

European Constitutional Imaginaries

On Pluralism, *Calculus*, *Imperium*, and *Communitas*

Jiří Přibáň

I. Introductory Remarks

Like human beings and their technical inventions or institutions, concepts have a social existence. They are created, used, expanded, criticized, blended, abandoned, and replaced by other concepts with new semantics and persuasive force. Their meaning changes with the passage of time, yet they also have capacity to frame social communication and determine its normative expectations and limitations. They can even define theoretical and public discussions and select between ‘good’ and ‘bad’ views or legitimate and illegitimate claims in politics, law, science, and other social systems.

The concepts of imagination and imaginaries are intrinsic to social, political, and legal philosophy and theory. Karl Mannheim’s sociology of knowledge involving the study of political ideologies and utopian imaginations¹ continues to inform the sociology of politics and nationalism just as much as Benedict Anderson’s more recently applied analysis of nations as imagined communities.² Charles Wright Mills’ notion of the sociological imagination³ still excites those theorists keen to use their intellectual and conceptual skills as tools of societal, political, and legal reform. Furthermore, when Charles Taylor engaged in explorations of modern social imaginaries more than two decades ago,⁴ he could hardly predict how popular his inquiry into specific themes of social and political philosophy would become among legal theorists.

Unlike the imagination, imaginaries are pre-reflexive and deeply entrenched modes of collective understanding of social existence. The concept of constitutional imaginary, then, refers to the symbolic capacity of presenting the pluralistic construction of social reality as one commonly shared and meaningfully constituted polity.⁵

The very idea of popular self-government and laws expressing the people’s collective will and shared values draws on the imaginary of society as unity defined by legal rights and guaranteed by political force. The constitution of society as one imaginary polity defined by the unity of *topos-ethnos-nomos*, that is the unity of territory,

¹ Karl Mannheim, *Ideology and Utopia* (Routledge 1991).

² Benedict Anderson, *Imagined Communities* (Verso 1983).

³ Charles W Mills, *The Sociological Imagination* (OUP 2000).

⁴ Charles Taylor, *Modern Social Imaginaries* (DUP 2004).

⁵ For the sociological concept of constitutional imaginary, see Jiří Přibáň, ‘Constitutional Imaginaries and Legitimation: On *Potentia*, *Potestas*, and *Auctoritas* in Societal Constitutionalism’ (2018) 45(S1) *Journal of Law and Society* 30; for the context of constitutional theory, see especially Martin Loughlin, ‘The Constitutional Imagination’ (2015) 78 *Modern Law Review* 1.

people, and their laws, informed the rise of modern nations and nationalisms as much as constitutional democratic statehood and its liberal and republican regimes did. It persists in the current post-national European society, which, nevertheless, invites other imaginaries of its political and societal self-constitutionalization.

Like the modern nation-states, the historical process of supranational European integration has been informed by two general political goals, namely economic prosperity and social stability. These goals are formulated through modern social imaginaries of the economic market, legal rights, and democratic political power. However, these typically modern liberal imaginaries are further strengthened by imaginaries of a supranational European community which is socially and morally pluralistic, efficiently and rationally governed, economically prosperous, and sufficiently democratized to challenge populist and illiberal responses to the European integration. The imaginaries of legal pluralism, administrative calculemus, economically prosperous imperium, and democratically mobilized communitas, therefore, legitimize transnational European politics and law.

I therefore argue that European constitutional imaginaries have to be distinguished from the imagination of EU constitutional theory as much as do European political ideologies and utopias. They spontaneously evolve in European society and, despite their theoretical contextualizations and uses, cannot be purposively constructed by theorists to justify the integration and constitutionalizing of Europe. The imaginaries of statehood, nationhood, European polity, and transnational societal integration are not products of theoretical speculations and political programmes. Furthermore, these imaginaries are more general than ideologies because their function is not to legitimize the existing relations of political domination. They are societal power themselves, which precedes structures of political power and constitutes the common understanding of social reality despite all its fragmentations, diffusions, and differentiations.

In this chapter, I draw on the theory of societal constitutionalism to analyse the polysemy and polyvalence of the European constitutional imaginaries. I highlight the sociological meaning of the concept of imaginary as a *background power* of both national and transnational legal and political systems, which determines legitimacies and illegitimacies in EU law and politics. I subsequently analyse specific imaginaries of EU integration and their general components. I conclude by arguing that these European constitutional imaginaries are part of the societal constitutionalism of the EU beyond constraints of law and politics and the old semantics driven by the imaginary unity of statehood.

II. Theoretical Imaginations: From Social Transformations to Critical Self-Descriptions

Sixty years ago, C.W. Mills introduced *the sociological imagination* to 'define the meaning of the social sciences for the cultural tasks of our time.'⁶ He famously

⁶ Mills (n 3) 18.

criticized Parsons's social systems theory and all other grand theories treating individuals as isolated fragments of society, preferring morally and intellectually engaged research into general and specific societal problems. Criticizing sociological theories' tendency to ignore practical problems arising within power and authority institutions, Mills stated that theoretical concepts, such as value orientation or normative structure, are primarily related to the central symbols of legitimation.

According to Mills, the relationship between symbols and structures of institutions is one of the most important problems of sociology. The legitimation function of symbols in acceptance or rejection of the existing power structures shows the impossibility of moral unity in modern society. The sociologically imaginative exploration of shared values, therefore, must focus on legitimation techniques and concepts within specific structures of society. It needs to abandon the speculative and prescriptive approach seeking first to discover and define them, and only subsequently to analyse the social system and political order in light of these foundational values.⁷

Decades after Mills's employment of the sociological imagination as a practical and humanist methodological alternative to the grand theories of modern society, James Boyd White introduced the concept of *the legal imagination* as a response to the critical need of transforming legal education and the lawyers' understanding of law.⁸ Similarly to Mills's pragmatic and politically engaged sociological approach, Boyd White considered the imagination a transformative methodological tool with practical and political consequences for symbols and structures of power and authority and legitimation of the system of positive law and its agencies. Instead of directly politicizing law in the traditional ways of legal realism or critical legal studies, however, Boyd White sought an imaginative transformation of the legal system by establishing and exploring legal connections with the realm of literature and fictional narratives and their internal constructions of subjects and subjectivity, modes of interpretation, and different styles of writing.

Apart from the practical aim of transforming the legal mind, education, and reasoning by internalizing methods, conceptualizations, and interpretations from the world of literature, Boyd White's concept of the legal imagination had the original theoretical value of exploring, analysing, and explaining the legal system, its agencies, and its operations by non-legal methods. The legal imagination thus evolves through external observations of law and comparisons to literature which allegedly enable both the reconstruction of thoughts, fictions, and actions of lawyers and the reconstitution of their semantics and modes of communication.⁹

Boyd White's comparative analysis of the imagination in law and literature has inspired many scholars in critical legal theory attempting to transform the system of

⁷ *ibid* ch 2, pt III.

⁸ James Boyd White, *The Legal Imagination* (UCP 1973).

⁹ In this respect, Boyd White's invocation of the legal imagination draws less on the directly political job of the theoretical imagination typical of Mills and more on the traditional use of imagination as a specific method of the humanities and history which had been elaborated by the British philosopher RG Collingwood in the 1920s. According to Collingwood, the historical imagination was supposed to be a guiding method enabling historians to reconstruct history by re-enacting the thought processes of historical persons. Similarly, Boyd White examines the imaginary and fictional reality of law by comparing it to the fictions and imaginary world of literature to engage with subjects and operations of the legal system. See Robin George Collingwood, *The Idea of History: Revised Edition with Lectures 1926–1928* (OUP 1994) 245.

positive law, especially its legislation and adjudication. According to these approaches, the legal imagination allegedly opens up the possibility of transgressing epistemic norms of legality and engaging in affective, sensory, and emotional forms involved in adjudication. The importance of art and imagination in legal adjudication allegedly consists in its potential to reveal specific values, interests, emotions, and social harms and injustices at stake in specific legal cases and techniques of juridical decision-making. Legal theory and internal imaginative and fictional constructions of the system of positive law are subsequently challenged by the philosophy of imagination, theories of emotions, and rhetoric to disclose elements and contexts typically hidden and covered over by legal texts.¹⁰

These views of the legal imagination draw on the long tradition of theory as an illuminating enterprise revealing what is hidden in social reality and transforming it through its discoveries and insights. The legal imagination is considered an epistemological tool with the potential to change both the conceptual and argumentative framework of jurisprudence and the systemic operations of legal decision-making. The transgressive value of the legal imagination in the system of positive law is then measured by its engagement in political and moral contexts of law, professional ethics, and judicial virtues and vices.¹¹

Such normative and transvaluative expectations of the legal imagination may be difficult to imagine at the level of specific legal norms, arguments, and interpretations. Nevertheless, the constitutive and re-constitutive role of the non-legal imagination in positive law is traditionally examined in the realm of constitutional law as a meeting point of politics and law.

In this context, Martin Loughlin recently elaborated on the concept of *the constitutional imagination*, which, in his words, is ‘the manner in which constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape—and re-shape—political reality.’¹² For Loughlin, the constitutional imagination is a complex concept bringing together thought, text, and action and explaining their interplay in the constitution of modern political authority. It originates in modern philosophies of the social contract setting external parameters of modern politics as operating through the written constitutional documents and converting political actions into constitutional aspirations, principles, and rules.

Loughlin examines a genealogy of the process of constitutionalization of modern politics and historical and intellectual roots of the current political situation in which ‘[t]he claim that constitutions specify the authoritative ground rules of politics is today more widely accepted than at any other point in modern political history.’¹³ He is interested in the imagination’s capacity to constitute and transform political and social reality.

This *potentia*—power of philosophical knowledge and thoughts to create the modern imaginary of politics as the text of constitution—is linked to Locke’s initial

¹⁰ Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart Publishing 2020).

¹¹ Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing 2020).

¹² Loughlin (n 5) 3.

¹³ *ibid* 2.

distinction between society and government, which, according to Loughlin, rejects the older absolute concept of sovereignty just as much as the organic imaginary of one political body. These are replaced by the mechanical metaphor of governmental checks and balances and demystification of power as the ultimate guarantor and transcendental reason of social order.¹⁴

Loughlin further argues that the recent shift from negative constitutionalism constraining political actions to positive constitutionalism channelling politics through legal means is part of the more general modern development of operationalization of government, which ‘today acquires its legitimacy not through transcendent claims but through its regulatory functions in seeking to improve the life and health of its citizenry’.¹⁵ Instead of simply praising the transformative potential of the modern constitutional imagination, he thus acknowledges its power to transform modern politics and society yet remains critical of its consequences, especially the transformation of the modern democratic state into an organization of societal governance.

III. From the Transformative Constitutional Imagination to the Social Imaginaries of Constitution

Loughlin’s conceptualization of the constitutional imagination raises important meta-theoretical and social-theoretical questions regarding the role of positive law and jurisprudence in constructing ‘imagined communities’.¹⁶ In constitutional law, the prominence of the legal imagination is magnified by the fact that the constituent power of the people can only be imagined and its real impact on politics is always a matter of its invention and re-invention by political and legal actors as much as by constitutional theorists. Who is the people? What is its constituent power? How is a sovereign people self-constituted as a polity of the constitutional rule of law? These questions obviously cannot fit the restrictive jacket of the theoretical imagination and belong to the more general societal constitutions of positive law and politics.

Nevertheless, these self-examining encounters encourage some theorists to further explore the potentialities and possibilities of democratic constitutionalism and its imagination ‘beyond the people’ and its image wars.¹⁷ Other scholars even invite their readers to adopt, for instance, the ‘eutopian imagination’ and constitutions of modern popular selfhood beyond the conceptual circularity and paradoxes of political constitutionalism.¹⁸

However, such normative expectations transform the imagination’s hermeneutics from a self-referential *circle* into a speculative quasi-Hegelian *spiral* of historical progress through political applications of theoretical knowledge. They promote the constitutive power of imagination in society and draw on the belief that sociological and legal theory can internally constitute its imagination as a specific method which

¹⁴ *ibid* 8.

¹⁵ *ibid* 23.

¹⁶ Anderson (n 2) 6.

¹⁷ Zoran Oklopčic, *Beyond the People: Social Imaginary and Constituent Imagination* (OUP 2018) 354.

¹⁸ Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World* (Edward Elgar Publishing 2016) 100.

subsequently will be used externally to reconstitute social reality and transform its cultural, legal, and political contexts.

The theoretical imagination, therefore, can be described as the observer's method, which promises two very different sets of validation—the scientific validation of truth and the moral validation of collective political existence. It is expected to coevally operate as the scientific enterprise and the evaluative ground of legitimate social steering.

This theoretical approach draws on the long tradition of modern European rationalism and scientific knowledge as the capacity to see that others do not see what they do not see. In other words, the scientist operates here as the observer collecting the truthful knowledge of false knowledge of the observed subjects who, unlike the scientist, do not recognize the falsity of their symbolic and imaginary constructions of social reality.

Nevertheless, an alternative theoretical route to this historical optimism and speculation on the role of theory in social life suggests a more cautious study of constitutional, political, and any other social imaginations and imaginaries. Loughlin's concept of constitutional imagination is broad enough to include important elements of more sociologically informed explorations of modern social imaginaries as intellectual constructs and conceptualizations of the general meaning and legitimation of social and political order.¹⁹

The imaginary function of constitutions as symbolic forms of the collectively meaningful life can be contrasted to their political institutionalization and legal coding.²⁰ The complex relationship between general imaginaries of modern society and specific political ideologies and the role of constitutional texts and interpretive strategies has to be compared, contrasted, and critically analysed to comprehend complexities of modern political government, its constitutional forms, and its legitimizing symbols. In other words, the focus has to shift from theoretical imaginations to a theory of self-descriptive constitutional imaginaries operating in the systems of positive law and politics at both national and transnational European levels.

The concept of imagination as a complex of normative and speculative expectations of political constitutions thus needs to be distinguished from a more sociologically informed concept of imaginary which Charles Taylor introduced to social and political theory and philosophy in the late 1990s. According to Taylor, social imaginaries precede both theoretical knowledge and practical action and refer to the common sense of legitimacy and meaningful life.²¹ Constitutional imaginaries, therefore, are best described as semantic reflections of structural tensions in modern constitutions, such as the distinctions between hierarchical political mastery and horizontal civic autonomy; normative authority and factual self-creation; reason and will; or transcendental validity claims and their immanent enforcement. They are responses to the most general question of the possibility of a legitimate political order and collective self-rule materializing in the rule of law.

¹⁹ Loughlin (n 5) 3.

²⁰ Kim Lane Scheppelle, 'The Social Lives of Constitutions' in Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (CUP 2017) 35, 35.

²¹ Taylor (n 4), 23.

IV. A Sociology of Constitutional Imaginaries as Societal Power Formation

Modern political and legal theories and philosophies of constitutional democracy draw on the intrinsic tension between the concepts of constitution as power limitation and as power formation. According to the liberal constitutionalist tradition, political constitutions normatively limit power and eliminate its potential excesses, including the tyranny of the majority, potentially threatening all democratic regimes. Constitutions and their legal normativity are considered stabilizers and functional preconditions of democratic power. The rule of law and fundamental rights, separation of constitutional power, and division between the private and public spheres restrain and legally operationalize arbitrary societal forces. Political constitutions are expected to contain the collective political will and transform its contingencies into the normative rational order, guaranteeing societal stability, certainty, predictability, and functionality.

Legality and power meet in constitutions and the basic paradox of constitutionalism, namely sovereign democratic power of the people exclusively executed by its legal self-constraint,²² is a common research field of modern constitutional theory. However, this theoretical canon has been increasingly challenged by social-theoretical and sociological approaches to constitutions and constitutionalism.²³ These approaches find the existing theoretical canon 'reductive'²⁴ and consider it to fall short of addressing the more general societal contexts of both democratic power and political constitutions.

Instead of power-limiting functions, sociologically informed approaches to constitutions consider them to be power-formation organizations in which different societal powers can be constituted, maximize their efficiency, and expand their execution.²⁵ Analysing the problem of power formation and the paradoxical process of its societal expansion through political limitation, the sociology of constitutionalism then adopts the concept of social imaginaries originally elaborated by the social theories and philosophies of Castoriadis, Lefort, Taylor, and others to explore the symbolic dimension of constitutions.²⁶ Constitutions are subsequently analysed as specific forms of collective self-representations and political self-identifications beyond formal rational techniques of self-rule.²⁷

Avoiding the reductionist approaches of political theory focusing on already institutionalized power and critical theory busy with legitimation values and hegemony, a

²² Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2008).

²³ See especially, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012); Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (CUP 2011); Chris Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure* (CUP 2016).

²⁴ Hauke Brunkhorst, *Critical Theory of Legal Revolutions* (Continuum 2014).

²⁵ Scheppele (n 20).

²⁶ For the legal context, see also Jiří Příbáň, *Legal Symbolism: On Law, Time and European Identity* (Ashgate 2007).

²⁷ Chantal Mouffe, *The Return of the Political* (Verso 1993).

social-theoretical and sociological approach to constitutional imaginaries treats them as a background power coevally enhancing its societal force and legitimizing its constitutional form and operations. Imaginaries thus show the inseparability of constitutional powers from other societal forces and knowledge.

Paul Blokker, for instance, reformulates Castoriadis's general political imaginary significations of mastery and autonomy as a dual constitutional imaginary, namely the modernist imaginary defined by sovereignty of power limiting reason and the democratic imaginary defined by the self-creation and self-assertion of the sovereign people.²⁸ According to Blokker, these two imaginaries provide for the conceptual framework as much as the ideological meaning and ontology of political constitutions. The modernist imaginary is driven by the primary distrust of political sovereignty and draws on the requirement of legal and normative limitations of power in both the public and private spheres. The democratic imaginary then signifies the opposite social dynamic of self-determination and self-constitution of polity through its political mobilization and self-empowerment.²⁹

Blokker's duality of the constitutional imaginaries draws on the most general distinctions defined by philosophies and theories of politics and law, but its central focus is the difference between the societal processes of power limitation and power formation. Similarly, other sociological theories define constitutional imaginaries as part of the power and action dynamics in the political system in particular and society in general. They echo Max Weber's remark about 'world images' created by 'ideas' as having the 'switchmen' function and determining 'the tracks along which action has been pushed by the dynamics of interest'.³⁰

Expanding the socio-legal analysis of constitutional imaginaries as power formation, it is then necessary to critically adopt the perspective of societal constitutionalism which reformulates the Hobbesian problem of the constitution of society as a society of many constitutions evolving at both national and supranational European levels.³¹ According to this perspective, constitutions are not considered only juridical and political constructions formulated in terms of constitutional sovereignty, territorial control, and popular power. Their structures and semantics are part of more general constitutions of different social systems. Instead of the image of society totally integrated by the ultimate rule of political constitution, the sociology of constitutionalism offers a perspective of multiple societal constitutions evolving through communication between the system of positive law and other functionally differentiated social systems of economy, politics, administration, science, or education.

Furthermore, theories of societal constitutions have shifted attention from national and public law themes to the transnational and private law regimes.³² Formal structures of constitutional monism and politically organized processes of constitutional integration have been contrasted to the informal networks of European and global

²⁸ Paul Blokker, 'The Imaginary Constitution of Constitutions' (2017) 3 *Social Imaginaries* 167, 176–77.

²⁹ *ibid.*

³⁰ Max Weber, 'The Social Psychology of World Religions' in Hans Gerth and Charles Wright Mills (eds & transl), *From Max Weber: Essays in Sociology* (OUP 1958), 267–301, 280.

³¹ Teubner (n 23) 35.

³² For the impact of the concept of transnational law, see Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (CUP 2020).

legal pluralism and its spontaneous processes of self-constitutionalization.³³ New constitutional subjects and imaginaries have been recognized by the sociology of constitutionalism beyond typically modern political imaginaries of nationhood and statehood.³⁴

Societal constitutionalism assumes the condition of European and global legal pluralism and transnational regimes reconstituting power in global society. Some scholars even speak of ‘the world power system’,³⁵ while others demand that this plurality of transnational legal regimes and power evolving in them be contrasted to non-political yet subversive justice claims and civil constitutions.³⁶ Societal constitutions are defined as spontaneously evolving, horizontally organized, and heterarchical alternatives to the political, administered, vertically organized, and hierarchical structures of political constitutions evolving at national and transnational global levels.³⁷

The theoretical shift from the public, national, monist, and unified to the private, transnational, pluralist, and fragmented networks and regimes thus means the possibility of a radical reconceptualization of constitutionalism as a transnationally and globally evolving system operating independently of constituent and constituted powers and its political subjects. Despite the risk of losing the political function of constitutions, theories of societal constitutionalism show a general sociological problem behind every constitutionalism—private and public or national and European—namely the plurality of power regimes evolving in society through their constitution-making and imaginary self-legitimation. Due to this capacity, it is possible to adapt the perspective of societal constitutionalism to the context of European integration and reformulate its history and recent trends as specific societal power formations and imaginary legitimations.

V. A History of European Social Imaginaries and Their Destabilization

European integration was constituted by two legitimate goals applicable to all political societies, namely economic prosperity and political stability. These goals were formulated by the founding fathers of European integration within the framework of typically modern social imaginaries of: (1) *market* as an exchange of mutual advantages and benefits between different agents; (2) community of *rights* equally shared by

³³ Jiří Příbáň, *Sovereignty in Post-Sovereign Society: A Systems Theory of European Constitutionalism* (Routledge 2015) 93–118.

³⁴ Among many, see, for instance, David Held and others, *Global Transformations: Politics, Economics and Culture* (SUP 1999); Martin Shaw (ed), *Politics and Globalisation: Knowledge, Ethics and Agency* (Routledge 1999); Daniele Archibugi (ed), *Debating Cosmopolitics* (Verso 2003); Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Ashgate 2008).

³⁵ See, for instance, Jean de Munck, ‘From Orthodox to Societal Constitutionalism’ in Jean-Philippe Robé, Antoine Lyon-Caen, and Stéphane Vernac (eds), *Multinationals and the Constitutionalization of the World Power System* (Routledge 2016) 135–57.

³⁶ See Gunther Teubner, ‘Self-subversive Justice: Contingency or Transcendence Formula of Law?’ (2009) 72 *Modern Law Review* 1, 9; Teubner approvingly refers to David Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157, 172–73.

³⁷ Teubner (n 23) 60.

their subjects; (3) political *power* democratically accountable and operating and conditioned by the non-political public sphere.³⁸

The societal constitution of the transnational European polity was thus associated with the same imaginaries as those operating as the background legitimation power of the modern constitutional democratic state. Furthermore, European constitutional imaginaries determine the integration's *potentiality* and viability in both the positive form of desires and the negative form of warnings and prohibitions. They can warn against political atrocities and wars of the past as much as they can promote political values of peace, democracy, and freedom. Imaginaries of *constructive optimism* drawing on desires of prospective benefits and general prosperity of the EU thus have the prohibitive side of *deconstructive pessimism*, warning against the horrors of the European past and possibilities of their return.

Negative warnings and positive expectations coevally influenced the history of European integration from its beginnings up to the 1980s, when politically post-dictatorial and economically peripheral Greece, Portugal, and Spain joined the European Economic Community, as well as in the post-1989 'return to Europe' of former communist countries.³⁹ After the end of the Cold War, the newly established European Union looked like the strongest magnet for both established democracies and democracies in the making, and the enlargement of the EU with Austria, Finland, and Sweden in 1995 was followed by the most radical succession of enlargements in 2004, 2007, and 2013, turning the Union into the biggest single market and supra-national polity.

Furthermore, the post-1989 'return to Europe' of former communist countries drew on the imaginary contrast between the European Union and the Soviet Union. Peace, democracy, and rights were considered fragile yet very precious values protected by the EU and membership in this transnational organization was considered the best political and societal prospect for post-communist societies in the 1990s. The post-communist constitutional imaginaries then looked pretty simple and straightforward and were consistent with the dominant European imaginaries of the market economy, liberal democracy, and constitutional rights.

In the 1990s, Europeanization and globalization replaced the Cold War's reductive binary coding of West/East. Processes of democratization of the pre-1989 autocratic and totalitarian states and their transformation and further integration into transnational structures of evolving European and global society even looked like part of the Hegelian logic of the World Spirit and History coming to its end. Ever closer Union and progressive integration seemed strong and solid despite regular practical and theoretical challenges and criticisms. The whole project of European integration was even imaginable to some as a simple normative and ethical struggle between the good side, Euro-optimists, and the bad side, Euro-pessimists.

This image of historical struggle, however, began to recede at speed with the Constitutional Treaty crisis at the turn of the twenty-first century. In the past two decades the EU has experienced an unprecedented series of crises, from the eurozone and migrant crisis to Brexit, Covid, and illiberal yet democratically enacted politics

³⁸ Compare Taylor (n 4) 21–22.

³⁹ See, for instance, Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012).

in several of its member states, particularly Hungary and Poland. These institutional failures lead to both segmented structural tensions between member states and EU institutions and functional systemic tensions between the European economy, politics, law, and administration.

Furthermore, the historically justified imperative of limitation of state sovereignty and national politics, which resulted in totalitarianism and war, became destructive itself because another historical fact was ignored: the fact that the nation-state also represents the most legitimate organization of constitutional democratic politics. Despite a number of well-intended efforts, the EU never managed to match or substitute for democratically elected and publicly accountable and representative bodies operating at the level of its member states.

Further integration without democratic consolidation thus exposes the EU to the Marxist fallacy described by Ernest Gellner in his *Nations and Nationalism* as the expectation that the boundaries between nation-states will be weakened and eventually disappear when members of those nations realize that their nationalist sentiments are only ideological masks hiding the real causes of their conflicts and existential hardship.⁴⁰ Similarly, theorists of European integration used to believe that transnational structures would be gradually strengthened as citizens of the EU experienced the benefits and realized the humanist potential of European integration. Nationalist prejudices were expected to disappear together with further weakening of the nation-state and its replacement by transnational networks and regimes of multiple rationalities successfully substituting for nationally practised and constrained procedures of democratic legitimation.

However, hierarchies of nation-states are still popular among their citizens, in both democratic and authoritarian forms, while transnational and horizontally operating European institutions beyond national boundaries are not necessarily perceived as beacons of humanity and cosmopolitan values. The current delegitimation process of European integration, therefore, cannot be tackled at superficial levels of political ideologies, theoretical imaginations, and moral values. Instead, it has to be comprehended against the background of further analysis of more specific social imaginaries of European integration and their constitutional power.

In the following sections I therefore focus on the specific European imaginaries of legal *pluralism*, administrative *calculemus* of social steering, economic *imperium* of prosperity and democratically mobilized *communitas*, and their contextualizations of the general modern imaginaries of market, rights, and power. I show how they are internally constituted and operate within functionally differentiated systems of law, administration, economy, and politics, yet have the capacity to present European society as one collectively shared and meaningfully constituted community. In their specific ways, these imaginaries, which obviously can be detected at national levels but play a particularly important role at transnational levels of European integration, represent a typical paradox of modern society, which is functionally differentiated and constitutes societal unity as difference, yet also keeps its imaginary capacity to describe such differentiation as unity. Instead of some theoretical imagination or political utopia,

⁴⁰ Ernest Gellner, *Nations and Nationalism* (Blackwell 1983) 12.

European society thus represents its collective self to itself only through the specific imaginaries spontaneously constituted by its different systems.

VI. The Imaginary of European Constitutional Pluralism

Political constitutionalism has been typically associated with the classic *topos-ethnos-nomos* unity and its notions of legal monism, political hierarchy, and cultural homogeneity. Against this imaginary of constitutional authority and legitimacy, theories of legal pluralism claim that changes in European and global society require abandoning state-centred conceptualizations of law and politics and adopting the concept of law as a plurality of normative orders operating within, beyond, and outside the nation-state.

Though criticized as ‘an oxymoron’⁴¹ contradicting the very notion of constitution as the ultimate legal authority enforced by political power, the concept of legal and constitutional pluralism has become a critical point of reference of European constitutional debates since the establishment of the EU in the 1990s.⁴² According to the critics, the classic distinction between societal *potentia*, political *potestas*, and legal *auctoritas*—that is, the distinction between societal power, its political institutionalization, and normative legal authorization—by definition assumes the ultimate power source.⁴³ Nevertheless, globalization of society, one segment of which is the process of European integration, transforms the concepts of normative order and authority.⁴⁴ Modern constituted hierarchies are challenged by entirely new power structures operating through heterarchies of non-legal regimes and depoliticized governance.

Legal pluralism of the EU is thus not just a jurisprudential problem of several legal systems operating within one transnational order. It is a socio-legal problem of the plurality of social systems and different transnational agencies, organizations, and institutional frameworks.⁴⁵ Instead of searching for moral foundations or the basic norm of European law and society, it is a plurality of differentiated systems that constitutes European society and both state and non-state power structures and operations. EU constitutionalism subsequently can be imagined as the plurality of societal authorities operating without a constitution, state, and even polity.

Responding to these transformations of constitutional authority, it is necessary to adopt the concept of constitutional pluralism as societal plurality of self-constitutive normative orders. The simple juridical fact of the coexistence of different official constitutional orders mutually recognizing their authority and its self-limitation is to be distinguished from the sociological plurality of both official and unofficial normative systems and regimes constituting society.⁴⁶ This conceptual shift leads to the study of

⁴¹ Martin Loughlin, ‘Constitutional Pluralism: An Oxymoron’ (2014) 3 *Global Constitutionalism* 9.

⁴² Jiří Přibáň, ‘Asking the Sovereignty Question in Global Legal Pluralism’ (2015) 28 *Ratio Juris* 31.

⁴³ For further details on this distinction and its importance for constitutional imaginaries, see Přibáň (n 5) 31.

⁴⁴ See, for instance, Gunther Teubner, ‘The King’s Many Bodies: The Self-Deconstruction of the Law’s Hierarchy’ (1997) 31 *Law and Society Review* 763.

⁴⁵ Peer Zumbansen, ‘Transnational Legal Pluralism’ (2010) 1 *Transnational Legal Theory* 141.

⁴⁶ Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (CUP 2002).

the state law's social environment and non-legalities or a-legalities operating within it.⁴⁷ More importantly, it shows different forms of legitimation and illegitimacies, alternatives, and resistances to the official legal norms.

Exploring these transnational legal changes and challenges, Gunther Teubner established a theory of societal constitutionalism according to which the Europeanized and globalized systems of economy, politics, science, or sport and education are externally assisted in their operations and evolution by the system of positive law. This systemic communication between law and its social environment amounts to the constitutionalism without state sovereignty and political power.⁴⁸ Nevertheless, potentialities and contestations in this societal constitutionalism evolving at European level also show that the question of legal authority and its legitimation persists even in non-political constitutional regimes.⁴⁹

Social heterarchies and horizontal systemic communication involve claims to constitutional authority in the EU but these are typically framed by the functional constitutional settlements and their efficiency. In this respect, Neil Walker recently reformulated the typically modern difference between legitimation by instrumental efficacy and foundational values and the following tension between reasons of functionality and principles by recalling the classic distinction between *gubernaculum* and *iurisdictio*.⁵⁰

Gubernaculum originally described a ship's rudder or steering oar and now generally signifies the capacity to govern and steer anything including political society. Its legitimation depends on performance, deliverance, and goal achievements. On the other hand, *iurisdictio* signifies procedures and principles according to which power has to be executed to claim legitimacy. It is the entitlement of power which is formulated by legality.

The distinction between *gubernaculum* and *iurisdictio* thus represents structural coupling between the political system, which has power as its medium of communication, and the legal system communicating through the medium of legality. According to the social systems theory, this coupling leads to the establishment of constitutions as social organization of legally organized and politically enforced authority.⁵¹ The theory of societal constitutions subsequently expands the notion of constitution to the structural coupling between the system of positive law and any other social system, not just the political system.⁵²

This theoretical approach of societal constitutionalism is particularly important for EU constitutionalism, driven by the administrative capacity to govern and economic performativity as much as by political power and legal authorization. European

⁴⁷ Fleur Johns, *Non-Legality in International Law: Unruly Law* (CUP 2012); Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 *Modern Law Review* 30.

⁴⁸ Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997).

⁴⁹ For the general theory of transnational law and authorities in it, see Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (OUP 2013).

⁵⁰ Neil Walker, 'The Antinomies of Constitutional Authority' in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Edward Elgar Publishing 2016) 125, 128

⁵¹ Niklas Luhmann, *Law as a Social System* (OUP 2004) 404.

⁵² Teubner (n 23) 71.

societal constitutionalism is unlimited by legality and power; its emergence is determined by structural coupling between the systems of European law and other systems such as economy and administration.

Similarly, Michelle Everson criticized the formal statist concept of constitutionalism and the normative imaginary of democratically and juridically self-constituted polity, and contrasted it to the current European economic constitution and its creation of the European market polity.⁵³ Rather than the classic imaginary of polity as sharing a collective existence and common destiny, she persuasively argues that the European polity includes the plurality and multiplicity of rationalities, such as economic rationality and imaginaries of the market stretching far beyond rationality of the EU legal and political systems.

Instead of searching for simple formulas and basic norms of the EU polity's constitution, it is necessary to recognize the social consequences of the economic constitution as much as those of the political and legal integration. The European polity thus consists of the differentiated plurality of legal, administrative, economic, political, and other rationalities which can have both integrative and disintegrative effects.

This pluralist imaginary draws on a radically constructivist argument that constitutions are not products of pre-existent polities which would be their ultimate source of authority and social basis. Instead, legal constitutions evolve and operate as the self-referential unity of primary and secondary rules legally supporting other social systems, from economy and administration to science and education.⁵⁴

European societal constitutionalism thus avoids the theoretical and conceptual pitfalls of transnational political constitution-making without democratic polity-building illuminated, for instance, by endless and tiresome 'no demos' debates in the post-Maastricht EU. It stretches beyond the state as much as beyond the systems of politics and law themselves. Societal constitutions emerging at European level include legislatures and courts as much as epistemic communities, legal and non-legal professions and their associations, NGOs and private corporations, and other social organizations, networks, and knowledge regimes.

In this societal pluralism, *iurisdictio* constitutes just one of many systemic operations externally limiting self-constitutions of society by legality while *gubernaculum* represents the internal governing and steering capacity of individual subsystems. This self-limitation of the European legal system and its recognition of normative and societal pluralism shows other imaginaries evolving beyond EU legality, such as the imaginary of *calculemus* legitimizing the system of EU administration and its capacity of social steering. The historical and intellectual evolution and meaning of *calculemus* will be discussed in the next section.

⁵³ Michelle Everson, 'Beyond the *Bundesverfassungsgericht*: On the Necessary Cunning of Constitutional Reasoning' (1998) 4 *European Law Journal* 389, 403.

⁵⁴ Teubner (n 23) 88.

VII. The Imaginary of European Administrative Calculemus

Some theories of European constitutionalism still consider it a critical project of cosmopolitan political identity-building and moral mobilization of solidarity, recognizing yet bridging political, cultural, and societal differences. However, the theory of societal constitutionalism abandons the concept of constitutionalism as a meeting point of legal normativity, political will, and moral aspirations and pushes for alternative sociological explorations of the great variety and plurality of self-constitutionalizations within European society.

Teubner's theory of societal constitutions transforms the concept and imaginary of constitutionalism and constitutional polity vis-à-vis the EU's supranational and transnational organization and governance. It supports the distinction to be made between European society and the EU as one of its many organizations. Any kind of imaginary polity constituted by the Union's structures subsequently must be analysed within the framework of European society and its specific systems of positive law and politics, and not as its ultimate normative precondition and settlement.

The EU's legal and political systems facilitate the evolution of European society but do not constitute it. This society is functionally differentiated and constituted by other systems alongside politics and law, such as economy, administration, science, and education. The European constitutional polity is constituted by structural coupling between the systems of EU law and politics just as much as other social systems.

The emphasis on societal laws operating independently of political decision-making and positive law has always been part of the sociological tradition and imagination. It can be traced to the philosophy of Condorcet, who, like other philosophers of the Enlightenment era, wanted to apply mathematical and statistical methods in public administration and thus replace power and oppression with the rule of scientific truth and human happiness. His rational men, so-called sophisters, were expected to replace monarchs and priests and govern on the basis of their calculation skills. The future could be decided on the basis of rational calculation of utilitarian consequences. Condorcet's *calculemus* was to become the new form of governance using statistical and quantitative methods, cost-effectiveness, and industrial technologies instead of the old form of political government by the privileged classes. Disinterested experts were expected to rationalize social life and maximize the satisfaction of human needs.⁵⁵

Condorcet's disciple Saint-Simon further elaborated on this governance by scientific, economic, and industrial rationality and hoped to replace the government of individuals with the impersonal governance and administration of things. He also contrasted industrialists and scientists and their productive role in modern society with the old professional politicians and lawyers who merely reproduced the old government establishment. The subsequent birth of sociology as the science of rational governance of society, which is superior to the other political forces, was sealed by

⁵⁵ Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Pimlico 2003) 255.

Saint-Simon's secretary August Comte, who claimed its status as a positivistic religion promoting universal and impartial reasoning and calculation.⁵⁶

Transnational governance theories often draw on this long tradition of sociology as anti-political science and describe European society as post-polemical and heterarchical, constituted by administrative gubernaculum rather than conflicts of power and authority. It moves beyond the retro-politics of the sovereign state by adopting the rational and efficient arbitration of public choices. These theories consider European and global society 'operated by a professional personnel which lacks ... the capacity to bring to prevalence any type of power-mediated politics.'⁵⁷ Unlike power politics, the depoliticized expert knowledge of professionals allegedly liberates politics from the logic of power conflicts and turns the whole political enterprise into problems of European or global calculation, distribution, administration, and arbitration.

The above-mentioned distinction between gubernaculum and iurisdictio is radicalized by the theory of societal constitutionalism because it treats European transnational governance as merely one specific form of multiple societal constitutionalizations.⁵⁸ Constitutions are thus liberated from identity politics of constituent power and constitutional subjects. Societal constitutions are the opposite of state hierarchies and power politics. Their heterarchies and polyarchies of societal coordination, administrative reasoning, and expert consultation constitute European polity beyond the imaginary of a community of shared cultural values and political principles.

Nevertheless, these non-political self-constitutionalizations of European governance are not self-justifying and their organizational complexity is challenged by the legal constitutional call for iurisdictio. As Christian Joerges critically notes: '[W]hile governance arrangements seek the law's support, they also challenge the law's rule through a de-juridification of the polity.'⁵⁹ The polyarchies of EU governance thus cannot avoid the political distinction between inclusion and exclusion of subjects and agencies involved in governance structures and operations.

Societal constitutionalism, therefore, cannot ignore the political aspects of administrative calculemus and social steering and replace them by the most general sociological extensions of the constitutional self-reference of rules on rules.⁶⁰ The concept of European polity including its imaginary of administrative calculemus and efficient social steering have to be studied in their self-referentiality as part of evolving transnational European society. In this respect, new post-state imaginaries of pluralistic and rationally administered constitutional polities using hybrid legalities and iurisdictio⁶¹

⁵⁶ Jiří Příbáň, 'The Concept of Self-Limiting Polity in EU Constitutionalism: A Systems Theoretical Outline' in Jiří Příbáň (ed), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (Routledge 2016) 37, 41.

⁵⁷ Jean Clam, 'What Is Modern Power?' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart Publishing 2006) 145, 152.

⁵⁸ For an early view of European governance as constitutionalization, see Alec Stone Sweet and Thomas L. Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *American Political Science Review* 63.

⁵⁹ Christian Joerges, 'Constitutionalism and Transnational Governance: Exploring a Magic Triangle' in Christian Joerges, Inger-Johanne Sand, and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 343.

⁶⁰ Teubner (n 23) 63.

⁶¹ Paul Schiff Berman, 'Toward a Jurisprudence of Hybridity' (2010) 1 *Utah Law Review* 11, 14–15.

cannot hide the fact that these societal constitutionalizations always involve societal power configurations and legitimations.

VIII. The Imaginary of Prosperous Imperium

The growing complexity and differentiation of administrative and economic management and their legal regulation and political context led to a rethinking of the concept of constitution in all these social systems. The economic constitution has been adopted by European constitutionalism theories to highlight the importance of European economic and administrative regulation⁶² and the role of both national and European political institutions as economic agencies. At the same time, it addresses the political role of economic institutions such as banks, market regulators, and trade organizations.

In post-1945 European integration, the common market has always been associated with the imaginary of the European commonwealth. The market as social institution, based on economic rationality and communication through the code of profit, was to constitute Europe as the union of economic prosperity and political stability. In this transnational society, politically authoritative decisions and their enforcement in the common market realm were expected to be legitimized by factual recognition of mutual benefits and profitability.

European integration and its history are examples of the typically modern process of politicization of economy. Unlike the Marxists, who considered economy a substructure of society which determines the processes of political and legal superstructures, the founding fathers of the European common market believed it to be just one institution to be taken together with other institutions of evolving European society and its specific systems of law, politics, administration, science, or education.

The EU's economic constitutionalization went hand in hand with the post-Maastricht EU's process of steady political constitutionalization.⁶³ Nevertheless, the imaginary of the prosperous transnational *imperium* has been just as intrinsic to its early history as the complex presence of European integration. Constitutionalization of the European economic system thus cannot be limited to the structural coupling between the systems of European economy and law. It has been part of the evolution and constitution of European society beyond its political, legal, and economic or administrative regulation limits.

According to this imaginary, the market's economic function is also considered a societal force behind political constitution-making. In this respect, it is possible to analyse the EU's economic constitution by applying Max Weber's classic definition of imperium as discipline based on the recognition of rules as factually binding, which, nevertheless, can be politically enforced against possible resistance.⁶⁴ Its combination

⁶² See especially Giandomenico Majone and others, *Regulating Europe* (Routledge 1996); Renaud Dehousse, 'Europe Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?' (1998) 35 *Common Market Law Review* 595.

⁶³ Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27.

⁶⁴ Max Weber, *Economy and Society: An Outline of Interpretive Sociology. Vol II* (UC Press 1978) 651–52. This classic definition is different from more recent distinctions between imperium and dominium in the

of societal discipline and political enforcement explains specific operations of the European common market and its proclaimed ability to generate commonwealth and political interests beyond national economies and states by the instrumental mode of mutually advantageous consociation.⁶⁵ The political appeal of the spontaneously evolving market and the economic appeal of a strong state legally enforcing market rules thus reinforced each other throughout the history of European integration, and the influence of the German school of ordoliberalism was significant in this context.⁶⁶

The imaginary of a spontaneous social order of the common market and the imperium of prosperity evolving from it was strongly supported by juridical constitutionalization, including the ECJ's case law. As Karlo Tuori observed, 'the second-order principles of effectiveness and uniformity have functioned as a bridge linking economic and juridical constitutionalisation.'⁶⁷ The ECJ's jurisprudence of free movement law became a key moment in the economic constitutionalization of Europe.⁶⁸

The constitution of a supranational European polity legitimized by the economic value of prosperity was as important as its legitimation by political values of democracy, rights, and peace among the multitude of European peoples. However, initial procedural values of the economic constitution externally assisting the common market by legal rules gradually became accompanied by other societal values of rights, harm, and solidarity, to the extent that some scholars now speak of the specific subsystem of 'the social constitution.'⁶⁹ The post-Maastricht EU's economic constitution thus accommodates concepts of political constitutionalism, such as citizenship, representation, and participation.⁷⁰

Furthermore, the post-Maastricht economic constitutionalization of the EU witnessed various conceptualizations and criticisms of political interference and consequences of the single market regulations, the evolution of economic and social rights, and exceptional responses and policies of the European Central Bank (ECB), the

sociology of law and economics literature. For instance, Terence Dainith defines imperium as 'a generic term to describe those instruments of policy which involve the deployment of force by government' and dominium as 'those policy instruments which involve the deployment of wealth by government'. See Terence Dailith, 'Legal Analysis of Economic Policy' (1982) 9 *Journal of Law and Society* 191, 215–16. Instead of using this distinction between the use of force and distribution of wealth by government, I refer to Weber's definition of imperium as the recognition of rules as factually binding and the combination of power of discipline and punishment.

⁶⁵ Jiří Přibáň, 'Imaginary of the *Imperium* of Prosperity and Economic Constitutionalism in the EU: A Socio-Legal Perspective of Spontaneity of the Common Market and Its Limits' in Lisa Mardikian, Achilles Skordas, and Gábor Halmai (eds), *Economic Constitutionalism* (Edward Elgar Publishing 2023).

⁶⁶ Milene Wegmann, *Früher Neoliberalismus und europäische Integration. Interdependenz der nationalen, supranationalen und internationalen Ordnung von Wirtschaft und Gesellschaft (1932–1965)* (Nomos Verlagsgesellschaft 2002).

⁶⁷ Karlo Tuori, *European Constitutionalism* (CUP 2015) 137–38.

⁶⁸ Harm Schepel, 'Constitutionalizing the Market, Marketing the Constitution, and How to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 *European Law Journal* 177.

⁶⁹ Tuori (n 67) 227–32.

⁷⁰ Peter Lindseth, 'Delegation Is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 139–63.

European Commission (EC), and the International Monetary Fund (IMF) adopted vis-à-vis the eurozone economic crisis. Ad hoc informal bodies without official jurisdiction, such as the 'Troika' consortium of the ECB, EC, and IMF, exposed the state of economic and administrative governance and its detrimental effects on democratic legitimacy and constitutional values at member state and European levels.⁷¹

As regards the EU's economic constitution, the imaginary of spontaneous self-constitution and coupling between the common market and case law produced by the judiciary and courts through dispute resolution⁷² was challenged by the European Commission's growing regulatory powers in the post-Maastricht EU. The ECJ's initial function of a 'negative integration' guarantor⁷³ was limited by the institutional and organizational transformations commonly described as the EU's 'macroeconomic constitution'.⁷⁴

Policy documents, such as the Stability and Growth Pact of 1997 and the fiscal pact in the Treaty on Stability, Coordination and Governance, constitute the EU's political economy, focusing on political implications of the European market as much as economic implications of EU politics, which include both European and member state political systems.⁷⁵ Furthermore, the macroeconomic constitution now has its case law, such as the ECJ *Commission v Council* ruling in 2004 regarding the excessive deficit procedure⁷⁶ and the *Pringle* case addressing the eurozone crisis.⁷⁷

The imaginary of the spontaneously self-constituting imperium of prosperity, which evolves as a structural coupling between European economy, politics, administration, and law, thus currently operates as a background power of EU economic constitutionalism in both its microeconomic and macroeconomic regimes.

IX. The Imaginary of Mobilized European Democratic Communitas

In normative constitutional theory and philosophy, impersonal rationality of the market and consociation of utilitarian and purpose-oriented action is often contrasted with imaginary communities of values and collective existence, such as nations. The distinction between the forces of life in its authenticity and the forces of alienating systems is a formula used for both progressive or conservative revolutions and for the alleged symbolic revolution of humanity against alienating systems. The first goal of

⁷¹ Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review* 817, 824–26.

⁷² Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004) 66.

⁷³ Koen Lenaerts and Eddy de Smijter, 'The Question of Democratic Representation: On the Democratic Representation through the European Parliament, the Council, the Committee of the Regions, The Economic and Social Committee and the National Parliaments' in Jan A Winter, Deirdre Curtin, Alfred E Kellermann, and Bruno de Witte (eds), *Reforming the Treaty on European Union—The Legal Debate* (Kluwer Law International 1996) 173, 175.

⁷⁴ Tuori (n 67) 174.

⁷⁵ Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union* (OUP 2005).

⁷⁶ C-27/04 *Commission v Council* [2004] ECLI:EU:C:2004:436.

⁷⁷ C-370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756; see also Tuori (n 67) 210.

politics is then considered to be overcoming the enormous force of money and capitalism by the sovereign powers of the forces of life.⁷⁸

These imaginaries contrasting the impersonal logic of legality, *calculemus*, and the market to the mobilized agora of political society are part of the populist rationality drawing on the distinction between elitist expert knowledge and popular wisdom. It can be taken as evidence of further constitutionalization and democratization of EU politics that these imaginaries now find their specific forms and formulations in the context of EU constitutionalism.

The emergence of democratic mobilization in the European context is a response to the growing populism at member state level. While populism is commonly contrasted with constitutionalism⁷⁹ and perceived as the cause of backsliding towards authoritarianism,⁸⁰ some scholars appeal to ‘populist reason’ as a tool mobilizing and speaking for ‘the outsiders’ to ‘the system.’⁸¹

In this theoretical context, constitutionalism stands for power limitation and populism is considered the realm of the political will and power formation beyond institutional and constitutional constraints.⁸² Because societal constitutionalism defines imaginaries as background power, it logically has to examine the imaginary of populism in its both national and European contexts.

The post-1989 rise of identity populism and its politics is part of the transnationalization of global society.⁸³ It also informs the process of European integration and its constitutional imaginaries of authentic political identity and alienating depoliticization, both of the people and beyond. Description of the EU as a politically deficient and even morally corrupt administrative machinery or imperium of money and profit⁸⁴ is a populist response to the profound Europeanization of national societies and its impact on the typically modern imaginaries of nation, state, democracy, and popular sovereignty.

Constitutional imaginaries of transnational Europe face a populist backlash due to their transformative power affecting the state and nation and their forms of organization and functions in modern society. European integration used to be imagined as an alternative to the modern history of nationalist politics dominated by nation-states. However, the current state of the EU, with its democratic deficit and expertise-driven decision-making, cannot avoid collisions with populist imaginaries and responses emerging within and beyond democratic institutions of

⁷⁸ *ibid* 507.

⁷⁹ Jan-Werner Mueller, ‘Populism and Constitutionalism’ in Cristobal Rovira Kaltwasser and others (eds), *The Oxford Handbook of Populism* (OUP 2017).

⁸⁰ Cass Mudde and Cristóbal Rovira Kaltwasser (eds) *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (CUP 2013); Paolo Cossarini and Fernando Vallespin (eds), *Populism and Passions: Democratic Legitimacy after Austerity* (Routledge 2019).

⁸¹ Ernesto Laclau, *On Populist Reason* (Verso 2005) 153.

⁸² Jan-Werner Mueller, *What Is Populism?* (University of Pennsylvania Press 2016).

⁸³ Ulrich Beck, Anthony Giddens, and Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (SUP 1994).

⁸⁴ For an analysis of Eurosceptic attitudes from critics of the EU’s current regime to the critics of EU policies and supports of exits from the EU, see Catherine E De Vries, *Euroscepticism and the Future of European Integration* (OUP 2018) 8.

its member states.

The EU constitution-making failure and subsequent searches of post-constituent constitutionalism only highlight the inseparability of constitutionalization and democratization and the coevolution of political representation and identity beyond the semantics and structures of the modern nation-state. Responding to these processes, the imaginary of the transnational pluralistic European public spheres and the peoples' Europe mobilized as 'demoiocracy' has been formulated by recent theories of European constitutionalism.

The transnational European public sphere cannot be imagined as constituting a democratic sovereign. However, it can be imagined as a communication network channelling the deontology of rights, liberty, and equality as part of the public media network⁸⁵ and critically observing and pluralistically limiting the expansion of power formed through EU political institutions.

To have one public sphere speaking in the authentic voice of the European people is an impossible fantasy. However, EU democratized politics can be reimagined as a specific mobilizing and pluralistic structure of public spheres⁸⁶ of communication between governing institutions and the governed citizens and peoples of the EU.⁸⁷

This imaginary of the mobilized European public spheres is very close to the concept of demoiocracy pursued by some scholars as a response to the increasing conflicts between elitist and populist legitimations permeating EU institutions. While originally used in a critical sense to describe the constitutional dilemma of EU politics in the 1990s and the need to constitute a European demos,⁸⁸ Kalypso Nicolaïdis recently adopted the concept as a middle way between the federalist dream of the European demos and the intergovernmentalist notion of the EU as an association of states governed by their sovereign demoi.⁸⁹

The concept of demoiocracy responds to the EU's democratic deficit by arguing that the absence of the European demos does not rule out the possibility of democratic control and legitimacy of EU political institutions. The EU as a *communitas* of demoi governing together but not as one abandons the imaginary of one Europe of shared values, further strengthening the European bonds and collective identity, and instead builds on procedures of deliberative democracy and applies them to the pluralistic community of the EU.⁹⁰

⁸⁵ Ruud Koopmans and Paul Statham (eds), *The Making of a European Public Sphere: Media Discourse and Political Contention* (CUP 2010).

⁸⁶ Thomas Risse (ed), *European Public Spheres: Politics Is Back* (CUP 2014).

⁸⁷ Hans-Jörg Trenz and Klaus Eder, 'Democratizing Dynamics of a European Public Sphere' (2004) 7 *European Journal of Social Theory* 5.

⁸⁸ Philippe van Parijs, 'Should the European Union Become More Democratic?' in Andreas Follesdal and Peter Koslowski (eds) *Democracy and the European Union* (Springer 1998) 287.

⁸⁹ Kalypso Nicolaïdis, 'European Demoiocracy and Its Crisis' (2013) 51 *Journal of Common Market Studies* 351

⁹⁰ James Bohman, 'From Demos to Demoi: Democracy across Borders' (2005) 18 *Ratio Juris* 293.

X. Concluding Remarks: EU Societal Constitutionalization and its Imaginaries

European societal constitutionalism has the capacity to theorize constitutional processes as part of both social integration and fragmentation, divergence and convergence, inclusion and exclusion, legal and non-legal regulation. It actually comprehends these distinctions as part of the same functionally differentiated process of societal self-constitutionalizations and highlights conflicts, contestations, and crises emerging between the economic, social security, legal, and political constitutions of the EU.

For instance, the eurozone financial crisis led to political responses exceeding the legitimate self-constraints of EU legality and administrative governance. These responses are considered the *de facto* state of exception in which legality has been suspended and decisions taken without pre-existent rules.⁹¹ The failure of *gubernaculum* of economic efficacy thus threatens to delegitimize the existing *iurisdictio* of EU constitutional authorities.

Furthermore, the absence of supreme constitutional authority vis-à-vis the financial and economic or migrant crises experienced by the EU has revealed the plurality of power structures and their reconfigurations in different sectoral constitutions of the EU. If democracy originally had been constituted as the political system granting power to the many poor citizens—the *demos*—against the few rich citizens of the ruling elite—the *oligoi*⁹²—the current critical state of the EU offers a new form of this structural conflict and coupling of societal powers not only beyond the nation-state and national polity segmentary boundaries, but also as part of functional differentiation and self-limitation of the general systems of law, administration, economy, and politics.

Some critics respond to these challenges by calling for genuine political constitutionalism with the autonomous capacity of EU institutions to mobilize and enforce fiscal and human resources and thus exercise supreme constitutional authority. According to them, the growing societal *potentia* of European economy, law, and administration is becoming a destabilizing force in the absence of political *potestas* behind *auctoritas* of EU constitutional law. This absence allegedly leads to the ‘parasitic legitimacy’ of the EU and ‘as if’ fictional constitutionalism, which is weak in terms of both its normative foundations and its efficacy and cannot sustain further EU integration.⁹³

Nevertheless, EU societal constitutionalization and its different imaginaries show that, if there is a basic norm of European constitutionalism, it can be summarized as ‘no *gubernaculum* without *iurisdictio*’. However, this basic norm operates in both political and non-political regimes, which are the holders of power beyond politics and legitimation beyond legality.

⁹¹ See, for instance, Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance Authoritarian Managerialism versus Democratic Governance* (Hart Publishing 2014).

⁹² Paul Cartledge, *Democracy: A Life* (OUP 2016) 18–19.

⁹³ Peter L Lindseth, ‘The Perils of “As If” European Constitutionalism’ (2016) 22 *European Law Journal* 696.

The tension between democratic *iurisdictio* and technocratic *gubernaculum* in European constitutionalism may be managed by societal constitutions of *demoi* with the *potentia* of dissent and its execution through the procedures of systemic self-contestation in EU law, politics, administration, and economy. European constitutionalism then carries the possibility of legitimation and ‘jurisprudence’ of different regimes of administrative, economic, and legal knowledge. Understanding this jurisprudence of different disciplines of knowledge requires identifying and analysing their constitutional imaginaries evolving in different social systems, and constituting new subjects of both political and societal constitutions in Europe.