


IMAGINING EUROPEAN CONSTITUTIONALISM AS A CONSTITUTIONAL SCHOLAR

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I am grateful to the organisers of this symposium and particularly to the authors for their reflections on our book, *European Constitutional Imaginaries: Between Ideology and Utopia*.¹ This is a very special occasion to have our ideas discussed by the new generation of scholars, who have started their academic careers “on the hills of Fiesole” – where much of what we discuss today was born a few decades ago.² It is therefore somewhat touching to read their personal reflections on their paths to academia, and what it is to be a European constitutional scholar today. I deeply appreciated Maciej Krogel’s observation that our book has the ‘ambition ... to understand what has happened to the very capacity of imagining and narrating the constitutional tales in Europe’.³ And I was saddened by his admirably honest observation about the very place he came to become a scholar:

when entering the field of EU constitutional scholarship in 2018 in the hills of Fiesole, I had quickly noted that it is not the field for constitutional

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¹ Jan Komárek (ed) (OUP 2023). As this is an edited volume, I take the liberty to speak “for the book”, without having discussed my views with the other authors. “Our” book means that it has been a collective endeavour, not that I as the editor would want to use the royal “we”.

² This applies to Maciej and Maxmilian, not Hagen, who joined our symposium in writing only, too late for me to be able to properly reply to his insightful reaction to the book.

³ Marciej Krogel ‘Constitutional Imaginaries: The Story of the Rise and Fall of Interlectual Enchantment’ (2024) 15 *European Journal of Legal Studies* 91, 95.

narratives or imaginaries. Constitutional scholars have not been expected to imagine. Rather, they have been primarily expected to deliver (surely, in-depth) responses to (broadly understood) policy questions about what is happening in East-Central Europe, and how to tame it.⁴

In the first part of my reply, I would like to address the question raised by Maciej towards the end of his contribution: ‘Would it be possible to trace the fate of the European constitutional imaginaries as the story of alienation of the professional academic activity?’⁵

Maximilian Reymann’s contribution nicely relates to Maciej’s experience of today’s EUI: in his view, there is ‘a slight blind spot in [the] book’.⁶ In his view,

[t]he recent judicial developments in EU constitutional law, especially concerning the rule of law crises, have seen the CJEU arguably engage in the construction and elaboration of a very specific constitutional imaginary that has unfortunately found little engagement in this book.⁷

Maximilian’s approach is far from what Maciej found disappointing at the EUI (and in this sense it gives us reason to hope that not everything there is about policy advice and research with immediate “social impact”).

He suggests that ‘[t]he move towards EU value constitutionalism, which imagines the EU legal order as an ethical value order, paints a powerful picture, that is increasingly becoming a legal reality in the EU’.⁸ Maximilian praises our book for giving us ‘the language and tools to consider’ the Court’s approach to this value constitutionalism, which he calls ‘ordo-ethical’.⁹ I will deal with Maximilian’s analysis in the second part of my reply.

⁴ Ibid, 97.

⁵ Ibid, 104.

⁶ Maxamillian Reymann ‘National Imaginaries for a Transnational EU’ (2024) 15 European Journal of Legal Studies 73, 78.

⁷ Ibid, 79.

⁸ Ibid.

⁹ Ibid, 80.

Finally, Hagen Schulz-Forberg's critical observations concern the lack of proper definition of one of the central concepts of the book: ideology. He suggests several useful ways of how to engage in it, illustrating what the EUI is best at: making space for a truly inter-disciplinary dialogue among people with different backgrounds, but a shared interest. It is to provide critical reflection on the European integration project from a detached – academic – standpoint. Unfortunately, his piece came too late for me to be able to properly engage with, and I must hope to have another chance to do so.

Before I begin, one note of warning: as both Maciej's and Maximilian's contributions are (at places) quite personal, I would like to keep this spirit in my reply, hopefully not degrading the scholarly quality and seriousness of their engagement with our book.

* * *

There is little to disagree (at least for me) with Maciej's observation about a sense of alienation among those who want to “think like academics” rather than like practitioners (“true lawyers”) or policy advisors. For a long time, I have had in the making a follow-up paper to my ‘Freedom and Power of European Constitutional Scholarship’,¹⁰ which would deal with some of the questions raised by Maciej. I take this as a welcome opportunity to use some of the ideas that I try to develop in that piece and connect them to Maciej's reflections.

One of the first questions I raised in our symposium is, what does it mean to engage in scholarship? Alternatively, we can frame the question somewhat differently by asking ourselves, what is the justification of the kind of research (if it can be called “research” at all, given today's standards and definitions) performed in this book? The volume (of course, with lots of limitations and deficiencies spotted in the replies) tries to provide a critical reflection on some deeper presuppositions of the integration project,

¹⁰ Jan Komárek, ‘Freedom and Power of European Constitutional Scholarship’ (2021) 17 *European Constitutional Law Review* 422-441.

without calling directly for action. It rather invites further thinking and reflection, which may not lead to an immediate change in the “real world”. To use Maciej’s words, the book is not about ‘responses to (broadly understood) policy questions’.¹¹ How can it be justified, then?

To do so, I would suggest using the distinction based on the difference between work and play made by the British philosopher Michael Oakeshott.¹² I use it despite the clear risk that it will confirm the suspicion of practice- and policy-oriented scholars about their colleagues who fail to bring grants that would save the world (or at least make it a better place): that they (the practitioners) engage in real work, while those who find it difficult to join only play.

Oakeshott reflected on the distinction between work and play when thinking about humanity and its relationship to the material world – nature.¹³ Oakeshott added that work is concerned with satisfying basic human needs and wants.¹⁴ Written at the dawn of the consumer society, Oakeshott observed that ‘[a] creature composed entirely of wants, who understands the world merely as the means of satisfying those wants and whose satisfactions generate new wants endlessly, is a creature of unavoidable anxieties’.¹⁵ Therefore the need for “play”, understood broadly as ‘an activity that, because it is not directed to the satisfaction of wants, entails an attitude to the world that is not concerned to use it, to get

¹¹ Krogel (n 3), 97.

¹² Michael Oakeshott, ‘Work and Play’ *First Things*, June/July 1995, cited from the online edition <<https://www.firstthings.com/article/1995/06/work-and-play>>, accessed 19 January 2024.

¹³ See on this question Pierre Charbonnier (Andrew Brown transl.), *Affluence and Freedom: An Environmental History of Political Ideas* (Polity Press 2021).

¹⁴ Oakeshott also distinguished between ‘needs’ – concerning ‘bare existence’ and ‘wants’, which are unique to humans due to their intelligence: ‘to be “intelligent”, here, means to be a creature not merely of needs which must be satisfied, but of wants which are imagined, chosen and pursued’, Oakeshott (n 12).

¹⁵ *Ibid.*

something out of it, or to make something of it, and offers satisfactions that are not at the same time frustrations'.¹⁶ Play includes other human activities besides games or sports. The key is that play-like activities are not instrumental. Poetic imagination (arts), but also science therefore belong to this category.

Oakeshott acknowledges that scientific discoveries 'are often eligible to be used for the exploitation of the resources of the world for the satisfaction of human wants'; however, "science" itself is a great intellectual adventure of understanding and explaining which is free from the necessity of providing useful knowledge'.¹⁷ I suspect that to Oakeshott, the notion of "applied sciences" would be the same misnomer as "professors in practice", which the LSE, Oakeshott's home institution, started to appoint decades after he retired. This confuses work and play, or practice and theory, and needs to be rejected, since

[i]nstead of regarding 'work' and 'play' as two great and diverse experiences of the world, each offering us what the other lacks, we are often encouraged to regard all that I have called 'play', either as a holiday designed to make us 'work' better when it is over, or merely as 'work' of another sort.¹⁸

For Oakeshott, "Theorizing" is not validating or "proving" a conclusion reached, it is a procedure of discovery or enquiry. It is, briefly, the urge to inhabit a more intelligible or a less mysterious world'.¹⁹

I suspect that this is what brings many (but not all, to be sure) young people to PhD programmes and places like the EUI; they want to understand before they start changing the world. It is a great privilege that one has to decide what is the relevant issue and why it matters. This, at the same time, is however the hardest part of doing a PhD, something that in my view

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Michael Oakeshott, 'What is political theory?' in Luke O'Sullivan (ed.), *What is History? And Other Essays* (Imprint Academic 2004) 391-402, 392.

delineates future original scholars from what I would call “knowledge-workers”. The latter then find their place in consultancy firms, think-tanks or governmental institutions (including those of the EU).

Here comes my second observation based on reading Maciej’s piece and my own experience as an academic – and this time as a teacher and increasingly as a mentor to younger colleagues. If finding the question – “the research question” – is at the heart of what would transform a graduate *student* into a researcher (and future scholar), then all PhD programmes which pride themselves on integrating their PhDs into a larger research programme (usually a big grant) are in fact failing the student and never allow her to learn what she should.

Now, this may sound like some nostalgic observations of someone who was lucky enough to enter academia at a very different time, when universities (and other institutions) were not controlled by ‘knowledge corrupters’.²⁰ In fact, I started working at the LSE in 2010, exactly when David Cameron and the Conservative Party came to power in the UK and further reinforced the perception of universities as places whose aim was to contribute to the nation’s GDP, something that originated with Thatcherism in the 1980s and has never been abandoned since.²¹

Before the LSE, I had experience from working in many different contexts (after an obligatory military service, I worked for a think tank focusing on environmental policy, then, just at the time the Czech Republic joined the EU, for the Foreign Ministry, and, finally, as a legal clerk for the President of the Czech Constitutional Court when the Court was reviewing the Lisbon Treaty). All my non-academic jobs were exciting (and the military service provided me with some valuable experiences); however, nothing

²⁰ Colin Crouch, *The Knowledge Corrupters: Hidden Consequences of the Financial Takeover of Public Life* (Polity 2015).

²¹ See briefly, William Davies, ‘Stay away from politics’ 45(18) *London Review of Books* (London, 21 September 2023) <<https://www.lrb.co.uk/the-paper/v45/n18/william-davies/stay-away-from-politics>> , first accessed 28 October 2023.

compared to when I saw people I considered as true academics, be it in the early days Jiří Přibáň (who then became a mentor to me and is one of the contributors to the book), or a bit later Joseph Weiler. Especially the latter's career cannot be described as "purely academic", but what he epitomizes to me (and I suppose to many of us in the field) is curiosity for the sake of understanding – although, as a teacher he obviously wants to change things through this as well.

This, I think, is the main worry one can get from Maciej's piece: that the ambition of thinking for its own sake – thinking as playing in the Oakeshottian sense and imagining – is not something to be found at universities (any more). It is not that such practice will disappear, but rather that it will become the privilege of those who do not need to prove to be "useful" – the already privileged and wealthy.

Maciej's colleague from the EUI, Maxmilian Reymann argues in response to one of the volume's core premises that 'we must not only practice "*constitutionalism as critique*" in scholarship, but rather constitutional law itself must become a reflexive structure that is able to engage with and critically reflect on its engagement with the *other* and claims raised from beyond its current epistemological horizon'.²² Maxmilian's critique of the Court of Justice's 'ordo-ethical approach of value constitutionalism', exemplified by its case law concerning judicial reforms in Poland (or to put it more broadly, the Court's engagement with the "rule of law crisis" in the EU) would then exemplify constitutional law so conceived.

On a more general level, Maxmilian observes the following:

[w]hile I do believe that it is useful to go beyond the concept of ideology and that the act of imagining possible utopias can help us in that endeavor, I would be highly doubtful of normatively rather thick imaginaries

²² Reymann (n 6), 89.

constructed with the explicit goal of furthering the European constitutional project or emanating from its very core.²³

He then observes ‘a certain tension’ between my critical ambition expressed in the book and my observation that ‘[o]ne of the problems of today’s European constitutionalism lies in its inability to offer a utopia’.²⁴ However, the tension appears only if I saw the latter as a problem I needed to address as a critical scholar.

Here I may echo a powerful statement by Bernard Harcourt, made in his deeply self-reflective book on how to act as a critical scholar in the actual world. As he painfully acknowledges, he is aware that his participation in certain practices (in his case defending, pro bono, people condemned to the death penalty in the United States) helps to perpetuate the system against which he fights through his legal advocacy:

[m]y ambition is not to spend my time justifying a form of governmentality; others can do that (they do it all the time). They do it very well – all too well. I want to be spending my time critiquing and finding the problems because few do that properly, relentlessly. I want to be justifying the *ungovernability*, not the governability.²⁵

The point is, in my view, that there are many more scholars engaged in trying to create utopias of Europe (which are forms of ideologies, ideologies-to-be, not something opposite to them).²⁶ I can observe, as I do in the book,

²³ Ibid, 76.

²⁴ Jan Komárek, ‘European constitutional imaginaries: Utopias, Ideologies, and Other’ in Komárek (n 1) 1-17, 4.

²⁵ Bernard Harcourt, *Critique & Praxis: A Critical Philosophy of Illusions, Values, and Action* (Columbia University Press 2020) 489.

²⁶ In a certain sense, anybody providing a “big” narrative about the EU and its “finalité” is engaging in utopian/ideological thinking. Both words have negative connotations, but here are meant neutrally, as the components of constitutional imaginaries. On this, and why utopias are “ideologies in the making”, see Komárek (n 24) 2-5. Examples abound, including scholars who are critical of European

that they have not been very successful in the last few years.²⁷ Being allowed to think critically without the mission to reform and help is more and more difficult under the conditions described in Maciej's piece – but certainly possible, as Maximilian's reply shows.

integration. Joseph Weiler's 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403-2483, analysed in one of the chapters of the book (Jan Komárek, 'Why Read The Transformation of Europe Today? On the Limits of a Liberal Constitutional Imaginary' in Komárek (n 1) 119-146) is a primary example.

²⁷ Komárek (n 1), 1. The primary example would be Jürgen Habermas's writings on Europe from the last decade.