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DIALOGUE AND DEBATE: SYMPOSIUM ON EUROPEAN CONSTITUTIONAL IMAGINARIES

European constitutional imaginaries: rejoinder

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Abstract

All discussants of this book symposium on the monograph *Constitutional Imaginaries* address different aspects of constitutionalism beyond national and international limits and engage with the concepts of transnational law and global society to test and contest the book's central argument according to which specific European constitutional imaginaries are internally constituted by different social systems and therefore paradoxically represent the unity of European society through their specific semantics. In this rejoinder, I focus on some overlapping themes, namely the process of social differentiation, its impact on both social and legal pluralism, and the paradox of legitimation in societal constitutionalism to respond to their comments and criticisms.

Keywords: constitutional imaginaries; European constitution; economic constitution; constitutional populism; constitutional theory

I am intellectually indebted to all discussants and their most illuminating, inspiring and critical engagement with my work on constitutional imaginaries. They present insightful readings of my book and creatively interpret its main ideas and arguments.

Paul Blokker draws on our longstanding exchange of ideas regarding legal symbolism and imaginaries and carefully analyses basic conceptual distinctions and intellectual inspirations to situate my theory of constitutional imaginaries within a larger field of socio-legal and constitutional theory. Marija Bartl and Paul Linden-Retek return to the problems of legitimation, hegemony and ideology and examine the societal constitutionalism's originality of the new constitutional question beyond the subject of constituent power. Unlike them, Francesca Scamardella expands this question and uses the theory of societal constitutionalism to address the problem of constitutional governance beyond the state and in the global digital sphere.

Each author addresses different aspects of constitutionalism beyond national and international limits and engages with the concepts of transnational law and global society to test and contest my argument according to which specific European constitutional imaginaries are internally constituted by different social systems and therefore paradoxically represent the unity of European society through their specific semantics. In this rejoinder, I focus on some overlapping themes, namely the process of social differentiation, its impact on both social and legal pluralism, and the paradox of legitimation in societal constitutionalism.

Scamardella addresses the paradox of social differentiation in constitutional imaginaries. According to her, the adoption of social systems theory calls for the reformulation of social and legal pluralism in the context of functional differentiation and systemic autopoiesis. A new system of constitutional governance needs to be established in globally operating regimes beyond the

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classic principle of territoriality of law. She asks two theoretical questions, namely the general process of societal constitutionalism and the specific function of imaginaries in it, and explores the material, social, and cultural background of constitutions as collective self-representations and self-identifications beyond the state and law.

Like Scamardella, I argue in favour of the expansion of pluralism beyond the legal system and common jurisprudential problems of two or more legal orders operating within one polity. The mutual recognition of different normative claims needs to be reformulated as a sociological problem of the plurality and functional differentiation of different social systems. Imaginaries do not overcome this differentiation and plurality by re-establishing the symbolic unity of social order and its legitimation. They, rather, are internally constituted by differentiated social systems, and their images of social unity, therefore, are imagining society as the unity of differences.

Constitutional pluralism is part of the pluralism of social systems and their functional differentiation. Apart from other problems, this theoretical shift requires constitutional lawyers and theorists to address the legal system's self-limitation in society which operates at national as much as international and transnational levels. The EU legal system is a good example of this self-limitation and recognition of both normative and societal pluralism. It actually reveals how, apart from the imaginary of pluralism constituted by the legal system itself, other imaginaries evolving in other social systems of European society constitute its unity of differences and legitimation.

In my book, I identify four distinctive European imaginaries – *pluralism* constituted by the legal system, *calculemus* constituted by the system of administration, *imperium* of prosperity constituted by the economic system, and *communitas* constituted by the political system to address legitimation by democratic mobilisation and its deficits in the EU. Theoretical discussions and controversies regarding the EU's legal and constitutional pluralism peaked more than a decade ago. The problem of administrative efficiency and bureaucratic structure of the EU has been a permanent feature of EU legal, political, and social studies. However, the problem of the EU's economic constitution became a major issue especially after a series of economic and social crises in the EU in the last couple of decades.

The economic constitution is a central focus of Bartl and Linden-Retek's critique of potential ambiguity in the systems theoretical approach to constitutional imaginaries. While Scamardella addresses the risk of colonising expansionism of specific social systems and calls for 'a global constitutional governance capable of functionally limiting the perverse expansionistic tendencies'[1] of different social systems, Bartl and Linden-Retek focus on the limits of the imaginary of societal pluralism and the process of functional differentiation behind it.

Bartl and Linden-Retek correctly observe that 'pluralism is where differentiation as such becomes constitutionally intelligible as a legitimating value'[2] and that the pluralist imaginary opens the possibility to identify other imaginaries constituted by different social systems. However, they warn against 'the antagonisms that animate it'[3] and the understanding of imaginaries as an ipseity leading to the self-identification of people and representing totalising tendencies of social systems.

Warning against the totalising and even terrorising tendencies of autopoietic social systems are common among critical theorists and postmodern philosophers[4] and Bartl and Linden-Retek draw on this tradition by invoking Jacques Derrida and his paradoxes of legitimation and violence of the law before the law. However, their critical learning from deconstruction possibly could reflect on Gunther Teubner's use of Derrida's 'mystical recursivity' of a constituent power (founding itself by simultaneously presupposing its own existence) as a constitutive paradox of

[1]Scamardella in this volume.

[2]Bartl and Linden-Retek in this volume.

[3]Ibid.

[4]For an early and typical misreading of Luhmann's social systems theory, see J-F Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester University Press 1984) 63.

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societal constitutions which effectively makes the concepts of self-determination and self-identification redundant in societal constitution-making processes.[5]

Furthermore, Luhmann described deconstruction as second-order observing which is part of communication ruling out a holistic or dialectical approach and draws on a paradox of the world in which 'parts have higher reflective potential than the unity itself'.[6] My interpretation of Michel Foucault's concept of power as social forces constituted through contingent systemic operations without any stable identities and ideological hegemonies, therefore, fits into this post-dialectical and post-identitarian constitution of society.[7] Rather than a failure, a systemic crisis discussed by Bartl and Linden-Retek can be comprehended as a reconfiguration of these specific forces operating in different systems which reconstitutes their imaginaries and the distinction between legitimacies and illegitimacies produced by those systems.

In the opening commentary of this book symposium, Blokker expands the argument that imaginaries are a 'crossroads concept'[8] to situate my theoretical approaches within the growing body of sociological and legal research of constitutional identities and imaginaries. While using the distinction between reproductive and productive imagination to explain my theoretical choices and ambivalent approach to Castoriadis's seminal work inspiring so many critical sociologists and legal scholars, he correctly states that my theoretical questions are deeply rooted in the original sociological question of the constitution of modern society and the demise of traditional social networks.

The problem of functional differentiation and the relation between society and its parts is addressed by Blokker when he analyses the consequences of my abandonment of Castoriadis's radical concept of creative imagination as unfitting the autopoietic social systems theory and its reductive view of legitimation. However, Blokker is right in his conclusion that my approach to the problem of legitimacy and illegitimacy differs from Luhmann's theory because it considers the polysemy and polyvalence of specific systems a problem operationalised by social imaginaries.

This operationalisation is present in European constitutional imaginaries, particularly the imaginary of postnational *communitas* which, challenged by anti-EU populist politics, has to constitute its specific semantics and value structures of democratic legitimation. Despite his regret of my neglect of Castoriadis's philosophy of creative and revolutionary imaginaries, Blokker's concluding warning against the sacralisation of the people and community in populist politics finds a common ground with my systems theoretical critique of both identitarian politics and liberal constitutionalism.

All four commentators managed to address all major arguments and distinctions related to the problem of European constitutional imaginaries beyond the classic triad of *topos-ethnos-nomos*. They critically engage with my interpretation of societal pluralism as much as functional differentiation and its meaning in the systems of EU law, governance, economy, and politics. While offering their specific reading of European constitutional imaginaries, they also acknowledge the general need to rethink the power/authority and unity/diversity conceptual distinctions, which inform modern theories of constitutionalism, in the context of the polity/non-polity and the state/societal constitution distinctions. We are, therefore, united in our diverse understanding of the possibility of imagining EU constitutionalism without a constitution, polity and state.

The official motto *In varietate concordia* originally adopted by the European Convention in 2000 thus also applies to the constitutional theory which transforms the statist and monist concepts of law into the polycentric and polyvalent constitution of European society. Unity of this

[5]G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 61.
[6]N Luhmann, *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford University Press 2001) 101.
[7]J Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge 2022) 25–6.
[8]Blokker in this volume.

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transnational and functionally differentiated society is imaginable only through the plurality of its social imaginaries evolving in the systems of EU law, administration, economy, and politics.

It is exactly for this reason why societal pluralism and functional differentiation are present in all European constitutional imaginaries even though they cannot constitute any normative and value foundations of European society. In the self-limiting system of European law, this constituent power of societal *pluralism* is particularly strong and therefore communicates the imaginaries of administrative *calculemus*, economic *imperium* of prosperity and politically mobilised *communitas* beyond the classic concepts of modern constitutionalism.

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

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