NUS National University of Singapore | Department of Political Science, Faculty of Arts & Social Sciences

NUS National University of Singapore | Centre for Legal Theory, Faculty of Law

Yale NUS College

Jointly Present

Global Rule of Law: Critical, Historical, and Philosophical Perspectives

The increasing power, complexity, and necessity of global legal regimes demands sophisticated analysis. This conference—"Global Rule of Law: Critical, Historical, and Philosophical Perspectives"—responds to that demand with an interdisciplinary exploration of global rule of law. A variety of scholars, including political scientists, legal scholars, historians, and philosophers, will explore a series of essential questions. How should we understand the idea of the rule of law? As a matter of theory and of practice, what is the relationship between law, justice, and coercion? In what ways, if at all, does the global rule of law differ from the rule of law within the state? Given the differences between international and domestic law, is the concept of the global rule of law appropriate? What lessons for furthering the global rule of law can we learn from the history of attempts to establish the rule of law domestically and internationally? What types of legal, political, and economic institutions are required to realize the rule of law, and how might those institutions be realized globally? What challenges, resistances and unintended consequences should we take into account when theorizing the global rule of law?

Session 1

Chair: Terry Nardin, Professor, Department of Political Science, National University of Singapore
Commentator: Nicole Roughan, Associate Professor, Faculty of Law, National University of Singapore

Speakers:

David Lefkowitz
Associate Professor, Department of Philosophy, University of Richmond
A New Philosophy for International Legal Skepticism?

Republican legal theorists maintain that In order to treat one another justly individuals who cannot avoid interacting with one another must submit to a common juridical order – an institutionalized practice of coercive government whose participants exhibit fidelity to a conception of the rule of law as valuable for the constitutive contribution it makes to the treatment of all subjects with equal concern and respect. In this essay, I argue that there are plausible and perhaps compelling reasons to doubt that the existing international legal order satisfies these conditions – or as it is sometimes put, that so-called international law is not really law. First, I contend that it often fails to satisfy several of the institutional requirements for the rule of law, such as the impartial settlement of disputes and coherence, in general, between "law in the books" and "law in action." Second, I maintain that even if we assume arguendo that international law does satisfy the conditions for the rule of law, many international officials operate with a mistaken understanding of what makes the international rule of law valuable. This understanding is both the cause of and evidenced by the judgments such officials make regarding the morally justifiable exercise of international coercion; e.g. under what conditions States enjoy a legal right to wage war, or under what conditions conduct counts as a crime against humanity. If successful, this critique implies that international officials are morally permitted and perhaps even required to exercise the powers that attach to their offices in ways that would be morally impermissible were the global system of coercive government a genuine legal order. These include telling noble lies, by which I mean identifying as law norms that do not flow from the normative logic that actually structures international relations, and refusals to govern, including both failures to pronounce on the legality of certain international acts and forbearing from enforcing findings of law. Several recent examples from the fields of International Criminal Law and International Human Rights law exemplify the former strategy, while two opinions issued by the International Court of Justice regarding States' territorial rights serve to illustrate the latter. The second part of this paper

comprises a contribution to republican non-ideal theory, a set or system of normative principles that ought to inform our attempts to create the conditions for a republican political order – which is to say, a genuine legal system.

Session 2

Chair: Luke O'Sullivan, Associate Professor, Department of Political Science, National University of Singapore
Commentator: David Lefkowitz, Associate Professor, Department of Philosophy, University of Richmond

Sinja Graf
Assistant Professor, Department of Political Science, National University of Singapore
The Case for Renaming 'Crimes against Humanity'

'Crimes against humanity' is the most broadly applicable of the four international crimes codified in international criminal law. Similarly, it is the crime that is most often mentioned in political and journalistic discourses above and beyond legal scholarship and proceedings. This paper contends that 'crimes against humanity' ought to be renamed as 'atrocity crimes' by mobilizing one historical and one theoretical argument. The historical argument details the coincidental naming of the crime at the onset of the Nuremberg Trials. The theoretical argument holds that 'humanity' ought not to be mobilized as a legal concept. First, once tied to (criminal) law, humanity becomes a normative concept that requires the distinction between law-abiders and trespassers. This necessary distinction between those complying with humanity's laws and those offending against humanity goes against the conception of humanity as a unified, universal community of equals. Second, any definitional content of 'crimes against humanity' will indirectly define 'humanity'. Such definitions are inevitably partial and a product of hegemonic sensibilities. Naming atrocious acts as 'crimes against humanity' portrays them as beyond humanity itself, whereas such acts are empirical part and parcel of our human condition.

Chair: Michael Dowdle, Associate Professor, Faculty of Law, National University of Singapore
Commentator: Terry Nardin, Professor, Department of Political Science, National University of Singapore

Carmen Pavel
Lecturer, Department of Political Economy, King's College London
The International Rule of Law

Given the extensive role it plays in regulating affairs among states, the potential for misuse or abuse of the authority of international law, and of inequities in the promulgation, interpretation and application of its rules should give us pause. Rule of law constraints to the arbitrary power of public officials and the requirements about the formal qualities of the law, such as publicity, prospectivity, and coherence, impose discipline and generate an internal morality of the rule of law necessary to protect the interests of its subjects, which are mostly states, and of those who benefit from its protections, which is everybody. This paper contributes a new perspective to the already extensive literature on an international rule of law, which is divided on the point or possibility of an international rule of law that mimics to the extent possible the features of a domestic rule of law. It argues that one of the main goals of an international rule of the law is the protection of state autonomy from interference by international law norms and the authority of international institutions and that the best way to codify this protection is through constitutional rules restraining the reach of international law into the internal affairs of a state. This goal will have to be balanced against the other important goal of an international rule of law, the protection of the autonomy of individual persons, best realized through the entrenchment of basic human rights.

Session 3

Chair: Lucy Reed, Professor, Faculty of Law, National University of Singapore
Commentator: Damian Chalmers, Professor, Faculty of Law, National University of Singapore

Karen Knop
Professor, Faculty of Law, University of Toronto
Feminism and the Lost Private Side of International Law

Where to look for the rule of law in international law? International law is not one thing, even at any one time. Nor do the understanding and import of a given concept of legal obligation - or non-obligation - remain constant over time. This presentation seeks to make the case for a deep dive into both from a feminist historical perspective, drawing on the outline for a future project on gender and thinking history, politics and law through the international. I illustrate why it might be fundamentally valuable to recognize the history of international law as including private international law and, further, what a gender analysis of key concepts might investigate. For the purposes of the rule of law in international law, the most relevant of these potentially gendered concepts is "comity:" a notion also found in public international law, where it tends to be neglected or dismissed as a poor substitute for legal obligation.

Chair: William Bain, Associate Professor, Department of Political Science, National University of Singapore

Tony Anghie
Professor, Faculty of Law, National University of Singapore
Presentation: *TWAIL Approaches to the Security Council*

Session 4

Chair: Tony Anghie, Professor, Faculty of Law, National University of Singapore
Commentator: Navin Rajagobal, Senior Lecturer, Yale-NUS College

Tan Hsien-Li
Assistant Professor, National University of Singapore
Reconceptualizing Regionalism in Southeast Asia: ASEAN's Turn to Rules and Institutions

This article sets out an emerging theory of 'Southeast Asian regionalism' by reconceptualizing the ASEAN discourse through the incorporation of the rule of law and institutions. This theory will not only be novel in the area of ASEAN studies but is expected to add another dimension to the multi-faceted field of regional integration in international law. It is necessary to situate ASEAN regionalism within its contemporary paradigm because theories of Southeast Asian regionalism have traditionally been dominated by realist and, to a lesser extent, constructivist perspectives stemming from the field of security studies. Such models are increasingly inaccurate for three substantive reasons. They overlook: the substantial economic and socio-cultural cooperation under the auspices of ASEAN since its establishment in 1967; the intensifying use of law and institutions especially following the adoption of the landmark ASEAN Charter in 2007; and the actual legal and institutional foundations of the ASEAN Community post-2007. This article thus develops concepts and parameters with which to do so by discussing the undisputed role of realism in ASEAN's history before turning to expound on the limitations of realism in the new rule of law and institutions framework. The emergent theory of ASEAN regionalism will then be constructed using these characteristics as well as concepts extrapolated from existing institutionalism-informed theories.

Session 5

Chair: Nicole Roughan, Associate Professor, Faculty of Law, National University of Singapore
Commentator: Simon Chesterman, Professor, Faculty of Law, National University of Singapore

Frédéric Mégret (participating via Skype)
Associate Professor, Faculty of Law, McGill University
Theorizing "dualisme de résistance": Illiberal International Law, Sovereign Resistance and Global Checks-and-Balances

This paper seeks to theorize the role that states and domestic courts may have in resisting international law when it turns "illiberal" in broadly understood terms. Within a horizon of compliance with international law, both states and courts have occasionally -perhaps even increasingly- refused to implement international obligations into the domestic legal order on the grounds that to do so would violate human rights. Whilst some of these instances (e.g. the ECJ ruling in Kadi) are well documented, others are less so, and typically various instances of arguably the same phenomenon have not been studied together. The paper will look, in addition to objections to the implementation of Security Council mandated sanctions, at resistance to (i) obligations to surrender to international criminal tribunals and as a result of European Arrest Warrants, (ii) the supremacy of EU law above all domestic constitutional guarantees, (iii) the international narcotics regime particularly as it applies to cannabis. It will be argued that the various forms of resistance that manifest themselves in each of these instances, even as they vary quite significantly in terms of their main actors and rationales, share common characteristics, notably in terms of how they position domestic law in relation to international law. The paper will seek to recontextualize them within broader and evolving ideas about the nature of international law, the best way to implement it, and its status domestically. Although international law has generally favoured domestic implementation and can be seen as historically and conceptually pro-monist, its occasional illiberal turn is shedding new light on what I call "dualism de résistance." That dualism based less on the provincialism of domestic legal systems than their standing up for certain principles which may be mistreated by the international legal order. Although this form of resistance has been described as a sort of civil disobedience, I will suggest it is better understood as potentially a form of "checks-and-balances" on the global governance of international law, in which states and their courts emerge as part of a broader system of regulation and moderation of international illiberalism.

Chair: Sinja Graf, Assistant Professor, Department of Political Science, National University of Singapore

Başak Çalı,
Associate Professor, Hertie School of Governance, Berlin and Koç University Law School, Istanbul
International Rule of Law as Coherence: The Role of Regional Human Rights courts

Regional human rights courts have long been recognised as key promoters of domestic rule of law. This role has come about in hybrid forms promoting both a formal and a substantive conception of domestic rule of law— by developing fine-grained fair trial standards, by clarifying what is meant by 'prescribed by law' in qualified provisions, by developing procedural obligations that are attached to substantive rights and by promoting a democratic conception of domestic rule of law. In this paper, I focus my attention away from the role of regional human rights courts in promoting rule of law domestically and instead ask what role regional human rights courts play in promoting the rule of law at the international level. This focus is justified, as regional human rights courts have come to deliver judgments not only monitoring the health of rule of law domestically, but also have addressed cases in which actions of states justified under other parts of international law raised questions of compatibility with human rights treaties.

Taking cue from Waldron's argumentative conception of the rule of law, this paper argues that one central role regional human rights play in upholding international rule of law is by fostering coherence in the international legal system. Regional human rights courts are well placed to deliver coherence in the international legal system due to their positioning that allows them to unpack the relationship between human rights and international rule of law. The practice of regional courts in promoting international law as coherence, however, is confronted with the normative ambiguity of the place of human rights of individuals in promoting international rule of law. Whilst it is well supported that domestic rule of law must serve the ends of protecting the human rights of individuals, it cannot be taken for granted that international rule of law unambiguously must serve the same purpose in the same fashion. Against the background of this ambiguity, the paper identifies three legal doctrinal models developed by regional human rights courts to promote human-rights oriented coherence in international law. These are 1) the human rights hierarchy model (employed by the Inter-American Court of Human Rights); 2) the human rights presumption model and 3) the rebuttability of human rights model (employed by the European Court of Human Rights). The paper argues that these three doctrinal models hinge on important disagreements with respect to the telos of promoting international rule of law as coherence.

The paper has four parts. In the first part I discuss the contested conceptual and normative underpinnings of international rule of law and ask what it may mean to promote international rule of law in a horizontal legal order. I hold that an argumentative conception of the rule of law (as opposed to a formal one) that emphasises the promotion of coherency in the international system offers a sound working definition of international rule of law, in particular from the perspective of the role of regional human rights courts in promoting international rule of law. In the second part, I focus on paradigmatic cases from the regional human rights courts and posit the three doctrinal models that seek to promote coherency between human rights law and other parts of international law. In the third part, I assess the appeal and pitfalls of these models against a background of a fragmented and plural international legal order that does not exclusively serve the purpose of advancing the rights of individuals, but also other values, namely advancement of peace and security, effective regulation of armed conflict and protection of regulatory autonomy of states. In the concluding section, I reflect on the tensions between international rule of law that is exclusively focused on rights of individuals as opposed to the aggregate entity of individuals.

Session 6

Chair: James Penner, Professor, Faculty of Law, National University of Singapore
Commentator: M. Sornarajah, Professor, Faculty of Law, National University of Singapore

Patrick Taylor Smith
Assistant Professor, National University of Singapore
Creating a Global Rule of Law through Accretive, Permanent Revolution: the Case of EULEX

The global order is comprised of a complicated and sophisticated system of rules that significantly influence the life chances of those subject. Yet, at least prima facie, this system lacks the matrix of features that constitute the rule of law. This gives rise to a puzzle. The rule of law is normatively desirable, at least in part, because it is necessary for the legitimation of political power. Yet, that sort of power will need to be exercised in order to create the rule of law. This paper will make three interrelated arguments. First, the standard views of how the rule of law may be legitimately created ex nihilo—consent and higher authority—are either inadequate or inapplicable to the case of the global legal order. Second, creating the rule of law in situations where these other accounts fail will require that political agents 'dirty their hands' in revolutionary actions that violate the usual principles of political morality. If the revolution was in the past and the rule of law has been established, then the immoral actions of the revolutionaries does not undermine the authority of the existing legal system. When evaluating potential revolutions, however, I suggest that—in order for revolutionary movements to be worth supporting—they need to satisfy some basic normative prescriptions. Finally, I argue that revolutionary actions to create a global rule of law will need to be different—in fundamental ways—from past revolutions—both violent and not—to create a domestic rule of law in a particular society. More specifically, a global revolution will likely need to be both accretive—revolutions will likely need to build on each other in discrete steps--and permanent—the revolutionary project will likely be multi-generational—in comparison to domestic revolutions. In order to illustrate these distinctions, I will look closely and the debates surrounding both NATO and EU interventions in Kosovo, arguing that these interventions are not merely attempts to end a humanitarian crisis but also movements towards restructuring legal authority in a more cosmopolitan direction.

Session 7

Chair: Simon Chesterman, Professor, Faculty of Law, National University of Singapore
Commentator: Vincent-Joel Proulx, Assistant Professor, Faculty of Law, National University of Singapore

Devika Hovell
Associate Professor, Department of Law, London School of Economics
Understanding Security Council Authority

To theorize at all in the area of international organizations can be risky business. Positivism and realism remain the two master '-isms' in international law and continue to exert muscular control over the discipline. In light of recent events, the realist account of international law is even more difficult to shake off. Power trumps law – never was the realist motto more

apposite. Yet, in the co-ordination of international affairs, even powerful states acknowledge a role for international organizations. The UN Security Council remains, at least for the time being, the nucleus of collective international authority. It is not a government, but increasingly issues rules and publicly attaches significant consequences to compliance or failure to comply with them – and claims the authority to do so. This authority does not stem from raw power or coercion, nor is it sustained by formalist legal justifications that its authority derives from the combined effect of Article 25 and 103 of the UN Charter. As Buchanan and Keohane recognize, an institution's ability to perform its functions depends on whether those to whom it addresses its rules regard them as binding and whether others within the institution's domain of operation support or at least do not interfere with its functioning. The continuing authority of the UN Security Council cannot therefore be severed from questions about its legitimacy. The aim of the paper is to establish the foundations of the legitimate authority of the UN Security Council. In doing so, I reject orthodox international *state consent* theory and domestically-oriented *individual autonomy* theory. Instead, my proposal is that the grundnorm of the international legal system is recognition of 'shared responsibility' to address common threats. The paper will critically analyse the representative (or shared) aspect and purposive (or responsibility) aspect of Security Council authority, revisiting also the role of the Council in maintaining a balance of power in international relations. My tentative conclusion is that Security Council directives must fulfil (i) polity; (ii) purposive and – most controversially – (iii) princely justifications in order to establish their legitimate authority.

Chair: Patrick Taylor Smith, Assistant Professor, Department of Political Science, National University of Singapore
Commentator: Benjamin Schupmann, Lecturer, Department of Political Science, National University of Singapore

Ming-Sung Kuo
Associate Professor, Faculty of Social Sciences, University of Warwick
Beyond Constitutionalism: Thinking Hard about Multilevel Constitutional Ordering in the Shadow of the State of Emergency

This paper will aim to test the limits of the idea of multilevel constitutionalism by taking up the question of the state of emergency in the transnational context. Multilevel constitutionalism has been hailed as providing an innovative framework of analysis for constitutional issues in the globalizing world, suggesting a new paradigm of constitutionalism in the post-Westphalian political landscape. I shall argue that this view of multilevel constitutional ordering is partial as it leaves the hard question – the state of emergency – out of its conceived constitutionalism beyond the state. I shall suggest that pace the conventional view of the sovereign invocation of emergency power, the state of emergency in the present globalizing world is decentred, setting its administration apart from the holders of (residual) sovereignty in a multilevel constitutional order. As a result, a multilevel constitutional order would make the legitimacy of the state of emergency more complex. Leaving this core political issue unaddressed, multilevel constitutionalism falls short of a political project. To frame the transnational political landscape constitutionally, it is time to think beyond constitutionalism and rethink the question of political responsibility that underpins the constitutionalization of emergency power and holds the key to multilevel constitutional ordering. I shall conclude that focus of global rule of law be shifted from the normative framework of multilevel constitutionalism to the political project of multilevel constitutional ordering.'