

ICON-S Britain and Ireland Chapter Launch Conference

The International Society of Public Law (ICON-S) was founded to bring together scholars from diverse places and fields to explore major themes and challenges in public law, broadly defined. The Britain and Ireland Chapter of ICON-S is being set up to bring together scholars with an interest in this region in the spirit of interdisciplinary collaboration that animates ICON-S.

This conference, to serve as the formal launch of the Chapter, begins our work in this vein, discussing themes and trends in comparative constitutional law, EU law, international law, and British and Irish constitutional law.

The theme of the conference is “Constitutional Relations after Brexit”. Brexit dominates the political and legal landscape in Europe. The plenary panel, keynote address and one of the parallel sessions are dedicated to this theme. Other parallel sessions focus on broader issues of public law.

Keynote Address

Professor Deirdre Curtin (EUI): Aeroelastic Europe: Flying Together After Brexit

What is the EU-27 vision of the future of Europe after Brexit? The EU is not breaking down, it is not muddling through, it is resolutely heading forward (or planning to do so). That forward trajectory includes more integration to address common challenges but with more differentiation in terms of participating Member States and institutions. There is a new version of old problems and old solutions. Three important policy areas will be discussed as illustration. These are EMU and the Eurozone, the Defence Union and the Security Union. Far from consolidating a constitutional structure of “bits and pieces” the future EU moves more flexibly towards an image of constructive collaboration in which membership and the allocation of roles can -and probably will -vary.

Professor Curtin is Professor of European Law at the European University Institute in Florence where she also directs the Centre for Judicial Cooperation. Before joining the EUI in 2015, she held chairs in Amsterdam and Utrecht and was the founding director of the Amsterdam Centre for European Law and Governance. She is a member of the Royal Netherlands Academy of Arts and Sciences and a laureate of the Spinoza prize, awarded by the Dutch Scientific Organization, for research in the field of European law and governance.

Chair: Professor Gavin Barrett (UCD)

Venue: Hoey Lecture Theatre

Schedule

Monday 4 September

9-9.30	Registration
9.30-11	Parallel Panels 1 <ul style="list-style-type: none"> - Panel 1A - Religion at Work in the Constitutional Order of the European Union - Panel 1B - Issues in Comparative Constitutional Law
11.-11.30	Coffee break
11.30-1pm	Parallel Panels 2 <ul style="list-style-type: none"> - Panel 2A - Dialogic judicial review in comparative lens - Panel 2B - Implications of Brexit
1-2pm	Lunch
2-3.30pm	Parallel Panels 3 <ul style="list-style-type: none"> - Panel 3A - Popular constitutional change
3.30-4pm	Coffee break
4-5.45pm	Plenary panel - Constitutional Relations After Brexit (pages 10-11) Professor Peter Leyland (SOAS), Professor Aileen McHarg (Strathclyde) and Professor Colm O’Cinneide (UCL)
6pm	Reception

Tuesday 5 September

9.30-11	Parallel Panels <ul style="list-style-type: none"> - Panel 4A - Doctrinal and Historical Issues in Comparative Constitutional law - Panel 4B - Iterative Federalism
11-11.30	Coffee break
11.30-12.30	Keynote address Professor Deirdre Curtin (EUI): Aeroelastic Europe: Flying Together After Brexit

All venues are in the Long Room Hub

Hoey Lecture Theatre, 1st Floor:
Galbraith Seminar Room, 1st Floor:
Ideas Space, 2nd Floor:

Keynote, plenary panels, parallel panels A
Parallel panels B
Lunch, reception

Panel 1A: Religion at Work in the Constitutional Order of the European Union

This panel will discuss the implications of the recent CJEU Decisions on Headscarves in the Workplace (C-188/15 Asma Bougnaoui, ADDH v. Micropole SA and C-157/15 Achbita v. G4S Secure Solutions NV). The participants will discuss the contribution of the judgments to EU antidiscrimination law and how the judgment compares to those of other jurisdictions. They will also discuss the role of religion in the constitutional order of the EU and the role that the CJEU can play in relation to issues of religion at work.

Moderator: Dr David Kenny (TCD)
Venue: Hoey Lecture Theatre

Prof. Colm O’Cinneide (UCL): An Awkward Fit: Why the CJEU’s Headscarf Judgments Sit Uncomfortably in the Framework of EU Equality Law

This presentation will discuss the contribution of the judgments to EU antidiscrimination law in the workplace, and the extent to which they are consistent with and give effect to the structure of non-discrimination norms developed in EU law since the 1970s.

Dr Ronan McCrea (UCL): Adjudicating on religion in Europe: what the CJEU should and shouldn’t do

This presentation will discuss the role of religion in the constitutional order of the EU and the role (and the significant limitations on the role) that the CJEU can play in relation to issues of religion at work. He will focus on the tension between the right to religious freedom which sees religion largely as a choice and religion as protected status under anti-discrimination law which sees it as a form of identity and the particular view of religion woven into the EU’s constitutional order.

Dr Ioanna Tourkochoriti (NUIG): How can a comparative approach to freedom of religion in the workplace be instructive for the CJEU?

This presentation will discuss the recent CJEU judgments from a comparative perspective. She will discuss case law from the US on similar issues. She will propose an interpretation on why the CJEU decisions differ from US case law. She will present the background philosophy on the role of the government in the US and in Europe in association with religious expression. And then she will analyse how the comparison can be helpful towards elaborating better criteria for the CJEU in view of accommodating religious expression in the workplace in the future.

Panel 1B: Issues in Comparative Constitutional Law

This panel brings together scholars focusing on topical conceptual questions in comparative constitutional law. Each paper addresses a major foundational question about the nature of constitutionalism and the origins of constitutional legitimacy, focusing on supranational constitutionalism, cultural transplants across constitutional systems, unamendability, and the nature of conventions.

Moderator: Dr Oran Doyle (TCD)

Venue: Galbraith Seminar Room

Dr Cormac Mac Amhlaigh (Edinburgh): Supranational Constitutionalism as Ideal theory

Supranational constitutional scepticism comes in two primary forms: ontological and normative. The ontological objection to supranational constitutionalism argues that only states have constitutions, no supranational governing entity can be classified as a state and as such constitutionalism has no role to play in global governance. The normative objection to supranational constitutionalism argues that whereas some forms of constitutional thought may be appropriate to certain problems of global governance, it would be a mistake to think that constitutionalism is up to the task of addressing the legitimacy problems of global governance more generally.

This paper dismisses the ontological objection as incoherent in failing to provide satisfactory definitions of statehood or constitutionalism but argues that the normative objection has more bite. The core idea of the normative objection to supranational constitutionalism is, at root, a form of democratic objection. It entails the idea that the supranational arena lacks two necessary ingredients for democracy as a way of legitimating governing power; a demos or some form of conscious group identifying itself as the governed, and robust institutions and structures that allow for the exercise of democratic decision-making. As such, the paper argues, the normative objection to supranational constitutionalism must be taken seriously.

However the paper goes on to argue that the obstacles to supranational constitutionalism emphasised by the normative objection are not insurmountable. The normative objection to supranational constitutionalism views constitutionalism as a way of legitimating governance; that is as a form of political theory. Recent debates in political philosophy demonstrate that political theories can be more or less idealistic and that even unfeasible or utopian political theories have a role to play in political discourse such as clarifying the objections of political action as well as providing a benchmark by which to evaluate contemporary practices. When viewed in the register of ideal political theory, then, the paper concludes, the normative objection to supranational constitutionalism is undermined.

Prof Anat Scolnicov (Winchester): Fertile soil? - Legitimacy, rationality and cultural constitutional transplantations

I want to examine to what extent constitutional court judges can effect constitutional change, and whether it is possible to transplant ideas from one constitutional culture into another. In this paper I utilise Paul Kahn's distinction between constitutionalism based on legitimacy and constitutionalism based on rationality. But I challenge Kahn's claim that this distinction means that constitutional culture is specific to each state and cannot be changed by appeal to universal constitutional norms.

In my paper I examine decisions from the United Kingdom, Germany, Israel and the United States to show that, differently from the expected divide between US and European constitutional courts, courts in all these states have based their decisions at times both on appeals to legitimacy and on appeals to rationality. In my talk I will be discussing primarily

decisions of courts in the United Kingdom. I argue that English courts, in addressing constitutional questions have based their decisions mostly, though not exclusively on appeal to sovereign will. However, English constitutionalism has shifted, through judicial decisions, recognize the influence of European law, towards that of constitutional rationalism.

For constitutional rationalists the text of a Constitution, or even whether a document called a 'Constitution' exists or not, is of little importance. Rationalist constitutionalists, who seek to base constitutional decisions on universal constitutional values, such as reasonableness, proportionality, equality or democracy will reach their decisions even without a written text to refer to. (Unlike those based in sovereign will).

But, as I will show, the converse is not true. Where there is no written constitution, the constitutional court is not necessarily rationalist. Although constitutionalism based on sovereign will has been associated a written constitution, constitutional courts have based their cases on sovereign will even without such a text. Judges have, should shifted their constitutional explication from that based on legitimacy to that based on rationality. Constitutional change effected by courts striving to rationalist ideals will be shown to be prevalent and is to be encouraged.

Tarik Olcay (Glasgow): Alternative judicial justifications for unamendability: Beyond constitutionalism?

Recent comparative constitutional law scholarship has shown that the practice of substantive judicial review of constitutional amendments is being increasingly adopted in many jurisdictions. A parallel line of scholarship offers justifications for this seemingly undemocratic doctrine of 'unconstitutional constitutional amendments'. The prevalent justification rests on foundationalist arguments in testing the constitutionality of constitutional amendments, which generally hold that it is justified to regard constitutional amendments that violate the identity of the constitution as unconstitutional. It is true that in most cases courts too use such foundationalist arguments in establishing limitations on constitutional amendments and grounds for their judicial review.

This paper aims to show that courts do not always necessarily rely on strictly foundationalist arguments in justifying limitations on constitutional amendments and their judicial enforcement. Non-foundationalist arguments in determining and justifying the limitations on constitutional amendment are found in court decisions from India, Turkey and Colombia. Such arguments prioritise normative considerations such as human rights, compliance with international law or other ideals without relying on the foundational commitments of the constitution. The paper concludes by exploring whether such judicial practice can inform a general theory of non-foundationalist justification for constitutional unamendability.

Conor Crummey and Eugenio Velasco (UCL): Statutory Conventions: Conceptual Confusion around the Sewel Convention in Miller

In *Miller v Secretary of State for Exiting the European Union*, the Supreme Court held that the UK Parliament was under no legal obligation to seek the consent of the Scottish Parliament before passing legislation to leave the European Union. Section 28(8) of the Scotland Act 1998, they held, does not elevate the Sewel Convention from the status of political convention to legal requirement. We argue that the Court's reasoning on this point was unclear and underdeveloped, and betrayed a conceptual confusion about the nature of political conventions.

We focus on four problematic assumptions that the Court made:

- (i) That a political convention does not cease being a political convention even if it is recognized in statute;

- (ii) That (i) obtains because of the nature of the content of a political convention, regardless of formal legal enactment procedures;
- (iii) That Parliament did not intend that a legislative provision should create a justiciable legal rule;
- (iv) That the words ‘it is recognized’ and ‘will not normally’ in the relevant provision support (iii).

In making these assumptions, the court in effect created a new constitutional category: the ‘statutory convention’. We argue that this was misguided, as section 28(8) created a legal duty on the UK Parliament to seek the consent of the Scottish Parliament before passing legislation to trigger Article 50. This legislation has passed, but as the constitutional landscape becomes ever more complex, the confusion over the nature of political conventions created by the Court merits examination and conceptual clarification.

Panel 2A: Dialogic judicial review in comparative lens

This panel brings together scholars focusing on various aspects of the debate about dialogue in judicial review, focusing on different jurisdictions and aspects of its normative justifications.

Moderator: Dr Aileen Kavanagh (Oxford)
Venue: Hoey Lecture Theatre

Dr Tom Hickey (DCU): The dialogue model in normative lens

In this paper I argue that the constrained form of judicial review of legislation - such as that established through the Canadian Charter of Rights - is likely to promote more intensive collaboration/dialogue between the judicial and political arms of government than the strong form of judicial review as in the Irish system. I argue that not only does the constrained form make for more robust judicial interventions on rights questions than under a system of judicial supremacy, but that it also makes for more forthright rights-engagement on the part of political actors; that it encourages greater responsibility among legislators for the rights-dimensions of legislation. I consider then whether the intermediate model of constitutionalism, characterised as it is by constrained forms of judicial review, does better than models of judicial supremacy by a particular conception of contestatory democracy. I consider by extension whether this conception of contestatory democracy might go some way towards offering a normative defence of dialogic judicial review/collaborative constitutionalism.

Prof Colm O’Cinneide (UCL): Against dialogue: why the dialogue model represents a dead end in justifying judicial review of legislation

The dialogue model of judicial review, whereby courts and the legislature are expected to engage in a responsive process of constitutional norm generation, has been widely acclaimed as representing a solution to the perennial legitimacy issues associated with judicial review of legislative acts. It has been embraced by academics and judges alike (see e.g. Lord Neuberger’s opinion in the UK Supreme Court case of *Nicklinson* [2014] UKSC 38). It has also fuelled much of the enthusiasm in recent years for weak-form review and ‘third way constitutionalism’, as embodied in measures such as the UK’s Human Rights Act 1998. However, like any other fashionable theory, dialogue has begun to generate a critical backlash. In particular, it has been accused of being (i) being inherently unstable, on the

basis that it tends to degenerate into either judicial acquiescence or judicial dominance; (ii) favouring particular modes of juridical-style discourse over alternative modes of political/normative articulation; and (iii) glossing over the existence of serious value incommensurability in contemporary democratic societies. All these criticisms have bite. However, critics of dialogue have generally pulled their punches when it comes to treating this defective model, usually advocating minor adjustments of its settings to favour either stronger judicial protection of rights or greater *de facto* legislative supremacy. I argue this approach is flawed. Good grounds exist for ditching the model in its entirety, and falling back upon more traditional concepts of how the courts, legislature and executive should interact - one which recognises their distinct and differing functions within the constitutional system. By extension, this necessarily also involves giving up on the idea that dialogue theory can provide an adequate normative basis for judicial review.

Dr David Kenny (TCD) The Canadian experience of dialogic judicial review: lessons for Ireland

In a recent judgment, the Irish Supreme Court adopted something akin to a suspended declaration of invalidity, allowing the legislature six months to address an unconstitutional statutory provision rather than invalidating it outright. This, alongside other recent developments, raises the possibility that the Irish courts will embrace a sort of "dialogic" remedial approach, seeking legislative solutions for constitutional problems where possible in preference to invalidating laws.

In this paper, I wish to discuss some unresolved issues that continue to trouble suspended declarations in Canada, where they are a much more mature remedy: how they can make it difficult, in some instances, to give an individual remedy to the plaintiff in the case. As well as raising questions about vindication of individual rights, in an adversarial system, this risks discouraging litigation in certain types of cases. I wish to examine this problem and suggest how it might be addressed in Ireland, while exploring the limits and drawbacks of "dialogic" remedies.

Panel 2B - Implications of Brexit

This panel will discuss various aspects and implications of Brexit along several axes, including the Northern Ireland Bill of Rights, the future of the common law's influence in Europe, and the future of Irish citizenship.

Moderator: Dr Eoin O'Dell (TCD)
Venue: Galbraith Seminar Room

Dr Anne Smith (Ulster): Brexit, Northern Ireland: Constitutional opportunity for the Northern Ireland Bill of Rights?

The post-Brexit reality is that the constitutional relationships with the UK and the EU and the devolved regions in Scotland, Wales and Northern Ireland will change. The task of securing agreement on this major constitutional change is huge. While it is vital to secure agreement on the major constitutional issues, it is also recognised that enhancing equality and greater protection of human rights is fundamental to a new phase in the constitutional relationship and arrangements both at the EU and at the devolved levels of governance. This paper will concentrate on enhancing human rights protection at the devolved level with specific focus on Northern Ireland. The paper will argue that the task now is to use this constitutional juncture/moment/crisis (just pick the one you prefer) and transform it into

an opportunity. To this end, this paper will argue that this an opportune time to renew and revisit one of the outstanding issues of the Good Friday Agreement, namely the Bill of Rights for Northern Ireland. The paper will argue that a Bill of Rights could provide a framework to secure and enhance human rights protection in Northern Ireland post Brexit. The paper will draw upon a current research project that is aiming to address this significant constitutional project, as one part of a general attempt to rescue the human rights agenda in Northern Ireland post Brexit.

Roisin Costello (TCD) Fade to Black? The Common Law's Declining Influence and its Implications for the Rule of Law in Europe

This paper will examine whether the declining influence of Common Law systems within the European Union will undermine the Rule of Law in a newly constituted 27-member Union. The paper will interrogate whether the Dicean judgment that the Rule of Law is best served by Common Law systems is correct, with the result that the future of the Rule of law will be cast in doubt by a Union dominated by Civil Law jurisdictions.

In doing so, the paper will contend that the EU presently occupies an unsatisfactory middle-ground, fully committed to neither a Common nor Civil law model with the result that principles of the Rule of Law are vindicated partially by explicit commitments in codified texts (Article 2 TEU), as well as implicitly through framework initiatives including the EU Framework to Strengthen the Rule of Law but fully, and effectively, by neither. The paper will argue this partial coverage, in concert with the contested nature of sovereignty within the Union, is undermining the Rule of Law, a shift which will be exacerbated by the declining influence of the Common Law in a 27-member Union. The paper will conclude by advocating the need for a revitalised, explicit, commitment to the Rule of Law as the remaining 27 members redefine their constitutional relationship in the wake of Brexit.

Stephen Coutts (DCU) Irish Citizenship Post-Brexit: A Transnational Analysis

Brexit will result in an increasingly complex, differentiated and overlapping constitutional space, particularly for Ireland, which will retain links with both the UK and the EU. The purpose of this paper is to analysis this overlapping constitutional space through the prism of citizenship and in particular Irish citizenship. Irish citizenship, in retaining links to both the UK and the EU, is presented as a form of transnational citizenship generating rights and links to other polities based on historical and current ties. It will therefore sit at the overlap of Irish, UK and EU constitutional spaces and operates across all three. Irish citizenship is anchored in the Irish political community (including the extra-territoriality dimension with respect to Northern Ireland). However, the Irish polity and with it Irish citizenship, has historic links with both an older union (the United Kingdom) and a newer union (the European Union) both of which have generated reciprocal rights for their respective nationals. Through the operation of the Common Travel Area and EU citizenship rights, Irish citizenship contains within it extensive rights of quasi-equal treatment within both the United Kingdom and 26 other EU member states. The result is a citizenship that has a transnational rights dimension, granting effective associative membership with polities with which Ireland has historic and current links. Furthermore, as a result of the reciprocal nature of these links, the Irish political community itself is opened to nationals of those states. The result is a case-study in the usefulness of viewing citizenship through a transnational lens and of the changing shape of the European citizenship space.

Panel 3A - Popular constitutional change

Constitutional change has become one of the most studied topics in comparative constitutional law, providing a lens through which the competing forces of constitutionalism can be analysed. The Irish Constitution provides a distinctive model of constitutional change, amendment by an arguably sovereign people through a referendum process. This panel explores the implications of popular involvement in the amendment of the constitution.

Moderator: Dr Rachael Walsh (TCD)
Venue: Hoey Lecture Theatre

Dr Eoin Daly (NUIG): Popular sovereignty as unfettered constitutional amendability

Popular sovereignty often appears as a constitutional platitude - something of a blank canvass that yields no particular institutional prescriptions. Nonetheless, it is sometimes given quite a peculiar doctrinal translation in the context of the constitutional amendment process - specifically, it is sometimes interpreted as precluding any check or fetter on the people's power of constitutional amendment. In this paper, I attempt to relate this constitutional-doctrinal interpretation of popular sovereignty to the theoretical and historical genealogy of the concept. On the one hand, the notion of unfettered constitutional amendability finds some support in the theory of constituent power (which itself has an ambiguous and contested relationship with popular sovereignty). Moreover, some historical concepts of "sovereignty" ostensibly support the idea of unfettered amendability - and particular, the idea of sovereignty as entailing *unaccountability*. Ultimately, however, I argue that the understanding of popular sovereignty as requiring unfettered amendability wrongly assumes that constitutional-amendment referendums are capable of empowering the people in something that can meaningfully be called a "sovereign" role.

Dr Oran Doyle (TCD): Constitutional Change in Ireland

In this paper, I analyse the methods and history of constitutional change in Ireland in order to suggest some more general observations about the constitutional order. Constitutions can be changed through formal amendment processes; they can also be changed, however, through informal processes, such as judicial interpretation, desuetude and the emergence of constitutional conventions. Furthermore, given constitutions' pre-eminent status in domestic law, they can be used as instruments of social and political change. In this paper, I first set out the constitutional rules that govern formal amendment. I then analyse the sorts of changes that have been made through the amendment process. Finally, I explore the meshing of informal constitutional change and formal amendment in the areas of contraception, abortion, gay rights and children's rights. I argue that the key structures of the Constitution have been subject to remarkably little change. The most prominent area of constitutional change has concerned hot-button moral and social issues. In this domain, the Constitution has become both an instrument of social change and a site of social contestation. Contrary to some recent analysis of the marriage referendum, I argue that the use of referendums largely follows from a reasonable interpretation of what the Constitution says, rather than a political avoidance technique or a political-cultural predisposition for referendums. Nevertheless, recent exercises in deliberative democracy may have introduced a means for political actors to remain ambivalent on social and moral issues, while allowing interest groups to fight each other in social change referendums. This should

not distract, however, from the broader picture of general acquiescence in, if not approval of, the existing constitutional order.

Dr David Kenny (TCD): Changing the Irish Constitution for a United Ireland

With Brexit prompting debates on a United Ireland, there is an unspoken assumption that a German style unification under the existing Irish constitutional order is the most likely way for this to come about. This assumption does not take into account political obstacles to this, but also ignores the legal and constitutional complexity of this issue. In this paper, I wish to examine if the Irish Constitution could accommodate unification; how seriously it would have to change to do so; and - if this change is very significant - what might be the merits of change over replacement. This raises broader questions of why constitutions are reformed rather than replaced.

Plenary Panel - Constitutional Relations after Brexit

Brexit dominates the political and legal landscape in Europe. Within the UK, Brexit heralds a period of radical constitutional change. It will not only transform the UK's relationship with the EU and its Member States, with effects reaching deep within the United Kingdom legal order, but may also bring about a new phase in the constitutional relationship between London and the devolved administrations in Scotland, Wales and Northern Ireland. In Northern Ireland, the shadow of Brexit looms large. The special constitutional relationship between the United Kingdom and Ireland in respect of Northern Ireland - enshrined in the Good Friday Agreement - must adapt to the post-Brexit reality. This panel explores the reconfiguration of constitutional relationships within the United Kingdom as well as between the United Kingdom and Ireland. Particular attention is paid to territoriality: both the territorial compromises of the United Kingdom Constitution and the more general question of whether constitutions need to be rooted to a particular demos and a particular place.

Moderator: Dr Aileen Kavanagh (Oxford)
Venue: Hoey Lecutre Theatre

Prof Peter Leyland (SOAS, University of London): Brexit and the Multi-layered Constitution

It will be argued that the concept of a 'multi-layered constitution' provides a useful starting point in approaching the question of disengagement from the EU. A central theme in developing the idea of the 'multi-layered constitution' is that the restructuring of the constitutional architecture of the United Kingdom over the past 40 years or so has given rise to the dispersal of power from the Westminster Parliament upwards to the European Union and downwards to devolved legislatures but that at the same time the idea also acknowledges that there has been a redefinition in the role of law and government itself. In this paper three specific aspects are singled out for further discussion: the role of the Westminster parliament in overseeing Brexit; the definition of conventions and the application of the Sewel Convention to Brexit legislation in light of the *Miller* judgment; and some of the implications for Ireland (North and South) given the multi-layered supra-national constitutional settlement currently in place.

Prof Aileen McHarg (University of Strathclyde): Brexit and the Fragility of the United Kingdom's Territorial Constitution: A View from Scotland

Brexit is a highly destabilising event for the United Kingdom's territorial constitution:

First, it involves a shift from a three-level system of (legislatively-empowered) government to a two-level system, raising questions about the internal distribution of competences currently exercised at EU level.

Second, it removes an external unifying and stabilising constitutional force, raising questions about how - and whether - this can be satisfactorily replicated internally.

Third, the EU referendum of 23rd June 2016 produced a territorially divided result (a majority of voters in England and Wales voted to Leave the EU, producing a narrow UK-wide majority, while majorities in Scotland and Northern Ireland voted to Remain), raising questions about the significance and appropriate response to territorial division on issues of major constitutional importance.

Focusing on Scotland, I will argue that Brexit has exposed the fundamental fragility of the UK's territorial constitution in two key dimensions. The first is the lack of constitutional security for the devolved level of government. The second is the absence of effective mechanisms of shared rule to handle issues straddling UK and devolved competences.

I will discuss these issues, first, in relation to the decision to leave the EU, focusing on debates leading up to the European Union (Notification of Withdrawal) Act 2017. Secondly, I will consider current debates over the European Union (Withdrawal) Bill, concerning the implications of withdrawal for the domestic constitutional order.

Prof Colm O'Connell (UCL): Cosmopolitanism Versus The Demos: The Unresolved Tension Between 'Open' and 'Closed' Democratic Constitutionalist Frameworks

Constitutional theory has increasingly begun to grapple with the tension generated between (i) the tendency for constitutional frameworks to 'open' themselves up to external cosmopolitan influences (e.g. EU/ECHR/other international norms) and (ii) the embedded expectation that exists that such frameworks should in the final analysis remain 'closed', i.e. that the people of a particular nation state should retain effective control when it comes to determining the specific content of national law and, more generally, the norms of 'their' system of constitutional governance. In the UK, this tension fuelled the campaign for Brexit - and continues to cast a shadow over incorporation of the ECHR into British law via the Human Rights Act 1998. But this is not a specifically 'British' problem: a variety of constitutional commentators from a number of different jurisdictions and/or theoretical perspectives, such as Alexander Somek, Martin Loughlin, Jed Rubenfeld and Eric Posner, have argued that the ambitions of 'cosmopolitan constitutionalism' have been radically over-extended. This paper aims to untangle some of the issues underlying this debate (making specific reference to the Irish context post-Brexit), and argues that this tension is both inevitable and desirable.

Panel 4A - Doctrinal and Historical Issues in Comparative Constitutional law

This panel deals with new perspectives on constitutional concerns about restrictions on tobacco packaging and free speech; human rights issues related to inspection of prisons; the drafting of the 1937 Constitution of Ireland; and the rights of indigenous peoples.

Moderator: Dr Rachael Walsh
Venue: Hoey Lecture Theatre

Dr Eoin O'Dell (TCD): Is the Standardised Packaging of Tobacco a Proportionate Restriction on Constitutional Speech Rights?

This paper will evaluate the constitutionality of statutory restrictions upon tobacco packing in Ireland. It concludes that public health and the protection of children constitute pressing and substantial reasons sufficient to justify the Public Health (Standardised Packaging of Tobacco) Act 2015 and Part 5 of the Health (Miscellaneous Provisions) Act 2017 as proportionate restrictions upon tobacco companies' constitutional speech rights.

Dr Mary Rogan (TCD): Inspecting prisons: what does the law require?

The inspection and oversight of prisons is essential to the prevention of ill-treatment and the upholding of the rule of law in prisons. This paper examines the law governing the inspection of prisons in Ireland and places it in an international context. The paper argues that some amendment to the law governing inspection of prisons is necessary to fulfil international human rights principles. The paper also examines the position of the European Court of Human Rights on inspection of prisons. To do so, it analyses the approach taken by the Court to the questions of the exhaustion of domestic remedies and preventive remedies in prison cases. It notes that the Court has focused on judicial remedies, and, to some extent, domestic complaints mechanisms in assessing compliance with the Convention's principles. The paper argues the Court should give more consideration to how systems of inspection and oversight can act as preventive remedies as well as more guidance to states on how those systems should operate.

Dr Donal Coffey (Max Planck Institute): The drafting of the Irish Constitution 1937: Influences and Legal Insights

This paper presents a new method of dating the drafts of the Constitution of 1937. By adopting a sequential model, and linking this in to drafts that are dated, one can construct a clear idea of the manner in which drafting progressed. This model is then used to consider insights into different legal controversies, including the doctrine of unenumerated rights, the prerogative, and the inspiration for the fundamental rights Articles of the Constitution.

Emma Nyhan (EUI): International Law in the Vernacular and the Bedouin in Israel

The shift of the Bedouin in Israel to the international law of indigenous peoples manifested itself most clearly in the mid-2000s, when they submitted a formal request for indigenous recognition at the UN. This indigenous turn is curious when we consider that the Bedouin were historically situated beyond formal legal frameworks of the Ottomans (1519-1917) and British (1917-1947) and governed themselves according to their own customs. The events of 1948 marked a critical turning point to their way of life, at which point the Israeli State apparatus sought to bring the Bedouin collective under a Western-crafted order, in an effort to modernize them and permanently settle them in authorized areas. To counteract, the Bedouin have attempted to locate themselves in an internationally-created legality and have resorted to re-defining themselves. Crucial to this re-definition, or re-invention, is the UN definition of indigenous peoples. While the Bedouin have achieved some success in their quest for indigenous recognition on the international level, this in no way reflects a general consensus. In light of these trends, and by showing how the Bedouin in southern Israel are becoming indigenous, this intervention illuminates the ways in which international law concepts and categories (like indigenous peoples) are made active and effective in context. While acknowledging the Bedouin's indigenous turn is a brilliant or risky move, this leaves us asking why this particular legal framework is chosen and prioritized over possible others such as human rights, minority rights, the rights of internally displaced persons (IDPs) or Israeli law.

Panel 4B - Iterative Federalism

A popular refrain in EU regulation and governance is one of experimental ‘learning by doing’ through recursive or iterative processes that explains how subsidiarity works in practice (Sabel and Zeitlin 2015). This process, however, is not apolitical with different interests seeking to influence the way recursive learning happens in the EU (Börzel 2012; Kumm 2012). There hasn’t been a conceptual category to understand and explain how the political life of experimental governance through recursive learning plays out in the EU. This panel is interested to see whether Carlson’s (2009) characterisation of ‘iterative federalism’ in the United States may be of explanatory value in this regard. Per Carlson, looking at the interaction between states and the federal government in the US as purely hierarchical or one where one steps in to fill a regulatory void in the other does not explain this process. Rather, the federal government plays an enabling role for some state initiatives; rather than treating all states as ‘legally homogeneous’, some states are ‘singled out’ for ‘special regulatory power’. Then a process of exchange leads both the state and federal government to influence each other. It may be asked whether this process may explain the way EU governance works, and whether a nuanced version may be more suitable in not only explaining the history and development of regulatory interactions between the EU and Member States, but also to have a hold on the changes that might emerge should a ‘singled out’ State seek to alter its status in the iterative process.

Moderator: Dr Mary Rogan (TCD)
Venue: Galbraith Seminar Room

Mark Flear (Queen’s University Belfast): Iterative Federalism and New Health Technologies

This paper uses the example of the regulation of new health technologies to argue that a market-oriented risk-based framing dominates at the EU level while some national flexibility is permitted, and that this configuration is determined by and instrumental to the EU’s aims of forging European integration. In particular, while consensus is reached around regulation of essential safety and quality requirements at the EU level, this provides scope for some national differentiation during implementation, depending on the specific area in question. The EU level appears to facilitate national differentiation. The scope for the latter helps to build “Europe” or “EU compliant” regimes that work together even as they are made part of and help to legitimate the larger regulatory enterprise, the EU’s identity as an innovative regulator with high standards, and ultimately the project of European integration. This analysis seems to substantiate a view that the EU and Member States are not static categories, but are instead mutually constitutive, interactive and iterative as they (are made to) work together in the construction of a more integrated European socio-political order.

Kai Purnhagen (Wageningen University): Multilevel Constitutionalisation in EU Product Safety Law

This paper uses the example of the “new approach” regulation to EU product safety to illustrate a multilevel constitutionalisation process in a classical trade area, which needs to balance regulations of measures “at the border” with re-regulation “behind the border”. Departing from the rationale of the EU regulation on product safety law within the ambit of the “New Approach”, I will analyse how recent CJEU case-law increasingly introduces a substantive judicial review of standards. In doing this, the CJEU draws a fine line between EU and Member State authority. It constitutionalises at the border, but leaves “behind the border” regulation to Member States. While such a decentralised approach is usually seen as a major advantage of EU regulation as it allows Member States to maintain their juridical

cultures, it is often overlooked that EU Primary Law, in particular Art. 34 TFEU, and EU liability law also imposes harmonising standards for these kind of behind the border measures. Constitutionalisation of the “New Approach” hence follows two different strategies: “At the border” measures are subject to full EU scrutiny. “Behind the border” measures need to confirm with EU liability law and in particular Art. 34 TFEU. I will illustrate the impact of this constitutionalisation approach on the example of the recent PIP breast implant scandal.

Suryapratim Roy (TCD): Iterative Federalism and EU Climate Regulation

This paper deals with the development of climate change regulation in the EU, and focuses on the emissions trading scheme (EU ETS). An essential feature of the EU ETS has been experimental governance, and learning by doing in both initial design as well as subsequent developments. The property of technocratic iteration has been advocated by both the European Commission as well as the Court of Justice in justifying the satisfaction of non-discrimination and the distribution of burdens in EU climate law. Drawing on the political economy of the development of the EU ETS, this paper argues that iteration happens within conditions that are negotiated by certain Member States and parties within Member States. Industrial interests in the UK played a major role in the development of the EU ETS, diffused into EU regulation, and seem entrenched in its fabric. It is unclear whether changes in the political status of Member States or the negotiating leeway given to influential industries would affect the terms within which iteration happens. As a first step, it is suggested that following the distribution of benefits and burdens could point to the life of the iterative federalism of EU climate regulation.

Alexandros Seretakis (TCD): Brief comments on Iteration and EU Takeover Regulation