

Prof. Emilios Christodoulidis (Glasgow)

Constitutionalism in Europe: Disquieting Developments

Wednesday 17 April 2013

On 17 April 2013, Emilios Christodoulidis visited the University of Lucerne to deliver a public talk within the *laboratorium lucernaiuris* lecture series discussing the transition in constitutional law thinking, towards what he called “creeping constitutionalism”. He enlightened a captivated audience about the trend of the forming of constitutional law through it being brought in through the “back door” rather than traditional channels of the political process.



Emilios Christodoulidis has been Professor of Legal Theory at the Law School of the University of Glasgow since 2006. Prior to that he taught at the University of Edinburgh, where he also obtained his LLM and PhD degrees. His teaching and research interests lie mainly in the area of the philosophy and sociology of law and in constitutional theory. He is currently writing a book taking an innovative and interdisciplinary approach to considering how the logic of the market is displacing the logic of politics. Regarding this, Christodoulidis discussed

during the lecture two cases heard by the European Court of Justice (ECJ), *Laval* and *Viking*, both of which related to strike action against cheaper labour coming from other EU member states. Classically, EU law does not have competence over social rights, such as the right to strike. However, the ECJ ruled in both cases that EU law applied such as to implicate trade unions directly, due to the rights of freedom of movement and freedom to provide services. The ECJ found that collective action is a restriction on fundamental freedoms and so presumptively unlawful unless it can be justified (“balanced”) and is proportionate (“appropriate, necessary and reasonable”).

Christodoulidis stated that what we are seeing is private constitutionalism and a change in focus from the protection of migrant workers to one of ensuring market access. The debate is no longer one of social rights versus economic freedom, but rather one centred on market access. In other words, the rights of workers from one state over another. This results in “social dumping”, whereby businesses use cheaper labour from states that do not have such stringent labour or social standard, and leads to a “race to the bottom”, as governments are forced to reduce their labour, social and environmental standards in order to keep their labour force competitive.

A constitution has a framing function. It is meant to come first. However, the ECJ rulings reflect a modern type of constitution making, where the “terms” of the debate have changed. Christodoulidis argued that – despite the call for balance and proportionality – there is essentially nothing to balance, as it is not possible to balance anything against market access, especially if one affects market access with social dumping, or achieves market access through social dumping. He asked further how we are meant to achieve proportionality and what exactly we can possibly balance when we have the rigid vocabulary of market access. A focus on market access

automatically focuses the discussion on barriers, making it impossible to have social policy. In other words, the terms of market access inherently prevent us from discussing and balancing social interests.



Christodoulidis' presentation sparked lively debate around the concepts of a "constitution" and "constitutionalisation", from classic, modern and social legal theory perspectives, and around how we can achieve balance with market access, which is a valid interest, and other social interests. Christodoulidis argued that we need to talk about these issues from a higher constitutional perspective, in a transparent manner with representatives from all EU member states, thus reflecting a political constitutionalism rather than constitutionalism through the "back door". He noted that the EU now has deeply entrenched "constitutionalisation without a constitution", centred on market returns rather than political process, and that there has been a related collapse of the "collective political economy". By way of his lucid analysis of these issues, Christodoulidis succeeded in outlining new and stimulating perspectives on a number of "disquieting developments" in the field which are in urgent need of redress.

[Jessica C. Lai]