Global Constitutionalism

Human Rights Democracy Rule of Law

Scholars' Workshop 2021: Diversity in Global Constitutionalism

Held virtually

Workshop Programme

Day 1: 15 July 2021

9:45 am **Introduction:** Jonathan Havercroft

10:00 am-11:30 am **First panel:** ***Constitutional Development across Diverse Polities***

- Sebastian Rudas "Indigenous Peoples and Multiculturalism: Two Perspectives"
- Vito Breda "The Aftermath of the Bougainville Independence Referendum: Another Case of a Constitutional Crisis, Hybrid Customary Democracy, and Institutional Development in Oceania"
- Andi Hoxhaj "Establishing the Rule of Law in Hybrid Regimes"

Commentator: Jonathan Havercroft

Break

3:00 pm-4:30 pm **Second panel:** ***Legality, The Judiciary, and Justice***

- Nicola Tommasini, Pedro Arcain Riccetto, Karina Denari Mattos "Who Are We Empowering? Judicial Diversity in Constitutional Courts"
- Gaurav Mukherjee "The Legitimacy of Transformative Constitutionalism"
- Lucrecia García Iommi "Difference, Access to Contestation and The Legitimacy of the International Criminal Court. Moving Beyond the ICC 'Africa Problem"

Commentator: Jacob Eisler

Day 2: 16 July 2021

9:45 am **Introduction**

10:00 am-11:30 am **First panel:** ***Identity and Globality***

- Wenjuan Zhang, Madhavi Gopalakrishnan "Balancing Cultural Identity and Globalization: The Convergence and Divergence of Constitutional Transformation in India And China"
- Marcelo Carvalho Loureiro "Constitution, Indigeinty and Citizenship: Analysing the Roots for Legal Alterity in Lusophone Constitutional Systems"
- Yvette Lind "Contemporary challenges to democracy from a transnational taxpayer perspective"

Commentator: Jo Shaw

Break

2:00 pm-3:30 pm **Second panel:** ***Diversity and Transformation in Global Constitutionalism***

- Atharva Sontakke "Constitutional (Identity) Crisis? Transformative Constitutionalism and the Search for Autochthony in India"
- Jessika Eichler "Diversity in Global Constitutionalism"
- Constanza Salgado, Domingo Lovera, Pablo Contreras "Between Emancipation and Political Self-Determination: The Use and Misuse of International Law in The Chilean's Constituent Process"

Commentator: Jo Shaw

3:30 pm-3:45 pm **Closing remarks**

Abstracts of the Workshop Papers:

1) Sebastian Rudas

Indigenous Peoples and Multiculturalism: Two Perspectives

In 1998, the Constitutional Court of Colombia decided the *Arhuaco* case. The Arhuaco are an indigenous people of Northern Colombia. The conversion of some Arhuaco members into an Evangelist church generated tensions within the community, as local Arhuaco authorities feared a steady conversion of more members would threaten the existence of their culture. They decided to restrict the freedom of religion of the new religious group among them. Consequently, freedom of religion was heavily restricted for Christians. Arhuaco Evangelists lost their case at the Constitutional Court, who accepted the argument that without such restrictions Arhuaco culture could disappear.

Part I of this article shows that the *egalitarian theory* of multiculturalism is decisively at odds with the decision reached in *Arhuaco*, mainly because of the Court's accepting cultural preservation arguments. Insofar as Colombian multiculturalism is unacceptable from a liberal egalitarian point of view, it might be tempting to say: so much the worse for egalitarian multiculturalism. Why should a *liberal egalitarian* conception be the bar against which to assess the morality of Colombian institutional practices? Wouldn't this be an instance of cultural imperialism?

In Part II, I identify what I argue is an independent perspective from which the justice of the relations involving cultural pluralism can be assessed. It takes issue with the assumption that the Colombian state is sovereign over the territories of indigenous peoples. The recognition of rights to self-determination to them signals acknowledgement that such assumption, historically uncritically accepted by national ethnic elites, needed revision. §3 analyses the notion of cultural imperialism as a form of injustice. §4 shows how the injustice of cultural imperialism has operated in Colombia and why the Constitution of 1991 is an attempt to redress it.

A common justification of self-determination rights is the metaphysical thesis that a characteristic feature of cultural pluralism is the incommensurability of value. Different cultural groups endorse incommensurable values and therefore each group should be entitled to make decisions autonomously. This justifies self-determination rights by another route: by showing the relevance of the commitment to correct for historical injustice. My purpose is to call attention on the fact that, if the state has sovereign authority over indigenous peoples, it is because it has acknowledged that such sovereignty is limited. It is by accepting this conditional statement that it is possible to explain tolerance of internal restrictions.

2) Vito Breda

The Aftermath of the Bougainville Independence Referendum: Another Case of a Constitutional Crisis, Hybrid Customary Democracy, and Institutional Development in Oceania

In the 2019, constitutionally entrenched consultative referendum for Bougainville's independence indicated that a large majority, that is 97% of the population, supported independence. The required referendum over independence was also one condition of an ongoing constitutional reform that granted recognition and autonomy to Bougainville. Crucially, the referendum was one of the last steps in the process of ending a civil war that re-established a system of governance in the region, that was *de facto* abandoned by Papuan New Guinea's (PNG) central institutions.

In this essay, I will explain that are multifarious elements that contributed to the present constitutional arrangements. For instance, the relation between the secessionist movement in Bougainville and PNG government was mediated by international intervention

that was mindful of the social context. However, this essay will focused on the political and institutional drivers of change that continue to reduce the possibility of constitutional crisis, and might prevent the return to civil unrest. These drivers were chosen because they helped the resolution of a crisis and because they continue to drive the development of PNG's constitutional system. This paper is divided in three sections preceded by an introduction and followed by conclusion. The introduction explains the methodology associated with the study of the drivers of change. The following section discus a selection of the drivers of change related to Bougainville's secession process. The first driver of change is the economic changes that are associated with institutional development in Bougainville. The second driver of change considered in this paper is the role of customary law and participatory democracy in increasing the perception of legitimacy of the decentralisation process. It is a negative driver of change. It will be argued that a perception of legitimacy of constitutional reforms in Bougainville and PNG is heavily dependent on a 'bottom up' village consultation process. The consultation process creates inertia in the process of recognition of Bougainville's independence. The third driver of change is the role of hybridisation of public institutions - that is the amalgamation of customary practices into the activity of public institutions, which might inform other similar constitutional reforms in Oceania.

3) Andi Hoxhaj

Establishing the Rule of Law in Hybrid Regimes

In last 30 years, considerable efforts have been devoted to building the rule of law in the wake of armed conflicts, military interventions, and the collapse of communism in the Western Balkans. Increasingly, international and domestic reformers have come to appreciate that long-term solutions to security and humanitarian problems depend crucially on building and strengthening the rule of law and fostering effective, inclusive, and transparent governance structures and independent judicial systems. However, building the rule of law is no simple matter – this paper assesses the case of the Western Balkans countries (Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia and Kosovo). (and how the international interventions have supported establishing the rule of law from both an institutional and culturally level since the fall of communism and break of Yugoslavia. The paper focus on two cases studies, Albania and Kosovo. In Albania the paper assesses the EU and the U.S. efforts to support establishing the rule of law through institutional support and in particular it assesses the EU-US led judicial reform that was introduced in 2017. In the case of Kosovo, the paper assesses the impact of the European Union Rule of Law Mission in Kosovo (EULEX) to establishing the rule of law in the country. This paper also assesses the cultural as well as the institutional challenges to establish a cultural of rule of law in hybrid regimes such as those in the Western Balkans region.

4) Nicola Tommasini, Pedro Arcain Riccetto, Karina Denari Mattos

Who Are We Empowering? Judicial Diversity in Constitutional Courts

There is a growing body of literature focused on the decision-making benefits of a diverse composition of political and judicial bodies in modern democracies. If institutions are not sufficiently diverse, confidence in their ability to make decisions that are considerate of all viewpoints and interests may be undermined. Furthermore, diversity allows for a range of perspectives on issues, which leads to more informed decisions. Among the institutions that might benefit from diversity are constitutional courts, especially given that much decision-making authority in recent decades has been transferred from political branches of government to courts. Indeed, the legitimacy and confidence of courts may be strongly connected to the diversity of its members. Furthermore,

some studies find that a judge's background, such as his experience as an academic, prosecutor or politician, has a significant impact on outcome.

However, descriptive data on judicial diversity in a cross-country comparative measure is still lacking. For this reason, the aim of the study is to understand the different levels judicial diversity across different groups (gender, ethnicity, professional, cultural and socioeconomic background). Existing studies mostly engage only with gender aspects of court composition. Constructing an original data set of 51 American and European democracies' highest courts' composition in the past 20 years (2002-2021), the research proposal aims to fill the gap of judicial diversity studies across different groups regarding their access, peer recognition, internal promotion, permanence and reasons for departure. We show how diversity has evolved over time and suggest reason for that development.

The database focuses on the highest court that exercises judicial review in each country and houses 39 variables, falling into six categories: identifiers, personal attributes (such as age, gender and ethnicity), nomination and confirmation, positions and period of service on the Court and departures from the bench, educational, social and professional background characteristics, and tradition of high-level public service within the Justice's Family. Additionally, we collect broader information on each justice's social and political context and reputation related to appointment and removal processes, such as scandals or impeachments.

It is our hope and belief that our investigation will contribute to the understanding of judicial diversity in courts and shine a light on the factors that shape it. It will also provide comparative data on diversity that may contribute to further studies and policy making.

5) Gaurav Mukherjee

The Legitimacy of Transformative Constitutionalism

This paper develops a typology of threats to the legitimacy of judicially led transformative constitutionalism. This is necessary because courts in India, South Africa, and Colombia are increasingly criticized on their adjudication records. In India, the Supreme Court is increasingly seen as having acquiesced to executive inaction in curtailing civil liberties[1] and social provisioning[2] with a concurrent erosion of fidelity to judicial precedent and judicial reasoning.[3] In South Africa, outcomes in constitutional litigation have become uncertain and far too contingent on the choice of forum (the Supreme Court of Appeal being seen as more conservative in its reasoning than the Constitutional Court) as well as the public salience of the underlying subject matter.[4] Decisions from the Constitutional Court of Colombia are often criticized for the inability of individualised *tutela* judgments to address the broader political economy that create conditions material insufficiency while also distracting from the vital process of political and social organising.[5] These threats, if not engaged with in a rigorous manner, threaten to undermine both the legitimacy and effectiveness of the transformative constitutional project, escalate inter-branch tensions and consequently expend the courts' limited institutional capital. The typology, which is organized along *doctrinal/interpretive, sociological*, and *institutional*

[1] Tarunabh Khaitan, *The Indian Supreme Court's identity crisis: a constitutional court or a court of appeals*? 4(1) Indian Law Review 1 (2020).

[2] Rahul Mukherji, *Covid vs. Democracy: India's Illiberal Remedy* 31(4) Journal of Democracy 91, 99-100 (October 2020); Gaurav Mukherjee, *The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights* 53(4) Verfassung und Recht in Übersee 411 (2021); Mihir Desai, *Covid-19 And The Indian Supreme Court*, Bloomberg Quint, 28 May 2020, available at https://www.bloombergquint.com/coronavirus-outbreak/covid-19-and-the-indian-supreme-court.

[3] Alok Prasanna Kumar, "*More Executive-minded Than the Executive": The Supreme Court's Role in the Implementation of the NRC* 31(2) National Law School of India Review 203 (2020).

[4] Criticism has come from a number of quarters - for a liberal perspective: Theunis Roux & Rosalind Dixon, *Marking Constitutional Transitions: The Problem of Transformation in Constitutional Design*, in Tom Ginsburg & Aziz Z. Huq (eds.), FROM PARCHMENT TO PRACTICE IMPLEMENTING NEW CONSTITUTIONS (Cambridge University Press, 2020) and see Gaurav Mukherjee & Juha Tuovinen, *Designing Remedies for a Recalcitrant Administration* 37 South African Journal on Human Rights (2021)(forthcoming); for a radical perspective, see Sanele Sibanda, *Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty* (2011) 22 Stellenbosch Law Review 482, for a conservative view, see Francois Venter, *The limits of transformation in South Africa's constitutional democracy*, 34(2) South African Journal on Human Rights 143, 158 (2018).

[5] Amy Kapczynski, *The Right to Medicines in An Age of Neoliberalism* 10(1) Humanity Journal (2019); Diego González, *Explaining the Institutional Role of the Colombian Constitutional Court* in Tom Ginsburg & Aziz Z. Huq (eds.), FROM PARCHMENT TO PRACTICE IMPLEMENTING NEW CONSTITUTIONS 189, 202-203 (Cambridge University Press, 2020).

dimensions[6] – most of which usually tend to vary across time - has implications not only on doctrinal coherence and the perceptions of the role of courts across the polities under study, but also their relationship with the coordinate branches as agents in the process of social transformation.

6) Lucrecia García Iommi

Difference, Access to Contestation and The Legitimacy of the International Criminal Court. Moving Beyond the ICC 'Africa Problem'

In a world of enduring differences, norm contestation is inevitable. Yet, access to contestation for stakeholders can turn contestation into compromise instead of conflict (Wiener 2014, 2018). African stakeholders did not enjoy such access in the negotiation and implementation of the Rome Statute for an International Criminal Court, which explains the normative crisis that followed the arrest warrant against Al-Bashir (García Iommi 2020). While there are dimensions of the crisis in Africa specific to the region, the ICC "Africa problem" is plausibly the beginning of a more widespread legitimacy problem for the Court as it expands its work to other parts of the world. Indeed, limited access to contestation is not circumscribed to African countries.

Following Wiener, this paper argues that critical to preventing such scenario is to further governance at the messo level through increased access to contestation for stakeholders. Specifically, it is necessary to promote contestation over the complementarity principle, the "cornerstone of the Rome Statute". Complementarity establishes that the ICC may only exercise jurisdiction over cases that states are unwilling or unable to investigate and prosecute themselves. It establishes the fundamental parameters for the relation between the Court and member states, giving primacy to states. The complementarity principle thus appears well-suited to accommodate diverse legal traditions and different ideas of justice. Yet that has not so far been the case.

The ICC and its allies have generally interpreted complementarity in an expansive manner, requiring that member states' normative and institutional frameworks mirror those of the Court (De Vos 2020). This reinforces a narrow, top-down interpretation of the Rome Statute, limiting contestation over the anti-impunity (criminal accountability) norm and its relation with other fundamental norms. Increased access to contestation would facilitate a compromise between the prevailing expansive views of complementarity and the narrower interpretation of complementarity many stakeholders favor. This narrower view would return autonomy to local actors in the process of determining the appropriate justice mechanisms, empowering them in the implementation of the Statute and fostering a sense of ownership. Arguably these contestation processes are already ongoing even if the Court and its supports are not productively engaging with them. An example would be the persistence of traditional justice mechanisms, such as those the Acholi implement in Northern Uganda. Accordingly, mapping these contestation processes should be the starting point of repoliticizing the complementarity principle and creating a roadmap towards more inclusive and fairer global justice governance.

7) Wenjuan Zhang, Madhavi Gopalakrishnan

[6] Richard Fallon, *Legitimacy and the Constitution*, 118(6) Harvard Law Review 1787 (2005); Or Bassok, *The sociological-legitimacy difficulty* 26(2) Journal of Law & Politics 239-272 (2011); Max du Plessis, *Between Apology and Utopia - The Constitutional Court and Public Opinion*, 18(1) South African Journal on Human Rights 1 (2002); Craig McEwen & Richard Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 (3) Law & Policy 257 (1986); James Gibson et al., *On the Legitimacy of National High Courts* 92 American Political Science Review 343 (1998).

Balancing Cultural Identity and Globalization: The Convergence and Divergence of Constitutional Transformation in India And China

Since the 1940s, global constitutional trends have leaned towards universal rights and cosmopolitan constitutionalism. However, this migration of constitutional ideas often took place without proper regard for local contexts or cultural identity; the subsequent failure of many Constitutions in their early years, or the struggle of states to live up to the normative promises of their Constitutions, may be attributed to this. India and China's attempts to balance cultural identity with the imperatives of globalization have both converged and diverged in terms of their approaches to constitutional transformation.

The Indian Constitution of 1950 does not strongly acknowledge cultural identity, but has a powerful enforcement mechanism in the form of the Supreme Court, a polity composed of unelected legal elites. While the enduring nature of the Indian Constitution has been attributed to its ideological ambiguity and the creation of a progressive constitutional morality developed through the judicial activism of the Supreme Court, it has proven increasingly fragile in the face of the current trend towards autocratic constitutionalism driven by party politics.

Until 1982, constitutional transformation in China was a turbulent affair due to the ideologically rigid and functionally weak design of its Constitutions. The 1982 Constitution, the most enduring of the four different Constitutions, was created to accommodate the demands of economic development, the social transformation from the Cultural Revolution, and the global imperative to shift away from a strict embrace of Communism. This Constitution has been the subject of four major amendments which have accommodated the global trend towards universalism, i.e. policy experiments pertaining to the market economy, rule of law, and human rights protections, but until recently neglected the matter of constitutional enforcement. Only the most recent constitutional amendment in 2018 re-emphasized the socialist cultural identity while also proposing the creation of a constitutional review mechanism. This recent shift from embracing universal values with little scope for enforcement to the current emphasis on cultural identity coupled with constitutional enforcement is worthy of examination.

This paper will examine the trends of constitutional transformation in India and China through the framework of cultural identity and universalism and attempt to answer the following questions: How does the cultural identity of a Constitution at birth (ideological commitment) and its enforcement mechanism (functional design) influence its reproduction (constitutional transformation)? What kind of causal inference can be made through a comparative study of constitutional transformation in India and China?

8) Marcelo Carvalho Loureiro

Constitution, Indigeinty and Citizenship: Analysing the Roots for Legal Alterity in Lusophone Constitutional Systems

Contemporary indigeneity law and policy can be regarded as positive acts establishing the rights, duties and legal status of autochthonous people. But, 'how does the status of "indigenous" develops within modern constitutional systems?' and 'which is the connection between coloniality and indigenous policies?' These two questions guide the development of this article in critically enquiring about Lusophone constitutional systems, indigeneity and citizenship. To critically explore this issued, this article draws on the examples of the constitutional systems of Portugal, Angola, Brazil and Timor-Leste.

Portugal, Europe's oldest and most long-lasting empire (1415-1999), engaged in a colonial process marked by slavery and racial alterity. Inside Europe's last empire, logics of oppression metamorphosed from slavery (over in 1869) and 'mandatory servitude' (since 1878) into a new political status: the indigenous. In the early 20th century, with the enactment to the 'Statute of the Portuguese Indigenous', individuals 'of the Black race, or descending from it' were deprived from citizenship rights and regarded as

subcitizens inapt for the ‘metropolitan’ rights. Angola, part of the empire until becoming an independent constitutional system in 1975, engages in the indigenous debate from a different end. The country, a national-state founded on anti-imperialist ideology, became the post-colonial home of formerly ‘indigenous’ ethnicities.

Different from Angola, Timor-Leste has never been regarded as an ‘indigenous’ territory in Portuguese colonial law. However, the indigeneity question in the island emerges with the Indonesian invasion and genocide (1975-1999). During this period, Maubere people were offered special status through the ‘Special Autonomous Region of East Timor’, which was refused and independence followed later in 1999. In Brazil, despite the novel constitution of 1988, indigenous people continue to enjoy substandard citizenship rights. The reason behind it is connected to ‘Statute of the Indian’ enacted under military rule (1973), which continues to govern indigenous rights and statuses and allows for executive interference in the National Indigenous Foundation.

Thus, a concise analysis of the four constitutional systems allow for the understanding of the Lusphone indigeneity and citizenship contexts through:

i) the analysis of colonial policies and indigeneity in the context of a ‘metropolitan’ state (Portugal);

ii) the understanding of indigeneity in the context of a ‘settler’ state (Brazil);

iii) post-indigeneity as the source of national independence (Angola)

iv) and the rise of indigeneity through para-colonisation (Timor-Leste).

9) Yvette Lind

Contemporary challenges to democracy from a transnational taxpayer perspective

The core of this paper is premised on the idea that international tax competition, in combination with prior financial crises and the ongoing erosion of domestic tax bases, has led to a development where individual countries are intentionally designing their legal systems to attract affluent taxpayers who are mobile by choice, such as high-net value- and high-income individuals, while deterring poorer individuals, most often those who are forced to move, for instance asylum seekers and immigrants.

The paper attempts to challenge the common view that law provides stability, certainty and fairness to society and its constituents as this does not presently hold true due to economic globalization, increased taxpayer mobility, and the outdated perception of formal citizenship. National practises of so-called investment citizenships, golden visas, and naturalization citizenships reinforce inequality as they currently provide preferential treatment to affluent taxpayers compared to poorer ones. Prior (legal) commentators have missed out on this interlinking between differing areas of law and how they, when combined, affect not only individuals but also society itself when managing matters such as social diversity and integration of non-citizens. The challenge of some groups being prioritized above others is addressed in this study through some comparative examples of the interlinking between formal citizenship, taxation and access to democratic inclusion and the subsequent effects this interlinking has on equality between differing groups of transnational taxpayers.

10) Atharva Sontakke

Constitutional (Identity) Crisis? Transformative Constitutionalism and the Search for Autochthony in India

Constitutional courts in the Global South, including India, have recently invoked arguments based on constitutional identity while adjudicating significant cases. In India, such arguments have often employed concepts like “constitutional morality” and “transformative constitutionalism”. At a general level of understanding such arguments can be seen as attempts to explicate the

constitutional identity of postcolonial states as that which requires negation or rejection of the colonial past, and embraces emancipatory constitutional commitments. In this paper, I explain how this form of constitutional identity has been understood and applied by Indian Supreme Court. I undertake this study by examining recent constitutional cases including *Navtej Johar v. Union of India*, *Joseph Shine v. Union of India*, and *Indian Young Lawyers' Association v. State of Kerala*. I argue that while the court attempts to de-centre the involved issues from colonial frameworks, its reasoning is ultimately embedded in non-autochthonous epistemic frameworks. In other words, explication of such a constitutional identity may be *post*-colonial in nature, but it fails to be sufficiently *de*-colonial.

In arguing so, this paper aims to develop novel insights in the following areas of constitutional law. Firstly, it seeks to understand what happens when concepts like "transformative constitutionalism", borrowed from the South African experience, are transplanted in different postcolonial constitutional contexts? Secondly, what role do pre-colonial religious or traditional inheritances play, if at all, in developing autochthonous constitutionalism in postcolonial states? And thirdly, what implications does the commitment to "transformative constitutionalism" have in providing an account of social and constitutional change?

11) Jessika Eichler

Diversity in Global Constitutionalism

This paper adds to the literature on indigenous autonomies, forms of representation and decision-making procedures, constituting one of the most pressing indigenous demands of our times. It does so by relating two forms of categorically distinct procedures regulating indigenous representation, that of I) internal decision-making bodies and organisational instances, including collective customs and traditions, and II) indigenous participation in the legislative branch of the State. Such entanglements of what could be regarded as separate procedures of representation are explored and contextualised in view of the 2020 parliamentary elections held in the Bolivarian Republic of Venezuela and the impact of recent legislative changes on the procedures, regulating the election of indigenous representatives to the national assembly while accommodating indigenous customary law on the matter. The paper strives to trace the development of indigenous representation in the State's legislative branch ever since the constitutional codification of a quota system in 1999, resulting in the establishment of dedicated seats reserved for indigenous representatives. It approaches questions of indigenous representation by means of a multi-institutional reading and shaping of indigenous collective participation, by understanding the positioning of different State organs on the matter. This may classically include the legislative branch, but it also involves the judiciary, based on an incident in 2016, resulting in the early termination of indigenous mandates as ruled by the Venezuelan Supreme Court. Given the recent complexities around institutional dynamics and power struggles, indigenous representation will be examined, following a close reading of policies and decisions as adopted by the constituent institutions of the State.

12) Constanza Salgado, Domingo Lovera, Pablo Contreras

Between Emancipation and Political Self-Determination: The Use and Misuse of International Law in The Chilean's Constituent Process

International human rights law, and indeed global agreements on the foundations of democracy, have been important tools of political emancipation (or at least they keep the promise alive). In the specific case of Chile, this has occurred both in the context of the civil-military dictatorship (1973-1989) - under which international law served as an important space for denunciation - and

once democracy was restored (1990 onwards) - where international human rights law has served to democratize some of the offshoots of the dictatorship, such as the prohibition of film censorship, the arbitrary discrimination on the basis of sexual orientation and gender identity, and the misuse of anti-terrorism legislation against indigenous peoples.

Today, Chile is going through a constituent process that will redefine its constitutional foundations. Among the regulations shaping that process, Article 135 of the current constitutional text provides that the Constitutional Convention - the fully elected assembly of the people that will be charged with the task of drafting a new constitution – "must respect international treaties ratified by Chile and currently in force". The breadth of the clause in question has led some (not few) voices to argue that the international treaties that should serve as a limit for the functioning of the Convention are not only those relating to human rights, but also those relating to free trade and foreign investment protection agreements. If so, the new constitution would not be able to dictate rules that, for example, modify the legal foundations of the current economic development model.

While there is no doubt that international human rights treaties should be a substantive guide to the constituent process, in this paper we wish to draw attention to the possible anti-democratic limits that other types of treaties may impose on a constituent process. In short: it is not a question of simple reforms, the approval of laws or simple public policies. Rather, it is about a constituent process in which the constitutional redefinition of a republic, while respecting the substantive bases of democratic coexistence, should not be subjugated to particular interests, all under the banner of being in consonance with "international law".

Biographies of the Speakers:

Sebastian Rudas is a postdoctoral researcher at the Universidade de São Paulo, Brazil. He obtained his PhD in political theory from the Libera Università degli Studi Sociali (LUISS) in Italy in 2015. In 2017, he was a visiting post-doctoral researcher at RIPPLE-Research in Political Philosophy, hosted at KU-Leuven. His research interests are related to moral, religious, and cultural pluralism in contemporary liberal and democratic states. He is also interested in cultural pluralism, more concretely, in the relations between indigenous peoples in Latin America and the state of which they are citizens; also, whether, and how, it is possible for these relationships to be just. He has published in venues such as: *Constellations*, *Les ateliers de l'éthique*, *Ideas y Valores, and Croatian Journal of Philosophy.* He is originally from Colombia.

Vito Breda (PhD Edinburgh, LL.M Brussels, and LLB Milan) is the Team Leader of the Comparative Research Group and Senior Lecturer in Law at the University of Southern Queensland School of Law. Previously, he was a MacCormick Fellow at the Law School of the University of Edinburgh, Visiting Fellow at the Centre for European Studies at the ANU and Lecturer in Law at Cardiff University. He has written articles and essays on the interplay between customary law and constitutional law of Samoa, American Samoa, Hawaii, New Zealand, Guam and the Northern Mariana Islands**.** Breda is also the sole editor of *Legal Transplants in East Asia and Oceania* (2019, Cambridge University Press). He is the sole author of: *Constitutional Law and Regionalism* which was endorsed, among others, by James Tully (2018, Edward Elgar Publishing), *The Objectivity of Judicial Decisions* (2017, Peter Lang Publishing) and the co-editor of *Diverse Narratives of Legal Objectivity* (2016, Peter Lang Publishing). He is currently completing *Constitutional Crisis and Regionalism* that will be inserted in the Elgar Monographs in Constitutional and Administrative Law series, edited by Rosalind Dixon, Susan Rose-Ackerman, and Mark Tushnet.

Andi Hoxhaj (PhD) is an early career researcher at the University of Warwick, teaches in EU law. He obtained his doctoral degree in 2017 from the University of Warwick. His areas of focus are corruption, governance, organised crime, civil society, the rule of law, the European integration, and the Western Balkans. In April 2018, Hoxhaj was awarded the with the British Academy Rising Star Engagement Award funding for his project on "The UK—Western Balkans post-Brexit". He is an author of the book titled The EU Anti-Corruption Policy: A Reflexive Governance Approach (Routledge, 2020).

Nicola Tommasini is a D.Phil student at the University of Oxford, Exeter College. He holds an LLM, from Yale Law School (2020), a M.Phil from the University of São Paulo and a B.A from the Pontifical Catholic University of São Paulo (2017). Nicola was Schell Fellow at Yale Law School. He is also an Associate Researcher at Fundação Getúlio Vargas-SP and has held multiple scholarships in Brazil. His main fields of interest are comparative constitutional law, constitutional change, institutional design and democratic theory.

Pedro Arcain Riccetto is a Postdoctoral Research Fellow at the Blavatnik School of Government and an Early Career Fellow at the Bonavero Institute of Human Rights at Oxford University. He is also part of the Democracy Fellows Program at Harvard's Ash Center, the Victor Nunes Leal Chair in Judicial Studies at the Supreme Court of Brazil, and a researcher at Yale's MacMillan Center. His current interests focuses on two main topics: the evolution of judicial diversity and its impact on democracy, and the political role played by courts when constitutions are being drafted, changed, or substituted by new ones.

Karina Denari is Adjunct Professor at the Federal University of Rio de Janeiro Law School, Brazil, Senior Researcher at the Business & Human Rights Center, FGV, Brazil, and Associate Researcher at the Justice and Constitution Center, FGV, Brazil. She holds her PhD. in Law from the Federal University of Rio de Janeiro (UFRJ, Brazil) and her master's degree in law from the University of São Paulo (USP, Brazil). She was Visiting Doctoral Researcher for the 2018 Fall Semester at the Kellogg Institute for International Studies (University of Notre Dame, U.S.) sponsored by CAPES (Brazil). Her current interests are judicial compliance indicators, decision-making effectiveness parameters, and judicial diversity measurement and impact.

Gaurav Mukherjee is an SJD candidate in comparative constitutional law at the Central European University, Budapest/Vienna, and a Visiting Fellow at the Max Planck Institute for Comparative Public Law & International Law, Heidelberg. Gaurav is a co-

convenor of the International Association of Constitutional Law (IACL) Research Group on Social Rights and an Assistant Editor of the Review of Democracy, a journal based out of the Democracy Institute, Budapest. He has previously been an Equality Law Fellow at the University of Melbourne and is a holder of the Indian Law Review Early Career Prize. He has taught courses in comparative constitutional law and political science at universities in Austria, Italy, Hungary, India, and Bangladesh. His writing has appeared in books published by the Oxford University Press, and in journals like the South African Journal on Human Rights, Verfassungs und Recht in Übersee, the Indian Law Review and the University of Oxford Human Rights Hub Journal.

Lucrecia García Iommi is Associate Professor of Political Science at Fairfield University, where she teaches International Relations (IR) theory, U.S. foreign policy, and international law. Her research focuses on IR theory, norms dynamics, international law and global governance. She specializes in the International Criminal Court. Dr. García Iommi has published in a range of journals, including *International Studies Quarterly*, *International Relations*, *Global Constitutionalism* and *Cambridge Review of International Affairs*. She is the co-editor of *The United States and International Law: Paradoxes of Support across Contemporary Issues* with Richard W. Maass (2022, Michigan University Press). She is also an active member of the APSA and ISA Human Rights sections and the Chair-elect of the latter.

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