FAKULTETA ZA DRŽAVNE IN EVROPSKE ŠTUDIJE
FACULTY OF GOVERNMENT AND EUROPEAN STUDIES

MEDNARODNA KONFERENCA »Judicial Ideology under Empirical Scrunity«

INTERNATIONAL CONFERENCE »Judicial Ideology under Empirical Scrunity«

Knjižica povzetkov
Booklet of abstracts

Uredil
Edited by
prof. dr. Matej Avbelj

Ljubljana, 16. September 2019

NOVA UNIVERZA
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PROGRAM / PROGRAMME
Datum / date: 16.09.2017
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9.00	**Welcome and Introduction to the Conference** Gorazd Justinek, dean; Matej Avbelj, project leader
9.15	**Keynote 1: prof Arthur Dyevre (KU Leuven)** **Matej Avbelj** (Chair)
10.15	**Panel 1: Judicial Ideology in Comparative Theoretical Perspective** **Pietro Faraguna,** Roots and justification of the ideology's taboo on the Italian Constitutional Court **Tamara Ćapeta,** Rule of law and ideology of a judge **Konrad Lachmayer,** The authority of the Austrian Constitutional Court **Matyas Bencze,** Judicial ideologies in an illiberal democracy **Matej Avbelj** (Chair and Discussant)
12.30	**Lunch**
13.30	**Keynote 2: prof. Chris Hanretty (Royal Holloway University of London)** **Katarina Vatovec** (Chair)
14.30	**Panel 2: Judicial Ideology in Comparative Empirical Perspective, Part 1** **Janez Šušteršič,** Voting patterns in constitutional court: backgrounds, collegiality and ideology **Eva Balogh,** HunConCourt - an empirical analysis of the jurisprudence of the Hungarian Constitutional Court **PoczaKalman**, Attitudinal model applied to the judges of theHungarian Constitutional Court. A refined analysis of judicial behavior from 1990 to 2018 **Robert Zbiral** (Chair and Discussant)

16.00	**Coffee break**
16.30	**Panel 3: Judicial Ideology in Comparative Empirical Perspective, Part 2** **Krisztina Blazkova**, Justice, expediency and legal certainty: the effect of judicial philosphy on adjudication **Monika Glavina**, Referral and Referral-Free Behaviour of National Judges: What Motivates the Use of EU Law Inside and Outside of the Preliminary Ruling Procedure? **Jernej Letnar Černič** (Chair and Discussant)
19.00	**Dinner**

PANEL 1: Judicial Ideology in Comparative Theoretical Perspective

INVITED PLENARY LECTURE

ROOTS AND JUSTIFICATION OF THE IDEOLOGY'S TABOO ON THE ITALIAN CONSTITUTIONAL COURT

Pietro Faraguna, Assistant Professor of Constitutional Law, University of Trieste

Conference abstract: Judicial ideology seems to be a sort of taboo in the Italian constitutional experience. This presentation will explore and question possible justifications of this taboo. First, the appointment method of constitutional judges will be explored with a brief overview of the most common profiles of constitutional judges. Then, the presentation will illustrate the high consideration given to the principle of collegiality in the Court's decision-making. Finally, the presentation will explore how the ideology taboo played an important role immediately after the adoption of the 1948 Constitution. In fact, this taboo contributed to build and consolidate the authority of the newly established Constitutional Court within a politically extremely divided polity. Lastly, the presentation will discuss whether this justification is still valid, and, if not, what is (if any) the ideology taboo's current role within the constitutional system.

RULE OF LAW AND IDEOLOGY OF A JUDGE

Prof. dr. Tamara Ćapeta, Jean Monnet Chair, University of Zagreb

Conference abstract: The paper starts from several premisses. First, most generally the concept of the rule of law means that every public authority is subject to legal rules. Second, legal rules are largely indeterminate. Third, everyjudge (hopefully) has some ideology, understood as a sorted out and thought through idea of optimal organisation of a good society. The question the paper raises is thefollowing: Given the indeterminacy of legal rules, is the fact that judges rely on their ideologies when interpreting legal rules acceptable within a society based in the rule of law? There search will, hopefully, yield a positive answer.

THE AUTHORITY OF THE AUSTRIAN CONSTITUTIONAL COURT

Prof. Konrad Lachmayer, professor of public law, European law and foundations of law, Sigmund Freud University Vienna

Conference abstract: The judges of the Austrian constitution court cannot express dissenting opinions. The actual as well as former presidents of the constitutional court defend the constitutional framework by referring to legal certainty and the political pressure, which would increase, if dissenting opinions are possible. These opinions would threaten judicial independence and the authority of the court. In times of increasing governmental pressure on courts, it does not seem wise to change the constitutional culture by opening the internal differences of the courts to the public by politicising the constitutional court. The ideal of legal certainty is stabilised by the fiction of the clarity of legal norms (Hans Kelsen). Kelsen was not only member of the Austrian constitutional court, but – as well known – also the conceptual founding father of the Austrian model of constitutional review.

Kelsen, however, was well aware the fact that courts always have a scope of political power while interpreting legal norms. A history of 16 politically most prominent and sensitive cases on the website of the Austrian constitutional court starting with Schnitzer´s Reigen (1921), followed by abortion cases (1977) and concluding with the annulment of the elections of the Austrian federal president the court (2016) illustrated that the court knows its political importance. In 2017 the court enabled the marriage of homosexual and lesbian couples as well as the adoption of children by those couples. Interestingly enough 25 years ago the very same court (obviously composed by other judges) defended criminal law regarding homosexual men as in conformity with the constitution.

The constitutional court is using the term „ideology“ only in the context of national socialism and terrorism. It illustrates the negative connotation of the term in the constitutional discourse. The academic debate on the political dimension of the constitutional court is very small (see e.g. Tamara Ehs). An empirical analysis of the courts´ ideology is missing. As the court´s judgments are fully available since 1983 the potential of empirical research is great. The paper will present the implications of personal changes of the court, the role of the principle of equality in the politics of the courts as well as the ideology of the court in asylum cases.

JUDICIAL IDEOLOGIES IN AN ILLIBERAL DEMOCRACY

Prof. dr. Matyas Bencze, University of Debrecen

Conference abstract: In my presentation I will focus on a relatively new ideological division amongst the ordinary judges of Hungary. The basis of my approach is that judicial decisions delivered in politically sensitive cases cannot be suitably explained by invoking simply the received categories of the judicial ideology. Neither the conventional sets of categories (liberal, conservative, socialist) nor the „transitological" ones (post-communists vs. democrats) are sufficient explanations for the different approaches that can be detected in judicial decisions delivered in such politically sensitive cases. Although Hungarian judges represent a variety of different ideological views, the latest developments in Hungarian politics (the construction of the "illiberal democracy") have led to the emergence of a new ideological dividing line within the judiciary.

The government is keen to emphasize that, in its view, the judicial system is only a servant of some 'greater good" such as state sovereignty, public safety and moral sense of the majority. The governmental pressure has pushed one part of the judges to deliver such decisions that fit the values dear to the government even if those decisions go against the law as well as against traditional legal methods and values. In my works those judges are referred as 'the conformists'. Another part of the judiciary takes the effort and resist to the governmental pressure. Those judges still follow the law, the established case law and the classic legal values when delivering their decisions. I refer to them as 'the rule of law judges'.

In my research, I have identified certain sociological factors that can strengthen the conformist attitude amongst Hungarian judges and my aim is to talk about those factors at the conference. The legal-theoretical conclusion of my research can be summed up as follows: in an illiberal democracy it is relatively easy to abuse the Dworkinian concept of adjudication.

PANEL 2: Judicial Ideology in Comparative Empirical Perspective, Part 1

VOTING PATTERNS IN CONSTITUTIONAL COURT: BACKGROUNDS, COLLEGIALITY AND IDEOLOGY

Prof. dr. Janez Šušteršič

Conference abstract: The paper provides a first explorative analysis of voting patterns in the Slovenian constitutional court. It uses data on judges' votes from three different periods with stable compositions of the court (1993-97, 2002-06, 2011-16). It first explores the commonalities in voting by clustering the votes of individual judges in non-unanimousdecisions. For two periods, there is a clear, although not deterministic relation with the judges' appointing parliamentary majority. There is also evidence of correlation between judges' voting patterns and their revealed ideology. The revealed ideology measure used in the paper is based on a novel methodology, which, contrary to the common approach based on mathematical analysis of judges' votes alone, builds on the information available from judges' writings (the reasons of the court and the separate opinions of judges), and measures ideological positions along three conceptually distinct dimensions (economic, social and authoritarian).

In the second part, the paper explores the dynamics of dissent in the court. Dissent is defined as existence of opposing votes, split votes or separate opinions (both concurring and dissenting ones). There are clear differences in the level of dissent in the three periods under investigation, ranging from 21 to 44 percent, but little evidence of any trend over time. Rather, some other factors emerge as important drivers of dissent, most notably the moderating role of some court presidents and the apparent effort to reach unanimity in decisions opposing the executive and legislative branches of government. These factors both indicate a strong norm of collegiality, which was also found in some other top courts in other countries. The most interesting result, however, is that unanimous decisions of the court tend to be systematically more liberal on all three ideological dimensions than the non-unanimous ones.

HUNCONCOURT - AN EMPIRICAL ANALYSIS OF THE JURISPRUDENCE OF THE HUNGARIAN CONSTITUTIONAL COURT

Tamas Gyorfi, Senior Lecturer, University of Aberdeen, United Kingdom
Éva Balogh, Lecturer, University of Debrecen, Hungary
Flóra Fazekas, Senior Lecturer, University of Debrecen, Hungary

Conference abstract: The HunConCourt is a funded project that conducts empirical research on the jurisprudence of the Hungarian Constitutional Court, focusing on the period between 2005 and 2017. Our project has two main aims. First, we intend to set up a comprehensive database (modelled on the US Supreme Court database) of the HCC's decisions that is made available to the public. Second, relying on that database, we aim to analyse many aspects of the Court's jurisprudence, including the ideal points of the judges of the HCC and the success rate of different forms of petitions.

This conference would give us an excellent opportunity to discuss some aspects of our research design with experts who work on similar projects and would also give us the opportunity to present the main findings of our research so far. We would like to discuss the difficulties our project faces in adopting a conceptual framework that was designed to analyse the behaviour of judges in common law jurisdictions. The question we would like to discuss in particular is how this framework can be applied to the jurisprudence of continental constitutional courts that have to deal with many analytically distinct legal issues in a typical case and also have powers that do not exist in the decentralised form of judicial review.

As it is well-known for comparative constitutional scholars, Hungary adopted a new constitution in 2011. The government has also changed the composition and the powers of the HCC. The general perception of these changes is that the Hungarian political system took a distinctive authoritative turn. Our research intends to subject this perception to empirical scrutiny and identify the main differences between the pre-2011 and post-2011 period empirically.

ATTITUDINAL MODEL APPLIED TO THE JUDGES OF THE HUNGARIAN CONSTITUTIONAL COURT. A REFINED ANALYSIS OF JUDICIAL BEHAVIOR FROM 1990 TO 2018

Kálmán Pócza, senior research fellow, Hungarian Academy of Sciences/National University of Public Service
Gábor Dobos, research fellow, Hungarian Academy of Sciences/National University of Public Service
Attila Gyulai, research fellow, Hungarian Academy of Sciences/National University of Public Service

Conference abstract: Although there are few studies (Szente 2016; Halmai 2015) which tried to apply the attitudinal model of judicial behavior in Hungarian context, the scope of this projects haven't been expanded to the time period between 1990 and 2018. The judicon research project (www.judicon.tk.mta.hu) collected not only data on judicial rulingsbut also data on parliamentary voting behavior of Hungarian MPs. Connecting the two datasets will allow us to apply the attitudinal model of judicial behavior to the practice of the Hungarian Constitutional Court. Since the dataset of the judicon project transcends the binary approach of analyzing constitutional/unconstitutional decisions, we will be able to find out *how far* judges followed the policy and value preferences of their nominating parties. We do not simply respond to the question of the attitudinal model with a simple yes or no, but we can also determine judges' relative proximity to their respective nominating parties. By taking only politically relevant decisions into account we will be also able to detect whether judges took decisions in a tricky way. Research might uncover judges' possible strategies in taking *strong* rulings against (politically) *less* important legal regulations adopted by their respective nominating party and against (politically) *more* important regulations of the opposing side, while being *more permissive* against (politically) *more important* legislative regulations adopted by their nominating party and against (politically) *less important* regulations adopted by the other side.

PANEL 3: Judicial Ideology in Comparative Empirical Perspective, Part 2

JUSTICE, EXPEDIENCY AND LEGAL CERTAINTY: THE EFFECT OF JUDICIAL PHILOSOPHY ON ADJUDICATION

Kristina Blažková, PhD candidate in Legal Theory at the Charles University in PragueClerk at the Constitutional Court of the Czech Republic

Conference abstract: Emphasis in current legal philosophy is placed on external influences on judicial behaviour such as the role of personal background and political and value preferences of judges; adjudication is thus examined through the lens of the attitudinal and strategic theory. In my research, I concentrate on a factor internal to law and the legal system – judicial philosophy. I define the concept as an explicit and more or less structured understanding of the concept of law which directs the judge's legal reasoning in the so called hard cases. The importance of the concept for practical adjudication is that it helps the judge to avoid her own non-legal bias which could delegitimize her decision-making. If the judge is aware of her judicial philosophy, she may be more sincere, transparent and critical about some of her choices done throughout the decision-making.

I formulate different judicial philosophies based on G. Radbruch's value triad of justice, expediency and legal certainty which make up the concept of law. They simultaneously complement and contradict each other. In hard cases, adjudication consists of a decision which of the values should prevail over the other two. My research proposition is that every judge understands that the essence of law is to seek justice in its formal sense; judges however differ in their preference either for legal certainty or expediency of law. Legal certainty entails insistence on valid legal norms, stability and coherence of the law and the functioning of the legal system as a whole. Preference for expediency of law on the other hand puts emphasis on the individual decision, the judge's view of state and society and her subjective feeling of justice and equity.

In my conference paper, I would like to present the results of my empirical study of the decision-making of the Grand Chamber of the Czech Supreme Administrative Court. The Grand Chamber is a judicial body of seven judges designed to solve conflicts of application of law between the small chambers. The reasons I choose this judicial body is the heterogeneity and erudition of the judges sitting in the Grand Chamber, the in-depth argumentation of the individual decisions and the practice of publication of dissenting opinions. Up to the end of 2018, the Grand Chamber has issued 262 decisions. I seek to process these decisions, focusing especially on decisions with dissenting opinions, with the aim to identify patterns and indications of conflicting value-approaches. I would like to identify generalizing elements of the interplay of the above mentioned value triad in order to develop the concept of different judicial philosophies.

REFERRAL AND REFERRAL-FREE BEHAVIOUR OF NATIONAL JUDGES: WHAT MOTIVATES THE USE OF EU LAW INSIDE AND OUTSIDE OF THE PRELIMINARY RULING PROCEDURE?

Monika Glavina, KU Leuven

Conference abstract: Over the last three decades, the preliminary ruling procedure inspired a colossal amount of research. Legal scholars and political scientist have focused on the number of preliminary questions submitted to the CJEU and on how the referral activity of national courts varies across time, member states and levels of national judicial hierarchy. Still, very little is known about what motivates national judges to refer legal questions to the Luxembourg court. Further then, the question of how and to what extent national judges use EU law in their daily practices, as well as what motivates the use of EU law remains a wide and largely unexplored area of research. This is despite of the fact that the number of national decisions involving EU law is estimated to be much larger than the number of cases referred to the CJEU.

Based on the results obtained by surveying 450 judges from two new EU Member States: Slovenia and Croatia, this research explores factors which either motivate or constrain individual judges in their use of EU law, both inside and outside of the scope of Article 267 TFEU. Building on the team model of adjudication, the attitudinal model and the resource management model, I find that judicial knowledge of EU law and judicial attitudes towards the EU and EU law are the strongest predictors of the referral and referral-free behaviour of national judges. Yet, judicial consideration to refer legal questions to Luxembourg seems to be further constrained by the institutional factors of a court at which judges sit. Because sending preliminary questions goes beyond ordinary tasks of a national judge and requires more time and effort, workload and resources play much greater role for the referral than for the referral-free behaviour of national judges.