in which comparative constitutional studies is practiced, and for the way in which domestic legal orders engage in comparative constitutionalism.

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**Dr Derek O’Brien**, Oxford Brookes University

*The Role of the Head of State in the Modern Commonwealth Caribbean*

Upon independence, all of the Commonwealth Caribbean countries opted for a parliamentary rather than a presidential system of government. Implicit in this choice is the separation of the head of state from the head of government and all of the Commonwealth Caribbean countries, with the exception of Dominica, chose to have the Queen as their head of state. In each case, the Queen acts through her representative in the country concerned, the Governor General. Dominica chose instead to have a ceremonial president as its head of state. Since independence, two other countries have replaced the Queen with a ceremonial President as their head of state: Guyana and Trinidad and Tobago.
Regardless of whether the head of state is a Governor General or a ceremonial President, their role is based largely on the model of the monarch under the British constitution, particularly in relation the exercise of those ‘reserve’ powers traditionally associated with the British monarch. There are, nevertheless, some significant differences between the position of heads of state of Commonwealth Caribbean countries and the British monarch, which have significant implications for their political neutrality. Moreover, unlike the prerogative powers of the British monarch which are controlled by ‘conventions of the constitution,’ the powers of the heads of state of Commonwealth Caribbean countries are embodied in written constitutions which contain express rules about the terms upon which they are to be exercised, thereby potentially exposing heads of state to the jurisdiction of the courts, a concept unthinkable under the UK Constitution.

The constitutional role of the British monarch has been the subject of much recent academic debate. It has been argued that traditional assumptions about the inherent discretion of the monarch in the exercise of her reserve powers are wrong, misconceived and anachronistic, and that there is a need to find a normative basis for the exercise of these powers by reference to fundamental constitutional principles of democracy and responsible government. The practical significance of the debate surrounding the constitutional role of the head of state within a parliamentary system of government has also been vividly demonstrated most recently by events in Canada, in December 2008, where the decision of the Governor General to grant the Prime Minister’s request to prorogue Parliament led to what has been described by commentators as a constitutional ‘crisis.’

Against this background I will seek to explore in this paper the constitutional and symbolic roles of the head of state in the modern Commonwealth Caribbean. I will particularly wish to focus on those factors which have a bearing on the role of the head of state in the context of the Commonwealth Caribbean, including: the legacy of colonialism, the scope for political interference in the exercise of the head of state’s ‘reserve’ powers and the potential for control of the exercise of these powers by the courts through judicial review.

Merris Amos, Queen Mary, University of London

Standing to Seek a Remedy for a Violation of Human Rights Law: has the United Kingdom got this particular transplant right?

The ability of claimants to bring proceedings before a court to allege a violation of the constitution by a public authority, and obtain a remedy should a violation be found, is a key aspect of the effectiveness of that state’s constitutional law. The United Kingdom’s Human Rights Act 1998 (HRA), which gives further effect in domestic law to the majority of the Convention rights contained in the European Convention on Human Rights (ECHR), places a limit on who is able to bring a legal claim alleging that there has been a breach of their Convention rights by a public authority. Known as the “victim test”, this limit is contained in s.7 of the HRA which provides that only the victim of an unlawful act may bring proceedings and further, that a person can be a victim only if he or she would also be considered to be a victim for the purposes of Art.34 of the Convention if proceedings were brought before the European Court of Human Rights.

In addition to the concerns with the victim test expressed during the parliamentary debates, those writing about the HRA at the time also canvassed their
concerns. Miles observed that a “victim-based standing rule may in some cases place insuperable barriers to the vindication of rights” (1) and that “[o]nly time will tell whether the victim test will assure adequate access to justice for the basic objectives of the Human Rights Act to be realised.” (2) Nicol and Marriott observed that if they wished to raise human rights issues, then representative applicants would probably be forced to go “to the artificial expedient of finding nominal plaintiffs.” (3) And, furthermore, “serious abuses of power by public authorities which result in highly diffuse harm may be rendered unchallengeable.” (4)

The purpose of this paper is to examine the impact that the victim test has had over the last ten years on the effectiveness of the HRA as a means for providing as “much protection as possible for the rights of individuals against the misuse of power by the state within the framework of a Bill which preserves Parliamentary sovereignty.” (5) Particular consideration will be given to the question of the appropriateness of transplanting a test utilised in the international context to the national level. The paper will conclude with a discussion of what might be a more appropriate test for standing in the domestic human rights context, given present debates concerning the prospect of a British Bill of Rights.

(2) ibid at 167.
(4) ibid.

14.00 Workshop 4: Constitutional reform/formation: Comparative and International Influences

Grégoire C N Webber, Department of Law, London School of Economics

Post-Conflict Constitutions and Constitutional Narratives”?

The dominant constitutional narrative surrounding the status and making of a constitution is grounded in the received understanding of the US Constitution. According to this narrative, a written constitution is revolutionary; it constitutes from naught a forward-looking political charter for the government’s political arrangements and limitations. A constitution represents a clean break with the past, a new beginning, and the simultaneous expression and constituting of a People. Reified, it stands supreme and out of reach, protected by judicial guardians against possible encroachments from ordinary and lesser political actors. To the extent that the dominant narrative is challenged, a ‘realist view’ competes as the primary counter-narrative. Here, a constitution is understood to reflect no more than political preferences and power-imbalances. Beyond this, the realist counter-narrative resists greater constitutional understanding; its realism is reductionist.

Post-conflict constitution-making challenges both the dominant constitutional narrative and the realist counter-narrative and, in so doing, invites a review of the grounds of constitutional theory.

Post-conflict constitutions challenge the narrative that assumes a single constitution-making moment. Post-conflict constitutions often proceed by way of
provisional or interim arrangements, at times interrupted by stalemates or procedures for judicial certification. When preceded by power-sharing agreements or peace accords, the vision of principled visionary founding fathers is challenged by warring factions negotiating under the supervision of UN missions and foreign delegates promising more or threatening less aid. The historical contingencies of post-conflict constitutions make explicit how anchored in a given moment a constitutional moment can be, thus questioning assumptions about the forward-looking orientation of a constitutional founding.

The reified status of a constitution under the dominant narrative is equally challenged by post-conflict constitutions. In addition to providing political stability, a post-conflict constitution highlights the necessary antecedent and subsequent political stability on which all constitutions rest. When conceived as the implementation of a power-sharing agreement or peace accord, a post-conflict constitution is initiated to sustain a fragile stability. The sustainability of a post-conflict constitution rests on forces and influences external to it, including any number of transitional justice measures that seek to establish a public commitment to the peace that the constitution requires but cannot provide without more. A constitution, in this context, is part of a series of efforts towards sustainable conflict management. Together, these post-conflict realities complicate the dominant narrative’s account of the status of a constitution post-founding.

Post-conflict constitutions demonstrate how constitutions are adopted in conditions that generally militate against good constitution-making and, yet, illustrate how the impetus for constitution-making nevertheless remains grounded in the crisis of a post-conflict scenario. This seeming paradox, highlighted in Jon Elster’s scholarship, invites an amended account of the dominant constitutional narrative in light of the experience of post-conflict constitutions. A more encompassing constitutional narrative informed by post-conflict constitutions calls for a re-evaluation of the narratives surrounding established constitutions to illustrate that they share many of the same attributes identified with post-conflict constitutions, including political compromises and interim and transitory constitution-making processes.

**Professor Sophie Boyron**, University of Birmingham

*Constitutional Reform in France and the UK: Understanding the comparative dimension(s) in constitutional change*

Interestingly, both the French and the British constitutions have recently gone through a process of reform and ‘modernization.’ The vast programme of constitutional reforms on both sides of the Channel provides an ideal field of research when trying to understand the impact that the comparative dimension has on the process of change. It may appear foolhardy not to say controversial to compare these two constitutions in this way, but beyond their obvious differences, it possible to draw some enlightening parallels between them, particularly when it comes to the analysis of the recent reforms. It may be that the use of comparative data has been more in evidence in France than in the UK, but in both processes of constitutional reform, the comparative dimension or one may say more appropriately ‘the influence from beyond the borders’ was present and took many a varied form and fulfilled a number of different functions. In the course of the paper, various types of comparative influences will be identified along with the different roles that they played at various stages of the reforms. In turn, this may allow traditional comparative analysis to move beyond its strict and usual confines and to
Paul Brady, Balliol College, University of Oxford

**Political-Philosophical Ideas in the Construction of the Irish Constitutional Order**

This paper considers the influences of British, American and European constitutional forms and ideas on the framing of the 1922 Irish Free State Constitution. Though often overlooked by contemporary legal scholars and historians, the 1922 document was the foundation stone of the modern Irish constitutional order and it had a major influence on the form and content of the 1937 Irish Constitution that remains in force to this day.

The paper argues that the 1922 Free State constitution is best viewed as an ambitiously innovative and historically significant political experiment which, though in many ways typical of the constitutional creativity and legal transplantation of the early inter-war period, was nevertheless shaped by the intellectual presuppositions of an Irish nationalist movement that, for the most part, was a distinctive blend of Catholic, democratic and constitutionalist influences.

This case study is of relevance for studies in political science and comparative constitutional law as it notes, using archive material from the drafting committee and Irish cabinet, the debate over how various foreign constitutional structures and concepts could and should be borrowed by an Irish nationalism eager to forge a ‘free democracy.’ The fledgling state was eager to preserve the best aspects of Westminster government, and benefit from the stability that continuity would offer, while simultaneously articulating a distinctively Irish political order that might somehow stand in contrast to British thought. The result was an intriguing juxtaposition of many core features of the British and Dominion constitutions with a number of novel devices including fundamental rights declarations, judicial review of legislation, provisions allowing for vocational councils, the appointment of ministers from outside the membership of the legislature, and provisions for legislation by means of citizens’ initiatives and referendums.

The paper seeks to go beyond a mere cataloguing of the political machinery of the Irish Free State, however, by highlighting how the political debate that took place among Irish leaders, over the extent to which a constitutional text should propose symbolic and programmatic national aspirations, affected the document’s ultimate ‘drafting philosophy.’ While most commentators have sought to distinguish the 1922 and 1937 constitutions in terms of a secular / religious divide, the paper concludes that it is more useful to consider the major stylistic and substantive differences between the two texts in light of this earlier debate over the purpose and limitations of a written basic law, a debate which continues to have resonance in contemporary Irish politics.

Vijayashri Sripati, Osgoode Hall Law School, Canada

**UN Constitutional Assistance [UNCA]: New additions to the “Standard of Civilization”?**

This essay is drawn from my doctoral dissertation on the evolution of United Nations [UN] constitutional assistance from a post-colonial and “Third World Approaches to International Law” (TWAIL) perspective. Its (essay’s) central thesis is that the UN’s push to standardize how a constitution is made, and what it should broadly
contain, proposes to set a new international “standard of civilization,” defined as “an expression of assumptions, tacit and explicit to distinguish those that belong to a particular society from those that do not” (Gong, 1994). Further, such imposition of standards is legitimized as a means of implementing public international law. Indeed, history is replete with examples of how the standard of civilization was imposed, meekly consented to, and eagerly embraced. It argues that we must approach the UN’s constitutional assistance from this angle, recognizing its broader historical and ideological aspects and the underlying structural strengths and weaknesses of today’s international society.

UN constitutional assistance is today offered to “post-conflict” countries and others as a component of its development assistance under the broader “democratic governance” framework. In fact, the UN has declared constitutional assistance as an integral part of its “work” and released a policy note in this regard. Since constitution making is quintessentially a domestic political process and involves a profound reshaping of a state’s politico-economic order, this essay maintains that the legitimization of the UN’s constitutional assistance as a practice, and the consequent internationalization of constitution making, must be critically examined. Although today’s international standards of civilization incorporate many standards—pertaining to human rights, financial administration, rules of war, and sustainable development (Gong, 2002) - this essay focuses only on the first two on this list. It argues that the UN’s “transparent, inclusive and participatory” constitution-making standard is a new and explicit addition (of a procedural nature) to today’s standards of civilizations, whereas its standards for constitutional content are not wholly new but include some existing standards relative to human rights (explicit) and financial matters (implicit).

References
Gong, Gerrit W. “Standards of Civilization today” in Mehdi Mozaffari, Globalization and Civilization (Routledge, 2002).

15.30  Tea

**Theme 3: Constructing Constitutions**

16.00  **Workshop 1: Styles and conventions of constitutional drafting**

Matthew E. Crow, UCLA

*Radical Jurisprudence in Constitutional Text-Making: Jefferson’s Writings and Rewritings*

Out of uncommon attentiveness to the variety of texts that underwrote the transmission of law through time, Jefferson practiced a mode of constitutional text making and criticism characterized by fragmentation in the inherited body of legal knowledge. In turn, this experience enabled the development of a constitutional vision that took as its founding principle the security of the conditions for an engaged citizenry to practice judgment and take collective action to authorize new constitutional forms.
Such a vision sought to provide a home to the critical capacities of citizens, and did so through a self-conscious linkage between the historical representation of a never fully codified and multifaceted past, one consisting of a variety of histories, civil and natural, and a never fully ordered political representation. What has been dismissed as Jefferson’s constitutional skepticism, or downright anti-constitutionalism, is better understood as a constitutionalism and jurisprudence profoundly aware of the potential for projects of democratic retrieval, re-description, and redemption of fragments of the past as they are embodied in texts.

**Professor David Golov and Professor Daniel Hulsebosch**, New York University School of Law

*On an Equal Footing: Constitution-Making, the Law of Nations, and the Pursuit of International Recognition in the Early American Republic*

This paper argues that the American founders wrote the federal Constitution not simply to organize their domestic government but also to position the new United States in relation to the polities around them. The founding generation undertook constitution-making while breaking away from one European empire, courting the assistance of others, and trying to integrate themselves into the Atlantic world of nations on an equal footing. The key to that integration was recognition: legal and practical acceptance by the European nation-states. Many founders believed, based on years of diplomatic experience, that a prerequisite to full recognition was adherence to the law of nations. They designed the federal Constitution – and innovated upon revolutionary republicanism – to express their commitment and make it credible by embedding within it institutions and references to the law of nations and, for the most part, insulating those elements from popular politics, in the executive and judiciary. After ratification, the founding generation continued to construct their new republic Constitution with an eye toward earning and keeping international recognition. For them, recognition served both realist and idealist purposes: safety and security on the one hand, and full membership – as individuals and a nation – in the European-based Atlantic world that they equated with “civilization.” This anxious and cosmopolitan context is absent from modern understandings of American constitution-making. The connection forged between constitution-making and international recognition is one of the unexamined influences of the United States on global constitutionalism. Although there is also a small but growing literature on the influence of American constitutionalism on other nations, the focus has been on the degree to which other nations have patterned the contents of their constitutions on that of the United States. We instead focus on the form: constitution-making itself. The United States established the generic pattern for future postcolonial nations seeking recognition: first with a Declaration of Independence, next with a written constitution. Without ignoring all the differences between modern independence movements and American independence – indeed, despite those many differences – the similarities in the legal forms of independence are striking. It was the first non-European state to perform statehood as understood in the European tradition of the law of nations, and some of its designs and experiments became part of the law of nations, and remain part of modern international law.

**Dr Mara Malagodi**, School of Oriental and African Studies, University of London

*Constitutionalizing Nepal’s Hindu Monarchy: Rationale and Impact (1990-2007)*
Nepal’s re-democratisation in 1990 was sanctioned by a process of constitution-making aimed at establishing a constitutional monarchy and a parliamentary democracy after thirty years of monarchical Panchayat autocracy. The 1990 Constitution of Nepal was the result of the political settlement amongst the country’s main political forces. The frame of government established by the new Constitution revolved around the institution of the Shah monarchy. The legitimacy of the over two-centuries-old monarchy has been historically based on the progressive translation of the traditional concept of Hindu kingship into modern nationalist narratives. The traditionalist Hindu legitimation of political power in Nepal was also maintained in the 1990 Constitution of Nepal – the fifth in the country’s history. The traditionalist legitimation of political power in 1990 Nepal was institutionalised in the embattled constitutional definition of the Kingdom as Hindu in Article 4(1) and in an array of Articles informed by Hindu symbolism and devised to protect the Hindu connotations of the state-constructed Nepali nation. The analysis of the debates of the Constitution Recommendation Commission which drafted the document illustrates the rationale of the constitution-makers in choosing to incorporate the traditionalist narratives in the new democratic document. The paper aims to demonstrate how these symbolic constitutional provisions had a substantive impact on legal exclusionary patterns through a detailed analysis of Nepal’s Supreme Court decisions between 1990 and 2002 in which the apex court interpreted the aforementioned constitutional Articles. It is argued that the text of the 1990 Constitution and the conservative judicial decisions contributed to the progressive delegitimation of the 1990 Constitution and of the system of government it instituted which resulted in the abrogation of the 1990 Constitution in January 2007 and the abolition of two-hundred-and-sixty-year-old Shah monarchy in the first meeting of the newly-elected Constituent Assembly in May 2008.

Dr David Marrani, University of Essex

*The Real Nature of the Fifth French Republic* (under N Sarkozy...)

The Fifth French Republic was established in 1958 under the guidance of Charles de Gaulle. De Gaulle, ‘the man who won the war’ (World War II), was called by the establishment of the previous regime (Fourth Republic) to ‘save’ the country, ‘once more’. De Gaulle clearly wanted a system with a strong leadership. According to his ideas, the président head of the state would eventually be elected directly by the people (The change occurred in 1962). If many scholars insisted on the system being very close to a parliamentary democracy, some argued that it is in fact very close to a presidential system like the one of the USA. That said, it could also been argued that the democratically elected président became somehow an elected monarch, receiving his legitimacy from the collective support of its people, rather than the divine anointment of the ancien régime monarch, the election becoming here equivalent to the coronation of a King.

If one reads the text of the constitution, it is obvious, at any stage, that no monarchy has been restored. Indeed, the head of state’s appointment is based on democratic election and not on belonging to the traditional French aristocracy, such as the Bourbon (Royal) or Bonaparte (Imperial) families. But the spirit of the system reveals the presence of ‘the monarchy in the Republic’. In addition, changes affecting the elections and term of office of the président since 1962, together with the way N Sarkozy has acted since 2007, have demonstrated a presidentialisation of the Fifth
Republic.

In this paper I wish to discuss the problem of the Nature of the Fifth French Republic, particularly since the election of N Sarkozy. I particularly want to look at the ambiguities found in both the text and the spirit of the Constitution, allowing the Fifth French Republic to show at the same time elements of the monarchy and elements of presidential system of government.

16.00 Workshop 2: Influence of culture and tradition in the drafting and implementation of constitutions

Dr Elizabeth Craig, University of Sussex

Cultural Difference and Mutual Recognition: A Critique of Recent Constitutional Developments in Northern Ireland

The recent debates that have taken place in Northern Ireland over the inclusion of a right to self-identification in any future Bill of Rights and the potential implications for employment monitoring and current government structures provide the starting point for this paper. The Northern Ireland Constitution Act 1973 and the Fair Employment (Northern Ireland) Act 1976, which focused on discrimination on the grounds of religious belief or political opinion, have been described as the then Government’s ‘Charter of Human Rights’. The first part of the paper will explore the extent to which these instruments helped reinforce the ‘two communities’ paradigm in Northern Ireland. The paper will then consider the extent to which this paradigm has been challenged, or reinforced, by subsequent constitutional developments, in particular the coming into force of the Human Rights Act 1998, the Northern Ireland Act 1998 and the recent Bill of Rights debates. The paper will conclude by reflecting on the prospects of a Northern Ireland Bill of Rights Act and make preliminary suggestions for how culture, identity and language issues might be addressed in such an Act. The paper will argue that there needs to be greater clarity over the relationship between a ‘politics of positional difference’ and a ‘politics of cultural difference’ (as per Iris Marion Young) and will explore the extent to which a shift towards the latter has been influenced by developments in European minority rights law and within liberalism more generally. The paper will also reflect on the usefulness of ‘the politics of cultural recognition’ in helping reconcile the tensions which have emerged in debates over the inclusion of a right to self-identification in any future Bill of Rights.

Riddhi Dasgupta

Competing Constitutional Ideals in ‘Force Majeure’-Federalism Cases: Calling the Shots in Disaster Management

Federalism in times of force majeure is an extraordinary question. Do the ordinary rules of federal-State power division still apply? Are the federal government’s powers enhanced? Federal models like the United States, Canada and some European systems help us start the conversation about the tipping point where national government ceases to govern and the constituent states step in. This issue might help us tackle other questions involving federalism: Property rights and expropriation, marijuana legalization, and progressive taxation are just some of the topical issues where a nation’s commitment to constitutional process (namely, federalism) is quite out of sync with its
preference for a certain resolution of the specific political controversy. Neither a strictly processual nor an absolutely result-oriented expedient suffices.

The constitutional method of national-over-state preemption does not actually help resolve this federalism quandary. Certain key questions in this analysis are purposive: Does this specific policy pertain proximately to interstate issues such as commerce and infrastructure? Does it enhance the human dignity of persons? Does it protect individuals from abuses of government power? This paper examines the issue in some detail, and the discourse engages with some American constitutional cases. Eventually the paper comes out in favor of a model that enhances the human dignity of persons and allows the federal disaster management teams to do their job without being able to use force majeure as a pretext to erode State sovereignty.

Professor Mary Clark, American University, Washington College of Law
Comparative Constitutional Provisions

My paper relates to all three themes highlighted in the call for papers insofar as it compares and contrasts the choices made (and the reasons for the choices made) regarding the structure of the judicial appointment systems at the time of creation of the U.S. and U.K. Supreme Courts, as provided for in the U.S. Constitution and the U.K. Constitutional Reform Act ("CRA"). More specifically, my paper examines the reasons why the Senate was included in the judicial appointments process in the U.S. Constitution and why Parliament was not included in the judicial appointments process in the CRA.

Thus, with respect to the themes highlighted in the call for papers, my paper’s relevance is as follows:

1. **Conceptualizations of purposes of constitutions.** The paper examines the ideas and concerns that shaped the framing of the judicial appointments provisions in the U.S. Constitution and U.K. Constitutional Reform Act, with particular attention to the choice of inclusion or exclusion of the legislature.

2. **Transplants, etc.** The paper examines the ways in which early American statesmen responded to the then-current British judicial appointments practices in framing the judicial appointments provision in the U.S. Constitution and the ways in which recent debates concerning the judicial appointments provision in the U.K. Constitutional Reform Act responded to current U.S. judicial appointment practices, with particular attention in each case to the role of the legislature.

3. **Constructing constitutions.** The paper, writ large, is about choices made in constructing constitutions. The paper approaches this subject through the lens of choices made with regard to the role of the legislature in judicial appointments in the U.S. Constitution and U.K. Constitutional Reform Act.

Dr Mariusz Golecki, University of Łódz, Poland
**Constitutional features of a complex legal system: European law from Grundnorm towards a transnational framework**

Many hopes of the adherents of constitutional reform in the EU remained in vain after the enactment of the Lisbon Treaty. Meanwhile the creeping constitutionalisation of the EU law leads to the empowerment of the UE quasi constitutional court- the European Court of Justice. This kind of constitutionalism
is albeit firmly grounded on judicial cross-border cooperation. The main purpose of this paper is to address the question of whether and how the concept of judicial control based on transactional framework developed in law and economics could effectively supplement if not substitute the notion of constitutional democratic legitimacy. In order to demonstrate that it is logically possible and institutionally feasible to build a system based on circularity, self-referentiality and privatization of legal remedies, the paper contains the analysis of the recent development of the EU law which at least partially takes this direction.

16.00 Workshop 3: The Role of Judges And Courts With Constitutional Competence In The Implementation Of Constitutional Instruments, and the Role of Parliamentary Committees

Jack Caird, School of Oriental and African Studies
The Role of the House of Lords Select Committee on the Constitution in Enforcing the British Constitution

The House of Lords Select Committee on the Constitution (HLCC) is the first body in the United Kingdom explicitly established to review the constitutionality of legislation. This constitutional innovation has occurred in a typically pragmatic and low-profile fashion. This article seeks to introduce the HLCC and instigate a debate over the importance of its constitutional function. First, it introduces the model of constitutional enforcement which the HLCC represents: constitutional review through parliamentary constitution committee. This model has not received the attention it deserves and in this section I highlight some of the key points it can contribute both to the academic debate and to the practice of constitutional enforcement in parliamentary systems. Second, the article seeks to introduce and review the work of the HLCC by contrasting its work in its first parliamentary session (2001-2002) and with that of 2008-2009. While this review is far from comprehensive, it is designed to examine the choices made by the HLCC in the interpretation of its remit and to illustrate the development that has occurred over the past decade. The HLCC has made a major contribution to constitutional scrutiny in the United Kingdom in nearly a decade of operation, however, it remains clear that there are many ways in which its work could be enhanced and it faces challenges ahead which will not easily be resolved. The HLCC must be allowed to profit from the experience of nine parliamentary sessions, however for it to do so it should promote its existing contribution and demonstrate a willingness to adapt to radical constitutional developments.

Dr Arthur Dyevre, Centro de Estudios Políticos y Constitucionales, Madrid
The Empirical Case for Judicial Review: Judges as Agents and Judges as Trustees

Lawyers, constitutional theorists and political philosophers continue to disagree over the merits and legitimacy of judicial review – the power of judges, now recognized by many constitutions around the world, to disallow democratically enacted laws. Borrowing insights from delegation theory, industrial organization as well as empirical accounts of judicial behaviour, this paper assesses two distinct approaches to the justification of judicial review: (1) Following the Principal-Agent Model, judges are given the authority to review and invalidate legislation to enforce the choices of the
constitutional framers over recalcitrant legislative majorities. (2) By contrast, under the Trustee Model, judges are given the power of judicial review to act as trustees of the political system: their task is to ensure that the legislative process produces the “best” outcomes or, at least, policies that are Pareto-optimal. While showing how the two models relate to traditional understandings of the role of judges, the paper assesses the extent to which the organizational setting of courts and the judges’ incentive structure ensure that judicial review works as each model prescribes. It is argued that, from an empirical standpoint, justifying judicial review is easier – albeit by no means unproblematic – under the Trustee than under the Principal-Agent Model. The institutional design of most courts invested with the power of judicial review does more to ensure output legitimacy than to ensure that judges confine themselves to the task of enforcing the determinations of the constitutional framers.

Matthew Williams, Wadham College, University of Oxford

*What role has the language of legislation played in changes to the constitutional role of senior judges in British politics since 1960?*

Lord Atkin quoting *Alice Through the Looking Glass* in *Liversidge v Anderson* [1942] AC 206 at 245,

> 'When I use a word,' Humpty Dumpty said, in rather a scornful tone,  
> '...it means just what I choose it to mean - neither more nor less.'  
> 'The question is,' said Alice, 'whether you can make words mean so many different things.'  
> 'The question is,' said Humpty Dumpty, 'which is to be master - that's all.'

Some judges are born political, some seek out political power, and others have politics thrust upon them. This paper aims to show that the latter is the true description of developments in the constitutional role of senior British judges since 1960. The paper will outline the ‘unintended politicisation of the judiciary thesis’ which seeks to explain the increased political power of judges as a product of the increased enactment of ambiguous legislation by successive governments. This paper therefore adopts a historic institutionalist perspective, in order to move away from traditional accounts that explain changes in the institutional balance of British politics as being caused by the personal political ambitions of the judges themselves. The hypothesis tested for this paper is that legislation has become more ambiguous since 1960. A new methodology was required to test this hypothesis, with the result being a discourse analysis that has been used to objectively measure the ambiguity of legislative sections for a sample of 1,335 sections between 1960 and 2005. Results show with 95% confidence that legislation has become more ambiguous since 1960, with the 1980s and the 2000s showing the highest numbers of ambiguous legislative sections, at the time when strong Commons majorities allowed the government to pass a greater volume of legislation. However the 1990s showed the highest proportionate levels of ambiguity when government was hamstrung by a small Commons majority, and more had to be achieved from less legislation.

Dr Yuri Borgmann-Prebil, University of Sussex

*A Jurisprudential Perspective of Constitutional Conflict between Constitutional Courts: Between National Constitutional Supremacy and European Constitutional*
Supremacy

The aim of this paper is to explore the role of European Court of Justice and national courts with constitutional competence in the development of European constitutionalism from a legal theory perspective. More specifically, the paper examines the foundationalism of European law with reference to legal theories focussing in particular on Habermas' discourse theory of law. The paper will use the judicial dialogue between the European Court of Justice and the German Constitutional Court (including and especially the recent Lisbon judgement of the German Court\(^{(1)}\)) to illustrate both the contestability of the scope of the European constitution and continued redrawing of constitutional boundaries between the Member States’ and the European legal orders. The policing of the boundaries of European law by national judges is portrayed as the mirror image of the monitoring of the boundaries of national law by the European Court of Justice, especially through its rule of reason jurisprudence. The constant (re-)drawing of those boundaries constitutes a key constitutional characteristic of supranational constitutionalism. It is argued that the (re-)drawing of these boundaries is an inherent feature of European constitutionalism.

The argument is made by the application of the legal theories of Hart, Dworkin and Habermas. Hart's legal positivism is found to be deficient to explain European constitutionalism because it externalises the reasons that validate European law. This is a serious flaw because these reasons constitute an essential ingredient of European constitutionalism. Dworkin's theory of law as integrity is considered as a powerful alternative because it aptly captures the considerable value foundationalism inherent in the European constitution. However, ultimately Dworkin's theory fails to explain the contestability of European law sufficiently. It will argue that Habermas’ legal theory reconciles Hart’s legal positivism with a normative (or Dworkinian) account of law and that it is the most appropriate legal theory to conceptualise the contested nature of the foundations of European law in general, and the constant delimitation of the boundary between member state and European law in particular.

1) BVerfG, 2 BvE 2/08

19:00 Workshop Dinner

DAY THREE: Thursday 1 July

09.30 Introduction

09.45 Workshop 4: Constitutional Purposes

**Professor Andrew Harding**, University of Victoria, British Columbia, Canada and **Professor Peter Leyland**, London Metropolitan University

*The Colour of Thailand’s (Un)Constitutional Reforms: Red, Yellow or Orange?*

Among the world’s leading offenders in the field of hyper-constitution-making is Thailand, which has had 18 constitutions since 1932, including no less than 10 in the
period 1968-78. It has more experience than almost any other country both of constitution-making and of constitutional malfunction.

This paper inquires into several related issues of relevance to the panel and the themes of the Workshop more generally.

It begins by considering the underlying reasons for Thailand’s hyper-constitution-making, finding the answer in the chain-reaction phenomenon of a constitutional cycle (coup/constitution/election/weak government/coup) which appears to be remarkably intractable to resolution by constitutional design.

The paper proceeds to look at constitution-making processes and the textual issues involved, relating to, for example, the separation of powers, political parties, the electoral system, and independent agencies; and the impact of international developments on constitution-making in Thailand with particular reference to the 1997 and 2007 constitutions. The paper draws on this discussion of an increasingly complex constitution-making culture to inquire why these processes continue to be highly contested despite the short lived nature of the constitutions and the challenges involved in implementation.

The paper finally considers Thailand’s present constitutional impasse and the significance of constitutionalism in light of this history, in particular the major reforms of 1997. The paper concludes by highlighting significance of unwritten assumptions and legal culture and relating them to written rules.

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**Dr Giuseppe Martinico, Scuola Superiore Sant’ Anna, Pisa**

*Constitutionalism as a “resource”: strength and weakness of a constitutional approach to the development debate*

In this paper I argue that cooperation for development may be seen as a technique of the second-modernity constitutionalism. I base this argument on its goal to correct the asymmetries produced by the economic globalization and its stress on the idea of development as a process of emancipation of the person, especially as concerns the last generation of such policies. Indeed, all conditionality policies may be understood as an attempt to translate the development discourse from the mere economic level to a more comprehensive level, including human rights.

This tension in the new cooperation for development policies - conceived as a vehicle to extend and affirm constitutional goods such as human rights - inevitably have paved the way for a constitutional approach to such issues.

This paper focuses on the possible consequences of a constitutional approach to the development debate.

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**Arun Sagar, University of Rouen**

*Constitutional Interpretation in Federations and its Impact on the Federal Balance*

Most of the existing literature on judicial interpretation of federal constitutions focuses either on individual federations or on comparative studies of specific judicial techniques and/or the case law in specific fields. This paper argues that the general interpretative philosophy underlying the approach taken by constitutional courts has a huge impact on the balance of power between the constituent units and the federation; an originalist interpretation that treats the constitution as a fixed body of rules tends to favour the constituent units, while progressive or ‘living’ constitutionalism tends to have
a centripetal effect on the federal balance. However, even the adoption of an originalist approach is not sufficient to fully counter a general centralising trend noticeable in all the federations studied. This can be explained partly by the manner in which powers are attributed and divided in the constitution itself, partly by social, economic and technological developments, and partly by changing conceptions of the relationship between the federation and the constituent units. Further, the analysis reveals that constitutional courts often adopt a different approach to interpretation in federalism-related issues than they do in other areas of constitutional law, such as fundamental rights. Unlike many of these areas, the case law on federalism seeks not to define the limits of state power but rather to define the relation of power between different levels of government within the state. Comparative studies of constitutional interpretation need to take into account not only the overall interpretative approach prevalent in different legal systems but also how these approaches vary according to the subject matter in question.

09.45 **Workshop 5: Formulation and drafting of specific constitutional provisions**

**Roger Masterman**, Senior Lecturer, Durham Law School

*Dynamics of a Contemporary Separation of Powers*

In spite of the numerous academic critiques of separation of powers theories, and the uneasy relationships between ideas associated with constitutional separation and those linked with sovereignty, separation of powers remains an enduring influence on the constitutional thought and practice of systems operating under a sovereign Parliament. The continuing relevance of separation of powers to such systems can – in part at least – be ascribed to the aspirations which lie behind the doctrine as a constitutional and/or political theory (particularly where those aspirations are reinforced by the rule of law) rather than to the aims of separation of powers as an instrument of institutional design.

While the UK constitution has largely rejected separation of powers as a tool of institutional efficiency, the doctrine’s emphasis on institutional restraints (particularly those which exert influence on the judiciary) has a degree of purchase. Increasingly however, some of the more established divisions between the powers of the judicial and the elected branches of government can be seen to be breaking down; human rights adjudication, for instance, exposes a whole range of ‘policy’ choices to closer judicial scrutiny than a hierarchical separation of power, driven by sovereignty, would seem to allow. The use of ‘spatial metaphors’ to delineate the respective powers of courts, executives and legislatures is therefore increasingly rejected in order to avoid the exclusion of certain governmental powers and decisions from meaningful judicial examination, while the distinctiveness of judicial process is emphasised and structured legal tests adopted in order to preserve an ordered constitutional boundary.

Separation of powers at the micro-level is therefore increasingly characterised by the withering of non-justiciability doctrines, the elaboration of principles of judicial deference, and judicial review based on proportionate interference as opposed to *Wednesbury* unreasonableness. A heightened intensity of review, across a broad spectrum of governmental power, is obviously consistent with notions of separation of powers that emphasise constitutional checks and balances, but poses a further threat to the already wounded concept of legal sovereignty. This paper therefore asks whether the distinct dynamics of this contemporary separation of power – alongside the recognition of the judiciary as an institutionally separate branch of government in the UK – can form
the basis of a reconceptualised separation of powers doctrine capable of exercising a restraining influence across the three branches of government.

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**Liav Orgad**, Interdisciplinary Center (IDC) Herzliya, Israel

*The Preamble in Constitutional Interpretation*

From Plato’s Laws through common law and up to modern legal systems, preambles have played an important role in law and policy-making. By conducting qualitative research of the function and status of preambles in different common law and civil law countries, this Article highlights a recent trend in comparative constitutional law: the growing use of preambles in constitutional adjudication and constitutional design.

The Article explores the theory of preambles and their functions. It presents a typology for determining the legal status of preambles: a symbolic preamble, an interpretive preamble, and a substantive preamble. The Article then examines the legal status of the U.S. Preamble. It shows how the U.S. Preamble remains the most neglected section in American constitutional theory. While focusing on Macedonia, Australia, and the Treaty of Lisbon, the Article concludes by discussing the sociological function of preambles in top-down and bottom-up constitutional design.

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**Dr Alfred E Kellermann**, Senior Legal and Policy Advisor, Visiting Professor in the Law of the EU, T.M.C. Asser Institute, The Hague

*Constructing constitutions - The influence of international legal developments on the drafting and implementation of constitutions: The European Union and national constitutions*

In the first part we have especially focused on the impact of the European Union (and the Copenhagen criteria) on the formulation and legal effects of texts of the national constitutions of the EU member States as well as the (potential) EU candidate and acceding countries.

In the second part we dealt especially with the situation in the Netherlands ("new monism") and the legal effect of decisions of international organisations (UN, EU) within the Dutch legal order.

**The impact of the EU legal order on the constitutions of the EU Member States and potential (candidate) countries**

At the national level EU enlargement will contribute in many candidate countries most likely to the constitutional modernization of the country. The EU accession will give impetus to fundamental changes in this respect. Adaptation of the national constitutional provisions to comply with the acquis communautaire and EU requirements for Membership will be required.

Also after accession it will be necessary to adapt constitutional requirements as the acquis communautaire is a moving target and because there are constitutional problems with the ratification of treaties. As examples we analyzed the ratification of the Treaty of Nice by Ireland and the ratification by the Czech Republic and Germany of the Lisbon Treaty. We indicated the legal reasoning in the judgments of the Czech (3 November 2009) and German Constitutional courts (30 June 2009) on the compliance of
their constitution with the Lisbon Treaty.

Multi-country cooperation in research is necessary for an efficient and effective preparation of the texts of national constitutions. We drafted in **ANNEX I guidelines and questions for research** on adaptation of national constitutions of EU Member States and (Pre) Candidate countries as a tool of management for a possible multi-country research project. Such a project can improve the quality of European and national constitutional law and can guarantee as an outcome identical legal effects of the constitutions in the national legal orders. In **ANNEX II** we drafted **guidelines and instructions for drafting national constitutions.**

**Impact of the International and EU legal order on the Netherlands Constitution and its practice**

The Dutch Constitution (Artt. 90 – 94) holds that legislative, executive, and judicial powers can be conferred on international institutions by treaty and the provisions of law of supranational sources to have direct effect providing they are binding on persons by virtue of their contents. No further action of the national authority was required.

Dutch regulations will further be inapplicable if they are not complying with the provisions of the treaties. Interesting is to remark that amending the Netherlands constitution is more complicated than introducing a treaty which is in conflict with the constitution.

The Dutch constitution denies further the judicial power to review the constitutionality of the acts of Parliament or treaties. On the other hand, the acts of Parliament and the constitution itself may be reviewed on their compatibility with international law.

Although the volume of European legislation in the Netherlands is estimated approximately 70% of the total legislation, in the Dutch constitution no reference at all is made to the EU or EC.

On request of the Dutch Government a number of policy options for amendment of the 1983 constitution have been developed. These options take into account the possibility, to limit, legally, the effect of a norm or international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law and the sometimes debatable legitimacy of international legal acts, according to the theory of “new-monism”. Monism and dualism should cease to exist as the exclusive theories.

The Dutch government made an evaluation on the assessment of the Dutch constitution from a legal, social and political viewpoint. The results of this evaluation show that these functions of the constitution are weak and become weaker because of the following three reasons:

- a. International Human Rights protection gets more attention than Dutch legal protection.
- b. Review of Dutch laws against the constitution is unconstitutional in the Netherlands.
- c. The text of the constitution is not familiar and not well-known.

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**09.45 Workshop 6: Human Rights in Constitutions**

**Dr Charlotte Skeet,** University of Sussex
Transjudicialism, Amendment, and Constitutional Design: Constitutionalisation of Women's Human Rights Norms in the UK

This paper explores recent (post-1997) developments in the constitutionalisation of women's human rights norms in the UK. The paper compares and contrasts different ways that activists have sought constitutionalisation. To this end it examines transjudicialism, government activity, and design of devolution settlements. Discussion is located with reference to the theoretical literature on the constitutionalisation of rights and draws on the experience of other relevant jurisdictions.

Dita Gill, London Metropolitan University

Stretch to fit: a comparative analysis of the impact of “constitutional status” of international children’s rights on the enforceability of such rights

The Committee on the Rights of the Child has noted the “particular importance [of] the need to clarify the extent of applicability of the Convention in States where the principle of “self-execution” applies and others where it is claimed that the Convention “has constitutional status” or has been incorporated into domestic law”. (1)

The paper will survey a variety of constitutional approaches to implementation of the Convention on the Rights of the Child and the impact of the various approaches on applicability at national level of the rights guaranteed thereby with particular regard to states in which the Convention is considered to have “constitutional status” such as South Africa whose Bill of Rights includes a section devoted specifically to children’s rights which closely mirror the rights found in the Convention on the Rights of the Child.

The primary focus of the paper will be an analysis of Final Comments issued by the Committee on the Rights of the Child in respect of States Parties’ reports submitted under the Convention’s process of periodic review together with analysis of any relevant non-governmental reports submitted to the Committee for consideration alongside the report of a State Party. The paper will consider whether “constitutional status” would appear to grant children improved access to rights under the Convention or whether other factors appear to play a more significant role in implementation of rights. The paper will also consider the status of non-national children such as refugees and asylum seekers and pose the question whether “constitutional rights” guaranteed by the State must stretch to cover such children as well under the obligations of the treaty.

This discussion leads to consideration of the final question to be posed: whether the eroding of state sovereignty by acceptance of human rights obligations carries with it a loosening of constitutional structures to embrace obligations to protect and promote the human rights of all children at a global level.

Note:

Dr Ioannis Glinavos, Kingston University, Kingston upon Thames

Pro-market reform sustainability and the tool of 'Constitutionalization': Economic Rights as Fundamental Rights?

This paper explores the potential of the concept of 'constitutionalisation' of pro
market policies to explain the contemporary nature of the state market relationship. The analysis in this paper shows that the contemporary legal framework offers opportunities to investors to challenge and control state action on the 'micro level' via what has been described as a 'regulatory freeze'. This means that it is not so much that courts and tribunals have adopted significantly expanded definitions of expropriation in order to fundamentally restrict state regulatory discretion. On the contrary, a regulatory freeze is the consequence of states' own reluctance to legislate/regulate in areas where challenges might be brought. The paper goes on to argue that the legal position is supplemented by an enforcement arm distinct from legal mechanisms. The market exercises 'macro level' control over state discretion through its ability to penalise states that challenge or seek to challenge the current, predominately pro market incarnation of the state market relationship. The paper begins by an evaluation of the role of private property rights in modern capitalism which shows the extent to which modern interpretations of market expectations are anchored on the protection of private property. The paper then proceeds with a comparative study examining definitions of expropriation internationally, aiming to define the outer limits of curbs on state discretion. This discussion inevitably addresses the work of private dispute resolution mechanisms (ICSID, Iran-US Claims Tribunal) and institutional mechanisms for dispute resolution contained in NAFTA, the EU and the ECHR. Finally, the paper reflects on the Greek sovereign debt crisis of 2010, showing the potential of international markets to influence policy directions consistent with global market expectations, creating an almost constitutional global system of restrictions on government discretion consistent with a liberal version of the state-market relationship. The paper concludes by suggesting that efforts to cement a liberal version of the state-market relationship, using national and supranational legal curbs on government discretion are politically dangerous and developmentally short sighted, especially when the enforcement mechanisms take extra legal paths.

11.00 Coffee

11.30 **Concluding Plenary Session**

**Stephens Laws CB, First Parliamentary Counsel**

**Professor Jeffrey Jowell QC, University College London**  
*Advising on Constitutions: Absolutes and Relatives*

This paper will consider the role of the constitutional advisor, drawing from recent cases. Three types of constitutional change will be identified, which require different treatment: *Convulsive change* (“never again” constitutions), *episodic change* (responding to a particular event or series of events), and *incremental change*. In each case, historical, cultural and social factors need to be taken into account. But to what extent is an advisor able to identify common values and preferences? To what extent should those values and preferences be able to compromise democratic absolutes? What are those absolutes? How can one assure the legitimacy of the process of constitutional renewal? And to what extent should one freeze the pre-commitment to the new order?

13.00 Lunch