

# «Democracy and Globalization»

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## Convenors:

Klaus Mathis (University of Lucerne)

Alberto Ghibellini (Massachusetts Institute of Technology)

Charlotte Sieber-Gasser (University of Lucerne)

## Description:

At the eve of the fourth industrial revolution, which is expected to further accelerate global integration independent from participation of countries in international institutions, the question how liberal democracies secure their legitimacy, as well as that of international integration, remains largely unanswered.

Urgency to address the issue derives not only from the fact that the nation state, wherein liberal democracy has hitherto mostly developed, no longer represents an adequate frame for effective policy-making. It also depends on the fact that liberal democracies' cumbersome decision-taking processes constitute a disadvantage in a quickly evolving global setting. This has been demonstrated for instance by the rapid rise of countries like China in recent years: the existing regulatory framework appears to reward countries with the ability to prioritize political and economic interests over concern for individual rights and bottom-up procedures of legitimation.

While some scholars argue that new, trans-national institutions would allow liberal democracies to more effectively cope with globalization, others suggest reviewing domestic decision-taking processes. The suggested measures range from global federalism and democratization of international organisations to increasing both transparency in international negotiations and legitimacy of negotiating mandates, to name just a few.

In addition, the question whether globalization is essentially at odds with liberal democracy remains disputed. Theories of post-democracy and the globalization paradox suggest that the foundations of liberal democracy - resting on representation and consent - have eroded in the course of globalization. As a consequence, new foundations may be required or the traditional foundations must be re-established. If so, the heart of the question "democracy and globalization" becomes not so much how to update the

democratic institutions in order for them to be applicable to the new global setting, as how to save the liberal-democratic compromise and, more pointedly, whether that compromise is actually tenable.

This workshop aims to shed light on the topic of democracy and globalization in view of the imminent fourth industrial revolution. Although our primary goal is to investigate the conceptual roots of the tension between democracy and globalization, we are open to, and encourage, contributions that aim to tackle different features of that question from a broadly interdisciplinary perspective. In particular, we are interested in implications of digitization, artificial intelligence, and e-commerce for the foundations and the regulatory framework of liberal democracy and globalization, as well as research aimed to fathom the legal and political impact of globalization on national or transnational liberal democratic institutions.

Possible topics include:

- social media and democracy
- big data and democracy
- economic integration independent from the existing regulatory framework
- artificial intelligence and democracy
- digitization and globalization
- automation, internet of things (IoT) and labour
- new social contract and globalization
- post-democracy and globalization
- globalised elites and democracy
- transnational or global federalism
- populism and globalization
- the GAFA (Google, Amazon, Facebook and Apple) monopoly and democracy
- transparency and democratic legitimation of international law

**Schedule:**

**Thursday, 11 July 2019, Room 4.B47 (Main Building, 4<sup>th</sup> floor)**

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9.15

**Welcome Note**

*Prof. Dr. Klaus Mathis, University of Lucerne*

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**9.20 Participation**

(Chair: Charlotte Sieber-Gasser; 10' presentation, 10' discussion each)

«Can we enhance the ability of domestic parliaments to recognise, influence, defy or fulfill international legal obligations or are we trying to re-arrange deckchairs on the Titanic?»

*Evelyne Schmid, University of Lausanne*

«Participation in standard setting for the agro-food industry»

*Sven Stumpf, Friedrich-Alexander University Erlangen-Nürnberg*

«Re-Reading Transconstitutionalism for Public National Institutions»

*Mariana Carvalho De Paula De Lima, Defensora Pública do Estado de Minas Gerais*

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**10.30 Coffee Break**

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**11.00 Digitalization**

(Chair: Alberto Ghibellini; 10' presentation, 10' discussion each)

«The State as a Transaction Cost Problem under the Condition of Technological Disruption - A Research Agenda»

*Benedikt Schuppli, Lisk Foundation/Université Paris II, and Stefan Schlegel, University of Bern*

«The Brazilian case: the effect of social media in a current democratic regime»

*Andre Gualtieri, Pontifical Catholic University of São Paulo*

«'Cambridgeanalization' in politics? The Spanish Act 3/2018, December 5 2018, Data Protection Regulation and the future of democracy»

*Rafael Rodriguez Prieto, Universidad Pablo de Olavide de Sevilla*

«A New Face of Militant Democracy in the Digital Age?: Fake News Regulation Issue and the Case of Taiwan»

*Kuan-Wei Chen, Ludwig-Maximilians-University Munich*

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**12.30 Lunch Break**

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**14.30 Sovereignty**

(Chair: Charlotte Sieber-Gasser; 10' presentation, 10' discussion each)

«Post-Westphalian Constitutionalism»

*Martin Belov, University of Sofia*

«Westphalian sovereignty after the fourth industrial revolution In search of legitimate governmental control over the internet»

*Michael Klos, Leiden University*

«An Untenable Compromise? Liberal Democracy between Populism and Globalization»

*Alberto Ghibellini, Massachusetts Institute of Technology*

«Toward a New Social Contract»

*Marcin Kilanowski, Nicolaus Copernicus University*

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**16.00 Coffee Break**

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**16.30 Legitimacy**

(Chair Alberto Ghibellini; 10' presentation, 10' discussion each)

«Justice in FTA's IP Regulation»

*Johan Rochel, University of Zurich*

«*pacta sunt servanda* and Democracy: Crisis of Legitimacy in International Economic Law»

*Charlotte Sieber-Gasser, University of Lucerne*

«Politics as Change or Preservation - A case of Experts against Citizens?»

*Vesa Heikkinen, University of Helsinki*

«Popular Sovereignty and Legal Form - Framing the Democratic Argument in Global Law»

*David Roth-Isigkeit, Goethe University Frankfurt/Main*

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**17.50 Final Remarks**

*Alberto Ghibellini and Charlotte Sieber-Gasser*

**Contact Information on behalf of Workshop Organizers**

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## **Abstracts:**

### **«Can we enhance the ability of domestic parliaments to recognise, influence, defy or fulfill international legal obligations or are we trying to re-arrange deckchairs on the Titanic?»**

*Evelyne Schmid, University of Lausanne*

Today, domestic legislators operate in a complex normative landscape in which various regulatory obligations and ambitions are placed upon them. The call for paper departs from the assumption that ‘the question how liberal democracies secure their legitimacy, as well as that of international integration, remains largely unanswered’. Indeed, some consider that the density of today’s legislative environments might be one of several reasons for the current criticisms of international, European and other regional law. Yet, the picture is more nuanced: while some deplore an almost total loss of discretion left for elected domestic parliamentarians, others, on the other hand, complain of an alleged lack of influence of international law on domestic legislative processes. We are living in a world in which both claims can be true.

Those who have tried to address the legitimacy related challenges arising in the contemporary normative environment have proposed approaches at two levels. First, some have paid attention to the international level. Efforts have been made to ‘democratise’ international law-making and norm production processes and institutions. The second group of suggested approaches concentrates on the national level. International law research has started to pay more attention to the role of domestic parliaments vis-à-vis international law and other international normative developments. Within that second group of approaches, the tendency has been to focus on domestic constitutional rules on legislative approval. Yet, there is much more to be considered than legislative approval. In the suggested contribution, I will discuss whether or to what extent it is reasonable to argue that we should strive to enhance the ability of domestic parliaments to recognise, influence, defy or fulfil international norms. How significant is the risk be that we are making domestic processes even more cumbersome by trying to enhance a domestic parliament’s ability to engage with international norms? Should we invigorate their role in relation to their international legal norms, including by opposing them or would this just make matters worse and raise unrealistic expectations?

I will not be able to come to the workshop with a definite answer to my question or even a solid methodology to answer it. Rather, my ambition is to present a set of arguments that seem to underline the need to pursue and enhance efforts at the level of domestic processes and some possible responses to the concerns that can be raised against them. I will also explain why I believe that it is correct to assume that something is changing in the international legal landscape. While the debates about an alleged crisis or even the decline of international law are at times ahistorical, I will argue that the challenges to the international legal system we are witnessing today are more corrosive or at least different from the past precisely because of the high level of intertwining with domestic legal orders.

### **«Participation in standard setting for the agro-food industry»**

*Sven Stumpf, Friedrich-Alexander University Erlangen-Nürnberg*

Nowadays food standards govern a globalised food production system. The article discusses the two different frameworks of food standards, private sustainability standards as well as WTO-standards in the context of Global Governance. Global

Governance means the use of international organisations and their rules for international cooperation, but it is also as restricting national sovereignty since national states cannot set their own rules because of the intentional framework. From civil societies' viewpoint this framework, has gaps that have to be closed by the agro-food industry in order to adjust the global agro-food system to sustainable development. Seeing as participation is at the core of sustainable development; the focus will be on the participation of the stakeholders and the underlying question of the democratic legitimacy of the two different frameworks of food standards.

According to the preamble of the WTO agreement the goal of the WTO is to foster long term global wealth in accordance with sustainable development. The WTO pursues this objective by encouraging free trade and setting international binding trade rules. In this regard, it is important to note the underlying assumption of the WTO law is that economic progress brings ecological and social progress through trade. Art. XX GATT may be construed as permitting some ecological justifications for barriers to trade. However, social reasons, like working conditions are missing completely.<sup>1</sup>

As a result, binding social and ecological standards are widely missing which means such trade is not fostering sustainable development but only economic growth. Therefore the WTO framework is criticised as well as for the fact that there is no real stakeholder involvement in the negotiation of the terms of trade; even if the WTO members are represented by their governments, hence, formally speaking, the WTO framework may be viewed as legitimate.

Consumer and civil organisations have been pressurising the food industry, in particular retailers, to close these gaps. The growing demand for fair trade products<sup>2</sup> shows consumers' increasing sensitivity regarding the production process. Reacting to this, agro-food industry started setting standards privately. Complying with these standards is necessary for market entry, which has an especially burdensome effect on small farmers from less developed countries, and poses many challenges for them.<sup>3</sup> As to whether the standards are legitimate or not, whilst they are set by private actors without legitimisation, stakeholder involvement in the process of standard setting is part of several private sustainability standards.<sup>4</sup> These standards allow for more participation than the WTO does. However, due to their functionality they have to be exclusive, so they might also operate as barrier to trade, thus they would need a justification from the view of the WTO law.

In sum, it is argued that the private sustainability standards and WTO law complement each other. In case of stakeholder involvement, private standards balance societies' demand for sustainability and the producers' different economic development stages so it closes the governance gaps of WTO law. Whereas the WTO law limits the natural exclusivity of the private standards in order to prevent market foreclosure.

1 WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm)

2 Fairtrade International, <https://de.statista.com/statistik/daten/studie/171401/umfrage/umsatz-mit-fairtradeprodukten-weltweit-seit-2004/>

3 WTO, SPS Committee, Summary of the Meeting held on 29-30 June 2005, G/SPS/R/37, para. 20.

4 See the Standard-Setting Code of ISEAL, [https://www.isealalliance.org/sites/default/files/resource/201711/ISEAL\\_Standard\\_Setting\\_Code\\_v6\\_Dec\\_2014.pdf](https://www.isealalliance.org/sites/default/files/resource/201711/ISEAL_Standard_Setting_Code_v6_Dec_2014.pdf)

## «Re-Reading Transconstitutionalism for Public National Institutions»

*Mariana Carvalho De Paula De Lima, Defensora Pública do Estado de Minas Gerais*

The post-democracy scenario has demonstrated the insufficiency of the state in the realization of human rights and/or fundamental rights. Plus, the globalization reveals that the “westfalian state” loses its strength while new institutions, public, governmental and non-governmental, emerge as new actors of the global system. This framework implies new forms of checks and balances, with new actors discussing the best way to interact law and politics beyond the constitutional boundaries. The international relations about human rights or fundamental rights goes further than the states, since pluralism gains shape of multicentric society, multilevel protection and intertwining of legal orders. Based on this context, the transconstitutionalism theory proposes to apply a transversal rationality for a dialogue between the different legal orders in the solution of a transnational problem. This occurs because a transconstitutional problem may involve local, national, international, supranational and transnational institutions and courts. In order to solve this, the transverse ratio acts as a “transition bridge” in the interaction between the various systems by a dialogue. In this dialogue, there is no preordained solution because the autonomy of the systems is respected. Accordingly, the constructive exchange of experiences between diverse rationalities usually happens in the courts, by the judicial dialogue - cross-citation of precedents and ratio decidendi and by the transconstitutionalism (construction and reconstruction of the legal contents in the different legal orders by the interweaving of the same ones). Despite the importance of the judicial dialogue, this is not the only way of interaction in the global realm for facing human rights or fundamental rights problems. Therefore, the national institutions should go towards to apply the transverse ratio and start a inter-national dialogue. The purpose of this text is to show a re-reading of transconstitutionalism by the involvement of the national public institutions in the construction of the new check and balances focused on the protection of human rights. In this manner, there would be discussions/meetings between public national institutions, respecting multiculturalism and their own autonomy, in order to build global purposes about human rights effectivity, recomendations for the states in a global realm and in a local realm too (in their own contries). This reports should be sent to United Nations in occasion of their respective Universal Periodic Review, as a new “transition bridge” between United Nations and the states. Hence, the United Nations recomendations, by a intertwining of public national institutions ruled in the Universal Declaration of Human Rights (though respecting multiculturalism and their autonomy) is the new checks and balances which should be developed in the global world.

### **«The State as a Transaction Cost Problem under the Condition of Technological Disruption - A Research Agenda»**

*Benedikt Schuppli, Lisk Foundation/Université Paris II, and Stefan Schlegel, University of Bern*

This contribution suggests to embed the assessment of the likely impact of the technological disruption of „fourth industrial revolution“ on the legal system into transaction cost economics. This will allow us to assess the challenges ahead before the background of legal and economic history. The basic concept of the suggested approach is to start at an Archemedian Point in the absurd; the observation that there would be no need for states (nor any other form of hierarchically organized institution for the allocation of ressources) if there were no transaction costs (and if property rights were well defined). Whatever it was that created states in the first place, if there were no longer any transaction costs, there would no longer be any states. In that sense, states

are tools to deal with transaction costs. If transaction costs change, states will have to change. Technological disruptions fundamentally change the structure of transaction costs. Transaction cost economics therefore turns out to be a necessary tool to treat the question, how the future public institutions might look like, by which we will have to organize political participation and a sense of belonging.

The problem to solve is threefold:

We first need a plausible account of the state as a tool to deal with transaction costs and of public law as a facilitator of transactions that otherwise would be prohibitively costly.

Second, we need an understanding of how the state and along with it public law was transformed through changes in the structure of transaction costs by previous industrial revolutions. This will allow a meaningful prediction of the disruptive effects of an ongoing fourth industrial revolution, especially a good explanation, under which circumstances technological disruption leads to higher transaction costs and under which to lower transaction costs. Studying the legal system's reaction to previous disruptions will prove helpful to that end.

Third, we need a theory on when the legal system allows itself to recede in the case of falling transaction costs and when - to the contrary - the regulation of private activities (as a sub-field of administrative law) gets more costly and more intrusive as transaction costs among privates fall and entry points for the legal order into the regulation of private activities become harder to establish (the regulation of social media and the so-called platform economy might well be early examples).

Rather than offering answers to these questions, the aim of this contribution is to sketch a research agenda in order to improve our understanding of these questions. It will be an agenda with the virtue that all the questions regarding technological disruption and the *res publica* can be analyzed through the common and systematic framework of institutional (more specific: transaction cost) economics, that the essentialism of the nation state can be overcome (the nation state, in this perspective, becomes a tool to deal with transaction costs among others) and to be able to assess the challenges ahead for the organization of a livable community against the background of an understanding of the legal disruptions (triggered by technological disruptions) that accompanied the three previous industrial revolutions.

### **«The Brazilian case: the effect of social media in a current democratic regime»**

*Andre Gualtieri, Pontifical Catholic University of São Paulo*

Social media is the product of a revolution in information and communication technologies whose immense potential to transform human life is only just beginning. However, it is true that, as Luciano Floridi states, these technologies are affecting our sense of self, the way we relate to each other and how we shape the world and interact with it. Technological advances almost always have a good side and a bad side. Thus, the information revolution we are experiencing gives us reasons to be optimistic, but it also gives us sources of concern about the future.

In recent years, one of the most relevant issues in political and legal philosophy has been the relationship between democratic regimes and social media. This is because it has become clear that platforms such as Facebook and twitter have come to play a determining role in the way politics has been exercised in liberal democracies. The more and better a politician uses social media the greater the chances that he will win an election.



My purpose is to analyze this relationship based on the Brazilian presidential elections of 2018. Brazil is one of the largest democracies in the world, whose population actively participates in Facebook, Twitter and WhatsApp. The Brazilian case is an important example of how social media came to play a fundamental role in politics, since the winning candidate used them almost exclusively, instead of the traditional methods of doing politics, used by its competitors. Jair Bolsonaro was elected President of Brazil having only 8 seconds of electoral program on television during the campaign. In a speech delivered in December 2018, he said that today "popular power no longer needs intermediation, new technologies have allowed a direct relationship between the voter and his representatives."

Is it possible that what has been seen in Brazil becomes the standard in other democracies in the world? Is the reality we are facing today challenging the paradigm from which democracies have been thought so far? Some problematic effects of social media can be pointed out: they favor the dissemination of false news and extreme visions, undermining democratic coexistence; people start to live in "bubbles", experiencing "realities" increasingly distant and not communicating, generating a huge polarization. The formation of these "virtual ghettos" has drastically reduced the possibility of dialogue with people of diverse thinking and the opportunity to perceive a common reality. To what extent could all this compromise the health of democratic regimes?

Antonio Garcia Martinez, a former Facebook employee, noted that it was once said that everyone was entitled to their own opinion, now, instead, it is more like the right to their own reality. This severely impairs the social unity necessary for the proper functioning of democracy. As Cass Sunstein asserts, in a healthy democracy, people can not live in an "echo chamber" or "cocoon of information."

### **«'Cambridgeanization' in politics? The Spanish Act 3/2018, December 5 2018, Data Protection Regulation and the future of democracy»**

*Rafael Rodriguez Prieto, Universidad Pablo de Olavide de Sevilla*

This paper explores the Spanish Act 3/2018, December 5 2018, Data Protection Regulation and Digital Rights and an amendment which allows political parties to use personal data obtained from web pages and other open sources to carry out political activities in the electoral campaign and its consequences in electoral democracy and civil rights. The amendment (art. 58 bis) undermines art. 16.2 y 18.4 of Spanish Constitution. Attorneys and NGOs denounce this regulation helps political parties to develop ideological profiles. Political parties could carry out practices like those of Cambridge Analytica. Cambridge Analytica was a former British-based data corporation accused of having harvested the data of millions of Facebook users without their permission to hit floating voters in the US with pro-Trump adverts.

David F. Noble once wrote, "The technological is political." Now more than ever, this idea rings true. The Web and its domains are no peaceful terrain; the range of online possibilities, the direction the Web may be taking and the legal concerns it all arouses. Hence, the confluence of different processes is fundamental in our research on the topic; in fact, this confluence is both a structural and a structuring variable, in Bourdieusian terms.

The Web's controversial nature—coupled with the impact Internet has on the different imaginaries, practices and stakeholders involved in the struggle—accentuates the need

to incorporate methods of analysis capable of adapting to the complexity of the subject. Diving deep to examine just how the Web's core power structures are built and behave is a surprisingly complex endeavor. This is due to the difficulty of examining a real-time, constantly fluctuating reality. Internet's inherent mutability—the incredible speed at which it morphs itself—make it virtually impossible to take a step back and analyze it from a safe distance. The Web's breadth and depth, its proclivity to expand and penetrate the social arena, make in-depth, serene analysis both essential and next to impossible. Nonetheless, this proverbial river of information and knowledge must be matched with an equal measure of reflection and critique.

The paper aims to analyze the Spanish act in order to deep on the conceptual roots of the tension between democracy and globalization and the legal and political impact of internet in electoral campaigns. Of great urgency is an honest debate regarding what exactly we expect out of the Internet; we must submit the Web to real, participative, democratic process—something which has yet to occur.

The Internet is synonymous with revolution. It implies a profound change at all levels; even in terms of human evolution, of biology, if we consider the difficulties upcoming generations are already having using pens and pencils. But the Web is also a good example of internal shifts and rifts—trends that drive Internet either in the direction of shared, common-good tools and spaces or down the road to privatization and commercialization.

### **«A New Face of Militant Democracy in the Digital Age?: Fake News Regulation Issue and the Case of Taiwan»**

*Kuan-Wei Chen, Ludwig-Maximilians-University Munich*

In the era of digitalization, the issue of Fake News has raised global challenges to democracy, as many statements point to Fake News as the enemy of democracy. From government, political parties, journalism, to technology leaders and social media, they all have noticed or begun to try to "solve" this issue. However, it's clear that the tension between the regulation of Fake News and freedom of speech needs to be highlighted. This kind of "intolerant" attitude towards the "enemy of democracy" within democracy and the beginning of designing restrictions on freedom of speech seem to echo the theory of militant democracy. Various measures responding to Fake News resemble a new face of militant democracy in the digital age.

Taiwan, as a meaningful example of discussing this issue, is equipped with almost unused militant democratic designs in its legal system, and this young democracy, where people highly rely on information technology, has suffered from Fake News controversies in recent years. On the one hand, not only during the election period, different camps accused each other of infringing on democracy with the spread of Fake News. In major public cases, such as same-sex marriage and nuclear power issues, or in major disasters, related rumors also passed through various communication software or social media, causing many follow-up effects. On the other hand, the "China factor" plays some role under the related discussions in Taiwan. The government and the parliament have begun to try to use existing legal tools or to propose new ones to deal with the issue, but the question of whether such "militant" democracy guards or harms democracy is also problematic.

Therefore, this study aims to explore whether the discussions, challenges, and developments of militant democracy theories may provide insight into contemporary

Fake News issues and to develop a theoretical framework for regulating Fake News. In turn, the framework takes stock of and analyzes the use of the regulatory tools currently being tried in Taiwan, and seeks the possibility of maintaining a balance between the smooth operation of democracy and the guarantee of freedom of speech.

This study argues that the difficulty of defining the “enemy” in militant democracy theory also reflects in the identification of regulatory objects of Fake News regulation. Moreover, relevant theoretical criticism has a considerable degree of value on the issue. Among them, this study emphasizes that the modest use of militant democracy provides a principle to deal with the threat of Fake News, but also admits that many challenges are more serious in the digital age. As far as the important features of Taiwan’s democratic system are concerned, any tough tool designed as “top-down” prohibition or penalty should be noticed. This study believes that soft institutional incentives, such as encouraging the establishment of a fact-checking civil mechanism, etc., and the active use of the characteristics of digitalization to strengthen democracy may be a positive way to view Fake News issues from the perspective of contemporary militant democracy.

### **«Post-Westphalian Constitutionalism»**

*Martin Belov, University of Sofia*

The main thesis of this paper/presentation is that we are witnessing the emergence of some features of post-Westphalian constitutionalism which may eventually, under the appropriate circumstances, lead to transition from Westphalian to post-Westphalian constitutionalism as a distinct age in the development of the constitutional civilization. Westphalian constitutionalism has emerged with the first constitutional drafts and reformist attempts at the second half of the XVIII century. It has gained momentum during the XIX century and its culmination and full recognition has been achieved at the end of the XIX and in the first half of the XX century. Westphalian constitutionalism has been triggered by objective phenomenon of global importance - the industrial revolution. It has been preconditioned upon the emergence of new social and legal order based on two fundamental constitutional ideologies - humanism and rationalism.

Globalization, in conjunction with the ongoing information, mobility and AI revolutions, are currently producing deep socio-legal transformation. It has the potential to profoundly restructure Westphalian constitutionalism and transform its constitutional ideology, constitutional axiology and constitutional design. Thus, at the beginning of the XXI century, we may be witnessing a transition to post-Westphalian constitutionalism.

Post-Westphalian constitutionalism will challenge our understanding of identity, authority, and legitimacy. It will deconstruct fundamental explanatory and ordering schemes such as hierarchy, territoriality, jurisdiction, and citizenship. It will reshape profoundly fundamental constitutional principles and concepts such as sovereignty, democracy, welfare state, separation of powers and rule of law. Constitutional pluralism, judicial dialogue, the rising role of expert institutions such as the courts and the agencies in policy making, the crisis of territoriality, representation, democracy and national liberal representative democracy are just some of the important manifestations of the crisis of Westphalian constitutionalism possibly indicating a transition to post-Westphalian constitutionalism.

This paper/presentation commences with an outline of the main features of Westphalian constitutionalism. It continues with analysis of the constitutional transition at the beginning of the XXI century put in a socio-legal context trying to explain what we are actually experiencing. It makes a brief outline of the reasons for the emergence of Post-

Westphalian Constitutionalism. Furthermore, the paper tries to define the concept of Post-Westphalian Constitutionalism and to outline the main characteristics of Post-Westphalian constitutionalism. In addition Post-Westphalian Constitutionalism is compared with other concepts with which it is related in one sense or another. Finally, some conclusions are drawn up.

## «Westphalian sovereignty after the fourth industrial revolution In search of legitimate governmental control over the internet»

*Michael Klos, Leiden University*

### **Traditional concepts contested**

New technologies cause traditional concepts of state to be contested. One of these concepts is Westphalian sovereignty, the principle that every state is sovereign over its own territory. Unlike traditional technologies, digital technologies do not necessarily align with territorially organised jurisdictions but transcend over traditional borders. Motivated by the impact on state and society, this development is often referred to as the 'fourth industrial revolution'.

The internet is said to provide a non-territorial and (almost entirely) anonymous place to voice opinions. Of particular interest are the speed and more geographical independence of speech. Modern communication media allows a message to be made available not in only one but a multitude of different jurisdictions with a single click.

How democratising this may seem, the internet also has a dark side, enabling illegal, sometimes dangerous, speech to be shared anonymously. Traditionally, the Westphalian state is called upon to defend against such threats of order and security. However, the question arises to what extent Westphalian states are capable to police the internet. To what extent are states legitimately able to exercise sovereignty over the distribution of messages across different territories and jurisdictions? What other possibilities to effectuate control on the internet are there?

### **Legitimate rule over the internet?**

In this article different models, as mentioned in the literature, towards the exercise of (state) control on the internet will be discussed. In this contribution, the central concept is Westphalian sovereignty. Do these models render Westphalian sovereignty obsolete? Alternatively, do they presume it a necessary prerequisite? Is the proposition to replace Westphalian states with international governance structures not too ambitious? Is it even desirable?

Inspired by J.P. Barlow's famous A Declaration of the Independence of Cyberspace, the internet is viewed as a self-organising community without any necessity for state intervention. In this view, state control is not even a real possibility. State intervention in censoring the internet does not seldom cause an uproar, arguing that such intervention will abolish the internet as it was meant. However, there are also counterarguments to be found. Internet companies seem willing to align with state policies. A recent example is the possible launch of a Chinese version of the search engine Google complying with Chinese censorship laws.

The view of the internet as independent from state intervention is mere ideology and not a 'fact of nature' nor a result of technological design. As mentioned, this article

aims to discuss five different alternatives for (governmental) control over the internet and how these models relate to Westphalian sovereignty:

- Model 1: The view of the internet as a self-organising community without any form of government intervention;
- Model 2: An independent 'internet state';
- Model 3: Internet governance by internet-stakeholder only such as companies;
- Model 4: Internet governance between public and private actors;
- Model 5: A United Nations maintained internet;
- Model 6: Alignment with state laws: meaning that private companies must comply with state regulation;
- Model 7: Fragmentation of the internet in different 'branches' dependent on the jurisdiction of the user.

### **«An Untenable Compromise? Liberal Democracy between Populism and Globalization»**

*Alberto Ghibellini, Massachusetts Institute of Technology*

When, in the early 2000s, Colin Crouch spoke of “post-democracy” with reference to increasingly globalized liberal democracy, Ralf Dahrendorf, among others, diminished his critique by observing that Crouch was insisting on social, equalitarian democracy rather than liberal democracy itself (Crouch 2004). A few years on, however, the rise of so-called “national populism” (Taguieff 2012) or “souverainism” seems to have shown that Crouch’s critique was not completely off the mark. Indeed, not only from an equalitarian, social democratic perspective, but also from a liberal democratic one, the economic, social and political pressure globalization has put on democratic institutions has turned out to be dramatically destabilizing. As a result, some kind of “political closure” of these institutions, as Habermas put it (Habermas 1998), has started to be regarded as necessary, if not desirable, and the main question currently being debated is whether this closure is to be conceived in terms of social redistribution and enhanced solidarity at a transnational level or nationalistic retreat (Bauböck 2017; Bauböck-Ferrera 2017).

The point is that what we have become accustomed to call liberal democracy, or democracy without any qualification, is, according to some interpreters (Manin 1995; Crouch 2004), not as democratic as we may think. According to Manin, for example, regardless of what such an authority in the field as Tocqueville claims, liberal democracy, resulting from the democratization of representative government, is not truly democratic, but, in fact, a mixed regime - “the mixed constitution of modern times” - where the intrinsically aristocratic institution of representation and the liberal concern for individual rights, notably property rights, reach a compromise with democratic requirements by way of the universal extension of suffrage. This line of argument can be pushed even further by viewing welfare state as an additional enhancement of the democratic side of the agreement (Bauböck-Ferrera 2017). The problem however remains that, no matter how well-balanced the compromise can be at a certain moment in history, the sudden or unexpected modification of one of its constitutive elements can make the balance unstable. Liberalism and democracy, after all, appear to be at odds with each other to some extent, the former being essentially individualistic and primarily concerned with the limitation of public power for the sake

of individual freedom, the latter, on the contrary, viewing that power as an indispensable tool for the achievement of its major goal: equality (Schmitt 1932).

If so, globalization can be regarded as quintessentially liberal in that it enhances individual freedom, in particular economic freedom, and curtails the sovereignty of nation-states to the point that they can no longer rule over the national economy and local businesses (Crouch 2004; Habermas 1998). What Constant said about nation-states' dependence on international credit could now be said, by the same token, regarding global corporations threatening nation states that they will move their business abroad if they do not grant them suitable conditions in terms of labor flexibility and tax reduction: that this "race to the bottom" is, ultimately, a positive outcome, once it is considered from the perspective of the individual whose major concern is not to be infringed upon by the state and to maximize his or her personal freedom [Dahrendorf 1995].

This view, however, no matter how enthralling for those who share it, forgets that to the empowerment of those who benefit from globalization and its boosting of individual freedom seems to correspond, at least in relative terms and at the disaggregate level, a disempowerment of those who do not [Kriesi, 2006]. The previously unimaginable opportunities which globalization brings to those who are able to take advantage of it are often counterbalanced by the social dumping and marginalization experienced, or perceived, by those who stay put or are not able to reap its benefits (Bauböck-Ferrera 2017). The rise of populism and "souverainism" can be seen as coming from this background. If so, populism is not merely a phenomenon that should only be interpreted in terms of demagoguery and poor democratic standards. On the contrary, no matter how clearly deficient in terms of respect for the forms and procedures of liberal democracy, populism should be regarded as a, at least partially, democratic phenomenon.

In other words, the question arises as to whether the compromise which goes under the name of "liberal democracy" is still possible in an increasingly globalized world, where the liberal, individualistic side becomes preeminent. In this paper, my aim is, first, to further explain the terms of the above-outlined question by discussing the relevant literature in more details, in particular with reference to the view of liberal democracy as a mixed regime and the tensions between liberalism and democracy independently considered. Furthermore, I will investigate the view that a "political closure" has now become necessary in order to ease those tensions.

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### «Toward a New Social Contract»

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We often hear that we need a new social contract. At its core, the social contract is a tacit agreement constructed on the basis of social justice and a sense of belonging to a community that is fair, equitable and prosperous. The problem is that, in the last few decades, trust in those foundations has dramatically eroded among the people. The technological and economic transformations that occurred in the West have reshaped the relationships between education, work, opportunities and welfare, rendering our previous social contract outdated, and making it necessary to establish a new one that benefits everyone. The possibility of a new one should be analyzed from a multidisciplinary perspective with the aim of finding real world solutions to the challenge we face today. In my presentation I will move into the realm of policy oriented work to provide analysis of the current questioning of our social structures as well as to suggesting solutions to this challenge. Suggestions will be presented by focusing on three key points of the contract that are being questioned, regarding the viability and economic, social and political implications of some of the alternatives suggested around the world. Those points are:

1. Taxation provides representation: The truth of the matter today is that elected representatives around the world face significant challenges when it comes to addressing the needs of their citizens. The scale of the digital market, and its velocity of transformation, means that most public officials lack the necessary instruments to deal with the externalities of technological change. To this true problem of representation is added a sense of corruption and lack of efficacy of elected officials.

2. Education and hard work bring opportunity: Due to the rapidly evolving nature of the labour market, and in particular to the process of automation of many current white collar jobs, the youth in the West is finding it ever more difficult to prosper economically. Abiding by the rules is not producing economic prosperity. The rapid erosion of the Middle Class in the US and Europe and the emergence of the precariat is leading many to question the legitimacy of the social arrangements they find themselves in. The questioning of democracy as a system of government by some groups within liberal societies is but the tip of the iceberg.

3. Respecting the rules of the community provides a sense of belonging: Growing economic precariousness added to the rapid ethno-cultural transformation of Western societies is leading many to feel uprooted or ever more detached from traditional forms of belonging. Open borders and cosmopolitanism means for some collectives a loss of identity and a loss of cultural references they deem fundamental. The reaction has been a questioning of the elites that have implemented those policies and numerous attacks on minorities.

### «Justice in FTA's IP Regulation»

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In the knowledge economy of the 4<sup>th</sup> industrial revolution, IP regulations are called to play an important role. IP regulations are at the crossroad of many tensions: between states and multilateral legal order (mainly WTO), but also between private actors and

public authorities. The present submission wants to tackle ethical and legal tensions to be found in IP regulations, most importantly in form of justice questions.

It will do so in focusing on the way bilateral and pluralilateral FTA deal with IP regulations.

<sup>1</sup> These norms are known as “TRIPS-plus”.<sup>2</sup> The relevance of these TRIPS-plus provisions is reinforced in the cases of what Nakagawa calls “mega FTA” (such as the TPP, the TTIP or the TISA).<sup>3</sup> My investigation shall raise questions about the content of these TRIPS-plus norms, but also about the ethical dimensions of the strategy of “forum shopping” chosen by many actors.<sup>4</sup>

Firstly, substantial IP norms raise important questions for justice in innovation (e.g. enhancing patent protection, patentability, regulatory protection of drugs, etc.<sup>5</sup>). In their capacity to quickly integrate new challenges (e.g. digital challenges and new technologies), they might be the forerunners of other IP provisions.<sup>6</sup> The contribution will preliminarily map the different justice issues raised by substantial IP norms in times of the 4<sup>th</sup> industrial revolution.

Secondly, the “forum shopping” issue is also very relevant. In accounting for these practices, Sell distinguishes between “horizontal” forum shopping (interplays among various organisations in charge of IP issues, from highly- specialised agencies to human rights forums) and “vertical” forum shopping (from the WTO-dimension to multi- and bilateral agreements).<sup>7</sup> I shall focus on the vertical dimension, thereby raising the issue of responsibility of states in light of their democratic commitments.

These two dimensions of the TRIPS-plus agreements raise two challenges which shall be the core of my argument. On the one side, there is the ambition to develop a legal argument that illuminates the relevance of a justice approach. The argument is consistency-based: if Member States do commit to specific values, principles and objectives (as entailed by TRIPS as minimum standards), their bilateral policy should not undermine them. A similar argument follows from human rights-based argument and the duties accepted by States as part of their commitments. These positivised values, principles, objectives and rights shall be considered as vectors for legal arguments that focus on bilateral law- making and on strategic choices on forum shopping. I shall argue that these specific norms are the *locus* where the democratic commitments of a political community (as part of its trade policy) should be theorized and where solutions to address trade-offs should be found.

On the other hand, the argument highlights which site of justice is a FTA. It is argued that the commitments made by the state in the context of FTAs and in the context of the WTO can be assessed along distinct justice standards, reflecting distinct institutional contexts. This contribution will be the place to offer an argument and an exemplification of this distinction. In turn, this distinction shall be important to highlight the type of commitments which are made by States as part of their trade policy.

<sup>1</sup> Seuba (2015).

<sup>2</sup> Helfer (2015), 7; Ho (2011), 225.

<sup>3</sup> Nakagawa (2014).

<sup>4</sup> For description of this strategy, Helfer (2009); Sell (2011). <sup>5</sup> Ho (2011), 228 ff.



<sup>6</sup> Burri (2015), 53 ff.

<sup>7</sup> Sell (2011).

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#### «*pacta sunt servanda* and Democracy: Crisis of Legitimacy in International Economic Law»

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The legitimacy of various international treaties or international law in general is increasingly being called into question. Not the least, the globalization of the past two decades and the associated growth in the number of ratified treaties worldwide has contributed to this. In the course of this development, some of the current treaties are no longer considered legitimate in their entirety, either purely because of their age or because of the divergence between the agreed rules and the current need for regulation.

In our rapidly changing world, established, older international treaties can create legal certainty and stability on the one hand - but they also sometimes stand in the way of the further development of the law, no longer regulate essential aspects of intergovernmental cooperation, or even complicate important new measures, e.g. for the protection of the climate. This demonstrably contributes to the fact that a substantial proportion of the population in Europe and in the USA perceives international law as a threat to national sovereignty. In consequence, the question of legally binding

integration into the global community of states has become a core issue of political campaigns.

In this struggle between national sovereignty, democratic legitimation and stability in intergovernmental cooperation, the principle of «*pacta sunt servanda*» plays a central role: as a key principle in international law, it protects order, stability and legal security in international relations. It renders commitments in international law generally binding, unless a country decides to withdraw from them, and ensures - among others - that international obligations prevail over time and despite changes in governments and political agenda.

This paper investigates to what extent *pacta sunt servanda* is also serving the lasting legitimacy of international law. It is argued that it depends on the nature of the legally protected right whether the principle remains adequate not only in protecting stability and legal security, but also in protecting legitimacy. In the case of human rights protection, for instance, the protected right is widely considered to be universal and the underlying regulatory issue - the protection of fundamental rights against state power - has in over sixty years changed only marginally.

On the other hand, the protection of market access rights appears to be less suitable for the strict application of *pacta sunt servanda*, since market realities change quickly and therewith the nature of the protected right changes as well. While in a rapidly changing global market, a minimum level of regulatory stability and legal security remains critical; the legitimacy of international trade rules suffers when the gap between static rules and a dynamic market becomes too wide. The fact that international economic law is increasingly met with non-compliance and controversies around the world suggests that this gap is widening and that international trade rules are likely to face a crisis of legitimacy.

In this crisis, it is suggested that *pacta sunt servanda* plays a two-fold role. On the one side the principle forces states to comply with rules to which they agreed to more than fifty years ago, locking in state consent to what may no longer appear adequate rules. State consent is locked in not legally, but due to the nature of International Economic Law: because of economic and political necessity. On the other hand, the principle prevents greater consideration of democracy as one element of legitimacy. Instead *pacta sunt servanda* mostly limits the scope of interpretation of international economic law to the negotiating history of the treaty in question. In the case of the General Agreement on Tariffs and Trade (GATT 1947), for instance, the relevant negotiating history dates back more than seventy years in the meantime.

This paper therefore discusses to what extent the principle of *pacta sunt servanda* remains adequate to guide compliance with and interpretation of international economic law. It is brought forward that - in the interest of continuing legitimacy - *pacta sunt servanda* should strictly be applied to compliance with the core principles of international economic law (namely, the principles of non-discrimination). With regard to the interpretation of the legal scope of the exception clauses in WTO Agreements and other treaties in international economic law, however, strict application of *pacta sunt servanda* appears inappropriate, if not harmful to overall continuing legitimacy in international economic law: direct democratic decisions, for instance, ought to qualify for an exception on the basis of public morals as long as they are implemented on a non-discriminatory basis.

«Politics as Change or Preservation - A case of Experts against Citizens?»

During the 2016 discussion on Brexit the British justice minister Michael Gove asserted that “the people in this country have had enough of experts”. Appearing on television as part of the Leave campaign, the justice minister refused to name economists who were in favour of leaving the European Union, adding later that he did not ask the people to trust him in the matter, but to trust themselves.

While this paper makes no attempt to analyse Brexit as such from any perspective, Gove’s words may serve as a way of introduction to the predicament faced by all contemporary democratic societies, namely the tension between the “people” and the “experts”. In other words, the question to be pursued is the distinction between a political society ruled by citizens, and a political society relying on experts and their knowledge in particular fields.

The paper will use as its starting point the basic premise outlined by Leo Strauss: All political action aims at either change or preservation - preservation insofar as one wants to keep that which is good lest it deteriorate; and change insofar as one wants to bring about something better than the current status quo. While neither direction is as such superior to the other, the distinction between them often marks the line between global elites and the democratic masses.

The many unknown changes brought by Brexit notwithstanding, this paper will attempt to defend the argument that experts as political decision-makers may unduly favour change - or reform - as political action, whereas citizens are still more likely to lean towards *sensus communis*, or the established common sense of a political community. Following the work of Strauss, among others, this argument will pit together two distinct spheres of political knowledge: 1) technocratic view of infinite scientific progress (exemplified by Auguste Comte and his positivism), and 2) a democratic view of civic society founded on existing tradition and norms (exemplified by classic republican thinkers such as Aristotle).

The resulting argument is one which claims that the political decision between change and preservation tends to take a different form depending on the party making it - whether technocratic or democratic - due to the fact that the nature of the knowledge consulted differs among the two. As will be elaborated in the paper, the “measuring stick” is different: for the technocrat it is constantly renewing itself as befits the nature of scientific progress, and for the citizen it is stable, due to its origin in the established common sense.

While this observation is necessarily a philosophical generalisation, and not one grounded on demonstrable facts, it nonetheless serves as a step toward better understanding of the widening gap between “the people” and “the experts”.

### **«Popular Sovereignty and Legal Form - Framing the Democratic Argument in Global Law»**

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My contribution aims to specify the essential element of the democratic argument in global law by giving a comprehensive overview on theoretical approaches. I would like to draw on the third chapter of my book *The Plurality Trilemma* (Palgrave Macmillan 2018) where I have tried to establish a framing for the argument of democracy in global law. What democratic approaches have in common is that they try to contain the chaos of

globalization in a framework that shows similarities to the constitutional architecture of nation states. One of their most forceful defenders is certainly Jürgen Habermas, who argues that “the challenge before us is not to invent anything but to conserve the great democratic achievements of the European nation state, beyond its own limits.” The Habermasian argument has attracted critical voices, arguing for the inadequacy of democracy to provide for global order. Yet, these approaches must not be reduced to uncritical restatements of national constitutional law. Rather, many thinkers have internalized the insights from Critical Legal Studies, that is the increasing separation of law and society. In their view, the democratic argument becomes something fictional. They involve the belief that the combination of popular sovereignty and law, i.e., discursive procedures interlinked with mostly strict understandings of the legal form, are the most adequate answer to plurality beyond the state that arises through globalization. In that, they highlight the necessity of a public sphere and discourse for the possibility of legitimacy. The concrete forms of these combinations turn out to be vastly different. Whether this results in a plea for global democracy as in the Habermasian formulation of constitutionalism, just a protection of discursive rationality on the basis of a horizontal relationship between legal orders, or even merely a romantic re-statement of legal formalism as in the case of Martti Koskenniemi, all unite in the belief that law has a role to play in the formation of global order as self-government. The survey starts with Habermas’ cosmopolitanism and explores the origin of his democratic conception of law. While the strict interpretation of Habermas’ preconditions leads to the unlikely and static vision of global democracy, there are other, more modest ways to make sense of a democratic concept of law. Finally, the contribution turns to varieties of discursivity that approach the conflict of legal orders from a strictly horizontal perspective in the conflict-of-laws paradigm, yet recognize and highlight the rationality potential in the legal form. The conflict-of-laws approaches presented here subscribe to the strategy of legitimacy preservation as a response to plurality. That relying on the emancipatory potential of law is neither uncritical nor rationalistic, nor needs reference to the public-private distinction, can be seen in more critical approaches, most prominently Martti Koskenniemi’s formalism.