IMAGINE
European Constitutional Imaginaries
Utopias, Ideologies and the Other

IMAGINing Together with EuroStorie Helsinki

iCourts, Faculty of Law, Copenhagen

24-25 March 2022

Programme

Thursday, 24 March:

14:50 Welcome remarks from Jan Komárek (IMAGINE)

15:00-16:00 **Michal Krajewski (IMAGINE): Social Rights Quandary During an Economic Emergency: The Polish Constitutional Experience**

In European tradition, the constitutional review of legislation is connected to different but not mutually exclusive goals such as the protection of personal liberty or social progress. The specific priorities of constitutional review may unfold differently in different societies. The Polish society proved to be particularly strongly attached to social welfarism, as evidenced by the continuous popularity of the current government's social welfare platform. However, the approach of constitutional review towards social rights was ambiguous. In this context, this article puts the ambiguous relationship of Polish constitutionalism and constitutional review to social rights to deeper scrutiny, exploring the conditions affecting the weak constitutionalisation of social rights in 1990s and the cautious constitutional case-law in this field in years leading up to the constitutional crisis characterised by the European sovereign debt crisis when Poland was subject to the EU Excessive Deficit Procedure. The article highlights a tension between the mainstream view as to what the legitimate role of constitutional review is, and what it is not, and social expectations manifested by an influx of social rights cases. The article argues that the view regarding the non-justiciability of social rights became entrenched in the context of the 1990s economic emergency and, coupled with other structural factors, it led the Constitutional Tribunal to oftentimes assume the role of one providing a constitutional justification to controversial austerity choices rather than a critical accountability forum and an agent of social progress. The role of constitutional review thus shaped affected the range of assets on which the Constitutional Tribunal could assert its authority in times of challenges to constitutionalism and judicial review.

Paolo Amorosa (EuroStorie): The Lost History of Social Federalism: an Alternative Genealogy of European Legal Integration across the 20th Century

The addressing of current crises in the legal thought on European integration normally takes the shape of a reckoning with the legacy of European constitutionalism, a legacy whose origins is routinely associated with the Law Department of the European University Institute, starting with the 1980s research project "Integration through Law" (ITL), which famously launched the career of Joseph Weiler but was designed and directed by the comparative lawyer Mauro Cappelletti. My project offers a new genealogy that complements and re-orients common accounts of ITL as the origin of a later constitutionalism neglectful of political economy.

Cappelletti's design of ITL represents the culmination of a long-standing tradition of legal thought pioneered by his mentor Piero Calamandrei in the interwar years: social federalism, which has consistently construed European integration as inextricably linked to matters of social justice. My research seeks to provide awareness that visions of social justice have been central to previous intellectual endeavors already in the canon of EU law scholarship, and that those visions have a storied history of their own, particularly relevant in an historical moment where the challenge seems to lie precisely in understanding how to infuse European institutions with democratic and egalitarian legitimation.

16:00-16:30 Coffee break

16:30-17:30 **Marina Ban (IMAGINE): History, Constitution, and Identity in Hungary**
The paper deals with the instrumentalization of historical narratives in Hungarian constitutional traditions through the examination of identity-based constitutionalism, highlighting a central feature of the Hungarian ambivalence in its ongoing struggle with history; the political and legal efforts to find the country's constitutional self through an engagement with the past. By examining such engagement with history via law, a different reading of Hungary's current crisis is proposed by engaging with its past going further than 1989, or 1945, delving deep into the 19th century to map out the history and identity-based constitutionalism present in Hungary well before its current rule of law problems. It sheds light on watershed moments in the country's past, different from those of the European mainstream, and the ramifications of neglecting these narratives. Analyzing the historical traditions and their inclusions in Hungarian constitutionalism shows that these are inextricable to the country's legal development and the way it conducts oneself nationally and internationally. Thus, the paper offers an alternative understanding of the political and legal mindset behind the country's current behavior among its rule of law backsliding.

Karolina Stenlund (EuroStorie): Holocaust memory as postcolonial memory - inclusion and exclusion in the EU fight against antisemitism
In my talk I will present an abstract of my article in progress. It deals with Sweden's and Finland's alleged infringements of the "Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law". According to the Commission our national laws do not fully nor accurately transpose EU rules on combating racism and xenophobia (INFR (2020)2324 18/02/2021). Direct adaptations of the framework decision are requested.

The formal notice from the Commission raises many interesting questions. The presentation will focus on the postcolonial aspect of it. The Council Framework appears to be "neutral" as regards to which types of genocide that it encompasses. However, at a closer reading it is clear that only holocaust denial is covered by the regulation. Thus, the Council Framework Decision 2008/913/JHA – together with the EU Strategy on combating antisemitism and

fostering Jewish life (2021-2030) – can be understood as a part of EU's postcolonial heritage which excludes slavery and other occasions of genocide that has occurred during history from legal protection.

18:30-??? Dinner in Il Buco

Friday, 25 March:

9:00-10:00 CLOSED: Project leaders discuss their present work, their plans and possible collaboration – Jan Komárek (IMAGINE), Niklas Olsen (CEMES), Morten Rasmussen (CEMES), Kaius Tuori (EuroStorie)

10:30-11:30 **Tuuli Talvinko (EuroStorie): Emergence of "rule of law" in EU policies**
The European Union is commonly understood to be founded on the principle of 'rule of law'. However, the narrative of a common European tradition of rule of law was only evoked in the EU during the early 1990s. The concept was originally used by EU institutions in the negotiations concerning the future EU membership of the former Eastern Bloc countries. Along with other listed EU values, the concept of rule of law was referred to in different policy and legislative documents requiring reforms and institutional changes in Central and Eastern European societies.

My current research traces the objectives and policy implications of the early references to rule of law in the EU. The idea is to approach the topic by examining the concrete uses of said concept, instead of looking at the official definitions or caselaw formulations.

Birgit Aasa (IMAGINE): Mutual trust and the rule of law in the EU - An uneasy relationship
The paper discusses the precarious relationship between the principles of mutual trust and the rule of law in the EU. It illustrates a tense interaction between the two as although the principle of mutual trust has become and been promoted as a rationale to tackle rule of law failures in Member States, it has at the same time created serious rule of law problems in the EU itself long before such promulgations. But mutual trust has not always possessed the effect and potential to enforce the rule of law and Article 2 TEU values in the Member States. The paper asks the question whether a lawfulness presumption is at all an adequate principle from a rule of law perspective as such a presumption frustrates effective judicial controls claimed to be of the essence of the rule of law in the EU. As the case law examples will show, mutual trust presumptions have already had severe rule of law ramifications in recent years by allowing, upholding and extra-territorializing manifest errors and actual non-compliances in practice. Besides the more well-known fundamental rights sensitive areas of asylum and criminal law, the paper showcases the more overlooked area of civil justice case law. The case law suggests that it is doubtful whether a lawfulness presumption is an adequate judicial principle from a rule of law standpoint – if compliance presumptions are not receptive to actual facts on the ground for overruling the presumption, they also bring about serious rule of law and legality issues. Thus, although facilitating inter-state cooperation, the effectiveness of EU law and everyday judicial practice, the newly acquired instrumental usage of mutual trust as a vehicle of enforcing Article 2 TEU values and the rule of law in Member States might be questionable and susceptible to the critique of creating double standards.

11:30-12:00 Coffee break

12:00-13:00 **Ville Erkkilä (EuroStorie): From homeland to no man's land. The history of injustice, high hopes and redistribution of property in rural Eastern Europe from 1945 to 1989**

In my talk I will present my ongoing project on land reforms and their legal consequences in Finland, the Estonian Soviet Socialist Republic (ESSR) and the German Democratic Republic (GDR) from 1945 to 1989. The project concentrates on the role of the lower courts, and on the experiences of the rural population, paying special attention on the peculiar strategies of survival and adaptation of rural people. The wider aim of the project is to trace the genealogy of the sentiments of injustice and inequality in contemporary rural Eastern Europe by investigating the redistribution of property as a phenomenon that altered and shaped people's identities.

Ladislav Vyhnánek (IMAGINE): Narratives lost, narratives found: On the ever changing understanding of the Czech constitutional project and its place in Europe

The Czech constitution was drafted in 1992 - very hastily, under external time pressure and behind closed doors (and is still quite poorly documented). The result is a very reasonable liberal democratic constitution - but it notably lacked some specific Czech flavour. It was not because the Czech society could not come up with important issues, the reflection of which would shape the basic constitutional features of the Czech Republic as a political community. There was simply too little time to reflect and the whole process was too closed. Still, there were some narratives present in the society which the constitution itself did not reflect. It could as well have been a conscious decision to have a "minimalist" liberal democratic constitution that omitted the expressive function of a constitution on purpose, but that was probably not the case. Some of them were soon picked up by the constitutional court (like the reflection of the Czech past, including the relationship towards Germany and the communist regime), others have taken even more time to take shape and find their place in constitutional/political discourse (haves vs have-nots; the importance of national sovereignty). I will talk about those omitted constitutional narratives that either had emerged in the 1990s or have been recently emerging (both substantively, but also as regards the process of their emergence). Many of those unreflected narratives have soon manifested themselves as political issues (often not completely spontaneously but by actors outside the then political mainstream) that have an ambition to reshape basic features of the Czech constitutional project.

13:00 Lunch at the Faculty