



# The First IMAGINE Workshop

Convened by Professor Jan Komárek

*iCourts*, University of Copenhagen

Date 22 May 2019

IMAGINE: European Constitutional Imaginaries: Utopias,  
Ideologies and the Other

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## **AIM:**

In November 2018, the conference *EU Constitutional Imagination: Between Ideology and Utopia* unofficially opened works on the ERC-funded project which deals with European constitutional imaginaries. Most contributions are now being revised to make up a coherent volume on the topic and their penultimate draft should be available at the end of April. More information on the conference can be found here: <https://jura.ku.dk/icourts/calendar/2018/eu-constitutional-imagination/>, IMAGINE's website is <https://jura.ku.dk/icourts/research/imagine/>.

To this workshop, which is the first in a series to be organised in the context of IMAGINE, we have invited scholars who have already contributed to the study of what we call "European constitutional imaginary" in their own way, having used various methodologies: (legal) sociology, history, political theory or political science. The chief aim of putting this group together is to reflect on the very framing of our project, as exemplified by the introductory chapter, written by IMAGINE's principal investigator, and a selection of chapters to the volume resulting from the above conference.

## PROGRAMME:

21 May, 19:00: workshop dinner for those already in town – Restaurant FAMO CARNE, Gl. Kongevej 51

22 May, iLab Room 6B.4.66, Faculty of Law, University of Copenhagen, Njalsgade 76, Copenhagen:

8:30-9:00 Coffee and small breakfast

9:00-9:20 Introduction to the workshop by the convenor

9:20-10:50 FIRST PANEL (for the details of each speaker and paper, please see below)

**EU Law's Swan-Song ? Europe's Constitutionalist Moment in the Great Tournament of Social Sciences** by Antoine Vauchez

**Re-Imagining the Narratives of European Integration** by Matej Avbelj

**The Imaginary and the Unconscious: Towards an Ideology Critique of European Constitutionalism** by Amnon Lev

10:50-11:20 Coffee break

11:20-12:50 SECOND PANEL

**The Contested Utopia of U.S. Constitutionalism and the Lost Ideology of Racial Capitalism** by Fernanda Nicola and Jeff Miller

**The Magic of the C-Word: Eric Stein's Many Constitutionalisms in Context** by Alexandra Kemmerer

12:50-13:50 Lunch

13:50-15:20 THIRD PANEL

**Metabolic Constitutions and Constitutional Imaginaries** by Peter Lindseth

**The role of transformative constitutionalism in the context of EU integration** by Jo Murkens

15:20-15:50 Closing remarks by the convenor; publication plans

## PARTICIPANTS AND ABSTRACTS:

1. **Re-Imagining the Narratives of European Integration** by Matej Avbelj (Graduate School of Government and European Studies, Nova Gorica) – the author of, among other things, *The European Union under Transnational Law: A Pluralist Appraisal* (Hart 2018)

From Jan: Matej will revisit his old work (which very much inspired my own work), on the narratives of European integration. A very useful background can be found in his 'The

Pitfalls of (Comparative) Constitutionalism for European Integration', Eric Stein Working Paper No. 1/2008 (<https://ssrn.com/abstract=1334216>):

*The purpose of this paper, in contrast to the mainstream EU scholarship, is to expose the other, much less studied and potentially darker side of the EU constitutionalism. It therefore asks a question about the constitutional pitfalls for European integration. Relying on a social constructionist approach following which the current state of EU legal affairs is a product of the dominant constitutional narrative, it examines whether and to what an extent constitutionalism as a dominant narrative is itself a source at least of some of the problems that haunt the integration. The paper thus proceeds on a hypothesis that if practices of integration do not deliver as they should, this must be due to the guidance of the dominant narrative. For any practice that is based on the wrong narrative can not be but self-defeating. To prove this hypothesis the contours of the dominant constitutional narrative will be examined first. It will be explored how the integration appears in the light of the constitutional narrative and why and where the constitutional narrative has emerged from. The answers to these questions will subsequently reveal the central, unique and peculiar role that comparative constitutionalism has played in the emergence of the EU constitutional narrative. It will be demonstrated and explained how and why a constitutive dependence of the EU constitutional narrative on a very specific comparative constitutional experience actually created two at present major legal and political problems of integration. Finally, by the way of conclusion, the paper will assess why and whether the present EU constitutional narrative, in spite of its numerous drawbacks, should and could be reformed so that the very idea of European constitutionalism could be salvaged and that integration could continue its constitutional journey, albeit following a different track.*

2. **Metabolic Constitutions and Constitutional Imaginaries** by Peter Lindseth (University of Connecticut), the author of, among other things, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010)

*By way of background, this talk will elaborate on the claim I've developed, inter alia, in "The Perils of 'As If' European Constitutionalism" (2016), "Between the 'Real' and the 'Right': Explorations Along the Institutional-Constitutional Frontier" (2017), "The Metabolic Constitution and the Nature of EU Legal Pluralism" (2018), and "The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance" (2019).*

*To summarize, my claim is that distinction between a genuine constitution and a mere imaginary ('as if' constitutionalism) derives from whether the polity possesses the capacity to extract and redirect ('mobilize') human and fiscal resources in a legitimate and compulsory fashion. Legitimate compulsory mobilization is the crucial element in the political metabolism of a community, converting social and economic resources into work for public ends. This 'metabolic' function is the essential element of any genuinely 'constituted' public authority. Other types of legal regimes (e.g., of a supranational 'administrative' character like the EU) might impose constraints on the exercise of public power. But we must recognize that the constraint on power is merely a necessary but not a sufficient feature of a constitution or of constitutionalism more broadly. If a type of law (like EU law) merely constrains but does not 'constitute' power in this metabolic sense, it*

*is not genuinely constitutional, no matter how much lawyers, judges, and legal scholars might wish it were so.*

3. **The Imaginary and the Unconscious: Towards an Ideology Critique of European Constitutionalism** by Amnon Lev (Faculty of Law, University of Copenhagen), the author of, among other things *Sovereignty and Liberty: A Study of the Foundations of Power* (Routledge 2014)

*The paper deals with the methodological challenges that an ideology critique of European constitutionalism faces. It looks at how the social imaginary operates as a tool of interpretation, with a view to determining the ways in which it inclines theory and what limits it imposes on interpretation. In the second part, it examines the functions that the idea of Europe served in public law theory. I argue that there is a stock of ideas or theorems about state interaction that cluster around the idea of Europe, and condition how we think about the social and institutional reality it maps onto. The third part proposes a mapping of the space(s) of ideology critique, on the understanding that this space is where our forms of interpretation intersect with the materiality of the ideas that are available to us.*

4. **The Contested Utopia of U.S. Constitutionalism and the Lost Ideology of Racial Capitalism** by Fernanda Nicola (Washington College of Law, American University), the co-editor and author of, among other things, *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2017) to present with Jeff Miller, PhD candidate, European University Institute, Florence

*Our paper focuses on the reception of US constitutionalism in European legal scholarship. In particular, we explore how the writings of Eric Stein and Joseph H. Weiler, during three decades starting around the 1980s to 2008, profoundly influenced the constitutional paradigm in European Community and European Union law. Our chapter offers a different insight into the reception of US constitutionalism through the work of these two prominent scholars, whose European constitutional approach is coming under scrutiny by historians and lawyers alike. Since the 1980s, for over two decades, Stein and Weiler strategically used a selective conception of US constitutionalism to support their vision of a federal constitutional Union with a strong Supreme Court. In doing so, they attributed to US constitutionalism a utopian role and to its Supreme Court a neutral and quasi-mythical character. Today, Jan Komárek's work criticizes the EU for its preoccupation with achieving a US-inspired constitutionalism, which he characterizes as a static set of free market and individual rights guarantees. All three European constitutional scholars, Stein, Weiler, and Komárek, use the EU-US constitutional comparison to advance their own projects. And in doing so, they underemphasize the extent to which the history of American constitutionalism shows how contested and unsettled ideologies undergirded racial capitalism and civil rights struggles. Just like its US counterpart, the European constitutional utopia cannot shy away from state resistances, populist revivals and its colonial past re-emerging through immigration, trade and religious conflicts. Only by casting light on the contested and bracketed European ideologies, including state rights and racial capitalism, can the project continue towards an inclusive and democratic constitutional settlement.*

5. **The Magic of the C-Word: Eric Stein's Many Constitutionalisms in Context** by Alexandra Kemmerer (Max Planck Institute for Comparative Public Law and International Law), the author of, among other things, intellectual biography of Eric Stein (forthcoming)

*In his writings and reflections in European legal and political integration, Eric Stein drew from his encounters with a heterodox variety of constitutional trajectories: Czech liberal-democratic constitutionalism à la Tomáš Garrigue Masaryk, US constitutionalism, post-1945 global-internationalist constitutionalisms, various European constitutional traditions (in particular German and Italian), inter alia.*

*From a transnationalist perspective that had been decisively influenced by the writings and practice of Phil Jessup and by US international law discourse, Stein developed a pluralist constitutional vision that might sometimes be hidden behind strategic uses of bold transatlantic comparisons, but holds utopian potential for a European project in crisis.*

6. **The role of transformative constitutionalism in the context of EU integration** by Jo Murkens (London School of Economics and Political Science), the author of, among other things, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (OUP 2013)

*TC touches on the vast literature of the EU as a 'transitional' polity as opposed to a loose union of democratic states or a European federal state (Union-as-a-state).*

*Its characteristics are the presence of distinct political demoi progressively opening to each other, and a preference for sharing, pooling, enmeshing policy, without harmonising/unifying.*

*The problem with the transitional literature is that it asks whether the EU is or could be a state; or whether it could be the object of reference of a constitution; or whether it has a demos or whether it needs one.*

*By contrast, TC examines the constitutional assumptions and approaches that befit the EU. What kind of a constitution can provide clarity over institutions, law-making procedures, division of competences as well as honour its function of integrating a large and varying number of Member States, which requires leniency. Irrespective of its form, the EU can learn from the post-colonial literature on transformative constitutions, which attempts to harness continuity and change.*

7. **EU Law's Swan-Song ? Europe's Constitutionalist Moment in the Great Tournament of Social Sciences** by Antoine Vauchez (Centre européen de sociologie et de science politique (Université Paris 1-Sorbonne / CNRS), the author of, among other things, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP 2015)

*Rather than considering EU law scholarship in isolation, I suggest to bring it back both in the general context of EU social sciences (that is in the many scholarly contests over the definition of Europe's raison d'être, underlying logic, and future) and in the general context of EU polity (that is in the variegated set of political opportunities and venues open for expertise). I argue that EU constitutionalism and EU constitutionalist projects of the 1990s-early 2000s (their content, their scope as much as their saliency at the time) need to be*

*understood in relation to the specific historical moment in which it rose ; a moment when EU law's overarching position in EU studies was increasingly contested by other disciplines (political science and economics), and EU law's political appeal was undermined by the ubiquitous rise of the "governance" paradigm at the Commission and the progressive reorientation of Europe's integration dynamics around the Economic and Monetary Union. This in turn allows to better grasp EU constitutionalism as legal scholarship, professional ideology and political utopia.*