THE RENOVATION OF THE MODERN CONSTITUTION:
CONTEMPORARY CONSTITUTIONAL TRANSFORMATIONS IN EUROPE

25 MAY 2015, UNIVERSITY OF TRENTO, ITALY

Programme

9:00-9:15 Opening
Paul Blokker, University of Trento

9:15-10:00 Keynote speech
Andrew Arato, New School for Social Research, NY

“Pouvoir Constituant or State Maker? The Role of the International Dimension”

10:00-11:30 Crises and Constitutional Change in Europe
Chair: Paul Blokker; discussant: Marco Dani, University of Trento

Jiri Priban, Cardiff Law School


Michael Wilkinson, London School of Economics

“Authoritarian Liberalism and the De-Differentiation of the Political and the Economic in the European Constitutional Order”

Gary Schaal, Helmut Schmidt University, Hamburg

“Neoliberal Challenges to Democratic Constitutional Reform”

11:30-12:00 Coffee break

12:00-13:00 Participatory constitutionalism
Chair: Carlo Ruzzo, University of Trento; discussant: Paul Blokker, University of Trento

Silvia Suteu, Edinburgh Law School

“Participatory Constitution-making and the Renovation of the UK Constitution”
Francesco Palermo, Università degli Studi di Verona, senator Italian Senate

“(Embryos of) Participation in Constitution-Amending in Multi-Level Europe”

13:00-14:30 Lunch break
14:30-16:00 Constitutional Politics in post-Westphalian Europe

Chair: Hans-Joerg Trenz, University of Copenhagen; discussant: Jiri Priban, Cardiff Law School

Kriszta Kovács, ELTE, Budapest/University of Trento

“Using the Amendment Rule to Change Constitutional Identity”

Paul Blokker, University of Trento

“Constitutional Paradigms: The Italian 1948 Constitution between Conservation and Reform”

Baldvin Bergsson, University of Iceland

“Constitutional changes as a political tool: Lessons from Iceland”

16:00-16:30 Coffee Break
16:30-17:30 Constitutional transformations

Chair: Kriszta Kovács, ELTE/University of Trento; discussant: Michael Wilkinson, LSE

Catherine Dupré, University of Exeter

“Constitutional Transformations as Transformation of Constitutional Time”

Gábor Attila Tóth, University of Debrecen

“Domestic and International Actors in Constitutional Regime Changes”

17:30-18:00 Final remarks

Paul Blokker, University of Trento
Abstracts

Andrew Arato, New School for Social Research, NY - “Pouvoir Constituant or State Maker? The Role of the International Dimension”

The conflict in the Ukraine represents a grave threat to both regional and international peace. The present de facto territorial arrangements are highly unstable, as well as entirely unacceptable to at least one of the sides. Neither these two sides in the conflict, nor the powers that support them, have been able to offer mutually acceptable solutions that would significantly diminish the danger of their renewed violent confrontation. In such a situation the role of the wider international community could be conceivably of great help. The goal of such a role cannot be restricted to mere peace making, since the stakes involve the territorial structure of states and even their constitutional arrangements. Thus assuming the necessity of such an external role, two fundamental questions arise: how interventionist is the international role supposed to be, and in which processes is it legitimate to intervene? Should any such intervention restrict itself to an inevitable "pouvoir irritant" as defined recently in an important article by Nico Krisch, or should it assume dimensions of a power that actually helps to constitute procedural arrangements or even substantive outcomes? And in either case should intervention, soft or hard, aim at limiting or enabling domestic actors to design their own solutions to their conflicts?

These are the questions I will raise in the paper. By drawing a series of distinctions, I will try to illuminate the choices involved in international intervention, and will try to make the case for interventions that go beyond mere discussions in the international public sphere, and yet are able to observe some key forms of self-limitation. I will try to do justice to the value of autochthony, while recognizing that the international community cannot and ought not absolve itself of any responsibility when states are constructed out of deeply divided societies. In the second part, even more tentatively, I will make an attempt to apply my results to a possible international role in the Ukraine.


Modern democracy, whether local, national or supranational, does not need any transcendental source of legitimation and draws on the force of political negotiation, deliberation and representation. It generates legitimacy from within its political system and without recourse to the divine will or tradition. This historical and structural change means that popular sovereignty became a social rather than political question. Immanent problems of the conditions and quality of social life replaced transcendental notions of sovereignty as an external, unconditional and exclusive force constituting the political society. Permanently evolving self-referential political and legal procedures operate without this image of a transcendental sovereign ruling the rest of society by its laws. Separation of power and the protection of human rights enhance functional differentiation and self-limitation of the political and legal systems. Separating different branches of power results in the proliferation of political procedures, conflicts and decision-making and, therefore, further functional differentiation of both politics and law in modern society. At the same time, the protection of human rights differentiates between the public and private spheres and constitutes further demarcations and limitations of democratic politics. The notion of popular sovereignty as one self-governing sovereign polity of equal and free citizens is thus contrasted to the ever growing differentiation of political and legal procedures. The people is sovereign, yet only through self-limiting and permanently differentiating subsystems of constitutional rights and communication between different branches of constitutional power and their specific institutions.
Popular sovereignty, nevertheless, includes the normative idea of legitimate settlement between constituent and constituted power. This circular communication between governors and those who are governed by them is captured by the concept of sovereignty as polity incorporating self-descriptive normative images and holistic imaginations of society as cultural unity and totality. In this paper, I, therefore, analyse the concept of sovereignty as part of cultural communication of collective symbolism and moral value foundationalism in both the national and post-national European or global contexts.

Following this analysis, I critically conclude that the semantics of sovereignty as the ‘real’ democratic polity representing the whole society is part of the specific cultural function of memory. All references to ‘foundations’ and ‘constituting’ moments of such polity use memory as operation, selecting between remembrance and forgetting which actually supports and enhances general operations of the systems of positive law and politics. While this specific selection does not make culture an autopoietic system of modern society, it further supplements the internal communication of the systems of positive law and politics and thus makes it possible to speak, for instance, of legal and/or political culture. However, this conceptualization of culture makes it an intrinsic part of different social systems which cannot be treated as their ultimate foundation.

Michael Wilkinson, London School of Economics - “Authoritarian Liberalism and the De-Differentiation of the Political and the Economic in the European Constitutional Order”

Reaction to the Euro-crisis calls into question the normal differentiation of the political and the economic in the liberal constitutional imagination. It recalls the phenomenon of an authoritarian liberalism, bypassing political-democratic and social-democratic norms in order to maintain market liberal projects of economic integration and ordo-liberal principles of fiscal discipline.

Authoritarian liberalism was first identified by Hermann Heller in late Weimar, where organs of the state responded to the perceived breakdown of the differentiation of the political and the economic under conditions of intense social and political conflict by suspending parliamentary democracy. Heller identified Carl Schmitt as one of the main protagonists of this configuration, not only because of his formal notion of sovereign dictatorship but also because of his defense of a 'strong state and sound economy' against the incursions of the social democratic Rechtsstaat and the movements of economic democracy. And Karl Polanyi's work on the same period enables a wider perspective on this phenomenon, suggesting that when politics is over-determined by geo-political-economic pressure, such as to maintain a 'gold standard', preventing of social democracy, extreme anti-systemic reactions are likely to follow.

Since the euro-crisis, extraordinary rescue measures have been implemented to maintain the single currency, which, in an era of 'economic Messianism', is deemed integral to the success of the project of integration. But this response to crisis is then itself deemed to be constitutionally critical because threatening the constitutional differentiation of the political and the economic, intervention coming into conflict not only with political-democratic and social-democratic norms, but also with other 'liberal' imperatives, such as respect for ordo-liberal concerns of 'moral hazard' and 'market logic', which have been elevated to constitutional status.

The asymmetry and incompleteness of the supranational union means that in defending a form of 'militant democracy in one country' - whether ordo-liberal or social-democratic - domestic constitutions threaten any overarching constitutional framework for European integration. But their repression provokes the emergence of anti-systemic movements aimed at reclaiming the autonomy of the political, resetting the constitutional differentiation of the political and the economic by re-founding it on a new domestic - or supranational - constitutional basis.

What then are the similarities and differences between the configuration of and response to
political-economic crisis in the interwar period and in the current conjuncture? What does this tell us about the foundations of modern constitutionalism and their transformation in the project of European integration? Does the conflation of the political and the economic in times of financial crisis reflect a broader disequilibrium that modern constitutionalism struggles to negotiate, between capitalism, democracy and the rule of law?

**Gary Schaal**, Helmut Schmidt University, Hamburg - "Neoliberal Challenges to Democratic Constitutional Reform"

Back in 2003 Wendy Brown wrote: „Liberal democracy cannot be submitted to neo-liberal political governmentality and survive.” Mirroring older arguments from the Frankfurt School, the famous German sociologist Wolfgang Streeck (2015) put forward the thesis that democracy and capitalism are in conflict and democracy will not survive alongside capitalism. While the consequences of neo-liberal governmentality on democracy are well analyzed by now, its effects on constitutions and constitutional change has been addressed with less scrutiny (neglecting the inspiring work by Paul Blokker on this topic), which is disappointing since a democratic constitution constitutes the common playfield for democracy and capitalism alike. And just like democracy, the idea of constitutionalism as well as its reality are under pressure. Constitutions are becoming more and more a mere means of everyday politics and particularistic interests (not only in Hungary and Russia), so that the line between Higher Law and Law is blurring. Additionally, societal and economic acceleration increase the functional necessaries for constitutional change (Rosa 2005, Scheuerman 2004). The paper addresses the role of constitutions and constitutional change within the framework of neo-liberal political governmentality. It will ask, whether and how constitutions may function as a stronghold against neo-liberalization and exemplify the ambivalent character of participatory constitutional reforms under neo-liberal hegemony.

**Kriszta Kovács**, ELTE, Budapest/University of Trento - "Using the Amendment Rule to Change Constitutional Identity"

Constitutional theory often makes a clear distinction between the total replacement of a constitution and the amendment of a constitution. There are cases, however, when constitutional amendments introduce new constitutional identities. The paper reveals the difference between the constitution making and amending authorities. I argue that the former creates a brand new constitutional framework based upon certain basic principles; the latter could only modify the constitutional rules within the boundaries of those basic principles. The concept of identity is there to describe the difference between the two powers. Furthermore, the concept of legitimacy helps to evaluate constitutional identity changes. The timely example is Hungary where transitions to regime changes (and thereby identity changes) took the form of constitutional amendments.

**Paul Blokker**, Università di Trento - "Constitutional Paradigms: The Italian 1948 Constitution between Conservation and Reform"

The paper analyses the constitutional politics of reform in Italy in the period 1990-2015. In this period, the attitude of major political groupings towards the 1948 Constitution changes significantly. The constitutional compromise of 1948 loses its firm hold on the historical political parties, which become tied up in the Tangentopoli corruption scandal. The reformed centre-left of the political spectrum changes position from constitutional veneration to constitutional instrumentalism. The centre-right, which had never been part of the original
constituent moment and part of which was understood as an anti-constitutional political movement, increasingly articulates a form of constitutional populism, grounded in notions of strong leadership, non-mediated relations between civil and political society, and an instrumentalist understanding of the constitution, in terms of a perception of constitutional revision as an instrument of ordinary politics. The general constitutional attitude shared between the left and right emphasizes ‘grandi riforme’ and constitutional engineering, and the modernization of political institutions. Constitutional resistance, defending the original compromise of 1948, is particularly evident in civil society movements such as Libertà e Giustizia, and forms part of the main constitutional position in populist movements such as the Movimento 5 Stelle. The paper analyses the constitutional positions and narratives of both political and civil society actors, and in particular explores the range of justifications offered either in favour of or against constitutional reform.

Baldvin Bergsson, University of Iceland - “Constitutional changes as a political tool: Lessons from Iceland”

While Iceland underwent what some have described as a constitutional moment following the economic crash in 2008, it is unlikely that the draft written by the Constitutional Council will form the base of a new constitution. The current coalition government does not support the draft and the level of criticism the two parties waged against the process means that it is politically impossible for them to change their position. This paper will examine how the Icelandic political parties responded to demands for constitutional change after the economic crash and analyse how that fitted with prior statements about the constitution. Furthermore it examines how the parties responded to various groups calling for societal changes.

Silvia Suteu, Edinburgh Law School - “Participatory Constitution-making and the Renovation of the UK Constitution”

This paper looks at citizen assembly-style constitutional conventions as a path towards revitalising constitutional renovation. Such conventions were notoriously set up in British Columbia, The Netherlands, Ontario, Iceland and Ireland; the Scottish Government promised one for an independent Scotland; and calls for a UK-wide convention remain strong following the Scottish referendum. The assumption behind such calls has been that direct citizen engagement in constitutional revision processes will supplement or even replace traditional political institutions and thereby invigorate democracy. Involving the people in constitution-drafting, the argument goes, actualises the hitherto mythical ‘people’ and turns self-government into an empirical reality.

My paper seeks to test this assumption in the context of calls for constitutional reform in the UK. While acknowledging the numerous potential benefits of citizen assemblies in constitution-making, I suggest that more thought is necessary before advocating them as a one size fits all solution to the woes of representative democracy in Britain. To begin with, they need to be seen as legitimate themselves. This will involve complex decisions over inclusiveness, allocated resources and over how to define their success. For example, would a highly participatory process be acclaimed even if the resulting proposals were not adopted? Furthermore, the democratic potential of constitutional conventions may be frustrated by an unmanageable mandate – whether too broad or, conversely, too technical and limited in scope – dooming it to either ineffectiveness or irrelevance.

Finally, one must remember that the costs of popular constitution-making, including in terms of political will and citizen interest, will unavoidably render constitutional conventions exceptional. The majority of constitutional reforms are bound to come about via more traditional channels. Thus, focusing solely on popular involvement in times of crisis may be short-sighted and ultimately detrimental. If democracy is a work in progress, it is still
representative democracy that we are working towards improving, including via boosts of participatory activity.

**Francesco Palermo**, Università degli Studi di Verona, senator Italian Senate - “(Embryos of) Participation in Constitution-Amending in Multi-Level Europe”

The paper proceeds from the contemporary crisis of legitimacy and decision-making processes, especially but not exclusively in Europe. Demands for more participation and claims for accommodation of pluralism beyond mere parliamentary representation are common to modern democracies. Responses so far have been unsystematic, although many attempts have been made at various levels to provide broader participation and inclusion in decision-making. While it is commonly argued that participatory processes are more suited for lower levels of government and rather administrative issues, comparative practice shows that such processes are taking place to a surprising extent also at constitutional level.

After a brief contextualization of the problem, the paper goes on to describe some of the more significant European experiences of the past years. These include the supranational level (from the convention set up to draft the EU charter of fundamental rights to the new procedure for amending treaties set out in article 48.3 TEU), the national level (cases of Austria, Iceland, Ireland and Italy) and the sub-national one (attention will be paid to the recent experience of some Italian regions such as Sardinia, Friuli Venezia Giulia and South Tyrol). While very different in origin, procedure and outcome, all these cases have in common the search for more inclusive and complementary processes to amend constitutions at various levels in the European context.

The paper concludes by arguing for a more thorough analysis of the phenomenon, which has so far received too little attention, particularly by lawyers. It is contended, in particular, that such processes are especially useful when it comes to “constitutional maintenance”, as they are at odds with revolutionary aims and rather tend to introduce changes without breaking with the overall constitutional structure. Furthermore, it is argued that federal studies can provide useful insights to identify procedural solutions, as federalism is the oldest and more consolidated constitutional instrument for the institutional accommodation of pluralistic claims and their regulation. Finally, it can be concluded that the spreading of participatory practices is encouraged in a multi-level context such as the European legal space, to which mutual influence and cross-fertilization are inherent.

**Catherine Dupre**, University of Exeter - “Constitutional Transformations as Transformation of Constitutional Time”

Rooted in the memory of the time of inhumanity and anti-democracy, a desire to leave behind a bad period of history has been crucial in giving European constitutionalism its distinctive feature, often crystallised as a 'never again' foundational promise. As a result, the development of post-war constitutionalism in Europe has led to a particular construction of constitutional time, which includes – but is not reduced to – shaping the present in terms of a negative past, namely the rejection of the unwanted past of war and inhumanity. However, this paper identifies and discusses three other distinctive features of constitutional time in Europe. The first is the overall direction of constitutional time, namely the argument that it is envisaged as mono-directional from the rejected past to the possibility of a better future. The second is its dynamic character, namely the argument that constitutional time does not stand still, caught in a sort of eternal present, but rather that it keeps evolving, with the present being constructed as an opening towards a plurality of possible futures. The third feature of constitutional time is the speed and flow of constitutional time, which raises issues of synchronisation of different paces of time and of temporalities across Europe, as well as outside Europe. On this basis, the paper suggests that considering these various dimensions
of time allows for a more nuanced discussion of the current constitutional transformations. In particular, it makes it possible to identify the transformations that could negatively affect the quality of constitutional time, thus putting democracy and humanity at risk.

Gábor Attila Tóth, University of Debrecen (with Andrew Arato) - "Domestic and International Actors in Constitutional Regime Changes"

The concept of the constituent power emerged in the revolutions of the 17th and 18th centuries. Classical theories have implied a strong link between the constituent power and a single organ of the state in which the powers of sovereignty were concentrated. Today we are also able to speak of non revolutionary forms of regime change and constitution making. Democratic constitutions from Spain to Poland or South Africa could now be seen as products of many players –not only representative organs but also round tables and popular involvement–, acting through multiple procedures and stages. Indeed, international law still insists on constitution making to be a purely domestic matter. Taking experiences from Bosnia, Iraq or Hungary, however, we can no longer neglect significant role of international monitoring institutions, advisory committees, and courts. Our fundamental claim is that procedural legitimacy matters. We will argue that learning from the lessons of post revolutionary constitution making by the main actors, whether internal or external, can greatly help in solving the problem of legitimacy. We want to make this case first by comparing revolution and post revolution, and second by highlighting some of the procedural principles of constitution making. Finally we will consider the legitimate role of domestic and international actors in the post revolutionary constitution making.