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DIALOGUE AND DEBATE: SYMPOSIUM ON EUROPEAN CONSTITUTIONAL IMAGINARIES

Constitutional imaginaries, rationality, and creation

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Abstract

In current debates on the constitutional imaginary, different dimensions are stressed in distinct contributions, ranging from philosophical and legal–theoretical, to sociological and socio–legal approaches. To situate Jiří Přibáň's work in this larger scheme of reflection on the imaginary, this article identifies a number of core angles. Unlike Přibáň's systems theoretical interpretation of imaginaries, Castoriadis's philosophy of creative imagination puts emphasis on uniqueness, on historical creation *ex nihilo*, or the creation of worlds without a precedent in the existing world and without presuming any clear function. This also means that imaginaries relate to forms of meaning that cannot be reduced to binaries, codes, or structural languages (legitimacy – illegitimacy) that keep society together, but rather relate to meaning that can never be fully articulated or theoretically entirely grasped and explained. However, Přibáň does not ultimately fully reduce constitutional imaginaries to functional vehicles as becomes clear in his acknowledgement of the polysemy and polyvalence of functionally differentiated society. From this perspective, the contemporary populist challenge to constitutionalism appears to be based on a struggle between technocratic forces promoting a modern, legal–rational imaginary of constitutionalism, whereas populist forces endorse a constitutional imaginary that is grounded in traditionalism and authenticity. This counter-constitutional populist challenge is not merely about a rejection of liberal democratic orders but regards the questioning of the rational–scientific imagination as such.

Keywords: constitutional imaginaries; social imaginaries; constitutional populism; creative imagination; European constitutionalism

Constitutions and constitutionalism are increasingly discussed beyond a strictly legal approach, with analyses exploring societal, cultural, as well as ideological dimensions.[1] This broader interest in constitutions coincides with today's increasingly prominent challenges that the predominantly liberal–legal understanding of constitutionalism is facing. This dominant liberal–legal perspective on constitutionalism[2] slowly but steadily emerged in the post-WWII period (in particular since

[1]M Belov, *Constitutional Semiotics: The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Bloomsbury 2022); W Gephart and JC Suntrup (eds), *Dynamics of Constitutional Cultures* (Klostermann Verlag 2019); PW Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia University Press 2019). J Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge 2022); H Vorländer, 'Constitutions as Symbolic Orders' in P Blokker and C Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017) 209; A Teutsch, 'Using Constitutional Imaginaries in Constitutional Comparison – Yes, But How?' 3 (1) (2023) International Journal of Social Imaginaries 108.

[2]See, for the liberal predominance, among others, MW Dowdle and MA Wilkinson, *Constitutionalism Beyond Liberalism* (Cambridge University Press 2017). The core dimensions of the liberal–legal vision understand constitutions predominantly in a negative sense, as bulwarks against the abuse of power, and put strong emphasis on the need for apex courts and judicial review as well as the protection of universal human rights. Rather different perspectives tend to conflate the liberal–legal

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1989), both in the domestic and the international contexts, but is now increasingly contrasted by a more general democratic and rule of law crisis as well as more specifically by populist and authoritarian political projects.[3] While much work on constitutionalism remains close to an original 'faith' in liberal constitutionalism, and tends to prioritise a defence of the status quo, scholarly attention now increasingly explores the broader questions of how the hegemonic view of organisation of modern societies around the core idea of a (liberal) has come about in the first place.

Powerful conceptual instruments to study constitutions in this broader sense involve the notions of 'imaginary' and 'constitutional imaginaries'. The idea of (social) imaginaries is best understood as a 'crossroads concept'[4] and should be related to a broader attempt of theorising culture. While the debate on how to understand social imaginaries is ongoing,[5] there is a general agreement that the imaginary dimension relates to forms of meaning-giving and to broader collective understandings that provide the world horizons of human beings and make society possible through forms of self-identification. Clearly, in current debates on the constitutional imaginary, different dimensions are stressed in distinct contributions (ranging from philosophical and legal–theoretical, to sociological and socio–legal approaches), and, in order to situate Jiří Přibáň's work in this larger scheme of reflection on the imaginary, it may be useful to identify a number of core angles.

Most conceptions of imaginaries stress central dimensions of the concept in, first, an emphasis on the *cultural* and *symbolic underpinnings* of our societal orders, and second, an acknowledgement of the crucial role of imagination in social life. Imaginaries are understood as a constituent basis of the social-historical world.[6] Social imaginaries consist in the socio-historical imagination of social reality, which means that they allow a group of individuals to imagine themselves to be part of the same community over time, but also more fundamentally to make sense of reality.[7] Different authors have stressed the imagined nature of communities, most notably Benedict Anderson, but clearly also Charles Taylor in his understanding of the role of social imaginaries in bringing about a 'new vision of moral order', the 'modern moral order'.[8]

Clearly, there are affinities here with classical sociology, not least Durkheim's notion of 'conscience collective' and his later collective representations. In this perspective, social imaginaries appear to stress a structural dimension to culture and relate it to societal evolution and increased complexity and differentiation. Přibáň is clearly inspired by this Durkheimian/Taylorian dimension of cultural background dimensions of society, even if with a specific twist, which links (an early) Durkheim with Luhmann, in an emphasis on functionalism and differentiation. A core question in this reading regards social imaginaries foremost as vehicles of order, integration, and the imagination of social unity. Imaginaries provide the means by which society can imagine itself as a political and social community and its members as equal associates of a common project.

A closely related dimension is the conception of social imaginary as symbolic ensembles. Alexander Latham-Gambi has, for instance, likened the social imaginary to a 'grammar' or a

understanding of constitutionalism with constitutionalism *tout court*, eg, M Loughlin. *Against Constitutionalism* (Harvard University Press 2022).

[3]Populism, in particular in its right-wing version, can be seen as a strong critique on the liberal-legal idea of a constitution as a higher order, which defines the rules of the political game, but is in itself not subject to democratic politics. Populists tend to prioritise the political majority's will, rather than the constitutional text.

[4]S Adams and JP Arnason, 'A Conversation on Social Imaginaries: Culture, Power, Action, World' 1 (1) (2022) International Journal of Social Imaginaries 129.

[5]S Adams, P Blokker, NJ Doyle, JWM Krummel and JCA Smith, 'Social Imaginaries in Debate' 1 (1) (2015) Social Imaginaries 15; S Adams, 'What Are Social Imaginaries?: A Pathway Through the Labyrinth' 2 (2) (2023) International Journal of Social Imaginaries 183.

[6]JB Thompson, 'Ideology and the Social Imaginary: An Appraisal of Castoriadis and Lefort' 11 (5) (1982) Theory and Society 659.

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

[8]C Taylor, *A Secular Age* (Harvard University Press 2007) 159.

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'vocabulary'.[9] In constitutional terms, the imaginary informs the fundamentals of what society is made up of, what constitutes society, and what are the relations between its constituent parts. Přibáň relates to this dimension by stressing how a 'plurality of social immanence and differentiated social forces [is transformed] into the community of transcendental values and ideals'. In fact, social imaginaries 'generate principles and values transcending these specific structures and constituting general expectations of living in one legitimate polity'.[10] In this, Přibáň's discussion is deeply imbued in the original sociological question of what makes modern society possible in the wake of the demise of traditional communities. In this light, constitutions are clearly key vehicles of integration and create unity out of diversity.[11]

In the emphasis on unity in diversity and identity, approaches towards social imaginaries leaning on Durkheim, Taylor, and more generally on structuralist considerations, tend to emphasise the *reproductive imagination*, that is, the collective knowledge, meanings and presuppositions that are largely taken for granted and that emerge slowly over time. In this perspective, the constitution as a political and societal form is largely taken for granted. It is almost as if the constitution is a natural accompaniment of processes of societal and functional differentiation. This comes through in some ways in Přibáň's account, when the constitutional imaginary is turned into a purposive vehicle that serves objectives of integration, communication, and informs value distinctions between what is legitimate and what is illegitimate (in fact, functional approaches frequently take binary views[12]). This is relevant on the domestic level, but it equally pertains to post-national processes of societal integration, such as the European Union.

This functionalist–structuralist account of imaginaries by itself however provides a somehow limited account of the imaginary and displays a number of significant blind spots. In Přibáň's work,[13] this is probably partially related to a rather cursory discussion, and subsequent dismissal, of Cornelius Castoriadis' landmark contribution to the conceptualisation of social imaginaries. As noticed, by explicitly focussing on Taylor, the reproductive and integrative background dimension of constitutional imaginaries is stressed in Přibáň's account, while the crucial dimension of *productive* or *creative* imagination (central in Castoriadis) is largely left aside. Questions of radical imagination seem not to fit easily into an account inspired by systems theory (although in the work of another scholar inspired by Luhmann, Hauke Brunkhorst, revolutionary dimensions of undetermined creativity have been explicitly conceptualised[14]). This becomes visible in the stress on functionality: imaginaries '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'.[15] In fact, according to Přibáň, 'imaginaries have the capacity to represent the pluralistically constituted and functionally differentiated modern society as the collective self of shared experiences, meanings and values'.[16] The 'function of imaginaries is the constitutionalisation of *facts* of differentiated societal power as legitimising *values* of one polity' and '[i]maginaries are constituted by specific social systems'.[17]

While the functionality flowing from imaginaries (in terms of contributing to the creation of institutions) is surely a highly significant dimension, it is in a way a secondary one. In other words,

[9]A Latham-Gambi, 'The Constitutional Imaginary: Shared Meanings in Constitutional Practice and Implications for Constitutional Theory' 15 (1) (2021) ICL Journal 21; see also Belov above n 1.

[10]Přibáň above n 1, 3.

[11]A clearly related term in constitutional debates is that of 'constitutional identity', which is at the core of concerns about democratic backsliding and populist assaults on constitutions.

[12]See W Binder, 'Social Imaginaries and the Limits of Differential Meaning: A Cultural Sociological Critique of Symbolic Meaning Structures' 44 (suppl 2) (2019) Österreichische Zeitschrift für Soziologie 17.

[13]See in particular Přibáň above n 1, 1.

[14]See H Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury Publishing 2014).

[15]Přibáň this issue 1.

[16]Přibáň this issue 2.

[17]Přibáň this issue 3; emphasis in original.

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the functionality is crafted *a posteriori* onto a first order imagination. The original creative imagination cannot be reduced to functional concerns (that is, as purely and only a reflection of existing 'necessities'). Castoriadis radicalises this insight by claiming that imaginaries are based on 'images' *without* a referent in the world (and hence as not simply mirroring the world, 'reality', or an intrinsic rationality to be laid bare). The *reproductive* imagination hinges on a structuring or ordering function, which contributes to identity and value identification, and makes it possible for human beings to imagine their togetherness (and hence reproduces unity or some form of whole). In Přibáň's reading, this structuring function emerges from an ongoing process of functional differentiation, which necessitates a form of constitutional ordering. In contrast, the *productive* imagination, which seems less of Přibáň's concern, puts emphasis on uniqueness, on historical creation *ex nihilo*, or the creation of worlds without a precedent in the existing world (and without presuming any clear function, or rather, understanding the imaginary as preceding the possibility of identifying some kind of 'function'). This also means that imaginaries relate to forms of meaning that cannot be reduced to binaries, codes, or structural languages (legitimacy – illegitimacy) that keep society together, but rather relate to meaning that can never be fully articulated or theoretically entirely grasped and explained. In other words, in the moments that Přibáň seems to reduce the imaginary dimension of constitutions to a functional dimension, he gives the impression that the 'surplus meaning' and indeterminacy that constitutes the imaginary is eradicated. The fact that constitutions as vehicles of societal rationalisation are in themselves the fruit of radical imagination seems ignored. What Castoriadis calls the 'magma' or the indeterminate nature of imaginaries – in strong contrast to scientific assumptions of determinism – seems not taken up. This latter insight also means that the meaning of constitutions and constitutionalism is always in formation and open to conflict and critique (as for instance resulting from the indeterminate nature of the modern social imaginary signification of autonomy, stressed by Castoriadis). In other words, Přibáň's emphasis on functional differentiation is itself a product of social imagination.[18] Applying imaginaries to constitutions is not merely about identifying their symbolic workings in society (beyond a strictly internalistic and legalistic understanding) and stressing their functional operation. Rather, on a more profound level, it begs the question of why and how constitutions have come to play a fundamental, constitutive role in modern societies in the first place. Under conditions of modernity, constitutions have become a *conditio sine qua non* for society as such to be (recognised, acknowledged), and are understood as to provide a fundamental legitimatory grammar to societies.[19] In other words, in particular in the post-Second World War era, the constitution as imaginary has become a 'gold standard' for modern democracies. This very fact means that constitutions have become widely institutionalised in a functional sense. But it equally means that constitutions maintain an (unexplained) imaginary dimension, which is one of the driving forces behind constitutional challenge and change. Hence, the notion of constitutional imaginary should also be able to account for the original emergence of the 'constitution' as a powerful and pervasive imaginary as well as help elucidating the potential re-interpretations of what the constitution means in social practice and hence in relation to ongoing shifts in imagination.

That Přibáň ultimately does not fully reduce constitutional imaginaries to functional vehicles becomes clear in his acknowledgement of the polysemy and polyvalence involved (hinting at – although not fully acknowledging – the indeterminate nature of the image of the constitution). He relates such polysemy however to the process of functional differentiation and the competing expression of societal subsystems and their semantics[20] and their distinctive interpretations of the binaries of good and bad or legitimate and illegitimate. From this perspective, the contemporary

[18]See also Binder above n 10 26, discussing Luhmann.

[19]See C Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press 2011).

[20]Přibáň above n 1, 6.

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populist challenge to constitutionalism appears to be based on a struggle between technocratic forces promoting a modern, legal–rational imaginary of constitutionalism, whereas populist forces endorse a constitutional imaginary that is grounded in traditionalism and authenticity. One could rephrase this as a struggle between a postnational imagination of a European rational order as a distinctive societal system or European *communitas* against the rebellion of the populist tribalists who defend obsolete nation-state systems. While such an image of the current predicament of European constitutionalism is captivating, one wonders if it does not portray the 'interpretative' and 'imaginative' struggle into too neat a counter-position. Fair enough, both the legal–rational imaginary and the populist imaginary display tendencies towards absolute truth claims, and hence both close the door to fundamental indeterminacy while articulating strong, exclusive claims to legitimacy. But at the same time, both imaginations suffer from internal tensions and contradictions that bring us back to the indeterminate and open nature of – in our case – the constitutional imaginary. In fact, constitutions cannot be reduced to technocratic devices that allow us to master the world, ever better, and ever more rationally. But constitutions can equally not be limited to a view of self-constitution and identity (autonomy). Indeed, the constitution as imaginary escapes specific societal contexts and has come to constitute a powerful universal horizon of meaning-giving to modern societies. Within this horizon, specific political projects claim constitutional meaning and legitimacy in distinctive, contrasting ways. The imaginary institution of society is always open to contestation, in part due to the pluralism stressed by Přibáň, but more importantly as a result of the lack of distinctive or precise ultimate meaning that the imaginary carries in the first place.

What a social theory of the imaginary should hence contribute to is an elucidation of the workings of imaginaries, not least by making explicit the partial or limited manner in which societal and political forces engage in instituting imaginaries in practice. This involves rendering explicit moves towards imaginative closure, but this also necessitates carefully bringing out the internal tensions and contradictions of such constitutional projects, and their distinctive relations to core imaginary significations, such as order or rational mastery and autonomy or self-rule. The reduction of rationality to formal–procedural and legal–positivist understandings in the dominant legalistic interpretations of the constitutional imaginary is rooted in one such tension (while prioritising legal–formal codes and legal positivism, it is never able to fully eliminate other rationalities, not least those related to constituent power). The sacralisation of the people and community in populist projects indicates another strong tension (the people can never be fully identified, and its 'authenticity' clashes with universal claims, as in 'Europe of the Peoples'). What is perhaps the most profound challenge in the current competition over constitutionalism and legal orders is the deep questioning of the core of the constitutional imaginary in its legal–rational understanding; in other words, the claim of modern constitutionalism to put into practice the modernist promise of full rational mastery of society. Indeed, the counter-constitutional populist challenge is not merely about a rejection of liberal democratic orders but regards the questioning of the rational–scientific imagination as such. This involves not just a contest over principles of rational versus value-based forms of legitimacy, but this deeply questions the fundamentals of functionally differentiated society and calls for a different grounding of (constitutional) law.

Competing interests. The author has no conflicts of interest to declare.

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