

Tilburg Rule of Law Workshop
Bridging idealism and realism in constitutionalism
and Rule of Law

Convenors:

Maurice Adams, Ernst Hirsch Ballin, Anne Meuwese
2-3 October 2014

Theme and aim:

In recent years we have seen a plethora of initiatives promoting the Rule of Law and constitutionalism. Both are thereby understood as necessary to create a just political order.

Constitutionalism and Rule of Law cannot always easily be distinguished, since the Rule of Law is many times believed to be encompassing constitutionalism, judicial review, separation of powers, as well as a variety of governance structures.¹ One way of looking at this, is that on the national level constitutions are mostly understood to be a necessary (though not sufficient) condition for a polity to be governed by the Rule of Law and constitutionalism. On the supra- or international level (e.g., the European Union, World Bank), where constitutions are absent or have a different shape, it are usually Rule of Law discourse and measures that are taken up to implement the values that are deemed necessary to establish a just political order.

In this workshop, following Jonathan Wolff's claim that "ideal thinkers who want to have some impact on reality should pay more attention to issues of transition"², we aim to explore the viewpoint that the best normative theory conceives the ideal and the real as mutually regulating each other, and to apply this to the tension between realism and idealism in public law, though the angle of Rule of Law promotion and constitutions. "It must be the task of the constitutional lawyer to reconcile rules of law and constitutional reality in such a way that the existing dialectical conflict between rule and reality can be removed as far as possible by creative interpretation of the constitution without doing violence thereby either to reality in favour of the rule, or to the rule in favour of

¹ M.D. McCubbins, D.B. Rodriguez and B.R. Weingast, "The Rule of Law Unplugged", 2010 *Emory Law Journal*, p. 1455 ff.

² "Fairness, respect, and the egalitarian ethos", 27 *Philosophy & Public Affairs* 1998, p. 113. See also Robeyns in her plea that "much more theoretical work remains to be done on the questions of how to bridge the gap between ideal and nonideal theory." I. Robeyns, "Ideal Theory in Theory and Practice", 34 *Social Theory & Practice* 2008, p. 342. This also is in tune with Aristotle's well-known observation that "[t]he attainment of the best constitution is likely to be impossible for the general run of states; and the good law-giver and the true statesman must therefore have their eyes open not only to what is the absolute best, but also to what is the best in relation to actual conditions." See Aristotle, *The Politics* 134 (Bk IV, 1288b21) (Ernest Barker & Richard Stalley trans., 1998).

reality”³, Leibholz once wrote in the context of judicial interpretation. This statement is also, we believe, more generally applicable to Rule of Law and constitutional aspirations. As K. Loewenstein once had it, a constitution is what power holders and power addressees make of it in practical application: so what about the concordance of the reality of the power process with the norms of the constitution and the Rule of Law values it embodies?⁴

We will study this type of questions by exploring new historical and conceptual analysis, through several country case studies and through studies of recent transnational phenomena.

Format: Circulation of papers one week in advance (full drafts preferred; early drafts from 4-5 pages onwards accepted); 15-min. presentations at the workshop by the author, followed by discussion. Publication of the papers in an edited volume subject to peer review (there are contacts with CUP).

Location: Tilburg University, The Netherlands

Funding: This workshop is made possible by generous contributions to the Rule of Law research in Tilburg by the Vfund and by a grant from the Visiting Professors Programme of the The Royal Netherlands Academy of Arts and Sciences (KNAW).

Participation: Interested scholars and practitioners are welcome, but place are limited and registration is required. Please contact frw.per.secretariaat@uvt.nl.

³ G. Leibholz, ‘Constitutional Law and Constitutional Reality’ in Festschrift für Karl Loewenstein (Tübingen: Mohr Siebeck, 1971), pp. 305, 308.

⁴ The University of Chicago Press, Chicago/London, 1957 (2nd edition 1965), pp. 147-148.

Programme - Thursday 2 October 2014

14:00-14:30

Opening words by Alex Brenninkmeijer (European Court of Auditors and Utrecht University)

14:30-16:45 Session 1: The real and the ideal

Realism and Idealism in Constitutional Law – introduction to the project: Maurice Adams (Tilburg University)

Development of constitutionalism: historical perspectives: Randall Lesaffer (Tilburg University)

Discussant: Peter Lindseth (University of Connecticut)

Tempering Power: Realist-idealism, constitutionalism, and the rule of law: Martin Krygier (University of New South Wales)

Discussant: Hans Lindahl (Tilburg University)

Discussion and coffee break

16.45-18:15 Session 2: Case studies

South Africa: Pierre de Vos (University of Cape Town)

Discussant: Gerhard van der Schyff (Tilburg University)

Israel: Adam Shinar (The Interdisciplinary Center, Herzliya)

Discussant: Sofia Ranchordás (Tilburg University)

Discussion

Evening: workshop dinner – all speakers and discussants are invited

Programme - Friday 3 October 2014

9.30-12.45 Session 3: Case studies

China - The revision of China's Administrative Litigation Law and its constitutional significance: Neysun Mahboubi (University of Pennsylvania)

Discussant: Boudewijn de Waard (Tilburg University)

Arab World: Sumit Bisarya (International Idea, The Hague Office)
Discussant: Daniel Augenstein (Tilburg University)

Discussion and coffee break

Netherlands: Maurice Adams & Gerhard van der Schyff (Tilburg University)
Discussant: Morag Goodwin (Tilburg University)

Italy: Joerg Luther (Università del Piemonte Orientale "A. Avogadro")
Discussant: Federico Fabbrini (Tilburg University)

Discussion

12:45-14:00 lunch

14:00-16:00 Session 4: case studies

Hungary: Gabor Atilla Toth (University of Debrecen)
Discussant: Jonathan Tomkin (European Commission)

European Union: Dimitry Kochenov (University of Groningen)
Discussant: Ernst Hirsch Ballin (Tilburg University)

Discussion and coffee break

16:00-18:15 Session 5: Transnational phenomena and international developments

Resistance Norms: Institutional Change, Administrative Governance, and the Rule of Law: Peter Lindseth (University of Connecticut)
Discussant: Jurgen de Poorter (Tilburg University)

Measuring the Rule of Law: Mila Versteeg (University of Virginia) and Tom Ginsburg (University of Chicago)
Discussant: Koen van Aeken (Tilburg University)

Peer review as a catalyst of change in public law: Anne Meuwese (Tilburg University)
Discussant: Ramses Wessel (Twente University)

Discussion

Closing words by Ernst Hirsch Ballin (Tilburg University)