

November Schmooze – The future of constitutional law and international law as a grammar of legitimacy

Concept:

In the postwar era, law and courts came to play fundamental roles as the agreed-upon basis for legitimacy - in a particularly obvious way in Germany, but also elsewhere. *"For it was contempt for the law that preceded the unspeakable horrors of Nazi tyranny. Thus, the framers of our Constitution drew two central lessons from history: law before might, and effective checks on might by law."* This statement by former German Chancellor Angela Merkel (at the occasion of the 60th anniversary of the German Constitutional Court) speaks to the central role that public law held in the post-war period as the grammar of political legitimacy. In the same year of 1949, in a different context and for different reasons, India did a similar thing in resting its new independence on a constitution of its own. These two landmark texts foreshadowed an enormous increase in public law mechanisms and tools. On the international level, law-making proliferated. During the 1960s, new-independent Jamaica announced what was arguably the world's first human rights-based foreign policy, and by the 1970s human rights had become increasingly important in the conduct of international relations. Institutions and procedures, some introduced in the years after 1945, were expanded or expanded themselves. In the 1990s, the Third Wave inaugurated a new era of constitutions, invariably including constitutional review by courts. Of course, not all was well in this era - ideals and reality differed, not least in the genocides in Yugoslavia and Rwanda in the 1990s. Yet both cases also saw the establishment of new mechanisms to address the massive human rights abuses as a matter of law, most notably in the form of the ICTY and the ICTR, and the legal ground they prepared for the future ICC.

Current developments suggest that this era is coming to an end. International lawyers have been discussing whether our times, and in particular the conflicts in the Ukraine and Gaza, mark the death of international law, at least in its post-1945 form. Legal scholars have become increasingly critical of human rights, while right-wing movements are increasingly appropriating the language of rights for their own purposes. Constitutional law has seen a similar shift, encapsulated in terms such as "autocratic legalism" (Corrales, Scheppele) and "abusive constitutionalism" (Dixon & Landau). More recent events in the US question whether even those labels are still appropriate. Many of the Trump administrations actions have been marked by an indifference to compliance with existing law, as indicated by its high rate of defeat in lower courts. Compared to the Federalist Society (an important partner in Trump's first term but with which he has now broken), the current Trump administration is less interested in an alternative constitutional vision and more interested, simply, in power.

Public lawyers and political theorists seem divided about how to respond to these shifts. Some opt for a full-throated defense of the postwar commitment to international law (and presumably constitutional law) in a "time of monsters" (e.g. Peters, 2025). Others – in particular constitutional lawyers – have become increasingly skeptical of the post-1945 paradigm, arguing that we need to fundamentally rethink terms such as constitutionalism and perhaps even democracy. More particularly, in this second camp some have declared the death of constitutional courts (e.g. Porat 2025), and others seek to use the current moment to push back against legalization in favour of a more political concept of constitutionalism and rights (e.g. Loughlin, 2022). Some scholars have argued that the overemphasis on courts and elite-driven legal constitutionalism is partly to blame for the feelings of powerlessness and alienation that fuel the rise of right-wing authoritarianism (Halmai, Manow).

Others see the conventional liberal democratic, court-centric constitutional model as an ultimately inadequate way to respond to structural inequality or post-colonial concerns about identity and ownership (Sibanda, Ramalekana). Still others (Bugarcic & Tushnet, Müller) argue for a more political response to the current crisis, focusing on democratic experimentation rather than legal safeguards. Similarly, Amal Sethi has criticized the trend in some states towards further isolating constitutional court appointments from politics to avoid the capture of such institutions. He argues we should rather seek to ensure that courts are connected to the people by ensuring that the selection of judges represents different societal groups and interests (2025).

The idea behind this “schmooze” is to explore some of these ideas. Is the diagnosis that law is losing its role as a predominant frame of legitimacy overblown? How much of the post-1945 world order – assuming that idea or timeline makes sense on a global level – can we salvage at this point? How much should we want to salvage? If we seek to reinvent democratic constitutionalism or international law, are we throwing the baby out with the bathwater, and at a risky time no less? Have constitutional law, international law and/or rights language become too dominant in public talk in the past 80 years, and do we need to re-politicize legal processes? If so, how do we do this and what do we lose by doing it?

Schmooze Format:

Participants are invited either to submit a previous piece of writing of theirs that speaks to these themes (up to 15 pages max., please!) or distribute a short 2-5 page outline of their thoughts that touch on the themes above, without necessarily speaking to all aspects, **by Nov. 13**. At the workshop, they should present their thoughts very briefly in 7-10 minutes, on the assumption that outlines/papers have been read before. Münster students will be involved in the workshop, writing response papers and participating in the discussion with the panellists. The idea is to have more of a conversation about the themes, prompted by the inputs of speakers, than a traditional conference.

Workshop Schedule – Thursday 20.11.2025

15.45 – Welcome

16.15 – 17.45 – *First Panel: International and European Developments*: Gráinne De Búrca, Itamar Mann, Svenja Ahlhaus

18.15 – 19.30 – Keynote Address: Jan Werner-Müller (Princeton)

20: 00 – Dinner for Speakers

Friday 21.11.2025

9:30 – 10:00 – *Second Panel: Regional Spotlights*: Caroline von Gall, James Fowkes, Max Steuer

10: 30 – 12:00 – *Third Panel: Combatting populism and authoritarianism*: Bojan Bugarcic, Amal Sethi, Ming Sung Kuo

12:00 – 13:00 – Lunch

13: 00 – 14: 30 – *Last Panel: Lessons for Germany*: Jan Werner Müller, Samira Akbarian, Michaela Hailbronner