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Introduction

Christopher Lamb was seventeen years old when, in 2004, a youth court imposed an anti-social behaviour order (ASBO) under the Crime and Disorder Act 1998 on him for 'using disorderly behaviour or threatening abusive or insulting words likely to cause harassment, alarm or distress'.[1] The ASBO prohibited him from going into the town centre of Whitley Bay, a town with a population of about 40,000 in North East England, as well as from entering the metro system or any bus shelters in the region for two years.[2] Lamb repeatedly breached the ASBO by entering the prohibited area, although, as a court pointed out, none of these breaches involved anti-social behaviour or, indeed, impacted on the public in any way.[3] However, since any breach of an ASBO amounted to an offence punishable with up to five years imprisonment,[4] a judge sentenced Lamb to twenty-two months in a young offender institution.[5] This sentence was later reduced to six months.[6]

Patricia Johnson, a grandmother of several children, was arrested on suspicion of a marijuana trafficking offence in Over-the-Rhine, a neighbourhood near the city centre of Cincinnati, Ohio.[7] The arresting police officer served her with an exclusion notice that prohibited her from entering Over-the-Rhine for three months. The legal basis for this prohibition was an ordinance of the City of Cincinnati of 1996 that established 'drug exclusion zones' in areas with 'a higher incidence of drug-related activity'.[8] The city council had designated Over-the-Rhine as a 'drug exclusion zone'. Anyone arrested within such a zone for one of several enumerated offences was subject to exclusion for up to three months from

[1] *R.* v. *Lamb (Christopher)*, [2005] EWCA Crim 3000, para. 2. [2] Ibid.
[3] Ibid., para. 18. [4] Crime and Disorder Act 1998, s. 1(10) (repealed).
[5] *R.* v. *Lamb (Christopher)*, [2005] EWCA Crim 3000, para. 10. [6] Ibid., para. 20.
[7] *Johnson* v. *City of Cincinnati*, 310 F.3d 484, 488–9 (6th Cir. 2002).
[8] See Cincinnati Municipal Code, § 755–5 (repealed). For a description of the background and exact contents of the ordinance, see *State* v. *Burnett*, 755 N.E.2d 857, 858–9 (Ohio 2001).

the 'public streets, sidewalks, and other public ways' in all 'drug-exclusion zones'.[9] Violation of an exclusion order was subject to prosecution for criminal trespass. Johnson helped care for the five children of her daughter who lived in Over-the-Rhine, regularly taking two of them to school. She was found within the exclusion zone during the exclusion period and charged with criminal trespass. She was never indicted of the marijuana trafficking offence that had given rise to the exclusion order.[10]

Mario Gsell is a journalist who in 2001 wanted to observe, and report on, the World Economic Forum (WEF), which is held annually in the Swiss ski resort of Davos.[11] As every year, the police established checkpoints on all access routes (roads and railroad) to Davos where they carried out personal and vehicle searches.[12] Although there was no explicit legal basis for doing so, the policy of the police was, and apparently still is,[13] to deny access to Davos to all potential protesters and to turn back anyone who is not clearly identified as not posing a security risk as well as anyone whose identity cannot be reliably confirmed, except if they are known to the respective police officers.[14] The bus Gsell was travelling on was stopped by the police shortly before Davos. Despite presenting his press card and informing the police about his planned activities in Davos, Gsell, as all other passengers, was ordered to turn back.[15]

1.1 Exclusion from public space and its challenges to liberal democracy

These are just three of many examples that demonstrate that various states have started to prevent certain categories of people from gaining access to places that are normally publicly accessible. While the power of the police to temporarily remove people from a specific public place to defuse a dangerous situation has existed for some time,[16] in the last few years numerous liberal democracies have introduced laws that authorise the police and other authorities to exclude people from *large parts* of public space for *extended periods of time*. Among the new legal tools put

[9] Cincinnati Municipal Code, § 755–5 (repealed).
[10] *Johnson* v. *City of Cincinnati*, 310 F.3d 484, 488–9 (6th Cir. 2002).
[11] BGE 130 I 369, 370–1 (2004). See also *Gsell c. Suisse*, no. 12675/05, 8 October 2009 (only available in French).
[12] BGE 130 I 369, 370–1 (2004). See also BGE 128 I 167, 168 (2002).
[13] Amtsblatt des Kantons Graubünden 2013/2, 10 January 2013, pp. 14–18.
[14] BGE 130 I 369, 384–5 (2004). [15] Ibid., 371. [16] See Section 3.1.

at the disposal of state authorities are exclusion orders, dispersal orders, control orders, curfews and the establishment of zones where particular activities, such as demonstrating, are prohibited. In some instances, as in that of Gsell, law enforcement authorities have also banned individuals from public places without there being any explicit legal basis for doing so. The targets of these new exclusion measures include teenagers, drug addicts, protesters, homeless people, alcoholics as well as (potential) sex offenders, street gang members and football hooligans. As will be argued below, this rise of exclusion measures is characteristic of two broader developments that have fundamentally transformed public space in recent years: the 'privatisation of public space' and its increased regulation and control due to the rise of the 'security society'.[17]

Granting the state the power to exclude people from public space poses a number of challenges to the basic values and principles on which liberal democracies are founded. Exclusion measures are typically based – if they have an explicit legal basis at all – on legal norms that are very vaguely and broadly drafted, raising concerns with regard to the rule of law; they interfere with a range of guarantees of liberty and equality; and they prevent ever-larger sections of the population from being visible, and participating, in public life and are thus problematic from the perspective of democracy. Yet despite these fundamental constitutional problems, and the emergence of case law addressing some of them, exclusion from public space has not attracted much interest from constitutional lawyers. Most scholars who have tackled the issue of exclusion from public space so far have done so from the perspective of (critical) geography,[18] sociology,[19] criminology[20] or, to a limited extent, property/land law[21] or 'administrative law'[22] (understood in the sense of the continental European tradition).[23] This book aims to address this gap by comprehensively exploring the implications that powers of exclusion from

[17] See Section 2.5.
[18] Belina, *Raum, Überwachung, Kontrolle* (2006); Mitchell, *The Right to the City* (2003).
[19] Litscher/Grossrieder/Mösch-Payot/Schmutz, *Wegweisung aus öffentlichen Stadträumen* (2011); Beckett/Herbert, *Banished* (2010); Gasser, *Kriminalpolitik oder City-Pflege?* (2004).
[20] Von Hirsch/Shearing, 'Exclusion from Public Space' (2000).
[21] Gray/Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' (1999); Ellickson, 'Controlling Chronic Misconduct in City Spaces' (1996).
[22] Finger, *Die offenen Szenen der Städte* (2006).
[23] On the different understandings of 'administrative law' in the common law and the continental European traditions, see Bell, 'Comparative Administrative Law' (2006), 1261.

public space have for the foundational elements of any liberal democratic constitution: the rule of law, fundamental rights and democracy. To do so, it analyses relevant laws, their application and the emerging jurisprudence of three liberal democracies that have been at the forefront of developing exclusion measures: the United Kingdom, the United States and Switzerland.

1.2 Methodology

In order to explore the issues set out above, a comparative constitutional analysis will be undertaken: the book examines the constitutional law implications of exclusion from public space, comparing the situations in the United Kingdom, the United States and Switzerland. This section explains the reasons for choosing this methodological approach.

1.2.1 A constitutional analysis

As explained above, the issue of exclusion from public space has so far mainly been examined from the perspectives of geography, sociology and criminology. These existing inquiries are predominantly *descriptive and explanatory*: their primary focus is on a description of various exclusion measures and an analysis of the reasons for their adoption and of their (geographical, sociological or criminological) implications. Although nearly all of the respective authors are evidently critical of exclusion from public space, they rarely explicitly state the basis for their criticism: at most, they *imply* that exclusion measures represent bad policy or that they are morally objectionable.[24] In contrast, I aim to explore exclusion from public space from a *normative* perspective. More precisely, I consider measures excluding people from public space in the light of the most relevant fundamental values and principles on which liberal democracies are founded, assessing them for their compatibility with these values and principles. In order to identify the latter, the constitutions of the three liberal democratic states referred to above will be examined, with a view to identifying common underlying 'constitutional values and principles'[25] or, in John Rawls' terms, 'constitutional essentials'.[26]

[24] E.g. Beckett/Herbert, *Banished* (2010); Gasser, *Kriminalpolitik oder City-Pflege?* (2004).
[25] For a definition of these terms, which are often used interchangeably, see Jacobsohn, 'Constitutional Values and Principles' (2012).
[26] Rawls, *Political Liberalism* (1993), pp. 227–30. See Michelman, 'Rawls on Constitutionalism and Constitutional Law' (2002).

Measures excluding people from public space normally fall within the competence of municipal or local authorities, and the relevant legal powers are often provided by state (in the United States), cantonal (in Switzerland) or even municipal, rather than national, legislation. Since these laws, and their application, may differ considerably, the few legal analyses of exclusion from public space that do exist have focused, by and large, on particular local contexts and specific land law or administrative law aspects.[27] As a consequence, only very little attention has been paid to the 'broader issues' raised by exclusion from public space, that is, its implications in terms of constitutional law. This lack of attention is surprising, considering that the regulation of the use of public space is an issue that is at the heart of constitutional law as it has important implications for key constitutional values such as the rule of law, fundamental rights and democracy. This book seeks to address these so far largely unexplored constitutional law implications of exclusion from public space.

1.2.2 A comparative analysis

Vicki Jackson distinguishes several broad classes of methodological approach in comparative constitutional law ('classificatory', 'historical', 'normative' or 'universalist', 'functionalist' or 'consequentialist' and 'contextualist'), which, as she concedes, may overlap with each other and within which, in turn, different techniques may be used.[28] According to her classification, the present study would probably be characterised as primarily 'functionalist',[29] since, as will be explained in this section, the main objectives of the comparison are to facilitate a comprehensive analysis of various ways of excluding people from public space and to assess these for their compatibility with the fundamental values and principles that are common to liberal democratic states. In view of the last point, namely its aim of identifying common principles, Jackson

[27] E.g. Finger, *Die offenen Szenen der Städte* (2006); Ellickson, 'Controlling Chronic Misconduct in City Spaces' (1996).

[28] Jackson, 'Comparative Constitutional Law' (2012), 55–67.

[29] Ibid., 62–6. On functionalism in comparative law in general, see Michaels, 'The Functional Method of Comparative Law' (2006); Zweigert/Kötz, *Einführung in die Rechtsvergleichung* (1996), pp. 31–47. On functionalism in comparative constitutional law, see Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999), 1238–69. For critiques of the functionalist approach to comparative constitutional law, see Teitel, 'Comparative Constitutional Law in a Global Age' (2003); Frankenberg, 'Critical Comparisons' (1985), 434–40.

might also assign this study to the category of comparative analyses she describes as 'universalist'.[30] At the same time, however, the inquiry also aspires to be 'contextualist': it is guided by the belief that legal norms and their application, especially in the field of public law,[31] should not be considered without paying due attention to their particular institutional and national contexts.[32] I therefore make an attempt to present the various principles and norms at issue before their respective historical and political backgrounds. I hope that, by contributing to an understanding of how the issue of exclusion from public space is addressed in other legal systems, the book will also help readers get a better grasp of the particularity of their own respective legal system and the context within which it operates.

The first objective of the comparative analysis is to explore various ways of approaching the issue of exclusion from public space. A number of states currently face the same social problem, namely that the presence of particular groups of people in (certain parts of) public space is seen as undesirable or even as a threat to society. As a reaction to this common social problem, they have created new laws or added new provisions to existing laws. Comparison across a number of states makes it possible, first of all, to gauge the extent to which the adoption of measures excluding people from public space represents a general trend in liberal democratic states. This in itself constitutes a worthwhile objective. More importantly, however, comparison allows for a more comprehensive analysis, and thus also a more reliable assessment, of the different ways of dealing with the social problem referred to above. How do the new legal regulations try to address the problem? How are they implemented? What are their consequences?

The second objective of the comparison is to identify fundamental values and principles relevant in the context of exclusion from public space that are common to liberal democratic states and to assess exclusion measures for their conformity with them. Which types of exclusion measures, if any, are compatible with the 'constitutional essentials' of liberal democracy and which ones are not? In order to answer these questions, the jurisprudence of UK, US and Swiss courts (as well as of international courts and adjudicatory bodies) dealing with these issues

[30] Jackson, 'Comparative Constitutional Law' (2012), 60–2.
[31] See Tushnet, 'Comparative Constitutional Law' (2006), 1253–7; Bell, 'Comparative Administrative Law' (2006), 1260; Starck, 'Rechtsvergleichung im öffentlichen Recht' (1997); Strebel, 'Vergleichung und vergleichende Methode im öffentlichen Recht' (1964).
[32] Jackson, 'Comparative Constitutional Law' (2012), 66–7.

will be subject to a comprehensive and thorough analysis. A comparative approach makes it possible to move beyond specific local contexts and, by considering exclusion from public space from the perspective of the fundamental values of liberal democracy, to gain a better understanding of their wider implications. It should therefore also be clear that this book does not – and cannot – aim to explore each and every legal issue that is related to exclusion from public space.

A comparative approach is all the more pertinent given that there is a strong interplay between the constitutional values and principles of different liberal democratic states. As the following chapters try to demonstrate, the 'constitutional essentials' of such states have not developed in isolation but, on the contrary, have profoundly influenced each other. And they continue to do so: courts (both constitutional courts and lower courts) and legal scholars regularly refer to the law and case law of foreign jurisdictions (as well as international law and the jurisprudence of international courts) when applying and interpreting constitutional principles such as the rule of law, fundamental rights and democracy. It may thus be revealing to compare how the issue of the relationship between these constitutional principles and access to public space is conceptualised and tackled in various liberal democracies.

This observation holds especially true with respect to the fundamental rights conformity of exclusion measures. Today, the study of fundamental rights is linked to the study of international law and comparative constitutional law to such an extent that a scholarly work that deals with fundamental rights is arguably incomplete if it fails to take into account international human rights jurisprudence and, at the very least, key developments in other jurisdictions.

International human rights law is of great relevance to an inquiry such as the present one in that numerous states, including those considered here, have ratified at least the key human rights treaties and are thus obliged to comply with the guarantees contained therein.[33] Furthermore, both the creation and application of *domestic* guarantees of fundamental rights are frequently influenced by the jurisprudence concerning the respective guarantees at the international level.[34] How rights guarantees

[33] See Section 5.1.

[34] On how, for instance, the ECHR and the European Court of Human Rights have shaped domestic law in European states, see e.g. Spielmann, 'Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe' (2012); Keller and Stone Sweet (eds), *A Europe of Rights* (2008); Blackburn and Polakiewicz (eds), *Fundamental Rights in Europe* (2001).

are articulated and interpreted in domestic constitutional law can today no longer be properly understood if one does not have a grasp of the degree to which national institutions might be responding to the supervision of international institutions such as the European Court of Human Rights or the UN Human Rights Committee. On the other hand, comparative constitutional law is important for an understanding of international human rights norms, as international institutions often consider the relevant jurisprudence of national courts when interpreting these.[35] As Mark Tushnet has concluded, today 'in some aspects the study of comparative constitutional law is continuous with the study of international human rights law'.[36]

As far as the domestic level is concerned, there is increasing assimilation of various constitutional systems in the field of fundamental rights. This development towards convergence is prodded in part by the emergence of international human rights law: the lists of fundamental rights in national constitutions have become more and more reflective of international human rights instruments and thereby also more and more reflective of one another.[37] At least in respect of fundamental rights protection, the claim that there is now what David Law has called 'generic constitutional law' seems therefore justified.[38] Law and Mila Versteeg analysed 729 constitutions adopted by 188 different states from 1946 to 2006 and found, first, that a significant number of rights-related provisions appear in virtually all constitutions and can therefore be described as 'generic'.[39] The guarantees of freedom of expression, freedom of religion and equality, for example, were contained in 97 per cent of all constitutions in force as of 2006.[40] Second, Law and Versteeg demonstrate that the number of 'generic rights' has been increasing over time.[41] The trend towards transnational convergence, it has been argued, is however not limited to the *codification*

[35] Accordingly, the European Commission for Democracy through Law of the Council of Europe (Venice Commission) regularly publishes the *Bulletin on Constitutional Case-Law*, containing summaries of the most significant decisions taken by constitutional courts in Europe: Council of Europe, Venice Commission, *Bulletin on Constitutional Case-Law* (Strasbourg) (1993). For the European Court of Human Rights, see McCrudden, 'A Common Law of Human Rights?' (2000), 522.

[36] Tushnet, 'Comparative Constitutional Law' (2006), 1233.

[37] See Thürer, 'Kosmopolitische Verfassungsentwicklungen' (2005), 38.

[38] Law, 'Generic Constitutional Law' (2005).

[39] Law/Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011), 1187–94, 1199–200. See also Law/Versteeg, 'The Declining Influence of the United States Constitution' (2012), 770–9.

[40] Law/Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011), 1200.

[41] Ibid., 1200–2.

of fundamental rights, but it also applies to the application and interpretation of these norms. As part of what is described by some as a 'global' or 'transnational judicial dialogue'[42] and by others as a 'constitutional engagement in a transnational era',[43] constitutional court judges around the world not only meet each other and exchange ideas more and more regularly but also refer to each other's decisions to an unprecedented degree. As a result, one of the leading texts on comparative constitutional law concludes that in the area of fundamental rights there is now 'widespread overlap – if not underlying universalism – at the core'.[44] This development towards convergence is particularly far advanced in Europe where, as an ambitious work tries to show, a *ius publicum europaeum* is emerging: a common European public law, consisting of both a common constitutional law and a common system of scholarship.[45]

There are good reasons to be sceptical about far-reaching claims that constitutional law all over the world is converging and that there is now 'a global community of courts',[46] which is engaged in an 'active and ongoing dialogue'.[47] Yet this is not the place to assess the different positions in this debate.[48] For present purposes it suffices to note that even authors who are sceptical about the alleged trend towards convergence acknowledge that, in the distinct area of human and fundamental rights, there is now indeed broad and substantial consensus among national constitutions and constitutional courts. Ruti Teitel, for instance, who is generally very critical of convergence claims,[49] argues that in

[42] E.g. Slaughter, *A New World Order* (2004), pp. 65–103, 268; Slaughter, 'A Global Community of Courts' (2003). See also Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges' (2008).

[43] Jackson, *Constitutional Engagement in a Transnational Era* (2010).

[44] Dorsen/Rosenfeld/Sajó/Baer, *Comparative Constitutionalism* (2010), p. 3.

[45] Von Bogdandy/Cruz Villalón/Huber (eds), *Handbuch Ius Publicum Europaeum, Bd. 1* (2007); von Bogdandy/Cruz Villalón/Huber (eds), *Handbuch Ius Publicum Europaeum, Bd. 2* (2008); von Bogdandy/Cassese/Huber (eds), *Handbuch Ius Publicum Europaeum, Bd. 3* (2010); von Bogdandy/Cassese/Huber (eds), *Handbuch Ius Publicum Europaeum, Bd. 4* (2011). For an English summary presenting some of the results of this research project, see von Bogdandy, 'The Past and Promise of Doctrinal Constructivism – A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' (2009). Peter Häberle claimed already in 1991 that there was a *gemeineuropäisches Verfassungsrecht* ('common European constitutional law'): Häberle, 'Gemeineuropäisches Verfassungsrecht' (1991).

[46] Slaughter, 'A Global Community of Courts' (2003).

[47] Slaughter, *A New World Order* (2004), p. 66.

[48] For a critical analysis of the idea of a 'global judicial dialogue', see e.g. Law/Chang, 'The Limits of Global Judicial Dialogue' (2011).

[49] See Teitel, 'Comparative Constitutional Law in a Global Age' (2003).

respect of what she calls 'transnational human rights law' there is now such a degree of agreement that one may speak of a limited universal 'law of humanity', which she describes as 'the logical peak of the comparativist project'.[50] Given that we may be witnessing the emergence of a 'common law of human rights'[51] or a 'global model of constitutional rights',[52] it is indeed in this particular field of constitutional (and international) law that adoption of a comparative approach promises to be especially fruitful.

In the following chapters on the rule of law (Chapter 4), liberty (Chapter 5), equality (Chapter 6) and democracy (Chapter 7), the first section of each chapter will explain how the three domestic constitutional systems (as well as the international legal system) have influenced each other with regard to these 'constitutional essentials' and draw out commonalities and differences. The main body of each of these chapters then compares the situations in the three states with specific regard to the issue of exclusion from public space.

1.2.3 Choice of states

The states selected for this comparative analysis of the constitutional law implications of exclusion from public space are the United Kingdom, the United States and Switzerland. It would be dishonest to claim that this choice is due to nothing else than scientific logic. As Günter Frankenberg has pointed out, it is inevitable that the selection of jurisdictions for any comparative study will hinge upon a range of contingent factors, including the author's biographic background, his or her academic interests and practical restraints (such as language).[53] Nevertheless, there are several objective reasons that justify a focus on these three countries for present purposes.

In older scholarly works it was sometimes claimed that comparisons will only make sense if they are made between countries that belong to what has variously been described as the same 'legal family',[54]

[50] Teitel, *Humanity's Law* (2011), p. 190. See also Teitel, 'Humanity Law: A New Interpretive Lens on the International Sphere' (2008), 695–702; Teitel, 'Comparative Constitutional Law in a Global Age' (2003), 2593.
[51] McCrudden, 'A Common Law of Human Rights?' (2000).
[52] Möller, *The Global Model of Constitutional Rights* (2012).
[53] Frankenberg, 'Critical Comparisons' (1985), 433–4.
[54] David/Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (2003), pp. 15–23. For an English translation, see David/Brierley, *Major Legal Systems in the World Today* (1985), pp. 17–31. Despite the title of his work, David uses the term 'legal family'.