

Exploring European constitutional imaginary's OTHER

Team IMAGINE
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Jan Komárek: Introduction to the panel

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Abstract: This panel brings together the team of people working on the ERC-funded project *IMAGINE - European Constitutional Imaginaries: Utopias, Ideologies and the Other*. We will discuss the key assumptions of the project and specific case studies focused on how the constitutional imaginaries of Europe have been construed in four countries of Central and Eastern Europe – the Czech Republic, Estonia, Hungary and Poland.

By European Constitutional Imaginaries (ECIs) we mean sets of ideas and beliefs that help to motivate and justify the European integration, providing it with an overarching sense and purpose recognized as legitimate. The case studies focus on countries that for most of the post-war history were the “other” to the West, seen as liberal, democratic and based on free market and competition, as later represented by the EU.

Keywords: European constitutional imaginary; post-communist Europe; post-1989 Europe

Birgit Aasa: The Estonian ‘East to West Migration’ as an Ontological Anxiety and its Lessons for Europe

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Abstract: The Estonian transformation from an eastern outpost in the West to a western outpost in the East merits scholarly attention. The case study departs from the paradox that the Estonian constitutional theory and practice has opted for one of the most liberal and ‘EU-friendly’ interpretations of the primacy claims of EU law, despite the fact that the sovereignty clause of the Estonian Constitution has been described as one of the strongest in Europe and perhaps even the World. The Supreme Court of Estonia has, at odds with most other EU highest courts, explicitly ruled that if a provision of the Constitution is not compatible with EU law, its effects will be suspended without any safeguards or emergency brakes. The initial hypothesis is that the concept of sovereignty as imaginatively presumed and practiced in Estonian courts, media and academia has been always strongly security dominated and thus understood in the collective imaginary as necessarily shared. This relates to political-normative, financial and defense (or ontological) sovereignty and conditions them. The context might invite to rethink statehood, sovereignty and EU membership from the lens of postcolonialism, the predicament of belated modernity

and fragility of statehood and the so-called ontological anxieties among peoples, rulers, courts and academia.

Keywords: European constitutional imaginary; Estonian constitutionalism; sovereignty; postcolonialism

Marina Bán: A Tale of Three (Four, Five?) Identities: Hungary & the End of Empire

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Abstract: This paper deals with the rejection of the past throughout Hungarian constitutional traditions. It also tackles its obsession with harking back to it.

The history of constitutionalism is woven thick with the culture of forgetting. This form of instrumentalization of the past is a central feature of the Hungarian ambivalence in its ongoing struggle with history; history being used as both its ally and its enemy. Its 2011 Fundamental Law is exemplary of mnemonic constitutionalism and the shaping and instrumentalization of identities through the deployment of a defensive nationalism. However, it is also a constitutionalism built on the importance of selective remembrance and forgetting - of repurposing history – which assumes that constitutions do not have a past. Efforts to forget, though, have only ushered a vengeful return to the scene and exacerbated the crisis of identity gripping Hungary and its constitutional contract.

Using a postcolonial theory as its method, the authors endeavour to bring the past back to the table. Engaging chronologically with the vicissitudes of the Hungarian past – a gripping tale of Empire, statehood, and sovereignty – starting from the 19th century, the paper analyzes and introduces the fundamentals and development of identity constitutionalism. This term, proposed by the authors to describe the state-of-affairs in Hungarian constitutionalism will be introduced and explored. It does so by tying legal narratives in colonial and post-colonial environments to their past as part of a wider move to engage with legal mnemonics. It suggests that this is not necessarily a Central Eastern European problem, but an emerging European trend that seeks to defer attention from the past in order to generate and project a workable identity aesthetic. In doing so, it situates Hungarian legal developments within its appropriate context, and in relation to external powers, as well as assess observable consequences. In analyzing the historical traditions that brought it about, and their ramifications on Hungarian narratives more generally, it will be shown that these are inextricable to the country's legal development and the way it conducts oneself nationally and internationally.

Keywords: European constitutional imaginary, Hungarian constitutionalism, history, identity

Michał Krajewski: Europe's Social Deficit and its Reflection in the Polish Constitutionalism

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Abstract: Comparative constitutional legal studies have recently acknowledged the emphasis by influential actors and European institutions after 1989 on elitist legal constitutionalism in Central and Eastern Europe. This emphasis has overshadowed the need for other forms of constitutionalism, such as the civic one, concerned with democratic social culture. Legal constitutionalism in this understanding is mainly concerned with democratic and judicial institutions, personal and political rights. However, little-discussed is the relation of legal constitutionalism, in the form prevalent in the CEE region after 1989, to the spheres of social justice and socio-economic protection of citizens and their welfare. This paper argues that studying this relationship between the 'legal' and the 'social' is crucial, considering especially the social justice platform that has proven empowering to illiberal political forces in recent years. Exploring the social justice limb of legal constitutionalism is crucial for understanding what is commonly called the rule of law crisis in the CEE, i.e. the recently evident failure of constitutionalism to take root in the region.

The paper examines intellectual imaginaries related to social justice and social rights in the Polish constitutionalism from the late 1980s, tracing their roots to an even earlier period of the Solidarność movement’s activity and its egalitarian social values. It demonstrates how the shift in the conception of social justice under neo-liberal trends and the imaginary of modern European constitutionalism as a ‘scientific’ and mostly elitist juristic endeavour affected Polish constitutional law and constitutional review over the last decades. The paper relies on a study of constitutional drafts from the late 1980s, the preparatory works on these drafts by politicians and juristic experts, legal scholarly literature from this period, the case-law of the Constitutional Tribunal and semi-structured interviews with important constitutionalist actors such as judges. As social justice becomes increasingly more pressing in Europe and beyond, the Polish context might invite to rethink the leading values of European constitutionalism and its status as legal ideology and utopia.

Keywords: European constitutional imaginary, Polish constitutionalism, social justice, social rights, neo-liberalism, legal scholarship

Ladislav Vyhnánek: Further Supra-National Tendencies and the Counter-Limits of the Czech Constitutional Order

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Abstract: This contribution assesses the possibility of reacting to the recent crises and challenges by embracing “further supra-national tendencies” (as regards political commitments as well as institutional reforms. In its two Lisbon judgements (2008 and 2009), the Czech Constitutional Court has shown a fairly open and sympathetic approach towards such tendencies of the Lisbon Treaty. Other constitutional actors (such as the Government and the President) have however been much more sceptical. In the meantime, there have been constitutional and political developments (both in the Czech Republic and abroad) that lead us to question: “To what extent does the relative openness and euro-optimism of the Lisbon judgements still reflect the Czech position”? Could the constitutional counter-limits present a practical obstacle to the EU’s future development?

Keywords: European constitutional imaginary, Czech constitutionalism, sovereignty, constitutional court, constitutional counter-limits

