



MAX PLANCK LAW

Legal Infrastructures of Democracy

Legal Fields, Public Spheres, and the Twin Challenges of State and Market

CALL FOR PAPERS

Başak Çalı (Centre for Fundamental Rights, Hertie School)
Mikael Rask Madsen (iCourts, University of Copenhagen)
Antoine Vauchez (Univ. Paris 1, CNRS & Max Planck Fellow)

 **Hertie School**
Centre for
Fundamental Rights

 **iCourts**

Recent decades have seen unprecedented levels of pressure on democracies in Europe and elsewhere from both state and market forces. Democratically elected governments have in some countries centralized executive power, stifled democratic dissent, and weakened the independence of the judiciary. Simultaneously, the unmediated and largely market-driven development of digital technologies has allowed for major disinformation campaigns, undermining the informed decision-making capacity of both politicians and citizens. Lawyers and civil society organizations have in different ways responded to these developments, in particular through legal mobilization before courts, domestic or international, but with mixed levels of success.

Legal, sociological, and political science scholarship have also reacted to these developments. Many have highlighted the centrality of the rule of law as a target ('muzzle laws', court-packing, etc.) for the authoritarian assaults on democracy (Sadurski 2019; Coman 2022), while others have emphasized how authoritarian regimes have increasingly and assertively taken on the mantle of constitutionalism, 'human rights', and the 'rule of law' (Scheppelle 2018; Megret 2022). Similarly, while many have pointed to the unprecedented pressures of globalized markets on the functioning of legal institutions,

undermining some of the equality promises that lie at the core of democratic citizenship (Della Porta and Keating, 2018; Alter and Zurn, 2020), others have insisted on the increasing investment of corporate interest in human rights' discourse through *pro bono*, philanthropy, and corporate social responsibility (Cliquennois 2022).

And yet, despite this saliency of law and legal institutions, we know surprisingly little about the collective agency of legal fields and their complex relationship to the performance—or decay—of contemporary democracies. Whilst studies of legal mobilization and access to justice (Anagnostou 2014; Çalı 2010; Cichowski 2007) have explored how, why and when individuals and social movements strategically use law and courts to pursue legal and policy goals, we are still short of a general understanding of the conditions and constellations under which the field of law, lawyers, and legal institutions allow for the development and maintenance of an inclusive and equally open public sphere of citizens in-between the market and the state (Fraser 2014).

As a result, we are left with no clear notion of the contemporary entanglements between law and democracy. All the more so that three decades of fast development of the 'rule of law & democracy' policy arsenal through the rise of IO's conditionality policies and donors' agenda have favoured a *thin* and legal-formalist description of their relationship (see Krygier 2016; Lasser 2022).

Historically, one of the ways in which democracies have withstood the challenges from state and market has been through the counter-power of law (Rosanvallon 2008). Sociologists have shown how law and lawyers have been instrumental in the development of an autonomous sphere of civil society as an alternative to the contending forces of capitalist markets and the state (Halliday and Karpik, 1998). Other scholars have demonstrated how law and particularly human rights, over time, not only became a fundamental institution of liberal society but also one of the few institutions where citizens could be defended and gain political leverage vis-à-vis the state and market actors (Madsen and Verschraegen, 2013).

And yet, the relationship between law and democracy is never a one-way street. While the development of semi-autonomous legal fields has been a *condition* of the development of a more inclusive and equally open public sphere, it also comes as a *potential limit* to democracy through the diffusion of episteme of expertise at its very core (Vauchez 2022). In addition, law and lawyers can also be the drivers of colonial power 'abroad' (Dezalay 2004; Alter, 2022) or of authoritarian turns 'inside'—and they have often been key to the reinforcement of structural imbalances between labour and capital (Teles 2012; Vauchez and France, 2021). While civil society actors remain most often weakly structured, even fragmented, market and state actors are typically well-organized in terms of legal resources—thereby threatening the capacity of law to provide a *level-playing field* (Galanter, 1974) and translating into asymmetries and constraints on the meaningful exercise of rights (empowerment and disempowerment) or on the structuring of legal alternatives.

Against this backdrop, this workshop will explore the conditions and constellations through which law, legal institutions, and lawyers in today's Europe (and beyond) effectively provide a critical *infrastructure* for maintaining and defending an inclusive

and equally open public sphere in-between market and state pressures. It does so by transplanting the notion of 'infrastructural power' initially coined by Michael Mann to seize States' concrete capacity to deploy and implement policies (Mann 2008). By 'legal infrastructures', we mean to look at both the *units of governance* of legal fields (bar associations, judicial councils, law schools, legal NGOs, etc.) and the related set of *legal categories and theories* that have been used to ground their autonomy from / proximity to States and markets (independence, separation of powers, rule of law, human rights, constitutionalism, etc).

The workshop aims to generate theoretical and comparative insights on this crucial question, and to provide a thicker description of the changing capacity of 'legal infrastructures' to contribute to the defence of the democratic potential of the 'public sphere' over time and from comparative perspectives. In so doing, it invites its contributors to think critically through the contemporary challenges of the rule of law and democracy between the (oft-combined) pressures of the state and the market; and it looks for a variety of disciplinary perspectives (historical, legal, political science, sociological, as well as normative theory) and an exploration of these processes.

We welcome papers that approach law not simply as doctrinal knowledge, but as a key infrastructure of *democratic* (ie inclusive and equally open) *processes*. These may be grounded in socio-legal studies, theories of democracy, law-in-context, critical legal studies, European studies, human rights studies, or others. We particularly welcome papers drawing on empirical and qualitative research methods.

Suggested paper themes include:

- Processes undermining or reinforcing the independence/autonomy of legal professions in the judiciary, in law schools and at the bar by State (managerialization, politicization, criminalization, etc) and by market forces (commodification of legal education, deregulation of the legal profession, globalized corporate law firms, etc)
- Corporate and/or executive pressures and interferences in the field of law (advocacy, philanthropy, lawfare, etc) and their translation before national apex courts and European and international courts in the meaningful exercise of core rights (digital rights, reproductive rights, freedom of expression, etc) and/or on the structuring of legal alternatives.
- International organizations, the European Union, and civil society actors as external buttress to the legal field's autonomy from corporate interests and executives: assessing the actors, techniques, and shortcomings of 'rule of law & democracy' policies since the 1970s.
- Actors, *milieux*, and transnational circulations of ideas and doctrines on the relationship between lawyers, legal fields, and democracy (varieties of constitutionalism, militant democracy, law-and-economics conceptions of democracy, etc) in particular since the 1970s.

Submissions

The workshop is open to both established and early-career scholars. Interested participants should provide an abstract in Word format of no more than 500 words. Together with their abstract, in the same Word document, applicants should provide the following information: name, affiliation, the title of the proposed paper, and an email address. Interested participants should also indicate whether they are able to present in person in Frankfurt on the dates of the conference.

To submit an abstract please email antoine.vauchez@univ-paris1.fr by 13 March 2023 with the heading 'Legal Infrastructures of Democracies Workshop'. Work already published, or under review for publication, is not eligible for submission, since we may produce special issues or edited volumes based on the conference. Speakers will be informed of the acceptance of their proposals by 25 March 2023 and will be required to submit a draft think paper of 5 pages by 10 July 2023.

Workshop Format

A two-day workshop will be held in person in Frankfurt, 7–8 September 2023. However, the workshop may be made hybrid to accommodate presenters online at the sole discretion of the organizers. The organizers will cover economy class travel, accommodation, and meals for all invited paper presenters.

References

- Alter, Karen. 2021, 'From colonial to multilateral international law. A global capitalism and law investigation', *International Journal of Constitutional Law*, 19(3), p 798–864.
- Alter, Karen and Michael Zurn, 'Conceptualizing Backlash Politics', *The British Journal of Politics and International Relations*, 22(4), 563–584.
- Anagnostou, Dia. 2014. *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-level European System*: Bloomsbury Publishing.
- Çalı, Başak. 2010. 'The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006'. *Law & Social Inquiry* 35(2), p 311–37.
- Cichowski, Rachel. 2007. *The European Court and Civil Society*. Cambridge: Cambridge University Press.
- Coman, Ramona, 2022. *The Politics of the Rule of Law in the EU Polity. Actors, Tools and Challenges*. Palgrave.
- Della Porta, Donatella and Keating Michael (eds). 2018. *The Paradoxes of Democracy and the Rule of Law*. Cambridge University Press.
- Dezalay, Yves. 2004. 'Les courtiers de l'international : Héritiers cosmopolites, mercenaires de l'impérialisme et missionnaires de l'universel', *Actes de la recherche en sciences sociales* 151–152, p 5–34.

- Dezalay, Yves, and Mikael R. Madsen. 2012. 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law'. *Annual Review of Law and Social Science* 8, p 433–52.
- Fraser, Nancy. 2014. *Transnationalizing the Public Sphere*. Cambridge, Polity.
- Galanter, Marc. 1974. 'Why the "haves" come out ahead: Speculations on the limits of legal change'. *Law & Society Review* 9(1), p 95–160.
- Halliday, Terence C., and Lucien Karpik (eds). 1998. *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*. Oxford: Oxford University Press.
- Lasser, Mitch. 2021. *Judicial Dis-appointment. Judicial Appointments Reform and the Rise of European Judiciary*. Oxford, Oxford University Press.
- Krygier, Martin. 2016. 'The Rule of Law. Pasts, Presents and Two Possible Futures', *Annual Review of Law and Social Science*, 12(1), p 199–229.
- Madsen, Mikael Rask, and Gert Verschraegen. 2013. 'Making Human Rights Intelligible: An Introduction to Sociology of Human Rights'. p 1–22 in *Making Human Rights Intelligible: Towards a Sociology of Human Rights*, edited by Mikael R. Madsen and Gert Verschraegen. Oxford: Hart.
- Mann, Michael. 2008. 'Infrastructural Power Revisited'. *Studies in Comparative International Development* 43(3), p 355–365.
- Megret, Frédéric. 2022. 'Human Rights Populism', *Humanity*, 13(2), p 240–259
- Merkel, Wolfgang. 2004. 'Embedded and defective democracies'. *Democratization* 11(5), p 33–58.
- Muller, Jan-Werner. 2016. 'The Problem with Illiberal Democracies', *Project Syndicate*
- Rosanvallon, Pierre. 2008. *Counter-Democracy: Politics in an Age of Distrust*. Cambridge University Press.
- Sadurski, Wojciech. 2019. *Poland's Constitutional Breakdown*. Oxford University Press.
- Scheppele, Kim. 2018. 'Autocratic Legalism', *University of Chicago Law Review*: 85(2), p 545–584.
- Teles, Steven M. 2012. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton University Press.
- Vauchez, Antoine. 2018. 'The Strange Non-Death of Statism: Tracing the Ever Protracted Rise of Judicial Self-Government in France'. *German Law Journal* 19(7), p 1613–40.
- Vauchez, Antoine, and Pierre France. 2021. *The Neoliberal Republic: Corporate Lawyers, Statecraft, and the Making of Public-Private France*. Cornell: Cornell University Press.