


CONSTITUTIONALISM AS PRACTICE

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When writing ‘Der Begriff des Politischen’ for the Heidelberg-based journal *Archiv für Sozialwissenschaft und Sozialpolitik* (1927), Carl Schmitt could seemingly not resist a polemical sneer at his intellectual opponents. His starting point was an infuriation with liberalism. Schmitt contended that while it claimed to rest on a set of ideas and institutions that would guarantee apolitical social and economic progress, liberalism was in reality deeply political. For liberals, distance to politics was fundamentally a laudable condition, because, in their minds, it reeked of arbitrariness and unchecked power: politics needed to be reined in, framed, and the best tool for this caging in of politics was the rule of law based on a constitution. This, for Schmitt, was merely a scapegoat, a diversion from the claims to power inherent in liberal ideology. In 1932, Schmitt turned the article and a 1928 lecture into a short but influential book and lashed out in footnote number two that those who claimed to be apolitical were even more political than anybody else, because they tried to hide their political convictions.¹

Schmitt was convinced that no moral high ground was above politics because no such ground could ever not be representative of a certain standpoint, a political and social vision. As is well known, the political was everywhere for Schmitt and the collapse of power in the figure of the ‘leader’, whom he theorized as both source and endpoint of all legitimacy, only a small step in his reasoning. Schmitt’s position was and still is controversial and criticized for opening the possibility of constructing theoretical claims to political legitimacy for non-democratic and illiberal regimes, ranging from authoritarianism to fascism.

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¹ Carl Schmitt, *Der Begriff des Politischen* (Duncker & Humblot 1932) 20.

Yet, almost a hundred years later, we must admit that the tension Schmitt illustrated is still not resolved: the moral sources of constitutions rely on constantly contested basic concepts that themselves reflect an ideological standpoint and a stand in and on history. At least if we read Jan Komárek's edited volume *European Constitutional Imaginaries*, we learn that the claims, visions, and assumptions written into the basic concepts of our constitutional orders are semantically contested. The authors identify an astonishingly naïve liberal mindset among earlier legal theorists, one that was shaping much of constitutional thought since the 1990s. This mindset, it seems, had stopped thinking in alternatives that were still viable within the confines of an overall liberal order. Clearly, though, *European Constitutional Imaginaries* shows its reader just how transitory our contemporary experience is when even the most basic concepts and assumptions on which we found our societies are under intellectual (and political) fire.

We learn that writing constitutions is about taking a stand. And, interestingly, it is not only about taking one stand, but at least two. First, a stand on timelessness, on shared truths expressed by concepts that together constitute what Komárek and his stellar team of authors call a utopia, a place representing an unchanging, perfect – timeless – society. And second, a stand on time, on an interpretation of where we come from and how we are supposed to get where we want to be. For historians working with a conception of history understood in plural, history as narratives and thus as temporalizations, which are constantly (re)shaped by present experience, this form of interpretative time is precisely what an understanding of the power of history is about. This perspective on time as “human time”, as Paul Ricœur called it,² who connects me theoretically with Komárek and his team, is fundamental for my own thinking about history, too. History is not a singular, holistic story, connected by dots of events clearly discernable in time. Multiple histories exist side by side, they are rewritten based on new findings, but mostly by new questions arising from new experiences which require new explanations. Experience, mostly surprising, unexpected experience, triggers the writing of history – especially when this experience

² Paul Ricœur, ‘The Human Experience of Time and Narrative’, *Research in Phenomenology* 9 (1979), 17-34, 19.

is felt to be a crisis, something that escapes existing logics and patterns of explanation.

Hans Kelsen, Schmitt's intellectual arch-enemy, brief colleague in the faculty of law at Cologne University before he left for Geneva to thrive at the Graduate Institute for International Studies, and author of crucially important work for democratic constitutions as well as international legal theory, also declared that the moral basis for any legal norm was a social construction. Indeed, he would insist that no independent truth or purely objective foundation could ever be found for a constitution. In the beginning, there are always truths that are presupposed to be valid by any given society. He writes in his *General Theory of Law and State*, '[t]he ground of truth of an "is" statement is its conformity to the reality of our experience; the reason for the validity of a norm is not – like the quest for the cause of an effect – a *regressus ad infinitum*; it is terminated by the highest norm which is the last reason of validity within the normative system'.³ Reasons of validity are shaped by presuppositions of truth.

Reading Komárek's edited volume on fundamental concepts and ideological foundations of European law reminded me of this inescapability of taking a stand when mapping out the basic moral compass of a constitution. The book also illustrates how, apparently, European legal thought and much of EU discourse were complacent and lacked the fundamentally important self-criticism that is needed to avoid getting stuck in a hegemonic (and increasingly myopic) interpretation of experience. Komárek calls it, following Karl Mannheim, the inescapability of ideology, or the 'Mannheim paradox',⁴ which holds that whichever perspective we have on a certain ideology is itself fueled by another ideology. Reduced to this basic condition, ideology appears almost as a banality of the everyday, welded to our daily experience, a political phenomenology even of our most boring normality. What *European Constitutional Imaginaries* teaches us is that for too long, EU

³ Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) 111.

⁴ Jan Komárek, 'European Constitutional Imaginaries: Utopias, Imaginaries, and the Other', in Jan Komárek (ed.), *European Constitutional Imaginaries* (Oxford University Press 2023) 1-17, 4.

legal thought and EU policies were caught up in their own ever more narrow narratives of legitimacy. The normative space for policies had shrunk, defined mostly by the ideology of the early 1990s, which was all about free markets and the automatic good they would bring, coupled with a disdain towards more active economic policies or an embrace of the social question as a task for Europe. Komárek concedes on the opening pages that the manuscript had been submitted shortly before the outbreak of the war in Ukraine. Indeed, the ongoing war, aggravated further by the Israel-Hamas conflict, is reshaping European narratives and policies fast. The fact that Ukraine not only embraces the EU's canon of values (expressed by core concepts), but is fighting a devastating, brutal war in their name, shines new light on the meaning of these concepts and the legitimacy they create. Yet, there are additional things moving in Europe besides geopolitics and the military-industrial complex. Green transition and climate change, as well as a reconceptualization of economic policies related to the environment, but also to increasing social inequality, have all stirred within the EU over the last few years. A concept like economic security (re)appears in EU papers and speeches. The impact of the market on both the social fabric of societies and on our abilities to cope with climate change have added to a shift in EU rhetoric away from what was for a long time understood as neoliberal or ordoliberal discourse. Values and fundamental norms are back on the agenda in Europe. Komárek's important intellectual effort shines light on Europe's recent past and provides us with a critical assessment of the politics of constitutionalism in the EU, with a critical reading of European legal thought and its inherent constructions of history and where it should lead us. It also leaves us asking about the relation between politics and law and the location as well as the generation of power and legitimacy.

Given the current situation of the EU, a follow-up volume would be needed. The critical minds of Europe's sharpest legal theorists have a lot of work, it seems to me. Having gained knowledge about Europe's recent history and the ideological pitfalls of constitutionalism, being sensitized about the role of narratives and taking a stand and thus aware of one's own normative agency, constitutes a promising perspective from which to start working

towards a new, constructive discussion about shaping European constitutional imaginaries for the future.

UTOPIA AND TIME

While it may be argued that a discussion of semantic origins is superfluous when we have just learned that meanings of concepts change and that this change has fundamental consequences – that the contestation of concepts is the truly important object of study – it is nevertheless helpful to reach a clearer idea about what one’s analytical terms entail. Utopia appears in *European Constitutional Imaginaries* as an ideal society, though it remains without too many contours beyond the market narrative. So far so good, and so uncontroversial.

Utopia, taken literally, simply means ‘no-place’ or ‘not-place’, nowhere. A place that does not exist. Thomas Morus coined the concept in his *De optimo rei publicae statu deque nova insula Utopia* from 1516 and introduced the meaning still connected to the term, that of an ideal or good society. He was able to do so because of English pronunciation. In Greek, ‘ou’ means ‘no’ or ‘not’, but transliterated it is written ‘u’, which, in English is pronounced like another Greek word, ‘eu’, meaning good. Utopia thus carried the idealistic, good society connotation through this layered meaning. Clearly, there would have been a pun here for Komárek, but maybe wisely he left any word games on ‘EU-topia’ for others.

Importantly for an understanding of history’s relation to utopia, a shift from place to time took place in the conception of ideal societies. Until the late eighteenth century, utopia would be synchronous, yet in a far away, shrouded place. Of course, *topos* means ‘place’ in Greek, and the ideal society was elsewhere, even though only in imagination, but at the same time. More famously found the ideal island after being lost at sea. During European modernity, then, ideal-typical societies would no longer be elsewhere, but ‘elsewhen’; no longer simultaneous, but in a different place – rather, somewhere specific, but in a different time. Reinhart Koselleck, the leading scholar and founding father of conceptual history or *Begriffsgeschichte*, has shown that temporalization is the defining feature of modernity since the

eighteenth century. He went into detail about the emergence of temporalization as a mode of legitimacy in his study on critique and crisis,⁵ and even pointed to what, for him, was the first modern utopian text: Louis-Sébastien Mercier's *L'An deux mille quatre cent quarante. Rêve s'il en fut jamais* (*The Year 2440. A dream, if there ever was one*), from 1771. With Mercier, the temporalization of utopia began, shifting from place (*topos*) to time (*chronos*), in this case Paris in the year 2440. As Koselleck notes, ever since then, utopia should really be called *uchronia*.⁶

European Constitutional Imaginaries points to the critical role of utopian futures in the construction of legitimacies. And it is rightfully critical towards both the single-mindedness of market-based visions of temporal unfolding written into constitutional imaginaries since the end of the Cold War, and towards the naivety among European lawyers and politicians alike in not questioning the assumptions feeding the optimistic market language. As Alexander Somek and Jakob Rendl stress, there seems to have been a lack of critical reflection among European lawyers when it comes to contesting and questioning the truth presuppositions nurturing fundamental assumptions of core constitutional concepts.⁷

I would here like to add some reflections on the relationship between utopia and temporalization, and explore this relationship as one of the sources for the writing of history in modern societies. The very practice of arranging core concepts as a normative basis for constitutional orders produces a narrative over time, a particular history. It is not a history written by historians, who would critically engage with sources. It is a history produced by those who practice the conceptual arrangement, interpretation and also the contestation of the constitutional orders. As such, history is produced as

⁵ Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Bourgeois Society* (MIT Press 1988).

⁶ Reinhart Koselleck, *Zeitschichten. Studien zur Historik* (Suhrkamp 2003) 35.

⁷ Alexander Somek and Jakob Rendl, 'Messianism, Exodus, and the Empty Signifier of European Integration', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 147-159.

part of the process of producing a narrative of legitimacy for a certain type of order built to establish a society that should represent the meaning of its core concepts.

Arguably, this is not an easy and straightforward task. After all, which institutions, arrangements, laws, practices best realise the concept of ‘human dignity’? How is this dignity protected and recognized in the best way? With Komárek and his authors we learn that for some decades following the end of the Cold War, an ever more expanding free market order was taken to be such an ideal arrangement for dignity to thrive. The utopia of an order in which the core concepts of a liberal constitutionalism had been connected with the free market. The perfection of the market became seemingly synonymous with the perfection of society. Looking back over the last two decades, the so-called neoliberal narrative was astonishingly resilient in the face of quite dramatic challenges: From the failed referenda for the European constitution in 2004 and 2005 in France and The Netherlands, followed by the financial crises erupting since 2008, the Euro crisis, the technocratic power display of the troika towards the elected government of Greece, Brexit, the ever increasing votes for so-called populist and illiberal political narratives, the tangible rise of social inequality, not to mention the Corona crisis – and now the war in Ukraine to top the list, while all along climate change also rose to centre stage. At the end of these twenty years of crisis, the EU is in the midst of shaping a new narrative. European fundamental values are today supposed to be reached by caring for the environment, by economic security, a circular economy – ‘green transition’ – and also by enforcing Europe’s military. In a world moving beyond neoliberalism, Europe is changing its narrative, too. The period of the globalization narrative as the road to utopia is moving into the past and the contours of a new narrative are discernible among turbulent experiences. The history emerging from the new narrative of Europe is still about to be written, but surely includes Ukraine, a reinvigorated yet also changed and de-neoliberalized concept of the West, climate change and even more member states. Our contemporary experience has been called *Zeitenwende*, a turn of the time, by German chancellor Olaf Scholz. It will bring new histories in its wake.

This understanding of history as temporalization, as a narrative shaped the relation between a utopian goal and how agency over time has taken, takes and will take us there, represents a third type of history in the context of *European Constitutional Imaginaries*. I would like to add it to the two versions of history I can decipher from reading the book. One is called New History by Komárek, written in capital letters, and describes the recently developed historical scholarship on European law, especially the history of the European Court of Justice. Morten Rasmussen from Copenhagen University appears in *European Constitutional Imaginaries* as the leading voice of this New History. I find the recognition of history and historians by legal theorists very refreshing and a great achievement of interdisciplinary work. The chapter by Marco Dani and Agustín José Menéndez is even dedicated to an historian, Mark Gilbert, whose reading of European history is a little different to Rasmussen's and thus constitutes the second version of history found in *European Constitutional Imaginaries*. Both of my accomplished colleagues have their own readings of history, coming from specific traditions. Rasmussen always close to the archives and with the zealous energy of putting things into their proper context while resisting the temptation to take a stand (or at least trying to do so), as lawyers would be prone to do because of their self-understanding as normative thinkers.⁸ Gilbert fashioned his Whig reading of European integration some years ago and sticks his interpretative neck a little further out when critically engaging with his sources: in this case the federal end-goals he reads into European integration processes as their final stage, becoming nothing short of a *telos* of history, something that, as all historians agree, no matter where they put their focus, simply does not exist objectively. History is open-ended.

Coming myself from an approach inspired by conceptual history, it is (naturally) surprising to read nothing about this approach, which would be the third approach I tried to sketch out above, particularly in a book that places the power and role of concepts at its heart and that presents the role

⁸ Komárek (n 3) 9.

of concepts as elegantly as Jiří Přibáň.⁹ In fact, I would even argue, that this type of history is precisely the type that is critically analysed by Komárek and his authors. They describe and decipher the historical narratives woven into the ideological fabric of EU constitutional imagination.

European Constitutional Imaginaries forcefully reminds us that we need to constantly engage with and rewrite our fundamental presuppositions. Blindness, or rather the inability of self-critique, is a historical moment of modern societies, that Koselleck calls 'hypocritical'. He does not mean to imply that this is a moment in which societies become compulsive liars. Instead, he refers to moments in which historical actors are simply beyond critique and cannot imagine a Plan B. When societies, and most importantly their intellectuals and politicians, stop being self-critical, when the dominant, hegemonic discourse is no longer questioned, any new crisis cannot be solved but with old recipes. When the hegemonic view then unravels, there are no new answers, no new and at the same time legitimate ideas. In these in-between historical moments, when a declining hegemonic worldview (expressed by hegemonic interpretations of experiences) has not yet been replaced by a new one, a gap between experience and expectation, between present and future opens.¹⁰

The existing dominant narrative loses its capacity to shape the future and no new driving narrative has been developed in its place. In these historical moments, radical alternatives begin filling the gap. In our contemporary experience, the populist wave in Europe has risen to fill the gap and claimed its place as an alternative to the weakening narrative of Europeanization (and globalization) through legal reforms and free markets.

⁹ Jiří Přibáň, 'European Constitutional Imaginaries: On Pluralism, Calulemus, Imperium, and Communitas', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 19–43, 22.

¹⁰ Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Bourgeois Society* (MIT Press 1988); Hagen Schulz-Forberg and Bo Stråth, *The Political History of European Integration: The Hypocrisy of Democracy-through-market* (Routledge 2010).

In *European Constitutional Imaginaries*, the liberal utopia is identified as a version of a political ideology taking the shape of a constitution-based road to a peaceful, prosperous, and ever more united region, glued together by shared values able to make its members rise above their otherwise conflicted histories. There seems to be a contentment with the demasking of liberals from the 1990s as creators of a utopia, however. In particular, Joseph Weiler is called out as a voice from this decade, creating a kind of end of history narrative for European law and the direction of international law as such. With Weiler, his place of employment, the European University Institute in Florence, is also singled out as the most important place for the construction of post-Cold War European constitutionalism.

There is a clearly discernible utopia in Weiler's deliberations, Komárek, Somek and Rendl claim. A utopia Weiler has even clad in religious metaphors, suggesting more than simply an ideal society. Somek discusses the latter's hegemonic narrative critically and confronts European legal theoreticians with the task of readdressing the more fundamental questions of constitutionalism, its core concepts, and their temporalization.¹¹ With Koselleck's analysis of history as temporalization we gain a complementary perspective on European constitutional agency, an agency actively practiced by EU legal theorists who (at least try to) think and write a more integrated Europe into being. Progress through law seems to have been an ideological agenda shared by EU lawyers, we learn from *European Constitutional Imaginaries*. The utopia of an integrated, liberal, peaceful Europe was embraced and the road towards it mapped out by constitutionalism and its stand on both time (history) and timelessness (utopia).

IDEOLOGY AND PRACTICE

Schmitt's demasking of liberalism as deeply political translates into Komárek's claim that everything is ideological. There is a tendency in his elaborations to be more playful than precise with the key terms related to practices and concepts through which societies create their normative groundwork. Instead of a definition of ideology, except for a short reference

¹¹ Somek and Rendl (n 8).

to Mannheim, Komarek floats from ideology to terms like imaginaries, images, and ideas – completely missing a Marxist understanding of ideology, despite obvious similarities between a Marxist reading of ideology and the thrust of *European Constitutional Imaginaries*, which aims at unmasking the EU and its legal proponents as ideological actors. Marx's understanding defines ideology as a system or set of ideas and convictions accepted as true in any given society. Based on these ideas, the ruling classes shape their interest. For Marx, ideology is thus a way of establishing and maintaining power, a tool in the hands of the ruling classes to keep ruling. Ideology justified their position and reaffirmed it. In opposition to ideology, Marx claimed that his approach was purely scientific. This perspective, that science beats ideology with facts, has become widespread and one does not need to be a (full-blown) Marxist to share it. Through scientific analysis, the ruling class could be called out for its manipulations of the truth. Ideology, for Marx, was not much more than a conscious construction of false beliefs to rule the masses. The position taken by Komárek and his team of authors is, on the one hand, similar to Marx. Their intellectual effort aims at showing the ideological core of European law and lawyers producing a narrative to shape the region in a specific way. On the other hand, they are also not directly Marxist in their ideological critique when they seem to imply that the ones building the European (neo)liberal narrative since the 1990s were not fully aware of what they were doing.

If I apply Komárek's critical assessment of European constitutionalism over the last thirty years, key European actors appear as a ruling class without class consciousness, naively believing in the liberal apolitical automatism suggesting an ever-better society through market integration.

Maybe ironically, or intentionally, Marx's own stand on ideology is opposed to the original meaning of the term. Enlightenment intellectuals in the late eighteenth century had formed the *idéologues*, a group believing in the human capacity to shape the future through knowledge (or ideas) and human action that was taken based on this knowledge. A *logos* of ideas was an Enlightenment-born notion connected to claims on human perfectibility, an emancipatory notion that highlighted the ability to learn, to cut off false

beliefs as well as systems of knowledge and power based on faith and heritage and to replace these with science and knowledge.

Throughout *European Constitutional Imaginaries*, ideology remains ill-defined beyond the Mannheim paradox. There are fruitful references to Ricœur in both Komárek's opening chapter and in Kalypso Nicolaïdis's contribution. In a complex intellectual operation, Nicolaïdis wants to get rid of utopia as a fixed imagination of a perfect social and political condition by practicing constant critique or 'permanent reinvention' rooted in the present. She laments that the future is suddenly full of variations, full of possible futures, because of a 'breach in our present'.¹² It is hard to imagine, however, how constant reinvention can be possible without pointing to alternatives, which, arguably, should replace the present in the future. Yet, Nicolaïdis also grapples with utopia and the wrongs that may be perpetrated in its name. Rather than engaging with our production of futures as a society, she recommends a constant reflection of the present.

What her approach reminds us of is a core liberal idea, namely that freedom as a core concept implies that no final goal of a society can be planned or prescribed. Instead, there is continuous change. Freedom, in the eyes of liberals, also means the freedom to make mistakes, to constantly reshape the present without having a clear roadmap to the good society. The good society has no design in liberal thought. Or, put differently, the design of a liberal society is to have no design. The fact that it is open to change coming from immediate experience and that certain red lines are not to be crossed (act within the boundaries of the constitution, please!) is what makes it liberal, not a utopian plan. The utopia is to have no clearly discerned utopian characteristics beyond being free, prosperous, and peaceful. Liberalism, so to speak, is an ideology without utopia understood as a society in some finalized, concrete shape, but as a society that has the ability to constant, self-inflicted change.

¹² Kalypso Nikolaïdis, 'The People Imagined: Constituting a Democratic European Polity', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press) 231–257, 237.

When it comes to the analytical value of the concept of ideology, Komárek has a more eclectic approach, as various terms (ideology, imaginary, idea) apparently describe a single, basic point. As he sums up himself: ‘My main ambition is to take ideas – whatever their origin or prominence – seriously’.¹³ Beyond his convincing call for a contextualization of European constitutionalism(s) throughout the process of European integration, which is nothing else than a history of European legal thought and constitutional practice, no real definition of ideology is provided. There is no genealogy of its meaning to which *European Constitutional Imaginaries* relates, no discussion of the role of ideology in law and politics, or how to critically engage with it. No clear demarcation from Marx, no more complex embrace of Mannheim. It is again Ricœur who is drawn upon the most,¹⁴ when his lectures on ideology and utopia are quoted. More than a source on ideology, he serves as an example for thinking about the relations between ideology and utopia. Ricœur sees a logical need for a utopia because of the inescapability of ideology. Whether or not one has acted rightfully in an ideological sense is judged against the backdrop of a utopian goal, he argues. The relation between time and timelessness is strongly highlighted here.

Reading Komárek’s introduction and chapter in *European Constitutional Imaginaries*, it seems to be the case that the very denunciation of constitutionalism as ideology is already an uprooting intellectual exercise within the discipline. Yet beyond calling out the ideological elements of European legal practice, a more detailed understanding of ideology is not sketched out. There is a footnote hinting at Michael Freeden’s fundamental work on ideology as political practice, but it is not discussed or taken as a source of inspiration. Freeden’s work could indeed have been quite helpful for Komárek’s enterprise. It is the result of years of erudite scholarship and critical methodological thinking, and it displays a sophisticated understanding of ideology as political practice. What makes it even more important in the context of *European Constitutional Imaginaries* is his decades-

¹³ Komárek (n 3) 13.

¹⁴ Ibid, 4.

long work on liberalism,¹⁵ the ideology Komárek and his authors tackle as well and which, as we learn from Freeden, has a long and multi-faceted history. Freeden's work is complex and broad. Here, I would like to focus on two terms central to his work: practice and morphology.¹⁶

Practice is relatively straightforward. Freeden shows that ideology is characterized by collapsing theory and practice. Ideology becomes visible when it is performed (or its opposite detected). Ideology is never strictly theoretical, and it is never purely practical. Rather, the enactment or performance of core concepts inserts these very concepts into a central position within political systems. At the same time, this continuous enactment of concepts leads to a change in their meaning. Practice thus both confirms and changes the meaning of basic concepts. It makes ideology's normative underpinnings both visible and, because of the visibility, also able to be judged, criticized, changed.

Morphology in the sense of Freeden, may be best described as the semantic relations between concepts that generate the meaning of another concept, or the relation between concepts within the semantic field belonging to any given concept. Concepts also come with counter-concepts and with several further concepts in their close semantic range. Freedom's counter-concepts, for example, may be coercion and tyranny, its semantic field is made up of a variety of further concepts such as rights, the individual, property, morality, etc. Morphology thus describes the meanings and relations that construct an interactive network or hierarchy of concepts that informs an ideology.¹⁷

To take the concept of freedom once more as an example, the interactive network of freedom's semantic field was politically contested partially during the corona pandemic. The positions of the right to health and the right to work, or rather the freedom to live a long and healthy life and the freedom

¹⁵ Michael Freeden, 'European Liberalisms: An Essay in Comparative Political Thought', *European Journal of Political Theory* (2008) Vol. 7(1) 9-30

¹⁶ Michael Freeden, 'Political concepts and ideological morphology', *The Journal of Political Philosophy* (1994) Vol. 2(2) 140-164; 'Practicing ideology and ideological practice', *Political Studies* (2000) 302-322

¹⁷ Freeden 'Political concepts and ideological morphology' (n 15).

to engage in contractual relationships with the goal of increasing one's prosperity, were contested politically by asking which of the two concepts in freedom's semantic field was more important: longevity or prosperity, the freedom to live a healthy, long life or economic freedom. Should the individual's right to live be foregrounded or its right to economic activity? Arguments were constructed, scientific opinion weighed in. Those on the side of the economy even went as far as saying it would be advisable to keep the economy going because of the long-term effects economic crises have on the health of citizens.

Instead of a string of terms all hinting at the power of ideas, Freedén's sophisticated work on semantic fields and the more fine-grained constructions and contestations of legitimacies could have been a point of orientation for a deeper analysis of European legal concepts.

CONSTITUTIONALISM AS PRACTICE

Among the major insights I take from reading *European Constitutional Imaginaries* are the various connections between history and law. Not only is a generation of lawyers highly conscious of their own history and of what drove their predecessors and practitioners, not only are lawyers aware (and critical) of the *telos* built in the versions of history produced by constitutional theorists when they reflect on their conceptual constructions, there is also a deeper awareness of the role of concepts and their relation to time and thus to interpretations of history. The very practice of thinking and writing constitutionalism creates both a vision of the future (utopia) and a set of actions loaded with seemingly right ways of practicing to get a little closer to this utopia. European lawyers, it seems, are increasingly aware of their own construction of history, or at least very critically aware of the ideological elements of earlier legal thought (mostly it is Joseph Weiler who is singled out in *European Constitutional Imaginaries*). Komárek also points at the important role of political economy in relation to constitutionalism. This is a highly relevant observation. The collaborations of Christian Joerges and

Josef Hien,¹⁸ as well as the work of Anne Orford,¹⁹ for example, are fundamental for our understanding of the relation between law and economics – and they should be approached with open eyes and minds by historians. Further studies on the history of neoliberalism reveal that the notion of economic constitutionalism is not at all a new one. Coming out of the crisis of the 1930s and the Second World War, the neoliberal solution to the relation between politics and economics was precisely: constitutionalism. Even back then, neoliberals argued that market logics and basic economic rules had to be anchored at the source, namely at the constitutional level, to avoid arbitrary economic policy.

While the early-to-mid-twentieth century saw the rise of the concepts of the human person, human dignity and human rights to a hegemonic position as basic norms or fundamental concepts in liberal legal thought, this was not at all contrary to the political economic conceptions of early neoliberals. Neoliberalism embraced the concept of the human person and her dignity;²⁰ indeed, many arguments were made by neoliberals that this very dignity could only be guaranteed in a market economy running according to several institutionalized regulations (such as the necessary avoidance of all monopolies, both private and public). When the connection between political economy and law is analysed with an understanding of Freedén's morphology, the semantic field of related concepts that both constitute and connect political economy and the law gains a sharper profile.

In fact, Carl Joachim Friedrich had already observed shortly after the Second World War that what he called European neoliberalism had set out to address the relation between society and the state. Indeed, the definition of what Friedrich called the 'proper limits' between politics and the rule of law was already on the minds of European neoliberals in the time between the 1930s

¹⁸ Christian Joerges and Josef Hien (eds.), *Ordoliberalism, Law and the Rule of Economics* (Hart 2017).

¹⁹ Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021).

²⁰ Hagen Schulz-Forberg, 'Modern Economic Thought and the "Good Society"', in Peter Gordon and Warren Breckman (eds.), *The Cambridge History of Modern European Thought* (Cambridge University Press 2019).

and 1950s. As Friedrich explained in 1955, the ‘European neoliberals are resuming the never-ending task of balancing social justice and freedom, communal man and individual man, reason and will’.²¹

Enacting an ideology is a balancing act, at least in the case of liberalism. Finding the right mix between possible fundamental perspectives as well as applied policies, all representing a set of values in the best possible way, was what neoliberals had to do. Their policy recommendations changed over time and varied, depending on the historical situation. They did not lose sight of their overarching goal, however. Komárek would call it a utopia and some neoliberals did the same. Alexander Rüstow, one of the foundational thinkers and activists for social market economy and an outspoken enthusiast of neoliberalism,²² wrote in a letter to Carl Schmitt that he indeed believed that a stand on a certain utopia had to be taken. He wrote: ‘It seems to me that the idea of a democratic state based on the concept of humanity represents not only a possible, but in a certain way an unavoidable utopia’.²³

Still, the price mechanism, that is the free formation of supply and demand and the price for commodities and services, remained the main vehicle for neoliberals to get to utopia, even when it was not possible to implement it across the whole economy. As Jacques Rueff, the eminent French neoliberal, exclaimed at a colloquium in 1948: ‘If we wish to save civilization, we need to reconstitute the price mechanism’.²⁴

To ensure validity and legitimacy, the meaning of core concepts needs to be enacted, practiced. Practice links the meanings of concepts, which together shape an ideology, to the future. It illustrates the goals towards which this ideology is supposed to take a society (utopia). This practice involves the construction of temporalizations, and thus it involves the writing of history.

²¹ Carl Joachim Friedrich, ‘The Political Thought of Neo-liberalism’, *The American Political Science Review* (1955) Vol. 49(2) 509-525, 525.

²² Arne Käthner,

²³ Alexander Rüstow, ‘Letter to Carl Schmitt’ (4 July 1930), Carl Schmitt Papers, Federal State Archive of North Rhine-Westphalia, Duisburg, RW 265-11879/3.

²⁴ Jacques Rueff, ‘Contribution to discussion’, at *Colloque d’Avignon* (1948), Papers of Louis Rougier, Chateau Lourmarin, Box R3, Annex.

To my mind, constitutionalism as practice in Freedden's sense illustrates the 'between' in Komárek's subtitle – between ideology and utopia – a relation he himself does not define. The enactment of core concepts links ideology and utopia. As shown by many authors in *European Constitutional Imaginaries*, European constitutional imagination is historical. It creates a certain version of the past on which it builds, and it creates a certain version of the future, that is to say an assumed unfolding of time into a future that will have become our history.

It seems to me that historians and lawyers have a lot to think about together. Since the historical moment at which *European Constitutional Imaginaries* had to stop its analysis – which is our very present! – Europe has experienced war, an energy crisis, a migration crisis, a social crisis, and the ongoing challenges of populism and climate change. On the global level, liberal internationalism is unravelling, international organizations are not able to stop new wars, the Bretton Woods institutions are heavily criticized for being Western-centric, China leads a group of countries, BRICS+, in their effort to build a global power alternative to the US-led West. China aims at seeing at least eye to eye with the US. In our contemporary situation of polycrisis, it seems to be pivotal that lawyers do not only analyze and show the ideological elements of liberal thought and legal practice that have informed EU thinking since the 1990s. It is even more necessary to build new ideas, to define a global common good together, to avoid more war and tackle climate change and social inequalities united. A new agreement on basic concepts, and thus a rewriting of history, is needed. A global constitutionalism that moves on from and beyond the currently dominant concept is called for and needs to be enacted, practiced. Through practice, new histories will be written, and new futures will emerge. Hopefully, these will be peaceful and inclusive ones. Historians of concepts and legal theorists have quite obviously found a field of collaboration: constitutionalism as practice.