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European Constitutional Imaginaries: Utopias, Ideologies and the Other

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I. Introduction

In the early 2000s many people believed that European constitutionalism could push the integration project to a qualitatively new stage. Some understood the adoption of the Treaty establishing a Constitution for Europe by the high contracting parties in 2004 as the Union's constitutional moment, realising the utopia of 'an ever closer Union'.[1] Then the Treaty was rejected in the French and Dutch referenda and the European Council officially abandoned the 'constitutional concept'.[2] Several crises of the Union followed, most of them with direct implications for constitutionalism in Europe: the financial and economic crisis, the refugee crisis, the rule of law crisis in Hungary and Poland, and of course, Brexit.[3] The consequences of the ongoing Covid-19 pandemic may prove to be truly existential for the Union, as it exacerbates the impact of the crises just mentioned and adds new dimensions to the numerous problems that the Europe has been facing since 2004 (or even before).

The kind of constitutionalism emerging from the last decade and a half has lost its utopian character: the need to adopt a new constitutional settlement is seen not as a further step in European integration but as an obstacle better to be avoided. Only few actors now call for the reinvigoration of the constitutional process.[4] Political practice has returned to a much less demanding legalistic concept of the constitution, putting emphasis on the rule of law, understood mainly as compliance with rules (and this only selective). Union's constitutional utopia has been left to few intellectuals.[5] Remarkably, the *Franco-German non-paper on key questions and guidelines for the Conference on the Future of Europe* from November 2019, which called to 'generate new concepts to guide the future of Europe' did not mention the word

[1] On the utopian element in the reconstruction of what European integration stands for (and projecting such reconstruction onto the outside world) see Kalypso Nicolaïdes and Robert Howse, '"This is my EUtopia …": Narrative as Power' (2002) 40 Journal of Common Market Studies 767.

[2] Council of the European Union, Brussels, 20 July 2007, 11177/1/07, Brussels European Council of 21 and 22 June 2007, Presidency Conclusions, 15.

[3] For a recent analysis of the EU's various crises see Desmond Dinan, Neill Nugent and William E. Paterson (eds), *The European Union in crisis* (Palgrave Macmillan 2017).

[4] See Matej Avbelj, 'The Ljubljana Initiative for Re-Launching the European Integration' *Verfassungsblog* of 13 January 2017 <http://verfassungsblog.de/the-ljubljana-initiative-for-re-launching-the-european-integration/>, accessed on 18 August 2017. It is telling that the text of the initiative is no more available on the link provided in the article.

[5] Besides Avbelj (n 4) see particularly Jürgen Habermas (Ciaran Cronin transl), *The crisis of the European Union: A response* (Polity 2012) and Ibid, *The Lure of Technocracy* (Polity 2015).

"constitution" at all.[6] This is hardly suprising if it is true that even a Treaty amendment must not be mentioned in the debate on the future of Europe.[7]

How to account for this change?

This volume proposes to do so by looking more deeply into *European constitutional imaginaries*.[8] In the remainder of this introductory chapter, I will first try to define this concept and put it into the wider context of political theory and philosophy (section II). Then I explain what I think is missing in a number of recent publications that deal with European constitutionalism at a more reflexive and theoretical level and how the perspective taken here can enrich our understanding of the EU's present predicament (section III). Two perspectives are particularly important: that of history, discussed in section IV, and political economy, dealt with in section V. The conclusion (section VI) presents a broader project this volume is part of and gives a brief overview of each chapter's contents.

II. Constitutional imaginary: between utopia and ideology

The term has been recently used by legal theorists,[9] and sociologists,[10] each tapping into various intellectual traditions and disciplines. It is used here in a rather idiosyncratic way, which is based on these works, but does not follow their definitions slavishly. Constitutional imaginaries are understood here as sets of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule. They are as important as institutions and office-holders. They provide political action with an overarching sense and purpose recognized by those governed as legitimate.

A number of central concepts – 'contested truths' form part of any constitutional imaginary.[11] These concepts are essential to the practice of government, and yet unsettled. It is around them that important political (and also legal-constitutional) arguments turn – be it the nature of statehood and sovereignty, the constitution and its identity, democracy, rights (human and/or fundamental), institutions that implement and protect them (judicial review or not), etc. As Edward Rubin notes in his attempt to provide a new constitutional imaginary for the administrative state of the 20th century, 'these words and concepts possess inherent ambiguities because they encompass our deepest value conflicts, and are sedimented with the multiple

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[6] The non-paper and related documents are available at <https://www.europeansources.info/record/conference-on-the-future-of-europe-2020-2022/> accessed 22 June 2020.

[7] See Maïa de la Baume, 'Conference on the Future of Europe: Don't mention the T word', *Politico* 21 January 2020, <https://www.politico.eu/article/conference-on-the-future-of-europe-dont-mention-the-treaty-word-european-commission-parliament-ursula-von-der-leyen/> accessed on 22 June 2020). The *Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe* of 10 March 2021 (OJ 2021/C 91 I/01 of 18 March 2021) remains ambiguous on this point: it states that 'The scope of the Conference should reflect the areas where the European Union has the competence to act or where European Union action would have been to the benefit of European citizens. Citizens remain free to raise additional issues that matter to them'.

[8] A note on terminology: some authors make a distinction between imaginary and imagination, or use the term imagery. In this chapter I use the first, without however committing to any of possible distinctions.

[9] See particularly Martin Loughlin, 'Constitutional Imagination' (2015) 78 Modern Law Review 1.

[10] See Paul Blokker, 'The Imaginary Constitution of Constitutions' (2017) 3 Social Imaginaries 167.

[11] See particularly Daniel T. Rodgers, *Contested Truths. Keywords in American Politics since Independence* (HUP 1987) and Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton UP 2005). Constitutional imaginary is formed by words – since law (similarly to politics) is 'a linguistically constituted activity' - see Terence Ball, James Farr and Russel L. Hanson (eds), *Political Innovation and Conceptual Change* (CUP 1989). It however comprises images, architecture, visual arts and many other artefacts. See e.g. Kathleen R. McNamara, *The Politics of Everyday Europe: Constructing Authority in the European Union* (OUP 2015).

meanings that have been attached to them over many centuries of use'.[12] They are part of the conceptual vocabulary of modern public law and politics.[13]

Importantly, while constitutional imaginaries can be seen as 'necessary fictions' that make political rule possible,[14] they are also ideologies - understood in (post-) Marxist terms as a 'means of domination'.[15] On such reading ideology is primarily an instrument of domination. Ideology 'reifies' human experience, making the products of human activity (such as markets or a particular distribution of rights, especially property) to appear as natural and fixed. Ideological distortion of reality thus excludes any possibility of change. It is a form of "false consciousness".

European constitutionalism could be conceived as a kind of deceptive ideology. We can say that with the many crises of the last decade it has been finally unmasked as such – and collapsed. Constitutionalism is not capable to exercise the normative pull over the people it once (possibly?) could.

Unmasking the integration project – and its legal-constitutional conceptualisation - as an ideology does not mean, however, that possible alternatives (including the return to a strong 'nation state' that would give 'the power back to the people' and make their state 'great again') are not ideological themselves. This is (also) because ideologies are indispensable for political rule. In a broader sense they make part of individual's experience and understanding of the world. Ideologies integrate individual subjects and their beliefs into a common whole.[16] They conceal the gap between political order's claim to legitimacy and its subjects' beliefs – they create *necessary* fictions (of nationhood, *common* identity or *shared* history) that enable politics as a method of striving for freedom together with others.[17]

What is worse, however: there is no external vantage point from which to criticize ideologies. Not in a more trivial sense that any critique of ideology is also ideological, but in a way which challenges our own faculties of critical thought and perception of the world around us. Our very understanding of the political, social, economic or cultural context in which we live is also formed by the ideologies that we want to evaluate. This is known as the 'Mannheim paradox', named after Karl Mannheim, who sought to establish a scientific (hence, non-ideological) knowledge of politics.[18] However, science was revealed as a form of ideology too, particularly by the postwar critical theory and there seem to be no solution to the paradox.[19]

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[12] Rubin (n 11), 6.
[13] Explored e.g. by Martin Loughlin, *Foundations of Public Law* (OUP 2010) or Ball et al. (n 11). For an attempt in the context of European integration see András Jakab, *European Constitutional Language* (CUP 2016).
[14] See Yaron Ezrahi, *Imagined Democracies: Necessary Political Fictions* (CUP 2012), 37.
[15] See Susan Marks, *The riddle of all constitutions: International law, democracy, and the critique of ideology* (CUP 2000), 10. For an overview of the development of the concept of ideology and its various uses in practice and theory see Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (OUP 1996), 1-136.
[16] See Loughlin (n 9), 12-13.
[17] Ezrahi (n 14).
[18] See Karl Mannheim, *Ideology and Utopia* (Harcourt Brace and World 1936). See Peter Breiner, 'Karl Mannheim and Political Ideology' in Michael Freeden, Lyman Tower Sargent and Mark Stears (eds), *The Oxford Handbook of Political Ideologies* (OUP 2013) 38.
[19] See especially Jürgen Habermas, 'Technology and Science as "Ideology"' in Ibid (Jeremy J. Shapiro transl), *Toward a Rational Society: Student Protest, Science, and Politics* (Polity 1987) 81 and Jürgen Habermas, 'The Idea of the Theory of Knowledge as Social Theory' in Ibid (Jeremy J. Shapiro transl), *Knowledge and Human Interests* (Beacon Press 1971) 43.

Paul Ricoeur, the French philosopher of hermeneutics suggested a different way from this impasse: in his *Lectures on Ideology and Utopia* he proposes a counter-concept to that of ideology, openly admitting that

> the only way to get out of the circularity in which ideologies engulf us is to assume a utopia, declare it, and judge an ideology on this basis. Because the absolute onlooker is impossible, then it is someone within the process itself who takes the responsibility for judgment. It may also be more modest to say that the judgment is always a point of view - a polemical point of view though one which claims to assume a better future for humanity - and a point of view which declares itself as such.[20]

Utopia and ideology then toghether constitute imaginary, or imagination, which is the concept taken up recently by Martin Loughlin in his Chorley lecture at the London School of Economics and Political Science in 2014.[21] Imaginary – both at the level of an individual person who is co-producing it, and at the level of a society, where such imaginary forms part of its collective experience, is both ideological and utopian. It is ideological since in the interest of creating the society (or community), it supresses the individual and her preferences, needs or experience. Any belonging to the collective is such; the alternative being the aggregate of individuals, each different in their own sphere, not shared with others except through contracting. It is also utopian, since it gives the society a direction, or horizon – although it remains out of its reach.

Utopias are crucial for preserving opposition to the status quo as aspirational schemes that seek actualisation.[22] They orient political action towards change and can lead to reforms that reconcile the political order with the desires of its subjects.

One of the problems of today's European constitutionalism lies in its inability to offer a utopia that could give a sense of direction to those who cannot identify with the present state of affairs – but at the same time (still) hesitate to follow European constitutionalism's enemies.

We need to maintain, to the extent it is possible, both views of constitutional imaginary: as something indispensible for political rule, but at the same time something potentially oppressive. We need to understand why, in the different periods of European integration, European constitutionalists hold particular views about the constitution (both conceptual, referring to the realm of constitutional theory, and empirical, related to their understanding of the 'really existing' constitution of the EU) – without interpreting them as 'simply having been afflicted with psychological pathologies',[23] seeking power or even domination. When establishing the meaning (or meanings) of the European constitution, one needs to take their ideas as seriously as possible.

At the same time, in order to uncover the reformist potential of the constitutionalist project – its utopia – or its ultimate failure, we need to keep the critical project in sight. This can be pursued through 'ideology critique', which is, according to Susan Marks 'geared to promoting

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[20] Paul Ricoeur (George H. Taylor transl.), *Lectures on ideology and utopia* (Columbia UP 1986), 172-173, discussed in Loughlin (n 9) at 13.
[21] Loughlin (n 9). For a very useful account of the relationship between ideology and utopia in the work of various thinkers see Lyman Tower Sargent, 'Ideology and Utopia' in Freeden et al. (n 18), Chapter 24.
[22] Loughlin (n 9), 13.
[23] Jan-Werner Müller, 'The triumph of what (if anything)? Rethinking political ideologies and political institutions in twentieth-century Europe' (2009) 14 *Journal of Political Ideologies* 211-226, 214.

social change, not by advancing blueprints for the future, but by encouraging investigation of the resources of the past'.[24] Studying various utopias, as elements of European constitutional imaginary forms part of such critical project.

III. European constitutional imaginaries in the context of other reconstructive projects

Recently, several books have been published that provide important insights into constitutional imaginary of Europe.[25] They comprise works by constitutionalists themselves, which go beyond 'mere' conceptualisations of European constitutionalism and offer reflections on what it means to engage in constitutional practice and scholarship. In addition, 'New Legal History' of the EU is being written, together with the sociology of EU law. None of them, however, engage in a deep analysis of the *world of ideas* of EU constitutional law and theory, which lies at the heart of this volume and the overarching project.

András Jakab's recent book *European Constitutional Language*[26] comes close to an analysis of the European constitutional ideology in several respects: it seeks to analyse a conceptual 'vocabulary and grammar' of European constitutional discourse, sensitive to the historical and sociological context in which it has been arising since the 16th century. The 'grammar' for Jakab consists primarily of the rules of constitutional reasoning,[27] while the 'vocabulary' is formed by different conceptualised responses to social challenges at various points in history. This is because

> [o]ur basic concepts of constitutional law are a patchwork historical collection of responses to different challenges, and rightly so. Great social achievements like modern constitutional systems are all based on an incremental, lengthy, trial-and-error development of human knowledge.[28]

One cannot agree more –and the contextual analysis of the European constitutional discourse that Jakab offers provides important material for the ideology critique. Where we need to take parts with Jakab, however, is when he seems to apply the 'objective teleological method' to determining the content of the concepts, including the historical challenges they are intended to give response to.[29] To be sure, Jakab tries to be open about his normative preferences - to the extent that they can be read from his statement of political vision: 'a federal Europe (meaning the European Union) which is a strong contestant on the political and economic world stage and which is based on its common constitutional traditions'.[30] The statement says nothing with regard some crucial issues, which remain hidden from European constitutional discourse, such as the balance between politics and economics, democracy and capitalism or the EU's centre and its periphery. Instead, we have a chapter on 'the rule of law, fundamental rights and the

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[24] Marks (n 15), 27.
[25] Besides those discussed in this chapter, the following need to be mentioned too: Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (OUP 2016), reviewed in Jan Komárek, 'Rethinking constitutionalism and democracy . . . again?' (2019) 17 International Journal of Constitutional Law 992, Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021) and Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP 2021).
[26] CUP 2016.
[27] Analysed in a relatively short Part I of the book.
[28] Jakab (n 26), 87, where Jakab also acknowledges inspiration for such view in Anthony Quinton, *The Politics of Imperfection* (Faber & Faber 1978) – see also Jakab, ibid, 3, fn 11.
[29] Jakab (n 26), 87.
[30] Ibid, 5, fn 15.

terrorist challenge in Europe and elsewhere',[31] which is almost exclusively about the liberal principle of the rule of law. What is usually understood as 'fundamental rights' – be it in a more limited sense of negative liberties or as more demanding claims for social freedom – is not addressed at all.[32]

In fact, Jakab admits that his book is intended to be 'an intellectual contribution to European institution-building',[33] which does not have a critical-emancipatory ambition – which lies at the heart of a 'constitutional ideology critique' in the very specific sense suggested above. We need to problematize and analyse in a much greater detail the 'historical challenges' which inform the formulation of constitutional grammar and vocabulary of the time. In other words, we need to engage in a project of 'constitutionalism as critique' rather than simply contributing to the building of a project.[34]

Peter Lindseth's *Power and Legitimacy: Reconciling Europe and the Nation-State*[35] explicitly seeks 'to challenge the claim, so prevalent in the work of leading European legal theorists on integration over the last several decades, that autonomous regulatory power [of the EU] demands an equally autonomous form of "non-statal constitutionalism", or "constitutionalism beyond the state"'.[36] Instead of constitutionalism Lindseth suggests the notion of 'the post-war constitutional settlement of administrative governance', with delegation (from the member states to supranational institutions) as 'a foundational normative principle in European law'.[37]

But even if Lindseth was right about the administrative, and not constitutional character of the EU integration project, constitutional ideology can do very important work for the whole construction to be sustainable and for supranational institutions to maintain authority over individual member states. One may therefore accept Lindseth's characterization of the EU but point to a missing element in it: the role of constitutional ideology in the more critical sense mentioned above as something that conceals the gap between the claim to authority by the EU and beliefs of its subjects as regards what can possibly justify such authority. Still, Lindseth's book is indispensable for the kind of intellectual history of the problem of state governing capacity and ensuing delegation in the post-war period it offers, together with the re-conceptualisation of some basic dilemmas of constitutional law and theory.

Finally, *The Cosmopolitan Constitution* by Alexander Somek[38] is, in a sense, an analysis of the constitutional imagination of the West, moving from the American revolutionary 'we the people' constitution to the constitution of human dignity represented by the post-war German Basic Law. For Somek constitutionalism represents a 'project of emancipation', first from the received feudal hierarchy through the constitution of negative liberties, where the market is the source of freedom and the state always suspicious, and later, after the World War Two, emancipation from the sources of un-freedom originating from within the market society.[39] The

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[31] Ibid, Chapter 7.
[32] For various understandings of fundamental rights see e.g. Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).
[33] Jakab (n 26), 4, fn. 12.
[34] See Gavin W. Anderson, 'Constitutionalism as critical project: the epistemological challenge to politics' in Stephen Gill and A. Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014) 281.
[35] OUP 2010.
[36] Ibid, 18. See also Peter Lindseth, 'Constitutionalism Beyond the State?: The Administrative Character of European Governance Revisited' (2012) 33 Cardozo Law Review 101.
[37] Ibid, 24.
[38] OUP 2014.
[39] Ibid, 10-11.

present form of constitutionalism, 'cosmopolitan constitution' denotes the third stage in the development of the constitutional idea. It refers to 'the constitution of the nation states under conditions of international engagement'[40] and is deeply ambivalent: it acknowledges that constitutional authority is dependent on the national constitution's embeddedness into the international system (through supranational projects of European integration or human rights adjudication by the ECHR). The realisation of this authority is however still dependent on the state. People in the state, however, do not act in a way comparable to the 'we the people' constitution – such acting is deeply suspicious for the cosmopolitan constitution Somek presents in his book.[41] Instead they yield to administrative authorities and do not act in a meaningfully 'political' (collective) way.

Somek's book offers a powerful reconstruction of the constitutional idea and a critique of its present actualisation. It necessarily draws with a broad brush (ranging from the American revolution of the 18th century until today's experience of Europe). It does not explicitly examine the EU and its constitutional ideology, particularly *the people* who have construed its constitutional imagination and their *ideas*. In that respect Somek can provide a very important philosophical orientation for a project that would be more EU-specific and focusing on what has been written on the EU.

IV. The role of history

As suggested above, ideology critique is also dependent on a careful historical reconstruction.[42] 'Towards a New History of European Law' was the title of a special issue of *Contemporary European History*, which included numerous contributions from the recently established field of study, which uses legal historians' methods to examine the field of EU law.[43] Some of its protagonists aim 'to treat the purported "constitutionalisation" of the European legal order as a historical *problématique* in need of a healthy dose of disciplined analysis based on archival research'.[44] As such, this scholarship contributes to undermining the tendency of the 'constitutionalisation thesis' to dominate the discourse on the nature of the EU and its law among lawyers, although it is remarkably weaker today than it was at its the peak, that is before the rejection of the Treaty establishing a Constitution for Europe in 2005.[45]

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[40] Ibid 25.

[41] Think of the present fear of populism – no matter how much populism can get misrepresented in the present discourse. For an important corrective to the present trend to designate as 'populist' everything that challenges the present order see Jan Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016).

[42] See the text at n 24.

[43] 'Towards a New History of European Public Law' is also the title of a research project led by Morten Rasmussen at the Saxo Institute, University of Copenhagen (see <http://europeanlaw.saxo.ku.dk/> accessed on 10 August 2017). There is of course far more contributions to the history of European law, all emerging in the last decade. Besides this kind of research, there are interesting collections of reflections on the 'dark legacies' of European law, emerging from a collective project led by Christian Joerges: see Navraj Singh Ghaleigh and Christian Joerges (eds), *Darker legacies of law in Europe: The shadow of National Socialism and Fascism over Europe and its legal traditions* (Hart 2003) and 'Special Issue - Confronting Memories' (2005) 6(2) German Law Journal.

[44] Bill Davies and Morten Rasmussen, 'Towards a New History of European Law' (2012) 21 Contemporary European History 305, 309. See also special issue, 'Critical Legal Histories in EU Law' (2013) 28 American University International Law Review 1173 and most recently Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2017).

[45] For a prominent voice among EU academic lawyers, who argued against the constitutionalisation thesis, see Bruno de Witte, 'The EU as an international legal experiment' in Joseph HH Weiler and Gráinne de Búrca, *The Worlds of European Constitutionalism* (CUP 2011), 19-56 and the 'Dialogic Epilogue' with Joseph Weiler, 262-270

The New History scholarship (together with a more sociologically oriented research I will discuss below) helped to turn attention to a whole new range of actors: the Legal Service of the Commission, which appears as the true champion of constitutionalisation pushing it against a much more reluctant ECJ,[46] assisted by transnational networks of professional jurists and academics in and around FIDE.[47] Legal historians also helped to open the 'Pandora Box' of national responses to the ECJ's constitutionalising efforts – Bill Davies' *Resisting the European Court of Justice: West Germany's confrontation with European law, 1949-1979*[48] is path-breaking in the attention it gives to the internal debates in the German government, public opinion and academic debates.[49]

However, there are strong disciplinary limitations, openly acknowledged by the leading figure of the New Legal History movement Morten Rasmussen:

> it is important to point out that the methodology of the discipline of history is fundamentally different from either law or the social sciences. The focus of historians is less to promote an explicit theoretical approach. Rather, it is to identify the best possible documentary and oral evidence to analyze the historical processes that shaped European public law.[50]

This does not need to mean that historians' work cannot speak to the present: to the contrary, Davies mentions the ongoing debate among (particularly US) legal historians on whether the purpose of their work 'revolves around the relevancy and importance of the distinction between "applied" and "pure" legal history and whether legal history must address contemporary structures' and discusses advantages and pitfalls of both.[51] The problem rather is the lack of interest in, and one is even tempted to say, of competence to engage complex questions of constitutional theory, that are the necessary building blocks of constitutional ideology.

Sociological research drawing on Pierre Bourdieu's 'field theory'[52] emerged at about the same time as the 'New Legal History' scholarship.[53] The field is

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[46] See e.g. Morten Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' (2012) 21 Contemporary European History 375.

[47] See however, long before the 'New Legal History' emerged, Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 European Law Journal 165.

[48] CUP 2012.

[49] On the latter see also Bill Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context' (2015) 21 European Law Journal 434.

[50] Morten Rasmussen, 'Rewriting the History of European Public Law: The New Contribution of Historians' (2013) 28 American University International Law Review 1187, 1197.

[51] Bill Davies, 'Why EU Legal History Matters – A Historian's Response' (2013) 28 American University International Law Review 1337, 1350. See also Fernanda Nicola's contribution to the same special issue, (2013) 28 American University International Law Review 1173, 1185.

[52] See Pierre Bourdieu (Richard Terdiman transl.), 'The Force of Law: Toward a Sociology of the Juridical Field¨ (1987) 37 Hastings Law Journal 805. For short introductions to Bourdieu's sociology of law see Mikael Rask Madsen and Yves Deyalay, 'The Power of the Legal Field: Pierre Bourdieu and the Law' in Reza Banakar and Max Travers (eds), *An introduction to law and social theory* (Hart 2002) 189 and Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)' (2008) 2 International Political Sociology 128.

[53] See particularly Antoine Vauchez, *Brokering Europe: Euro-lawyers and the making of a transnational polity* (CUP 2015) and Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013). In the introductory chapter to the latter Vauchez notes the indiscriminate use of the term 'field' in the European studies, from the rather metaphoric and spatial to rigorously 'Bourdiean', using the related conceptual vocabulary.

> a place for struggle between different agents, a sort of marketplace where different positions are held due to the amount of capital (economic, cultural, social and symbolic) that agents possess and which determine their potential influence on the functioning of the field.[54]

Actors hold different symbolic power, another crucial category of Bourdiean analysis of law: 'It is the power to transform the world "by transforming the words for naming it, by producing new categories of perception and judgment, and by dictating a new vision of social divisions and distributions"'.[55] Through such power actors can exercise symbolic violence and become dominant – something that is at the centre of the critical analysis of ideology.

Antoine Vauchez's recent book is the most comprehensive study of the field of EU law. It explicitly acknowledges the existence of the 'constitutional paradigm as the inescapable frame of the EU polity in the face of diplomatic big bangs and centrifugal forces that have periodically attempted to reopen the space of political possibilities in Europe'.[56] The book's claim is that

> in the European Union, even more than anywhere else, there is no possible distinction between the 'law' and the 'society'. There are no areas of Europe's politics, economics, bureaucracy or civil society that have not been produced or co-produced to some extent by lawyers, whatever their guises may be. Legal Europe is *co-extensive* with Europe itself, and it is hardly possible to think about the Union and its 'system', its institutions and their 'logic', its markets and their 'functioning', its civil society and its 'causes', without delving into the impressive corpus of ad hoc legal theories and methodologies of Europe.[57]

Yet, despite this almost omnipotent role given to law the whole approach misses an important dimension: that of ideas (and ideologies) and the agency they can exercise, which my Project seeks to examine. If Vauchez's book 'inserts living, acting people into what has so far tended to remain a disembodied narrative of reified actors ('the Court', 'the Commission') pursuing abstract goals and *ex ante* defined interests',[58] ideology critique should examine *their ideas* and what these ideas can do – to the 'external world' (as part of the cultural capital contributing to the symbolic power in the Bourdiean sense), but also from their holders' *internal point* of view – in other words, what these ideas can do *to them*.

Now, if we focus on the ideas hold and promoted by European constitutionalists, what kind of constitutional ideology do they have? The first objection can of course be that there is no cohesive group of 'European constitutionalists' and that the ideas of say, Joseph Weiler on the one hand, and Koen Lenaerts on the other, have differed markedly, as they professional backgrounds. But one can agree with Vauchez that what

> we can conveniently place under the banner of 'the constitutionalization of Europe' flourished most particularly in the hills of Fiesole between Badia Fiesolana and the

[54] Madsen and Dezalay (n 52), 192.
[55] Ibid, 193-194, quoting Bourdieu (n 52), 839.
[56] Vauchez (n 53), 11.
[57] Ibid, 4.
[58] Ibid, 7.

> Villa Schifanoia, the home of the law department of the European University Institute (EUI) since its creation in 1976.[59]

This will of course do a great injustice to all other departments of EU law at European (and other) universities, which took the idea of European constitutionalism seriously – and a proper study of European constitutional ideology would need to take these into account too. But in the following part of this paper I would like to highlight what this strand of European constitutionalism has always missed: the ideological effects of its ideas, in the sense of concealing domination enabled by such kind of constitutionalism, especially in the form of economic power.

V. The importance of the "c-word" or why we cannot do constitutional theory without political economy'

The use of the vocabulary of liberal democracy in much of the European constitutional discourse has been stripped of its economic/social dimension: as if constitutional democracy in the EU travelled back before its post-war transformation analysed by Somek as the 'constitution of human dignity'.[60] Mattias Kumm's idea of 'legitimatory trinity' of global public law (which he applies in the context of international law and EU law too), according to which human rights, democracy and the rule of law have become the largely uncontested criteria of law's claim to legitimate authority, illustrate this well.[61] One is reminded of another trinity: *liberté, egalité, fraternité*, where the last can be translated as solidarity, to realise the contrast here.

It is true that there has been a very important strand of EU constitutional scholarship, which takes the economic (and implicitly social) dimension seriously – in fact putting it at its heart: European Economic Constitutionalism, introduced into the European constitutional language by a long-time professor at the EUI, Christian Joerges.[62] It was him who complained, as late as in 2015, about a 'benign neglect of the constitutional importance of the economy'[63] in the constitutional debate of the last two decades.[64]

Joerges' scholarship thus crucially contributes to the examination of European constitutional ideology proposed here. There has been no 'Great Forgetting' of questions of constitutional political economy which our colleagues in the United States have recently discovered in their

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[59] Vauchez (n 53), 202. The home has moved to Villa Salviati in August 2016.

[60] Somek (n 38), 84 and 155-175. See also Marco Dani, 'Rehabilitating Social Conflicts in European Public Law' (2012) 18 European Law Journal 621.

[61] 'Legitimatory trinity' was the term used by Mattias Kumm in a presentation at the LSE, European Public Law Theory seminar, 19 January 2012.

[62] See particularly Christian Joerges, 'What Is Left of the European Economic Constitution? A Melancholic Eulogy', (2005) 30 European Law Review 461 and 'What Is Left of the European Economic Constitution II? *From Pyrrhic Victory to Cannae Defeat*' in Poul F. Kjaer and Niklas Olsen (eds), *Critical theories of crisis in Europe: from Weimar to the euro* (Rowman & Littlefield 2016), 143.

[63] Christian Joerges, 'Constitutionalism and the Law of the European Economy' in: Mark Dawson, Henrik Enderlein, and Christian Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (OUP 2015), 216, 216. See also ibid, '"Brother, Can You Paradigm?"' (2014) 12 International Journal of Constitutional Law 769-785,

[64] Besides Joerges, one needs to mention the recent book by Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart 2016). Kaupa also takes up the issue of constitutional ideology in 'Has (Downturn-)Austerity Really Been "*Constitutionalized" in Europe? On the Ideological Dimension of Such a Claim' (2017) 44 Journal of Law and Society* 32.

discourse.[65] The point of the kind of analysis suggested in the concluding part of this paper is however different: to look into those contributions to the constitutional debate which 'benignly neglected' the questions of political economy and still were able to dominate the constitutional debate – in fact for more than the twenty years identified by Joerges.

There is one more, and more serious, reservation to Joerges' analysis of the European Economic Constitution, however.[66] It appears remarkably conservative in its acceptance of the ordo-liberal philosophy of the 'original' economic constitution with its division of labour between the supranational level, which would be responsible for establishing the market and protecting free competition on it, and the member states, which would remain responsible for social policy. In other words, Joerges seems to believe in at least theoretical possibility of having 'social market economy' in the EU, despite the dynamics between negative and positive integration and more widely, between unbound capitalism using the freedoms of the Internal Market to free itself from the 'red tape' of national regulation, and the state, which is defined by fixed borders and is dependent on their continued existence.[67] What we need in Europe, according to Joerges, is a 'conflicts of law' constitutionalism, which would be able to proceduralize multiple conflicts in the EU.[68] In Joerges's view, 'law cannot do more than provide procedures and principles which foster constructive cooperation'.[69]

Proceduralisation of conflicts shares some basic premises with Habermas' procedural paradigm of law and democracy outlined in his magisterial *Between Facts and Norms*.[70] There is no place to discuss it in detail, just to note that there is an important gap in Habermas' analysis, noted even by his 'sympathetic readers'.[71] There are social pathologies generated by the capitalist political economy, maintain even by the procedural paradigm of law, which escape Habermas' conceptualisation. In the European context, Wolfgang Streeck has become the most vocal critique of capitalism and its ties to European integration, to the extent that he was called 'nostalgic' by no one else than Jürgen Habermas.[72] In a bitter response to Habermas, Streeck observes:

> Unlike Habermas, I do not believe we can speak meaningfully about the future of democracy, in Europe or elsewhere, without at the same time speaking about the future of capitalism. Put otherwise, *we cannot do democratic theory without political economy*.[73]

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[65] See Jedediah Purdy, 'Overcoming the Great Forgetting: A Comment on Fishkin and Forbath' (2016) 94 Texas Law Review 1415.
[66] See also Jan Komárek, 'Political Economy in the European Constitutional Imaginary – Moving beyond Fiesole' *Verfassungsblog* of 4 September 2020 < https://verfassungsblog.de/political-economy-in-the-european-constitutional-imaginary-moving-beyond-fiesole/> accessed on 16 June 2021.
[67] For this analysis see Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).
[68] See, among many iterations, Christian Joerges, 'Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form', LEQS Paper No. 28/2010, <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper28.pdf> accessed on 27 August 2017.
[69] Joerges (2014, n 63), 777.
[70] Jürgen Habermas (William Rehg transl), *Between Facts and Norms* (Polity Press 1996), 427-446.
[71] William E. Scheuerman, 'Capitalism, Law, and Social Criticism' (2013) 20 Constellations 571, 583.
[72] See Jürgen Habermas, 'Democracy or Capitalism? On the Abject Spectacle of a Capitalistic World Society Fragmented along National Lines', Chapter 7 in Habermas (2015 n 5), a review of Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014).
[73] Wolgang Streeck, 'Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas' (2014) 21 Constellations 213, 218, emphasis in the original.

A good start for a critique of European constitutional ideology would be to consider the economic dimension of constitutional theory and the theory of European constitutional law in particular. And to realise the importance of the "c-word" – not the constitution, but capitalism and include it into our analysis of the European constitution.[74]

VI. Conclusion: Towards the study of the European constitutional imaginary

The foregoing was primarily intended to introduce a *problématique* that has only scarcely been studied in the context of EU constitutional law and theory: its constitutional imaginary, or better put, imaginaries. However, I am not interested either in 'myth-breaking' or creating new utopias (and ideologies). My main ambition is to take ideas – whatever their origin or prominence - seriously. It is imperative to understand why, in the different periods of European integration, European constitutionalists hold particular views about the constitution (both conceptual, referring to the realm of constitutional theory, and empirical, related to their understanding of the 'really existing' constitution of the EU). Through this ambition, we can fill a gap in our knowledge about EU constitutionalism.

In line with the foregoing observations, the chapters in this volume seek to address various questions raised by our awareness of the ideological – and at the same time utopian – character of European constitutionalism. They result from, first, conference organised under the same name in Copenhagen in November 2018 and then workshop in May 2019, where some drafts of conference papers were discussed with new chapters added. This, together with intensive communication with the authors has helpfully helped to produce a volume that contains original texts, which however speak one to another and form a coherent whole that addresses the issues raised above in the previous parts of this introduction.

The first part, entitled *Constitutional Imaginaries of the Past, Present, and Future of Europe*, contains chapters that provide a broad overview of the development of constitutional imagiaries of Europe. The first two chapters do so as self-standing conceptualisations. *Jiří Přibáň* offers an alternative understanding of constitutional imaginaries, grounded in social theory and constitutional sociology and distinguishes four such imaginaries in Europe: 'constitutional pluralism' in the realm of political constitutionalism, administrative rationality, market-based prosperity and finally, democratic mobilisation, of which populism is just one kind. These are put into the context of Přibáň's own theory of societal constitutionalism, which is taken as an overarching frame.[75]

Marco Dani together with Agustín José Menéndez offer a careful historical reconstruction of the debate on constitutionalisation of the integration project and explain the stakes of understanding correctly what kind of constitution people have in mind in such debates. Their chapter thus contributes not only to the study of European constitutionalism, but to European constitutional theory, which takes inspiration from both the supranational and national level, especially as they call for constitutional resistence from the collective of national constitutions to counterbalance the power, which was transferred by these same constitutions to the supranational center.

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[74] See Michael Wilkinson's numerous publications in this vein, especially Wilkinson (n 25).
[75] See Jiří Přibáň, 'Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism' (2018) 45(S1) Journal of Law and Society 30.

Signe Larsen provides and important corrective to the now widely accepted characterisation of the EU member states as 'constrained democracies', whereby the constraint is also provided by the EU, which serves as a 'militant democracy'.[76] Larsen warns that this is too much a reductive story of the post-war European constitutionalism, which in fact contains a richer variety of imaginaries: besides the 'post-fascist constitutionalism', which has informed the imaginary of the EU as a militant democracy, there is 'evolutionary constitutionalism' in countries, which have never faced constitutional failure (most importantly the UK, but also Nordic member states of the EU) and finally, 'post-communist constitutionalism', which is too quickly put into the same basket as the first, overlooking some key differences, especially no 'fear of the people' so much present in post-fascist constitutionalism.

Claudia Schrag Sternberg builds on her earlier work[77] to examine the pertinence of Pierre Rosanvallon's theory of democratic legitimacy for the EU.[78]In Rosanvallon's reconstruction, the legitimacy of modern democracies broke down in the 1980s owing to a loss of faith in its two main foundations in elections and bureaucracy; while Rosanvallon has left the EU outside his analysis, this chapter applies his his key findings to the process of European integration.

The second part of this volume, entitled *At the Origins of Constitutional Imaginary – The Work of Selected European Constitutionalists Revisited*, revisits the contribution of some key authors in the field. There is no doubt that Joseph Weiler and his 'Transformation of Europe' is the most influential one (also confirmed by our recent survey).[79] But shall we read it today? The present aithor, *Jan Komárek*, argues so and analyses various constitutional imaginaries behind 'Transformation'.

Alexander Somek and Jakob Rendl take issue with Joseph Weiler's claims that Europe was built with Messianic fervor.[80] After the destruction and evil wrought by the Second World War, Europe was supposed to be a 'promised land'. Their chapter examines how Weiler conflates the narrative of the exodus with the Messianic leap into a different aeon and concludes that they have to be held distinct. It also suggests that Weiler's fusion of two distinct religious ideas betrays the force of 'Europe' as an 'empty signifier' of integration.

Hugo Canihac goes back to the origins of one influential theory of European constitutionalism: constitutional pluralism and its 'founding father', Neil MacCormick. Canihac, a trained legal sociologist give particular attention to various professional and disciplinary coalitions, that gave rise to this (now apparently dominant) European constitutional imaginary.

Amnon Lev examines constitutional pluralism as a philosopher and historian of ideas, to examine the shifts that one of its key proponents, Neil Walker, undertook between his initial publications in early 2000s and those that revisit his theory more than fifteen years later. Lev argues that Walker does not fully appreciate the conception of political life that is at the heart

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[76] See especially Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale UP 2011).
[77] See Claudia Schrag Sternberg, *The Struggle for EU Legitimacy: Public Contestation, 1950s–2005* (Palgrave Macmillan 2013).
[78] Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton UP 2011).
[79] See Jan Komárek, Michał Krajewski, Nicolai Lillegaard Nyströmer and Ioannis Panagis, 'So, whose ideas matter? Determining intellectual influence in European constitutional imaginaries' ___.
[80] See Joseph HH Weiler, 'The political and legal culture of European integration: An exploratory essay' (2011) 9 *International Journal of Constitutional Law* 678.

of European integration – premised on the demise of the "political" in the society and the reduction of national politics to the questions of "survival".

The third part, *Rethinking Constitutional Imaginaries for the Present* is more programmatic in that it offers various new ways of thinking about European constitutionalism.

Peter Lindseth argues that European constitutionalists have focused too much on the constraining function of constitutions. However, the latter may also serve a 'metabolic function': 'the capacity to mobilise fiscal and human resources in a legitimate and compulsory manner'.[81] For the EU, the real test is whether it would be able to do this autonomously, that is, without mediation through the member states.

Neil Walker builds on the distinction between nomocracies and teleocracies and argues that the EU has long focused on pursuing various public goods – and was therefore closer to the latter. Teleocracies are concerned with pursuing various dicreete goals (or goods), whereas nomocracies are based on the public good of being able to live and govern in common. At the same time, there has always been a hope that in the course of time the pursuit of 'peace and prosperity' can create a sense of a shared polity, for which living in common would be a public good worth pursuing too. In other words, the EU would become a nomocracy. Walker investigates the conditions of whether this can ever be the case, also compared to the modern state.

Kalypso Nicolaïdes investigates what sort of imaginary can bring awareness among the peoples of Europe of their mutual interconnectedness and constitute a transnational European polity. She argues for a demoicratic perspective, which in her view can help to push back against 'technopolism'. Her chapter concludes with a strong argument for delegation of authority to the EU by the constituent member states: once they move from the politics of space to the politics of time, they need to create 'a pivot that requires deep democratic ownership of policies shaped and enforced by the EU as the guardian of the long term'.[82]

Paul Linden-Retek uses the perspective of constitutional imaginaries to shed a critical light on habermasian discourse theory of law and democracy and constitutional patriotism – a particular version of constitutional imaginary often connected with the European integration project. Crucially, Linden-Retek urges us to turn attention from legal principles on which the theory stands to 'the historical settlement of political conflict those principles reflect'.[83] He then suggests that a reformed constitutional patriotism should 'entail distinct modes of argumentation and interpretation: historical analysis, cross-jurisdictional translation, and material political consciousness, among them'.[84]

Finally, the fourth part takes up the claim made in this introduction: *Without Political Economy, There Can Be No Constitutional Imaginary*. It opens with *Michael Wilkinson*'s chapter on 'On the New German Ideology', which argues that the dominant constitutional ideology in postwar Europe is based on a fear of democracy, constituent power and popular sovereignty, and a desire for political and economic stability: all taken from the German inter-war experience and the failure of the Weimar Republic. What has been missing in most accounts of European integration, is the link between constitutionalism (which has been at the centre of attention of

[81] Lindseth in this volume.
[82] Nicolaïdes in this volume.
[83] Linden-Retek in this volume.
[84] Ibid.

most European constitutionalists) and capitalism and their critique. Wilkinson's chapter provides an excellent introduction to this task, alongside his just published book.[85]

Hjalte Lokdam argues that while the Economic and Monetary Union originally conformed to the neoliberal theory of interstate federalism by structurally circumscribing the effective exercise of activist public authority, the Eurocrisis and more recently Covid-19 pandemic have initiated changes that foresee more centralised public authority at the European level able to control economic developments across the Union in accordance with certain objectives. At the same time, the structural framework of economic policymaking shifted from a modality of governing that relies on depoliticization and the 'primacy of the market' to one that is based on the 'primacy of politics.' The challenge is, however, to make this politics real, and democratic.

The post-colonial roots of the integration project have been recently explored by historians and political economists alike. *Jeffrey Miller and Fernanda Nicola* connect these recent debates with intellectual history of European constitutionalism and its early enchantment with the United States' experience. This enchantment that was possible only because the scholars who invoked this experience dismissed how the jurisprudence of the U.S. Supreme Court over time protected the legal entitlements of slaveowners, businesses and states at the expense of slaves, workers, women and children. Their constitutional imaginary therefore obscured the embeddedness of racial capitalism in the European political economy ever since the beginning of European integration.

*Damjan Kuko*vec builds on his earlier critical work and argues s for an interpretative turn in constitutional thinking focusing on harm which relates to 'powerlessness': economic, and *consequently* political. Kukovec discusses powerlessness in terms of two kinds of European "periphery":

> The narrower and specific sense of the periphery in the European Union encompasses peripheral Member States and regions of the European Union. The wider sense of the periphery means general social disempowerment regardless of its geographic location. Both denote powerlessness in the system.[86]

In Kukovec's view, constitutionalism may play a rather conservative role, as while constituitions can change and be quite dynamic, if the question of powerlessness and harm is not addressed, nothing really changes on that level.

Finally, and to some extent in contrast to Kukovec, *Marija Bartl* argues in her chapter that constitutional imaginaries of modernity have always been presented to us as a story of progress. In the twentieth century there have been two kinds of such imaginaries: collectivistic, represented by the example of a failed constitution of the Weimar Republic, and privatizing one, embodied in the European economic constitution. Her chapter is a call on constitutional scholars to help to create a new progressive collective imaginary of progress to address 'environmental degradation, rising inequality, but foremost the sense of not having a home in the future, for large segments of society', which has 'undermined the credibility and affective appeal of privatizing imaginaries of progress in recent years'.[87]

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[85] Wilkinson (n 25).
[86] Kukovec in this volume.
[87] Bartl in this volume.

The *Editor's conclusion* to this volume suggests that there is much more to be explored in terms of constitutional imaginary – both at the supranational (EU) level and also within its member states. Let us hope it will inspire also our readers to reflect on the notion and possibly contribute to its further investigation.

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[88] Carlsberg Foundaton grant no. CF18-0026.
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