

Convenors:

Ralf Poscher, Michel Rosenfeld, and Bernhard Schlink

Illiberal and Populist Challenges to Liberal Constitutionalism

Theoretical, Institutional, and Practical Challenges

Workshop, May 16–17, 2025, Max Planck Institute for the Study of Crime, Security and Law

After more than half a century spread of liberal constitutionalism worldwide, the twenty-first century has seen a significant shift toward illiberal constitutionalism. Embedded in the Enlightenment and tracing back to the late eighteenth century French and US revolutions, liberal constitutionalism greatly expanded its reach after World War Two, the fall of various Western European dictatorships in the 1970s, the transitions from dictatorship to constitutional democracy in Latin-America in the 1980s and 1990s, the transition to democracy of former Soviet East/Central European countries in the 1990s, and the emergence from apartheid in South-Africa. Twenty first century illiberal constitutionalism, in contrast, has arisen in various ways, including the adoption of new constitutions as in Hungary; introducing illiberalism within and sometimes directly against a liberal constitutional regime as happened in Poland; and within the confines of traditional liberal constitutional democracies, as certain tendencies in countries such as India and the US suggest. Contemporary illiberal constitutionalism is often linked to exclusionary nationalism or populism and looms in certain cases as linked to transition to, or implantation of, authoritarianism. For some, such as Hungary's Viktor Orban, the difference between liberal and illiberal constitutionalism amounts to a *Kulturkampf* that revolves around values, but leaves constitutional rule and democracy intact. For others, however, illiberal constitutionalism betrays both constitutional rule and democracy while turning the language and tools of liberal constitutionalism against the fundamental tenets of the latter.

INTRODUCTION

Whether illiberal constitutionalism is in the end merely a variant of its liberal counterpart or an undermining and eventually a downright contradiction of the ideal of liberal constitutionalism is hard to unravel for many reasons. First, the terms “liberal” and “illiberal” are susceptible of varying interpretations that tend to fluctuate even further as one moves from one context to another. For example, are conservative US justices, such as Alito or Thomas, who stand against abortion or same-sex marriage constitutional rights nevertheless within the mainstream of liberal constitutionalism? Second, the ground and context of constitutional government and of constitutionally protected fundamental rights has shifted due to a number of highly consequential factors such as globalization, vast increases in wealth disparities, migratory shifts and dislocations, hardening and fragmentation of identitarian stances, repoliticization of religion, and tribalization of politics. Third, constitutional and political changes within and beyond Westphalian constitutional units have eroded confidence in the continuing viability of such liberal constitutional mainstays as sovereignty, the guarantees of the rule of law, the scope and confines of fundamental rights, and the preservation of a constitutional minimum of democratic guarantees. Fourth, on a theoretical level, is the turn to illiberalism a culmination stemming from an exhaustion with liberal ideology and the multiple ills of embattled liberal democracies? And fifth, what are the institutional and practical preconditions and consequences of actual transitions to illiberal and populist regimes that do not fall into pure authoritarianism?

Faculty Participants

Susanna Mancini, Professor, University of Bologna, Italy

Jan-Werner Müller, Professor, Princeton University, USA

Michel Rosenfeld, Professor, Cardozo School of Law, New York City, USA

Pablo Riberi, Professor, National University, Cordoba, Argentina

Bernhard Schlink, Professor, Humboldt University, Berlin, Germany

Fabio de Sa e Silva, Professor, University of Oklahoma, USA

Przemysław Tacik, Professor, Jagiellonian University, Kraków, Poland

Weitseng Chen, Professor, National University of Singapore, Singapore

* Please note that graduate students and postdocs working on a topic relevant to the workshop and who would like to attend are welcome to contribute a short presentation. If you are interested in securing one of these limited opportunities, please contact event co-organizer Randall Stephenson (email below).



FRIDAY, MAY 16, 2025

10:30–11:00 am **Registration**

11:00–11:15 am **Welcome**

Session 1: Varieties of Populist Constitutionalism

11:15–12:45 pm **Varieties of Populist Constitutionalism**
Professor Jan-Werner Müller, Princeton University

1:00–2:15 pm *Lunch*

Session 2: Shifts in Democracy: From Interest Based Politics to Populist and Identitarian Movements, from Liberal to Illiberal Constitutionalism

2:15–3:30 pm **The Latin American Experience**
Professor Pablo Riberi, National University, Cordoba

3:30–4:45 pm **The Asian Experience**
Professor Weitseng Chen, National University of Singapore

4:45–5:15 pm *Coffee break*

Session 3: Political Uses of Majority Religion to Institute Identitarian Cultural, and Political Hegemony

5:15–6:45 pm **Political Uses of Majority Religion to Institute Identitarian Cultural, and Political Hegemony**
Professor Susanna Mancini, University of Bologna

7:00–8:45 pm *Dinner*

SATURDAY, MAY 17, 2025

Session 4: Elements of Authoritarian Takeover in Constitutional Democracies

8:45–10:15 am **Elements of Authoritarian Takeover in Constitutional Democracies**
Professor Michel Rosenfeld, Benjamin N. Cardozo School of Law, New York

10:15–10:45 am *Coffee Break*

Session 5: The Authoritarian Takeover of the Judiciary: Replacing Judges and Courts and Transforming Judicial Philosophies

10:45–12:00 pm The Polish and Hungarian Experience
Professor Przemysław Tacik, Jagiellonian University, Kraków

12:00–1:15 pm The German Attempt to Prevent
Professor Bernhard Schlink, Humboldt University, Berlin

1:15–2:15 pm *Lunch*

Session 6: Law and Illiberalism: Insights from a Global, Collaborative, and Sociological Research Project

2:15–3:45 pm **Law and Illiberalism: Insights from a Global, Collaborative, and Sociological Research Project**
Professor Fabio de Sa e Silva, University of Oklahoma

3:45–4:45 pm Closing Remarks

ORGANIZATION

Event: “Illiberal and Populist Challenges to Liberal Constitutionalism: Theoretical, Institutional, and Practical Challenges”
(In-Person Event)

Date: May 16–17, 2025

Place: Max Planck Institute for the Study of Crime, Security and Law
Günterstalstr. 73,
79100 Freiburg i. Br.
Germany

Room F113 (Seminarraum) Fürstenbergstr. 19

Hosts: Department of Public Law

Organizers: Dr. Randall Stephenson, LL.M. (r.stephenson@csl.mpg.de)
Prof. Dr. Svenja Behrendt

In collaboration with:



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