



**Rechtskulturen:
Confrontations Beyond Comparison**

*Rechtskulturen – Confrontations Beyond Comparison. The Berlin Law Fellow Program.
A Project of the Berlin Research Network Law in Context at the Forum Transregionale Studien.*

**Workshop II
EXAMINING (CONSTITUTIONAL) COURTS IN A LEGALIZED WORLD:
WHO CONTROLS JUDICIAL CONTROL?**

Wissenschaftskolleg zu Berlin, 16 – 17 December 2010

Conveners:

Christoph Möllers (Humboldt-Universität zu Berlin)

Susanne Baer (Humboldt-Universität zu Berlin)

Alexandra Kemmerer (Wissenschaftskolleg zu Berlin)

The Workshop.

The workshop “Examining Courts in a Legalized World: Who Controls Judicial Control?” (16 – 17 December 2010, Wissenschaftskolleg zu Berlin) is the second event of a four-part workshop series at the outset of the new Berlin postdoctoral fellow program *Rechtskulturen: Confrontations Beyond Comparison*, a project of the Berlin Research Network *Law in Context* at the *Forum Transregionale Studien*. The program will host its first group of fellows in 2011/2012. To conceptualize its research focus, a series of workshops shall allow us to question the questions; that is: to discuss whether the way we design research on law is adequate or in need of modification, with regard to the multiplicity of perspectives shaped by geopolitical location, disciplinary background, position and status, and the like. We want to sharpen the project’s scholarly profile and allow for the mapping and exploration of guiding research themes and questions for the coming years. Bringing together participants from a broad range of regional and (intra-)disciplinary backgrounds, the small-group workshops each focus on one rather large topic, with short papers and intensive discussions.

The first workshop discussed the notion of the public versus the private in various ways. Now, the second workshop shall focus on judicial review. It remains one of the most puzzling and paradoxical developments in the history of political institutions that many have established courts as sites of independent decision-making and control – competent to control even the very political

institutions which created them. That competence, the right to a last word, triggers many questions. The debate as to the legitimacy of constitutional courts in Europe and North America is thus very diverse, rich and multifaceted. But one may also perceive it as a discourse along established, well-trodden lines. Should it change, also in light of experiences with courts on the other continents? And should we modify our search in light of concepts from sociology, cultural studies, or political science? This workshop aims at a new start with supposedly familiar questions. We intend to specifically employ a transregional perspective, including Asian, South American and African sites of judicial law-making.

How is a court's competence to control (and eventually invalidate) political decisions perceived as a problem or a conflict, both on a juridico-political level and within the legal system? What strategies are used to deal with constitutional and administrative or other courts in that debate? What strategies do the courts use? What is the role of litigants and lawyers and scholars, for politicians and activists, and for judges? Who are they, and how do they perceive what they are doing?

Control in and of (constitutional) courts can be exercised as self-control, be it as judicial self-restraint or be it as respective supervision by and within a college of judges/justices. In addition, control is of course also exercised by and as outside supervision: through the critical eyes of academics, by public discourse, and by other institutions in the political system. There are three main avenues of intervention, as means of control (or at least nudging) of the courts. One intervention is the legislator who "responds" to a political system's highest judicial authorities. Secondly, the selection and nomination of justices / judges provides opportunities to influence the judicial branch – and appears not only as a much discussed topic in recent years in many democratic systems, but also as a field of growing interest for scholarly examination. In addition, discussions in various publics react and respond to a court's decisions. While courts bring certain topics on the agenda, they are also always situated in a tension with the public sphere.

The workshop aims to illuminate the paradoxical and complex interrelations between law and politics in democratic constitutionalism, in constitutional democracies. We would want to address in detail the modes and techniques of control. Some observe phenomena of a "new constitutionalism", and the rise of a "juristocracy" (Ran Hirschl) on national, supranational and international sites of governance. What exactly is that judicialization of politics and politicization of law? In a world made (new) by courts, there may be imperialist judges, but there are also deferential politicians. Are all courts "shifting the ground on which they construct their authority" (Pratap Bhanu Mehta)? Exploring such shifts as well as supposedly stable institutional arrangements, we need to ask questions of legitimacy, the democratic legitimation of courts. We thereby confront the nexus between law and politics and may transcend inherited dichotomies of law and politics, expand the analytic terrain within which to address the role of courts in today's world.

Schedule

Wednesday, 15 December 2010

7:30 pm Reception and Dinner (Literaturhaus)

Thursday, 16 December 2010

Wissenschaftskolleg, Großer Kolloquienraum

9:30 am – 10:30 am

Welcome

Dieter Grimm (Berlin)

LEGAL CULTURES: CONFRONTATIONS BEYOND COMPARISON.

MAPPING A RESEARCH AGENDA

Susanne Baer (Berlin)

EXAMINING (CONSTITUTIONAL) COURTS IN A LEGALIZED WORLD:

WHO CONTROLS JUDICIAL CONTROL?

Christoph Möllers (Berlin)

CARTOGRAPHIES OF COURTS, CONSTELLATIONS OF CONTROL:

A WORKSHOP AGENDA

Alexandra Kemmerer (Berlin)

10:30 am – 11 am

Coffee Break

11 am – 12:30 pm

CONTROL AS OUTSIDE SUPERVISION I:

THE POLITICAL SYSTEM STRIKES BACK THROUGH PUBLIC OPINION

Moderator: Ulrich K. Preuß (Berlin)

Pierre de Vos (Cape Town)

Pratap Bhanu Mehta (New Delhi)

Comment: Katja Gelinsky (Berlin)

12:30 pm – 2 pm

Lunch (Wissenschaftskolleg)

2 pm – 3:30 pm CONTROL AS OUTSIDE SUPERVISION II:
THE POLITICAL SYSTEM STRIKES BACK THROUGH LEGISLATION
Moderator: Susanne Baer (Berlin)
Seog-Yun Song (Seoul)
Adrian Vermeule (Cambridge, Mass.)
Comment: Oliver Lepsius (Bayreuth/Berlin)

3:30 pm – 4 pm Coffee Break

4:30 – 6 pm CONTROL AS OUTSIDE SUPERVISION III:
THE POLITICAL SYSTEM STRIKES BACK THROUGH JUDICIAL
NOMINATIONS
Moderator: Mattias Kumm (Berlin / New York)
Julio César Rivera (Jr) (Buenos Aires)
Renata Uitz (Budapest)
Comment: David Robertson (Oxford)

7 pm Dinner

Friday, 17 December 2010

Wissenschaftskolleg, Großer Kolloquienraum

9:00 am – 10:30 am CONTROL AS SELF-CONTROL I:
CONSTITUTIONAL COURTS AS COLLEGES OF JUSTICES
Moderator: Alexandra Kemmerer (Berlin)
Dominique Schnapper (Paris)
Dieter Grimm (Berlin)
Comment: Jeff King (Oxford)

10:30 am – 11:00 am Coffee Break

11:00 am –12:30 pm CONTROL AS SELF-CONTROL II:
JUDICIAL SELF-RESTRAINT
Moderator: Stefan Huster (Bochum / Berlin)
Nahed Samour (Frankfurt am Main)
John Ferejohn (New York)
Comment: Kate O'Regan (Cape Town)

12:30 pm – 2 pm	Lunch (La Forchetta)
2 pm – 3:30 pm	CONTROL AS OUTSIDE SUPERVISION IV: ACADEMIC CRITIQUE Moderator: Martin Loughlin (London) Aharon Barak (Herzliya) Brun-Otto Bryde (Karlsruhe / Gießen) Comment: Cheryl Saunders (Melbourne)
3. 30 pm – 4 pm	Coffee Break
4 pm – 5. 30 pm	CONCLUDING OBSERVATIONS / GENERAL COMMENT Moderator: Christoph Möllers (Berlin) Ran Hirschl (Toronto) Michael Zürn (Berlin) CONCLUDING DISCUSSION

Participants:

- Aharon Barak (Interdisciplinary Center Herzliya, former President of the Supreme Court of Israel)
- Brun-Otto Bryde (Bundesverfassungsgericht, Karlsruhe / Universität Gießen)
- John Ferejohn (New York University Law School)
- Katja Gelinsky (journalist, regular contributor to the Frankfurter Allgemeine Zeitung, , Berlin)
- Dieter Grimm (Humboldt-Universität zu Berlin / Wissenschaftskolleg zu Berlin / Yale Law School, former justice at the Federal Constitutional Court of Germany)
- Ran Hirschl (University of Toronto)
- Stefan Huster (Universität Bochum / Wissenschaftskolleg zu Berlin)
- Jeff King (Balliol College, Oxford)
- Mattias Kumm (Wissenschaftszentrum Berlin / New York University Law School)
- Oliver Lepsius (Universität Bayreuth / Wissenschaftskolleg zu Berlin)
- Martin Loughlin (London School of Economics)
- Pratap Bhanu Mehta (Center for Policy Research, New Delhi)

- Kate O'Regan (University of Cape Town / University of Oxford, former Justice at the Constitutional Court of South Africa)
- Ulrich K. Preuß (Freie Universität Berlin)
- Julio César Rivera (Jr) (University of San Andrés, Buenos Aires)
- David Robertson (St Hugh's College, Oxford)
- Nahed Samour (Max Planck Institute for European Legal History, Frankfurt am Main)
- Cheryl Saunders (University of Melbourne)
- Dominique Schnapper (EHESS / former member of the Conseil Constitutionnel)
- Seog-Yun Song (Seoul National University)
- Renata Uitz (Central European University, Budapest)
- Adrian Vermeule (Harvard Law School, Cambridge, Mass.)
- Pierre de Vos (University of Cape Town)
- Michael Zürn (Wissenschaftszentrum Berlin)

Guests:

- Anne van Aaaken (Universität St. Gallen / Wissenschaftskolleg zu Berlin)
- Jelena von Achenbach (Humboldt-Universität zu Berlin)
- Christian Boulanger (Humboldt-Universität zu Berlin)
- Matilda Chatzipanagiotou (Graduate School „GraKoV“, Humboldt-Universität zu Berlin)
- Tatjana Evas (Universität Bremen)
- Isabel Feichtner (German Institute for International and Security Affairs)
- Alec Freund SC (advocate, South Africa)
- Philippe Gérard (Graduate School „GraKoV“, Humboldt-Universität zu Berlin)
- Petra Gehring (Technische Universität Darmstadt / Wissenschaftskolleg zu Berlin)
- Anna-Bettina Kaiser (Humboldt-Universität zu Berlin)
- Ann-Katrin Kaufhold (Humboldt-Universität zu Berlin)
- Reinhard Müller (Frankfurter Allgemeine Zeitung)
- Sabine Müller-Mall (Humboldt-Universität zu Berlin)
- Virgílio Afonso da Silva (University São Paulo)
- Yoan Vilain (Graduate School „GraKoV“, Centre Marc Bloch Berlin)
- Tim Wihl (Humboldt-Universität zu Berlin)

The Berlin Law in Context Fellow Program.

Rechtskulturen: Confrontations Beyond Comparison

**A Postdoctoral Fellow Program of the Berlin Research Network *Law in Context*
at the *Forum Transregionale Studien***

The Postdoctoral Fellow Program has been conceived as a central element of the Berlin research network *Law in Context*, carried out by law professors of Humboldt-University, and funded by the Land of Berlin since October 2009 and based at the Wissenschaftskolleg zu Berlin, in collaboration with the Faculty of Law at Humboldt University. The research network *Law in Context* aims to enhance a re-contextualization of law not only among its neighboring disciplines – the humanities, the cultural and social sciences – but also aims to recontextualize our understanding of law beyond comparative legal studies, in a broader concept of legal cultures. We intend to create a space of reflection and communication where fundamental and salient questions of the law and its context(s) can be re-negotiated and re-connected with jurisprudence and legal methodology, as well as with findings from a variety of academic disciplines, beyond a narrow European or Anglo-American focus. Within the research network, the postdoctoral fellow program is crucial in that it may allow us to modify research questions in transregional constellations.

The postdoctoral fellow program is co-directed by Justice-elect professor Susanne Baer (Bundesverfassungsgericht, Karlsruhe / Humboldt University) and professor Christoph Möllers (Humboldt University), and scientifically coordinated by Alexandra Kemmerer (Research Network *Law in Context*, Wissenschaftskolleg zu Berlin). Each academic year, the program will invite seven young scholars to Berlin, to pursue projects which contribute to the study of *Rechtskulturen: Confrontations Beyond Comparison*. It shall enable and encourage both the fellows and the wider community to explore and create, for the fellows in an early stage of their academic careers, new research questions, in a vibrant research environment.

In Berlin, the postdoctoral fellows will work on projects of their own choice, which will be selected based on a call for fellowships. For the duration of one academic year, they will work, in accordance with their disciplinary fields or themes, in one of the local university or extra-university research institutes and will be associated with their respective research contexts. The rich and multifaceted academic landscape of Berlin, but also the presence and activities of a wide range of political and cultural actors, institutions and initiatives provide a stimulating environment, which allows for exploration and experiment, thus, contextualized legal scholarship. In and around Berlin,

several institutions with transnational impact and reputation have built and strengthened, over many years, profound expertise in legal studies and research on the social and cultural contexts of law, the interdependencies and interrelations between the law and its context(s).

Rechtskulturen: Confrontations Beyond Comparison thus addresses scholars from a variety of disciplinary backgrounds, regional contexts and academic fields of discourse. Bringing young scholars from global regions beyond established European/Northern-American academic contexts and spaces of intellectual discourse to Berlin, the program allows its participants to explore the law in new and innovative ways. The program will create a space of interdisciplinary learning that serves as a platform for diverse, partially interrelated and interconnected "learning communities". "Translation" will be required on a day-to-day basis, linguistically as well as in a (legal) cultural sense. Such "translation" implicitly points to the challenges presented by multicultural and diversified spaces to academia and society – challenges that are a central problem and inherent question of the project in its entirety. New forms of scholarly cooperation and dialogue will be encouraged, initiated and practiced.

The fellows will be part of a working group, based at the Wissenschaftskolleg and meeting there on a regular basis. In the *Berlin Seminar Law in Context*, they will cooperate with a larger group of scholars sharing a joint interest in contextual and contextualized legal knowledge. They represent a broad range of diverse approaches to the law, including gender studies, comparative research, law & literature, critical approaches to international law, administrative sciences, transitional justice, the law of development cooperation, and classical problems of legal philosophy. The *Berlin Seminar Law in Context*, meeting once a month at the Wissenschaftskolleg for a lecture and subsequent discussion, provides a forum for original and innovative legal research, i.e. scholarly explorations in the field of law, be it from inside the legal discipline, be it from the perspective(s) of the humanities and other social sciences.

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