NATIONAL IMAGINARIES FOR A TRANSNATIONAL EU?

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Jan Komárek's new book European Constitutional Imaginaries: Between Ideology and Utopia is not only an immense scholarly contribution to the discussion of European constitutionalism, but also a joy to read. The diverse voices and eclectic, yet perfectly structured mix of different methodologies and approaches to European Union (EU) law, gives expression to the pluralistic and heterogenous nature of the EU and its broader constitutional discourse. The collaborative nature of the book amplifies its message and arguably, such a book on ideological critique of EU constitutionalism(s) could only be written collaboratively.

I will first discuss, on a more personal level, how this book made me reflect on my own journey through the study of EU law.

I will then move to interrogate the concept of constitutional imaginaries employed by Jan Komárek, raising some concerns regarding the distinction between ideology and imaginary.

This will lead me to my own analysis of how I see the current case-law of the Court of Justice of the European Union (CJEU) on the rule of law as engaging in ideological construction of its own.

Finally, I will conclude with some thoughts on how the careful consideration of the ideological character of constitutional theories can help us move towards a more grounded and critical discourse on possible futures of EU law. [1]

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[1] Martijn W Hesselink, 'Progress in EU Contract Law' (2022) 18 European Review of Contract Law 2.

I How we know and are taught EU Law

While reading European Constitutional Imaginaries, I found myself reflecting on my own legal education. European law is my legal "mother tongue" if you will. Beginning with my LLB in Groningen, I have studied European law, not as a specialization after or during a national legal education. Now, at the EUI, I find myself at what the book identifies as a particular center of the 'constitutionalization of Europe'. [2]

I mention this because it was when I returned from Groningen to Germany, during a lecture on European law by a German public law professor, that I experienced the simultaneous power and impotence of the European constitutional imaginary. Power, in the sense of how deeply certain concepts and premises of European constitutional law, including the fact that there is such a thing as EU constitutional law, are entrenched and naturalized in certain EU law departments. The question of supremacy of EU law, is after all settled law since Costa/ENEL[3] in 1964. Impotence, in the sense of how the lack of a deeper analysis of the reasons given in support of European constitutionalism, as well as the often-ideological nature of those, leads to those very ideas being dismissed as unconvincing, or worse, not even seriously considered by many domestic legal scholars. The question of real supremacy is after all settled law as explained in the BVerfG Lisbon Case[4] (in Germany), only proper nation states have *Kompetenz-Kompetenz*.

It is rare that a book not only engages us on an academic level, but can also help us reflect on our own epistemological journey. How we know EU law and how underlying imaginaries, utopia(s), and ideological assumptions shape that knowledge is often as fundamental to the operation of EU law as

[2] 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), 10

[3] Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66

[4] Judgement on 30 June 2009, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08

its formal *acquis*. This book confronted me with the language that could put into words what I had long thought about as a rather frustrating experience, with what I understood at the time as a "stubborn" domestic public lawyer.

II IMAGINARIES OR SIMPLY IDEOLOGY?

I would like to engage with the concept of constitutional imaginaries as proposed by Jan Komárek. Imaginaries are initially presented as 'sets of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule.'[5] This brings me to the question of how exactly the concept of constitutional imaginaries differs from ideology, besides restricting its focus on constitutional discourse through the pre-fix constitutional. Jan Komárek makes use of Paul Riceour and Martin Loughlin, to highlight how the imaginary unfolds through a dialectic relationship between ideology, as necessary but dominating, and utopia, as providing a normative outside vantage point. This move does indeed take a step towards resolving the problem of the 'Mannheim Paradox'.[6] However, it should be stressed that the utopian may quickly be subsumed by the ideological, no longer providing an outside vantage point of critique, but mere ideological justification, no longer breaking the cycle but supplementing and reinforcing it. If we are to see ideology and utopia in such a dialectic relationship, then as Komárek also highlights in his book, utopia must be emancipatory.[7] It is this possible emancipatory potential of utopia, which ultimately serves as the justification for the move beyond ideology and the ambivalent or at times even positive attitude towards the concept of imaginary.

Taking the emancipatory claim seriously requires us to consider the concept of constitutional imaginaries' potential to not merely be subsumed by ideology. In a more classical Marxist sense, it would be important to consider

[5] cf Komárek (n 2) 2

[6] Karl Mannheim, *Ideology and Utopia* (Routledge 1991).

[7] cf Komárek (n 2) 6

which class is imagining a given utopia, or in more contemporary terms, it is essential from which positionality a claim for utopia is made. It could be argued that a utopia's critical potential to question the status quo and potential for opposition and ideological critique strongly depend on if that utopia is formulated from outside the dominant ideology, or from its borders.[8]

With this, I would like to slightly challenge the concept of constitutional imaginaries. While 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 constructed with the explicit goal of furthering the European constitutional project or emanating from its very core. Here, I see a certain tension between Komárek's claims that (i) 'One of the problems of today's European constitutionalism lies in its inability to offer a utopia […]', and (ii) '[…], we need to engage in a project of 'constitutionalism as critique' rather than simply contributing to the building of a project'. [9]

If in the end the goal is, as the main author and a majority of the chapters seem to indicate, to engage in a critical, reflexive, and emancipatory project that critiques the underlying ideology(s) shaping EU constitutional law, I wonder why so much weight is given to the formulation of imaginaries and utopias by elites, as something beyond merely an ideological tool. By ascribing the concept of 'constitutional imaginary' to certain ideological approaches to EU law, we run the risk of trivializing their ideological and dominating character. While I would not outright dismiss the usefulness of the concept of constitutional imaginaries, as something going beyond the limitations of ideology, by introducing a dialectic relationship with the

[8] Walter D Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton Studies in Culture/Power/History 2012); Rámon Grosfoguel, 'Transmodernity, Border Thinking, and Global Coloniality' [2008] Revisita Crítica de Ciências Sociais.

[9] cf Komárek (n 2) 4 & 6

concept of utopia and with that a certain level of imagination, I wonder if the bulk of the analyses in this book do truly go beyond ideology critique.

I would be further doubtful of the potential to engage in the construction and formulation of truly emancipatory utopias and imaginaries in a purely academic or institutional context. In the symposium on this book held at the EUI, Jan Komárek made the interesting comment that 'theory is play'. The act of imagining possible utopias, rather than trying to solve concrete problems given the tools at hand, such as the EU *acquis,* certainly has something playful. However, I wonder if the concept of utopia could not be better served if seen through the eyes of those oppressed and dominated by normative structures, such as the EU, or those actively imagining and living (temporary) utopias.[10] After all, emancipatory and critical projects are not only theoretical.[11] Rather, it is most often through practical action and real lived experience, that we may create the cracks in the dominant epistemic and material hegemony, leading to (temporary) free spaces in which we may imagine and justify to one another different constitutionalism(s). If critical theory is fundamentally about radical emancipation, starting from the power relations that exist and critiquing them both from an immanent and transcendent position[12] then theory is more the guidebook or the bets and hopes placed on the possible outcome of the game, rather than actually 'playing'. The game is really played on the ground, through struggle,

[10] Antje Daniel and Christine M Klapeer, 'Einleitung. Wider dem Utopieverdruss. Queer*feministische Überlegungen zum Stand der Debatte' (2019) 28 Femina Politica – Zeitschrift für feministische Politikwissenschaft 17-20.

[11] Arnold Lorenzo Farr, 'Whats's critical about Critical Theory again? Critical Theory, ethnocentrism, sexism and racism' (2023) 10 Perspectivas em Diálogo: Revista de Educação e Sociedade 29-30.

[12] Rainer Forst, 'What's Critical About a Critical Theory of Justice?' in Banu Bargu and Chiara Bottici (eds), *Feminism, Capitalism, and Critique: Essays in Honor of Nancy Fraser* (Springer International Publishing 2017) 226; in response to Nancy Fraser, 'What's Critical about Critical Theory? The Case of Habermas and Gender' [1985] New German Critique 97.

especially by those on or beyond the boundaries of hegemonic structures through their everyday resistance and solidarity.[13]

III THE VALUE CONSTITUTIONALIST IDEOLOGY OF THE CJEU

Returning to the concept of constitutional imaginary or ideology in a more practical sense within the EU, especially the CJEU's case-law, there is a slight blind spot in this book, which I feel pressed to highlight. I would argue that, while it is true that a certain hyper-fixation on the CJEU has long plagued EU constitutional law scholarship,[14] it is still essential to carefully analyze the jurisprudence developed by the Court and highlight how certain judicial developments are currently constructing and building on a certain constitutional imaginary.

It must be stressed that this analysis' focus on the Court is not meant to place 'so much burden on law and legal institutions that they may not be able to bear it',[15] but rather to argue exactly from that standpoint. We must take seriously the normative premises underlying the CJEU's jurisprudence and be attentive to when the law seems to fix certain discourses outside of political contestation. This focus on the Court is not meant to endorse a legal answer to these questions, rather the opposite. The discourse on European

[13] Borders and boundaries are understood here in the broad sense as socially constructed markers of difference or classification schemes. When taken together with an intersectional understanding of identity and oppression, this open up ways to think about not only being inside or outside the border, but also as positioned on the boundary, as both part of and excluded from.

See for example: Walter D Mignolo, Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking (Princeton Studies in Culture/Power/History 2012); see also Manuela Boatcă, 'Grenzsetzende Macht' (2010) 20 Berliner Journal für Soziologie 23.

[14] 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) 146.

[15] ibid.

values, with the important but often overlooked primary question of if there is such a thing such as European common values, and if and how we may know them, is certainly too large and complex to expect satisfying answers through legal means. However, we cannot ignore that the 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. The 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.[16]

Signe Rehling Larsen's chapter 'The European Union as 'Militant Democracy"[17] does a great job of introducing the inherent tension of a heterogenous space of European constitutional imaginaries and how 'post-fascist constitutionalism' is merely one possible imaginary. However, how this post-fascist constitutional imaginary is finding expression in the CJEU's case-law, and which premises are increasingly being operationalized and constitutionalized, has not found as much attention.

Surprisingly, it was one of the chapters in Part IV, on the importance of political economy, that may offer us the language and tools to consider the recent constitutionalization of an EU value order. While the question of an EU value order is not *prima facie* concerned with the question of political economy, we can how see the dynamics of what has been termed 'authoritarian liberalism' by Michael Wilkinson in his chapter 'On the New

[16] Frank Schorkopf, 'Value Constitutionalism in the European Union' (2020) 21 German Law Journal 956; Ferdinand Weber, 'The Pluralism of Values in an Identity-Framed Verbund Federal Belonging in the European Union after the Rule of Law Conditionality Judgments' (2022) 47 European Law Review 514.

[17] Signe Rehling Larsen, 'The European Union as "Militant Democracy"' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023).

German Ideology', has spread beyond the realm of the market.[18] The post-fascist imaginary outlined by Rehling Larsen, [19] meets the logic of authoritarian liberalism that is already part and parcel of EU (market) law, to not only avoid the excesses of democracy, but rather to take another step towards a post-political future.[20]

Similar to the arguments raised concerning the concept of authoritarian liberalism, the value constitutionalist approach of the CJEU moves to position the fundamental values as pre-political and its emphasis on a centrally determined value order that is at best constructed through a dialogue between the CJEU and the Member States' apex courts, can be read as a possible instance of 'a distrust of popular sovereignty, constituent power, and democracy'.[21]

Fundamentally, what I call the CJEU's ordo-ethical[22] approach of value constitutionalism, builds on the following premises:

(i) The Member State constitutional orders are fundamentally imagined and essentialized as ethical communities.

[18] Michael A Wilkinson, 'On the New German Ideology' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023)

[19] cf Rehling Larsen (n 17) 71-81

[20] cf Wilkinson (n 18) 282

[21] cf Wilkinson (n 18) 282.

[22] In line with the arguments raised in cf Wilkinson (n 18); see also Josef Hien and Christian Joerges, 'Dead Man Walking: Current European Interest in the Ordoliberal Tradition' (2018) 24 European Law Journal 6-7

The term ordo-ethical order is meant to stress the centralizing and state-centred approach to a value community, that reframes law as a value order, and which sees both the Member States and the EU as actively shaping and maintaining specific ethical values, the existence of which is what is meant to give identity and create community.

(ii) The Member States and the CJEU are privileged actors in this EU value discourse, occurring almost exclusively beyond the reaches of ordinary politics and popular engagement.

(iii) The constitutionalization of values at the EU level represents a form of historical progress, lending it an air of objectivity and naturality.

(iv) The EU value order gives expression to a European Identity, which is reinforced and constructed through this value dialogue with the CJEU at its core.

Together, these core premises construct a logic, in which the EU sees itself as a 'militant democracy' to echo Rehling Larsen,[23] with the power to defend against the excesses of popular democracy and extremism. However, at the same time, through an ordo-ethical logic, that locates the question of values in a pre-political space, the CJEU's approach in turn becomes authoritarian, recalling Wilkinson, in its rejection and distrust of public engagement with these fundamental questions. The facts on the ground in, but not limited to, Poland and Hungary, raise considerable doubts as to the current configuration's effectiveness of the 'militant' label. The ordo-ethical logic and its authoritarian tendency, on the other hand, make us question the future of the "democratic" label. Finally, the tendency to essentialize and restrict pluralism, that comes with making us of a national conception of constitutional order, put the transnational or possibly even "post-national" label into doubt.

IV Ethical Communities and Mutual Trust

I argue that the recent case-law of the CJEU is increasingly framing the EU legal order through an ethical communitarian imaginary of an EU value order. As various contributions of this book highlight, this imaginary is not new or primarily driven by the CJEU. Rather, as highlighted by Jiří Přibáň,

[23] cf Rehling Larsen (n 17)

it has been one of the dominant imaginaries concerning the organization of states and state-like normative orders and persisting 'in the current post-national European society'.[24] The persistence of this imaginary and its direct connection with the project of nationalism raises important questions how and if such a concept is applicable or desirable for a transnational polity, such as the EU.

Opinion 2/13[25] on the EU's accession to the European Convention on Human Rights, could be argued to be the starting point of the judicial constitutionalization of this European ethical communitarian imaginary. Constitutional legal orders, be they national or European, are equated with value orders and both the Member States, as well as the EU itself, are imagined as ethical communities. Furthermore, the existence of an ethical community with common values, is positioned as the pre-condition for the existence of the common EU legal order and the necessary level of trust. Considering paragraph 168 of Opinion 2/13, this fundamental premise is made explicit:

> This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised […].[26]

Besides imagining the EU legal order as an ethical community and positioning this specific type of community as the necessary basis for mutual trust, the CJEU also makes the move to frame the Member State legal orders, or possibly constitutional orders in general, as ethical communities. This view privileges a quite specific conception of the nation, turning them into

[24] Jiří Přibáň, 'European Constitutional Imaginaries: On Pluralism, Calculemus, Imperium, and Communitas' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 21

[25] Opinion 2/13 of the Court ECLI:EU:C:2014:2454

[26] ibid. para. 168

internally homogenous entities.[27] This point highlights the uncritical nature of the CJEU's value jurisprudence, which paints with an exceedingly broad brush and essentializes the Member State legal orders, positioning inherently contested concepts as objective, or necessary to the existence of a EU constitutional legal order.

V WHO SPEAKS IN THIS VALUE DISCOURSE?

The idea of constitutional orders as being fundamentally based on ethical communities, with the state, both national and EU, as the primary agent giving expression to those values, has considerable impact within which space and among whom this value discourse occurs. Positioning the EU and the Member States as ethical communities and carriers of values, which are internally homogenized and essentialized, paints the picture of a simple and rather two-dimensional space of this value discourse.

The *Wightman* case, concerning the UK's Article 50 procedure and its right of unilateral withdrawal from that procedure, is one such example, where the privileged position of the Member States in this value discourse is elaborated.[28] However, it is in C-156/21 (*HU conditionality judgement*), which dealt with the legality of the Commission's new rule of law conditionality budgetary measure, that the role of the Member States in this value discourse was clarified further.

> Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of 'the rule of law' which they share,

[27] Benedict R O'G Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2006); This is also picked up in cf Komárek (n 14)

[28] C-621/18 *Wightman v Secretary of State for Exiting the European Union, (Wightman)* ECLI:EU:C:2018:999, para. 63.

> as *a value common to their own constitutional traditions,* and which they have undertaken to respect at all times.[29]

It is not merely the consent of the Member States to be bound by the values of Article 2 of the Treaty on European Union (TEU), that signifies their commonality. Rather, there is an active element of construction, which sees a direct link between the Member State's constitutional traditions and the common values of Article 2 TEU.

Besides the centrality of the Member States, the Court positions itself above the Member States in this dialogue, taking on the apex position of the final arbiter not only of EU law *stricto sensu*, but also of the values of the EU legal order and in certain cases even the values of Member States' legal orders. It is the CJEU, which in the end determines how to interpret the common constitutional traditions of the Member States, when considering EU law issues, and thus positions itself as not only guardian but determiner of the common values.[30] Given the broad scope of what is relevant for EU law that has been constructed in the operationalization of the rule of law through Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union (CFR), the traditional limitations of the scope of EU law seems rather porous when it comes to the fundamental values.

What emerges can be described as an *ordo-ethical order*,[31] which places the state, be that at the national or EU level, at the center of the maintenance and promotion of a specific ethical vision and order.

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[29] C-156/21 *Hungary v European Parliament and Council of the European Union, (HU conditionality judgement)* ECLI:EU:C:2022:97, para. 234 (emphasis added); it must be mentioned that this case was decided following the submission of the manuscript of this book and as such this review is less to be seen as a direct critique, but rather as a continuation of the ideas developed in European Constitutional Imaginaries.

[30] Ibid. para. 234

[31] In line with the arguments raised in cf Wilkinson (n 18); cf Hien & Joerges (n 19)

VI THE EU VALUE ORDER AS PROGRESS

This leads us the idea of progress, against which the EU ordo-ethical order is imagined and constructed. This idea of progress is meant to have a legitimizing function, as progress is seen as an objective standard of betterment.[32] This idea of progress as a narrative of legitimacy is highly seductive and chapters like 'A Whig Interpretation of the Process of European Integration?' by Marco Dani and Augustín José Menéndez highlight how the idea that 'the constitutionality of European law is the result of an evolutionary process'[33] distorts the constitutional discourse and distract us from the 'neoliberal torsion'[34] and authoritarian tendencies of the EU itself.

By connecting the EU legal order with national legal orders, the hope is to create a chain of legitimacy, which extends to the EU level and builds the narrative of the EU legal order as the next step in this idea of progress. This drive to create chains of legitimacy and speak in terms of linear or connected progress was elegantly highlighted by Amnon Lev in his analysis of Neil Walker's Constitutional Pluralism.[35] This leads to tendency to refer back to the nation-state as the primary frame of reference and to build on a narrative

[32] See for example Amy Allen, 'Beyond Kant Versus Hegel: An Alternative Strategy for Grounding the Normativity of Critique' in Banu Bargu and Chiara Bottici (eds), *Feminism, Capitalism, and Critique: Essays in Honor of Nancy Fraser* (Springer International Publishing 2017) 253-257.

[33] Marco Dani and Agustín José Menéndez, 'European Constitutional Imagination: A Whig Interpretation of the Process of European Integration?' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 46.

[34] Ibid. 46 & 65

[35] Amnon Lev, 'The Imaginary and the Subconscious: Situating Constitutional Pluralism' in Jan Komárek (ed), European Constitutional Imaginaries: Between Ideology and Utopia (Oxford University Press 2023). 180; see also Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317.

of continuous and historically driven progress. If we are to take the transnational and heterogenous nature the EU seriously, we ought to justify it in transnational terms, rather than building on concepts that are directly interwoven with the project of nationalism.

We can underscore the way that the CJEU sees a direct and active link between the national legal orders, as value orders, and the EU as a value order based on Article 2 TEU, in the *Repubblika* Case.[36] The Court was confronted with the question of how the values of Article 2 TEU, operationalized through for example Article 19 TEU and Article 47 CFR, interact with national constitutional law. The CJEU would confirm the application of Article 2 TEU through its linkage with Article 19 TEU and indirectly Article 47 CFR, to national constitutional provisions. Most importantly, the CJEU developed of a non-regression standard concerning the common values of Article 2 TEU.[37]

What underlies this non-regression logic, is an historically dependent and progressive attitude towards constitutionalism, which sees constitutionalization as a 'continuous march forward'.[38] EU law, as developed out of the common constitutional traditions of interlocking ethical communities (Member States), is framed as the next step in a historically dependent and almost natural progress of (liberal) constitutionalism. A crucial part of this invocation of progress, is the post-political attitude at its core. Certain issues, like the neoliberal logic of free markets, or now the question of common (European) values, are framed as objectively determined through a process of progress.

[36] C-896/19 *Repubblika v. Il-Prim Ministru (Repubblika)* ECLI:EU:C:2021:311

[37] ibid para. 63 & 64.

[38] Martin Nettesheim, 'Die Werte der Union: Legitimitätsstiftung, Einheitsbildung, Föderalisierung' (2022) 57 Europarecht 542.

VII THE EU VALUE ORDER AND IDENTITY

The previously highlighted premises upon which the Court builds its value constitutionalist logic, come together in the 2022 Conditionality Cases concerning Poland's and Hungary's challenges against the EU Regulation on a General Regime of Conditionality for the Protection of the Union Budget through an action for annulment.[39]

In Case C-157/21 *Poland v. Parliament and Council*,[40] the CJEU provides a good summery the narrative of an EU value constitutionalist legal order in paragraph 143:

> […] once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded. That premiss is based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected […] That recital also states that the laws and practices of Member States should continue to comply with the common values on which the European Union is founded.[41]

[39] EU Regulation on a General Regime of Conditionality for the Protection of the Union Budget (Regulation 2020/2092) (2020) OJ L 433/6
For an overview of the Conditionality cases see: Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 German Law Journal 131; see also cf Weber (n 16).

[40] Case C-157/21 *Poland v. Parliament and Council (PL Conditionality Judgement)* [2022] ECLI:EU:C:2022:98

[41] ibid. para. 143.

What is interesting, is that the Court clearly highlights the 'specific and essential characteristics of EU law, […]',[42] which leaves the impression that the value constitutionalist narrative of an ethical community is the only possible option given the nature of EU law. I would like to stress the importance of this move, as it represents one of the key dangers of the constitutionalization of values. The language of necessity and obligation, lends the Court's interpretation of the EU legal order as a value order an air of inevitability. Further, the narrative of the EU legal order as a form of progress, positions the Court's reasoning as objective and value constitutionalism as something that was waiting to be "discovered", rather than something that is actively constructed. In the next passage, the Court even defines these 'specific and essential characteristics of EU law, […]' as the 'very identity of the European Union'.[43]

VIII Conclusion

We must engage in what Jan Komárek rightfully calls 'constitutionalism as critique',[44] and that means paying careful attention to the developments in the positive law, especially when coming from a privileged and central actor such as the CJEU. Recalling the debate on robust constitutionalism between Rainer Forst[45] and Aaron Harel,[46] we must not only practice 'constitutionalism as critique' in scholarship, but rather constitutional law

[42] ibid. para 143

[43] ibid. para 145:

"The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. (…)".

[44] cf Komárek (n 2) 6

[45] Rainer Forst, 'The Constitution of Justification: Replies and Comments' in Ester Herlin-Karnell, Matthias Klatt and Héctor A Morales Zúñiga (eds), *Constitutionalism Justified: Rainer Forst in Discourse* (Oxford University Press 2019).

[46] Alon Harel, 'Constitutionalism and Justice' in Alon Harel, *Constitutionalism Justified* (Oxford University Press 2019).

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.[47]

The brief critique of the CJEU's value jurisprudence in this review is meant to highlight the power of ideological assumptions and imaginaries, which influence both our thinking about constitutional (EU) law as legal scholars and legal actors, as well as the development of EU law through the CJEU. What we can see as dominant in EU law is the expansion of an ordo-ethical logic that increasingly frames fundamental questions as post-political. As highlighted throughout the book, the post-WWII imaginary of a fear of the excesses of democracy has long dominated the discourse on the European economic constitution. The value constitutionalist trend of the CJEU can be understood as picking up this logic and applying it beyond questions of the market.

My goal was to supplement the analysis of the book with an example of how ideology critique can aid us in our analysis of the case-law of the CJEU. Taking seriously the normative premises underlying the structure of EU law, and the approach of the Court towards questions of constitutional significance, will aid us in formulating a more grounded critique. The analysis of the underlying ideological currents and constructed imaginaries that shape the space of EU constitutional discourse, can strengthen this very discourse by turning it into a reflexive space that is critical of the power and dominance of certain narratives and concepts. This is why this book comes not a second too late. While reading, I found myself wishing I could have had the opportunity to read this book at the beginning of my EU law journey.

[47] cf Forst (n. 45).