Report of the 24th Käte Hamburger Lecture

Multi-Layered Constitutionalism in the Age of Illiberal Politics and Democratic Backsliding: A Global Perspective

With Prof. Renáta Uitz

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The 24th Köte Hamburger Lecture was addressed by Renáta Uitz, Professor of Comparative Constitutional Law at the Legal Studies Department, Central European University (CEU), Budapest. Her discussant was Jürgen Bast, who is Professor of Public Law and European Law at the Justus-Liebig-University in Gießen and Academic Director of the Refugee Law Clinic Gießen. Currently, he also works as a Guest Researcher at the Collaborative Research Centre (SFB) ‘Bedrohte Ordnungen/ Threatened Orders’, Eberhard Karls University Tübingen. Theresa Reinold, Assistant Professor of Global and Transnational Cooperation Research at the University of Duisburg-Essen, moderated the lecture.

In his welcome remark, Markus Böckenförde, Executive Director of the Köte Hamburger Kolleg/ Centre for Global Cooperation Research (KHK/GCR21), recounted research topics that were deemed relevant to global cooperation as KHK/GCR21 commenced its work six years ago. From the distant perspective of financial crisis and how it affects the European Union, discussion concerning global cooperation today has shifted greatly with the focus placed on EU and its democratic backsliding as well as multi-layered constitutionalism put in question. Instead of specific required laws, the moderator–Theresa Reinold–suggested that the evening should concentrate on political dynamics that lead to a recreation of law.

Based on her book project and research work on constitutionalism in Europe, Uitz kicked off the lecture with the notion that constitutionalism is under threat. The inevitable demise of constitutionalism owes much to its politicization by illiberal and political forces, routinely calling formal constitutional constraints into question. Once in office, populist political actors use constitutional and legal means to perpetuate their powers. Constitutional reform has become a farce of power abuse played by disingenuous political leaders. Rather than constitutional reform, Uitz termed these processes ‘constitutional chicanery’.

The misuse of constitutional emergency powers and the expansion of presidential term limits through constitutional amendment are classic moves in this game. The ‘reform’ of constitutional courts, judicial self-government and entire judiciaries are, by now, considered standard steps. Further measures include reform of independent constitutional support institutions, such as
central banks, media boards or ombudspersons – depending on what best serves the needs of local autocrats. The new style of constitutional reform for political self-perpetuation involves comparative constitutional arguments.

To illustrate such misuses, Uitz raised the example of Hungarian constitutional transformation showing how constitutionalism and the rule of law in an EU member state are dismantled through constitution-making. The result of this transformation also endures European scrutiny and occasional condemnation in time. In her opinion, the multi-layered constitutional architecture appears to accelerate the demise of constitutionalism in Europe.

In order to understand this development and to identify suitable course of action, Uitz drew the audience closer to the premises and mechanics of the multi-layered constitutional venture. It promises protection against the whims of the sovereign state from sources which surpass the level of national politics. Multi-layered constitutionalism entrusts constitutional control to distant entities which are allegedly beyond the influence of national power holders. While optimists consider the independence from local partiality and majoritarian tolerance positive, Uitz warned of limited knowledge on or lack of respect for local conditions including taboos and bias.

As an intricate web of interactions between national and supranational constitutional actors, multi-layered constitution is meant to stand on a foundation of common (shared) constitutional values and is inspired by trust among the participants whose fates are tied together. This builds on the willingness of the people to cooperate and to comply with even uncomfortable supra-national decisions. European multi-layered venture draws on wishful thinking: an expectation that even tighter constitutional togetherness can be secured in the face of the principle of subsidiarity and recognition of the uniqueness of national constitutional identities.

Following her elaboration on the mechanics of multi-layered constitutionalism, Uitz discussed a larger dilemma: mismatch between traditional constitutional arrangements and realities of supra-national interdependencies. Constitutionalism is an idea and an ideal about limiting the exercise of governmental powers and preventing the abuse of powers. Its toolkit includes
the intricate combination of such devices as democracy, separation between powers and checks and balance, the rule of law and the protection of human rights.

While the national level constitutionalism is about constraining the exercise of powers, on the supra-national level those constraints are yet to be in place. General rules become law, bypassing national parliamentary control and the constitutional guarantees of law-making are absent. Elected officials of national governments as well as their civil servants participate in supranational law- and decision-making processes without meaningfully defined mandates authorizing them to take particular negotiating positions. These are outside the purview of constitutional accountability mechanisms. Instead of limiting governmental powers, ‘constitutionalism’ in the multi-layered venture stands for a set of (allegedly) shared values, principles and noble aspirations. Yet, this takes place without the institutional architecture or operations that would hold the actors to these principles and expectations in their weak moments. In the course of the multi-layered constitutional experiment, the old constitutional framework had lost its ability to constrain the exercise of governmental powers. To Uitz, this is alarming. New formats and layers of decision-making lead to further increase of unchecked government power. Law-making on the supra-national level involves negotiation with private actors, while the multi-layered network offers no control over the process. Consequently, private deals can become public law. As new variants of distribution of power appear to be at play, classic constitutional constraints on political powers are becoming less relevant as in the case of Hungary.

Insisting on national peculiarities, invoking national constitutional identity and sovereignty are antithetical to the multi-layered project because it is built on commitment to shared ideals, trust and mutual cooperation. After decades of multi-layered cosiness, national constitutional regimes and their arrangements lack behind and remain the same as prior to the multi-layered experiment. Hypothetically, if the supra-national architecture disappeared, it would leave behind:
- a legislature which positions itself secondary to the executive as well as supra-national law-making mechanism,
- an executive branch and its power unchecked by legislative oversight as well as its public spending which is disconnected from the taxpayers and their value of political accountability,
- a range of constitutional institutions and their path-dependence of peer coordination on a supranational plain,
- a cohort of constitutional actors such as civil society organizations and their continued efforts to influence national constitutional actors through supra-national mechanisms.

These mismatches brought Uitz back to discuss the origin of multi-layered constitutionalism. According to her, it is a European idea. It was born in Germany, in response to the Germany Federal Constitutional Court’s reservations about the terms of participation in the EU in the Maastricht judgment (1993). It was clear from the outset that careful balancing between allegedly shared constitutional values and national peculiarities is necessary. In this approach, alternative centres of authority add a new quality to the national constitutional order by replacing a familiar pattern of hierarchical imposition of supra-national rules with a continuing interaction between the intertwined levels of transnational politics. For critics, this expansion inevitably results in the fragmentation of international law.

In search for a force to hold this construction together, Uitz calls in Jürgen Habermas, who offers cosmopolitan solidarity rooted in the moral universalism of human rights. The common challenge for such theories is how to account for the disagreement and discord evidently resulting from diversity in such communities. Without a European demos, multi-layered system could merely elevate conflicts that were generated at the national level to the supra-national level.

Uitz continued by mapping ‘easily traceable’ hard evidence of regional and global convergence in the multi-layered constitutional project:

- international and regional conventions on a wide range of subjects relevant for constitutional questions and fundamental rights,
guidelines developed by international organizations on minimum standards on the conduct of, for example, free and fair elections.

- advisory opinions and case law of regional organizations drawing on an existing trend traceable in the constitutional systems of member states,

- constitutional provisions which draw on models or examples from other constitutions, from membership requirements of supranational organizations, or comply with minimum standards defined by regional constitutional actors,

- judgements of national courts which rely on comparative analysis of foreign jurisprudence in similar cases.

These traces might give the impression that global constitutional convergence is undeniable and unstoppable. While convergence thesis is much agreed upon, the understanding behind it is far from established. In the ‘post-national’ era, lateral as well as hierarchical forces shape constitutional developments across the globe. Convergence along the horizontal axis depends greatly on the will and whims of similarly situated constitutional peers. On the other hand, convergence along vertical lines seems almost taken for granted in the multi-layered constitutional ‘project.’ After all, when nation states join international organizations they agree to be bound by the terms of membership, including the obligation to give effect to the decisions of supranational bodies created by them. The picture becomes more colourful that the narrative of global convergence would suggest. The diversity is explained with reference to the founding premises of regional and international organizations.

Firstly, the development of regional and international standards of human rights through judicial intervention is fraught with competing forces: the desire for setting a generally applicable minimum standard clashes with the cherished principle of subsidiarity. Subsidiarity advises that no level of government be called to perform any task, if it can be performed better at a more local level. With this, multi-layered constitutionalism invites the consideration of national specificities, even if such claims can be abused. Secondly, the judgments of regional human rights courts are to be enforced by member states, more precisely, national governments. Giving effect to such obligations is an obligation under international law. At this step, there is a high level of flexibility.
and uncertainty, which grants the actors choices that may not exist otherwise in the more rigid national constitutional systems.

Mutual trust suggests a sensible premise for lasting cooperation, and wishful thinking may keep it strong for a while. Yet, at the moment, this trust in domestic authorities shifts the burden of operationalizing the multi-layered constitutional regime to those whose rights are violated by the very same domestic actors who were unwilling to be bound by the shared values of the multi-layered system in the first place. Instead of searching for convergence and the heart of the global constitution, Uitz suggested the timeliness to admit that disagreement and conscious dissent on the national level remain important factors that explain the operation of the multi-layered constitutional reality. When the premises of trust appear to be false, the consequences are fatal – and not only for the multi-layered constitutional experiment, but also for constitutionalism itself.

Uitz concluded her lecture that the threat of an epidemic of undemocratic governance through constitutional reform is no longer an exotic animal in Europe, but very much a daily reality. At least seemingly, the European multi-layered constitutional experiment has much stronger institutional mechanisms in place to act against such systemic threats to constitutionalism and the rule of law than its regional counterparts. It is largely a matter of political calculation and courage whether the existing frameworks will be used to an end which is very much in the realm of possibilities embraced by the multi-layered experiment. Uitz emphasized that scholars can do more than lament the demise of constitutionalism. It is high time to remind those political actors in stable democracies about what is at stake with the crumbling of the multi-layered constitutional project.

In addition to the European constitutional experiment, the failure will affect constitutionalism in and for every single member state. Without constitutionalism, constitutional rules can do little to protect those who lose the next democratic elections from the whims and will of those who win them.
Discussion

Instead of bringing the audience back to optimism, Jürgen Bast accentuated some of Uitz's arguments. Distinguishing liberal from illiberal brands of constitutionalism, he warned that illiberal form of constitutionalism is not only used by authoritarian regimes, but can also be observed in the judgements of central European constitutional courts.

His second observation relates to the demise of constitutional constricts which is accelerated by multi-layered constitutionalism. While Uitz argued that decades of multi-layered cosiness have weakened traditional state level constitutionalism, Bast defended this ‘young’ idea of multi-layered constitutionalism. He referred to Uitz’s thought experiment of removing supranational safeguards. To him, it would be more convincing to discuss a concrete case in which supranational safeguarding functions have deactivated or destroyed the mechanisms at the national level. As such cases are yet to be identified, Bast drew audience’s attention to the difference between judicial and political supra-nationalism.

He then ended his comments on an optimistic note. The unexpected Brexit result and ensuing consequences clearly underline the voluntary basis of European Union membership. As the EU is built on willingness to cooperate and comply, binding nature of the law of the European Union is an essential part of this arrangement. For the future of multi-layered constitutionalism, Bast suggested that learning from other emerging regions, e.g. Latin America and Africa, might lend the EU a fresh perspective on how to get beyond non-interference and unconstitutional developments at the level of the member states.

During the plenary discussion, the audience questioned whether it was important to discuss global constitutional convergence and supranational structure. Actual challenges might simply lie in increasing national diversity of constituencies as number of members in the structure continues to grow. Other questions concerned differences between legal and political facets of supranationalism.