

Panel 10.43

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Room Sutherland · L249

Theme Courts, Judicial Power & Judicial Independence

Presentation type Parallel Session

Judicial Voice, Dialogue and the Public

529 Judicial Voice, Dialogue and the Public

Description

Panel assembled by the organization from individual submissions.

1698 (Former) Judges as Public Intellectuals: Promise or Threat to Constitutional Democracy?

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Abstract

In contemporary constitutional democracies the scope of post-judicial professional activities has expanded significantly, ranging from commercial consultancy to international missions. Among these, a particularly profound development is how former judges of higher courts (mainly constitutional and supreme courts) increasingly step into the public sphere as public intellectuals: commentators, authors, media experts, and moral authorities. Former judges, while no longer formally bound by judicial office, continue to draw on the symbolic capital of their judicial authority, which persists beyond institutional tenure. This raises fundamental questions about the compatibility of such public engagement with the constitutional values of impartiality, independence, and institutional legitimacy: values essential to the authority of the judiciary.

This paper examines the conditions under which the public interventions of former judges align with—or disrupt—democratic values. On the one hand, judicially grounded interventions can enhance public understanding of constitutional conflicts, enrich democratic deliberation, and serve as stabilizing voices in periods of political polarization. On the other hand, public engagement by former judges may blur the line between judicial and political discourse, contribute to the personalization of judicial authority, and undermine perceptions of neutrality.

Illustrated by selected cases and employing Pierre Bourdieu's framework of symbolic capital, this paper goes beyond individual ethics. It offers a normative inquiry into the persistent authority of the judicial voice in the public sphere, ultimately proposing specific criteria (such as restraint, relevance and temporal distance) necessary to maintain the legitimacy of the judicial voice after tenure.

3438 Mini-Publics and Constitutional Adjudication: Reintegrating the Public Without Plebiscitary Drift

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Abstract

Constitutional democracies face legitimacy tensions when institutional design fails to translate public participation into stable, publicly justifiable decisions. Constitutional courts decide controversies under polarization and unequal access to informal channels of influence. The challenge is how to reinsert the public into constitutional decision-making without undermining countermajoritarian review or turning adjudication into plebiscitary politics.

Brazil offers a laboratory. The Brazilian Supreme Federal Court (STF) has consolidated openness mechanisms—public hearings and *amicus curiae* participation—aimed at pluralizing information and perspectives, though their reach remains selective and uneven. More recently, this repertoire has expanded beyond judicial review through mediation, conciliation, and “contextualization hearings” by the Court’s Conflict Resolution Unit (in 2020). This trajectory aligns with the *status activus processualis* and a “society of constitutional interpreters,” shifting constitutional meaning away from monopolies toward institutionally mediated participation.

Experience reveals limits: public hearings operate intermittently and asymmetrically and fail to generate qualified public deliberation, at times functioning as formal legitimation for decisions already in motion.

This paper proposes an institutional model of deliberative mini-publics integrated into constitutional adjudication as auxiliary listening-and-translation bodies. Mini-publics do not decide cases; they complement adjudication with a verifiable layer of public deliberation while preserving decisional responsibility within the Court. The model assigns three functions—democratic density, institutional translation, and procedural legitimacy—while design safeguards address capture risks through representativeness, balanced briefing, and transparency. The contribution reframes precedents as a constitutional technology of power and risk allocation and proposes a participatory architecture correcting the limits of openness mechanisms

Abstract

This investigation reveals the contours of 'europeanisation' guided by a judicial influencer. In both Italian and French public law scholarship, the history of scholarly use of foreign law is to a considerable extent the history of referring to the Karlsruhe-based German Constitutional Court. In contrast, German public law scholarship appears to be rather inward-looking. This paper explains what consequences this holds for our understanding of the world of European constitutional law and its courts. In a nutshell: the influencer position of the German Constitutional Court reminds us that the Europeanisation of legal systems does not necessarily go in a single unifying direction. At least two knowledge communities exist. Alongside EU lawyers and legal scholars supporting the idea that the European Court of Justice forms the ultimate judicial authority, this study suggests the existence of a transnational 'Karlsruhe Counter-Culture'. A culture based around the idea that national constitutional courts and national constitutions do not stand hierarchically below the European Court of Justice and EU law.

1258 Judicial Dialogue on Fundamental Rights: a Comparative European Perspective

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Abstract

Judicial dialogue has become a defining feature of fundamental rights protection in Europe. Constitutional courts, supreme courts, and supranational judicial bodies increasingly engage in cross-jurisdictional exchanges through references to foreign case law, transnational legal principles, and shared constitutional values. This paper examines judicial dialogue on fundamental rights from a comparative European perspective, focusing on interactions among national constitutional courts, the Court of Justice of the European Union, and the European Court of Human Rights.

The paper explores how judicial dialogue contributes to the convergence of fundamental rights standards while simultaneously preserving constitutional diversity. Drawing on selected case studies from Western, Central, and Eastern Europe, it analyzes the forms, functions, and limits of judicial dialogue in addressing complex rights-based conflicts, including proportionality, constitutional identity, and the margin of appreciation. Particular attention is paid to moments of tension and contestation, where dialogue operates not as a mechanism of harmonization but as a structured exchange shaping constitutional pluralism.

The paper argues that judicial dialogue plays a crucial role in strengthening the legitimacy, coherence, and resilience of European fundamental rights protection, while also revealing the challenges of authority, hierarchy, and mutual trust within Europe's multilevel constitutional landscape.

251 Reimagining Identity Rights and Gender through Constitutional Adjudication against Legislative Pushback: A Case Study of the Turkish Constitutional Court

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Abstract

The Turkish Constitutional Court (TCC), in its landmark April 2023 decision, annulled Article 187 of the Turkish Civil Code, which compelled women to take their husband's surname upon marriage. This ruling, establishing that the compulsory assumption of a husband's surname violates the constitutional principle of gender equality, exemplifies a critical case of a constitutional court acting as a safeguard of identity rights.

The TCC had previously upheld the same provision in 2011, relying on arguments such as "family unity." However, through the combined pressure of feminist movements, the expansion of the TCC's individual application jurisdiction, and decisions from the European Court of Human Rights, the 2023 ruling explicitly abandoned the 2011 stance, recognizing differential treatment—where men retained their surname by default—as a direct constitutional violation. Despite the judicial victory, the Turkish Parliament prepared a draft that maintained the discriminatory practice. Though this draft was not enacted due to significant public opposition from feminist movements, women remain obligated to assume their husband's surname mainly because of the secondary legislation.

This paper analyzes the TCC's 2023 decision within the broader scholarly and political debates on democratic backsliding and women's rights in Türkiye. It traces the legal and political history surrounding Turkish women's surname rights and examines the implications of this ruling for the role of the judiciary in advancing human rights. Ultimately, it highlights the ongoing tension between judicial mandate and legislative resistance when constitutional rights challenge traditional norms.

2216 The Content and Claims of Weak Form Theory

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Abstract

In determining the proper role of courts in the adjudication of constitutional human rights issues, Weak Form Theory ('WFT') purports to provide a solution that is both novel and free from the defects associated with the ends of the traditional binary of constitutionalism - 'legislative supremacy' on one hand and 'constitutional supremacy' on another.

The work of theorists such as Tushnet, Gardbaum, and Bellamy makes clear that there are two main elements to WFT's response. First, WFT provides an account of the distinct institutional mechanisms of 'weak form' judicial review systems (WFJRS), as well as how they do (and, occasionally, should) operate in practice. Second, WFT makes the overarching functional claim that WFJRS successfully provide an optimal level of human rights protection, because their rights-protective mechanisms give effect to the will of democratically elected legislatures thus respecting the principle of democratic legitimacy.

This paper aims to provide a comprehensive account of the content and claims of WFT. First, it sketches a 'map' of WFT – identifying the theory's unifying concept of 'weakness' and distinguishing between 'central' and 'satellite' weak form theorists. Second, it outlines those principal institutional rights-protective mechanisms of WFJRS (weak form judicial review and pre-enactment political rights review) and illustrates their operation through two case studies : the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1998. Finally, it breaks down WFT's overarching functional claim into two main claims – (i) the 'Democracy Respecting' Claim and (ii) the 'Optimal Rights-Protection' Claim – and enumerates their key aspects.

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