

Abstracts for March workshop ‘Courts and Regulation’

Panel I: Judicial activism without political transformations?

(Un)intended effects of selected judicial activism in an instable political context: the Constitutional Court of Turkey

Silvia von Steinsdorff, LSI, Humboldt University

Established in the aftermath of the first military intervention in Turkey in 1960, the Constitutional Court of Turkey (CCT) has ever since strongly impacted the Turkish rule of law system as well as politics and society at large under constantly changing political preconditions. Despite repeated episodes of institutional near-death experience, it succeeded in consolidating its role as an independent and oftentimes activist court. Compared to other European constitutional courts, though, the CCT did not develop a similar reputation as a determined advocate of fundamental rights and democratic liberalization. The presentation analyses this lack of transformative power from an interdisciplinary perspective, focusing on the court’s decision-making process and the constitutional reasoning in some of its key rulings.

The Brexit Decisions from a Systems Theory Perspective: Judicial Conservatism in Action

John Paterson, University of Aberdeen

The relationship between the courts and the executive in the UK has become increasingly uneasy in recent years, not least as a consequence of the Human Rights Act 1998 but perhaps most dramatically in the context of the apparent constitutional confusion that followed the Brexit referendum. With the popular press labelling the judges in one Brexit challenge “enemies of the people” and the Prime Minister openly disagreeing with the full bench of the Supreme Court in another, it would be tempting to believe that judicial activism is thriving in the UK. Viewing the Brexit court decisions through the lenses of systems theory, however, reveals a quite different picture. Far from confirming judicial activism, such an analysis suggests, if anything, a rather conservative judiciary concerned with constitutional proprieties and a desire to do no more than remind the executive of what the UK constitution (for all its flexibility and occasional vagueness) actually means.

Panel II: Judicial activism for national security in action

Courts in times of crises: Lost in the (common) law cycle? The case of the Covid Pandemic'

Anna-Bettina Kaiser, Humboldt University

The German state, the federal level as well as the Länder level, has adopted numerous measures to fight the Covid pandemic. The measures that are certainly demanding most from the general public are the massive restrictions of fundamental rights, such as the right to move freely, the right to a profession, which is affected by the lockdown of stores and restaurants, and not least the right to peaceful assembly (Article 8). Most of these measures have been challenged before the administrative courts and the courts have so far handed down more than 1000 decisions on them. In a few eye-catching judgments, some courts have reversed some of the measures as disproportionate. Most of the cases have however remained unsuccessful. As a consequence, the courts have increasingly come under attack. This presentation asks whether these criticisms are fair and justified. Have the courts been too lenient in the crisis, as the (Common) Law Cycle Theory would suggest?

Domestic Courts and International Climate Change Law: What Does the Law Say?

Anna-Julia Saiger, Humboldt University

Courts, above all domestic courts, have become a well-known avenue for the pursuit of climate mitigation measures. All over the globe the number of cases increases at an ever-faster pace and scholarly accounts of the role of courts are quick to follow. However, legal approaches to the role of courts are yet to be developed. This presentation aims at filling this gap considering the latest developments in international law. With the 2015 Paris Agreement, the international community adopted a so-called 'bottom-up approach' to international obligations on climate mitigation. This legal architecture heavily relies upon national law. Domestic courts fulfil an important hinge function between the two legal orders. However, they do not always enhance climate obligations ('courts as climate actors'), but rather integrate other domestic actors into the decision-making process. A context-sensitive comparative approach is needed to assess the role of courts – and, indeed, their legal function in international climate change law.

Judicial Deference and Judicial Activism in UK National Security Cases

Jessie Blackburn, Durham University

Historically, national security cases have been characterised more by judicial deference than by judicial activism. This is because national security is traditionally seen to be a facet of government activity that is exclusively within the purview of the executive branch because of its unique knowledge and understanding of the issues. However, in recent years, an element of judicial activism has begun to creep into national security cases. One way that UK courts have sought to reconcile this is through greater access to the knowledge of accountability mechanisms designed to review national security, in particular, the Independent Reviewer of Terrorism Legislation, who has unlimited access to secret material, including that held by the security and intelligence agencies. This paper assesses cases that reference the Independent Reviewer to interrogate the tension between judicial deference and judicial activism in the UK and to understand how independent experts might contribute to activist judicial decision-making.

Panel III: New forms of judicial activism and restraint

The Rule of Law and Public Diplomacy: A Case Study on Hungary

Etienne Hanelt, University of Oxford

Hungary presents the most serious recent case of democratic and rule of law backsliding in the world (Lührmann et al. 2020) and has become a 'prime example of a competitive autocracy' (Way and Levitsky 2019). Nevertheless, Hungary has mostly avoided serious consequences from the European Union. In 2015, when conflicts with the European Union intensified, Hungary launched an official government news website (abouthungary.hu) run by an international spokesperson from the Prime Minister's Office. Abouthungary publishes articles predominantly in English and sometimes in German to reach an international audience. Based on a unique dataset obtained by mining abouthungary, this paper explores issue-framing and agenda-setting in rule of law conflicts with the European Union over time. This is complemented with an analysis of select Twitter accounts to provide insights into the dissemination of government information

Judicial Activism from the Bottom-Up: a socio-legal account of access to health care via courts in Brazil

Fernanda Farina, University of Oxford

Judicial activism is often looked at through the lenses of Constitutional and Supreme Courts. However, lower court judges are an essential part of understanding the increase of judicial power throughout the world. My research looks at judicial activism from the Brazilian perspective. By exploring what factors influence judicial decision-making in claims requesting access to health care, I offer a wider, socio-legal account of judicial activism in the country. The result of my in-depth qualitative study about health care litigation in Brazil points to the importance of understanding not only judicial activism in all levels of the Judiciary – particularly in the first degree - but especially the sociological factors which underpin judicial decision making. I suggest that judges' distrust in other public institutions, added to a sense of personal empowerment and empathy toward the litigants fuels judge's disposition to grant requests for drugs, treatments and medical devices not covered by the health care system.

Panel IV: Regulating 'in the shadow' of judicial review?

Drought and water scarcity management policy in England & Wales – current failings and the potential of civic innovation

Kevin Grecksch, University of Oxford

Drought and water scarcity management in England and Wales takes place in a narrow, confined governance space, it is to a large extent reactive rather than proactive, and it lacks the inclusion of vital stakeholders and their knowledge. This presentation will deliver an empirically based critique of current drought and water scarcity management policy in England and Wales and also propose a way to re-invigorate the drought and water scarcity management discourse in England and Wales. It is guided by questions of how drought and water scarcity management is currently done, who is involved (or not) and, foremost, what is the problem with current English and Welsh drought and water scarcity management. Moreover, the presentation will also discuss the question of what can be done to improve drought and water scarcity management in England and Wales. By addressing these questions in relation to several empirical materials, this presentation will make a contribution to the debate on drought and water scarcity management policies and how civic innovation could improve the management in both nations by bringing together people with different perspectives and knowledge.

Bettina Lange, University of Oxford

'Independent regulators? Co-producing environmental sciences with regulatory decisions'

Abstract

This presentation addresses the question whether regulators are independent also from judicial control through reliance on distinct forms of expertise. It focuses on the co-production of environmental sciences with regulatory decisions in the context of managing an increasingly pressing and complex issue for managing water resources in the UK: an increased risk of drought and water scarcity due to a changing climate. While some of the literature on evidence based policy-making and regulatory decision-taking suggests that environmental science knowledges are mobilized in order to inform executive decisions in an instrumental, conceptual or symbolic way, this presentation suggests that we need to ask how regulatory decisions constitute environmental science knowledges. On the basis of an analysis of interview data the presentation outlines different ways in which regulatory decisions constitute, and thus co-produce environmental science knowledges. The presentation argues that such co-productions do not necessarily entail to draw a boundary around a distinct epistemological field of 'environmental science', as suggested in some of the Science and Technology Studies literature.

Coronavirus Act 2020: Expertise as insulation from judicial activism

Charlotte Elves, Faculty of Law

Contained within the Coronavirus Act 2020 are a range of wide ranging, and in places unusually extensive powers. Whilst it is clear that these powers were both necessary and appropriate to manage the unprecedented challenges generated by COVID-19, this paper asks whether the formulation of the 'triggers' for these powers was such that they are essentially unsusceptible to evaluation or adjudication by the courts. In particular, I focus on the conditions necessary to satisfy the epistemic triggers antecedent to the use of these powers with a view to describing the situations within which a court might find itself at liberty to hold that the exercise of the powers contained within the Act was unlawful. In turn, this analysis considers the inseparability of the epistemic and normative triggers for these powers a key challenge for the courts.

