

CARDOZO/COLUMBIA COLLOQUIUM

ON

ILLIBERAL CONSTITUTIONALISM AND THE FUTURE OF CONSTITUTIONAL DEMOCRACY

Spring Semester 2020

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Together with Professor Jamal Greene (Columbia University Law School) and

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In the 1990's, after the fall of the Soviet Union, liberal constitutionalism going hand in hand with a global expansion of capitalism and a vastly increased protection of a widening array of fundamental individual rights seemed to be spreading worldwide. Liberal constitutionalism is committed to "checks and balances" and more specifically to the following four imperatives: 1) limitations on the powers of government; 2) adherence to the rule of law; 3) protection of fundamental rights; and 4) safeguarding the essentials of democracy. During the past decades, however, as discontents over globalization have multiplied, liberal constitutionalism has come under increasing attacks. On the one hand, in certain countries, such as China, Egypt and Venezuela, the trend has been squarely toward consolidation of anti-democratic authoritarianism. In other countries, on the other hand, liberal constitutionalism has given way to illiberalism or liberal conceptions and interpretations of the constitution have been challenged by illiberal ones. Thus, for example, Hungary replaced its liberal constitution by a new illiberal one in 2012. At the same time, in countries such as the US and some European countries, women and LGBTQ rights have become increasingly pitted against freedom of religion and discrimination based on religion claims.

Illiberal constitutionalism, often associated with populism, has targeted--in the words of Viktor Orban, Hungary's prime minister and one of its foremost champions-- what it casts as liberal constitutionalism's "permissive individualism", "ruthless capitalism", and "emphasis on checks and balances". In contrast, illiberal constitutionalism, emphasizes national pride, traditional culture, the majority or mainstream religion, and family values. Although illiberal constitutionalism has been attacked as a foil for, or precursor to, populist authoritarianism, its defenders argue that it can satisfy the essentials of constitutionalism just as its liberal counterpart can. For its advocates, illiberal constitutionalism embodies superior values than those of its liberal counterpart and is more responsive to the needs and aspirations of the people than those of the polity's elites. illiberal populist constitutional democrats can insist that they adhere to constitutional essentials just as their liberal counterparts do.

Illiberal constitutional democracy can in principle adhere to the rule of law; afford protection to fundamental rights--albeit interpreted consistent with an ideology based on "traditional" values as opposed to one grounded on permissive individualistic morality; and adhere to (populist) democracy.

Moreover, whereas illiberal democracy rejects liberal “checks and balances”, it need not therefore fail to impose limitations on the powers of government. Indeed, the illiberal democrat, in sharp contrast to the authoritarian ruler who eschews elections or rigs them, can point to direct control of the governors’ powers by the people through periodic elections—as has been thus far the case in countries such as Hungary and Poland.

The rise of illiberal constitutionalism poses several crucial questions regarding the future of constitutional democracy. Does the clash between illiberal and liberal constitutionalism boil down to an ideological confrontation over fundamental values—a veritable *Kulturkampf* pitting a populist right (but also plausibly an anti-*status quo* left) against an elite dominated vision—that remains well within the precincts of constitutional democracy? Have globalization and its economic, social, political and ideological consequences undermined the nation-state which some argue remains the *sine qua non* foundation of constitutionalism? And if that were the case, would illiberal constitutionalism cause a swing back of the pendulum or prove the best means to preserve constitutionalism against increasingly daunting challenges? Or, on the contrary, is illiberal constitutionalism but an intermittent stage of, or a disguise for, a full transition to authoritarian populism or eventually even to authoritarianism *tout court*? If true constitutionalism is inextricably tied to liberalism, can proponents of liberal constitutionalism mount a principled and convincing defense against illiberal constitutionalism and associated populisms of the left or the right? Do populisms of the right or those of the left pose greater threats to constitutional democracy? How do social media impact the struggle between liberal and illiberal discourse? Does social media displace the role and the impact of a democratic press? How does the use of social media disrupt democratic practices?

One of the notable recent developments is that proponents of illiberal values and visions of the constitution have appropriated the vocabulary and the rhetoric of liberal constitutionalism for use against the latter, and in many cases for countering liberalism seemingly from within. Accordingly, certain momentous changes have occurred in the approach to fundamental rights cases. In past decades, there had been a very significant expansion of civil liberties in cases pitting the individual against the state. In more recent times, in contrast, a backlash against maintenance or expansion of liberal rights has been often accompanied by a shift toward conflicts between fundamental rights. For example, the freedom of religion right of one individual is pitted against women’s right to equality; or the freedom of speech right of a baker is set against LGBTQ persons’ rights against discrimination. Moreover, those challenging established liberal rights have increasingly cast their claims in liberal garb. Are claims against expanding liberal rights a threat to, or a needed recalibration of, constitutional democracy? Are liberal and illiberal conceptions of fundamental rights equally compatible with the flourishing of constitutionalism? Does a shift from a liberal to an illiberal vindication of fundamental rights ultimately threaten constitutional democracy? Would constitutional democracy be best served by seeking a balance between liberal and illiberal conceptions of fundamental rights?

Another feature of many illiberal constitutional regimes is the challenge of constitutional adjudicators as anti-majoritarian actors and as authoritative interpreters of the constitution. Tellingly, in both Hungary and Poland the powers of constitutional courts and the validity of their precedents have been drastically curtailed. Are the illiberal attacks on courts qualitatively different than similar periodic attacks within the ambit of liberal democracies?

The Colloquium will present a wide variety of perspectives on the above issues and others related to them through weekly presentations of original papers by an international and interdisciplinary group of leading scholars engaging in groundbreaking work. Papers will be circulated in advance, and each week's presenter will discuss his/her contribution with the conveners and student and other participants at the Colloquium.

Colloquium Speakers:

January 23: Professor Saskia Sassen (Sociology, Columbia University) (at Cardozo)

Saskia Sassen is the Robert S. Lynd Professor of Sociology and Member of the Committee on Global Thought, Columbia University. She is the author of several books, including *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008) and *A Sociology of Globalization* (W.W. Norton 2007). Other recent books are the 3rd. fully updated *Cities in a World Economy* (Sage 2006), the edited *Deciphering the Global* (Routledge 2007), and the co-edited *Digital Formations: New Architectures for Global Order* (Princeton University Press 2005). She has just completed for UNESCO a five-year project on sustainable human settlement with a network of researchers and activists in over 30 countries; it is published as one of the volumes of the [Encyclopedia of Life Support Systems](#) (Oxford, UK: EOLSS Publishers). The *Global City* came out in a new fully updated edition in 2001. Her books are translated into twenty-one languages. She has received several honors and awards, most recently a doctor honoris causa from Delft University (Netherlands) and from DePaul University USA). She serves on several editorial boards and is an advisor to several international bodies. She is a member of the Council on Foreign Relations and the National Academy of Sciences Panel on Cities and has chaired the Information Technology and International Cooperation Committee of the Social Science Research Council (USA). She has written for *The Guardian*, *The New York Times*, *Le Monde*, *the International Herald Tribune*, *Newsweek International*, *Vanguardia*, *Clarín*, *the Financial Times*, among others, and contributes regularly to www.OpenDemocracy.net and *The Huffington Post*.

January 30: Professor Nathan Brown (Political Science and International Affairs; Director, Middle East Studies Program, George Washington University) (at Columbia)

Nathan Brown teaches courses on Middle Eastern politics as well as more general courses on comparative politics and international relations. In 2013-2015, Dr. Brown was president of the Middle East Studies Association, the academic association for scholars studying the region. In 2013, he was named a Guggenheim Fellow; four years earlier, he was named a Carnegie Scholar by the Carnegie Corporation of New York. For the 2009–2010 academic year, he was a fellow at

the Woodrow Wilson International Center for Scholars. His previous research was funded by the United States Institute of Peace and two Fulbright fellowships. In addition to his academic work, Brown serves on the board of trustees at the American University in Cairo. He is also nonresident senior fellow at the Carnegie Endowment for International Peace. His recent publications include: [When Victory Is Not an Option: Islamist Movements in Arab Politics](#) (Cornell University Press, 2012); [Arguing Islam after the Revival of Arab Politics](#), (Oxford University Press, 2016).

February 6: Professor Jan-Werner Müller (Political Science, Princeton University) (at Cardozo)

Jan-Werner Müller He has been a Member of the School of Historical Studies, Institute of Advanced Study, Princeton, and has also taught as a visiting professor at the Ecole des Hautes Etudes en Sciences Sociales, Paris, the Ludwig Maximilians-Universität in Munich, the Humboldt Universität in Berlin, and the Institut d'Etudes Politiques, Paris. He is the author of *Another Country: German Intellectuals, Unification and National Identity* (Yale UP, 2000; Chinese translation), *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (Yale UP, 2003; German, French, Japanese, Greek, and Chinese translations); *What is Populism?* (University of Pennsylvania Press 2016) (translated into 20 languages). His public affairs commentary and essays have appeared in the *London Review of Books*, the *New York Review of Books*, *Foreign Affairs*, *The Guardian*, the *New York Times*, and *Project Syndicate*.

February 13: Professor Przemyslaw Tacik (Philosophy and Political Science, Institute of European Studies, Jagiellonian University in Kraków, Poland) (at Columbia)

Przemyslaw Tacik, holds a PhD in philosophy (2014) and in law (2016). He has been a visiting scholar at the SUNY at Buffalo, Université de Nice, Universität Heidelberg, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Universidade de Lisboa, Paris Lodron, Universität Salzburg and Université Paris 1 – Panthéon Sorbonne. He has authored three books in Polish: *Sociology of Zygmunt Bauman* (2012), *Liberty of Lights. Edmond Jabès and Jewish Philosophy of Modernity* (2015, English translation to be published by Peter Lang in 2019) and *The Accession of the European Union to the European Convention on Human Rights* (2017), as well as over 30 articles in English and Polish. His interest include

international law, human rights, animal studies, critical theory and contemporary philosophy.

February 20: Professor Manuel Cepeda (Law, Former Chief Justice of the Constitutional Court of Colombia) (at Cardozo)

Manuel José Cepeda Espinosa served as a judge on the Constitutional Court of Colombia from 2001 to 2009 and was president of the Court from June 2005 to April 2006. After his term ended, he has combined academic activities with other engagements. He was a member of the technical negotiation team on Transitional Justice in the peace process with FARC. He was the President of the International Association of Constitutional Law (2014-2018). From 1987 to 1990, he served as presidential advisor for legal affairs to Colombian President Virgilio Barco Vargas. From 1990 to 1991, he was advisor to Colombian President César Gaviria Trujillo for the Constituent Assembly of Colombia. From 1993 to 1995, he was Ambassador of Colombia to UNESCO and thereafter to the Helvetic Confederation (1995-1996). He served as Dean of the Universidad de los Andes Law School from 1996 to 2000. The author of several constitutional law books, he graduated Magna Cum Laude from Universidad de los Andes in 1986 and received his Master of Laws from Harvard Law School in 1987. In 1993, he received the Order of Boyacá from the President of Colombia.

February 27: Professor Sionaidh Douglas-Scott (Queen Mary University Law School, London and Oxford University) (at Columbia)

Professor Douglas-Scott joined Queen Mary in September 2015 as Anniversary Chair in Law. Previously she was Professor of European and Human Rights law at the University of Oxford. She retains a link with Oxford as honorary research fellow at Lady Margaret Hall, Oxford. Professor Douglas-Scott specializes in public law (including comparative constitutional law), human rights and legal and social theory. Her publications include: *Constitutional Law of the European Union*, the *Research Handbook on EU Law and Human Rights*, and *Law After Modernity*, which was nominated for the Socio-Legal Book prize, and explores many issues of pluralism, justice and human rights. Her work also has clear practical dimensions and she was twice special legal advisor to the *Scottish Parliament* (then) European and External Relations committee Inquiry into 'Brexit and its consequences' from 2015-2017, and is also a member of the *Scottish Parliament Panel of Experts* regarding the UK's decision to leave the EU. She was awarded a major Leverhulme research fellowship (2018–2021) to work on a project on *Brexit and British constitutional unsettlement*. She has held visiting posts at various institutions in Europe and the US, including since 1993, she has co-taught comparative US and European human rights law with Justice Anthony Kennedy of the US Supreme Court. In March 2019, she was awarded an [honorary doctorate from the University of Utrecht](#).

March 5: Professor Seyla Benhabib (Philosophy and Political Science, Yale; Visiting Professor, Columbia Law School) (at Cardozo)

Seyla Benhabib is the Eugene Meyer Professor of Political Science and Philosophy at Yale University and was Director of the Program in *Ethics, Politics and Economics* (2002-2008). Professor Benhabib was the President of the Eastern Division of the American Philosophical Association in 2006-07, a Fellow at the *Wissenschaftskolleg* in Berlin in 2009, at the NYU Straus Institute for the Advanced Study of Law and Justice in Spring 2012, and at the German Marshall Fund's Transatlantic Academy in Washington DC in Spring 2013. In 2009, she received the [Ernst Bloch prize](#) for her contributions to cultural dialogue in a global civilization and in May 2012, the [Leopold Lucas Prize](#) of the Evangelical Academy of Tübingen. She holds honorary degrees from the Humanistic University in Utrecht in 2004, the University of Valencia in November 2010 and from Bogazici University in May 2012. She received a Guggenheim grant during 2010-2011 for her work on sovereignty and international law. Professor Benhabib was awarded the [Meister Eckhart Prize of the Identity Foundation and the University of Cologne](#) in May 2014 for her contributions of contemporary thought. Her books include: *Critique, Norm and Utopia. A Study of the Normative Foundations of Critical Theory* (1986); *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (1992; winner of the National Educational Association's best book of the year award); *Dignity in Adversity. Human Rights in Troubled Times* (Polity Press, 2011); *Equality and Difference. Human Dignity and Popular Sovereignty in the Mirror of Political Modernity* (Lucas prize Lecture in English and German: Mohr Siebeck Publishers, 2013) and [The Democratic Disconnect. Citizenship and Accountability in the Transatlantic Community](#), with David Cameron et. al. (Transatlantic Academy, Washington DC, 2013).

March 12: Professor Andras Sajó (Law, Central European University, Former Vice President, European Court of Human Rights) (at Columbia)

Andras Sajó, a judge at the European Court of Human Rights from 2008 to 2017, is University Professor at CEU where he was the founding dean of Legal Studies. He has been extensively involved in legal drafting throughout Eastern Europe. In addition, he participated and/or advised in drafting the Ukrainian, Georgian, and South African constitutions. He served as Counsel to the President of the Republic of Hungary (1991-1992) and chaired the Media Codification Committee of the Hungarian Government (1994). He also was the principal draftsman of the Environment Code for the Hungarian Parliament (1991-1992), as well as the founder and speaker of the Hungarian League for the Abolition of the Death Penalty. He has also served as Deputy Chair of the National Deregulation Board of Hungary.

He is a member of the American Law Institute (1997) and the Hungarian Academy of Sciences (1995). He has been a visiting Professor at Harvard, the U. of Chicago, Columbia as well as a recurring Visiting Professor at Cardozo and NYU. He also held many positions in public service: Chair, Broadcasting Drafting Commission, Hungary (1994); Consultant, World Bank (1993-1994, 1992, 1990); Consultant Environmental Policy & Management, World Bank Project in Russia (1991-1992); Consultant, United Nations Development Program (1989) In 1986, he received the Hungarian Academy of Sciences Book Award, and in 1993, he delivered The Blackstone Lecture at Oxford University. His publications include: *Constitutional Sentiments* (Yale University Press 2011) *Comparative Constitutionalism* (with Dorsen, Rosenfeld, Baer & Mancini) (3rd edition Thomson West 2016); *The Constitution of Freedom*, (Oxford University Press, 2017) (with Renata Uitz); *Oxford Handbook of Comparative Constitutional Law* (coedited with Michel Rosenfeld) (Oxford University Press 2012).

March 19: Columbia Spring Break. Cardozo Students Meeting with Professor Rosenfeld

March 26: Professor Marina Calloni (Sociology, University of Milano-Bicocca in Milan) (at Cardozo)

Marina Calloni: since 2002 is full professor in social and political philosophy at the Department of Sociology and Social Research, University of Milano-Bicocca in Milan. She is deputy president of the Italian Society of Political Philosophy. She is presently the Alexander Bodini Fellow in *Transitions from Globalism to Nationalism and Populism* at The Italian Academy for Advanced Studies in America, Columbia University. She has a Ph.D. in Philosophy (University of Pavia) and a Ph.D. in Social and Political Science (European University Institute in Florence). She was a research fellow at the University of Frankfurt under J. Habermas and a senior researcher and director of the International Network on Research on Gender at the London School of Economics. She was a visiting professor at the Universities of Bremen, Vienna, Lugano, Kurume. She earned a Fulbright Distinguished Chair at the University of Notre Dame (USA). Areas of Interest include: social and political philosophy; democracy, citizenship and representation; conflicts and humanitarianism; human rights and fundamental freedoms; critical theory of society; gender issues; critique of violence; international research networks and cross-border co-operation. Recent publications include: *Women, Minorities, Populism* in: A. Vajpeyi, V. Kaul (eds.), *Minorities and Populism. Comparative Perspectives from India and Europe*, London: Springer, 2019; *Southern Europe: Gender Studies and Institutions in the Euro-Mediterranean Region* in B. Kortendiek, B. Riegraf, K. Sabisch (eds.), *Handbuch Interdisziplinäre Geschlechterforschung*, Wiesbaden: Springer, 2019, vol. 2, pp. 1547-1558; *Intersectionality and Women's Human Rights: From Social Criticism to the Creation of Capabilities* in: E. H. Oleksy, A. M. Różalska and M. M. Wojtaszek (eds.), *The Personal of the Political: Transgenerational Dialogues in Contemporary European Feminisms*, Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2015, pp. 65-85.

April 2: Professor Samuel Moyn (Jurisprudence and History, Yale Law School) (at Columbia)

Samuel Moyn is Henry R. Luce Professor of Jurisprudence at Yale Law School and a Professor of History at Yale University. He has written several books in his fields of European intellectual history and human rights history, including *The Last Utopia: Human Rights in History* (2010), and edited or coedited a number of others. His most recent books are *Christian Human Rights* (2015), based on Mellon Distinguished Lectures at the University of Pennsylvania in fall 2014, and *Not Enough: Human Rights in an Unequal World* (2018). Currently he is working on a new book on the origins of humane war for Farrar, Straus, and Giroux. Over the years he has written in venues such as *Boston Review*, the *Chronicle of Higher Education*, *Dissent*, *The Nation*, *The New Republic*, the *New York Times*, and the *Wall Street Journal*.

April 7 (Tuesday) and Academic Thursday at Cardozo. Cardozo Students Meeting with Professor Rosenfeld

April 9 and 16 Cardozo Break. No Meetings for Cardozo Students

April 23: Professor Ratna Kapur (Law, Queen Mary University London) (at Cardozo)

Ratna Kapur is Professor of Law at Queen Mary University and Senior Core Faculty at the International Global Law and Policy Institute, Harvard Law School. She was previously a professor at Jindal Global Law School in India. She has written extensively on issues of human rights, with a specific focus on women's rights, the rights of migrants, sex workers, and religious minorities. She has also written about various aspects of Indian Constitutional law, in particular, the politics of secularism, the right to religious freedom, and equality. Her current research interest is on developing a critique of freedom in human rights law and exploring other non-liberal emancipatory possibilities. Her publications include *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Press, 2018); *Makeshift Migrants and Law: Gender, Belonging and Postcolonial Anxieties* (Routledge, Taylor and Francis Group, 2010); *Erotic Justice: Law and the New Politics of Postcolonialism* (Taylor and Francis, Cavendish: London, 2005; Permanent Black: New Delhi, 2005); *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law*, (co-authored) (Oxford University Press, 1999); *Subversive Sites: Feminist Engagements with Law in India* (co-authored) (Sage, 1996; paperback 1999; web edition 2018).

