



<b>Title</b>	<b>In or Out? Seeing exclusions from Constitutional Law from the theory of constitutional game</b>
<b>Author(s)</b>	<b>Tai, B</b>
<b>Citation</b>	<b>The 2009 International Conference on Exclusions from Constitutional Law, The City University of Hong Kong, Hong Kong, 28-29 October 2009. In Conference Abstracts, 2009, p. 5</b>
<b>Issued Date</b>	<b>2009</b>
<b>URL</b>	<b><a href="http://hdl.handle.net/10722/153201">http://hdl.handle.net/10722/153201</a></b>
<b>Rights</b>	<b>Creative Commons: Attribution 3.0 Hong Kong License</b>

**International Conference**  
**on**  
*Exclusions from Constitutional Law*

**28-29 October 2009**

*City University of Hong Kong*

**ABSTRACT OF PAPERS**

**WEDNESDAY, 28 OCTOBER 2009**

Session I

**Exclusion of Non-State Actors from the Constitution**

*Professor Mahendra Pal Singh*

In my paper I will primarily deal with the common conception that the constitutions address only the state and state actors and not the ones who fall outside that description. From the example of the Constitution of India and several other constitutions, including the Constitution of the United States, I will try to demonstrate that such a conception is misplaced and has been conveniently utilised by those in the positions of power to maintain their power and position unaffected by the constitutional goals and objectives set by its makers. Specifically I will illustrate my point from the application of fundamental or human rights in India both from the examples of constitutional provisions, judicial interpretation and legislative and executive practices in India and the theoretical justification for such approach in developing or underdeveloped societies like India.

**Transcending the State-centric Paradigm in Constitutional Theory and Practice: The South African Experience of Horizontal Application of Constitutional Rights**

*Dr Danwood M Chirwa*

The South African Constitution broke new ground by expressly providing that non-state actors can be bound by constitutional rights depending on the nature of the right and the duty in question; and requiring courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and developing the common law or customary law. These provisions were heralded as a major breakthrough in comparative constitutional law and practice which traditionally regard the constitution as a document which has vertical application to the state only. However, the euphoria around this breakthrough soon dissipated as South African scholars began to grapple with the precise implications of these provisions for non-state actors and for the existing substantive law, practice and procedure in South Africa. In particular, the jurisprudence and scholarship on these provisions have been complicated by the so-called direct and indirect horizontal debate, obscuring the original intention of breaking the barrier between the Constitution and non-state actors. This article takes stock of the South African experiment with horizontal application of constitutional rights with a view to drawing some lessons as to how best to bring non-state actors accountable in a constitutional context.

**Citizens and Aliens: Defining Constitutional Boundaries**

*Professor Sudhir Krishnaswamy*

TBA.

## **Citizenship Law: Key or Lock to Constitutional Rights Protection?**

*Mr Joachim Stern*

Citizenship law has for a long time been the key to determine whether a person enjoyed the protection of basic rights guaranteed by the constitution. Traditionally, constitutions have discriminated between citizens and foreigners, the first group enjoying fundamental rights and the effective protection thereof, while the latter often being subject to arbitrary decision making in many matters, some crucial for their existence.

Even though, within the last decades, the promotion of human rights and the principle of non-discrimination diminished this discrepancy, citizenship law still draws the line between including or excluding human beings into the full system of human rights protection in many areas, with democratic rights being the most prominent exclusions.

While international mobility steadily increases, in several countries the line that citizenship law draws has recently been re-ethnicized and subjected to conditions such as security and public order, language checks and financial criteria. At the same time constitutions often only lay down basic principles of citizenship law and leave the matter to simple acts of parliament. From a functional perspective this implies that a simple majority can decide about fundamental rights - a mechanism that can be considered incompatible with the principle of constitutional rights itself.

It is the purpose of this paper to outline the function of citizenship in the 21st century across several jurisdictions, to look at its changing framework in public international law and to analyse aspects of its content and function, especially from a democratic perspective.

## **The Governance of Risk and Innovation through Non-State Actors**

*Dr Iris Eisenberger*

When technical innovation shall make the blue-eyed green-eyed, the blond-haired red-haired, the blind see, the deaf hear, or human beings acquire a higher IQ we are confronted with basic questions: Where are the limits in changing human beings? Where to draw the line between humans and machines? Is enhancement of human capabilities legitimate? Or more abstract, can our constitutional/legal framework provide for these developments, particularly where legal gaps are evident and where new regulations will be necessary?

The rapidly changing, promising, ubiquitous, global, but yet uncertain nature of emerging technologies (like nanotechnology, biotechnology, cognitive science, robotics or artificial intelligence) poses major challenges to our constitutional/legal system. Novel international, supranational and national governance models involving non-state actors are emerging. This presentation shall shed light on how some of these governance models may lead to the exclusion of established constitutional values: such as democracy, due process or human rights.

The presentation will focus on the governance of risks and innovation of nanotechnology through non-state actors. A number of governance models and mechanism shall be highlighted.

First, private initiatives, voluntary agreements and code of conducts shall be the subject matter. Among which we can find the EDF-Dupont Nano Risk Framework, the UK Responsible

Nanocode, the German Manuals for responsible handling of nanoscale materials, the Code of Conduct Nanotechnologies Swiss Retail or the European Code of conduct for responsible nanoscience and nanotechnologies.

Second, standardization through national and international organizations as well as the regulation through private bodies and agents shall be at focus: CENELEC and CEN as examples for European organizations/institutions responsible for the harmonization and standardization of technical norms. These norms determine environmental protection requirements or the acceptable residues of heavy metals, contaminants or pesticides in food. Likewise of interest are private bodies or agents that have regulatory agency: for instance, nationally accredited bodies that regulate markets for technical products and devices. Medical devices like surgical equipments, implants, sensors or nanorobots are or would be assessed and certified through these nationally accredited private bodies.

Third, novel legal forms and mechanism that emerge in the wake of emerging technologies are of interest. In the governance and regulation of emerging technologies relatively novel legislative arrangements that involve private persons substitute traditional legal techniques of bans and orders, bipolar legal relationships and remedy-oriented law. Consensual techniques, informal administrative behavior and forms, cooperative mechanisms and multipolar legal relationships are at the core of technology law.

How will our environment, our society or human beings look like in the near and far future? These are issues that are in large parts transferred from nation states to non-state actors. Sector-oriented regulations leave certain interests aside. Common-welfare is often put behind specific economic interest. The transfer of regulation matters to non-state actors circumvents full democratic participation and lacks democratic legitimation and mostly regulates without any legal protection for third parties. Consensual legislation techniques and cooperative mechanism often lack a just balance of interests. All these issues beg the legal system for innovation. Where governance by non-state actors removes democracy, due process or human rights functional equivalents have to be put in place: for instance legitimation through transparency, acceptance and efficiency instead of hierarchical administrative democratic legitimation. The core question of this presentation will be whether and what legal scholarship can offer to these issues.

## Session II

### **Five Models of Comparative Reasoning**

*Mr Yap Po Jen*

Common law courts around the world have enriched their domestic adjudicatory process by using foreign materials in five different ways. These uses may be termed as follows: diagnosis, exposition, affirmation, functionalism, and universalism. This judicial cross-fertilization occurs not because the foreign decisions are in any way binding on the domestic polity, but because courts appreciate that they are engaging in a "process of collective judicial deliberation on a set of common problems." This paper explores in-depth each of the five modes of comparative reasoning and how they have been applied in practice by various common law courts.

## **In or Out? Seeing Exclusions from Constitutional Law from the Theory of Constitutional Game**

*Mr Benny Tai*

According to the theory of constitutional game, constitutional practices including the interpretation of constitutional provisions and application of constitutional provisions to real life situations are the result of interactive processes among different political actors enjoying constitutional powers under the constitution. Ideological, institutional and strategic factors affect how the political actors interpret or apply the constitutional provisions on the basis of their own constitutional goals. Political actors are constrained by the perception of other political actors on the legitimacy of their actions or non-actions.

The theory of constitutional game provides a perspective to understand the ambit of constitutional law (on paper as well as in action). Whether a certain social phenomena or social activity is excluded from or covered by the provisions of the constitution, it is resulted from the complicated process of game-like interactions among the political actors within its unique constitutional environment.

## **Freedom from the State: Modern Development of Human Rights Thought and the Theory of Obligation of the State to Protect Human Rights in Japan**

*Professor Koji Tonami*

TBA.

## **The PRC Constitution: What Purpose does it (not) Serve?**

*Dr Surya Deva*

It is widely accepted that constitutions serve several important purposes in the Western as well as non-Western traditions. Constitutions, for instance, signify a break from the past, organise political power, provide legitimacy to the legal system, empower people, limit the power of government organs, and work as a unifying force for diverse interests and groups.

Against this background, this paper seeks to ask and answer the following question: does the Constitution of the People's Republic of China serve these purposes? Although the PRC Constitution resembles – at least in appearance – Western liberal constitutions in some respects, it is really doubtful if it serves many of these purposes. This is not to suggest, however, that the PRC Constitution is devoid of any real value. It is perhaps designed to serve distinct purposes within the current Chinese legal framework. This paper will try to shed some light on what those purposes are and whether they mean anything to people outside China interested in the study of constitutionalism.

### Session III

## **Illegal migration in the EU: How does the Irregular Status of Migrants Affect their Human Rights Protection?**

*Dr Claudia Fuchs*

According to estimates, there are around 8 million illegal immigrants in Europe, and this amount increases by 500.000 to 1 million every year. Hence it is not surprising that addressing illegal immigration has been a central part of the EC common immigration policy since it was established in 1999. That year, the Treaty of Amsterdam conferred migration law competence upon the EC (the so called “first pillar” of the EU) and created a new legal framework. Special rules – on entry and residence, the combat of illegal migration and the return and readmission – are set out in Title IV of the EC-Treaty. These provisions are accompanied by a number of additional measures on EU- as well as on Member States-level.

The legal measures adopted since the Amsterdam Treaty focus on prevention and control of illegal immigration. The relationship between irregular migration law and human rights law does however constitute the subject of controversy. This is in particular due to the fact that migrants who lack the State’s authorisation concerning entry and residence are – from the State’s perspective – generally seen as offenders of its legal order. This, as a consequence, puts irregular border crossers or legal entrants who overstayed their entry visas into the status of “illegality”. As far as human rights protection offered to illegal migrants is concerned, it is mainly international legal rules governing the rights of migrants (such as the European Convention on Human Rights or the Geneva Convention) that have to be taken into account.

Against this background the question arises, whether the irregular status of migrants affects the “breadth” as well as the “depth” of their human rights protection. It has to be examined, to which extent the scope of the rights provided to legal respectively illegal migrants differs and how the irregular migration status impacts on the extent of protection. These considerations shall particularly be exemplified by taking a look at the European Court of Human Rights case law regarding the protection against expulsion in cases where family or private life is established in the State concerned.

## **Refugee Law in Hong Kong: Building the Legal Infrastructure**

*Mr Mark Daly*

It has been said that cats and dogs have more protection under Hong Kong law than refugees do (‘Pets better served than refugees, say lawyers’, South China Morning Post, 5 December 2004). Cats and dogs enjoy a dedicated statute, right of appeal to an independent board and specific provisions regulating decisions which vary length of detention. Not refugees.

Mr. Daly will discuss the situation of asylum-seekers, refugees and Convention Against Torture (“CAT”) claimants in the Hong Kong SAR and efforts by human rights lawyers to create a legal infrastructure for their protection and to safeguard their rights. This will involve a summary of the significant cases in the area.

Mr. Daly will also integrate into this landscape a summary of the case of “C&Ors (CACV 132-137/2008)” which will be argued in the Hong Kong Court of Appeal on the 12<sup>th</sup>-16<sup>th</sup> October 2009 and which may have a significant impact on the situation of asylum-seekers and refugees, involving issues of customary international law, non-refoulement, and the HKSARG policy not to carry out refugee status determination (“RSD”).

## **Out of Africa and Into China: Law and Living Situations of Africans in Guangzhou**

*Dr Guobin Zhu*

TBA.

## **The Politics of Norm and Exception in Singapore Criminal Due Process**

*Professor Michael Hor*

This paper will look at the the manner in which the "normal" shape and course of criminal law and due process is altered to "deal with" crime situations which are felt to be of particular urgency. It will explore the reasons, both stated and unstated, for making exceptions to the usual rules. It will ask if these changes were indeed necessary to deal with crime, in a strict sense, or whether they were to some extent only to demonstrate to the public that something was being done about it, or for some other internal administrative purpose. The paper will draw upon legislation and judicial decisions in the context of illicit drugs, corruption and some other kinds of criminal activity.



**THURSDAY, 29 OCTOBER 2009**

Session IV

**Constitutional and Anti-Constitutional Responses to Terrorism**

*Dr Konrad Lachmayer*

The last 10 years were strongly influenced by the security debate. The attacks of 9/11 became the symbol of a new form of international terrorism. These developments resulted in new responses to terrorism on a national and international level. This presentation will focus on the exclusionary effect of these responses.

The most well-known example is Guantanamo Bay. The United States created an area which should be excluded from the constitutional framework. In a long lasting procedure the US Supreme Court brought the situation of the detainees back into the framework of the US constitution. However, there are still persons detained in Guantanamo and the problems of deprivation of rights are still not solved. The problem of territorial exclusion of constitutional law in the context of terrorism cannot and shall not be reduced to Guantanamo. This example is just a symbol for a bigger problem of secret detention all over the world.

The second example of excluding constitutional rights in the context of terrorism is the establishment of terrorist lists by the UN Sanction Committee. These terrorist lists were supposed to stop the financing of terrorism and designed as economic sanction against individuals. In a preventive strategy the financial possibilities of individuals are limited or destroyed by freezing their funds and preventing any financial transaction. The individuals are lacking fundamental rights, like the right to be heard or fair trial. The European Court of Justice finally decided in 2008 to re-introduce constitutional standards in these cases. However, there are many problems left and the legal possibilities of persons concerned are still limited.

**Enacting Anti-Terror Laws in a Nation without a Bill of Rights: The Australian Experience**

*Professor George Williams and Ms Nicola McGarrity*

This paper focuses on the Australian constitutional system. It will first give some background on this system, before going on to examine the effect that Australia's lack of a Charter of Rights has had on the process of enacting anti-terrorism laws. We intend to a number of examples to demonstrate the side-lining of human rights and the principle of proportionality in the Australian context. In particular, we will discuss the urgent enactment of the *Anti-Terrorism Act 2005* and the National Security Legislation Discussion Paper. The Discussion Paper, which was released in August 2009 and is 450 pages long, does not contain any mention of 'human rights'. The emphasis by legislators on 'effectiveness' (over and above human rights and proportionality) is obviously not limited to the anti-terrorism context. However, it is particularly prominent in this context, with legislators often responding blindly to the public's demands for additional measures to be taken to protect them from the perceived terrorist threat.

Unfortunately, in a nation without a Charter of Rights, the legislative process is really the only meaningful opportunity for challenging counter-terrorism legislation on human rights grounds. The case of *Thomas v Mowbray* (2006) demonstrates the inability (and/or unwillingness) of the courts to impose limits on the power of the Commonwealth to enact laws for the defence of Australia. There are, of course, individual cases in which judges have enforced the human rights of terrorism suspects. For example, the decision by a Brisbane magistrate to release Dr Mohamed Haneef on bail in July 2007 and the decision of Justice Bongiorno in the Supreme Court of Victoria in March 2008 to stay a trial unless the conditions of detention of the 12 accused (who were being held on remand in a maximum security prison) were substantially improved.

This paper will ultimately reach the conclusion that, in the absence of a Charter of Rights, human rights principles are not given adequate weight either in parliamentary decision-making or by the courts.

## **The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German-Australian Comparison**

*Mr Christopher Michaelsen*

As a general principle of law, some form of proportionality is found in most legal systems. It is, for example, readily applied in the context of criminal law where the severity of punishment is expected to be proportionate to the seriousness of the crime. The proportionality principle, moreover, is regarded as a fundamental element of regulative policy and public administration. In this context, the principle is considered to find its origins in German constitutional and administrative jurisprudence. Over the past fifty years, however, it has become a preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest. From its German origins, the proportionality analysis spread across Europe into Commonwealth systems including England, Canada, New Zealand, and South Africa. In Australia it still awaits formal recognition in constitutional law and administrative law. This paper examines the application of the proportionality principle in the context of anti-terrorism law with particular reference to legislative initiatives in Germany and Australia. It analyses how – in the German context – the principle has played an important role in preventing undue restrictions of basic rights for the purposes of countering terrorism. At the same time the paper seeks to demonstrate that the lack of formal recognition of the principle in Australia has led to the adoption of a range of anti-terrorism laws that curtail civil liberties to an unprecedented extent.

## **Human Rights and Anti-terrorism Laws: An Analysis of India's Response to 26/11**

*Professor Dilip S Ukey*

This paper aims to examine and analyze the National Investigation Agency Act enacted by the Indian Parliament in the year 2008 after the Mumbai attacks in Nov. 2008 known as 26/11. India is witnessing several terror attacks in last few decades which jeopardize its security, unity and integrity as a civilized nation committed to democracy, rule of law and liberties of its citizens and others. The threat of international terrorism looms large over India and endangers its peace, secularity, economic progress and plurality- linguistic, cultural, religious, regional etc. There

have been systematic and planned attempts by terrorist outfits to create and perpetuate violence, terror and damage India's image as a peace loving nation before international community. The strong democratic roots and its commitment to rule of law and fundamental human rights of individuals, along with constitutional governance, enabled the country to overcome and withstand such onslaughts launched by terrorists from within and outside the country.

India is a unique blend of federal and unitary features in its Constitution, which establishes the respective organs of the government viz. legislature, executive and judiciary and more importantly provides basic/fundamental rights to people including right to go to the court. The Indian constitution swears to justice, liberty, equality and fraternity to all in its preamble. Similarly it being the supreme law of the land, all other authorities inter-alia law making authorities derive their power from the constitution and shall exercise the same within the defined limits of the constitution. It being by and large, a federal constitution, legislative, administrative etc. powers have been distributed between the center and the states (units or provinces) by the constitution itself. Fundamental rights guaranteed in part III of the constitution, place certain limitations, stipulations or restrictions upon the law making power of the concerned bodies or authorities. Hence, fundamental human rights curtails the exercise of legislative/administrative powers by the state.

However, these rights could be used and exercised by the people in a more better manner, only when the society is peaceful and an atmosphere is conducive for their enjoyment. Violence, terrorism, and inhuman barbaric treatments to people not only jeopardize their rights but put their life at risk or in a danger of elimination. Terrorism/ violence and basic human or fundamental rights are the sworn enemies. Such activities need to be prevented, controlled and if possible to be barred in a civilized state. Political and legal systems ought to be tuned and strengthened to tackle the menace of terrorism and violence. India has had in recent past the TADA, POTA like laws for the said object, yet those laws were required to be repealed on the ground of violating individual's rights, liberties and freedoms.

After 26/11 the Indian parliament has enacted the National Investigation Agency Act-2008 as a measure to counter and control terrorist attacks and activities in the country. This law sought to establish and constitute an investigating agency at the national level to investigate and prosecute offences affecting the sovereignty and integrity of India, security of state and other offences under the Act. It also intends to implement international treaties, conventions and resolutions of the UN vis-à-vis terrorism and other such related matters. The said Act also seeks to establish special courts to conduct trials of such scheduled offences. Though on ex-facie this legislation is being viewed as a tool to protect people from terrorist attacks and deal with such matters in a stringent manner, yet the scheme and some provisions of the Act appear counter to the basic fundamental human rights of individuals.<sup>1</sup>

Apart from this the legislation also suffers from certain constitutional troubled water. There are some serious constitutional questions to be addressed by the Act which doubts its validity and raises the question of federal character of the constitution and law making power exercised by the parliament. Similarly, even the administrative power sought to be exercised by the authorities of the central government also begs a scrutiny of its nature and distribution of powers by the Indian constitution. These and other issues are required to analysed in the proposed paper. The Ist part would deal with the doctrine of fundamental human rights, whereas the second part will be devoted to the some laws in relation to prevention of terrorism at national and international level. In the third part scrutiny of the NIA Act would be embarked upon vis-à-vis fundamental human

---

<sup>1</sup> Sec 6(4), 6(5) of the Act along with sec. 11 , 14, 16(1) and (5) etc.

right and its constitutional validity, whereas lastly some conclusions would be drawn including some suggestive measures to rectify the errors crept in the Act to make it more humane in view of human rights to address and counter the threat of terrorism in India in a more serious manner.

## **The Influence of Motive in the Definition of Terrorism on Constitutional Laws: A Comparative Study of Australia, Hong Kong, Singapore and Malaysia**

*Ms Wenwen Lu*

This paper focuses on the ways in which the definition of “terrorist act” in the counter-terrorism laws of Australia, Hong Kong, Singapore and Malaysia challenges constitutional protections in those jurisdictions. In particular, it considers the most controversial part of the definition: the motivational element of the definition, namely a political, religious or ideological cause.

The first part of the paper contrasts the definitions of “terrorist act” across the four jurisdictions with an emphasis on motive. It concludes that all states make some effort to create a relatively stringent and extensive definition of terrorism that all contain the motive element. On one hand, motive is one of terrorism’s distinguishing features, separating it from ‘ordinary’ crimes, especially the political status in terrorist acts; on the other, the inclusion of motive in defining the offence may breach fundamental human rights protections, and thus risk unconstitutionality.

This supposition is tested in the next section which outlines the relevant constitutional guarantees of the four jurisdictions. Hong Kong’s Bills of Rights Ordinance 1991 contains various protections of basic human rights, and certain fundamental liberties and rights are also included in Singapore’s and Malaysia’s Constitutions such as the rights to profess and practice religion and the freedom of speech. Though Australia does not have a comprehensive system of statutory or constitutional protection of human rights and fundamental freedoms, its High Court has found that the Commonwealth Constitution contains an implied freedom of political participation and communication, with some possibility of freedom of association necessarily included in that.

Then the paper explores how the motivational element in the various definitions may affect constitutional rights, paying special attention to the ways in which the definition might be used to impact directly and indirectly upon freedom of speech. The definition might place considerable limitations on the processes of discussion, debate and political speech. In essence, it enables the State to use counter-terrorism laws to suppress dissent, and even worse, to marginalise certain minority groups or minority interests.

The paper concludes that by promulgating extensive definitions to guarantee our security, we may violate constitutional laws and isolate and ostracise members of our community. Being an essential part of the strategy in fighting against terrorism, the definition constantly challenges the bottom line of a liberal and democratic society. How Australia, Hong Kong, Singapore and Malaysia deal with this issue will to a large extent affect the integrity of Constitutional laws or at least the integrity of constitutional commitments to free exchange and debate of religious and political perspectives.

## Session V

### **The Human Rights Implications of ‘New Aid’**

*Professor David Kinley*

Aid, or overseas development assistance (ODA), has gone through many manifestations since 1945. From rescue and reconstruction in the 1940s; through the dealing with the legacies of decolonisation in the 1950s and 60s, and the direct infrastructure grants and loans of the 1970s; to the fiscal conditionalities of the 1980s, and the governance and host-state participation conditionalities of the 1990s. But in the 2000s there are a new set of challenges to the sourcing of aid, understanding its impacts and measuring its efficacy.

In this paper I seek to raise questions over the specific human rights consequences of such challenges as raised by three emerging phenomenon: 1. recent calls for the aid tap to be turned off altogether; 2. the rise of institutional philanthropy as a significant player on the aid stage; and 3. the growing breadth and depth of ODA coming from non-OECD states, such as China (as well as Saudi Arabia, Venezuela and others). In particular the paper focuses on the implications of these developments for host-state observance of their international human rights obligations which are invariably, if differently, constitutionally sanctioned.

### **Global Constitutionalism: Ending the Chimera of the Developing-Developed Country Dichotomy**

*Dr Rostam J Neuwirth*

Comparative constitutionalism is meant to supplement the global constitutionalisation debate which focuses on legal aspects of the governance of global affairs. Legal aspects of global governance hence address questions concerning the areas of law- and policymaking at the global level and are directly concerned with the institutional structure as well as the substantive regulation of issues that are matters of serious concern to humanity as a whole. One field of such great concern is the relation between international trade and development aid, also known as a “trade and development” problem in the trade linkage debate, to which a great variety of related problems, such as poverty, human health, environmental protection, the preservation of cultural diversity as well as ultimately human dignity are linked.

Especially in the context of this debate but also in common language, it is a recurrent terminology to divide the world in so-called “developed” and “developing countries” and sometimes even “less-developed” or “least-developed countries (LDCs)”. Such distinction, it is argued here, is not only in stark contradiction to the very basis of nature and the human evolution but even stands in contradiction to the very foundations of constitutional law, both at the national, supranational as well as global level. Constitutional law is generally understood as the supreme legal layer in the *Stufenbau einer Rechtsordnung*, when excluding for the moment the meta-legal levels of the *Grundnorm* (basic norm) from a positivistic point of view or the sphere of religious norms from a natural law perspective. Furthermore, the distinction of developing and developed countries is used in an antagonistic way, hence forming a dichotomy which usually is contrary to the *telos* of a constitution which is generally found to be in the provision of a legal framework within which antagonistic forces find their free but peaceful expression and are balanced against each other.

This article hence advocates to “end the chimera” of the “developing/developed country” dichotomy and proposes the concepts of “development policy” and the sole use of “developing countries” as a generic concept for a new policy field fostering a more holistic and cybernetic approach to the organisation of life. To this end, it provides first a philosophical critique of the distinction trying to establish its chimerical character or else its irrelevance for the governance of global affairs or, expressed in an even sharper tone, to display the inherent malicious intent to maintain a deeply unjust situation. Consequently, it provides an overview of some selected national and regional constitutions to underscore the claims made by the philosophical inquiry. Based on this overview, it reviews some of the most common usages of the developing/developed countries’ dichotomy in the international legal arena and finally proposes some expected benefits for a much needed fundamental reform of the present international legal system with a view of establishing a more balanced and hence more sustainable global legal order.

## **Limits on Arbitrability: A Constitutional Concern?**

*Professor Bea Verschraegen*

Several areas of law, such as antitrust, securities law, intellectual property, political embargoes, bankruptcy, administrative contracts etc may be regarded as nonarbitrable, because they are subject to mandatory rules of law in order to protect “public interests”.

The importance of such a “nonarbitrability doctrine” is, from a comparative perspective, more and more decreasing. Though the question remains whether this trend is valuable or, quite to the contrary, a constitutional concern.

This paper deals with the question whether we are facing a legitimate expansion of issues that can (and should) be arbitrated or whether we are dealing with attempts of territorial and personal exclusions from areas touching upon constitutional law.

## **Private Rights under the Global Constitutionalism: A Perspective from Competition Law**

*Ms Guo Hua*

The modern constitutions can not avoid two main topics: limit power and protect rights. While the domestic constitutional discussion mainly focuses on “power” issue, the global constitutionalization debate is more of “right” colour, exemplified by the highly concern on human rights. The logic behind is somewhat similar to Dicey’s theory that “the constitution is not the source but the consequence of the rights of the individuals”. In this sense, it can be argued that the achievement of global constitutionalism in certain extent depends on how much private rights are protected. Meanwhile, the process of economic globalization also is observed to have on one hand, intensified the flow of goods, services, capitals and labours, and on the other hand, bred new forms of governance called private, non-state or “sovereignty-free” actors, such as multinational corporations, transnational societies, non-government organization and international organizations, or even individuals.

The key to understanding the shape of this new global governance lies in the way that economic competition is changing in the world. On one level, the way the state itself works is changing, the main task or function of the contemporary state is the promotion of economic activities, whether at home or abroad. On the other level, private actors, especially those footless multinational corporations, are adjusting their strategies to maintain advantages in the fierce international and domestic competition. What's more, with the development of technology and the prevalence of Internet, various products and services can be consumed cross borders, resulting in the new form of global consumers.

The profound changes in global economy and governance have also reflected in constitutional field. One of the trends is that the concern of constitutional law has shifted from "power-right" infringement to "right-right" conflict and governmental power thus plays as the balancer of private interests. As the economic constitutional charter, competition law is the right arena where private parties (especially company, consumer) and state (or government) meet each other. The direct goals of competition law are to promote effective competition among market participants and to protect the rational choice of consumers. However, the effective competition is always challenged by anti-competitive practices and consumers often make choices under information asymmetry, state (government) thus has to wave his "visible hand" to guarantee a healthy market. What is interesting to note in this context is that given that company and consumer are in large extend acting globally, this "visible hand" of state (government) is too short to be able to reach though national competition law is sometimes of extraterritorial effect. More ironically, the present international legal order, even the most promising WTO legal framework, hasn't prepared well for the access of non-state actors.

This article hence attempts to emphasis the private rights under global constitutionalization and argues the present gap between global legal order and practice, especially in the field of competition law. To this end, it first introduces the change of global governance in sense of constitutional perspective. Then it provides some practical cases corresponding to the private interests of company and consumer, and endeavoured to make legal analysis on those practices from competition law standpoint, both internationally and domestically. By legal consideration of global competition activities, this article advocates the realization of global constitutionalism relies on the promotion of private rights and wonders whether there is a necessary and possibility to reach a global competition law, and finally try to get the answer and suggest some alternative approach to shorten the practical/factual gap.

## Session VI

### **Protection of Human and Labour Rights in Special Economic Zones**

*Dr Christina Binder*

Special economic zones (SEZs) have been set up in numerous – generally developing – countries, including China, Brazil, the Philippines, Poland and Russia. In order to promote industrial and commercial exports and to attract foreign direct investment, SEZs usually, in addition to providing the benefits of a free trade zone, also offer other incentives such as exemptions from taxes or business regulations.

While SEZs are generally held to promote investment and employment by granting these exemptions, considerable problems including the enforcement of health and safety standards,

labour laws and trade union rights are encountered in these zones. Excessive working hours, low wages, a lack of trade union association and inadequate protection for women workers are reported accordingly.

This problem of “exclusion” from labor and human rights standards in SEZs is a mainly a practical one. Although in cases, SEZs provide for explicit exemptions from labor and human rights standards, mostly these standards apply in principle, but their implementation and enforcement is deficient or entirely lacking. Restrictions of trade union rights, abuses in working time, safety and health, and discrimination thus often persists in SEZs; notwithstanding a theoretical applicability of international and national standards and laws.

This presentation proposes, in a first part, to give an overview of the main problems which are related to the implementation and enforcement of international human rights and labour standards in SEZs on the basis of pertinent case studies and examples.

In a second part, the means and strategies to close that gap of “practical/factual” exclusion from applicable constitutional/human rights law will be examined. These include mechanisms to hold governments accountable for the lacking implementation and enforcement of relevant standards, such as reporting obligations and ILO supervisory mechanisms.

Likewise, other “softer” tools/instruments to promote the implementation and enforcement of the relevant standards will be presented. These include tripartite consultations between governments, employers and workers; the promotion and strengthening of the role of labour inspectorates; as well as information, education and awareness programmes to foster a culture of respect for labour rights.

Finally, a more general perspective will be given of what can be done to improve compliance with human rights and labour standards in SEZs. These will focus on the accountability of non state actors such as Transnational Corporations (TNCs); relevant Corporate Social Responsibility initiatives will be highlighted accordingly.

## **Territory Residents and Indigenous Property Holders under the Australian Constitution: In or Out?**

*Mr Sean Brennan*

There are only a few express rights in the Australian Constitution, one of which is the promise of ‘just terms’ when property is compulsorily acquired under federal law. But several hundred thousand people have been excluded from this property rights guarantee in the Constitution, due to the fact that they live in a Territory of Australia, rather than a State.

This geographical exclusion also intersects with questions of race. Thirty per cent of residents in the Northern Territory are Aboriginal people, many of them communal property holders. The 1969 High Court decision that excluded Territory residents from the property rights guarantee involved litigation by Bougainville villagers over unwelcome mining activity, when Papua New Guinea was an Australian Territory.

In 2009, in the case of *Wurridjal v Commonwealth* concerning Aboriginal land in the coastal settlement of Maningrida, the High Court ended the constitutional exclusion of property owners



in the Territories. But important constitutional questions remain about the compulsory acquisition of Aboriginal property rights and the ‘just terms’ guarantee.

The paper will analyse the juridical basis for exclusion of Territory residents from constitutional protection, probe the High Court decisions in 1969 and 2009 which book-end the discussion and explain how the intersection of compulsory acquisition (or eminent domain) with Aboriginal property rights poses unique difficulties for constitutional law – in particular, for the meaning of ‘just terms’. The *Wurridjal* litigation highlights important questions about the inclusiveness of constitutional law.

## **The Indigenous Struggle for Autonomous Territories: The Example of Mexico and the Postcolonial Dimension of the Demand for Autonomies**

*Dr Judith Schacherreiter*

The rebellion of the Zapatistas of 1st January of 1994 in the south of México gave an important impulse to the struggles for indigenous autonomies. The demand for autonomies of the indigenous population includes the demand for their own territories where they can organize themselves in accordance with their own governments, their own legal systems, their systems of security and where they can practice their own forms to exploit land and natural resources. This concept of autonomy is based on the concept of self determination but is not directed towards separation or foundation of a new „indigenous state“. The indigenous people demanding autonomies rather want to continue as a part of the nation state but with their autonomous territories where state powers and its capitalistic economic order are limited.

At least since the Zapatista rebellion, the demand for autonomy represents the core of the struggles of indigenous movements in Mexico. The concept of autonomy represents a dichotomic alternative to the assimilating approach of „indigenismo“. Arising from a colonial past and from neo-colonial and imperialistic forms of domination, the demand for autonomy implies a postcolonial dimension which transcends its local context and is directed towards a new order of the nation state as well as of global powers.

## **Exclusion from Constitutional Law in China: A Case Study of Riot Incidents in Xinjiang Uygur Autonomous Region**

*Dr Lin Feng and Dr Wang Shucheng*

Urumqi Riots were a series of violent incidents in China during which hundreds of civilians died and social disorder was disrupted. Chinese Government took a different approach in handling the riots in comparison with some western countries. Various governmental organs have been involved. In particular, the Supreme People’s Court has also been involved in handling the emergencies. This paper will discuss how Chinese government has dealt with the riots and whether it has done it constitutionally. China’s unique approach in handling the riots can partly be explained by China’s own different constitutional system, which is people’s congress system, and its different institutional arrangement. However, Chinese Constitution has provided clearly that China is committed to the rule of law principle and protection of human rights. As a result, all constitutional organs should operate within the four corners of the Constitution. Specifically speaking, the executive power should be limited by the Constitution, and the Supreme People’s

Court should perform its function independently according to laws and the Constitution, rather than get involved in the political affairs. China is, in essence, still a kind of authoritarian constitutionalism and the government plays a dominant role in regulating social affairs. Nevertheless, the paper argues that the authoritarian administration is not absolute in terms of derogation of human rights. A system of checks and balances should be established to limit the exercise of power by the government in case of emergencies in order to realize constitutionalism in China. The authors opine that even under the people's congress system, direct and/or indirect check of executive power is not only possible but also consistent with China's institutional arrangement.

## Session VII

### **Ubiquitous Computing and Areas in the Constitutional Law Beyond or Outside the Law**

*Dr Elisabeth Hödl*

In recent years, exciting technologies – and challenges – have been emerging in a field that can be referred to as ubiquitous computing. Computing is now moving out of the “box” (e.g. the PC workstation) and pervading our everyday lives. We are witnessing a shift in paradigm from a desktop model to a post-desktop model of human-computer interaction. In contrast to the desktop paradigm, in which a single user consciously engages a single device for a specialized purpose, ubiquitous computing involves a variety of computational devices and systems simultaneously the “users” may not even be aware of. Thus this paradigm is also described as *Pervasive Computing*, *Ambient Intelligence* or *Everyware* (Greenfield 2006).

Referring primarily to the “pervaded” objects we can speak of the *Internet of Things*, *Haptic Computing*, and *Things that think*. Take, for example, cars identifying their location and giving information to other cars (a technology to avoid accidents), or *Wearable Computers* and *Smart Clothes*, that is, personal technology carried by people at all the time and connected to the mobile phone and the internet. This IT-prosthesis function as a permanent enhancement of the cognitive demands of the human being. The technology to realise this vision is the RFID technology. Moreover, in the not too distant future many manufactured goods will not only contain a basic identification capability, they will also be able to gather data from integrated sensors, monitoring everything from air quality within buildings to physiological responses to medication (Estrin, Govindan, & Heidemann 2000).

Some of the challenges of ubiquitous computing are clearly technical. Ubiquitous computing encompasses a wide range of research topics, including distributed computing, mobile computing, sensor networks, human-computer interaction, and artificial intelligence. There is already a lively debate among researchers and practitioners working in the field of computer technologies addressing various technological issues in this area. By comparison, serious philosophical, social-scientific, political and legal discussion is rare. This is a deplorable fact, for these technical and technological developments will affect individual and societal welfare significantly. For example, aggregation of data form remote sensors can lead to greater social communication; but it can also allow organizations to discern more and more about our activity patterns and personal preferences, and thus lead to the invasion of privacy and undermine a climate of trust within social relations, thereby diminishing our social capital (Friedman, Kahn, & Howe 2000).

The guiding questions in discussing areas beyond or outside the law where constitutional law might not be applicable are:

- What kind of laws and rules are needed to uphold our current values of self-determination, autonomy, and privacy?
- Should the identity of the individual human subject remain the major concern of legal regulations of fundamental rights?
- Or will there be soon an irresistible need for more collectivistic re-conceptualizations of fundamental rights in order to better protect *networks* of communication and interaction which more and more seem to constitute the identity of the individual in the first place?

## **The Constitutional Rights under the Special Power Nexus**

*Professor Liu Zhi-gang*

The applying of the constitutional rights under the special power nexus has come through three phases, namely, the phase negating entirely the applying of the constitutional rights in the special power nexus; the phase acknowledging the applying of the constitutional rights in the special power nexus, and which doesn't apply the principle held by law; the phase acknowledging the applying of the constitutional rights in the special power nexus, and restricting them must apply the principle held by law. The exoterica bases of restricting constitutional rights under the special power nexus is mainly because of the need maintaining its system function, and which can be explained from the angle of the nexus between the majority and the minority in philosophy. Restricting the constitutional rights under the special power nexus can't breach a definite circumscription. The building of the circumscription can be carried through from three aspects : Firstly, establishing the legitimate presence of the special power nexus in constitution in the wake of Germany; Secondly, the restriction must be demarcated in the scope of the special power nexus in constitution; Thirdly, the restriction can't violate the principle held by parliament and other legal provision.

## **Political Questions and Judicial Review: Activism or Self-Restraint**

*Dr Li Xiaobing*

The political attributes of constitution and non-political attributes in the process of constitutional practice are two sides of a coin. When faced with a political problem, how constitutional institutions deal with is a major challenge for each country's constitutional practice. "Political questions" doctrine is a response to this problem which was created in the Constitutional practice of the United States Supreme Court. The adoption of this doctrine makes the court smoothly emerged from the political difficulties it may face and many countries transplanted and drew on the successful experience of the United States. But the constitutional institutions should not shirk their responsibility. Therefore, the application of this "Political questions" doctrine needs a comprehensively reflection and examination.