

CONSTITUTIONAL IMAGINARIES OF EUROPE

University of Copenhagen, 6-7 October 2022

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KEY IDEA

In *European constitutional imaginaries: Between ideology and utopia*¹ a group of international scholars of various disciplinary backgrounds (constitutional law and theory, political theory, sociology, and philosophy) examined the concept of constitutional imaginary: a set of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule. Such imaginaries are as important as institutions and office-holders formally embedded in constitutions. They provide political action (anchored in the constitution and getting expression through the medium of law) with an overarching sense and purpose recognized by those governed as legitimate. Most of the time participants in the constitutional practice and every-day politics do not reflect on these imaginaries. However, there are moments when imaginaries get to the heart of the public debate: usually when a momentous step is to be taken by the polity, such as when establishing a new constitutional settlement or entering entity such as the EU, or when a crisis shatters the existing arrangements – and imaginaries that support them. IMAGINE – the ERC Starting Grant project puts constitutional imaginaries at its centre.²

While there is an emerging scholarship that examines the ‘varieties of constitutionalism’³ in Europe and how this variety affects the production of constitutional imaginaries in both sites – (nation/member) states and the EU, the published work concerns primarily conflicts between national highest courts and the European Court of Justice.⁴ The broader intellectual debate among constitutional scholars and other intellectuals in the member states (who very often have engaged in public and policy debates) is missing from the picture.⁵

We think this is a mistake which calls for an urgent remedy; *Constitutional Imaginaries of Europe*, therefore comprises both how Europe is being imagined in national constitutions and how Europe affects the shape of constitutional law and theory in the member states.

As a distinctive feature of this project, we put a particular emphasis on post-communist Europe. The experience of what is also called the “Other Europe” from *both before and after* 1989 is more important for EU constitutionalism than the common view suggests.⁶ The mainstream picture focuses on the process of transformation of the post-communist states into future members of the Union, seeking to comply with the political and economic criteria on EU membership.⁷ However, the fall of communism in 1989 was also transformative for the Old Europe. The image of the Union as a guarantee of democracy and freedom from foreign domination, widespread in the Other Europe, incited changes in the deep structure of the Union *as a whole*. At the same time, the post-communist member states have brought with them their legacies that could be suppressed only to a certain point (essentially, until

¹ Jan Komárek (ed), *European constitutional imaginaries: Between ideology and utopia* (forthcoming, OUP).

² See <https://www.imagine-const.eu/>.

³ Signe Reihling Larsen, ‘Varieties of Constitutionalism in the European Union’ (2021) 84 *Modern Law Review* 477-502 and Bruce Ackerman, ‘Three Paths to Constitutionalism – and the Crisis of the European Union’ (2015) 45 *British Journal of Political Science* 705-714.

⁴ See Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and national courts, doctrine and jurisprudence: legal change in its social context* (Hart 1998) and Giuseppe Martinico and Oreste Pollicino *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010).

⁵ We however want to mention an ongoing project organized by Marco Dani, Marco Goldoni and Agustín José Menedéz, *The Legitimacy of European Constitutional Orders: A Comparative Inquiry* inspired by Ackerman’s book *Revolutionary constitutions: charismatic leadership and the rule of law* (The Belknap Press 2019).

⁶ See Jan Komárek, ‘Waiting for the Existential Revolution in Europe’ (2014) 12 *International Journal of Constitutional Law* 190.

⁷ See particularly Adam Łazowski (ed), *The Application of EU Law in the New Member States: Brave New World* (T.M.C. Asser Press 2010) and Michał Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Hart 2015).

they could stand in the way of the successful “return to Europe”). They re-emerged quickly after these states had joined the Union. Now, however, *they become internal to its constitutional imaginary*. Most existing constitutional law scholarship does not capture this.⁸ Moreover, it presents the current challenges to the authority of EU law as something that comes from without, not within the Union.

PROGRAMME AND ORGANISATION

We would like to reflect on this by how this conference is structured: it results from a series of workshops organized in four post-communist EU member states at the end of 2021 and the beginning of 2022. The workshops were preceded by several internal seminars and one IMAGINE workshop devoted to the history of political and constitutional ideas in Central and Easter Europe.⁹

Based on this previous work we have identified several overarching issues stemming from the debates on Europe and its constitutionalism in those member states. For the conference we invited scholars from the “old” member states to reflect on these issues and contributions stemming from the workshops. They will engage with scholars who have already taken part in the workshop. Through this we seek to avoid a certain hegemonic (and homogenizing) tendency in European constitutional scholarship, which often defines the concerns and issues to be debated through the perspective of the West (or the “old”) and its legal traditions - for example, how the rule of law or democracy are understood in the liberal-legalist constitutional thought or how the social question has been addressed by the Western welfare state – and abandoned when neoliberalism took over.

In order to put the different perspectives on European constitutional imaginaries in a true dialogue, we asked our speakers to present the paper written by someone else. This way we also hope to encourage discussions over long monologues and presentations. All draft papers will be available before the conference and we expect the participants to familiarize with them before the conference.

⁸ For an exception see Luuk Van Middelaar, *The passage to Europe: How a continent became a union* (Yale University Press 2013), 181-201; compare to e.g. Christopher J Bickerton, *European Integration: From Nation-States to Member States* (OUP 2012), which also has a historical ambition but does not examine the relevance of 1989 for its thesis.

⁹ For information on these events see IMAGINE web, https://www.imagine-const.eu/category/events/imagine_events/.

DETAILED PROGRAMME AND ABSTRACTS

THURSDAY 6 OCTOBER

9:30-10:00 REGISTRATION AND LIGHT REFRESHMENTS

10:00-10:15: Opening remarks by Jan Komárek

10:15-12:15 PANEL I:

FROM NATION-STATES TO MEMBER STATES – AND BACK? • Chair: Birgit Aasa (IMAGINE)

In the mainstream scholarship on European integration there is an influential strand of thought that stresses how supranational (or “beyond-the-state”) structures are being used by states (or, more precisely, their elites) to govern their societies. *The European Rescue of the Nation State* or *The Choice for Europe* were analyses in comparative economic history and political science. More recently, Chris Bickerton argued that the membership in the European Communities and later the Union has changed the fundamental structures of the state and the nature of statehood as such.

In this panel we want to take a look at this issue from the perspective of both states whose existence has been all but “self-evident”, to borrow from a famous speech by the Czech writer Milan Kundera, and states that seem to have existed unshattered for centuries. What are their shared or distinct anxieties regarding statehood, sovereignty and the EU? We also want to look beyond the confines of national constitutional imaginaries and see how European and international law have dealt with small nations and how the latter have been seeking to secure their role in the great play of powers of the twentieth – and as the contemporary events show us – also current century.

Maria Mälksoo (University of Copenhagen): *Vicarious Sovereignty: Becoming European the Estonian Way*

• Presented by: Martin Loughlin (London School of Economics and Political Science)

Vicarious identification, or ‘living through another’ refers to the way actors appropriate the achievements and experiences of others to gain a sense of purpose, identity and self-esteem. This chapter proposes that vicarious identification with ‘Europe’ has been constitutive for Estonia’s pooling of important aspects of its sovereign power with the European Union (EU) while retaining a strong nominal commitment to absolute sovereignty in its national constitution. Accordingly, the sharing of the sovereign authority of the state in essential aspects with the EU emerges as a generally accepted trade-off for a sense of ontological security attained through membership in the European polity. The chapter conceptualizes vicarious sovereignty and illustrates the reconciliation attempts of ideal-typical sovereign state subjectivity with the evolving empirical reality of the EU on the example of Estonia’s post-Soviet ‘home-coming’ in Europe. This is done via tapping into the visions of Europe, as articulated by the defining Estonian constitutional ‘map-makers’ at the time of the Convention on the Future of Europe in the early noughties: namely, Lennart Meri and Toomas Hendrik Ilves.

Martin Loughlin (LSE): *Ruling Britannia’*

• Presented by: Maria Mälksoo (University of Copenhagen)

In this paper I will examine and critically assess the ways in which English/British constitutional narratives have unfolded and how these have shaped the evolving relationship between the British state and the European mainland, and especially Britain’s unsettled relationship with, and eventual

exit from, the European Union. I take as my cue John of Gaunt's famous death-bed speech in Shakespeare's *Richard II*. This has already been evoked in two powerful accounts of Britain's relationship with Europe. First, there was Hugo Young's, *This Blessed Plot: Britain and Europe from Churchill to Blair* (1998) which chronicles the story of Britain's relationship with the Europe through to the Blair government, the first to be unequivocally pro-EU. Then, in 2021 Robert Tombs published *This Sovereign Isle: Britain In and Out of Europe*, which shows how Britain's exit from the EU is, in part, explained by its unique constitutional history. Although drawing on these accounts, I focus more precisely the constitutional aspects of this recent experience.

Aleksandra Kustra-Rogatka (Nicolaus Copernicus University in Toruń): *European integration—ineffable aspiration or the object of concern? About ambiguity of Europe in the Polish constitutional imaginary*

• Presented by: Jiří Přibáň (Cardiff University)

The Polish constitutional imaginary is an eclectic set of ideas, often contradicting or potentially conflicting with each other. This feature is partly the result of the complexity of Polish history, the leitmotif of which has revolved around regaining and maintaining independence for several centuries. This chapter analyses the relationship between thought, text, and action in the Polish constitutional imaginary about the idea of European integration. Although the EU accession was considered during the constitution-making process, the framers of the Constitution decided not to lay down a typical European clause. Article 90 shapes the intricate relations between two major ineffable ideas: sovereignty and European integration. The lack of coherence between the extensive sphere of thought and the laconic and agonistic nature of the constitutional text has been reflected in constitutional practice. European integration has been perceived in the constitutional practice as both an ineffable aspiration and the object of serious concern. Since 2004, for a long time, constitutional practice regarding the EU has been a syncretic collection of cautious friendliness towards EU law, emphasizing (formal) constitutional supremacy and narrowing interpretation of 'the conferral of competences'. Nevertheless, until last year the constitutional text tended to be interpreted as facilitating rather than limiting Poland's participation in the integration process. Therefore, the recent Eurosceptic turn in the political domain is unjustified either in the sphere of thought or in the constitutional text.

Jiří Přibáň (Cardiff University): *Constitutional Imaginaries in post-1945 and post-1989 Europe: A Critique of Politics of Authenticity in Nation State and Post-National Constellation*

• Presented by: Aleksandra Kustra-Rogatka (Nicolaus Copernicus University in Toruń)

In this presentation, I analyse imaginaries of democratic mobilisation within and beyond nation and nation state in the context of the post-1945 history and general process of European integration. I open by focusing on the imaginary of nation and democratic mobilisation including politics of authenticity in its populist varieties. I subsequently address this process of mobilisation both within and beyond limits of national politics and constitutional statehood as the imaginary unity of topos-ethnos-nomos and discuss possibilities of transnational European democratically mobilised and legitimised community.

12:15-13:30 LUNCH

13:30-15:00 PANEL II:

BRINGING BACK THE PAST (TO SERVE OR UNDERSTAND THE PRESENT?)

• Chair: Marina Bán (IMAGINE)

History and the way it is narrated forms part of constitutional imaginary – and yet, its uses (and abuses) in the context of European integration have not been sufficiently explored. In particular, constitutional lawyers have rarely reflected on the way they tell the story of their state – and there is much to be said

about European integration beyond the usual story of how the “Founding Fathers” securing peace and prosperity for the European continent after World War Two.

In case of the postcommunist states, 1989 is often taken as the “Year One” – where everything only began, except for the dark legacy of the communist rule, which needs to be overcome or rectified. However, most states of postcommunist Europe did not lose their formal sovereignty (although it was severely limited by the Brezhnev’s doctrine articulated in the aftermath of the Soviet occupation of Czechoslovakia in 1968) and constitutional thought dealt with questions that did not disappear with the triumph of Western liberalism.

There are blind spots on the other side of the former Iron Curtain – and the legacy of the Habsburg Empire – for its successor states, but for the Union as well, have not been examined thus far. This panel will reflect on these questions.

Kálmán Pócza (University of Public Service and MCC Center for Constitutional Politics):
Mission Impossible? Historical Imagination and Constitutional Theory in Hungary
• Presented by: Ulrich Wagrandl (Vienna University of Economics and Business)

The new Fundamental Law of Hungary adopted in 2011 has undoubtedly provoked fierce criticism. One of the main objections concerned the revival of the so called “historical constitution” of Hungary, a bunch of written and unwritten laws which served as the basis of the Hungarian political system for centuries. Certainly, the new Fundamental Law of Hungary denies that Hungary’s constitution is simply a product of a single constitutional moment. Instead, it implicitly and explicitly indicates that the text of the Fundamental Law is only one part of the Hungarian constitution. In fact, the text of the Fundamental Law explicitly refers to the uncoded historical constitution of Hungary which it describes as an integral part of the present-day Hungarian constitution. In the legal scholarship, however, these references have provoked intense debate, or they have been simply ignored as irrelevant to constitutional interpretation. The present paper seeks to answer the question of whether the historical constitution can be revived on theoretical grounds. The paper relies primarily on arguments from political and constitutional theory. The critics justify the impossibility of the revival of the historical constitution by relying on four basic arguments. First, I will introduce these arguments based on the notions of formal indeterminacy, substantive indeterminacy, incompatibility and discontinuity, and then draw attention to the four basic assumptions that implicitly underlie these arguments. In order to refute these arguments, I will then examine the definition of the concept of constitution and address the question of why there is no substantive (only incremental) difference between codified and historical constitutions. The paper will then develop a theoretical rebuttal of the arguments against the revival of the historical constitution. Focusing on two theoretical counter-arguments, I will show that neither the formal nor the substantive indeterminacy argument holds water, while I will also provide some empirical examples on the basis of which the incompatibility and the discontinuity arguments can be refuted. The conclusion of the paper is that the revival of the historical constitution is not an impossible mission, neither theoretically nor in practice, but the desirability and success of the revival depends on several factors.

Ulrich Wagrandl (Vienna University of Economics and Business): *A Constitution without qualities? Imaginaries of the state, people and European integration in Austrian constitutional law*
• Presented by: Kálmán Pócza (University of Public Service and MCC Center for Constitutional Politics)

Austria’s Constitution of 1920 is not very uplifting. Traditionally, it is disparaged as being the product of a compromise, uninspiring, incomplete – 100 years later, and having been amended more than 100 times – as a “torso” or even “a ruin”. It took Austria’s President Alexander van der Bellen (not a lawyer himself) to emphasize the Constitution’s “elegance” and “beauty” when he

faced a political crisis which ended in a vote of no-confidence against the government and the appointment of an interim cabinet of experts in 2019.

The President's praise took constitutional scholars by surprise. Having been taught – and teaching – that Austria's Constitution merely consists of "game rules" (Spielregeln), they wondered how the Constitution could inspire feelings of attachment and of awe – unlike Germany's Basic Law, which is the source of pride and patriotism ("constitutional patriotism") among German scholars and the public at large.

Accordingly, Austrian constitutional law scholarship has never really dealt with the underlying assumptions of the state, of its people and its position in Europe. Following an approach called "positivist" and locating itself in the legacy of Hans Kelsen and his Pure Theory of Law, Austrian constitutional doctrine has mostly confined itself to the interpretation of this or that constitutional provision. This leaves little inclination to ask the deeper questions. As the Constitution is amended so often and is ever expanding in volume, there also is not much time to lean back and reflect.

However, Austria's constitutional history and its distanced, sometimes ironic attitude towards its own Constitution has something to teach us. As is sometimes said, the Austro-Hungarian Monarchy of old provides an early example of supranational integration and the (relatively) peaceful coexistence of different nations. Since the Monarchy had no single nation, culture, religion or even language, the only thing to unite it was its law (as Hans Kelsen recalled in his autobiography). Pure law, for that matter, as any connection between law and a specific national culture was inconceivable in a multiethnic state.

Compromise and "integration through law" seem well suited for imagining the European Union. In my contribution, I aim to investigate whether Austrian Constitutional law scholarship has something to offer in this respect.

Wojciech Zomerski (University of Wrocław): *From the Facade to Solid Foundation? The Evolution of the Polish Constitutional Law Discourse in years 1944-1989*

• Presented by: Michał Krajewski (IMAGINE)

Contrary to the widespread narrative in both Polish and European constitutional law discourse, this chapter argues that Polish constitutional law theory, as it evolved in the years 1944-1989, was an active subject rather than a passive object in the process of the transition from the authoritarian socialism to constitutional democracy. In order to depict the role that the Polish constitutional law discourse played in preparing grounds for the transition, I confront its evolution with the legal and political reality of the Polish People's Republic (1944-1989). I describe the way the Polish constitutional law discourse went through in that period as a path from a façade to the foundation for constitutional democracy. The crucial role in this regard was played by a scholarly doctrine of constitutional review, unfolding from the late 1960s. It allowed the political elites, acting under vast internal and external pressure, to become a precursor of institutional changes in the region. The essential ingredient of these changes, namely the setting up of the Constitutional Tribunal, made Poland the only country in the Warsaw Pact with constitutional review. Despite the original intentions of the socialist political elites, the Polish Constitutional Tribunal played a crucial role in transforming Poland towards constitutional democracy in the years following its establishment. Thus, as I argue, the reforms of the 1980s might be treated not as a rejection but rather as an institutionalization of the Polish constitutional law theory as it evolved over the years. On the final note, I also consider how this evolution of Polish constitutional doctrines helps understand the constitutional law discourse regarding Central and Eastern Europe, including the recent debate on the origins of the rule-of-law crisis.

15:00-15:30 COFFEE BREAK

15:30-17:30 PANEL III:

IMAGINARIES OF VICTIMHOOD, ENEMIES, AND CONSTITUTIONAL IDENTITY • Chair: Ladislav Vyhnánek (IMAGINE)

World War Two, or, what the historian Tony Judt saw as the “European civil war that had begun in 1914” and finished only with the fall of communism, lies at the heart of the European constitutional imaginary. Schuman Declaration proclaimed in 1950 that “World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it” and warns, at the same time, that “A united Europe was not achieved and we had war”.

Creating “United Europe” meant, for a long time, suppressing the image of enemy and not using its affective power when mobilizing people around the constitution. This of course does not mean that enemies disappeared from constitutional imaginary of Europe – they were rather only partially shifted to its subconscious, un-reflected layer. In many states, however, these buried images have again been gradually emerging – either as political narratives with constitution-changing ambitions, as arguments in the case-law of constitutional courts or even as full-fledged constitutional reform projects.

This panel seeks to bring to light these imaginaries in order to better understand the current tensions in Europe – among its member states, but also withing them.

Marco Goldoni (University of Glasgow): *From Resistance to Victimisation: Engineered Myths in Postwar Italian Constitutionalism*

• Presented by: Attila Antal (Eötvös Loránd University)

If there is a founding myth of the Italian republican constitutional order this has to be seen in the organised resistance in the North of Italy during the occupation of the German forces after the armistice of 8th of September, 1943. This is partially a myth as it was not only resistance against German occupying forces but also civil war between two factions (Fascists and anti-fascist parties). Be that as it may, the resistance provided a narrative and a founding myth for the republic and its constitutional order. It also provided a representation of political action which would endow the Constituent Assembly with constituent power. The chapter tracks the trajectory from the formation of this founding myth to a different constellation of engineered myths which have been fabricated in parallel with the rise of three political phenomena: deepening of European integration, financialisation of the political economy, and collapse of the political parties whose legitimacy rested on the resistance during WWII. A new constitutional imagination emerges out of the encounters of these phenomena, and it is an imagination inspired by a revision of the original myth of the resistance. The chapter tries to identify a common underlying theme to these transformations in the idea of political passivity: an imagination of the potential for political action so poky that it requires an external bound (the European Union and the Eurozone in particular) to steer politics and a new public memory of the origins of the republic which emphasises the reasons of all involved parties in the civil war. In the end, this conjures up a political imagination of victimhood.

Attila Antal (Eötvös Loránd University): *The Constitutionalized Image of the Enemy in the Hungarian Fundamental Law*

• Presented by: Marco Goldoni (University of Glasgow)

The defining characteristic of the Hungarian Fundamental Law is its strong constitutional identity: the political identity of the supermajority has become constitutionalized. This identity image has a number of positive elements (i.e., elements that have been defined as desirable, a kind of fundamental characteristic of the public law system). These include Christianity, active memory

politics, national cohesion, various aspects of sustainability. In this paper, I argue that, in addition to the explicitly strong positive constitutional identity elements, the constitutional power intended that negative identity elements should be at least as strong as the positive ones (in many ways even stronger and more important in the daily political struggles relying constitutional identity). These are the pillars of constitutional identity that separate us from others in Laclauian and Schmittian sense, define boundaries and political fault lines.

The other main claim of this paper is that the negative constitutional identity has been presented in the original constitutional conception, which started to unfold in 2010, but also since 2015 (embedded in the amendments to the Fundamental Law) the constitutional enemy formation pervades public law and political debates. The main theme of this analyses is therefore to examine the hostile elements of negative constitutional identity. Three basic strands of Constitutionalised Image of Enemy (CIE) have emerged (and this reflects the constitution-power's view of history and the past): (1) anti-communism framed in actual political framework; (2) anti-immigration; (3) opposition to non-heterosexual forms of coexistence.

The analysis will focus on the following approaches to CIEs: the “Communist Constitution of 1949” and its declared invalidity; the responsibility of “political organisations that gained legal recognition during the democratic transition as legal successors of the Hungarian Socialist Workers’ Party”; the various aspects of anti-immigration that have been raised to constitutional level (police involvement in preventing illegal immigration; the terrorist threat; the amendment of the constitutional clause on accession to the EU with regard to the inalienable right of disposal of the territorial unit, population, form of government and organisation of the state); the definition of marriage and the constitutionalising of the biological sex of the mother and father.

The main analytical focus of the paper is on how the public enemy formation of the mention CIEs predominates in the Hungarian society, what are the main political and moral effects and how these may have an impact on the constitutional identity itself as enshrined in the Fundamental Law.

Epp Annus (Tallinn University School of Humanities/Ohio State University): *Estonians’ European imaginaries: the Soviet legacy*

• Presented by: Hent Kalmo (University of Tartu)

The article is interested in the ways that Estonia’s self-perception changed in relation to Europe over the Soviet years and during the re-establishment of the independent state. More specifically, the focus is on co-articulating the “Soviet question” in relation to the “European question”: in what ways did the decades of Soviet rule impact the understanding of Europe and Europeaness in Estonian national imaginaries? In such an analysis, many different factors have to be taken into account: the reception and understanding of Europeaness before the Soviet era; the relationship between cultural imaginaries and state-promoted ideologies; changes within the USSR over the decades in question; the matter of the Soviet colonial matrix of power; the long-rooted orientalizing of Eastern Europe in West-European imaginaries, and more. In order to address this complex set of problems, it is useful to proceed from a multi-scalar understanding of social phenomena. From this perspective, Estonia’s geopolitical “relocation” from the Soviet West to the European East, during the re-establishment of the Estonian republic, can be articulated as a shift in the geopolitical scale-system. In more general terms, attention to scale as a “tool for bounding space at different geographical resolutions” enables us to perceive historical conditions as complexly multiscale. A multiscale approach reveals how meaning-making unfolds through interaction across different scales of sociopolitical realities and imaginaries, and how in the Soviet-era Estonian SSR, local, regional, and global scales formed complex and dynamic systems of interdependency.

The collapse of the Soviet Union and the re-establishment of the Estonian Republic brought about substantial changes at all levels of social and political existence. During the decades of the Estonian SSR, the general category of “the West” (not “Europe”) had provided a cultural counterpoint to “Sovietness,” and the scale of Europeaness was significantly deactivated. At the same time,

analysis does reveals the hazy category of a tacit, internalized Europeanness, something perceivable mostly in contrast with certain imaginaries of Russianness. This tacit Europeanness included class and cultural competency and knowledge of European cultural traditions, yet it was only weakly (if at all) connected to then-current cultural developments in Europe. It lacked a dialogical dimension. In the early post-Soviet years, the newly rescaled relationship to Europe relied on longstanding imaginaries, yet it also went through the shock of Estonia “becoming the East.” The new situation (re)activated the concept of Europe as an imperative category and a point of reference for both political and cultural frameworks.

This paper will first articulate the theoretical framework of cultural imaginaries and multiscalar thinking, and then proceed to analyse the scalar cultural logic of the Soviet era, with a focus on the “question of Europe.” The last section will summarize the consequences following from the reestablishment of Estonian independence. The complexities of the Soviet decades are, of course, vast; the present essay will concentrate on the late Soviet period, from the 1960s to the mid-1980s. The essay will focus on the Estonian-speaking cultural zone: while such a choice is necessitated by the scarcity of data concerning European imaginaries among other population groups in Soviet and early post-Soviet Estonia, it also conveys the logic of the present project. By the 2020s, Russophone populations have become largely integrated within Estonia’s political and cultural sphere, yet during the early post-Soviet period, when Estonia’s policies of integration with Europe were formulated, Russophone populations participated in this process only marginally.

Hent Kalmo (University of Tartu): *Sovereignty and the Misery of Small Eastern European Nations*

• **Presented by: Epp Annus (Tallinn University School of Humanities/Ohio State University)**

It is widely believed that countries in Eastern and Central Europe have a strong attachment to national sovereignty. This belief is connected to what might be called the misery thesis: the idea that the region is different from Western Europe now because its history has been different.

A series of collective traumas have supposedly resulted in a mindset which emphasises national sovereignty above democracy and liberalism. Using Estonia as an example, I shall show that, while the nation is indeed celebrated in East-Central Europe, this attitude does not necessarily entail an attachment to state sovereignty. Depending on the kind of dangers that are thought to besiege the nation, state sovereignty may appear either as an all-important protective shield or, on the contrary, an obstacle on the way to some larger political community where the nation would fare better than in solitude. The relationship between cultural imaginaries and legal doctrine is thus not straightforward. East-Central Europe displays an ambivalent attitude to national sovereignty, illustrated particularly well by Estonia where a high symbolic appreciation of sovereignty has long coexisted with a tendency to seek deep forms of international integration. I shall argue that this ambivalence is related to the representation of the community as a small nation – a recurring cultural theme which functions by continuing to stir up new, often contradictory ideas that can be built into rivalling constitutional doctrines.

19:00 CONFERENCE DINNER

FRIDAY 7 OCTOBER

9:30-11:30 PANEL IV:

NEOLIBERALISM AND THE SOCIAL QUESTION • Chair: Michał Krajewski (IMAGINE)

Related to the triumph of liberalism as a political doctrine, the imaginary of individual freedom that gets best realised in the market where free people enter into transactions prevailed over the idea of freedom as something inevitably social – and having dimension of social justice, which demands more than the liberal idea of “justice as fairness”. Social question had to be answered through individual responsibility, not collective arrangements.

However, constitutions – and more importantly, constitutional actors - of some member states have resisted such move, which we seek to explore in this panel.

Mariana Canotilho (University of Coimbra Institute for Legal Research and Portuguese Constitutional Court): *50 years of democratic constitutionalism in Portugal – between constitutional aspirations and the European path*

• Presented by: Karol Muszyński (KU Leuven)

Approved in the aftermath of the democratic revolution of 1974, the Portuguese Constitution of 1976 (PC) was a sound success, both from the political and constitutional points of view. With it, the basic pillars of a solid democratic political regime were established, as well as a broad catalogue of fundamental rights and institutional guarantees that have proved themselves to be essential elements of a new, transformed, country. Both the post-revolutionary and pre-constitutional period and the first decades of democratic constitutionalism were marked by the public expression of very different ideologies and worldviews, as well as social, economic and political projects for the country that were deeply distinct. The CP's content, in its several versions (it was amended 7 times, between 1982 and 2005), is the result of arduous political negotiations and broad social consensus.

The development of democratic constitutionalism in Portugal, in the last (almost) 50 years has been marked by some important debates, which still influence different views and interpretations of the Constitution. I would like to highlight three of them: first, a discussion about the nature and limits of the “constitutional project” enshrined in the CP, the normative strength of the constitution and the margin of appreciation given to the democratic legislator. Second, the debate about constitutional openness, European integration, and the constitutional consequences of the overwhelmingly desired ‘European path’ of the country. And, finally, more recently, about the contradictions between such path and national constitutional features, especially during and after the Eurocrisis.

The objective of this work will be to reflect on the constitutional imaginary of democratic Portugal, in particular about the discrepancies between national constitutional aspirations and European integration, which are particularly acute in what regards the so-called “social question” (i.e., the social project, including social rights as limits to the legislator, and political economy views, that are strikingly different at the national and EU levels).

Johan Strang (University of Helsinki): *Neoliberalisation of Nordic democracy?*

• Presented by: Mariana Canotilho (University of Coimbra Institute for Legal Research and Portuguese Constitutional Court)

The Nordic countries have a long tradition of being celebrated – by themselves as well as by others – as models of democracy and they continue to be so today. This paper, however, builds on the observation that the nature and characteristics of the “democracy” championed by the Nordics has changed. No longer distinctively connected to national and popular sovereignty, public

participation, associational life and labour market arrangements, or economic and social equality, Nordic democratic exemplarity is today increasingly associated with rule of law, human rights, and political and economic freedom. No longer a social democratic alternative, the Nordic countries are today excelling as exemplars of posthistorical liberal democracies. This paper connects this development to the international literature on neoliberalism and democracy, and proposes some empirical ways in which to examine this development as a neoliberalisation of Nordic democracy.

Karol Muszyński (KU Leuven) (co-authored with Paweł Skuczyński, University of Warsaw): *The Constitutional Absence of Society and the Constitutional Crisis in Poland*
• Presented by: Zuzana Vikarská (IMAGINE)

This paper investigates the roots of the 2015 Polish constitutional crisis. We argue that the outbreak of the crisis was embedded within the socio-political developments which we call 'constitutional drift', taking place after the adoption of the 1997 Constitution but before the coming to power of populist politicians. In this period, the two dominant practices of reading the Constitution – liberal and communitarian – shaped Polish constitutionalism in a way that has led to the effective exclusion of society from participation in the policy-making process. The new paradigm of governance was favourable to the concentration of power in the executive at the expense of social actors and was incentivized by the political pressures associated with the EU integration and the requirements related to the Europeanisation of the legal order. The paper tracks constitutional drift in three areas – the sphere of social dialogue (relations with trade unions and employers' organizations), civic society (NGOs) and the professional self-governments (regulated professions) – where the 1997 Constitution requires the government to involve social actors in the policy-making process. To move forward, the paper argues that 1997 Constitution does not need to be interpreted along the lines of liberal or communitarian doctrines. The paper argues that there are good reasons to adopt an approach aligned with social constitutionalism (which we call a 'social reading'), which would involve social actors in a more intensive, transparent, and cooperative manner. We argue that revitalising the social reading of the Polish Constitution is fundamental to overcome the crisis and improve the relationship between Poland and the EU.

Florian Meinel (Georg-August-Universität Göttingen): *Supermajoritarian Democracy in the administrative constitution: The German Federal Constitutional Court's imaginary in context*

• Presented by: Johan Strang (University of Helsinki)

The German Federal Constitutional Court (Bundesverfassungsgericht) is internationally recognized for its landmark cases on the EU constitutional order and the limits of EU law's supremacy. The article will explore the domestic context of the Court's stance on EU constitutionalism. Foremost, the context is defined by the series of grand coalitions under Angela Merkel's chancellorship. With demarcations between government and opposition increasingly blurred, supermajoritarian decision making has increasingly been embraced by the Court. This article discusses the novel approach of the Court in its institutional assumptions and argues that it is part a deeper transformation of the German constitution. The Court, both enforcing and entrenching this transformation, has become the protagonist of a constitutional agenda centered on neutralizing parliamentary majority rule, which mirrors its skeptical view of EU law.

11:30-12:30 LUNCH

12:30-14:30 PANEL V:

LIBERAL CONSTITUTIONALISM: NO ALTERNATIVES? • Chair: Zuzana Vikarská (IMAGINE)

Liberal constitutionalism is in crisis – that much is agreed by both those who want to save it for our times and others who look for alternatives. This panel examines how liberalism and some of its central tenets, such as the rule of law or the strong role of experts, became dominant ideological constraints on developing alternatives. As will be seen, Europe and European integration have played an important role in this process.

Michal Kopeček (Institute of Contemporary History in Prague and Imre Kertész Kolleg, Friedrich Schiller University, Jena): *Consensus through the Rule-of-Law: The Politics of Liberal Constitutionalism and Its Intellectual Roots in Hungary and East Central Europe after 1989*

• Presented by: Mary Heimann (Cardiff University)

Post-communist Central and Eastern Europe was a vital laboratory for realising liberal democracy and market capitalism after 1989. Countries such as Czechia, Estonia, Hungary, Slovenia, and Poland served as models for 'transition'. Today some of these countries represent the most robust challenges to constitutional democracy inside the EU. The doctrine of democratic *Rechtsstaat* and the politics of liberal constitutionalism as pillars of the 1990s' liberal consensus' are at the heart of the matter. This paper will shortly outline the historical roots of the *Rechtsstaat* doctrine's ascendancy and its apogee in 1989. The main focus will be on the politics of liberal constitutionalism in the first years after the democratic and liberal revolution when the political spectrum in the region had been formed. It will analyse those political/ideological interpretations (neoliberal, social liberal, conservative) of the rule of law doctrine which, in interplay and competition, formed the basis of the so-called liberal consensus. The paper will pay special attention to the relation of these interpretations to the post-dissident democratic imagination and the so-called politics of civil society. It will conclude with the early discontents, in the 1990s, of the liberal constitutionalist hegemony.

Mary Heimann (Cardiff University): *Czechoslovakia: Lessons from the Failures of a Democratic State*

• Presented by: Michal Kopeček (Institute of Contemporary History in Prague and Imre Kertész Kolleg, Friedrich Schiller University, Jena)

Czechoslovakia was created at the end of the First World War with what were presented as lofty Wilsonian ideals. Its subsequent failures to remain a liberal, democratic or stabilising force in Central Europe came about because of a complex series of interactions between external pressures, which are well known, and internal decisions, which are not. Construing one's nation as the blameless victim is endemic to the whole of Central and Eastern Europe: this is the way that rival groups have traditionally sought to justify their right to exist as nations or as states. Czechoslovakia offers a useful case-study of a democracy which was fatally weakened, not only by external conditions, but also by internal attitudes.

François-Xavier Millet (University of the French West Indies): *On the French constitutional imaginary: has the long-standing republican tradition given way to liberal constitutionalism?*

• Presented by: Michał Krotoszyński (Adam Mickiewicz University in Poznań)

The political and legal tradition of France is imbued with Republican thinking inherited from the French Revolution and the Jacobins. Despite the constitutional instability that France has gone

through since 1791, that Republican ethos has been the red thread across the various constitutions of France up to the present time, thereby constituting the French 'constitutional' imaginary. That imaginary rests on grand narratives, such as the indivisibility of the Republic (against partition or federalism), the unity of the French people as the Nation (against the recognition of other "people"), the separation between Church and State (against a generous approach to freedom of religion), the focus on the (abstract) citizen as opposed to the (concrete) individual, the mistrust towards non-accountable judges. Those narratives, that were shared and promoted by people as diverse as, for instance, the Gaullists and the powerful Communists, have been central to the constitutional and political thought in France for decades, making it impossible not only to endorse but also to comprehend federalism.

However, while most European states had no other choice but to embrace liberalism either after World War II or after the fall of authoritarian and/or communist regimes, France has insidiously, silently undergone from the seventies onwards 'a liberal turn' that has gradually eroded that entrenched Republican thinking. That turn explains major constitutional developments, such as the seminal 1971 judgment of the Conseil constitutionnel (the French *Marbury v Madison*); the (narrow) ratification of the Maastricht Treaty; the concomitant rise of human rights protection and of judicial rule-making power; the enforcement of the constitution over parliamentary acts.

Nowadays, politicians, philosophers and constitutional scholars alike have largely become accustomed to the liberal thought and have embraced it, thereby creating a new constitutional imaginary for France. Tensions however remain with the long-standing republican, essentially anti-liberal ethos that still permeates French society and institutions. Those tensions largely explain the relative weakness of the French constitutional court, the strength of Euroskepticism and the will of a significant chunk of the political class and scholars to reinstate the supremacy over EU law not only of the French constitution but also of parliamentary acts, in accordance with the legicentric tradition. By the same token, the Republican vision appears so entrenched that even French liberals sometimes endorse a Republican conception of Europe, as notably illustrated by President Macron's plea for European sovereignty.

Against that background, I will examine, in the light of the political and legal scholarship, to what extent the French republican imaginary has been supplanted by the liberal one, thereby making France look alike any liberal democracy. I will also look at whether that republican imaginary has had any bearing on the EU imaginary, as if Europe was meant to simply be a bigger France following the traditional Republican patterns. Finally, in the light of the other contributions, I would like to determine whether, at a more horizontal level, bridges between national imaginaries exist beyond borderless liberal constitutionalism which, by nature, annihilates them in their idiosyncrasies. In particular, since the Russian Revolution was the ultimate offspring of the French Revolution, it would be interesting to ascertain whether the shared Republican imaginary still has an impact nowadays on the imaginaries of the former communist states.

Michał Krotoszyński (Adam Mickiewicz University in Poznań): *From Legal Impossibilism to the Rule of Law Crisis: Transitional Justice and Polish Counter-Constitutionalism*

• Presented by: François-Xavier Millet (University of the French West Indies)

Since 2015, the Law and Justice government has significantly altered the composition of the Polish Constitutional Court, the Supreme Court, and the National Council of Judiciary. It has also expanded the power of the executive branch in relation to the courts. This process – which the majority of scholars and legal practitioners see as a period of deterioration of the rule of law – also has a transitional justice dimension. In this paper, I claim that the decline of Polish liberal constitutionalism was possible because the current government managed to create an alternative constitutional vision – a counter-constitution, to borrow the term from Kim Lane Scheppele. The cornerstone of this counter-constitutionalism is a myth of 'legal impossibilism': a belief in strict constitutional constraints supposedly restraining the parliamentary majority from introducing crucial reforms, including mechanisms for dealing with the communist past. The analysis of the Polish constitutional framework demonstrates that 'legal impossibilism' perceived this way is a myth. However, under closer scrutiny and contrary to popular assumptions, in the transitional

justice domain 'legal impossibilism' becomes interpreted by those currently in power not as restrictions preventing any reckoning with the communist past. Instead, it appears as restraints upon a radical shake-up in political, social, and economic hierarchies. For this government, without such a change the democratic transformation remains incomplete.

14:30-14:45: Closing remarks by Jan Komárek

SPEAKERS' BIOS:

Epp Annus is associate professor with Tallinn University, Institute of Humanities (Estonia); she also lectures at the Department of Slavic and East European Languages and Cultures, Ohio State University (USA). Her recent books include *Soviet Postcolonial Studies: A View from the Western Borderlands* (Routledge, 2018) and *Coloniality, Nationality, Modernity: A Postcolonial View on Baltic Cultures under Soviet Rule*, ed. by Epp Annus (Routledge, 2018). Her research interests include Soviet and post-Soviet Baltic cultures, postcolonial studies, environmental studies and phenomenology of everyday life. She is the author of two novels.

Attila Antal holds a PhD in political science. He is a senior lecturer at Eötvös Loránd University Faculty of Law Institute of Political Science. He is a coordinator of the Social Theory Research Group at the Institute of Political History. He conducts his contemporary research in political theory of populism, social and critical theory, theory of democracy, green political thought, constitutionalism, political history. He is an editor at *Eszmélet* (a leading Hungarian quarterly journal for social critique).

Mariana Canotilho is a Researcher at the University of Coimbra Institute for Legal Research (UCILeR); she has also been an Assistant Professor at the University of Coimbra Law School since 2003 and is now a Judge at the Portuguese Constitutional Court (2019-2028) She was Advisor of the President of the Portuguese Constitutional Court between 2013 and 2019, a position she also held between 2003 and 2007. Mariana holds a law degree and an LLM in Public Law from the University of Coimbra Law School (Portugal), and a PhD in European Constitutional Law from the Faculty of Law of the University of Granada (Spain). Her research interests include European and national constitutional law, human rights (with a focus on social rights), inequality, and the role of courts in contemporary democracies.

Marco Goldoni is Senior Lecturer in Legal Theory at the Law School of the University of Glasgow. He is the author of *The Legacy of Pluralism* (with M. Croce, 2020), *The Materiality of the Legal Order* (2022), and co-editor with M. Wilkinson of the *Cambridge Handbook on the Material Constitution* (2023). He is joint general editor of the *Journal Jurisprudence* and editor of the Routledge series *Law and Politics: Continental Perspectives*

Mary Heimann holds the Chair of Modern History at Cardiff University, where she also founded and directs the Central and East European Research Centre. Her best-known publications are *Catholic Devotion in Victorian England* (Oxford University Press), 'Christianity in Western Europe from the Enlightenment to the Present Day' in Adrian Hastings, *A World History of Christianity* (Cassell Group) and *Czechoslovakia: The State that Failed* (Yale University Press), republished in 2020 as *Československo: stát, který zklamal* (Petrkov), translated by Zdeněk Hron and with introductions by Jan Urban and Petr Pithart. She is currently writing a new book on Christianity behind the Iron Curtain for Yale University Press.

Hent Kalmo is a Research Fellow at the Johan Skytte Institute of Political Studies at the University of Tartu. His research is focused mainly on constitutional law, legal theory and international law. He holds a BA degree from the University of Tartu, an LLM from Harvard Law School and is about to defend his

PhD thesis at the University of Paris Nanterre. Hent Kalmo also acts a legal adviser to the President of the Republic of Estonia.

Michal Kopeček is a historian, head of the History of Ideas and Concepts Department at the Institute of Contemporary History in Prague and co-director of Imre Kertész Kolleg, Friedrich Schiller University, Jena. He was, among others, Leverhulme Visiting Professor at the University of Cambridge in 2021 and 2022 and Visiting Professor at the Central European University in 2015. His research interests include the comparative modern intellectual history of East Central Europe, nationalism studies, history of state socialism and communism and the study of transition and democratization processes. Currently, he is working on his book project 'Dissident Legacy in Post-Socialism' focusing on Czechia, Hungary, Poland and Slovakia.

Michał Krotoszyński is an assistant professor in the Department of Theory and Philosophy of Law at the Faculty of Law and Administration, Adam Mickiewicz University, Poznań, Poland. He concentrates his research on transitional justice, legal interpretation and constitutional law. In 2017 he published a book *Modele sprawiedliwości tranzycyjnej [Models of Transitional Justice]*, and is also the author of numerous articles and book chapters, many of which were published in English. He also works as an attorney, specializing in health care law and communications law. More information can be found [HERE](#).

Aleksandra Kustra-Rogatka is an associate professor at Nicolaus Copernicus University in Toruń. Previously she worked as a legal clerk at the Constitutional Court of Poland (2008-2017). She was visiting researcher at Georg-August-Universität Göttingen (2006), Freie Universität Berlin (2010) and Libera Università Internazionale degli Studi Sociali Guido Carli in Rome (2020). She was re:constitution fellow 2019/20. Her research interests cover comparative constitutional law, European constitutionalism, judicial review and legal philosophy.

Martin Loughlin is Professor of Public Law at the London School of Economics & Political Science. He was educated at LSE, the University of Warwick and Harvard Law School and held chairs at the Universities of Glasgow and Manchester before returning to LSE in 2000. His publications include *Against Constitutionalism* (2022), *Political Jurisprudence* (2017), *The British Constitution: A Very Short Introduction* (2013), *Foundations of Public Law* (2010) and *The Idea of Public Law* (2003).

Maria Mälksoo is Senior Researcher at the Centre for Military Studies, Department of Political Science, University of Copenhagen. She holds the European Research Council's Consolidator Grant RITUAL DETERRENCE (2022-2027) and leads the UCPH team of the Volkswagen Foundation-supported MEMOCRACY project (2021-2024). Besides articles and book chapters on memory politics, critical security studies and International Relations theory, she is the author of *The Politics of Becoming European: A Study of Polish and Baltic Post-Cold War Security Imaginaries* (Routledge, 2010); a co-author of *Remembering Katyn* (Polity, 2012); an editor of the *Journal of International Relations and Development* Special Issue "Uses of 'the East' in International Studies: provincializing IR from Central and Eastern Europe" (2021), and of the *Handbook on the Politics of Memory* (Edward Elgar, forthcoming 2023). She is currently serving as the President of the Central and East European International Studies Association (CEEISA) (2019-2022).

Florian Meinel joined the Faculty of Law at Georg-August-Universität Göttingen in 2020, where he holds the Chair of Comparative Constitutional Law and Political Science. He studied law at Humboldt University (state examinations 2006 and 2012; Dr. jur., 2010), where he was a senior research fellow from 2012 to 2015 and a fellow of the German Research Council (DFG) from 2015 to 2018. He was elected Member of the Young Academy of the Berlin-Brandenburg Academy of Sciences and Humanities and the Leopoldina in 2014 and speaker of the board in 2016-7. Before joining the law faculty at Göttingen, he was professor of Public Law and Jurisprudence at Julius-Maximilians-

Universität Würzburg (Bavaria). During the academic year 2021-2, Florian Meinel was a Senior Mercator Fellow of the Mercator Foundation and Visiting Scholar at Harvard Law School.

François-Xavier Millet: A graduate of Sciences Po (Paris), Sorbonne Law School and Jean Moulin University in Lyon, François-Xavier Millet obtained his Ph.D. at the European University Institute (Florence, Italy). Following his doctorate, he became an Associate Professor at the University of Toulouse before being appointed at the University of the French West Indies, on Guadeloupe island, as Full Professor of Public Law after successfully passing the *agrégation* in France. He has published numerous articles in the field of European Union law and comparative constitutional law in French, English and also Italian. He is the author of two monographs: *Le contrôle de constitutionnalité des lois de transposition en France et en Allemagne* (L'Harmattan, Paris, 2011) and *L'Union européenne et l'identité constitutionnelle des États membres* (LGDJ-Lextenso, Paris, 2013), for which he was awarded the *prix de thèse du Conseil constitutionnel* and the Mauro Cappelletti Prize. He has been a co-editor of the European Constitutional Law Review (EuConst) since 2016. He was a *referendaire* within the Chambers of Advocate General Bobek at the Court of Justice of the European Union between 2015 and 2021.

Karol Muszyński is a post-doctoral researcher at the Centre for Sociological Research at KU Leuven and a research fellow at the Centre for Education and Social Theory at the Faculty of Law, Administration, and Economics at University of Wrocław. He previously worked at University of Warsaw as an assistant professor. He is interested in employment relations, violations and circumventions of law, access to justice, and involvement of social partners in policy making.

Kálmán Pócsa is a Senior Research Fellow at the University of Public Service and Head of the Center for Constitutional Politics at the Mathias Corvinus Collegium. He is the Principal Investigator of the JUDICON-EU project. His research focuses on constitutional politics, judicial-legislative relations and constitutionalism. Most recent publications include *Constitutional Politics and the Judiciary: Decision-making in Central and Eastern Europe* (London/New York: Routledge, 2019, editor); How to Measure the Strength of Judicial Decisions: A Methodological Framework, in: *German Law Journal* 18(2017):6 (together with Gábor Dobos and Attila Gyulai).

Jiří Přibán is an academic, author, translator and essayist specializing in the areas of philosophy, sociology and theory of law and constitutionalism. He is the founding director of the Centre of Law and Society and an editor of the *Journal of Law and Society*. He regularly contributes to the Czech and international media. His books include *Constitutional Imaginaries* (2021), *Sovereignty in Post-Sovereign Society* (2015), *Legal Symbolism* (2007) and *Dissidents of Law* (2002).

Johan Strang is an Associate Professor at the Centre for Nordic Studies, University of Helsinki. Trained as a philosopher, he is broadly interested in Nordic intellectual and political history. He has published on the history of Nordic cooperation, Nordic democracy, analytic philosophy, as well as on Scandinavian Legal Realism. Together with Stefan Nygård, he has contributed with a small state perspective to the discussion on transnational history, for example with the volume *Decentering European intellectual space* (2018)

Ulrich Wagrandl is a post-doctoral researcher at the Institute of Austrian and European Public Law at Vienna University of Economics and Business. His research interests include constitutional justice, general administrative law and administrative procedure as well as legal philosophy and political theory. His PhD thesis on the concept of militant democracy in Austrian constitutional law won an award by the Austrian Parliament. Latest publications include A theory of illiberal democracy, in Sajó, Uitz & Holmes (eds), *Routledge Handbook of Illiberalism* (2021) 94; The prohibition to abuse one's human rights: A theory, *European Law Journal* 25 (2019) 577; Transnational militant democracy, *Global Constitutionalism* 7 (2018) 143.

