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Imagining Statehood and Constitutionalism in Europe

Introduction

Jan Komárek, Birgit Aasa, Marina Bán and Michał Krajewski

1.1 IMAGINING EUROPE AND 'BEYOND'

How is Europe imagined in national constitutions and their conceptual frameworks? And how does Europe influence these very frameworks, or, as we call them, constitutional imaginaries? These are the key questions explored in this volume, which forms part of a collective project *IMAGINE: European Constitutional Imaginaries: Utopias, Ideologies and the Other*.[1]

The first book in the project, published in 2023,[2] examined constitutional imaginaries underpinning European integration: the sets of ideas and beliefs that help to motivate and justify European integration in constitutional terms. Scholars of various disciplinary backgrounds addressed questions raised by the ideological – and at the same time utopian – character of the EU's constitutionalism. The present volume turns the perspective around and puts emphasis on the EU member states, bringing together views from Western and Central Eastern Europe.[3] It explores what

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[1] ERC Starting Grant No 803163. More information on the project can be found at www.imagine-const.eu/ (last accessed 2 April 2025).

[2] Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023).

[3] We also use the distinction between the 'old' and 'new' Europe, or 'the West' and 'the East' in the text.

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both the mainstream and non-mainstream debates can contribute to European constitutional imaginaries. The volume introduces different themes emerging in national contexts in post-communist Europe and provokes reflections on them from the other side – the EU member states from before 2004.

This means rethinking the way we look at European law and politics: we do not start with questions raised in the centre of the EU (such as 'how to best implement "our" "common" values in the "new" member states?', or, 'why there is democratic "backsliding"'?). Instead, we identify concerns that emerge on the periphery of the EU in order to shed light on European integration and its constitutional imaginary as a whole. Through this exercise we seek to enhance the ambition called for by one of us in the article 'Waiting for the existential revolution in Europe':[4]

> Europe has a much better hope of overcoming its current crisis if it becomes spiritually united. Yet this cannot happen through East Central Europe trying to 'return' to the West or becoming the West. Rather, it lies in the recognition of its unique experience, which is not to be overcome or, even worse, forgotten, but used as a reservoir for Europe's future flourishing.[5]

Section 1.1.1 explains what we mean by 'constitutional imaginaries'. Second, in Section 1.1.2, we discuss how this concept can be employed to better understand the stakes behind the 'constitutionalisation' of the EU. Finally, we suggest what the contribution of post-communist Europe may consist of in Section 1.1.3.

Section 1.2 presents the three themes emerging from post-communist Europe: first, Section 1.2.1 shows how the nature of statehood transforms when the state integrates into a supranational structure and how the imagined 'other' (for example, the enemy, the Soviet Union or even Europe) influences the key concepts of national constitutional law, such as sovereignty, peoplehood or citizenship. The second theme, in Section 1.2.2, concerns the uses and misuses of history in the construction of constitutional imaginary. Finally, there have been varieties of liberalism at play in the period of post-communist transformation (which, from the perspective of the West, was the 'end of history'). These need to be analysed separately, before the hegemonic 'liberal ideology' can be criticised (Section 1.2.3).

Each theme is briefly introduced by the member of our project team who conducted a case study focused on one country: Estonia (Birgit Aasa), Hungary (Marina Bán) and Poland (Michał Krajewski). As will be seen, while it is true that each of these case studies gave rise to a particular theme, similar concerns can be found in other member states of the EU as well. It was precisely the point of our project to identify these similarities and at the same time put them into the common conceptual framework. This introduction explains how we tried to organise our

[4] Jan Komárek, 'Waiting for the Existential Revolution in Europe' (2014) 12 *International Journal of Constitutional Law* 190.

[5] Ibid., 212.

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work so that each of the chapters speaks to another and the volume offers (much) more than a mere collection of isolated reflections on a particular member state.

1.1.1 *Constitutional Imaginaries: An Expanding Concept*

Constitutional imaginaries refer to the set of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule.[6] Such imaginaries are as important as institutions and officeholders formally embedded in constitutions. They draw their intellectual basis from broader social imaginaries, which include 'symbolic collections of self-understandings – carried in images and stories and ways of thinking – that reflect crucial facts of social life, and also normative expectations about how that social life ought to be lived'.[7]

Constitutional imaginaries provide political action (anchored in the constitution and getting expression through the medium of law) with an overarching sense and purpose recognised by those governed as legitimate. It is these imaginaries that construct the past and the future of the polity and the political identity of its citizens.[8] Participants in the constitutional practice and everyday politics usually do not reflect on these imaginaries; they remain as background assumptions and framings of everyday political and constitutional thought and action. However, from time to time, imaginaries get to the surface and form the heart of public debate: especially when a momentous step is to be taken by the polity, for example, during the establishment of a new constitutional settlement, such as entering the EU, or when a crisis shatters the existing arrangements.

In some sense constitutional imaginaries can be understood as ideologies in (the post-)Marxist terms as 'means of domination'.[9] However, contrary to such negative connotations, we argue that imaginaries/ideologies are indispensable for political rule. They integrate individual subjects and their beliefs into a common whole.[10] There is a complex relationship between reality and ideology – 'ideologies are

[6] On the concept of 'constitutional imaginary', see Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies and the Other', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), chapter 1, and Martin Loughlin, 'Constitutional Imagination' (2015) 78 *Modern Law Review* 1. The present chapter builds on and develops the ideas presented in Komárek, 'European Constitutional Imaginaries'.

[7] Paul Linden Retek, 'History, System, Principle, Analogy: Four Paradigms of Legitimacy in European Law' (2021) 26 *Columbia Journal of European Law* 1, 8, referring to Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2003) and Cornelius Castoriadis, *The Imaginary Institution of Society* (MIT Press, 1987), 145.

[8] Ulrich Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *European Law Journal* 14, 20.

[9] For a critique of such reductive understanding of ideology, see e.g. Susan Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (Cambridge University Press 2000), chapter 1.

[10] See Loughlin, 'Constitutional Imagination', 12–13.

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neither true nor false but are a set of socially conditioned ideas that provide a truth that people … want to hear'.[11]

Constitutional imaginaries thus conceal structures of domination, making conscious choices, distribution and redistribution appear as natural, fixed and incontestable, or at least objectively good. This can be carried out through different means, including through presenting economic choices with significant social costs as objectively unavoidable given the economic situation (the economic emergency rhetoric), by relying on an existential fear of enemies that can be addressed only by joining a powerful alliance, or even by characterising constitutional law and the input of experts (legal, economic or others) as an apolitical and scientific endeavour, offering a universal blueprint for the just ordering of society. As such, ideologies can shape law, and so do constitutional imaginaries – they have a transformative function.

Even though constitutional imaginaries that emerged in post-1989 Central and Eastern Europe – or in any other time and anywhere else in Europe – have been ideological inasmuch as they offered a system of belief indispensable for political rule, it does not mean that alternatives (such as a return to the nation-state and radical 'sovereignty' based on the glorious historical experience – 'making country XY great *again*') are any less ideological. In a way, ideologies are inescapable in politics – and constitutional law alike.

Constitutional imaginaries also form utopias. Utopias provide an external vantage point from which we can criticise ideologies.[12] 'Only those orientations transcending reality' can be referred to as 'utopian' which, 'when they pass over to conduct, tend to shatter, either partially or wholly, the order of things prevailing at the time'.[13] Utopias preserve opposition to the status quo as aspirational schemes that seek actualisation.[14] Therefore, inquiring into the constitutional imaginaries of European states means also inquiring into their fundamental hidden or unhidden aspirations and expectations.

Admittedly, the nation-states usually stem from organic national communities and, as such, constitute 'nomocracies' – communities based on the public good of being able to live and govern in common. In contrast to 'teleocracies' (like the EU), they are not primarily concerned with pursuing specific goals or public goods.[15] However, the constitutional imaginaries emerging before and after 1989 in Europe do manifest specific goals and public goods that constitute fundamental

[11] Christine Sypnowich, 'Law and Ideology', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2019 ed.), https://plato.stanford.edu/archives/sum2019/entries/law-ideology/ (last accessed 2 April 2025).

[12] Loughlin, 'Constitutional Imagination', 13.

[13] Karl Mannheim, *Ideology and Utopia* (Routledge, 1936), 173.

[14] Loughlin, 'Constitutional Imagination', 13.

[15] On this point, see Neil Walker, 'The European Public Good and European Public Goods', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), chapter 11.

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constitutional principles – oftentimes remaining in opposition, such as sovereignty and security, individual freedom and social justice, the rule of law and transitional justice. Understanding these utopias is crucial for orienting political action towards change and reconciling the political order with the desires of its subjects.

1.1.2 *Constitutionalism and Imaginaries in the EU*

Constitutional imaginaries of Europe in general and in the post-communist Europe in particular have received relatively little to no scholarly attention.[16] There have been numerous interesting and engaging inquiries into bordering subject-matters, which are worth mentioning for a fuller understanding of the broader range of topics at hand when talking about constitutional imaginaries.

In recent years, prominent scholarship has emerged on the 'varieties of constitutionalism'[17] in Europe and how this variety affects the production of constitutional imaginaries in both sites – (nation/member) states and the EU. Nevertheless, the published works primarily concern conflicts between national highest courts and the European Court of Justice.[18] The most recent (and admirably ambitious) project studied constitutional doctrine and theory,[19] whereas the broader intellectual debate on the foundational ideas underpinning constitutionalism(s) among constitutional scholars and other intellectuals in the member states (who very often have engaged in public and policy debates) has still remained unexplored.[20] Our volume seeks to fill this gap with studies on both how Europe is being imagined from national vantage points as well as how Europe affects the shape of constitutional law and theory in the member states.

This analysis is necessary because we lack thorough and internationally accessible exploration of national debates about the changes brought to local constitutionalisms by European integration and how these constitutionalisms conceive of the statehood and its relationship to Europe. In particular, we need to acquire a more

[16] Besides Komárek, *European Constitutional Imaginaries*, see Jiří Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge, 2022), which, however, does not take the comparative perspective offered by our volume. Our volume takes a post-communist perspective as a starting point for a reflection on Europe as a whole.

[17] Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84 *Modern Law Review* 477 and Bruce Ackerman, 'Three Paths to Constitutionalism: And the Crisis of the European Union' (2015) 45 *British Journal of Political Science* 705.

[18] 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 (eds.), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing, 2010).

[19] Stefan Griller, Lina Papadopoulou and Roman Puff (eds.), *National Constitutions and EU Integration* (Hart, 2022).

[20] See, however, Marco Dani, Marco Goldoni and Agustín José Menedéz (eds.), *The Legitimacy of European Constitutional Orders: A Comparative Inquiry* (Edward Elgar, 2023).

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profound understanding of those constitutional imaginaries existing alongside the mainstream liberal paradigm, sometimes supporting and sometimes challenging it. In this sense, an important question tackled in this book is to what extent the non-mainstream imaginaries have been accommodated within the constitutional settlement. Have they been simply relegated to the sphere of anachronistic ideas, waiting for the right time to re-emerge and put in question the constitutional status quo? Inquiring into these debates is an urgent scholarly task given the emerging and mounting challenges to European integration. Notably, these challenges manifesting as illiberal and populist parties are no longer characteristic of only post-communist Europe.

1.1.3 *Learning from Post-Communist Europe*

As a distinctive feature, the volume puts particular emphasis on post-communist Europe. European constitutionalism has so far been interpreted as a Western invention with the post-communist states trying to catch up and 'return to Europe'. In consequence, most research on European constitutionalism, even research that includes the Eastern perspective, examines it through 'Western lenses'. Our goal has been to reverse this dynamic. It stems from the idea to identify influential discussions around constitutional imaginaries in Central and Eastern Europe and invite scholars from the 'West' to reflect on these imaginaries through the lenses of their own national constitutional experience. This way, we sought to avoid a certain hegemonic (and homogenising) 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. The experience of communism and post-communist transformation that begun in the 1990s, but certainly did not end with the entry of many post-communist countries to the EU, is neglected, or worse, taken as a threat to the achievements of the old Europe.[21]

Rather than painting broad-brush analyses of constitutionalism in Central and Eastern Europe, including its similarities or dissimilarities with the Western blueprint, this book suggests a different approach. We have sought to identify and shed light on distinct, perhaps even idiosyncratic but, at any rate, influential constitutional imaginaries in several states of Central and Eastern Europe relating to these states' position in Europe, especially those 'others' that have departed from mainstream liberal constitutionalism and the narrative of the return to Europe. We believe that studying these imaginaries enables a clearer understanding of the dynamics underpinning the constitutional transformation of post-communist

[21] On this, see e.g., the reactions to Damjan Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal* 406.

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member states, including conventionally considered 'achievements' as well as those termed 'backsliding' or 'departure from European values'. But it also provides a fuller picture of *European* constitutional imaginaries in its totality: as it is not only Western European states that form Europe, but the Eastern counterparts as well.

The experience of the 'Other Europe' from *both before and after* 1989 suggests more inventive and fruitful avenues than otherwise explored and expected.[22] Most often, the mainstream picture focuses on the process of transformation of post-communist states into future members of the Union, seeking to comply with the political and economic criteria of EU membership.[23]

Crucially, 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*.[24] The concepts of the 'rule of law' and European values appeared during the conditionality process to prepare the EU enlargement of 2004. As noted by de Witte, the enlargement was a 'constitutional agenda-setter for the EU'.[25] However, the EU institutions were criticised for prioritising 'legal and institutional checklists', while neglecting 'socio-political and socio-cultural realms',[26] as well as failing to engage with local constitutional traditions of, among other things, civil engagement.[27] We believe that national constitutional imaginaries in Central and Eastern Europe have still not received the attention they deserve; something that the present volume seeks to begin remedying.

In addition to the aforementioned analyses, states from the 'Other Europe' have recently received attention due to the much debated 'rule-of-law crisis', manifesting in the undermining of judicial independence, the protection of fundamental rights, media freedom and civil society, while reinforcing proto-authoritarian or authoritarian regimes. The subsequent newer strands of literature focus on the enforcement of EU legal principles towards such states[28] and the process for dismantling

[22] See Komárek, 'Waiting for the Existential Revolution in Europe'.

[23] 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 Michal Bobek (ed.), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Hart, 2015).

[24] See Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2012).

[25] Bruno de Witte, 'The Impact of Enlargement on the Constitution of the European Union', in Marise Cremona (ed.), *The Enlargement of the European Union* (Hart, 2003), 209.

[26] Kalypso Nicolaidis and Rachel Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma' (2012) *Jean Monet Working Paper* 08/2012, 2–3, https://jeanmonnetprogram.org/paper/rethinking-europes-rule-of-law-and-enlargement-agenda-the-fundamental-dilemma/ (last accessed 2 April 2025).

[27] Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2014).

[28] See, for instance, Carlos Closa and Dimitry Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

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constitutional safeguards.[29] While deeper cultural, historical and economic reasons underpinning the crisis have also been explored,[30] the internal dynamics between constitutional imaginaries of the 'Other Europe' have yet to be properly considered within the context of European integration and the rule of law crisis. This must, however, be done because post-communist member states have brought with them the legacies that have been supressed to a certain point: essentially, until they stood in the way of the successful 'return to Europe'. They re-emerged quickly after these states had joined the Union and now, *they become internal to its constitutional imaginary*. This presents the current challenges to the authority of EU law as something that comes from without, not from within the Union, and most existing constitutional law scholarship does not capture this aspect of Central and Eastern European constitutionalism.[31] Understanding whether and how European consensus on liberal constitutionalism has dominated the mainstream and superseded national constitutional imaginaries of Europe can be emancipatory, in and of itself, and also instrumental to advancing a genuinely European constitutionalism.

And, on the other hand, among the Central and Eastern European countries, there are also some of the most 'Euro-friendly' and open to EU law states in the Union. This also begs attention – why has such 'Euro-enthusiasm' taken root in that specific part of Europe and how it is related to existential questions of security and the very essence of *being* in the first place. And how does the EU system of law and governance provide replies and remedies to this predicament. All in all, the 'East' is a deep source of idiosyncrasies and novelties in the Union, which deserve more attention.

We need to engage with all the aforementioned aspects of constitutional imaginaries: (1) as indispensable for political rule, but at the same time potentially oppressive ('ideological' in the critical sense); and (2) as a means of justification and contestation. It is crucial to understand and seriously consider national constitutional imaginaries regarding Europe to uncover the reformist potential of the constitutionalist project – its utopia – or its ultimate failure.

1.2 THE STRUCTURE AND THE CONTENTS OF THE VOLUME

The structure of the volume derives from our work on the IMAGINE project throughout three years (2020–2023). A series of workshops, which took place in

[29] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

[30] For instance, Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist "Transitions", Populism, and the Rule of Law' (2019) 15 *European Constitutional Law Review* 544.

[31] 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* (Oxford University Press, 2012), which also has a historical ambition but does not examine the relevance of 1989 for its thesis.

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three post-communist EU member states (Estonia, Hungary and Poland) have identified several overarching issues. These issues were later discussed at a conference in Copenhagen.[32] The volume has subsequently integrated the reflections on these imaginaries coming from authors from other countries, especially from 'old' Europe, who participated at the conference. The following sections introduce the volume's contributions, explaining links between the three case studies and the actual content of the respective part of the volume.

The Estonian workshop inspired Part I of the volume, *Nation States, Member States and Their Others*, presented in Section 1.2.1. The workshop focused on the specific imaginary of national *sovereignty* that can be sustained only by, paradoxically, sacrificing parts of it for the benefit of the Union due to the constant threat from further East. We found similar dynamics of identifying one's own identity in opposition to the 'other' as well as tensions between the imaginaries of complete sovereignty and participation in European integration in Hungary and Poland, but also Italy and the UK. It is the presence of the constant threat from the East (or West) that still informs the constitutional imaginary of most post-communist member states. However, as is clear from the contributions by the authors from the two old member states mentioned, the idea of a 'threat' that lies behind the national border is not something unique to the former part of Europe.

The Hungarian case study focused on the imaginary of *history* and how it shapes national constitutionalism. It gave rise to Part II of the volume, entitled *Bringing Back the Past (to Serve or Understand the Present?)*, presented in Section 1.2.2. The constitutional memory of glorious imperial past is visible both in Hungary and Austria. On the contrary, in Estonia, such a glorious (imperial) past had never existed since the country was the subject of different colonial enterprises throughout its history, especially the Soviet Union. But the Soviet legacy also speaks to the ways in which history matters for national cultural and constitutional understandings of Europe. Again, only by combining insights from these various countries can we see what member states imaginaries of history share and what gives rise to their specific constitutional experiences.

Finally, Section 1.2.3 presents Part III of this volume, *The Varieties of Liberalism in Europe*, which emerged from the Polish workshop. It focused on the origins of *liberal constitutional* imaginary, which presented itself as an apolitical and scientific blueprint for a just ordering of the State, and some alternatives to it, especially those emphasising the need for *transitional and social justice*. The tension between the liberal constitutionalism and alternative imaginaries resonated well in contributions regarding Czechia, Portugal, France or the Nordic countries. By putting these

[32] The workshops were preceded by several internal seminars and one IMAGINE workshop devoted to the history of political and constitutional ideas in Central and Eastern Europe. For information on these events, see IMAGINE website, www.imagine-const.eu/category/events/imagine_events/ (last accessed 2 April 2025).

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perspectives together, we see that, through the transformation of the East, the West could transform itself too. The two processes have been linked far more than is usually understood and the flow of ideas and ideologies went in both directions.

1.2.1 *Nation States, Member States and Their Others*

Part I revolves around the questions of sovereignty and identity of different nation states and examines how these issues have shaped the understanding of and belonging to Europe. It also asks how nation states transformed into member states[33] and what were the processes, conflicts, compromises and subjugations made on the way. This part also reflects on the identitarian questions that different member states have gone through and experienced during their time as a nation state and a member state (the UK's experience is instructive in this respect, but other contributions map these changes as well). 'Their Others' in the title of this part refers in the UK's case to Europe, while for most post-communist member states it was the Soviet Union, which figured as the Enemy. Europe has been seen as the positive 'Other', through which states could hope to realise their sovereignty (as Chapter 2 illustrates). The chapter dealing with Hungary, which concludes this part, shows how the figure of an Enemy can be transformed into something else, such as liberal constitutionalism or even the EU and the values it represents.

1.2.1.1 The Estonian Inspiration: Rendering Sovereignty for the Purposes of Security?

The initial theme of this part was discussed at the Estonian workshop, which took place in Tartu in December 2021. The participants of the workshop delivered a multitude of papers on the broader theme of 'Searching for Estonian European constitutional imaginaries – sovereignty in context'.[34] The chapters written by Estonian authors therefore focus mostly on the concept of sovereignty, its different understandings and the particular application practices of it in the Estonian context.

Sovereignty is not an unequivocal or easy concept and it brings with it a certain amount of theoretical and conceptual baggage. Writing in the context of European integration, the Scottish philosopher Neil MacCormick has emphasised that the key idea of sovereignty is power without restriction.[35] This annotation brings along some conceptions of power, authority and territoriality. These can be observed in a particular setting – in the current case, Estonia.

[33] Bickerton, *European Integration*.

[34] For the programme of the workshop, see www.imagine-const.eu/workshop-searching-for-the-estonian-european-constitutional-imaginaries-sovereignty-in-context-tartu-9-december-2021/ (last accessed 2 April 2025).

[35] Neil MacCormick. *Questioning Sovereignty* (Oxford University Press, 1999), 127.

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In order to start unpacking the concept of sovereignty in the Estonian imaginaries, some contextual clarifications are due. Firstly, sovereignty has a particularly strong conceptual and celebratory meaning in the context of the Estonian Constitution. The Constitution of the Republic of Estonia incorporates a particularly strong sovereignty clause in its §1(2): 'The independence and sovereignty of Estonia are *timeless* and *inalienable*'.[36] This has been called 'one of the strongest accentuations of sovereignty in Europe and perhaps even in the world'.[37] It has been said that 'the fear of a rollback to a Soviet Union-type organisation was the main consideration behind the wording of this provision'.[38]

According to the Estonian Supreme Court (SC), 'the core essence of sovereignty is the right of discretion in all matters, irrespective of external influences'.[39] Despite this, the SC's approach in particular cases has been much more liberal and accommodating. There the SC treated sovereignty as a principle that is open to restrictions and weighing against other principles.[40]

Secondly, Estonia has a notable 'unconditionally EU-friendly approach'[41] to EU primacy claims, being an example of exceptionless EU law primacy or even adhering to a doctrine of absolute primacy.[42] It has been described as an unconditional acceptance of the standpoint of the Court of Justice of the European Union (CJEU) on primacy,[43] an unprecedented submissiveness to the EU that has no counterparts in other EU Member States.[44]

What might explain such an open approach to EU and international law and a disregard of national sovereignty claims? A small state dimension and a post-imperial sense of ontological insecurity of the very existing as a sovereign state arguably cause this unprecedented Euro-fondness. In other words, in order to be a state, you must

[36] The Constitution of the Republic of Estonia – RT 1992, 26, 349; RT I, 15.05.2015, 1, emphasis added.

[37] Madis Ernits et al., 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law' in Anneli Albi and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press, 2019), 902. See also, Anneli Albi, 'Estonia's Constitution and the EU: How and to What Extent to Amend It?' (2002) 7 *Juridica International* 39, 42.

[38] Ernits et al., 'The Constitution of Estonia', 902, referring to Viljar Peep and Lennart Meri (eds.), *Põhiseadus Ja Põhiseaduse Assamblee: Koguteos* (Juura, 1997), 68.

[39] Estonian Supreme Court 3-4-1-6-12, para 127.

[40] See Estonian Supreme Court 3-4-1-6-12, para 130.

[41] Ernits et al., 'The Constitution of Estonia'.

[42] Anneli Albi and Hent Kalmo, 'Estonia: From Rules to Pragmatism', in Stefan Griller, Papadopoulou Lina and Puff Roman (eds.), *National Constitutions and EU Integration* (Bloomsbury Publishing, 2021), 4, 21.

[43] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials*, 2nd ed. (Cambridge University Press, 2010), 190–191. Also see discussion in Tatjana Evas, 'Judicial Reception of EU Law in Estonia', in Bruno de Witte et al. (eds.), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar, 2016), 154

[44] Julia Laffranque, 'A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act' (2007) 7 *Juridica International* 55, 63.

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give away some of the very 'stateness' to exist in the first place. Underlying the Estonian acceptance of the supremacy of EU law is an existential fear against its Eastern neighbour. One might consider it a result of a fairly straightforward and perfectly reasonable cost-benefit analysis: the security-related benefits of international cooperation outweigh the loss of sovereignty.

When talking of history, one particularity sets the Estonian chapters apart from others included in this volume. Namely, Estonia was not merely a satellite state of the Soviet Union, but part of the Union itself as it stood in the designated period of history. This perhaps sets out specific visions and imaginaries of Europe generally and of the European Union particularly, but also of the Eastern neighbour – Russia. Is it somehow different to be stepping almost straight from one Union to another, from being the West of the East to being the East of the West, without broader contemplation and societal discussion of the idiosyncrasies and potential differences and similarities these Union-memberships and transformations entail. The Estonian reflections of it were rather poor or even non-existent, but that in itself also reveals something, some deeply rooted ideological and existential understandings of the meaning of Europe and Estonia's place in it. Namely, Estonia has always regarded itself as part of Europe, as the inherent borderlining component of it, something of an outpost between East and West[45] with a strong feeling of belonging to Europe.

All in all, Central and Eastern European distinctiveness from its Western counterpart is overt. History should not be underestimated in this equation and it plays a part in establishing the polities and societies which we today call Central Eastern Europe. History and size of the nation thus is featured in how sovereignty is perceived and performed in the region. History and size matter. Also for sovereignty.

1.2.1.2 Contributions

All contributions show the prominence of the concept of sovereignty from the existence and regaining of the state from the Soviet occupation in the first place to the securitised practice of it in contemporary law and politics. Sovereignty also has a transformative aspect in the current and historical perspective. The current sovereignty undertones allow a state like Estonia to still engage in deep forms of international and regional cooperation – such as the European Union – whereas the past connotations and usages of sovereignty operationalise it for the anti-imperial struggle. Here manifests the great transformability of the concept and its many practical usages.

These questions are well captured in Maria Mälksoo's Chapter 2, entitled 'Vicarious Sovereignty: Becoming European the Estonian Way'. Mälksoo proposes

[45] Heiko Pääbo, 'Estonian Transformation: From an Eastern Outpost in the West to a Western Outpost in the East', in Barbara Törnquist-Plewa and Krzysztof Stala (eds.), *Cultural Transformations after Communism: Central and Eastern Europe in Focus* (Nordic Academic Press, 2011).

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a new concept – 'vicarious sovereignty' – to understand and explain the way in which Estonia positions itself vis-à-vis Europe and its national constitution.

Mälksoo defines vicarious sovereignty as 'living through another'. One lives through another by treating their 'achievements and experiences', as Mälksoo puts it, as their own. Like in the case of many other states in the region, 'becoming European', or rather joining the EU and other European and international organisations, was Estonia's purpose, constitutive for its identity. However, the case of Estonia shows an interesting paradox, which is also evident in the Polish case, as described by Kustra-Rogatka in Chapter 7. On the one hand, Estonia's 'vicarious identification with Europe' has made it easier for this state to transfer parts of its sovereignty to the EU. On the other hand, the Constitution of Estonia proclaims a very strong commitment to absolute sovereignty which, again, is also characteristic for Poland. How can one reconcile two such conflicting commitments? Perhaps the states in the region, having barely regained their hard-fought independence, had no choice but to undertake this arduous task and hammer out their identity in-between sovereignty and integration *somehow*. In particular, Estonia had to accept this trade-off for the sake of its 'ontological security', in the words of Mälksoo. She illustrates how Estonia has sought to be 'independent', 'sovereign' and 'European' all at once and in the context of the described permissiveness of the Estonian model of EU membership.

Mälksoo explores 'Estonia's sovereignty-sharing with the EU through the lens of the vicarious identification concept' and the visions of Europe presented by the Estonian constitutional 'map-makers', as she calls them, at the time of the Convention on the Future of Europe: Lennart Meri and Toomas Hendrik Ilves. She specifically investigates the question of restrictions of sovereignty and the boundaries of the European constitution in the imagination of the Estonian influential thinkers and decision-makers during the Convention on the Future of Europe. She examines how these thinkers and decision-makers understood 'becoming European' not just in reference to the EU accession but also in terms of recognising the 'Europeanness' of Central and Eastern Europe by the West of the continent.

Mälksoo's contribution also addresses a phenomenon well-known from most member states: Europe, or the EU, becomes a space of political action that is instrumentalised by various forces at the national level. Marco Goldoni's Chapter 3, 'From Federation to External Constraint: Europe in the Italian Constitutional Imagination', is path-breaking in several respects. First, it shows how the imaginary of Europe has been changing in a single member state, from the period when European integration was only imagined in a quite literal sense by the members of resistance, to the establishment of the European Communities in the 1950s, followed (possibly paradoxically) by a period of ignorance until today, when the EU is seen as a source of external constraint. This story has been told several times already; however, Goldoni does not stop short at that. The second remarkable contribution he makes concerns the kind of actors he looks at in his

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analysis of Italian constitutional imagination. Inspired by the renewed interest in the study of political parties in political science and theory, Goldoni brings about an original study of Italian political parties relationship to Europe, highlighting the dependency of their imaginaries on what Europe 'offers' for them. In that, Chapter 3 nicely connects to the other chapters in this part, not only that of Mälksoo (Chapter 2), but particularly Kustra-Rogatka's Chapter 7 (dealing with Poland) and Saharov's Chapter 6, offering a conceptual history of the idea of 'self-management', which quickly transformed, after its introduction into official discourse, into a debate on sovereignty.

But does sovereignty in Central Eastern Europe have a different meaning than sovereignty in the Western part of the continent? Some have argued it does.[46] Do other concepts such as democracy, liberalism or rule of law perhaps then too have a different connotation? This brings to the question: is Central Eastern Europe's current predicament different because its history is different?

This is the main question to be answered in Hent Kalmo's Chapter 4, 'Sovereignty and the Misery of Small Eastern European Nations', which broadly speaking tackles the concept of sovereignty and puts it into the context of small Central Eastern European states. It also touches upon the issues of the East Europeans' 'Europeanness' among other things. Kalmo's thesis is that Eastern and Central Europe is not uniformly *souverainiste* in the sense that the constitutional rules of all the countries in this region are not always strongly protective of sovereignty.

Kalmo argues that it has been a certain representation or rather a set of conflicting representations related to the idea of being a small nation which has engendered the ambivalent attitude to national sovereignty observable in Eastern and Central Europe. This ambivalence is illustrated particularly well by Estonia, where the already mentioned strong symbolic commitment to national sovereignty has coincided with the ambition of international integration, as manifested with the openness of Estonia's legal system to international law. Kalmo's central concept – the smallness of the nation – is not so much a single idea, or a theory, but a recurring cultural theme, an unresolved problem and an axis of debate. It still generates legal contradictions and conflicting constitutional doctrines. When the national security may be endangered, sovereignty may either offer protection or, quite to the contrary, hinder seeking assistance from a larger political community. This 'small nationess' has thus hung over the region and can be seen as a common constitutional imaginary.

Kalmo also presents his 'misery thesis', which is kind of an idea of an 'Eastern *Sonderweg*'. According to this thesis, the history of Western and Eastern Europe have been different, so their essential characteristics must be different too, including political culture or even nationalism. The roots of these difference can be traced to the Middle Ages or beyond.

[46] Chris J. Bickerton, 'From Brezhnev to Brussels: Transformations of Sovereignty in Eastern Europe' (2009) 46 *International Politics* 732, 734.

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Kalmo draws the misery thesis from István Bibó's famous essay 'The Miseries of East European Small States'[47] for whom the key puzzle of the causes of the Second World War lied in Eastern Europe since it was there that most critical territorial disputes had flared up in the late 1930s. Also, according to Tony Judt, while 'northern and western European peoples formed states by expansion from a core',[48] the countries of modern Eastern Europe were born from the collapse of empires – Russian, Turkish, Austrian and German. The Eastern identity, for Kalmo, who refers to Judt, necessarily thus consists of 'an all-or-nothing claim to territory and power at the expense of a neighbour making an identical claim. This resulted in the great misfortune of the eastern half of Europe. the division into states came late and all at once'.[49] The misery thesis also explains the post-war difficulties of Central Eastern Europe by the simple fact that the region had remained on the wrong side of the Iron Curtain: its problems resulted from Soviet domination, not from something indigenous.

Martin Loughlin's Chapter 5, on 'Ruling Britannia', discusses the key features of Britain's constitutional identity, as they developed throughout history, and argues that they 'ensured that Britain could never become an active participant in the European federal project'.[50] In this respect, the chapter provides an interesting counterpoint to the other contributions in this part, not only those concerning Estonia, but also Goldoni's chapter on Italy. Europe is always perceived as the Other, which threatens rather than protects or extends sovereignty of a member state.

The British constitutional identity consists of several narratives, which all together provide for a constitutional imaginary of a nation, but also define the framework of its government. First, the doctrine of the ancient constitution, according to which it was already the early Saxons (the Goths) who had created an ancient, pre-feudal and liberty-preserving constitution. No great constitutional documents of English (and British) constitutional history (including the Magna Carta) instituted freedom for the English, as it existed long before them in the form of this 'ancient constitution'. Loughlin mentions how the modern constitutional scholarship avoided closer examination of the founding principles and instead relied on the Whig interpretation of history, which 'present[ed] a story about the triumph of liberty over absolute sovereign power, evidenced by the increasing importance of representative institutions in the British system'.[51]

The other narratives of the British constitutional identity relate to this mythology, especially those concerning the pivotal importance of local self-government in the English system and the rule of law. The persistence of the Crown and its paradoxical

[47] István Bibó, *The Art of Peacemaking: Political Essays by Istvan Bibo* (Yale University Press, 2015).
[48] Tony Judt, *A Grand Illusion? An Essay on Europe* (Penguin Books, 1996), 56.
[49] Ibid.
[50] See Chapter 5.
[51] Ibid.

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(perhaps) relationship to Parliamentary sovereignty have remained unresolved, also when the British state was formed and 'Britons' came into existence.

In the penultimate part of his chapter, Loughlin discusses the difficult relationship between the British Constitution and the European integration project, which led to the contemporary crisis of constitutional identity of Britain. For an external observer it may seem that Loughlin's 'best hope' – 'the advancement of radical reforms to the system of government, which might incrementally provide an institutional foundation for a renewal of faith'[52] was lost at the moment when the United Kingdom decided to leave the European Union.

The next Estonian contribution to the volume combines the concept of sovereignty and the Soviet era. It shows that imaginaries can also acquire a formal content and meaning, as was the case in the mid-perestroika Estonia when a contest for 'future scenarios' for economic development in Estonia was held. Juhan Saharov's Chapter 6, 'The Power of Concepts: From "Self-management" to "Sovereignty" in Soviet Estonia (1987–1988)', takes its grounding in these historical events, which he calls the finest hour for imagining alternative futures for the republic. He shows how the imagination of futures takes place in the late totalitarian system which has opened its society to radical reforms. He considers the period of 1987–1988 to be the period of different imaginaries – could Estonia become an economically independent republic within the Soviet Union, a sovereign socialist republic or an independent republic or be restored as a continuation of the pre-war Republic? As the ultimate outcome was the latter, he puts particular importance on the power of specific concepts and languages within the 1989 revolutions, including their impact on the Soviet collapse.

The central concepts in Saharov's 'conceptual revolution' are 'sovereignty' and 'self-management'. The contest for 'future scenarios' created the concept of 'self-management' in the economic sphere in Estonia in 1987, which continued its independent development to the final language of political sovereignty in 1988. This resulted in the fact that the politically and legally more useful term 'sovereignty' replaced the term 'self-management' as the central concept in reformists' tactics and an eventual declaration of sovereignty on 16 November 1988 by the Supreme Soviet of the Estonian Soviet Socialist Republic (ESSR) which initiated the 'Parade of Sovereignties' across the Soviet Union with its ultimate dissolution. Just like that, 'sovereignty' killed the Soviet Union[53], and it happened first in Estonia due to the conceptual revolution of 'self-management' to develop into the concept of 'sovereignty' in 1987–1988. As such, Saharov shows the identification of 'specific conceptual processes in pre-revolutionary periods through which specific and technical concepts, derived from an expert-language framework, acquire broader resonance

[52] Ibid.

[53] Edward D. Walker, *Dissolution: Sovereignty and the Breakup of the Soviet Union* (Rowman & Littlefield, 2003), 1.

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and meaning in society, thus contributing to the rise of a revolutionary situation'.[54] At the same time, they were also imaginaries of the future form of the republic, which transformed quickly from the economic visions into political ones in 1988. Thus, the role of the 'future scenarios' methodology should not be underestimated, and the method was a way to reform socialism, to imagine new models for a union republic and ultimately a sovereign independent republic.

Furthermore, a telling example of the transformations and tensions in the sovereignty concept has emerged from Poland around the interpretive difficulties encountered by the Constitutional Tribunal in highly controversial and political cases, in which it was expected to provide 'objective' and 'apolitical answers'. These tensions are analysed in detail by Aleksandra Kustra-Rogatka in Chapter 7, 'European Integration: Ineffable Aspiration or the Object of Concern? About the Ambiguity of Europe in the Polish Constitutional Imaginary'. Her doctrinal analysis demonstrates the struggles of legal constitutionalism in Poland operating in a difficult political context. The author depicts European integration as remaining in constant tension in Polish constitutional imaginary with the aspiration of retaining complete sovereignty. European integration and complete sovereignty acted as ideologies and utopias that Polish constitutionalism tried to mix like water with fire. The author analyses this shaky constitutional imaginary on three levels mentioned by Loughlin in Chapter 5: the level of thought (the constitution-making process), that of the text (the Constitution of 1997) and that of the constitutional practice (how the EU Treaties were ratified and what conditions and limits upon the European integration were imposed by the Constitutional Tribunal). The Constitutional Tribunal's at least partly conflicting doctrines of absolute constitutional supremacy coupled with simultaneous openness to European integration – aimed at satisfying the left, the centre and the right – must have ultimately failed. Kustra-Rogatka argues that the balance was recently clearly tilted towards 'sovereignty'.[55]

In addition, links can be discovered between the Central-European national constitutional imaginaries as well, particularly in the area of enemy-making, discussed in Chapter 8, 'The Constitutionalised Image of the Enemy in the Hungarian Fundamental Law' by Attila Antal.

Creating and joining 'United Europe' meant, for a long time, supressing the image of enemy and not using its affective power when mobilising people around the constitution. This, of course, does not mean that enemies disappeared from the constitutional imaginary of Europe – they were rather only partially shifted to its subconscious, un-reflected layer. In many states, however, these buried images have been gradually emerging again – either as political narratives with

[54] Juhan Saharov, *From Economic Independence to Political Sovereignty: Inventing 'Self-Management' in the Estonian SSR* (University of Tartu Press, 2021), 60.

[55] Wojciech Sadurski and Aleksandra Gliszczyńska-Grabias, 'Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by Constitutional Tribunal of Poland' (2023) 19 *European Constitutional Law Review* 163.

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constitution-changing ambitions, as arguments in the case-law of constitutional courts or even as full-fledged constitutional reform projects.

In relation to this, a Hungarian constitutional and historical intersection is revealed through the reliance on history in order to guard and maintain independence and sovereignty. This is also rooted in the idea of Hungary's historical constitution and has played a significant role in the building of identity in a legal manner through the case law of the Constitutional Court, ultimately rejecting mainstream European narratives.[56] This connection draws from medieval sources, as well as the narrative of Hungary being the defender of Christian Europe from invasion, which has been identified in the early nineteenth century, and reflects back to the Ottoman times between 1526 and 1686.[57] In addition, the current approach of the current Hungarian political regime to the historical constitution as the reason why Hungary is entitled to autonomy and independence have drawn from various historical struggles such as the 1848 revolution, the 1867 compromise with Austria, the resistance to the communist regime and, very propagandistically, since the 2010s against the EU.[58]

This type of identity formation through the incorporation of history in constitutionalism reflects further on the legacy of the democratic transition, particularly around the presence and relationship of the historical constitution and the invisible constitution. This doctrine was created by the Constitutional Court of the early 1990s as an exact opposite of using historical narratives, instead relying on supposedly universal democratic values.[59] Therefore, the idea of the invisible constitution made use of the same idea and motto as the transition itself – catching up and copying Western European democracies. The current constitutional system rejects this idea completely, throwing away the idea of the invisible constitution, favouring the integration of the historical constitution into the legal system instead. This shows how the legacy of the transition in constitutionalism is mixed. It can be criticised for leaning too much into European integration and lacking consideration of other aspects and developments of Hungary's past, such as the evolution of the country's role in Imperial Austria–Hungary.[60] While, at the time of its inception in 1867, Hungary was the economically and politically weaker member of the union, thanks

[56] Miklós Könczöl and István Kevevári, 'History and Interpretation in the Fundamental Law of Hungary' (2020) 5 *European Papers* 161, 166–167.

[57] Gábor Halmai, 'Fidesz and Faith: Ethno-Nationalism in Hungary', *Verfassungsblog* (29 June 2018), https://verfassungsblog.de/fidesz-and-faith-ethno-nationalism-in-hungary/ (last accessed 2 April 2025).

[58] Tímea Drinóczi, 'The Identity of the Constitution and Constitutional Identity: Opening up a Discourse between the Global North and the Global South' (2018) 21 *Iuris Dictio* 63, 68–70.

[59] László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary' (2003) 18 *International Sociology* 133, 152; Ildikó Szabó, 'Rendszerváltás és nemzeti tematika' (2005) 2 *Politikatudományi Szemle* 89, 95–96.

[60] Gábor Halmai, 'Restoring Constitutionalism in Hungary: How Should Constitution Making Be Different from What Happened in 1989?', *Verfassungsblog* (13 December 2021), https://verfassungsblog.de/restoring-constitutionalism-in-hungary/ (last accessed 2 April 2025).

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to the economic development of the immediately following decades, the state has managed to strengthen its position as Austria's equal in the arrangement.

Chapter 8 reveals this misuse and abuse of identity creation, particularly reflecting on the idea of enemy-making. He connects the ideas of history, constitution and imagination in the Fundamental Law itself. He explains how the misuse of history and identity in the Hungarian legal system becomes dangerous in creating a constitutionalised image of an enemy. This construction can then be relied on in political debates and even be used for propaganda purposes. Relying on a primary lens of politics, he delves deep into the polarities of the NER system and the process of enemy-making in the Fundamental Law. He shows how otherisation works in this system, how the Hungarian government has otherised different communities, somewhat ironically similar to how the country itself is otherised on the European scene. He reflects on the images of political enemies evolving as aspects of the Hungarian government's identity and how, through these identities, the antagonising of the EU mainstream becomes possible.

1.2.2 *Bringing Back the Past (to Serve or Understand the Present?)*

Part II examines how history and the way it is narrated forms part of constitutional imaginary. The uses (and abuses) of history in the context of European integration have not been sufficiently explored and, if so, the focus tends to be on Hungary. However, there are many more interesting questions reaching beyond the present 'rule of law crisis' in that country. 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' secured peace and prosperity for the European continent after WWII.

1.2.2.1 The Hungarian Inspiration: History and Constitutionalism

In November 2021, the Institute of Legal Studies of the Hungarian Academy of Sciences hosted the IMAGINE workshop, 'History, Constitution and Identity in Hungary', inviting experts from the fields of law, history and political science to reflect on the intersection of these fields, specifically on the emergence and re-occurrence of historical narratives in constitutional debates.[61] The workshop was built on the hypothesis of tracking the extensive differences between the approaches towards constitutional imaginaries as they relate to the historical past between the EU and Hungary. It aimed to exemplify and address these differences through the examination and analysis of Hungary's constitutional debates through a historical–political lens.

[61] For the programme of the workshop, see www.imagine-const.eu/history-constitution-and-identity-in-hungary-18-november-2021-centre-of-social-sciences-institute-for-legal-studies-hungarian-academy-of-sciences/ (last accessed 2 April 2025).

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The study of Hungarian constitutional imaginaries presents an opportunity to evaluate the complicated story of the use and misuse of history in Central and Eastern European constitutional debates. Not only is this a prominent feature of Hungarian constitutionalism but it directly relates to the strand in European legal scholarship that engages history of European integration – including its 'darker legacies'.[62]

To critically study the role of history in European constitutional imaginaries is important because the EU's efforts of fostering European unity and integration and ideas of democracy originate from a 'historical escapism' – to ensure the brutal crimes committed and constant (political and sometimes violently military) warring between neighbouring countries in the first half of the twentieth century should cease and never happen again.[63]

However, the EU, by virtue of being a supranational institution, gives rise to a conflict and a potential hierarchy between its member states over whose historical–constitutional visions and imaginaries prevail, and how to settle the disagreements that result from their differences – meaning which Member State will be able to better integrate their constitutional ideas into the EU's institutional structure.[64] The recent crises within the EU have revealed that the roots, basis and nature of constitutional imaginaries differ fundamentally between the Western and Central-Eastern part of the EU. As the building of the primary European constitutional imaginaries happened through mostly unspoken agreement of the old, Western Member States, Hungary's rule of law backsliding has exposed this divide and its much more far-reaching roots in the constitutional debate. This happened because the Hungarian developments involved a noticeable transformation of the approach to national and international history, ultimately posing the country against EU initiatives and values on the basis of Hungary's past.

The workshop was organised at a pivotal time as both national and international commentators have noted the prevalence of historical narratives and attempted to explain its expansive inclusion in the Hungarian Fundamental Law.[65] Such inclusion was part and parcel of Hungary's new political system, the System of National Cooperation (NER), as conceptualised by the Fidesz government after their 2010 landslide election victory. Noticeably, this system is markedly different,

[62] For a pioneering study in this context, see Christian Joerges and Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Hart, 2003). More recently the debate on the legacies of colonialism in European integration also started among legal scholars (somewhat belatedly): see Signe Rehling Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 6.

[63] Kalypso Nicolaidis, 'European Demoicracy and Its Crisis' (2013) 51 *Journal of Common Market Studies* 351, 352.

[64] Larsen, 'Varieties of Constitutionalism', 478.

[65] Gábor Halmai, 'Memory Politics in Hungary: Political Justice without Rule of Law', *Verfassungsblog*, 10 January 2018. https://verfassungsblog.de/memory-politics-in-hungary-political-justice-without-rule-of-law/ (last accessed 2 April 2025).

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especially from the Hungary of the transitional decades (1990–2010), as it seems to have incorporated and developed a strange imitation and mix of previous Hungarian historical eras and echoes, sometimes with politically-driven intentions, sometimes less openly, several pre-1990 historical regimes. In its international political behaviour, nostalgia and reliance on civic transformation, the NER system relies on the legacy of imperial Austria–Hungary. In its treatment of memory politics and the shaping of Hungary's image and the meaning of Hungarian-ness, it takes from the policies of the interwar Horthy-regime. In its economic policy, the NER is inspired by the communist regime, particularly its post-1956 period – the decades of 'goulash communism'.

Reflecting on these ideas, the workshop differed from similar events because it relied on an interdisciplinary perspective, discussing the historical periods to which the NER refers: the imperial civic age, the interwar conservative–nationalist age and the post–WWII communist period.

The participants have traced and discussed the roots of Hungarian constitutionalism in the nineteenth century by dissecting the concept and development of the *historical constitution* of the country, by revealing how the period of Austria–Hungary is reflected in the NER system through the rhetoric of civic transformation.[66] The NER's entire state organisational system is aimed at boosting Hungary's further civic developments. In terms of policy, the dismantled system of the Austro-Hungarian age has been rebuilt by Fidesz. This includes a complete reform of the judicial system and the municipal system, bringing back parallels to the previous nineteenth century arrangements.[67]

Presentations at the workshop further situated the intersection of history and constitutionalism during twentieth century Hungary, including the interwar conservative–nationalist and post–WWII communist periods. The role of the interwar Horthy-regime in the NER system is a lot less transparent and more influential than the impact of the imperial civic age. Unlike the Austria–Hungary allusions, which are less present in the Fundamental Law but can be detected in the legal

[66] The civic transformation of Hungary consists of legal measures enacted around and particularly in the immediate aftermath of the 1867 Austro-Hungarian Compromise Treaty, throughout the 1870s. These laws were the last symbolic and practical steps in shedding the feudal framework of state organisation, including the freedom of the peasantry, the reform of the tax and election system and the act on nationalities and the compromise treaty with Croatia. They are regarded as the stepping-stone in Hungary's late nineteenth century economic development helping the country to become a leader not only within the Empire but an international political factor as well. Therefore, the Austro-Hungarian period, particularly between the years of 1867 and the turn of the century, are known as Hungary's civic age. See: Norbert Csibi and Ádám Schwarczwölder (eds.) *Modernizáció és nemzetállam-építés: Haza és/vagy haladás dilemmája a dualizmus kori Magyarországon* (Kronosz Kiadó, 2018), 8–9; Csaba Fazekas, 'Történelem a politika hátterében: A rendszerváltás utáni magyarország politikai rendszere, valamint 19–20. századi előzményei' (2021) 11 *Multidiszciplináris tudományok* 329.

[67] Marina Bán, 'The Governance of History via Law: An Overview' (2022) 63 *Hungarian Journal of Legal Studies* 315.

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system, the Fundamental Law and the NER's historical memory-related policies fully lean into the much-criticised legacy of the Horthy-regime. The idea of strengthening nationalism, protecting of Hungarian identity internally and abroad, with the simultaneous prosecution of other minorities alludes to the Horthy-regime quite openly. This can be traced in the glorification of the Hungarian past in the Fundamental Law, the whitewashing of the more controversial aspects of the Horthy-regime and the continuous references to the Treaty of Trianon and its postWWIIWWI arrangement.[68] On the one hand, internally, this has brought about a nationalistic reframing of the education system and the rejection of minorities found not to have roots in the Hungarian past, or found not to adhere to the idealised version and meaning of belonging to the Hungarian nation. On the other hand, internationally, the system quite forcefully steps up to gift rights and privileges to the Hungarian community living beyond the border, specifically aimed at those living in the territories that had belonged to Hungary before the Treaty of Trianon.

The Kádár era of the communist regime reflects in the NER's economic policy, albeit much less openly, as the rejection of the communist past is a central part in the NER system. Nevertheless, the recent decades' economic measures reflect the nature of the communist regime very carefully in several aspects. In its systemic aspect, the NER brings back nationalisation and bulk buying of companies and estates, thus fostering corruption and the appearance of oligarchs. In its more personal aspects, several policy decisions particularly favour the upper middle class of society. This includes a very favourable tax system and measures aimed at fostering marriages and children, which not only adheres to a nationalist policy but also affords significant financial support to young couples and families.[69] In this way, the NER alludes to the times of goulash communism, involving policy decisions that economically benefit the population (or at least some groups of it) and guarantee them a comfortable life. In exchange, they are inclined to overlook other, deficient parts of the system as they are not implicated in it.

Therefore, the Hungarian workshop's reflections on the differences in historical outlook between mainstream Europe are complemented with the contributions of this volume. They reveal different blind spots on the both sides 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. World War II, or, what the historian Tony Judt saw as the 'European civil war that had begun in 1914'[70] 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

[68] Andrea Pető, 'The Illiberal Memory Politics in Hungary' (2021) 24 *Journal of Genocide Research* 86; Domonkos Sik, 'Memory Transmission and Political Socialization in Post-Socialist Hungary' (2015) 63 *The Sociological Review* 53, 59.

[69] Mitchell A. Orenstein and Bojan Bugarič, 'Work, Family, Fatherland: The Political Economy of Populism in Central and Eastern Europe' (2022) 29 *Journal of European Public Policy* 176.

[70] Tony Judt, *Postwar: A History of Europe Since* 1945 (Penguin Press 2005), 749.

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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'. However, the contributions to this volume tell a different story.

1.2.2.2 Contributions

Chapters 9 and 10, which deal with Hungary, attempt to understand how the incorporation of historical narratives in constitutionalism can be situated within the current system of democratic backsliding in this country. Kálmán Pócza's Chapter 9, 'Political Integration through Constitutional Memory? Historical Constitution and Community Building in Hungary', poses the question of what role Hungary's historical constitutionalism plays in the development and expansion of the constitutional imagination of Hungary. Despite the problematic nature of the Fundamental Law, where such recent historical–constitutional musing has been codified, and the chequered past of the historical constitution itself, its continuous prevalence presents an apt opportunity for Pócza to engage in the past, present and future of Hungarian historical constitutionalism. His analysis is timely because, while ample disagreement exists among Hungarian and international scholars on the place and use of the historical constitution in a modern legal system, its relevance cannot be denied and therefore should not be set aside as merely a political tool of an authoritarian regime.

However, while the historical constitution should not be set aside as only a political tool, Pócza's approach to the Fundamental Law remains mostly theoretical and figurative and, thus, does not really consider the political implications of the historical constitution concept in the NER and how it can be used and misused by the Hungarian government and by the Constitutional Court.[71] His analysis presupposes the use of the historical constitution in post-2010 Hungary as politically contextless, as a simple re-emergence of an essentially historical concept.

In contrast, this lack of consideration is addressed in Chapter 10, 'The Constitutional Concept of the Historical Constitution and Illiberalism: The Case of Hungary', by Tímea Drinóczi. Drinóczi examines the historical constitution and its place, use and misuse in the current Hungarian political system. She takes a legal approach and she reflects on the practical consequences of the inclusion of the historical constitution in the NER's legal system. She connects the misuse of the historical constitution to Hungary's budding illiberal authoritarianism and points out the dangers of too extensive reliance on historical narratives, particularly the potential mistakes and misinterpretation their legalisation can result in. While she

[71] Gábor Halmai, 'National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism', *EUI Working Papers* 2017/8, 8–12, https://hdl.handle.net/1814/46226 (last accessed 2 April 2025).

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does take the historical development of the concept into account, she focuses her analysis on the post-2010 evolution of the idea, aptly pointing out how the NER abuses the concept of the historical constitution for political means. She does not posit any use or present relevance of the historical constitution in modern times, which, due to the undoubted prominence of this concept throughout Hungarian history of the last two centuries, may be a slight oversight but remains a question well-addressed by Pócza.

In consequence, these two contributions function as opposites and complements. Through two different methods, they approach the controversial but absolutely necessary analysis of the place and importance of the historical constitution in the Hungarian legal system and its relationship to modern democracy, coming to completely different conclusions. Hence, they reveal the core of engaging with the interplay of historical and constitutional narratives in Hungary and the underlying imaginaries that shape them.

The works of Pócza and Drinóczi are further complemented by Epp Annus' analysis on the imaginaries of history and the feeling of 'Europeanness' in Estonia. In Chapter 11, 'Estonians' European Imaginaries: The Soviet and Pre-Soviet Legacy', she delves deep into the questions of the Estonian European (self-)images and the Soviet impact on them. She juxtaposes the 'Soviet question' in relation to the 'European question' and tackles the ultimate question of how the Soviet rule impacted the national imaginary of Europe and Europeanness. She takes a 'pluriscalar' approach: she analyses the sense of belonging at different scales, that is, the scale of the ESSR within the USSR as well as within Europe and even the larger 'West'. The author discusses how Estonia was 'relocated' from 'Europe' to the 'colonial matrix of control' exerted by Moscow and Leningrad within the Soviet Union and then again to 'Europe', and what it meant in practical terms for the society and the social imaginaries. Somewhat paradoxically, the Soviet Union's centre might have served for a time as an access point but also a gatekeeper to Europe. And yet, the author claims that earlier cultural traditions and values connected to Europe were preserved and, after the fall of the Soviet Union, contributed to the new hybrid imaginaries, as she demonstrated relying on rich literary sources. What might have helped in the process of retaining the distinct Estonian imaginary was that Estonia has always felt a somewhat culturally superior 'West' of the Soviet Union. Nonetheless, the 'return to Europe', as the popular rhetoric framed it, also raised challenging identitarian questions, such as 'exactly how European are we?' The related challenging questions are the relation to the former Soviet sphere and the Russian minority. Overall, Chapter 11 shows how the category of 'Europeanness' depends on its relations with other overlapping identitarian categories.

All in all, the Soviet experience can inform Estonia's understanding of Europe and the EU. The different scalar categories and imperatives at play have had the force to subjugate the rhetorically strong claims of sovereignty under the open and liberal claims to be open to the EU and the West in general, thereby supporting

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unconditional belonging to Europe assertions. Both the conceptual apparatus at play in the critical years of pre- and re-independence and the predominant European imaginaries during and after Soviet occupation exemplify the leap from colonised subjugated state to the re-strengthened pronouncements of national agency and sovereignty with a hint of post-colonial mentality.

In addition, Mary Heimann's Chapter 12, 'Czechoslovakia: Remembering and Forgetting the Failures of a State', provides an interesting reflection by the author of a monograph that provoked severe criticism in the country it studied, despite rather positive reception among academic historians. Heimann argues that today's Czech Republic succeeded to a series of failed constitutional imaginaries, polities which proved unable, for a variety of reasons, to endure in the forms in which they had first been conceived and created.

Although factually accurate, this is not the way in which the 75-year history of Czechoslovakia is usually told, commemorated or remembered. Chapter 12 looks at the highly emotive, polarised reception of *Czechoslovakia: The State That Failed* from its first publication in English (Yale University Press, 2009) until its eventual publication in Czech, with the support of former Czechoslovak dissident leaders. This case-study of how one revisionist history came to be written, received, blocked, championed and republished, sheds light on narratives of victimisation and exceptionalism which dominated official Czech memory after the overthrow of Communism in 1989 but which are increasingly being challenged by modern historians.

Finally, Ulrich Wagrandl's Chapter 13 explores the 'background stories' of Austrian constitutional law, especially one of which celebrates its greatest historical achievements of the rule of law and giving to the world constitutional review. This author takes inspiration from the famous Robert Musil's novel for the title of his chapter, which deals with Austria: 'A Constitution without Qualities? Three Narratives about Austrian Constitutional Law'. Wagrandl presents three narratives of the Austrian constitution, each of them faithful for the Central European sense for irony: first, that the Austrian constitution is in ruins, referring to its lacking aesthetic, especially if compared to its German counterpart. However, as Wagrandl shows, more recently the constitution became the subject of appraisal, when the first-ever crisis of government ensued after chancellor Sebastian Kurz was faced with the first successful parliamentary vote of no confidence in Austria in reaction to the corruption scandal in his party. Suddenly, Wagrandl notes, 'the Austrian president praised the "elegance" and "beauty" of the constitution'.[72]

The second narrative submits that the Austrian constitution is value-neutral and formalist. Again, Wagrandl carefully digs under the surface to find that it holds no more– even if it 'took a German law professor teaching in Austria to tell the truth'.[73]

[72] Chapter 13.
[73] Ibid.

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Finally, the third narrative provides that the Austrian constitution is a role model for European integration and that, from the historical perspective, it gave the world judicial review. From the perspective of this volume this is the most interesting one: especially as the Habsburg Empire, remembered – with no nostalgia – in some of its once subjected countries as the 'prison of nations', is suddenly taken as a model for the constitutional architecture of European integration. For Wagrandl, two features of the Austrian constitution stand out: the openness towards international law (EU law and the ECHR in particular) and the institution of a specialised constitutional court, brought to life by Hans Kelsen (although one must remember that the first-ever specialised constitutional court was established by the Czechoslovak constitution in 1920).

1.2.3 *The Varieties of Liberalism in Europe*

Part III starts from a now common diagnosis: 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 part examines how liberalism and some of its central tenets, such as the rule of law, the emphasis on legal institutions and principles 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, especially with its emphasis on integration through the market, which tends to be conceived as something separate from democracy or the rule of law. As the chapters in this part show, the relationship between the political and economic dimension of liberalism is much more complicated than had been thought at the 'end of history' and the reign of the Washington consensus.

1.2.3.1 The Polish Inspiration: Liberal Constitutionalism as a Sign of Belonging to Europe

The Polish workshop was held in Warsaw in December 2021. The starting point for the reflection on Polish constitutionalism was an ongoing debate about the status of liberal legal constitutionalism as a 'scientific' and supposedly apolitical endeavour. Liberal legal constitutionalism marked Poland's return and belonging to Europe and it was perceived as providing a blueprint for the rational organisation of the State. The Polish participants to the workshop reflected on the origins of this imagination, its operation in constitutional and political practice until its recent breakdown and alternative imaginations that it might have overshadowed (or not).

The debate is related to what has been termed in the literature as the 'constitutional crisis' or 'rule-of-law backsliding' in Poland. Scholars saw the symptoms of the crisis in the political capture of the Constitutional Tribunal and

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subsequent systemic undermining of judicial independence safeguards.[74] Some researchers have explained this crisis as resulting from the relatively superficial transplant of the Western legal institutions and principles during the political transformation in the late 1980s and 1990s, uncoupled from a deeper international isation of the rule-of-law values by the society and neglect of democratic civic engagement.[75] Factors related to the reality of economic transformation, culture and history might have played a role in resisting the rule-of-law values. The law was conceived of as an instrument of economic transformation subordinated to the goal of socio-economic change and generally enjoyed low authority within society from the communist times.[76] Also, Poles generally prefer non-institutional and extra-legal conflict resolution.[77]

However, other researchers have interpreted the crisis as a breakdown of the epistemic hegemony of liberal and legal constitutionalism, especially the belief in its apolitical, objectively rational and scientific nature.[78] This constitutional imaginary might have been in constant tension with the nature and origin of the constitutional text. The integrating objective of legal constitutionalism in Poland, thus understood, has been challenging to attain since the Constitution of 1997 was a complex political compromise, excluding the right-wing forces internally divided at that time and subsequently contesting the constitutional settlement.[79] The Constitution of 1997 ended up being a melting pot of ideas drawn from liberal ideology, patriotic narratives, the social teaching of the Catholic Church, the post-socialist belief in the welfare State and the ordo-liberal constraints upon the public finances, among other things. The Constitutional Tribunal and constitutional scholarship faced the arduous task of solving constitutional disputes and concretising constitutional standards based on the hybrid and ambiguous text. According to some researchers, the cracking belief in the possibility of deriving objectively rational standards from such a text pushes the Polish political system towards political

[74] Sadurski, *Poland's Constitutional Breakdown*.

[75] Krygier, 'The Challenge of Institutionalisation', 557–558. See also, Bojan Bugarič, 'A Crisis of Constitutional Democracy in post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13 *International Journal of Constitutional Law* 219, 238; Sadurski, *Poland's Constitutional Breakdown*, chapter 7; Blokker, *New Democracies in Crisis?*

[76] Grażyna Skąpska, 'The Legacy of Anti-legalism', in Martin Krygier (ed.), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Rodopi, 1994).

[77] Jacek Kurczewski and Małgorzata Fuszara, 'Patterns of Preference for Dispute Resolution in Poland' (2017) *Polish Sociological Review* 505.

[78] A. Czarnota, 'Constitutional Breakdown, Backsliding, or New Post-Conventional Constitutionalism?', in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Constitutionalism under Stress. Essays in Honour of Wojciech Sadurski* (Oxford University Press, 2020); Adam Sulikowski, 'Trybunał Konstytucyjny a polityczność: O konsekwencjach upadku pewnego mitu' (2016) (No 4) *Państwo i Prawo* 3; Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).

[79] Paul Blokker, 'Building Democracy by Legal Means? The Contestation of Human Rights and Constitutionalism in East-Central Europe' (2020) 18 *Journal of Modern European History* 335, 343–344.

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constitutionalism.[80] Increasingly often do we encounter ideas of the return to the parliamentary majority as representing the nation's will and the need to curb the 'excesses of judicial power' and unfolding 'juristocracy'.[81]

Interestingly, researchers specialising in legal philosophy and sociology, rather than the doctrine of constitutional law, had undertaken critical analyses of the epistemic status and legitimation strategy of liberal legal constitutionalism already a few years before the constitutional crisis began in Poland. Some scholars argued that constitutional law is deeply rooted in the Enlightenment, with its belief in individualism and the power of human reason.[82] Sulikowski argued for a 'post-modernisation' of the Polish constitutional scholarship, including critical analyses of the political and ideological foundations of legal doctrines, especially those developed by the Constitutional Tribunal, such as the right to life 'from conception'. In his view, the existing constitutional scholarship was animated by the belief in 'constitutional truth' generated by adjudication and scholarship, exceedingly focused on the doctrinal recycling and systematisation of the arguments and ideas emerging in the case law of the Constitutional Tribunal rather than their critical analysis.[83] Moreover, Dębska and Warczok critically deconstructed how the Constitutional Tribunal legitimised its power by presenting itself as a neutral and scientific institution – primarily, by dint of the recruitment of the constitutional judges mostly from professors of law – which speaks for the apolitical 'sacred law' rather than 'profane politics'. It neutralised its politically controversial appraisals, presenting them as objective legal truth.[84] After the constitutional crisis began, defenders of the positivist constitutional law scholarship saw 'post-modernism' and the resulting breakdown of trust in an objective constitutional truth as contributing to the rule-of-law decay.[85]

[80] Czarnota, 'Constitutional Breakdown'.

[81] Aleksandra Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts' (2023) 19 *European Constitutional Law Review* 25.

[82] Adam Sulikowski, 'O możliwościach postmodernizacji nauki prawa konstytucyjnego' (2010) (No 12) *Państwo i Prawo* 3, referring to Krzysztof Wojtyczek, 'Polska nauka prawa konstytucyjnego na przełomie wieków', in M. Zubik (ed.), *Dwadzieścia lat transformacji ustrojowej w Polsce* (Wydawnictwo Sejmowe, 2010), 36–37. See also, Adam Sulikowski, *Konstytucjonalizm a nowoczesność: Dyskurs konstytucyjny wobec tryumfu i kryzysu moderny* (Złota Seria Uniwersytetu Wrocławskiego, 2008).

[83] Sulikowski, 'O możliwościach', 12–13; Adam Sulikowski, 'Konstytucjonaliści a postmodernizm' (2011) (No 12) *Państwo i Prawo* 30, 37; Adam Sulikowski and Krysztof Otręba, 'O potrzebie studiów krytycznych nad prawem konstytucyjnym' (2017) (No 3) *Państwo i Prawo* 5.

[84] Hanna Dębska, *Władza, Symbol, Prawo: Społeczne Tworzenie Trybunału Konstytucyjnego* (Wydawnictwo Sejmowe, 2014); Hanna Dębska and Tomasz Warczok, 'Sacred Law and Profane Politics: The Symbolic Construction of the Constitutional Tribunal' (2014) 188 *Polish Sociological Review* 461.

[85] Marek Zubik, 'O przewrotnych interpretacjach przepisów Konstytucji dotyczących władzy sądzenia' (2017) (No 10) *Państwo i Prawo* 5.

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The origins of this dominant constitutional imaginary in Poland can be traced back to the communist period.[86] As argued by Zomerski in Chapter 15, the façade communist constitutionalism began to crack in the 1970s and 1980s. Legal academics started analysing how the previously developed theoretical ideas relating to positivist constitutionalism could be put to practice to unmask and remedy the pathologies of the communist regime. This intellectual process informed the setting up of the Supreme Administrative Court, the Ombudsman and the Constitutional Tribunal a few years before the communist regime collapsed in 1989. Also, this process corresponded to the general strategy of the democratic opposition, which demanded taking communist law seriously to obtain legal protection for dissidents, thereby fundamentally transforming the law's façade nature.

However, liberal and positivist legal constitutional doctrines that helped to dismantle the communist regime and introduce essential legal and political accountability of the holders of public power faced new challenges in the long run. The legitimation strategy based on the supposedly apolitical, objectively rational and scientific nature of liberal and legal constitutionalism – modelled upon the one practised in the West – was increasingly challenging to sustain in the context of the unfolding democratic conflict. During almost thirty years of its operation as an independent institution, the Constitutional Tribunal engaged with several highly controversial political issues, including the settlement with the communist past (lustration),[87] abortion and the freedom of conscience and religion,[88] the equality of men and women,[89] socio-economic reforms during the economic transformation[90] and austerity measures during the global financial crisis undermining the protection of social rights.[91]

In the context of highly controversial political problems put on the Constitutional Tribunal's docket, the Constitutional Tribunal might have been portrayed as siding with the previous liberal government, for instance, regarding their socio-economic reforms.[92] Undoubtedly, liberal constitutionalism created appropriate conditions for neoliberal reforms in the region in the 1990s but its relationship to the problems of

[86] See Chapter 15.

[87] Michał Krotoszyński, 'Transitional Justice and the Constitutional Crisis: The Case of Poland (2015–2019)' (2019) *Archiwum Filozofii Prawa i Filozofii Społecznej* 22.

[88] Karolina Kocemba and Michał Stambulski, 'Divine Decision-making' *Verfassungsblog*, 9 November 2020, https://verfassungsblog.de/divine-decision-making/ (last accessed 30 March 2023); Wojciech Sadurski and Aleksandra Gliszczyńska-Grabias, 'Freedom of Religion versus Humane Treatment of Animals: Polish Constitutional Tribunal's Judgment on Permissibility of Religious Slaughter' (2014) 11 *European Constitutional Law Review* 596.

[89] Dębska, 'Władza, Symbol, Prawo', chapter 4; Anna Śledzińska-Simon, 'Kobiety i płeć w Konstytucji' (2022) (No 10) *Państwo i Prawo* 74.

[90] Jerzy Oniszczuk, *Wolności i Prawa Socjalne oraz Orzecznictwo Konstytucyjne* (Szoła Główna Handlowa, 2005).

[91] Michał Krajewski, 'The Constitutional Quandary of Social Rights: Questions in Times of the Polish Illiberal Turn' (2023) 21 *International Journal of Constitutional Law* 156.

[92] Ibid.

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social justice might have been ambiguous.[93] Also, as pointed out by Krotoszyński in Chapter 20, a part of the right wing has criticised the Constitutional Tribunal's decisions relating to the compliance of lustration with the rule-of-law standards as supposedly geared towards protecting the post-communist elites against democratic accountability. The persisting necessity to deal with the communist past, including to revisit the status of former communist elites that transformed in contemporary capitalist elites, remains essential to the political manifesto of this part of the right wing. This is related to the belief in transitional justice being neglected or the absence of systemic regulation for the restitution of property nationalised in Poland after WWII and ensuing judicial failings.[94]

The breakdown of the epistemic status of liberal and legal constitutionalism as laying down objectively rational and apolitical standards for enacting laws, including those related to transitional justice, could explain the conduct of right-wing populist politicians engaged in dismantling the Constitutional Tribunal and judicial independence. However, another reasoning is necessary to explain the relative ambivalence of society towards constitutional backsliding. Although some protests and social movements against dismantling constitutional checks and balances emerged, they did not manage to stop the anti-constitutional changes.

Assuming the rationality of social actors, largely uninterested in stopping the constitutional backsliding, some researchers inquire into the functioning of Polish legal institutions before the crisis. They argue that a factor fostering the rule of law crisis in Poland has been severe failings in access to justice and the inefficient functioning of the judiciary coupled with a preference for extra-legal and informal dispute settlement. They found the general population's relative indifference towards dismantling the rule of law as rational in the short run. 'If the law is inaccessible and irrelevant, why die for it?'[95] Other researchers also highlight the failings of legal culture and lawyers' communication with ordinary citizens. Socialised in the tradition of legal formalism and unequipped with argumentative skills, judges and lawyers try as much as possible to apply narrowly construed statutory text. This way, they diminish their responsibility for 'justice' in individual cases.[96] Overall, it seems that legal constitutionalism might have generated promises

[93] Sulikowski, 'Trybunał Konstytucyjny a polityczność', 13–14.

[94] See Joanna Kusiak, 'Rule of Law and Rules-Lawyering: Legal Corruption and "Reprivatization Business" in Warsaw' (2019) 43 *International Journal of Urban and Regional Research* 589.

[95] Jan Winczorek and Karol Muszyński, 'The Access to Justice Gap and the Rule of Law Crisis in Poland' (2022) 42 *Zeitschrift für Rechtssoziologie* 5.

[96] Marek Zirk-Sadowski, 'Transformation and Integration of Legal Cultures and Discourses: Poland', in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds.), *Spreading Democracy and the Rule of Law: The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-communist Legal Orders* (Springer, 2006), 308–311. See also, Marcin Matczak, Matyas Bencze and Zdenek Kühn, 'Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland' (2010) 30 *Journal of Public Policy* 81.

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and social expectations of a well-functioning legal system, which were not fulfilled in practice.

In this context, an important question is how the emphasis on legal institutions and principles overshadows the importance of civic engagement and deliberative interactions with the society and its organic organisations. As Muszyński and Skuczyński argue in Chapter 18, in Poland, before 1997, social dialogue operated relatively well, with trade unions collaborating with parliamentary committees to hammer out social policies. However, due to neo-liberal trends of increasing the efficiency and rationalising law-making, social policymaking became top-down, concentrated in the hands of the executive, to efficiently implement the EU acquis prior to the accession. The dominance of the executive branch over parliamentary law-making and social dialogue may create conditions for the emergence of illiberal trends. Legal institutions and principles proved unable, by themselves, to stop these trends.[97]

1.2.3.2 Contributions

The contributions in Part III analyse the currently dominant legal, political and economic ideologies of our time – liberal constitutionalism and neoliberalism – and seek to uncover counter-narratives in the member states. It again puts together the experience of the old and Other Europe to uncover their mutual relationship – how one presupposes the other. Related to the triumph of liberalism as a political doctrine (analyses in the following part), 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.

The part is introduced by Michal Kopeček's Chapter 14, on 'Rule of What Law? Authoritarian Pasts, Liberal Politics and Constitutional Imagination in Early Post-Communist East Central Europe'. Kopeček reveals the great variety of imaginaries in Central and Eastern Europe behind the seemingly uniform concept of *Rechtstaat* and liberal constitutionalism, as well as related concepts, such as the rule of law, legality or rights. Looking from the historical perspective, he traces the evolution of these concepts in the region, exploring first the main tenets of the socialist legality and how it was challenged by human rights liberalism, with its attempts to empower emerging civil society, leading to the transformation of 1989. Kopeček explains also how human rights liberalism emphasised the cultural transformation of the society, whereas neoliberalism, which came later, aimed at a market transformation. While

[97] Chapter 18.

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Rechtstaat seems to have been the overarching concept uniting these and other constitutional imaginaries, it was internally differentiated with various imaginaries playing important roles at different stages of the transformation process. Ultimately, the dominant legal constitutionalism emphasised the need to protect democracy from itself by means of legal institutions, thereby institutionalising mistrust in citizens whom it considered to be not yet ready to take charge, which seems at odds with earlier ambitions of human rights liberalism. Simultaneously, neoliberalism prioritised economic growth and foreign investment. For neoliberals, the rule of law was supposed to guarantee, first and foremost, economic freedom and progress. Kopeček also discusses how Western thinkers writing about the role of law and rights and representing different schools of thought emphasising 'negative freedom' or 'substantive justice' influenced thinkers in Central and Eastern Europe. Moreover, he discusses how post-communist legal positivists, with their formal understanding of the rule of law, could relatively easily transition to the new constitutional settlement.

This exceptionally rich intellectual history of the rule of law in the region sketched by Kopeček helps understand that the overwhelming consensus about the importance of the rule of law or *Rechstaat* – fundamentally contested concepts – might in fact have been concealing the great variety of constitutional imaginaries that all seemingly refer to these overarching concepts. Perhaps even more importantly, this history helps understand why the apparent compromise about the rule of law in the region has turned out to be fragile and superficial. With this broad-brush but rich sketch, Kopeček has laid the ground for other chapters in this part of the volume.

Chapter 15, by Wojciech Zomerski, entitled 'From the Facade to Solid Foundation? The Evolution of the Polish Constitutional Law Discourse in 1944–1989' helps uncover the deep origins of Polish liberal and legal constitutional imaginary emphasising the idea of apolitical legal science. Zomerski enquires into why legal constitutionalism was so smoothly transplanted in Poland. Blokker had previously discussed this transplant as resulting from the activities of European organisations, such as the European Union and the Council of Europe.[98] However, Zomerski demonstrates that the grounds were prepared long before. Starting from the 1960s, legal academia in Poland enjoyed some intellectual freedom and began developing modern constitutional law ideas rooted in strict legal positivism to portray them as scientific and apolitical in the context of the communist regime. Initially, legal academics were interested in justifying the legal and justiciable nature of the communist Constitution of 1952 and its Kelsenian supremacy over the entire legal order. They argued against its portrayal as a purely ornamental document disconnected from social and political reality. By discussing this Constitution's limited justiciability and non-judicial enforcement mechanisms, they sought to legitimise the communist regime since constitutional norms stood in

[98] Blokker, *New Democracies in Crisis?*

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stark contrast with reality. This legitimation strategy was linked to the general optics adopted in Polish jurisprudence to portray the interpretation of the law as scientific and apolitical to maintain the law's relative autonomy from communist politics.[99] As already mentioned, the façade communist constitutionalism began to crack in the 1970 and 1980s. Legal academics started analysing how the previously developed theoretical ideas relating to positivist constitutionalism could be put to practice to unmask and remedy the pathologies of the communist regime by means of legal institutions such as courts or the ombudsman.

The dominance of liberal and legal constitutionalism and a nascent debate about alternative imaginaries does not seem confined to CEE. In Chapter 16, 'Nordic Democratic Exceptionality after the End of History: A Neoliberalized Constitutional Imaginary?', Johan Strang discusses the transformation of the Nordic constitutional imaginary. While mainstream Western constitutionalism was about constraining democracy in the name of the rights of citizens, as he argues, Nordic constitutionalism favoured unconstrained democracy enabling progressive social policies. However, Strang argues that the very notion of democracy in the Nordics has changed. Having departed from its roots in popular sovereignty, public participation and redistributive social policies, it is now associated – perhaps just as elsewhere in Europe – with the rule of law, human rights, political and economic freedom. Strang is wondering what the causes of this profound transformation of the Nordic constitutional imaginary are and how this transformation could be researched empirically. Perhaps it is connected to Europeanisation and globalisation. Notably, he does not treat it as a negative phenomenon, seeing in it a chance for avoiding the 'abusive paternalism' of the political community and empowering vulnerable minorities.

A reflection on alternatives to liberal constitutionalism and legal institutions was also found in the Portuguese constitutional discourse. In Chapter 17, 'Fifty Years of Democratic Constitutionalism in Portugal: Between Constitutional Aspirations and the European Path', Mariana Canotilho discusses, first, the origin and essential characteristics of the Portuguese constitution of 1976 resulting from the democratic revolution of 1974. In her view, that this Constitution has turned out to be so stable comes from the fact that it resulted from a wide political compromise between conservative and socialist forces, even though the compromise itself resulted from a serious conflict. It is a 'normative constitution', as Canotilho puts it, with a robust system of constitutional review and an exceptionally rich catalogue of fundamental rights, in which even socio-economic rights are justiciable rather than being merely policy principles. Interestingly, Canotilho notes that such elaborate guarantees of fundamental rights might lead to clashes with EU law, where the latter requires uniform conditions for the effectiveness of EU rules without leaving to the national

[99] Wojciech Zomerski, 'O wpływie doświadczeń realnego socjalizmu na teorię dogmatyki prawa: W stronę demokratycznej teorii prawa?' (2020) *Przegląd Prawa i Administracji* 221.

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constitution the possibility to undermine this effectiveness with standards of fundamental rights higher than those recognised at the EU level. Nonetheless, the Portuguese constitution and constitutional case law is widely open to international and EU law. Another essential feature of the Portuguese constitution is elaborate 'anti-oligarchic' provisions on political pluralism and democracy that is to be pursued at the different levels of society, including especially participation of political and social actors in public decision-making concerning many spheres of social life (such as healthcare and schools) and even the right of workers to participate in the management of companies. Thus, Portuguese democracy should be decentralised, popular and effective, and not only representative. The Constitution also contains the 'economic constitution', which presupposes the political control of the economy and State intervention.

Having characterised the Portuguese Constitution, which indeed seems to differ in important respects from the mainstream liberal constitutions, Canotilho provides an account of the most salient constitutional debates in Portugal. The first one was the constitutional debate regarding the 'directive constitution', that is, the extent to which the Constitution limits the lawmakers in pursuing their policies, especially in the socio-economic sphere, including whether there is a constitutional non-retrogression principle regarding the already achieved degree of social protection. Although the Portuguese Constitutional Court might have seemed to abandon this principle, Canotilho believes that the debate comes back in somewhat different terms. The second, closely related debate concerned a clash of the Portuguese economic constitution with the EU austerity measures during the economic crisis. How would compliance with these measures despite constitutional guarantees affect the Constitution's authority?, asks Canotilho. She argues that, by upholding the social constitutional imaginary, the Constitutional Court gained huge popular support. At the same time, she anticipates further clashes between the Portuguese and European constitutional imaginary. In this context, she argues for mutual openness of both EU and national imaginaries in view of preserving the valuable elements of the national imaginary, especially democracy that is to be pursued at different levels of society and social commitments. This way the EU constitutional imaginary could also be enriched.

Remaining interested in the shortcomings of liberal legal constitutionalism before the constitutional crisis in Poland, Karol Muszyński and Paweł Skuczyński, in Chapter 18, 'Constitutional Drift: Exploring the Deeper Roots of Polish Constitutional Crisis' explore how the dominance of liberal and communitarian constitutional imaginaries in the practice of governance in Poland overshadowed nascent practices of societal constitutionalism, thereby leading to the 'constitutional crisis' in the long run. They argue that an imaginary of societal constitutionalism has long been present in Polish society. According to it, different societal subsystems (labour, healthcare, politics) generate their own normativity and seek to influence the general law-making process. This imaginary corresponds to 'the classic corporate

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social model characteristic for continental Europe'. Hence, the importance of social dialogue between the executive, the lawmakers and social actors and creating opportunities for them to express their normativity and participate in governance. Otherwise, social actors become alienated, the social authority of law to the hammering out of which these actors could not contribute drops drastically, whereas the social system becomes susceptible to strategic action and control by actors wishing to seize the 'whole power'. They call this process a 'constitutional drift' which, in their view, explains the deep roots of the Polish constitutional crisis.

First, the authors argue that the Polish Constitution of 1997, resulting from a challenging political compromise, was drafted in sufficiently broad terms to accommodate interpretations in the spirit of liberal, communitarian and societal constitutional imaginary alike. The Constitution granted a special status to many types of social organisations and social dialogue. Nonetheless, in the long run, the societal imaginary was overshadowed by the liberal and communitarian imaginaries. In these imaginaries, the Constitution was seen as a vehicle of substantive values (negative freedom or common good) rather than a catalyst of a process in which societal organisations could effectively contribute to the genuinely democratic lawmaking process with their own normativities. The authors argue that the accession to the EU could play a role in this regard. Although the EU law itself gives an important role to social dialogue, in Poland social dialogue might have been seen as an obstacle to a technocratic Europeanisation of the legal order and an effective absorption of EU funds. In the mid-2000s, the role of social organisations was reduced by the executive to that of providers of technical input and expertise rather than fully-fledged social normativity. At that time, the rise of the executive had already become evident, coupled with the undermining of the parliament and treating it as a 'voting machine'.

In the view of the authors, the subsequent 'constitutional crisis', during which the executive sought to assert dominance over the judiciary, was only a continuation of earlier trends. At the same time, the authors believe that societal constitutionalism must be revived in Poland to stop and reverse the 'constitutional drift', thereby safeguarding the political system against constitutional crises in the future.

François-Xavier Millet's Chapter 19, 'On the French Constitutional Imaginary: The Erosion of the Long-standing Republican Tradition', discusses not so much the tension between liberalism and the social question, but a tension between liberalism and the Republican imaginary that put much more emphasis on the positive or political liberty, the formation of general interest or general will. Nonetheless, the social question and solidarity are still important components of the Republican imaginary.

Millet argues that the Republican imaginary is still evident in many other idiosyncrasies of the French constitutional law and it continues to clash with the Anglo-Saxon liberalism underlying the EU integration, including the law of the European Union and the European Convention of Human Rights. Having traced

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the deep roots of the Republican thinking in terms of 'common good' to, paradoxically, the monarchic Ancient Regime, Millet subsequently offers a *tour de force* through the French constitutional law. He highlights characteristic constitutional emanations of the Republican thought. He notes that even the French 'unbridled passion for constitution' is an expression of a typical Republican quest for best possible constitutional arrangements securing a perfect political regime and the formation of the general will rather than only a legal framework offering negative and individualistic safeguards *against* the State. He also notes such Republican elements in the French constitutional law as the indivisibility and centralisation of the State, the trust in the ability of the parliament to express the general will and general interest, coupled with the initial absence of mechanisms designed to enforce any supra-legislative individual rights against such general will, as well as *laïcité* (which, in the eyes of a liberal constitutionalist, may disproportionately restrict the freedom of religion), a special body of administrative law protecting public property, or the priority given to fundamental rights that are collective in nature (such as the freedom of the press and association). Certainly, many specific constitutional arrangements identified by Millet cannot be considered exclusively French (for instance, in Chapter 18, Muszyński and Skuczyński mention the elements of a Republican–communitarian constitutional imaginary in the Polish constitution-making process), but their *accumulation* in France clearly shows a distinct and dominant constitutional imaginary.

Subsequently, Millet moves to the French intellectual history, trying to discover any traces of genuine liberal thinkers in France. He admits himself that he fails in this quest, as even in the liberal thought he discusses he finds a distinct Republican flavour. He is also sceptical about any major intellectual turn towards liberalism in the 1970s in France. Coming back to constitutional law, he admits that the Republican constitutional imaginary has been seriously affected because of external factors such as the European Union and the European Convention of Human Rights. Certain Republican concepts, such as sovereignty, have been progressively replaced by their liberal substitutes, such as constitutional identity. Europeanisation is the reason, according to Millet, why the judicial review of legislation has been reinforced in France and encompassed not only the Republican concern for the separation of powers but also the liberal concern for individual fundamental rights.

Finally, Millet discusses how the Republican and liberal constitutional imaginary clash within the French debates as well as legal and political developments concerning Europe, such as the ratification of the Maastricht Treaty, the referendum of the European Constitution and the Yellow Vests movement. Thus, he shows that the clash of the imaginaries regularly resurfaces.

Another tension that legal and liberal constitutionalism may cause concerns the pursuit of transitional justice. In this context, Michał Krotoszyński's 'From Legal Impossibilism to the Rule of Law Crisis: Transitional Justice and Polish Counter-Constitutionalism' (Chapter 20) is a fact-checking exercise. It verifies whether liberal

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legal constitutionalism formed obstacles towards an alternative constitutional imaginary of transitional justice, especially lustration mechanisms. The author demonstrates that the accusation in this regard against the Constitutional Tribunal remains unjustified on legal grounds. First, he argues that, when it comes to transitional justice standards, Polish constitutionalism was not 'imitative' but 'adaptive', which again provides nuance to Blokker's argument of imitative constitutionalism in post-communist Europe. The Constitutional Tribunal creatively adjusted to the Polish context Western European recommendations (for instance, by the Council of Europe), thereby leaving the politicians with ample leeway to attain the political goals of lustration. Importantly, dissenting judges frequently expressed their expectations of either more transitional justice-oriented or more strictly rule-of-law approaches to the challenged lustration mechanism, proving the Constitutional Tribunal's preference for the middle-ground. Overall, the Constitutional Tribunal was not hostile to transitional justice. Instead, the politicians created the narrative of clashing constitutional imaginaries. They failed to enact efficient mechanisms for dealing with the communist past addressing the constitutional standards, blaming the Constitutional Tribunal.

1.3 INVITATION

The greatest hope we have with this volume is that it will provoke further reflections and debates in *both* the West and East and that the latter will not only mirror the West, but become a true partner in the debate on the current shape and future of Europe.[100] As the war in Ukraine has shown, post-communist member states – the former vassals of the Soviet Union – bring sensitivities that have been long ignored on the part of the continent that was free of foreign aggression for decades.

One such debate concerns the imperial legacies of Europe and their influence on the shape of the continent's integration and its law.[101] It should be clear that 'Europe' is not a hegemonic space that once controlled – sometimes with great violence – the rest of the world (with the possible exclusion of North America). Inside Europe there were also places whose experience is much closer to that of Europe's external colonies than that of the imperium. And their road to freedom has

[100] In that respect, the programme of the 2023 Academy of European Law, organised every year by the European University Institute in Florence, is anything but promising: the specialized course on 'Revisiting the Fundamentals of EU Law' features twelve academics, all of them coming from 'old' Europe.

[101] See Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic, 2014). Larsen, 'European Public Law after Empires' has opened this question in the context of law; see also Komárek's critique in Jan Komárek, 'Why Read the Transformation of Europe Today? On the Limits of a Liberal Constitutional Imaginary', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), 143.

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begun only very recently – or, if we really talk about Europe as the continent not reduced to the EU, some are currently fighting for it.

The greatest contribution of this book may consist in reminding those, who fight for their European future, that there is no Eden of freedom and prosperity there. Only another struggle, which, nevertheless, is mostly made of words resulting in political agreements rather than through arms and lives lost. Our job is to make our voices heard.

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