UNION UNIVERSITY LAW SCHOOL BELGRADE

International Workshop

TERRITORY IN LAW AND POLITICS

Book Of Abstracts

Panel 1: Territory in Political and Social Discourse

James Ker-Lindsay, Why Does Territory Matter?

Abstract: We take it as a given that states want to retain control over their sovereign territory. However, we rarely question the exact underlying motives for this. While there is a fundamental and powerful emotional understanding of a country's "natural" shape, the factors behind territorial control are far more complex. They can involve various economic, cultural, strategic and psychological elements. More to the point, when one explores these factors in the context of different conflicts, it becomes apparent that each territorial conflict has its own specific and unique dynamics. Understanding the nature of these diverse elements and their relative weights in the minds of policymakers and the wider public can potentially open up avenues to resolving territorial disputes. This paper argues that any attempt to address territorial disputes should start with an appraisal of the specific factors shaping the sides' perceptions of the territory.

Nebojša Vladisavljević, Power Sharing without Democracy: Evidence from National Self-Determination Conflicts in Yugoslavia, Bosnia and North Macedonia

Abstract: Power-sharing regimes are often studied as democracies even when they are a part of authoritarian or hybrid regimes. This paper contrasts power sharing without democracy in the national self-determination context – with all four pillars, largely constitutionalized and territorialized – with non-democratic but incomplete, informal and flexible power sharing in ethnic and ideological conflicts. It claims that power sharing facilitates peace and stability under both democracy and authoritarianism but problems arise in hybrid regimes and with political change. Evidence is provided from the comparative historical analysis of power sharing without democracy in communist Yugoslavia and post-communist Bosnia and North Macedonia.

Marko Milanović&Tatjana Papić, Political and Expert Discourse on Secession and Recognition: A Case Study of Serbia and Kosovo

Abstract: Our presentation will deal with tensions pertaining to the understanding and interpretation of international law in circumstances in which a state is faced with a serious secession claim.

How the public and experts in a particular state perceive international law is contingent upon different socio-cultural factors (norms, socialization, identity, collective memories, etc) of that community. When faced with a claim of secession, one can expect a heightened influence of certain factors, such as identity and collective memories. These not only play a role in building narratives, but also in shaping policies to counter secession. Our presentation seeks to explore other social factors, which have influenced how international legal issues are perceived in the secession context. This will be done on the example of Serbia, which faced the secession of Kosovo in 2008. Specifically, we will concentrate on examining divergent views on the nature of agreements reached within EU-facilitated negotiations between Belgrade and Pristina by different political and legal actors. The nature of these agreements is, in our view, clearly political – these are not legally binding instruments in international law. But Serbian political actors and legal experts have been sharply divided on the issue. Many have seen them as treaties, arguing that they constitute an implied or de facto recognition by Serbia of Kosovo's statehood. Our presentation will explore the nature of these agreements and whether they indeed constitute a form of recognition, building on the findings of our previous study on the sociology of international law in Serbia.

Panel 2: Territory in Legal and Constitutional Theory

Zoran Oklopčić, The Concept of Territory and the Legal Imagination of Jurisdictional Reconfigurations (from 2 to 3D)

Abstract: Seen in 3D, territory includes not just a fragment of the Earth's surface but also the land beneath it, the air above it, as well as a certain amount of water in the form of rivers, lakes, or, as the case may be, the sea adjacent to its shorelines. The most neglected juridical representation of the territories' three-dimensional existence comes from Hans Kelsen who likened territory to 'an inverted cone, whose vertex [lies] in the center of the earth where the conic spaces … of all the states, meet'. The prevailing, 2D conception of state territory is, on Kelsen's view, nothing but 'a visible plane formed by a transverse section of the State's conic space' (Kelsen 1949, 114). Though Kelsen's work continues to be remembered for his insistence on the 'purity' of an essentially image-free legal cognition, this presentation will take his conception of state territory as the starting point of an inquiry whose main aim will be to outline what might change in the scholarly conceptualizations of secession, partition, and (external) self-determination once the scholars' cognition of territory truly moves from two to three dimensions.

Miodrag Jovanović, Territorial Claims: The Role of Justice

Imagine there's no countries
It isn't hard to do
Nothing to kill or die for
John Lennon, "Imagine"

Abstract: Two bloody ongoing wars are stark reminder that we are still very much living in a world of countries in which many are willing to kill or die for a territory. It is important, however, to note that even the current situation, which is often depicted as a default point of departure, can be challenged on normative grounds. The division of the world into separate territories seems, for instance, problematic from a normative perspective of cosmopolitan justice. This paper wants to highlight different aspects in which justice is relevant for our discussion of territorial claims. First, the primary good to be allocated at the global legal level is membership in the international community, that is, sovereign statehood, which also presupposes the existence of the accompanying good – a chunk of territory over which the state can exercise political control. Second, the history of international legal order can largely be traced by the history of attempts at legal institutionalization of different allocative principles according to which the title to territory was supposed to be allocated. This, finally, reveals why most of the territory rights scholars are wrong in focusing on corrective, i.e. rectificatory justice, when in fact it presupposes distributive justice. Despite coming long way from the time when the primary good of the title to territory was allocated to, or withdrawn from, an entity on the basis of discretion and sheer power politics, the international legal order has not completely crystalized and institutionalized the relevant principle(s) for the distribution of this good. This leaves enough room for new allocative conflicts, such as ones in Donbas and Gaza strip.

Violeta Beširević, When the Flag Follows the Constitution: From Constitution to the Derecognition Campaign of a Contested State

Abstract: Inspired by the constitutional embodiments of the Serbian Constitution, and starting from the Rivka Weill assertion that "the overwhelming majority of democratic and anti-democratic states prohibit secession in explicit but indirect manners," this presentation shed light on constitutional law issues helpful in elucidating the state derecognition campaign as counter secession tool, and, by providing a fresh view, build up on the growing number of studies on counter-secession. I will first explain how the derecognition campaign of a contested state fits in the constitutional framework of government and then unpack constitutional pillars supporting the derecognition campaign, including demarcation sovereignty, territorial integrity, and the claim to territorial rights.

Gjyljeta Mushkolaj, Constitutional Design of Local Government and the Right of Municipalities to Freedom of Association – The Case of Kosovo

Abstract: In every country, governance is of a particular constitutional nature, depending on the political circumstances, the historical and national development, the geographical circumstances, and the principles that dominate society.

Kosovo, the youngest state in the geographical territory of Europe, also has its own characteristics, which affects the existence of a separate constitutional, legal, and political system and a unique organizational structure. However, it is another characteristic that makes Kosovo more special, and this is the path to the declaration of independence, the process of constitution making and state building, where the constitutional design of local self-government was and continues to be of central importance.

In line with the constitutional developments in Europe in the last thirty years, local government reform has become one of the main pillars of democratic development worldwide. This is also an important condition foreseen by the most powerful intergovernmental organizations to accept new state members and to recognize their right to benefit from this membership. In the last ten years, this has become a particularly strong demand of the European Union and its main tool of the enlargement conditionality. For South-Eastern European countries (the Balkans), this tool has turned into a real pressure for deep constitutional and legal changes. For Kosovo, it was even a condition and a fundamental element to resolving Kosovo's status, recognizing its independence by the majority EU countries, over 100 countries worldwide, and becoming a member of the World Bank, International Monetary Fund, and the Venice Commission, as the most important body for European constitutionalism.

This paper is an attempt to review the relationship between central government and local government, as well as the importance of citizen participation decision-making process by analyzing the hottest constitutional and political issue in Kosovo, the "Association/Community of Serb majority municipalities," a product of EU facilitated dialogue between Kosovo and Serbia under the auspices of EU Commission

Besides the body of constitutional theoretical literature, the paper uses an array of "grey literature" produced by UN, EU, Council of Europe and the Venice Commission.

Panel 3: Territory in International and Transnational Law

Jure Vidmar, The Concept of Territory in International Law

Abstract: The system of international law is inherently territorial in nature. This is because international law predominantly regulates relations between states, and states are presumed to have a territory. The presumption also works in the other direction: contemporary rules of international law presume – or are at least commonly interpreted as if they presumed – that an inhabited territory should have a state. Because of the close-knit territory-state relationship, the whole structure of the international legal system falls apart when the legal status of a territory is ambiguous. It is unclear which rules of international law are applicable – how and to whom should they apply – when it is impossible to objectively determine whether a territory forms a separate state or is a part of another state, or if it is not entirely clear whether a territory has a state, or when a territory's special status is acknowledged in practice though not necessarily in law. This paper seeks to explain the origins of territorial ambiguities, and argues that international legal doctrine has wrongly conceptualised territory as a natural element. Geographers have cautioned that territory is a social construct and ought to be de-naturalised. But what consequences would that have for the structure and application of international law?

Dimitry Vladimirovich Kochenov, The Myth of EU Territory

Abstract: Since the founding of the Communities the Treaties have paid very significant attention to the legal articulation of the territorial scope of European law. By the time of the entry into force of the Treaty of Lisbon the number of Treaty provisions directly dealing with EU territory and establishing different statuses for particular overseas or autonomous regions/countries of the Member States in EU law has grown to ten. The aim of the overview I endeavor to provide, which has been produced to make part of a much larger Oxford University Press Commentary covering all the Treaties in force including the EU Charter of Fundamental Rights, is to offer a concise analysis of all the ten 'territory' provisions in the Treaties and to specify the meaning of all the different statuses in EU law that particular Member State territories can acquire, the substance of EU law associated with each of the statuses in question, as well as to outline the procedures for status change as they stand today. The overview is arranged to present the relevant provisions in the order of generality and importance, rather than chronologically, giving a solid introduction into the current state of the law on EU territory and EU Law of the Overseas. Significant changes have been introduced into the second edition to take on board the far-reaching reconfiguration of the EU's overseas possessions following Brexit.

Antonello Tancredi, Independence Referendums in International Law, with Particular Reference to the Case of Ukraine

Abstract: The recent practice of independence attempts often shows recourse to referendum consultations. Although these consultations provide a degree of democratic legitimization to the independence attempt, they are not capable of giving rise to an internationally recognized right of secession. The referendum is not synonymous with self-determination, but only a means (not the only one) for exercising this right. In other words, a referendum can only produce legal effects in international law (i.e. an obligation to respect its outcome) in cases where there is a right to external self-determination to be exercised (although it may also find its legal basis in constitutional law or in an agreement between the parties concerned). The circumstances under which the annexation referendums held in September 2022 in Eastern Ukraine were conducted ("during active armed conflict, in areas under Russian occupation, and outside Ukraine's legal and constitutional framework", thus the *UN Secretary General's remarks on Russian decision on annexation of Ukrainian territory* of 29 Sept. 2022) have led the UNSG and many States to deny that these consultations represented "a genuine expression of the popular will" (*ibidem*). This confirms the link between ways of conducting popular consultations (which should be transparent, fair, free for military or other form of coercion etc.) and the "hard core" of self-determination, identified by the International Court of Justice as the need to respect the "free and genuine will" of the populations concerned.

Panel 4: Territory in National Law and Policy

Srđan Milošević, Historical Legitimacy of Territorial Organization: The Two Yugoslavias

Abstract: In this presentation, I will demonstrate how historical narratives operate as a legitimizing tool for framing the territorial organization of a state, focusing specifically on the cases of the First and Second Yugoslavia. The practice of leveraging historical narratives to justify territorial organization has been a distinctive feature in the formation of both entities. Constitution makers in each era turned to the shared past to legitimize their territorial frameworks, but intriguingly, despite drawing from the same historical reservoir, they arrived at starkly different organizational structures. In the First Yugoslavia, the emphasis was on a centralized system, seeking to blend diverse regions into a unified national identity. This approach was rooted in a selective interpretation of history that emphasized unity and continuity. Conversely, the Second Yugoslavia adopted a more decentralized and federal approach, reflecting a reinterpretation of the same historical events to underscore regional distinctiveness and autonomy. This

dichotomy illustrates not only the malleability of historical narratives in constitutional and territorial design but also highlights how the same historical facts can be construed to support vastly different political and organizational outcomes.

Tijana Rečević, False Positive or False Negative? Unraveling the Aims of Serbia's Foreign Policy Campaign for Kosovo's Derecognition

Abstract: The paper delves into the motivations and implications of Serbia's foreign policy concerning the derecognition of Kosovo. In a geopolitical context marked by global, regional, and domestic tensions, this research critically examines the strategic objectives of the Serbian government, seeking to differentiate between the current interpretations of its derecognition campaign as either a 'false positive' or 'false negative.' By unraveling the complexities surrounding Serbia's 'two-level game' regarding Kosovo's derecognition, the paper contributes to a deeper understanding of the nexus between foreign policy goals, instruments, and outcomes that somewhat deviate from the standard repertoire of states' international practice. By shedding light on Serbia's motivations and actions aimed at reversing the trend in the recognition of Kosovo, the research also addresses broader questions about the way in which the evolving nature of international relations shapes foreign policy challenges and opportunities for those navigating the issue of both seeking and giving recognition within the current global arena. The study employs a multifaceted analytical approach, combining a comprehensive review of diplomatic actions, nuanced policy statements, and the varying international and domestic reactions to Serbia's endeavors, including the public opinion.

Vladimir Tiutiuriukov, Territoriality in Taxation of SMEs: Recent Developments in EAEU

Abstract: OECD (2015) examined the practice of 38 countries (OECD and G20 members) in taxation of small and medium enterprises (SMEs). It found that more than 95% of all firms are SMEs, and that the governments of 17 countries employed special presumptive tax regimes for small enterprises and six reported special SME replacement taxes. Their general idea is to reduce tax and compliance burden.

EAEU Member States – Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia – also follow this trend, employing various special tax regimes (STRs) for SMEs, including tax exemption, special taxes replacing income and/or property taxes and special rules for calculation of income taxes.

The existence and application of these STRs entail two major issues. First, they were developed when the economy was mainly brick-and-mortar and SMEs worked locally, and may not be well adjusted to the developments of last years, when many SMEs expanded their activities to adjacent regions and countries

or entered e-commerce. In some cases, entrepreneurs even moved to the different countries. Second, double taxation avoidance conventions do not cover STRs, so SMEs may encounter double taxation.

SMEs in question continue to meet relevant domestic criteria for application of STRs (turnover, value of assets, staff count). At the same time, they encounter rules of other jurisdictions, and the territoriality of tax regulations becomes an issue. The countries commonly impose income and property taxes on both residents and non-residents (provided the latter earn income or own property in their territory). However, their approaches differ in respect of which tax regimes are available for residents and non-residents and which income or property should be taxed in that country. In addition, sometime regions within the countries offer specific benefits within STRs (e.g. lower tax rates in Russia), raising the question whether these benefits are applicable for income earned outside of the region.

This presentation examines the territorial dimension of STRs in EAEU Member states. The particular questions of this research may be divided into two parts: those related to SME "at home" earning income from another jurisdiction, and those related to a non-resident SME.

Domestic questions:

- Can a SME change jurisdiction within the country to enjoy more beneficial STR?
- Can a SME earning income from abroad report that income under STR?
- Can a SME earning income from abroad credit tax at source against domestic tax under STR?

Questions for non-residents:

- Can a non-resident business enjoy STR?
- Can an individual entrepreneur, living abroad, claim their income to be taxed under beneficial STR at their home country?

The preliminary research shows a variety of answers for each questions. However, it appears that Kazakhstan is the only EAEU Member State which introduced STRs as special rules for calculation of income taxes, thus simplifying the territorial scope of taxation for its SMEs. Other countries, replacing income taxes by STRs, complicate the cross-border activities of SMEs.