European constitutional imaginaries: a socio-legal perspective

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Abstract

Constitutional imaginaries are internal symbolic constructs of self-constituted positive law and politics which make it possible to imagine and describe functionally differentiated modern society as one polity and distinguish between legal and political legitimacies and illegitimacies in this polity. Imaginaries, therefore, are not limited by the unity of *topos-ethnos-nomos* and evolve in national as well as supranational and transnational constitutions. In the context of European constitutionalism, general imaginaries of the common market, universal rights and democratic power are thus accompanied by specific imaginaries of European integration through legal *pluralism*, administrative rationality of *calculemus*, economic *imperium* of prosperity and democratically mobilised non-state *community*. These imaginaries invite constitutional theorists to rethink the juridical concept of constitution and employ sociological and social theoretical perspectives of constitutionalism within and beyond the state. 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 the paradox of modern society constituting its unity as difference, yet preserving its imaginary capacity to describe such differentiation as unity. Like any other society, European society thus represents its collective self to itself only through the specific imaginaries spontaneously constituted by its different systems.

1 Constitutional imaginaries: a general outline

The concept of imaginaries invites constitutional and political theorists, philosophers and sociologists to critically revisit the concept of constitution as the normative legal limitation and control of political power. Imaginaries demonstrate that political constitutions also enhance this power and even represent societal forces impossible to contain by legal norms and political institutions.

The growing research interest in constitutional imaginaries, therefore, coincides with intellectual explorations of constitutions and constitutionalism beyond strictly legal and political perspectives. The cultural and symbolic dimension of constitutions is highlighted against the background of growing fears and anxieties regarding liberal constitutionalism as the core of modern democratic societies, both in relation to various forms of populist contestations within democratic systems and new forms of authoritarian politics.

In this societal, political and intellectual development, philosophies of Cornelius Castoriadis[1] and Claude Lefort[2] get cited next to the works of Benedict Anderson[3] and Charles Taylor.[4] Critical theoretical approaches are applied as much as methodologies of social and cultural anthropology.[5] Ernst Cassirer's philosophy of symbolic forms[6] and Paul Ricoeur's philosophy of mind and imagination[7] inform recent research of imaginaries as strongly as Emile Durkheim's sociology of collective representations[8] and Karl Mannheim's sociology of knowledge.[9]

Philosophical and sociological perspectives of imaginaries of politics and law are deeply intertwined[10] and the concept of imaginary is used as both a critical and analytical tool by current legal and constitutional theory in national and transnational contexts including the European Union. Analytical distinctions between cultural homogeneity and heterogeneity get reformulated by the language of normative critical theory. The interplay of transcendence and immanence or objective and subjective values affects legal and ethical arguments which are subsequently scrutinised by sociological theories and methods.

Explorations of imaginaries are open to many different approaches, and interpretations are many, yet philosophers and social scientists agree that imaginaries symbolically constitute society as unity despite all sorts of societal differences. They represent a specific paradox of modern society which is functionally differentiated into social systems such as economy, politics, law, religion, art and science and constitutes its unity as difference,[11] yet also describes itself through symbolic communication of differences as unity.

Because of imaginaries, society can represent its self to itself.[12] Despite all differences, imaginaries have the capacity to represent the pluralistically constituted and functionally differentiated modern society as the collective self of shared experiences, meanings and values.[13] As Taylor states, social imaginaries constitute 'common understanding that makes possible common practices and a widely shared sense of legitimacy'.[14] From a different philosophical perspective, Castoriadis argues that society is a system of significations which needs to define its identity, yet this definition is always in the imaginary mode. Society thus constitutes itself by factual answers to the imaginary question of collective self which does not have a single normative and value framework in modern culture.[15]

Imaginaries reconstitute society as one polity and their function is to differentiate between what is considered legitimate and illegitimate in it. Shortly, the function of imaginaries is the constitutionalisation of *facts* of differentiated societal power as legitimising *values* of one polity.

In the context of European integration and supranational law, politics, economy and administration, it is possible to see a growing body of interdisciplinary research of imaginaries in

[1]C Castoriadis, *The Imaginary Institution of Society* (Polity Press 1987).

[2]For Lefort on ideology and imagination, see C Lefort, *Democracy and Political Theory* (The MIT Press 1989); for the relationship between Lefort's notion of ideology and the social imaginary, see JB Thompson, 'Ideology and the Social Imaginary: An Appraisal of Castoriadis and Lefort' 11(5) (1982) Theory and Society 659.

[3]B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

[4]C Taylor, *Modern Social Imaginaries* (Duke University Press 2004).

[5]S Adams and JCA Smith, *Social Imaginaries: Critical Interventions* (Rowman & Littlefield 2019).

[6]See especially E Cassirer, *The Myth of the State* (Yale University Press 1946) 45.

[7]P Ricoeur, *Lectures on Imagination* (University of Chicago Press forthcoming in 2024).

[8]E Durkheim, 'Représentations individuelles et représentations collectives' 6(3) (1898) *Revue de Métaphysique et de Morale* 273, 300.

[9]K Mannheim, *Ideology and Utopia* (Routledge & Kegan 1936).

[10]See Cassirer's comment quoted in P Bourdieu, *On the State: Lectures at the College de France, 1989–1992* (Polity 2014) 165.

[11]N Luhmann, *Theory of Society, Volume 2* (Stanford University Press 2013) 16.

[12]C Gilleard, 'From Collective Representations to Social Imaginaries: How Society Represents Itself to Itself' 5(3) (2018) European Journal of Cultural and Political Sociology 320.

[13]JB Thompson, *Studies in the Theory of Ideology* (University of California Press 1984) 6.

[14]C Taylor, supra (n 4) 23.

[15]C Castoriadis, supra (n 1) 146–7.

European constitutional law and politics. For instance, Paul Blokker offered a profoundly sociological analysis of political constitutionalism including the imaginary of constitution and constitutionalism itself.[16] Zoran Oklopcic and Martin Belov provided for a theoretical analysis of symbolic–imaginary constitutionalism.[17] Focusing on the EU's political economy, Marija Bartl formulated a sophisticated alternative imaginary of collective prosperity in the EU.[18] Hugo Canihac explored early imaginaries in the history of European integration.[19] Jan Komárek analysed ideologies and imaginaries of European integration and recently edited a complex volume of essays on European constitutional imaginaries.[20]

Reflecting on these and many other recent original and innovative approaches to constitutional imaginaries, it is then necessary to avoid two different traps. The first one is ontological and takes imaginaries as definite responses to the question of the collective existence which is so popular with all varieties of identity politics. However, imaginaries are not constituted by some supreme authentic voice of the collective mind expressing the true self of society in its totality. The second one is related to the ideological critique and risks treating imaginaries as either the substructure of material power speaking through legal and political superstructures, or the superstructure of hegemonic ideology controlling the material constitution of society. However, imaginaries need to be distinguished from cultural myths of identity politics as much as ideologies allegedly obscuring the true nature of modern economy and politics. Their function is not ontological in the sense that they would operate as expressions of a true rule of humanity to be incorporated by the systems of positive law and politics. They are not ideological falsifications of social and political reality manipulated by the powerful groups and their material interests. Imaginaries, rather, are both constituting and constituted by society in its polysemy and rationalities of different systems.[21]

Imaginaries are constituted by specific social systems including the systems of positive law and politics. They are societal forces evolving immanently though these systems which are impossible to control by political and legal institutions and ideologies. They, therefore, require adopting the socio-legal perspective of societal constitutionalism to comprehend their meaning and potential of making transcendental validity claims which transform differentiated society into one political community of shared values.[22] A social theoretical inquiry into the imaginary constitution of political power and legal authority subsequently cannot be limited by either jurisprudential matters of legal principles and reasoning, or political matters of power institutions and constellations. It has to dig much deeper into the constitution of modern functionally differentiated society and its pluralistic value structures, unified only through the semantics of higher abstraction of imaginaries.

2 European constitutional imaginaries: beyond the unity of *topos-nomos-ethnos*

The constitution of society as one polity defined by the unity of *topos-nomos-ethnos,* the imaginary of polity as the unity of one people living on its territory under the rule of law, was intrinsic part of

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[16]P Blokker, 'The Imaginary Constitution of Constitutions' 3(1) (2017) Social Imaginaries 167.

[17]M Belov, *Constitutional Semiotics: The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart 2022) 107–25; Z Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018).

[18]M Bartl, 'Towards the Imaginary of Collective Prosperity in the European Union (EU): Reorienting the Corporation' 1(4) (2022) European Law Open 957.

[19]H Canihac, 'The Making of an Imagined "Community of Law": Law, Market and Democracy in the Early Constitutional Imaginaries of European Integration' 18(1) (2022) European Constitutional Law Review 2.

[20]J Komárek (ed), *European Constitutional Imaginaries* (Oxford University Press 2023).

[21]Compare, for instance, H Blumenberg, *Work on Myth* (The MIT Press 1985) 37.

[22]For the paradox of transvaluation of values and the imaginaries' capacity of representing the immanent societal constitution by transcendental validity claims, see J Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge 2022) 56–8. Here, I use the methodology of social systems theory and argue that imaginaries can be analysed as expanding the potential of functional rationality of different social systems and contributing to their legitimation beyond efficiency and performativity by making them part of the symbolic constitution of society.

the historical rise of modern nations and nationalisms as much as the constitution of democratic liberal and republican statehood. Through the modern nation state and its legal constitution, society imagines its unity, commonality and meaningful existence. This imaginary of the collective self as one polity persists in the current globalised society.

Like the modern nation states, the process of transnational European integration pursues two general goals, namely economic prosperity and social stability. These goals are formulated through imaginaries which are also typical of the nation states, that is market as free exchange of mutual advantages and benefits, rights equally shared by their subjects and power democratically accountable and operating and conditioned by the public sphere. These social imaginaries are impossible to simply be translated from the nation state to the transnational constitutional structures of the EU which are expected to be socially and morally pluralistic, efficiently and rationally governed, economically prosperous and sufficiently democratised.

Nevertheless, the process of European integration and the constitution of European society shows that constitutional imaginaries are not limited by the classic imaginary of *topos-nomos-ethnos* and evolve in national as well as supranational and transnational constitutions. In the context of European constitutionalism, general imaginaries of the common market, universal rights and democratic power are thus accompanied by specific imaginaries of European integration through legal *pluralism*, administrative rationality of *calculemus*, economic *prosperity* and democratically mobilised non-state *community*. These imaginaries have evolved and operate as societal background power constituting and legitimising European polity. They, therefore, invite constitutional theorists to rethink the juridical concept of constitution and employ sociological social theoretical perspectives of constitutionalism within and beyond the state.

These imaginaries are constituted by different social systems of positive law, administration, economy and politics and transform the imaginary of political constitution beyond the classic unity of *topos-nomos-ethnos*. A socio-legal theory of European constitutional imaginaries, therefore, needs to address this transformation of political constitution and the adoption of its imaginary by other social systems. It can do it by moving from the question of *what* is the social self as constitutional polity to the question of *how* this imaginary of the collective self is constituted by different systems and their semantics.

European constitutional imaginaries are to be comprehended as part of polysemous and polyvalent societal constitutionalism of the EU beyond constraints of law and politics and the old semantics driven by the imaginary unity of statehood. Focusing on the specific European imaginaries of legal *pluralism*, administrative *calculemus* of social steering, economic *imperium* of prosperity and democratically mobilised *communitas* and their European contextualisations of the general modern imaginaries of market, rights and power in the following sections, the following sections analyse how these specific imaginaries are internally constituted and operate within functionally differentiated systems of European 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 the paradox of modern society constituting its unity as difference, yet preserving its imaginary capacity to describe such differentiation as unity. Like any other society, European society thus represents its collective self to itself only through the specific imaginaries spontaneously constituted by its different systems.

3 The imaginary of legal *pluralism*

A view of the post-Maastricht EU as constituted by the pluralistic legal structures shows that the very concept of EU legal and constitutional pluralism gradually evolved into the 'prevailing

orthodoxy'[23] in EU legal and political studies. It also reveals another core image of constitutional law, namely the constitution of society as polity subject to the legitimate authority of law. While typical of the modern rule of law based nation state, this image is also an intrinsic part of European transnational constitutional imaginaries and theories of EU constitutional law.

Searching for the operative capacity of EU law, Kaarlo Tuori's theory of sectorial pluralism of EU constitutional law considers the common legal discourse a guarantee of normative coherence of decision-making and interpretation in the system otherwise typical of diverse legal practices and roles.[24] The EU constitutional discourse interconnects the pluralistic sectors of the macroeconomic, microeconomic, social welfare and security constitutions evolving through multi-dimensional and multi-temporal processes of EU legal integration.[25] The constitutional discourse promotes convergence, conversation and dialogue among different constitutional sectors of the EU which, rather than considered necessary conditions of the EU law's efficacy and governing capacity, are considered superior values of EU constitutionalism.

EU pluralism of constitutional sectors has its historical roots in the distinction between economic and political constitutionalisation of European integration and the systemic differentiation of EU economy, law and politics reflected in different theories of EU constitutionalism.[26] In this context, Michelle Everson contrasted the state centred imaginary of polity self-constituted by a legal act expressing the common will to share political destiny and existence to the imaginary of polity created by the European market and economic constitution. Everson then argues that, like the market economy, the European legal system has both integrative and disintegrative effects. The EU legal system certainly contributes to the constitution and evolution of European polity but it is not its only constitutive force. This polity also evolves through the plurality of non-legal economic, administrative and other societal rationalities. EU constitutionalism subsequently moves beyond legal and political rationalities and accommodates the multiplicity of societal rationalities and their mutual differences and incommensurability. Rather than operating as the European polity's supreme normative constitutional structure, EU's legal constitution reflects the plurality and functional complexity of the current EU.[27]

The process of functional differentiation of European society and the EU's legal pluralism cannot be limited by the discursive unity relating different sectoral constitutions of the EU to each other and ultimately integrating them into one multi-level and multi-sectoral European constitutional polity. An alternative imaginary of European legal pluralism can be formulated by the theory of societal constitutionalism which argues that constitutions evolve in society beyond politics and operate as the self-referential unity of primary non-legal and secondary legal rules which recursively strengthen different regimes and networks of societal regulation from economy and education to science and sport.[28] This concept of societal constitutionalism, rather than on the concepts of political power and legal authority, draws on operability and functionality of both legal and non-legal or political and non-political constitutions and their governing and steering capacity.

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[23]JHH Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 8 at 8; for the contrast of general orthodoxies and heterodoxies of legal pluralism theories, see E Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Ashgate 2009) 25–44.

[24]K Tuori, *European Constitutionalism* (Cambridge University Press 2015) 113.

[25]Ibid, 319.

[26]See especially, MP Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998); W Sauter, 'The Economic Constitution of the European Union' 4 (1998) Columbia Journal of European Law 27–68; C Joerges, 'What Is Left of the European Economic Constitution: A Melancholic Eulogy' 30 (2005) European Law Review 461–89; S Guibboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge University Press 2006).

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

[28]G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 88.

The socio-legal concept of constitutional pluralism finds its most original definition in Gunther Teubner's theory of fragmented societal constitutionalism and global legal pluralism. This theory revisits Luhmann's autopoietic systems theory and reinterprets Ehrlich's notion of living law to argue that constitutions actually emerge in society as counter-developments limiting the expansion of traditional politics and political constitutions. Societal constitutions thus function as external limitations of the modern expansionist tendency to politicise autonomous social spheres and increasingly enforce political regulation of non-political sectors of society.[29]

According to this theoretical view, societal constitutions evolve at European and global levels as autonomous forms of legal regulation externally assisting self-constitutions of non-legal societal sectors by their own binary coding of legal/illegal.[30] Societal constitutions, therefore, include legislatures and courts as much as epistemic communities, professional associations, NGOs, corporations, and charities. The concept of constitutionalism subsequently ceases to be just a political and juridical concept and becomes theorised beyond politics and law as much as beyond statehood and nationhood.

Furthermore, the systems theory of societal constitutionalism leads to the reformulation of the concept of European polity as constituted through the pluralistic societal self-constitutionalisation of functionally differentiated European society. This has significant legal theoretical and constitutional consequences. The juridical pluralism of different legal normative orders and their authorities, so typical of the EU's supranational and transnational structures incorporating the constitutional sovereignty of Member States, gets replaced by the socio-legal systemic pluralism critical of the state sovereignty based constitutionalism. While state constitutions persist as autonomous systems within the EU, their sovereignty has been both juridically and politically divided and their operations have been limited by other functionally differentiated systems beyond EU law and politics. According to the systems theory of societal constitutionalism, social differentiation is thus paradoxically considered 'the basic norm' which has the capacity to conceptualise constitution-making processes as part of both social integration and fragmentation, divergence and convergence, inclusion and exclusion or legal and customary regulation.

This socio-legal reformulation of the concept of constitutional pluralism helps to understand the constitution of European polity as an outcome of both European integration and differentiation. Self-constitutionalisations of different systems of European society[31] also operate as societal checks and balances against over-politicisation of European and other forms of constitutionalism beyond the state.[32] Constitutional conflicts and contestations between different European institutions or between the EU and its Member States, which arise from the pluralistic legal and political structures of the Union, subsequently have to be reconceptualised as part of functional differentiation and self-limitations of the general systems of administration, economy and politics to be discussed in the following sections.

4 The imaginary of administrative *calculemus*

In theories of European governance, the crucial role of administrative reason sometimes resembles early modern theories of human and social progress as the replacement of irrational political quarrels by the administrative rationalisation guaranteeing the better productivity and efficiency of social organisation. Politics was expected to give way to the rational *calculemus* drawing on the authority of statistical and quantitative data and expert knowledge. As Condorcet, who coined the

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[29]For critical assessment, see J Přibáň, 'Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner's *Constitutional Fragments* and Thornhill's *A Sociology of Constitutions*' 39(3) (2012) Journal of Law and Society 441.

[30]Teubner, supra (n 28) 105–10.

[31]For the European context, see J Přibáň (ed), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (Routledge 2016).

[32]G Anderson, 'Beyond "Constitutionalism Beyond the State"' 39(3) (2012) Journal of Law and Society 359.

concept of calculemus, argued, scientific organisation and disinterested experts can govern society much more efficiently and therefore better than politicians and their governments.[33]

The distinction between polity and society and the contrast between the inefficiency of political reason held by democratic contestations and the efficiency of administrative reason pursued by technocratic knowledge and expertise continue to inform recent theories of transnational European governance including the theory of societal constitutions. They share the criticism of modern politics as a system of conflicts, negotiations and power struggles mainly organised through the state and its official laws. In societal constitutionalism, *calculemus*-based governance is thus considered one of multiple forms of constitutionalisation beyond the systems of positive law and politics.[34]

As outlined in the previous section, the theory of societal constitutionalism moves the concepts of constitution and polity beyond the domains of legal and political science. They are being imagined not only beyond the nation state organisation but also beyond the public/private, procedural/substantive and official/non-official law distinctions. This theorisation is close to those theories of European governance which treat the concept of governance as different from both the juridification logic of the system of positive law and the power logic of the political system. European transnational and supranational forms of governance then appear to be just specific forms of multiple societal constitutionalisations.[35]

As regards this intersystemic connection between law and governance, Christian Joerges commented that '[W]hile governance arrangements seek the law's support, they also challenge the law's rule through a de-juridification of the polity'.[36] The problem of depoliticisation of constitutionalism and the rule of law by governance structures is strongly present in the historical process of EU integration and the role of law in it.

European polity beyond statehood and nationhood is commonly described as heterarchical and promoting both diversity and unity and constituting a polycentric and pluri-dimensional configuration of authority transcending territorial boundaries and national identities.[37] While the EU's societal self-constitutionalisation reveals the systemic limitation of politics and law in European society and the parallel importance of non-political and non-juridical systems such as economy, education and science or the media, this process also remains responsive to the expectations of public accountability and democratisation of the EU's transnational governing bodies.[38]

Furthermore, the theory of societal constitutionalism argues that European constitutionalism's proclaimed finality, namely the legal constitution of a European democratic polity replicating structural, semantic and normative patterns of state constitutionalism in the post-national European constellation, does not have the societal power of a legitimising transnational imaginary. In fact, it often has significant delegitimising effects. Contrary to the common theoretical claims within EU governance studies, the polycentric governance structures of EU law and politics, do not necessarily remove powers of the EU's Member States and rebuild the same power structures and semantics at European level. As witnessed in the post-Maastricht EU economic, political and constitutional crises, these structures are too weak and thin to replicate both power and legitimacy of the constitution of national polities and to reconstitute them as one European polity.[39]

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[33]I Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Pimlico 2003) 255–6.

[34]Ibid.

[35]For an early view of European governance as constitutionalisation, see AS Sweet and TL Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' 92 (1998) American Political Science Review 63.

[36]C Joerges, 'Constitutionalism and Transnational Governance: Exploring a Magic Triangle' in C Joerges, IJ Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 343, 351.

[37]N Walker, 'Sovereignty and Differentiated Integration in the European Union' 4 (1988) European Law Journal 355, 357.

[38]S Smismans (ed), *Civil Society and Legitimate European Governance* (Edward Elgar 2006).

[39]EO Eriksen (ed), *Making the European Polity: Reflexive Integration in the EU* (Routledge 2005).

Instead of grand political and juridical constitution-making accompanied by dramatic power games at state and European levels, the EU's multi-level and polycentric constitutionalisation incorporates self-limiting Member State governance structures and facilitates administrative efficiency and rationality evolving through coupling between national and transnational institutional frameworks.

However, the typically modern political problem of limitation of power is not reducible to the relationship between EU governance and Member State governments and limits of European administration's powers vis-a-vis democratically legitimised national administrations. Transnational governance by administrative expertise and efficiency remains the EU's source of both legitimation and de-legitimation itself. Recent crises of the EU reveal the limits and potentially self-destructive effects of expert knowledge. The imaginary of EU governance has to be considered a more general social problem of the self-limitation of *calculemus* rationality driving governance at both national and transnational levels.

Modern society is always at risk of de-differentiation and expansionist tendencies of specific social systems. As regards the system of politics, the risk of over-politicisation then draws on the totalitarian dystopia of popular self-government of everything driven by the Schmittian concept of identitarian statehood and national homogeneity.[40] The risk of depoliticisation, on the other hand, includes the equally totalising diktat of administrative *calculemus* as the sovereign technology of power evolving through the system of administration and entering all other social systems such as education and science. The expansion of governance by *calculemus* in the political and legal systems potentially leads to the marginalisation and even disappearance of core concepts of political constitutionalism such as citizenship, solidarity, social justice, loyalty, representative government and even the constitutional democratic state itself.[41]

The constitution of polities beyond politics and law, therefore, is not to be normatively interpreted as a political formula legitimising transnational European society. The fragmentation and differentiation of constitutional sites and regimes beyond law and politics merely demonstrate that constitutional processes can be traced in any social constellations. However, the imaginary polity communication in self-constituted social systems of European administration or economy shows that societal power can be reconceptualised and reconfigured but cannot be entirely depoliticised by sociologically expanding the meaning of constitutionalism beyond politics.[42]

5 The imaginary of prosperous *imperium*

The EU's economic constitutionalism has become intrinsic part of the post-Maastricht EU.[43] Initial procedural values of the economic constitution enabling the self-regulation of the market by external assistance of legal rules are now supplemented by the substantive values of efficiency, rights, harm and social solidarity which, according to some, evolved into the specific subsystem of 'the social constitution'.[44]

The economic constitution of the EU is a result of intersystemic communication and interrelations between the economic system and the systems of EU law and politics. Typical notions of the political constitution such as representation, participation and citizenship, became intrinsic part of economic rules and regulations in the post-Maastricht EU and started shaping its

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[40]R Wolin, 'Carl Schmitt, Political Existentialism, and the Total State' 19(4) (1990) Theory and Society 389, 403–4.

[41]However, the same risk of systemic expansion and functional de-differentiation applies to the constitutional system and any other systems evolving at European level. For instance, Dieter Grimm warns against the risk of overconstitutionalisation of the EU leading to its depoliticisation and thus contributing its democratic deficit. See D Grimm, 'The Democratic Costs of Overconstitutionalisation: The European Case' 21(4) (2015) European Law Journal 460, 469–71.

[42]N Walker, 'The Idea of Constitutional Pluralism' 65 (2002) Modern Law Review 317, 347.

[43]Sauter, above (n 26).

[44]K Tuori, above (n 24) 227–32.

economic constitutionalism.[45] Legal regulation of the common market is now profoundly influenced by economic and social rights and the recent Eurozone crisis profoundly changed views and assessments of the relationship between democratically legitimate governments and economic governance driven by efficiency and profit.[46]

These developments call for rethinking the concept of European economic constitutionalism in the context of the more general evolution of European society and its functional differentiation and specific operations of the systems of economy, law, politics and administration. The European commonwealth was historically expected to be constituted by the European common market. This interplay of prosperity created by the market and politics eventually leading to the constitution of European supranational polity is informed by the imaginary of the shared market as a social institution of the common economic and political good.

In this imaginary, the market's economic function and constitution is considered a societal force supporting the EU's unwritten political constitution including the commonality feelings among citizens and nations of the EU. A sociological analysis of European economic constitutionalism subsequently needs to analyse imaginaries behind this structural coupling between European economy, politics, law and administration and all its conflicts and crises.

In this theoretical endeavour, Max Weber's definition of *imperium* can be used as a concept explaining the persisting political appeal of the market as social institution balancing political enforcement and spontaneous evolution of society. The market is expected to harmonize individual and collective collaboration by competition based on the pursuit of particular interests which, nevertheless, discipline social behaviour and eventually contribute to the common good. However, this imaginary is inseparable from a strong state legally supporting the market regulation and enforcing the rules necessary for the functioning free market.

Weber defined *imperium* as the recognition of existing rules as factually binding which, nevertheless, is also backed by the enforcement of such discipline among the officials as well as those subject to it.[47]

This combination of social discipline and political enforcement is exactly what constitutes the imaginary of prosperous imperium in the EU. Integrated supranational and post-national Europe was expect to become the imperium of prosperity in which politically enforced and legally authoritative decisions would also be legitimised by factual recognition of mutual material benefits and economic profitability. The economic constitution in the EU and elsewhere, therefore, combines the market's *telos* and the political constitution's *nomos*. It draws on the distinction between the societal force of internal self-discipline required by the market rationality and external political enforcement.

Rather than contrasting the economic and political rationalities and constitutions as conflictual and mutually exclusive, the history of European economic constitutionalism, nevertheless, shows that the structural coupling of economy and politics rather draws on the self-constituted imaginary of imperium of prosperity in Weber's sense of the combination of the factually

[45]P Lindseth, 'Delegation Is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in C Joerges and Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 139.

[46]M Dawson and F de Witte, 'Constitutional Balance in the EU After the Euro-Crisis' 76 (2013) Modern Law Review 817, 824–6.

[47]M Weber, *Economy and Society: An Outline of Interpretive Sociology. Volume II* (University of California Press 1978; originally published in 1968) 651–2; this classic definition is different from more recent distinctions between imperium and dominium in the sociology of law and economics literature. For instance, T.C. 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 TC Dailith, 'Legal Analysis of Economic Policy' 9 (1982) 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.

recognised societal discipline and the normatively enforced political power.[48] The economic constitution subsequently can be treated as the combination of societal recognition of the market's telos and political enforcement of the legality's nomos. It can be addressed as the difference between the powers of internal self-discipline and external punishment even in the context of the transnational and highly specific system of European economy.

The imaginary of European prosperous *imperium* has been challenging the view that the legal system's centre and ultimate source of normativity is legislation because the EU's economic constitution was historically evolving as a system of economic and societal conflict resolution dominated by the judiciary and courts.[49] It was part of the judicial construction of Europe.[50] Nevertheless, the increasing legal regulatory powers and democratic accountability expectations to further steer and institutionalise the European market weaken the Court's role as a legal guarantor of the economic constitution.[51] Competition as the societal force behind the economic constitution is increasingly regulated by the Commission.[52]

Responding to these growing regulatory powers of EU institutions and the adoption of other societal goals, their regulations and policies, Christian Joerges critically concluded that 'the Maastricht Treaty was the end of the "economic constitution"'[53] and the rule of law as a founding principle of the EU was put at risk.[54] Unlike this sceptical assessment of the EU's economic constitution, Miguel Poiares Maduro and Julio Baquero Cruz highlighted the pluralistic nature of this constitution and emphasised its social dimension. Maduro thus suggested incorporating social and redistributive values into the economic constitution.[55] Similarly, Cruz emphasised social rights and non-economic values promoting democratic legitimation of the economic constitution.[56]

While acknowledging the need to incorporate social rights and justice into the EU's economic constitution, Joerges, nevertheless, further expanded and qualified his criticism of the rule of law decline in the EU vis-a-vis the Eurozone crisis management. He warned against the rule of law disregard and the de-legalisation of economic governance which, while tackling the economic crisis, weakened the EU's constitutional constellation by illegitimacies of executive federalism, the distributive regulatory and consolidating state, authoritarian managerialism and unconstrained expertocracy.[57]

Joerges's critique is extremely important because it reveals misconceptions and orthodoxies of constitutional theory of societal and legal monism built on the image of a uniform European society. Against these risks associated with legal regulation of economic governance, Joerges calls for a profound elaboration of the EU's principle of 'unity in diversity' and wants to reconstruct the economic constitution as 'a new type of "conflicts" law'.[58] According to him, this settlement would

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[48]Weber, above (n 47) 651–2.

[49]G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' 54 (2016) Journal of Common Market Studies 846.

[50]AS Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 66.

[51]K Lenaerts and E 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 JA Winter, D Curtin, AE Kellermann and B de Witte (eds), *Reforming the Treaty on European Union – The Legal Debate* (Kluwer Law International 1996) 173, 175.

[52]KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013).

[53]C Joerges, 'What Is Left of the European Economic Constitution? A Melancholic Eulogy' 30 (2005) European Law Review 461, 474.

[54]C Joerges, 'Taking the Law Seriously' 2(2) (1996) European Law Journal 105, 117.

[55]Maduro, above (n 26) 126.

[56]JB Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart Publishing 2002) 28–31, 155–60.

[57]C Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' 15(5) (2012) German Law Journal 985, 1023–4.

[58]Ibid, 1026.

require EU Member States to take their mutual economic and political interests seriously and constitute alternative cooperative common networks responding to the current and forthcoming economic and societal problems and crises. These forms of cooperation 'must then seek to derive its validity from the normative credentials of the very interactions that it organizes.'[59] Again, the recognition of societal pluralism and diversity of the EU is required to restart the process of integration and harmonisation of governance in the increasingly complex societal constellations of the EU.

The EU's economic system and its Eurozone crisis solution by exceptional measures beyond the rule of European law further illuminate the problems of legitimation of European integration.[60] In the economic constitution, the supremacy of technocratic knowledge and expertise is strengthened by the double clinch of governance by judges and economists[61] which further increases 'democratic costs'[62] of European integration beyond the systems of law and politics with their deficits of democratic legitimation.[63]

Addressing these structural problems of economic and legal constitutionalisation and political hybridity of EU institutions,[64] coupling between the systems of European economy, law, administration and politics is explored in a number of ways from the minimalist coordination of national and transnational governance to the general call for reconstituting European economy as a system based on social solidarity.[65] EU constitutionalism is subsequently described as a network of structural coupling between economic and administrative governance, legal jurisdiction and political mobilisation which organises the intersystemic communication of European politics, law, administration and economy.

One of the biggest problems of EU constitutionalism is its capacity to deal with expansionist tendencies of each of these systems. In this respect, expansionist tendencies of the economic system and its internal colonisation of other systems are as risky as the political system's expansionism threatening non-political areas of social life and their civil constitutions.

Addressing these expansionist tendencies of the economic system, Teubner explicitly stated that '[. . .] the One Reason of modernity has transformed into a late-modern polycontexturalism, a pluralism of partial rationalities, that forbids the political and social constitutions to incorporate exclusively economic rationality.'[66] The first risk of EU constitutionalism thus turns out to be the risk of functional de-differentiation which could be witnessed in the sovereign debt Eurozone crisis management subordinating the systems of democratic politics and the rule of law organised at both Member State and EU levels to the profit coding and economic efficiency.[67] The crisis management and coding took place outside the boundaries of political and legal systems while political party systems in different Member States became significantly weakened in their capacity to control political deliberation and protect democratic legitimacy of the political system.

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[59]Ibid, 1027.

[60]M Everson, 'The Fault of (European) Law in (Political and Social) Economic Crisis' 24(2) (2013) Law and Critique 107; P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press 2010).

[61]D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge, Cambridge University Press 2016).

[62]Grimm, above (n 41).

[63]A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 16(2) (2010) European Law Journal 95, 103; A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' 48 (2011) Common Market Law Review 1417; B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) Yearbook of European Law 263.

[64]F Vibert, 'Non-coercion, Decision Rules and Europe's Constitutional Debate' in D Schmidtchen and R Cooter (eds), *Constitutional Law and Economics of the European Union* (Edward Elgar 1997) 258.

[65]F De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 79–121.

[66]Teubner, above (n 28) 34.

[67]J Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' 23 (2012) European Journal of International Law 335, 335.

Political responses to the economic austerity policies thus further undermined democratic legitimacy without resolving the economic crisis and the historical evolution of EU constitutionalism thus entered a new period of 'constitutional mutation'.[68] This mutation is an outcome of expansionist tendencies of the economic and administrative systems. However, these tendencies cannot be tackled by technocratic solutions and call for the systemic rebalancing by democratically legitimate re-politicisation despite the fact that simplistic populist promises of voting the sovereign debt out of existence in general elections and referenda could not resolve the economic crisis and merely increased its risks and detrimental economic consequences as much as weakened legitimacy of political institutions and imaginaries.

6 The imaginary of transnational political *communitas*: on demoicracy

The impossibility to politically integrate the EU through its economic constitution is as unrealistic as the idea of integrating it through the legislated constitution which had been rejected following the French and Dutch national referendums in 2005. Apart from being divisive and unpopular among the European peoples, imaginary of the legal constitution as the basic normative structure for other systems of the EU collapsed because the legal system does not have the capacity to respond to the excessive demands of economic, administrative and other forms of societal governance.

Expansionist legalist and statist interventions underestimate the self-constituting potential of society and overrate, in Teubner's words, 'the cognitive and power-related capacities of the parliamentary legislator'.[69] Imaginaries of European constitutionalism, therefore, have to navigate 'between the Scylla of welfare-state concepts and the Charybdis of purely economic theories'.[70]

Furthermore, the contrast between the market's alienating rationality based on purpose-oriented interaction and the authentic political will of the people, detectable in all sorts of progressive and conservative revolutions and populist revolts, is too reductionist to inform the difference between economic and political constitutionalism. Imaginaries contrasting the dehumanising market power to the humanism of political action, rather, belong to the ideological explanations failing to grasp the complexity of political constitutionalism and the difference between expert knowledge and popular wisdom. The processes of constitutionalisation and democratisation of EU politics are then informed by transnational imaginaries reflective of intersystemic communication and structural coupling between politics and economy or law.

European constitutional imaginaries have been driven by the general expectations of economic prosperity and social stability. Modern imaginaries of the economic market, legal rights and democratic power, which constituted legitimacy of the nation state in the past,[71] continue to legitimise the EU's Member States and constitute a European polity in the present. Nevertheless, this polity has also been historically imagined against the background of the nation state's political extremities. Constitutional imaginaries of transnational Europe, therefore, draw on this controversial legacy of the modern nation state as a cradle of both constitutional democracy and illiberal dictatorship.

European integration used to be imagined as fully entrenched in democratic legitimacy of Member States and supranational European institutions both extending and respecting this democratic politics while minimising their democratic legitimacy deficits by the surplus of common economic, political and other societal benefits and interests. At the same time, this democratic self-imaginary used to be historically presented as a political and cultural alternative to the modern history of ethno-nationalism in its authoritarian and totalitarian forms. Similarly, it

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[68]AJ Menéndez, 'A European Union in Constitutional Mutation?' 20 (2014) European Law Journal 127.
[69]Teubner, supra (n 28) 28.
[70]Ibid, 35.
[71]Taylor, supra (n 4) 21–2.

used to be historically imagined as an alternative to the communist totalitarianism and imperialist ambitions of the Soviet Union disguised under the ideology of communist internationalism.

This imaginary of the EU as a historical alternative to the authoritarian and totalitarian politics finds its place even in recent political resolutions of the European Parliament supported by the vast majority of MEPs across the political spectrum.[72] Nevertheless, these recent political contestations and legitimation by negative examples does not resolve the increasing tension between the EU's expertise-driven 'elitism' and Member States' democratic institutions. Recent forms of both right-wing and left-wing populism are just one of many examples of this systemic conflict within the EU's normative foundations[73] and legitimation gaps in transnational democracy and constitutionalism.[74]

European constitutional imaginaries, therefore, have to move beyond the basic imaginary of a post-national and post-sovereign alternative to the sovereign nation state.[75] Echoing Hegel's comment that once none had the state, then some had it, and finally all have it in modern times, imaginaries of EU politics have to address the persisting function and both structural and semantic limitations of statehood and nationhood in the post-national and post-sovereign European political constellation and constitutional settlement.

The institutional weakness of the European Parliament and party politics, the absence of the European public sphere and the collective self of EU citizens rule out the constitution of European imaginary generated through civil society and identity politics confronting nationalist and other forms of populist politics emerging at Member State levels.[76] The constitution of the European identity sharing the values of constitutional patriotism, so popular during the EU's constitution-making,[77] is impossible to imagine in the current political condition despite legalist arguments endorsing the rights as transnational European identity builders[78] and the promotion of the rule of law agenda as part of the European republicanism values and identity.[79] The constitution-making failure two decades ago, rather, revealed the inseparability of constitutionalisation and democratisation as much as the coevolution of political identity and representation beyond the modern nation state.

Social and economic solidarity and transnational citizenship in the EU do not lead to the constitution of the public sphere which could replicate a collective self-understanding and cultural self-identification typical of the democratic nation state.[80] Plural identities, rather, result in a non-identitarian communication network operating through the media and limiting the societal power of the EU's systems of positive law and politics. The politics of democratisation of the EU is being constituted as the plurality of specific public spheres which facilitate political communication between governing institutions and the governed citizens, social groups and different peoples of the EU.[81]

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[72]See European Parliament resolution of 2 April 2009 on European conscience and totalitarianism, RC-B6-0165/2009. The resolution was adopted by a vote of 533–44 MEPs with 33 abstentions and co-sponsored by conservative, liberal, green and nationalist political parties in the European Parliament.

[73]See, for instance, N Bolleyer and C Reh, 'EU Legitimacy Revisited: The Normative Foundations of a Multilevel Polity' 19(4) (2012) Journal of European Public Policy 472.

[74]H Brunkhorst, 'Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism' 31(3) (2002) Millenium 675.

[75]J Přibáň, *Sovereignty in Post-Sovereign Society: A Systems Theory of European Constitutionalism* (Routledge 2015) 177–94.

[76]C Closa, 'Requirements of a European Public Sphere: Civil Society, Self, and the Institutionalization of Citizenship' in K Eder and B Giesen (eds), *European Citizenship between National Legacies and Postnational Projects* (Oxford University Press 2001) 181–201.

[77]O De Schutter, 'Civil Society in the Constitution for Europe' in EO Eriksen, JE Fossum and AJ Menéndez (eds), *The Chartering of Europe. The European Charter of Fundamental Rights and its Constitutional Implications* (Nomos 2003) 133.

[78]C Hilson, 'Legitimacy and Rights in the EU: Questions of Identity' 14(4) (2007) Journal of European Public Policy 527.

[79]A von Bogdandy, 'The European Renaissance of Republicanism: On the Future of EU Law in Light of Article 2 TEU' (January 15, 2024). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-02, Available at SSRN: <https://ssrn.com/abstract=4695467>.

[80]FS Pérez, *Political Communication in Europe: The Cultural and Structural Limits of the European Public Sphere* (Palgrave Macmillan 2013).

[81]T Risse (ed), *European Public Spheres: Politics Is Back* (Cambridge University Press 2014).

Democratisation of the EU, therefore, is associates with the imaginary of pluralistic public spheres channelling political conflicts and contestations at European level. This is closely accompanied by the constitutional imaginary of demoicracy[82] applying the principles and practices of deliberative democracy to the pluralistic political, societal and cultural constellation.

In this respect, Kalypso Nicolaïdis argues that the EU's Member States and their sovereign demoi have shared interests of both recognising national differences and exercising significantly stronger control power over European governance structures.[83] The EU as a Union of demoi governing together recognises the growing interdependence of particular polities and their capacity to constitute a new polity of shared interests and solidarity among all parties and individuals affected by decisions of European institutions.

The constitution of demoicracy depends on the EU's unique political structure as a polity of mutually fertilised liberal democratic states.[84] While criticising nationalist populism, it draws on the political potential of public mobilisation and involvement of citizens in European governance. It, therefore, is inseparable from the pluralistic public spheres and relies on democratic networks and deliberations independent of the Member States and the national public media. These heterogenic and horizontal networks of citizens and organisations are expected to challenge national constitutional imaginaries by the constitution of a transnational political *communitas* of the diversely self-constituted European demoi.

7 Conclusion

European constitutional imaginaries show that the hierarchies of state politics and law are increasingly challenged by the heterarchies of self-constituted transnational systems and hybrid normative orders combining legal and non-legal rules. Transnational legal regimes, business organisations, bureaucratic administration and civil society agencies transform the state legal systems and constitute a systemic plurality in which the imaginary of *topos-nomos-ethnos* has lost its theoretical and practical centrality.

European society, rather than the basic norm, is constituted by functional differentiation of self-constituted systems which draw on both societal unity and difference. The systems of EU law and politics construct their constitutional imaginaries as operative *pluralism* and demoicratic *communitas*. European institutions, most notably the ECJ, promote the concept of a unified supranational legal system, yet it remains contestable by top courts of Member States and recent economic, political and humanitarian crises reveal its internal and external limitations and the profoundly pluralist structure of the European legal system. The distinction and intrinsic tension between unity and difference inform operations of this system.

However, legitimation of European polity is not solely constituted by its legal operations and their internal distinctions. It equally depends on non-legal and non-political imaginaries of prosperous *imperium* and *calculemus* constituted beyond law by the market performativity and bureaucratic steering of the economic and administrative systems. Non-legal and non-political knowledge regimes and imaginaries constituted by the systems of administration and economy subsequently reformulate the political and legal questions of power and authority and the classic distinctions between technocracy and democracy, formal and informal rules or private and public law in European societal constitutionalism.

The systems of positive law and politics construct their imaginary of constitution as the legitimate form of government. At the same time, they internalise knowledge and imaginaries

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[82]JW Mueller 'The Promise of Demoi-cracy: Diversity and Domination in the European Public Order' in J Neyer and A Wiener (eds), *The Political Theory of the European Union* (Oxford University Press 2010) 187.

[83]K Nicolaïdis, 'European Demoicracy and Its Crisis' 51(2) (2013) Journal of Common Market Studies 351.

[84]F Cheneval and Schimmelfenning, 'The Case for Demoicracy in the European Union' 51(2) (2013) Journal of Common Market Studies 334.

constituted by the market performativity, administrative steering, social and moral pluralism and public mobilisation and use them as societal forces to legitimise their constitutional code of legality. The EU's founding principle *In varietate concordia*, therefore, can be revisited in the context of the theory of societal constitutionalism as the concept describing the unity of systemic differences European society which rules out the possibility of the ultimate normative and value unity overarching these differences.

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