

"Comparative Constitutional Law and Legal Culture: Asia and the Americas": an overview of the CRN01 under the Law and Society 2017 Meeting

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The Collaborative Research Network is a Law and Society Association's initiative that seeks to develop cross-disciplinary and cross-national research projects which intend to overcome the disciplinary barriers benabling the growth and integration of the social study of law. Organizing theme sessions for the LSA annual meetings, the CRNs can be a forum in which scholars, professors, students, as well as practitioners who are interested in interdisciplinary studies can organize discussions, share work, exchange ideas and build networks.

The CRN 01 - named Comparative Constitutional Law and Legal Culture: Asia and the Americas - was created in 2015, during the LSA Seattle meeting. It examines legal development, constitutional law and legal cultures from the perspectives of both legal sociology and comparative law regarding Asia and the Americas. In this age of globalization, when economic ties between these regions are gaining strength and momentum, it becomes a necessity to study them comparatively. This is especially important when developing economic relationships bring issues such as the rule of law and protection of human rights to the fore. In particular, it seeks to understand how political and historical paths, as well as global influences such as universalization of human rights and democratic constitutional values, have shaped the formation and evolution of constitutional law and legal culture in these regions various countries. It further seeks to examine the manifestations of contemporary legal culture in the political aspects of constitutional law, and in implementing democratic processes and human rights. The CRN brings together scholars engaged in these thematic and regional foci.

In 2017 CRN 01 took part in the Mexico City International Meeting on Law and Society, in Mexico, from June, from June 19th to June 23rd. This time it has sponsored 9 (nine) sessions that have launched the debate as following.

Constitutional theory development in Asia and in the Americas

Societies in Asia and the Americas may seem to have nothing in common given their particularities; however, many countries in these two regions share similar historical and political experiences (e.g. dictatorships, revolutions, democratic mobilizations, civil rights or human rights problems, corruption etc.) and interact more and more pushed by economic and cultural globalization. Nevertheless these geographically diverse societies, although very different in their current legal and political cultures, may also share constitutional and democratic values. This session intends to bring together scholars engaged in

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studying the evolvement of constitutional features, either regarding constitutional law or constitutional theory, related to these regional *foci*.

Session 1

Chair/Discussant:

Rafael Mario Iorio Filho

Universidade Estácio de Sá e INCT-InEAC

Constitutional Amendment as a Political Weapon: The Mexican Case

Presenter

Roberto Mancilla

Movimiento Ciudadano

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This article will account for the misuse of constitutional amendments with the purpose of furthering the agenda of a group or coalition in detriment of the overall system. In Mexico this practice has been used successfully for decades to ensure that the interests of political majorities –first by the PRI and then by a PAN-PRI coalition- are furthered and protected from any disruption. This analysis will be done in three parts: in the first, there will be an introductory exposition of the political situation of Mexico in the past century; insight of the amendment process of the constitution and the position of the academia of how it takes place will also be given briefly. The second part will give three examples of weaponized constitutional amendments and the ways it can be done: One of them is a direct approach by change that directly affects the overall system; the second is related to much needed amendments, which are used as leverage to pass unpopular policy or rules; this is an indirect approach. The third case pertains another indirect approach in which bylaws are used to write secondary legislation (with constitutional hierarchy) instead applying the amendments like they are supposed to. After this, the uses of weaponized constitutional amendments will be seen. They include: the constitutionalization of unconstitutional policies, preemption of courts and review, creation of privileges and advantages and policy entrenchment. Finally, the possibility of review and reversal of constitutional amendments will be studied, first as a history of constitutional review by means of the amparo suit (human rights protection suit) and then by analyzing an amendment made to Amparo Law, where a suit is now inadmissible if it attempts the review of a federal constitutional amendment.

**Friend of the Court. A comparison between the North American model and the Brazilian model.
Popular legitimacy or just procedure?**

Presenter

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This study aims to present the institute's friend of the court in Brazilian Law and North American Law, presenting a comparative regarding the applicability and effects. In Brazilian Law occurred forecast of friend of the court institute the following pieces of legislation: Federal Law 6385/76; Federal Law 8884/94 and Federal Law 9469/97. In addition to these laws, there was also forecast friend of the court in the Federal Law 10259/01, the procedure for uniformity of interpretation of federal law before the divergence of understanding remedial classes, during which interested parties, even if they are not parties to the proceedings, can manifest within thirty days. However, the friend of the court has assumed greater connotations in Brazilian law since 1999, with the Federal Law 9868, when it was entered in the control of Brazilian Constitutionality. The highlight of the friend of the court in parental rights took place in the Constitutional Control Concentrate before the Supreme Court. This mode of Judicial Review is externalized in an objective process, in which the Constitutional Court makes the compatibility of a contested legal norm with valid parameter of the legal system (Brazilian Constitutional of 1988), there is no need to talk about parties in procedural sense of the word, with only the applicants. It should be noted that this process mode, unlike the subjective process, it has been intended to guarantee the legal system abstractly considered and not the solution of individual conflicts. It works as friend of the court plural instrument, allowing the process of Judicial Review seeks greater proximity of the democratic principle an political pluralism, to be recipient of technical or scientific information required for a proper an lawful decision of the magistrate. As the influence the friend of the court performance in Brazilian Law, i have analyzed in master thesis seat, direct action of unconstitutionality full judged by who had the friend of the court acting in the Supreme Court between 2005 and 2011. Be welcoming, rejecting the plural argument was taken to the objective process. Since the North American Law, the friend of the court has links with the judicial precedents system. This because of lack of Constitutionality of concentrated control such as Brazil, with a diffuse constitutionality control system that operates against all effect. We intend this study demonstrate by applying previous studies the real influence obtained by friend of the court in Brazilian Law and Law North American. From this comparison we can draw up the conclusion about the importance of the participation of the friend of the court in the process.

Judicial Approaches to Separation of Powers in India

Presenter

Shubhankar Dam
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 Hong Kong

This paper tells the story of the legal and political aftermath of an iconic decision in India. Delivered in 1984, the decision, *DC Wadhwa v State of Bihar*, had to do with the executive's constitutional authority to

enact primary legislation. India has a parliamentary system. But the Constitution authorizes the executive to enact legislation if certain conditions are met. Such legislations are called ordinances, and they have a limited life span. Ordinances die, or lapse, unless they are properly enacted by the legislative branch within a prescribed period. DC Wadhwa raised the durability question: Is the executive authorized to repeatedly enact the same ordinance into law, if the legislative branch doesn't do so? The Court said no: Prolonging the life of an ordinance by repeatedly enacting would undermine the system of separated powers in the Constitution, and render the legislative branch irrelevant. Judges though left open a small window of exception: Under certain narrow, limited circumstances, the executive may do so. The decision was an instant classic. Widely reported and discussed in the popular press, the decision, many commentators felt, was a victory of constitutional values over executive arbitrariness. Thirty years have elapsed. How has the executive performed? Has it eschewed from repromulgating ordinances? Or in cases of repromulgation, has the executive kept to the narrow exceptions outlined in the decision? In this paper, I look at two levels of data. First, I study the frequency with, and the jurisdictional breath for, which DC Wadhwa has been cited as a precedent. How often have the Supreme Court and lower courts referred to DC Wadhwa as a precedent? For what sorts of issues have courts referred to the precedent? Second, I study the ordinance-related performance of the executive in the State of Bihar, the province from which the case originated. Did Bihar's executive abide by the decision, and give up on repromulgating ordinances? In addition, I also study the performance of the national executive in New Delhi. Until 1984, the national executive had never repromulgated any ordinance – a fact belabored in DC Wadhwa. Is that record on track? Or has the national executive gone Bihar's way – with repeated repromulgation of ordinances? These two levels of data yields contradictory responses. As a precedent, DC Wadhwa is a bright star. Consistently cited by high courts across India, and occasionally in neighboring jurisdictions, it has gained in prominence. But in practice, ordinances and repromulgation remain distressingly common. India, then, has all of these: a Parliament, an executive that can legislate without Parliament, a precedent prohibiting such executive legislation, and a willful disregard of the precedent.

Unamendability in Taiwan

Presenter

HSIANG-YANG HSIEH

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This article explores the practice and theory of unamendability in Taiwan, with a close look at the two decisions of Taiwan's Constitutional Court (TCC). Taiwan's Constitution says nothing about unamendability. In Interpretation no. 499 (2000), TCC invalidated Taiwan's fifth Constitutional Amendment, basing on an unwritten, judge-made doctrine of unamendability. In 2014, TCC in Interpretation no. 721 re-affirmed the doctrine of unamendability, created in Interpretation no. 499. But this time, TCC upheld the Constitutional Amendment under challenge. While most constitutional lawyers in Taiwan applauded TCC's decision in Interpretation no. 499, some doubted the legitimacy and constitutional basis for TCC to create the unamendability doctrine. A critical question was raised after reading Interpretation no. 721 together with Interpretation no. 499-while TCC re-affirmed the unamendability doctrine in Interpretation no. 721, did TCC in Interpretation no. 721 use the same unamendability doctrine to examine the constitutionality of the Constitutional Amendment as the one created and used in Interpretation no. 499? A more fundamental question remains unanswered: whether the unamendability doctrine is still good law in Taiwan? In particular, would Taiwan's current amending rules-under which an amendment may be proposed by the

legislatures and approved by a popular vote-make any change in the discussion? The answers to these questions have great impacts on TCC's legitimacy to look into the constitutionality of constitutional amendments in the future. With those concerns in mind, I will in this article consider and compare experiences in other countries' constitutional courts in addressing unamendability. In addition, I will consider theoretical arguments made by comparative constitutional scholars. Finally, I will look back to the context where TCC created the unamendability theory in Interpretation no. 499, and conclude with my observations by exploring what contributions Taiwan's experience may bring to comparative constitutional law.

Brazilian Supreme Court and U.S. Supreme Court : when history makes a difference.

Presenter

Ronaldo Lucas da Silva
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This work is part of a reflection that proposes to make a comparison between the formation of the Supreme Court of the United States of America and the Brazilian Supreme Court. This comparison aims to express the differences and similarities that can be perceived in the formation of these institutions. It proposes to study and disclose the aspects that are not usually considered but that can be only perceived if the analysis includes the understanding of the history of ideas, the legal culture and social aspects of each of these two countries which are consolidating substrates of their higher courts within their judicial structures. The hypothesis that arises is that the North American Court was born within a historical context marked by the American independence and a separate state from the British Empire, while the Brazilian Supreme Court would be a continuation of the Portuguese judiciary that remained after the Brazilian independence. This permanence has brought indelible features that are perpetuated over time. Thus a comparative approach of the objects will be required in order to highlight similarities, continuities, ruptures, inspirations, rejections and reproductions in the foundation process and construction of these two institutions. The working hypothesis will be based on the disclosure or not of the idea that the Brazilian Supreme Court had copied much of its structure from the Supreme Court of North American. This premise dominates the discourse of Brazilian legal historiography and that is exactly what needs to be discussed.

Session 2

Chair:

Fernanda Duarte
 UNESA e INCT/InEAC/PROPPI/UFF

Discussant(s):

Vera Lúcia Raposo
 University of Macao

A Plot of Concepts in the New Constitutional Order: Memories, Ethnodiversity and Toleration

Presenter

Edna Raquel Hogemann
UNESA

Focuses on social and ethnicity inclusion as one of the contemporary constitutionalism parameters. Examines the interconnection of fundamental notions of memory, ethnodiversity and tolerance and its relevance in the new constitutions design: the case of South Africa, Ecuador, Bolivia and Brazil. Conceives ethnodiversity from the presence of different ethnic or cultural groups in the same country or territory. Grasps the concept of tolerance reframed as designed by Walzer beyond Bobbio serenity, representing egalitarianism and liberalism, giving centrality to the concept of equality to open a possibility for reflection on the right to difference as a guarantee for pluralism. Discusses Cyrulnik's concept of resilient memory to replace the memory of the vanquished and its likely impact on the interpretation of the new constitutions, the interaction of individuals in their social contexts. Examines respect for ethnic differences in the new constitutionalism American Spanish, recognition of pluralism, not only a plurality of groups, but also a plurality of individuals; the right of "good living" (sumak kawsai) and those inherent in the nature (Pachamama). Identifies what is weak in the Bolivarian and Ecuadorian constitutions in guardianships formulation of the rights of indigenous peoples: seeking inspiration in Mutua. It promotes a dialogue with Walzer from the perspective of reabsorbing the notion of toleration as a principle and as object of law to face the problems introduced by the new Spanish American constitutionalism to conclude that, in the light of power paradoxes in a democratic society, it would appear the need to deepen experiences towards a new constitutional order guided by the solidarity of the people and the effectiveness of rights under a regulatory sign really inclusive of human rights.

Constitutional design and institutional reality: the recognition of the constitutional- systemic model

Presenter

Maíra Almeida
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The Constitution is not what certain institutions, individually say it is, nor what it was originally supposed to be, but the product of a dialogical interaction between institutions. In this approach, the Institutional Theory suggests new parameters for constitutional assessment, dynamic effects and institutional capacities, which support constitutional redesigns, especially interpretive powers rearrangements. However, the Institutional Theory merely overcomes the interpretative quarrel, and not even provides institutional boundaries for concepts poorly defined. It is argued that Constitutions are systems, interactive and dialogical, but eventually faulty. In these cases, the Institutional Theory offers no practical solutions; on the contrary, those failures result eventually from the concretion of institutional parameters. This is what happens currently in the American Administrative State and, *mutatis mutandis*, in the Brazilian State of Convenience, specifically the expansion of Executive Power under emergency circumstances - economic crises, armed conflicts, political instability. In these cases institutional dialogues wanes or end up and prevails the monologue of the Executive Branch. If it maintains dialogues with the Constitution and expands itself to preserve it, it is established a constitutional dictatorship.

However, if it suppresses dialogues and despises the Constitution, tyranny reigns. The constitutional dictatorship, thus, does not dismiss the Systemic Constitution.

The Competing Sites and Spirits of Constitutionalism in Cambodia

Presenter

Benjamin Lawrence
 University of Victoria

The practices and discourses of constitutionalism in Cambodia have been widely overlooked or misunderstood, both in scholarship and in Cambodian society. While the Constitution is largely absent from – or at most incidental to – academic accounts of contemporary Cambodia (Hughes and Un 2011; Strangio 2014), the country’s experience is only loosely captured in the growing literature on constitutionalism, even when it is regionally specific to Asia (Chen 2014) or thematically specific to the context of (neo-)authoritarian regimes (Ginsburg and Simpser 2013). Yet, the lexicon of constitutionalism remains a mainstay in the vocabularies of numerous actors in Cambodia. Hence, this project starts from a very simple question: what role does the constitution actually play in Cambodian society? However, it also begins with an understanding that answering that question in the Cambodian context requires a twofold broadening in our understanding of constitutionalism. Firstly, it demands that we commit to unravelling the common assumption that constitutionalism is innately synonymous with liberalism (Walker 1997) or the rule of law. Secondly, it demands that we acknowledge the extent to which the discourse and practice of constitutionalism often operates outside of legal, or even state, institutions (Kramer 2004; Ngoc Son 2014). Hence, to the extent that it has been operationalized by the state, on the one hand, this article will assess whether and how a discourse of constitutionalism has not only coexisted alongside processes of authoritarianism, but actually legitimized – and even facilitated – them. On the other hand, to the extent that the discourse of constitutionalism has simultaneously been used by other actors in the country, this study will also investigate whether and how the Constitution has been helpful in creating opportunities to challenge those same processes. Building upon an analysis of documents from legal and state institutions, civil society, and the Cambodian press, this article will make use of data from a series of open-ended, semi-formal interviews that I am currently conducting with constitutional actors and laypeople in Cambodia. Most interestingly, recognizing that the language of the constitution has been central to recent attempts to (sometimes pre-emptively) stifle criticism through civil society, religious institutions, and cultural production, interviews with laypeople will include members of the country’s vibrant NGO, Buddhist and artistic communities. Inspired by methodologies from ethnography and Legal Consciousness studies, these interviews aim to develop a holistic and contextualised understanding of constitutional praxis in Cambodia, which is inclusive of a grassroots or “bottom-up” perspective (Lawrence 2016). The result will be a study that provides new insights into a too-often overlooked constitutional system and, in the process, challenges existing understandings of how constitutionalism can or should be understood.

Transformations in the constitution and the democratic idea as a consequence of the peace process in Colombia

Presenter

Yenny Andrea Celemin Caicedo
 Universidad Jorge Tadeo Lozano

Colombia como muchos de los países occidentales contemporáneos puede clasificarse como una democracia constitucional. Las democracias constitucionales son una fórmula de organización política e institucional que se caracterizan por la interacción de diversos poderes públicos, algunos de los cuales han sido elegidos democráticamente. Estos poderes se encargan, entre muchas otras tareas, de la regulación de las actividades al interior de las comunidades nacionales bajo la égida de una Constitución (Elster, 2000, Habermas, 1999). En el marco de este diseño institucional se planteó la necesidad de efectuar un proceso de negociación entre el Gobierno del Presidente Juan Manuel Santos y las Fuerzas Armadas Revolucionarias de Colombia, FARC. Este proceso de paz, que dio origen al Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, que fue sometido a aprobación por parte de los Colombianos, en un plebiscito desarrollado el día 2 de octubre de 2016. A pesar de que la implantación y el futuro de los acuerdos de paz no son claros, en la medida en la que el resultado del plebiscito del 2 de Octubre no obtuvo las mayorías necesarias para su refrendación e implantación, lo cierto es que diversas instituciones y órganos de la Constitución (especialmente, las relacionadas con la formas para canalizar y materializar la democracia en Colombia) pretendieron ser, fueron o van a ser sido impactadas e influenciadas por los acuerdos. La creación de un procedimiento legislativo especial para la implementación de los acuerdos de paz (Celemin, 2016), la transformación del sistema de partido políticos implementados en Colombia tras la reforma política del 2003, o el cambio del umbral de un umbral de participación a uno de aprobación, son algunos de las modificaciones más importantes que se sucedieron como consecuencia del proceso de paz. El presente este proyecto de investigación tiene el propósito de describir y analizar los impactos y transformaciones que los acuerdos de Paz de la Habana pretendieron tener, han tenido y/o pueden llegar a tener en las instituciones democráticas reconocidas en el orden constitucional en Colombia.

The Deletion of the Chapter on the ‘Non-Party Care-taker’ Government from the Constitution of Bangladesh and the Subsequent One-Sided General Election in 2014: Addressing the Necessity to Prevent Bangladesh’s Lapse into Tyranny

Presenter

Dr M Ehteshamul Bari
 Deakin University

The Constitution of Bangladesh, as amended by the Constitution (Thirteenth Amendment) Act, 1996, provided that a Non-Party 'Care-taker' Government would be established within 15 days of the dissolution of the Parliament with the principal mandate of assisting the Election Commission in conducting the General Election in a free, fair and impartial manner within 90 days of the dissolution of the Parliament. The concept of this Non-Party 'Care-taker' Government was incorporated due to the distrust that exists between the two main political parties, i.e. the Bangladesh Nationalist Party and the Bangladesh Awami League (BAL), with regard to

conducting a free and fair election under the supervision of a political government. It was expected that a 'Care-taker' Government, headed by the last retired Chief Justice of the nation, due to its neutral character would have no incentive to manipulate the results of the general election. Consequently, the elections held under the supervision of 'Care-taker' governments in 1996, 2001 and 2008 were widely lauded as free and fair. However, on the basis of the Appellate Division of the Supreme Court's one-page long 'short order' declaring the provisions concerning the 'Care-taker' government unconstitutional, the government of BAL on 3 July 2011 used its overwhelming majority in the Parliament to pass the Constitution (Fifteenth Amendment) Act, 2011, which repealed the Chapter on 'Non-Party Care-taker Government' contained in the Constitution of Bangladesh. In doing so, the ruling party conveniently overlooked the recommendation of the court outlined in the very same 'short order' stressing the necessity of retaining the system of 'Care-taker' government, notwithstanding its unconstitutionality, for the supervision of the general elections scheduled for 2014 and 2019 respectively. The objective of this paper is to demonstrate that the Fifteenth amendment act was preferred to perpetuate the ruling party's grip on power as it facilitated the holding of a virtually voter-less and one-sided election in January 2014. The Parliament resultant of the 2014 election is not only devoid of any real opposition but is also subservient to the executive as it is the only parliament in the world where members of the opposition are also members of the executive branch. Finally, this paper puts forward a number of recommendations, including the restoration of the constitutional provisions concerning 'Non-Party Care-taker Government', so as to prevent Bangladesh from further sinking into the lap of tyranny, thereby bridging the gap between the government and governed- who had been deprived of their voting rights in the last election.

Session 3

Chair:

Eduardo Val
 UNESA

Discussant:

Enzo Bello
 Universidade Estácio de Sá

Brazilian judicial audiences and reputation: challenges to build an institutional identity

Presenter

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Presenting Co-Author

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Since theoretic reference of the Judicial Reputation Theory developed by Nuno Garoupa and Tom Ginsburg and by Brazilian judicial data analysis released by the National Council of Justice (Conselho Nacional de Justiça - CNJ), FGV DIREITO SP and FGV DIREITO RIO, this paper concerns about the Brazilian justice reputational

building ways. While the ordinary branches of Brazilian judiciary worries about a collective reputation building, the Brazilian Supreme Court is composed by eleven justices engaged to individual reputation building race at the cost of the collective reputation which result into a lack of institutional identity and under the society's disapproval. The research hypothesis is based on the recognition that even the judiciary as a whole is guided by a strong institutional influence aimed at promoting a collective reputation, in the case of the Brazilian Supreme Court both the organizational structure and the individual performance of ministers suggests another approach. We suggest that there is a prevalence of individual reputation often at the expense of the collective reputation. We will see that the procedural reforms of the last sixteen years also intensified the process of building a uniform and collectivization of decisions and judicial reputation, but it had no significant impact on the top body - Brazilian Supreme Court, which differs with its own procedural rules. The paper is organized in the following structure: 1. Introduction; 2. Judicial Reputation; 2.1; Individual Reputation; 2.2 Collective Reputation; 3. Procedural Law Reform and the incentives for a collective reputation; 4. The Brazilian Supreme Court and the Eleven Reputations; 5. Conclusions; 6. References.

MAID in Canada? Debating the Constitutionality of Canada's Medical Assistance in Dying Legislation

Presenter

Thomas McMorrow

University of Ontario Institute of Technology

In 2016, Parliament amended the Criminal Code of Canada, so that, under certain circumstances, it is lawful for medical professionals to act on an individual's request to terminate one's life. The legislation was passed subsequent to the Supreme Court's 2015 decision in *Carter v Canada*, which held that the existing blanket ban on voluntary euthanasia and assisted suicide was constitutionally invalid, because the relevant criminal provisions violated s. 7-- and could not be saved under s. 1-- of the Canadian Charter of Rights and Freedoms. The day the new law received royal assent, Julia Lamb and the British Columbia Civil Liberties Association (CCLA) challenged its validity. Their position (which the government refutes) is that the new legislation contravenes *Carter* and the Charter, due to the manner in which it restricts the class of persons eligible to receive "medical assistance in dying". Lamb and the BCCLA claim inter alia that although the new law is no longer a blanket ban, it still constitutes an absolute prohibition for those who are suffering intolerably from a grievous and irremediable medical condition but for whom death is not "reasonably foreseeable". In this paper, I discuss some of the jurisprudential and legislative history to the present case. Next I review arguments over the constitutional validity of Parliament's legislative response to *Carter*, while situating them in relation to a broader debate in Canada about the appropriate roles of the judiciary and the legislature in constitutional interpretation. I argue that beliefs about how law should govern medical assistance in dying bear a complex relationship to competing visions of Canadian constitutionalism.

Facial Challenges and the Fourth Amendment

Presenter

Alex Kreit

Thomas Jefferson School of Law

A basic principle of modern constitutional adjudication is that a "facial challenge" to a law or administrative policy is "the most difficult challenge to mount" and will succeed only if "the challenger [can] establish that no set of circumstances exists under which the Act would be valid." The rule rests on the premise that constitutional challenges fall into one of two categories: facial or as-applied challenges. An as-applied challenge is typically described as a narrow, fact-based affair involving a litigant who concedes that a statute, "even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances." Facial attacks, meanwhile, are said to be limited to laws that can "never be applied in a constitutional manner." Underneath this seemingly straightforward account, there is "sharp disagreement" among scholars about almost every aspect of facial and as-applied challenges-up to and including "the very meaning of the terms." But almost all agree that the distinction between facial and as-applied challenges is a "fundamental" feature of constitutional law. Until recently, however, the facial and as-applied challenges distinction has been almost entirely absent from Fourth Amendment jurisprudence. In some ways, this is not surprising. The vast majority of search and seizure cases involve an assessment of a single enforcement action-whether the police officer had sufficient cause to pull your car, for example. As a result, conventional wisdom long held that "facial invalidation is simply not all that relevant" to the Fourth Amendment since "[t]he most the Court can do in most cases is order the police not to search people or seize their belongings in a very particular factual situation." The idea that Fourth Amendment is exclusively the domain of "as-applied" challenges to executive action was upended in 2015 by the Supreme Court's decision in *City of Los Angeles v. Patel*. In *Patel*, the Court held a hotel inspection ordinance unconstitutional under the Fourth Amendment after finding that "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored." Beyond this pronouncement, however, *Patel* provides few answers as to how to apply the rules regarding facial and as-applied challenges in Fourth Amendment cases. Surprisingly, *Patel*'s treatment of facial and as-applied challenges has not yet generated much, if any, scholarly attention. Indeed, both before and after *Patel*, Fourth Amendment scholarship has largely ignored facial challenges rules and the handful of exceptions have addressed the issue only as an aside. Commentary on facial and as-applied challenges has similarly tended to ignore the Fourth Amendment. This paper aims to help fill this gap in the literature.

Session 4

How The North American and The Brazilian Executive Branches Act In A Governmental Crises

Presenter

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Although the US State and the Brazilian government are founded on Federalism, both of them do not have much in common in terms of their organization. This directly influences the way each of them faces

difficulties on a crisis. Therefore the performance of the Executive, when given responsibility for directing the actions of government to overcome the status quo of crises, must be attempted. Given the British experience on parliamentarism, the American Federalists sought a way to integrate their colonies without affecting their autonomy, controlling their political, administrative and commercial aspirations. In this context outcomes the separation of Executive, Legislative and Judicial Branches, not applying in an absolute way the system of checks and balances, defended by Madison. It is a completely new experience, which was not signed constitutionally, based on the control of the acts of parliamentarians and greater coordination between the powers, being led by the performance of the Executive Branch, which plays crucial role in the face of crises. The same can no longer be said about the Brazilian State about the respect to individual rights and the political-administrative structure of the federative entities. The separation of powers is given in the Constitution with no prediction of atypical functions. It turns out that, given the immaturity of its institutions, the relationship between the powers has occurred untimely, which ends up influencing the intensifying crisis in governance activity. With the appearance of emergency situations, the Executive Branch is called to overcome the crisis period. In Brazil, it is clear that the Executive doesn't have the same performance and isn't granted him deference or sufficient legitimacy to deal with the crisis. Looking erroneously in the Legislative and the Judicial Branches to achieve the means to overcome the crisis; on one side, the Legislative seeks solutions in abstract discussions, and on the other, the Judiciary is limited to the application of the rule as the interest of a popular majority. In the latter case, there is no representation before the crisis, in spite of the difficulty on understanding the Executive as a political institution and support their decisions at the administrative level. The Executive, unprovided of support and legitimacy, is setting up a table set of crises, since their duty to articulate the interests of all and promote the state development is forgotten among their representatives. Unequal forms of action of the US and Brazilian Branches directly influence the solution of crises brought on the statemanship. The absence of a powerful Executive that knows how to deal with crises is the differential between the Brazilian context of ongoing crises and the US. The Brazilian constituent in 1988 created high expectations in the State, which, before the outcome of any kind of crises, were left under frustration, contributing the undue weakening of the Executive Branch.

Political Conception of Justice in Democratic Institutions

Presenter

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Analyzing the "Political Liberalism", John Rawls describes the political conception of justice (justice as fairness) recognizes as a moral conception and in particular applies to the basic institutional structures of a constitutional democracy. The second feature is the presentation (this conception as a freestanding view) and notice it's expressed in the context of fundamental ideas included in the public political culture. Wherefore, Rawls acknowledge that justice as fairness rely on a political tradition of cooperation from one generation to the next and it has two fundamental ideas: a free and equal society as well as regulated by a political conception of justice. Besides, Adrian Vermeule identify the arrangements a constitutional democracy

should have in "Mechanisms of Democracy". He claims debates of large-scale institutional structures are inefficient since it is better to manage democracy by regulating marginal political conflicts and the cost to change the structures of an ongoing democracy is too high, thus he argues Law can and should provide mechanisms of democracy, small-scale devices including legal rules, voting rules and legislative rules. That would recast the institutional system over democratic values like impartiality, accountability, transparency and deliberation. In "Interpretation and Institutions", he urges that the early theories of interpretation are incomplete since they neglected two issues, how should certain institutions with their distinctive abilities and limitations interpret certain texts and dynamic effects consequences for public or private actors. Thus, the effort to show the current interpretation approach is indifferent to institutional issues. As we examine the Brazilian case it is remarkable several times the Brazilian government tried to accomplish their objective relying on large structural changes. In Brazil, e.g., it's ordinary the annexation of amendments to the constitution, since 1988 - currently constitution- there's already 96 amendments bringing instability to the structure of the democracy, whilst the American constitution there's only 15. Ergo, the changes into a political conception of justice among basic institutions as Rawls declared should rely over those small democratic mechanisms and the focusing on theories of interpretation which conceives about the institutional issues. Therefore, our goal is expound how these small-scale changes that cares about democratic institutions would be better in Brazilian situation than the currently method of large scale approaches. We urge that's more efficient for basic institutions evolve small-scale laws to cooperation -as Vermeule's thoughts - that large scale structure changes are ineffective and have insuperable cost to a coordinated and fair society, also could bring instability as the Brazilian case. Moreover, use these mechanism to anchieve the overlapping consensus of Rawls and try stabilish a equal and free society based on justice as fairness.

Constitutional law and legal culture in comparative perspectives: Asia and the Americas

In this age of globalization, when economic ties between Asia and the America are gaining strength and momentum, it becomes a necessity to study their legal cultures comparatively. This is especially important when developing economic relationships bring issues such as the rule of law and protection of human rights to the fore. This session examines legal development, constitutional law and legal cultures from the perspectives of both legal anthropology/sociology and comparative law. In particular, this session seeks to understand how political and historical paths, as well as global influences such as the universalization of human rights and democratic constitutional values, have shaped the formation and evolution of constitutional law and legal culture in countries in Asia and the Americas

Session 1

Chair/ Discussant

Edna raquel hogemann

UNESA

American Colonialism and Constitutional Redemption

Presenter

Seth Davis

University of California, Irvine School of Law

During the 2016 election season, Americans are debating what it would take to redeem the Constitution's promise of a "more Perfect Union" in a time of deep and stark disagreements about the nation's future. Despite the partisan rancor, most Americans share a faith in the Constitution's redemptive potential. Constitutional faith is the civic religion that shapes our constitutional law, theory, and politics and binds Americans as one nation, indivisible. This Essay is about what our faith forgets: The promise of a "more Perfect Union" of "We the People" is not redemptive for colonized peoples who did not consent to the Constitution but are subject to American power. It makes three contributions to constitutional law and theory by focusing upon the United States' colonial relationships with American Indians and Alaska Natives. First, this Essay makes the case that American colonialism poses a fundamental challenge to our constitutional faith. It traces the convergence of American constitutionalism and American colonialism in the concept of government power as a public trust, which is the foundation of federal plenary power over American Indians and Alaska Natives. Second, this Essay argues that the trust conception of constitutional law cannot solve the problem of redeeming American colonialism. Instead, the constitutional trust has reinforced the very power relations and ideology that Indian Nations challenge when they claim a right to national self-determination. Third, this Essay offers a viable alternative for redressing the wrongs of American colonialism through a common law constitutionalism that focuses upon Indian Nations' autonomy, not their dependence upon the United States. In looking to the common law of contract, property, and tort to reconstitute the law of American colonialism, this Essay offers a novel contribution to the emerging literature that reimagines constitutional law by reference to existing rules and norms from the common law.

Legal culture and legal equality in brazil

Presenter

Bruno Silva

UNESA

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The analysis of this current has its foundation on the 1988 Brazilian constitution. And the reason to do so, although it may seem arbitrary it actually is far from it. The new constitutional state founded in October 5th of 1988 marked the transition from a military dictatorship to a constitutional ruled state. The equality has a remarkable place in the Brazilian constitutional order as it is either deemed: a right (a fundamental right as a free translation of the usual designation used in Brazil) and an objective of the Federative Republic of Brazil. The equality as a right can be easily found on the 5th article of the Constitution under the expression "all persons are equal before the law". The equality as an objective is found on the 3rd article of the Constitution, item number III under the expression "reduce social and regional inequalities". Those "two equalities" are usually identified with formal equality and proportional equality. And the implications of both are great but it is not the purpose of this paper. We are here to talk about equality in law, and in order to be more specific, its operationalization in the juridical system. We can in a rather straight forward manner establish that the equality in law can be identified in two dimensions: the legislative activity and the judicial activity. The paper will only focus on the legislative activity. And thus, we are able to concentrate our efforts on finding in the written law (normative texts) just how the equality "is being treated" in Brazil. The hypothesis is that in Brazil the inequality established in the law, even though the Constitution. In the attempt to demonstrate this we will use the "special prison law" and show how people are treated in different manners by the law according to what we are choosing to call "social achievements". In order to enrich the discussion we will attempt to unveil this privilege which honors certain members of society through the cultural lens. The

hierarchy in the Brazilian society can be pointed out as culturally present no matter the historical reasons. And we will show how this transcends the day-to-day living to the so called rule of law affecting the possibility of legal equality.

Federalism vs Federalismo: not all the roads lead to Rome

Presenter

Fernanda Duarte

UNESA e INCT/InEAC/PROPI/UFF

Niterói, RJ

Presenting Co-Author

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This paper is part of our research project that has been going on for a couple of years in our research group called "Center for Legal Studies, Citizenship, Procedure and Discourse", located at Estácio de Sá University, Rio de Janeiro, Brazil. In order to illuminate the idea that legal systems cannot be translated/verted straightforwardly as if they were a mere lexicon translation challenge, we apply the semiolinguistic methodology of discourse analysis and the method of comparison by difference (this latter borrowed from Anthropology) to provide a description for native and/or theoretical categories of the Brazilian legal culture in contrast with American legal culture. We agree that there is much more about it that relates to meaning and understanding surpassing the linguistic problem. From the theoretical point of view our observations may be arranged in three sets of ideas: a) the understanding of Law as a set of local discourses and practices; b) the utility of the theoretical category "legal sensibilities" (GEERTZ, 1983); c) the recognition that culture interferes in socialization and social efficacy of Law when people translate legal categories. It is broadly said in Brazil that literal translations between legal concepts and categories of different legal systems are not only possible and but also feasible. For instance "judicial review" (controle de constitucionalidade in Portuguese) would be the same in American and Brazilian law, as if the words would only need a proper and accurate translation exercise to convey their proper meaning. However to show that this correspondence is tricky and dangerous we have been selecting different categories and putting them into description and analysis in the Brazilian and American legal cultures. Previously we have dealt with two other categories: equal protection vs. igualdade jurídica and due process of law vs. devido processo legal. This turn we have picked the category of federalism (federalismo in Portuguese). We believe this approach can work as a vaccine against uncritical transplantations of legal categories that ultimately become out of place with low capacity to interfere with reality and to shape behaviors that involve the enforcement of law.

Fearing the “Nicas”: Perceptions of Immigrants, Legal Attitudes, and Crime Control Policy in Costa Rica

Presenter

Mary Fran Malone
 University of New Hampshire

Do perceptions of immigrants shape legal attitudes and support for punitive crime control policy? To answer this question, this paper analyzes a prominent example of South-South migration: the Nicaraguan immigrant community in Costa Rica. Over the past two decades, Costa Rica has undergone extensive socioeconomic change, and Nicaraguans have been frequent scapegoats for the fears and worries generated by these changes. In industrialized countries, extant literature has examined the linkage between perceptions of marginalized socio-economic groups and public policy preferences, particularly crime and social welfare policy. This paper expands this line of research in two ways. First, I study the linkage between perceptions of immigrants and legal attitudes more broadly, such as support for civil liberties, support for vigilante justice, and the willingness to allow authorities to act on the margins of the law. Second, I examine an understudied case: Costa Rica. Costa Rica is a fascinating case, as it is a stable democracy, a middle-income country, and one of the oldest social welfare states in the hemisphere. Nicaraguan migration to Costa Rica is also a prime example of South-South migration. Thus, the case of Costa Rica allows us to examine perceptions of immigrants, and the impact of these perceptions, in a stable, peaceful, and prosperous democracy in the global South. Relying upon the Latin American Public Opinion Project's (LAPOP) 2014 national survey of Costa Rica (part of the AmericasBarometer survey), this paper empirically links perceptions of immigrants to legal attitudes and support for punitive crime control policy. Both of these topics are highly salient in Costa Rica today, as a spike in crime rates has led to heated political discussions about the best way to confront violent crime. Some policy proposals advocate granting the police greater discretionary power to confront suspected criminals, as well as implementing harsher sentences for convicted criminals. In public discourse, some have argued that criminals abuse their civil liberties and use them as a subterfuge for their criminal activities. These political debates take place against a broader backdrop of xenophobia, as Nicaraguan immigrants have been widely blamed for increases in crime. To understand the connections among perceptions of immigrants, legal attitudes, and support for punitive crime control measures, I use ordinal and binomial logistic regression to analyze this 2014 national survey. Preliminary evidence finds that respondents who perceive immigrants as economic threats are significantly more supportive of punitive crime control policies, more willing to allow police to act on the margins of the law, and more willing to sacrifice some civil liberties to fight crime.

"Living Well" practices : challenges for democracy and Law in Latin America/ Prácticas del Buen vivir: desafíos para la democracia y el derecho en América Latina

Presenter

Sandra Milena Gómez Santamaría
 University of Antioquia, Faculty of Law and Political Sciences

Work In Progress - Given the debates offered by the changing political scenarios in Latin America, specially related with constitutional reforms in Bolivia and Ecuador and also with the peace process in Colombia, this paper aims to explore which are the ideas included in the different "Living Well" practices and how they are

challenging democratic regimes in Latin America and the roles of law and legal cultures. As Colombia will be the center of this debate, the main focus for this work will be how some of this "Living Well" practices have been used by different social movements for including their claims in the Peace Agreement with FARC guerrilla group, even when we are in the middle of a difficult situation in regard with this post-conflict process. Among other aspects, this paper will be centered in the idea of "Living Well" is not just part of the indigenous agenda, but also of other groups that are in a close relation with them in Colombia. Even though, it seems the inclusion of the expression "Living Well" in the point 1 of the Land Reform is not a guarantee for understanding all the possible implications of this term and how it would impact other points of the Peace Agreement. Peasants, indigenous people and Afro groups have different considerations about what "Living Well" entails. So, as a first way to contrast these differences, having the map of the main ideas of "Living Well" in Latin America will open the possibilities, similarities and differences among them and their possible impacts in the Colombian sociopolitical context.

Courts and Judging in Asia and the Americas

This session broadly covers judicial issues in Asia and the Americas. The focus will be on work related to courts, judges and judging in these areas. Examples might include discussions of the political role of judging; challenges faced by judges in relation to judicial independency, democracy, governments or social groups; judicial impartiality; judicial behavior; the psychological aspect of judicial decision making amongst others. Papers dealing with current empirical researches conducted in these regions are particularly encouraged.

Session 1

Chair:

Rafael Mario Iorio Filho

Universidade Estácio de Sá e INCT-InEAC

Discussant:

Fernanda Duarte

UNESA e INCT/InEAC/PROPPI/UFF

Democratization and Judiciaries: A Comparative Perspective

Presenter

Po Jen Yap

University of Hong Kong

This paper critically examines the state of play in nine Asian jurisdictions, i.e. Bangladesh, Hong Kong, India, Malaysia, Pakistan, Singapore, South Korea, Taiwan, and Thailand; and it seeks to illuminate an interesting phenomenon. In jurisdictions like Hong Kong, Malaysia and Singapore where a dominant political party or coalition has remained in power since independence or decolonisation, their courts may formally superintend the electoral process, but in reality they do so at the fringes of the entity's political life. On the other hand, in dynamic democracies where there have been extended periods of competing political parties taking turns in office, their courts play a more central role in democratic consolidation. Such courts, as those found in India, South Korea, and Taiwan would ameliorate systemic inequalities in electoral systems and provide constitutional redress for vulnerable or unpopular groups that have been excluded from the voting process. But even then, successful courts in these dynamic democracies would attempt to be non-partisan arbiters between rivalling political parties and steer clear of overturning key electoral results or removing key politicians. Finally, we have fragile or unstable democracies where the armed forces are not under firm control of the civilian government and the country oscillates regularly between military and civilian rule. In these fragile democracies, Asian courts that get too close to the 'live wire of electoral politics' and become partisan tools that assist one political camp to dislodge its rivals, as the Constitutional Court of Thailand did, or pose existential threats to military interests, as the Supreme Court of Pakistan did under the stewardship of Chief Justice Iftikhar Muhammad Chaudhry, would only accelerate a political crisis that sends the country over the constitutional cliff. In these unstable democracies, prudent judges have preferred to insulate the Courts against political attacks (from the civilian government or the military) rather than engage in confrontational strong-form judicial review over the electoral process that antagonise political incumbents. This appears to be the path taken by the Supreme Court of Bangladesh (Appeals Division). My fundamental point is that all courts operate within political parameters and the task of scholars is to explain how these parameters can both empower or constrain courts.

The importance of Unanimity rule on Jury Decision Making: A new Challenge for the Jury System in Argentina

Presenter

Gustavo Letner

Council of Magistrates of the City of Buenos Aires
 Buenos Aires, Argentina

For much of its history, the American criminal jury has been required to reach unanimous verdicts. In 1972, in a pair of U.S. Supreme Court cases, the justices held that Sixth and Fourteenth Amendments did not require jury unanimity in state court jury trials. Social science research conducted on the impact of jury unanimity raises questions about the Justices's assumptions about how non-unanimous decision rules would affect the functioning of the jury. Recent certiorari petitions have pressed the Court to reconsider the jury unanimity issue in light of changing Sixth Amendment jurisprudence and the social science evidence. A plurality of the Court employed a functional rather than a historical test, and concluded that the prime functions of the jury would not be impaired if states required less-than unanimous jury verdicts. The available research shows that moving to majority verdicts and smaller jury sizes will come at the cost of reduced representativeness, accuracy, and predictability and a more limited role for minority voices. Citizens express a preference for larger unanimous juries in criminal trials. They believe that larger unanimous juries are more representative and more likely to render accurate results. The empirical evidence suggests that they are right. The Situation in Argentina: The jury in Argentina since 1853, its Constitution has stated in three sections that trials should be conducted with juries. Despite such clarity in its rules, the jury, at National level, is still an

outstanding debt. However, several provinces have established the jury trials. In 2005 the province of Cordoba adopted a mixed court system composed of two professional judges and eight lay judges. Then, Buenos Aires, Neuquen, Chaco y Rio Negro provinces adopted the classical jury system with some differences among them. One of those differences is the procedure used to reach verdicts. Chaco province has established the classical model of the common law: 12 jurors and unanimity for guilty and not guilty verdicts. On the other hand, Buenos Aires Province y Rio Negro have opted for majority verdicts for some cases and unanimity rule for others and Neuquen province requires majorities of 8/4 to deliver a guilty verdict and does not recognize the hung jury. My goal during the session is to show some statistics to illustrate how the unanimity rule has been applied in Argentina in its first years and demonstrate the implications that this rule has in the functioning of the jury system and why the majority rule should be abandoned. The current government has expressed its desire to establish the trial by jury at national level in the near future and therefore this new challenge should have to take into account the unanimity rule as a warranty of fair trial. I guess that was the way required by our Constitution.

Judicial Independence under Threat

Presenter

Menachem Hofnung

The Hebrew University of Jerusalem

Non-Presenting Co-Author

Mohammed Wattad

Zefat Academic College

When a selection of judges turns out to be a political issue? Is there a connection between court decisions and partisan political pressure to amend the nomination process? With the absence of written constitution and emergence of parliamentary system without checks and balances, the judicial branch in Israel was initially regarded as the weakest arm of government in Israel. The enactment of the Judges Act in 1953 anchored, formally, the principle of judicial independence and altered the method by which judges are being appointed to the bench, thus transferring such power from the elected Executive to a special committee composed of representatives of the Cabinet, the Knesset, the Judiciary and the Bar. With the changing nature of voting patterns and the formation of competitive elections and shaky coalitions in the 1980s, the court was frequently asked to intervene in political decisions. In a sense, petitions to the High Court of Justice became another tool for the parliamentary opposition and civil society to have their voice in the formation of public policy. This trend was enhanced following the enactment of the 1992 Basic Laws on human rights, and the consequent 1995 case whereby the Court interpreted these Basic Laws as granting the judiciary the power of judicial review. The Court's power of judicial review and legitimacy of its decisions have become issues of heated public debate. Since then, the process of appointing every single justice to the Court has not gone through without a very strict public and political scrutiny. We will ask whether the Judiciary really constitutes a third independent branch of government. This is so as one can witness continuous attempts to change the existing balance of power and limit the court from applying judicial doctrines and legal standards to executive and parliamentary decisions.

El oficio de juzgar y la traducción de los derechos humanos transnacionales en la Suprema Corte de Justicia mexicana. Estudio etnográfico sobre la práctica cotidiana del derecho en la Suprema Corte de Justicia de la Nación y su proceso de asimilación del derecho internacional de los derechos humanos

Presenter

Erika Bárcena Arévalo
CIESAS-CDMX

Beyond the conception of modern human rights as inherent to everyone for the mere fact of being a person, human rights are transnational ideas and their effectiveness is a prerogative of states. As a result, they must pass from its international production space to local contexts through a process of adaptation to local cultural forms. This process, called by Sally Engle Merry (2010) a << reformulation of human rights into vernacular >>, has often been approached from the experience of human rights activists and victims. However, there is a void in regards to how this reformulation is carried by the state courts. The Mexican Supreme Court, as a constitutional court, has been stronger at constitutional control of authority's acts than at developing rights. Moreover, international treaties had historically been "dead letter" in the Mexican legal practice, including those referred to human rights, because of the primacy of constitutional law. This has shaped dominant categories of perception and appreciation under which legal proceedings are solved in the Supreme Court. In June 2011 transnational human rights were explicitly incorporated as part of the Mexican constitution through a reform, and the process of incorporating them in everyday judicial practice at the Supreme Court is in course. After an ethnography research conducted for a year in the Mexican Supreme Court of Justice, I deliberate on the process of transnational human rights translation into vernacular and the internal dispute to establish the place of human rights in the juridical system, My hypothesis is that dominant categories of perception and appreciation are central in this process.

Current Legal Issues in Asia and the Americas

This session covers legal and social issues in Asia and the Americas. The focus will be on work related to current trends in these regions. Examples might include discussions of contemporary political or legal challenges faced by governments or social groups, analyses of emerging trends in legal theory as they are related to Asia or the Americas, and/or projects that concentrate on particular legal or social problems endemic to societies in either region. Papers dealing with issues of racial minorities, gender, or indigenous groups are particularly encouraged.

Session 1

Chair/Discussant:

Fernanda Duarte

UNESA e INCT/InEAC/PROPP/UFF

Brown v. Board of Education and the Symbolic Uses of Supreme Court Decisions

Presenter

Jeffrey Hockett
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American legal education is predicated upon the assumption that legal meaning is found within the opinions that accompany judicial rulings. The history of the United States Supreme Court's desegregation decision suggests that reality is more complicated than the conventional wisdom suggests. Indeed, the iconic status of *Brown v. Board of Education* (1954) was in significant measure a function of scholarly efforts to substitute a rationale – that the ruling was an attack upon the institution of white supremacy – for the Court's controversial social science-based opinion. Subsequent to *Brown*, scholars have contested the import of the ruling for constitutional controversies involving race. Conservative scholars tend to argue that a proper interpretation of this decision is one that is grounded in the color-blindness principle. By contrast, liberal intellectuals sometimes attempt to square *Brown* with the racial subordination principle – that government may not reinforce the subordinate status of a racial group but may employ racial classifications to aid the victims of discrimination. Certain considerations, however, reveal that the nature of this dispute is ideological rather than legal. The group terms in which *Brown* characterized the psychological harms of segregation contravened the individualistic premises of the color-blindness principle, while the narrow context of the judicial process prevented the justices from acknowledging the complex notion of social reality that informs the racial subordination principle. The upshot of these considerations is that the meaning of Supreme Court decisions is related to the efforts of scholars and political actors to use those decisions – especially iconic rulings – as powerful symbols in partisan battles.

Presenter

Animal Sacrifice and Religious Freedom in United States and in Brazil : The misconception of free exercise and Animal Rights

Lucia Frota Pestana de Aguiar Silva
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Animal Sacrifice and Religious Freedom in United States and in Brazil : The misconception of free exercise and Animal Rights C.R.N. 1 André Gustavo Corrêa de Andrade Lucia Frota Pestana de Aguiar Silva Reconciling freedom of religious expression with the rights of animals has been a challenge in the United States as well as in Brazil and the Americas. The discussion involves the valuation of constitutional rights while demonstrating the real need to address such conflict. Previous to the doctrines that defend the rights of the animals, this work aims to point the real need for freedom to limit religious practices. In 1993, the U.S. Supreme Court upheld a First Amendment religious free exercise challenge brought by a Florida Santería in *Church of Lukumi Babalu Aye v. City of Hialeah*. However, *Lukumi* may be the most misunderstood legal precedent in recent history. Animals feel pleasure and pain, experience emotions, remember, anticipate and learn. But, the range of rights that animals need are not always the same as the range of rights that humans need. Animals are not in need of equality before the law, freedom of speech, freedom of religion or fair taxation. However there are appropriate rights for animals. The religious civil liberties are guaranteed by the First Amendment to the United States Constitution: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise ; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. The "Free Exercise Clause" states that Congress cannot "prohibit the free exercise" of religious practices. The Supreme Court of the U.S. has consistently held, however, that the right to free exercise of religion is not absolute. For example, the First Amendment would protect one's belief in

animal sacrifice, but not the practice. The Fourteenth Amendment to the U.S. Constitution guarantees the religious civil rights. Whereas the First Amendment secures the free exercise of religion, section one of the Fourteenth Amendment prohibits discrimination, including on the basis of religion, by securing "the equal protection of the laws" for every person. In Brazil, the Brazilian Constitution, in its article 225 §1º, VII disciplines and protects the environment and also guarantee in the 5º article the freedom of religious manifestation. The basis of this work is to question religious freedom without any written line about its limits. Thinking about what Religion could give as an answer about animal sacrifice, we could compare exactly with everything Nazis did to Jews, and remember it's urgent also to learn and teach how to extend compassion to everyone in need and to fight against a holocaust wherever it appears. Theodor Adorno, wrote, "Auschwitz begins wherever someone looks at a slaughterhouse and thinks: they're only animals."

Presenter

Sons of a Minor God: Use of Reproductive Techniques by Single People and Gay Couples

Vera Lúcia Raposo
 University of Macao
 Macao

The progressive recognition of new family units (monoparental and same-sex families) as object of legal protection is the product of huge changes in society and in the way we understand our sexual choices. One of the consequences of this social mutation relates with the access to assisted reproductive techniques (ART). The access to ART is traditionally allowed only to married people (obviously of the opposite gender, since same-sex marriage is still the regular standard and the only option legally admitted in many parts of the world) or sometimes to heterosexual couples living in a de facto relationship. Nowadays some legal orders already allow the use of ART also by single people and gay couples. Brazil is a good example of this kind of solution, but in the remaining Latin-American countries, as well as in Asia, the restrictive solution takes precedence, even though in most cases there is no proper regulation regarding ART. However, all around the world most legal orders still impose restrictions based on the marital status and/or the sexual orientation. Such legal prohibitions are very problematic from a juridical perspective. In fact, it is recognised that reproduction is a fundamental right and a human right (instead of a mere aspiration or a futile whim), as it has been stated by various courts around the world, including the Inter-American Court of Human Rights. This conclusion also results from the interpretation of some rights expressly recognised in national Constitutions - namely the right to privacy and the right to create a family - as including reproduction on its scope of protection, leading to the conclusion that reproduction is actually a constitutionally protected right. If it is so, any restriction on the access to ART is actually limiting the fundamental right to reproduce, which can only be legally allowed in face of a particularly strong justification, such as the protection of the rights of others or of prominent constitutional values. In order to escape to constitutional criticism, the supporters of restrictive access to ART have invoked an apparently unbeatable argument: the protection of the future child. It is argued that the well-being of the child would be at stake and that its rights would be violated if the child was to be born in a monoparental family and especially in a same-sex family. However, this argument does not stand in front of a strict constitutional scrutiny: on the one hand because it is too simplistic to justify limitations to constitutionally protected fundamental rights; on the other hand because it is unclear, since until the present moment no one clarified the exact content of "the child's best interest". My paper intends to demonstrate that in fact they are mostly moral arguments, without juridical foundations, therefore, unable to ground limitations to reproductive rights.

Presenter

Affirmative action in the Supreme Court: United States and Brazil in comparative perspective

Presenter

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This study aims to analyze, in a comparative perspective, the recent case held in the United States Supreme Court FISHER v. UNIVERSITY OF TEXAS AT AUSTIN ET AL. The research aims to analyze the main arguments and categories in conflict in this trial, contrasting them with arguments and categories about racial issues and racial discrimination in Brazil, especially through the trial of ADPF 186 by Brazilian Supreme Court, which has decided on the constitutionality of racial quota system racial for reserve seats in Federal University of Brasília. The case FISHER v. UNIVERSITY OF TEXAS AT AUSTIN ET AL was only decided on June of 2016, although it has began in 2012, when Supreme Court announced that it would review the decision of Fifth Circuit Court of Appeals, which decided that "race" can be used as selection criteria for candidates by Federal University. In this trial review, the Court of Appels has decided that the criteria used by the University of Texas were constitutional because it followed the criteria previously defined for such programs in the trial of the case Grutter v. BOLLINGER. The following Supreme Court's decision was unexpected. After death of the conservative judge Anthony Scalia, and after the liberal judge Elena Kagan recused herself and left over four conservatives judges and three liberals judges to dismiss the case, it was expected that all conservatives voted against affirmative action. But the conservative Justice Anthony Kennedy finished voting with the Liberals for the constitutionality of affirmative action. The study aims to examine that decision using two theoretical references. Through the references of Brazilian and American social sciences that investigate the differences between race relations in both countries, especially the authors Antônio Sérgio Afonso Guimarães, Roberto Da Matta, Florestan Fernandes and Thula Pires, we intend to relate the different racial ideologies of both countries with the decisions in their respective constitutional courts. In addition, we use theoretical references of french semiolinguistics discour analysis, mainly based on Patrick Charaudeau works, to investigate the main discursive strategies and categories used in affirmative action trials in United States and Brazil, for to emphasize their differences and similarities. The work starts from the hypothesis that different racial ideologies in both countries, and their respective forms of racial prejudice, result in different legal cultures about affirmative actions, especially regarding to the concept of equality in both countries. Therefore, we investigate on decisions of Brazilian and North-american Supreme Courts, through discursive analysis of these trials, the relationship of different racial ideologies of both countries in the treatment given to affirmative action.

Presenter

Race and American Constitutional “Exceptionalism”

Presenter

Mark Graber

University of Maryland Carey School of Law
 Silver Spring, MD

American exceptionalism in American political development and in comparative constitutional law also share a common blind spot. The classical works on American political development dismiss or discount the substantial influence of race on the course of American politics. Contemporary works on comparative constitutional law similarly ignore or discount the powerful impact race has had on the American constitutional experience when discussing why the United States tends to have stronger free speech protections, fewer protections for positive rights, and less reliance on proportionality review than any other constitutional democracy. The American constitutional experience may diverge from the constitutional experiences of most constitutional democracies in large part because struggles over race in the United States push American free speech doctrine, protections for positive rights, and rights analysis more generally than struggles over the implementation of anti-fascist commitments push analogous constitutional practices in most other constitutional democracies. "Race and American Constitutional Exceptionalism" details and comments on the contemporary debate in comparative constitutionalism over American exceptionalism. Part I reviews the internal and external histories of American political and constitutional exceptionalism. The survey covers the originals of American exceptionalism in the thought of John Winthrop, Hector de Crevecoeur, and Alexis de Tocqueville, the twentieth century debate over why American politics failed to generate a substantial socialist movement, and the twenty-first debate over whether and why the United States is constitutionally exceptional, a regime whose constitutional practices differ in kind and degree from the constitutional practices of other Western constitutional democracies. Part II extends the study of American exceptionalism to constitutional politics. Focusing on the decision of the Supreme Court of the United States in *New York Times Co. v. Sullivan* (1964), often exhibit A in the case for American free speech exceptionalism, the text examines the failure of comparative scholars to see racial politics lurking behind non-racial doctrine and explores how the distinctive history of race and racial politics might inform comparative scholarship on American constitutional exceptionalism. *Sullivan*, other American constitutional practices that are similar structured by racial struggles, and analogous free speech cases decided in other constitutional democracies suggests that debates over American exceptionalism might progress by comparing the role of race and racial politics in American constitutional politics to the role of anti-fascist imperatives in many other constitutional democracies.

Presenter

Current legal issues in Asia and the Americas II: Access to Justice.

This session covers legal and social issues in Asia and the Americas. The focus will be on work discussing challenges to access to justice, considered broadly as the access that citizens have to dispute resolution tools of justice including but not limited to courts, but also to civil and administrative processes that might impact on protecting rights. Papers might include discussions on access to justice on its two dimensions: procedural access and also substantive justice. Examples dealing with issues of effective access to justice, reductions in costs, access to lawyers and access to courts and the the efficaciousness of a justice system in meeting the dispute resolution needs of its citizens are welcome.

Session 1

Chair/Discussant

Denis De Castro Halis

Faculty of Law / University of Macau

Attrition in Public Defenders Offices

Presenter

Valerio Bacak

Rutgers University

Presenting Co-Author

Sarah Lageson

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Anecdotal accounts of high turnover among public defenders due to occupational stress, limited institutional resources, and heavy workloads are abundant. But there is virtually no empirical evidence about the prevalence and causes of attrition in public defender offices. In this study, we use data collected by the Department of Justice in their 2007 Census of Public Defender Offices to understand macro-level forces that impact attrition rates between states. Census-level data include, among other relevant factors, information about caseload, case complexity, funding structures, and salaries. Additionally, we augment the Census data from 449 state-funded offices and 517 county-funded and local offices with a variety of state-level indicators. We then compare attrition rates between state-funded public defender systems and county-funded systems, along with a host of sociodemographic control variables. Preliminary findings suggest a strong effect of caseload on attrition rates, however, we also explore how broader forces shape attrition in public defender offices, including demographic, labor market and criminal justice attributes. Public defenders are essential to the fair administration of justice, yet law and society scholars have yet to empirically examine the institutional and organizational characteristics of this legal field. Our approach allows us to understand relationships between political, economic, and social indicators and the delivery of legal services to indigent defendants-and thereby identify areas most in need of reform.

The production of evidence in the Brazilian and North American civil procedure

Presenter

Carlos Nascimento

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The aim of this study present topical notions and comparisons of Brazilian and North American procedure systems, their structure and dynamics, analyzing this dialectic process some relevant points in those systems. The procedures of Brazil and US systems have some similarities, despite the predominance of North American Law

is the common law and equity, incorporating the culture of analysis of individual cases judged and in Brazilian law is the civil law romanistic origin which worships the legislated text, although we are currently living the meridian of jurisprudence. It is intended to highlight this work the similarities in the Brazilian and the American procedure, highlighting in this regard the special features of both systems, verifying preliminarily that both start with the application for adjudication exploited by initial, the defendant quote, contestation, evidence probative to the sentence. It also to make a comparative study whereas the North American modal is elastic, volatile multiforme, instrumental, enabling the parties to better prepare for the trial, with a minimum of judicial interference in preparatory phases, focusing on oral as opposed to the Brazilian systems. In the American procedure law all procedures undergo prior time research and survey evidency, called discovery. Save up evidence in case of alleged age or deponents disease avoiding clarify difficult point, limited to dispute the specific terms. Agreements are forced to lasting processes for long. These are the outlines of the US civil procedure where the conclusion will be made with an emphasis on demonstrating the efficiency and deficiency in both systems, especially regarding the speed the processes for effective adjudication.

Class Actions and Access to Justice: the impact of opt in/opt out and other models

Presenter

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This paper aims to analyse opt in/opt out and other models in the realm of class actions, and their impact on access to justice. The concern from facilitating access to justice is not new. To the contrary, more than four decades since the Florence Project led by Mauro Cappelletti, Bryant Garth and Nicolás Trocker appeared, several economic, judicial and social barriers to justice still exist, stronger in some countries than in others, specially when the focus in Latin America, compared to US and European countries. The expansion of class actions and other procedural vehicles for the protection of collective rights is believed to help reducing those barriers; but depending on the model adopted ("opt in", "opt out" or other models), such contribution could be more effective or not. In order to serve to this purpose, the paper will first analyze the arguments in favor and against each class action model focusing on the guarantee of due process of law, costs, number of individual claims about individual homogeneous rights and the concept of standing. Opt-in and opt-out are the most frequent models, but not the only ones that exist. There are, at least, six different models that will be discussed. The research will also look at empirical data in order to observe the impact of each model in accessing justice individually and collectively, comparing the evolution of the data through claims in different countries during 5 (five) decades. The paper concludes with a discussion about the impact of each model in guaranteeing or hindering access to justice.

The recognition of expertise and the decision making process in Classes Appeals from Small Claims Courts of the Federal Court of the 2nd Region (Brazil).

Presenter

Cristina Iorio
UNESA

Rio de Janeiro, Brazil

"The recognition of expertise and the decision making process in Classes Appeals from Small Claims Courts of the Federal Court of the 2nd Region (Rio de Janeiro, Espírito Santo - Brazil)" is the first result of my ongoing research project that is being conducted in the research group called "Center for Legal Studies, Citizenship, Procedure and Discourse", located at Estácio de Sá University, Rio de Janeiro, Brazil and aims to be my research project to my master in law dissertation. This research also dialogue to CRN1 concerns because try to reflects about some Brazilian legal cultural issues. Applying the Semiolinguistic Methodology of Discourse Analysis and the methods of deep interviews and participant observation, borrowed from Cultural Antropology, we aim to provide a description for native and /or theoretical categories of the Brazilian legal culture in order to illuminate the idea or hypothesis that there are a lot of judges practices or discourses do not provide by Law or Brazilian Code Civil Procedure, more specifically. In other words, this paper aims to describe the practice did not provide for in the Brazilian Code of Civil Procedure, but present among the judges who compose the Classes Appeals from Small Claims Courts of the Federal Court of the 2nd Region (Brazil) to consult, to build their votes or their decision making process, who is recognized among them as the holder of greater expertise in this legal area to assist in the construction of the vote or decision. That is what I intend to convey with my effort.

Presenter

Globalization of law and the common law influence in brazil

Presenter

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It is true that the phenomenon of globalization as an important integration process at the international level, reached not only the economy and politics, but the law and it is virtually impossible to imagine a single legal system that does not suffer influence of others. Brazil has traditionally adopts the civil law, however, especially since the entry into force of the new Civil Procedure Code in March 2016, it was noticed a strong influence of the common law system with the clear use of the binding vertical of the previous effect court used in the north American model. It remains to examine what is the meaning of this approach. Although it is not possible to state that the legal model adopted in Brazil changed, clearly we realize it is this strong influence, in order to contain mass demands, and this allows conclude that there are not necessarily judicial precedents, but called provisionses binding court to be examined in the light of the Constitutional Democratic State. Thus, it is imperative to conclude that a move towards hybrid legal system and, precisely because of these strong influences of the common law system, it can no longer say, exhaustively, that Brazil adopts the civil law system. Incidentally, stagnate legal systems is no longer a good understanding for the procedural doctrine, since the systems suffer mutual influences. Whereas the country experiences a Constitutional Democratic State concerned to meet the

rights and fundamental guarantees provided in the Constitution, it is concluded that the binding legal provisionses system, if carefully and properly employed, in order to meet the legal equality of parts, legal certainty and predictability, is an important means to contain the excessive number of lawsuits and mainly contributes to compliance with the principles of speed and effectiveness of the process in line with the access to justice, to ensure a process fair. The use of a dialectical methodology enables an analysis of judicial provisionses and its compatibility with the principles and guarantees in the context of the constitutional democratic state, from the placement of scholars exponents which are divided on admission of these mechanisms serve mainly to equality legal and as necessary instruments for mass demands for restraint, given that in Brazil, according to a recent survey by the National Council of Justice, there are, on average, over one hundred and five million cases. Others worry about the perfect service to principles and guarantees, visualizing possible offenses, in particular the principles of the contradictory and full defense, besides the very equality. In short, this study is justified by the need to observe the effects of globalization on law, the mutual influences of the systems. The theme enables broad and indispensable reflection in the current context of the Brazilian legal system.

Processes of decolonization towards the strengthening of citizenship and the (re)construction of Human Rights in Latin America

Pannel Session

Since the 15th century there has been a process of growing colonization of traditional peoples by Modern European States in "our Americas". The 18th and 19th centuries model of Liberal Constitutionalism reinforced the process of economic, political and cultural capitalist domination, through the legal and political legitimation of a Constitucional Rule of Law. Nowadays, it persists under the clothes of the coloniality of power, being and knowledge. This has imposed a reduced and surveilled democracy that has developed a bureaucratic State unable to root a culture of values constitutive of a participatory citizenship. The forced transplants of neoliberal models turned human rights into formal structures and changed its meanings. This panel intends to contribute through interdisciplinary studies to rescue the authentic human rights of our peoples, focusing the regional identity and the reconstruction of an original and inclusive model of Politics and Law in Latin America.

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