Political Economy in the European Constitutional Imaginary – Moving beyond Fiesole

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The volume seeks to re-connect law and political economy, both understood in very broad terms. My contribution provides an additional perspective on this theme, and discusses the place of political economy (or rather its conspicuous absence) in the constitutional imaginary of Europe, which has dominated much of the last three decades. It originated, in the words of Antoine Vauchez, 'in the hills of Fiesole between Badia Fiesolana and the Villa Schifanoia' (now of course Villa Salviati). Joseph Weiler's *The Transformation of Europe* is the foundational piece of this imaginary. I have recently analysed *Transformation* and discussed it at the place of its birth. This contribution builds on that analysis.

I firstly explain what I mean by constitutional imaginary and present *Transformation* as such. I stress its neglect for questions of political economy, something that has marked much of the European constitutional scholarship at least until the Eurocrisis (and probably even beyond that). In the final part I will argue, using constitutional imaginary as a heuristic tool, that European economic constitutionalism, which was emerging from the hills of Fiesole at the time when *Transformation*'s imaginary dominated the field, is not able to fully grasp some questions of constitutional political economy. We need to move beyond Fiesole.

Why "Constitutional Imaginary"?

Constitutional imaginaries are sets of *ideas and beliefs* that help to motivate and at the same time justify the practice of government and collective self-rule. They are as important as institutions and office-holders. They provide political action with an overarching *sense* and *purpose* recognized by those governed as legitimate. Constitutional imaginaries can be seen as 'necessary fictions' that make political rule possible, or as ideologies understood in (post-) Marxist terms as a 'means of domination'.

Constitutional imaginaries conceal from citizens some negative impacts of their central principles. Unconstrained commitment to international free trade agreements (as part of a neo-liberal imaginary) can make some people (feel) 'left behind' – and dominated by those who benefit from intensive international cooperation. The latter may not even realise their domination – until it is revealed by a radical result in a referendum or a presidential election as we saw after the Brexit vote or the election of Donald Trump to the presidency of the United States.

Constitutional imaginary is built on a tension, recently explored by Martin Loughlin in his Chorley lecture at the LSE. Imaginary – both at the level of an individual person who is co-producing it, and at the level of a society, where such imaginary forms part of its collective experience, is *ideological* and *utopian*. It is ideological since in the interest of creating the society (or community), it supresses the individual and her preferences, needs or experience. Any belonging to the collective is such; the alternative being the aggregate of individuals, each different in their own sphere, not shared with others except through contracting. It is also utopian, since it gives the polity, which is constituted through the imaginary, a direction, or horizon – although it remains out of its reach.

A number of central concepts – 'contested truths' form part (not the whole) of a constitutional imaginary. They are essential to the practice of government, and yet unsettled. It is around them that important political (and also legal-constitutional) arguments turn – be it the nature of statehood and sovereignty, the constitution and its identity, democracy, rights (human and/or fundamental), or freedom – the dominant ethical category of the modern society. They are part of the conceptual vocabulary of modern public law and politics.

Importantly, constitutional imaginaries are very much dependent on the underlying notions of political economy – and vice versa. They are interdependent, as some authors in the German debate on the ordering of law and economy knew well. Ordoliberals put the relationship between law and economy at the centre of their work, as discussed in Christian Joerges and Michele Everson's contribution to the volume and explored, in the context of private law, by Marija Bartl.

To take one example, market can be seen as a source of freedom – and the imaginary of the government, individual and her rights will follow from that. Market can be alternatively understood as a potential place of domination, which people, in order to gain freedom, need to control through their rights and collective government. The shape of the market will however (hence the interdependence) reflect its legal constitution – whether it will be a neoliberal "market without adjectives", as some proponents of economic reforms of the 1990s argued, or a market embedded (through regulation) in a polity and its law.

Unfortunately, this insight has never penetrated the theory of European constitutionalism. True, there was European Economic Constitutionalism, but for a very long time the mainstream constitutional debate 'benignly neglected' the questions of political economy. Moreover, as I argue below, even the latter theory did not grasp some important questions that need to be addressed through "law of political economy".

Transformation as a Constitutional Imaginary at the "End of History" and the Beginning of a "New Europe"

Lawyers, and especially more philosophically oriented lawyers with a foot in legal and political practice, are important co-producers of constitutional imaginaries. Joseph Weiler represents one of them, arguably the most influential in the two decades between 1989 and the beginning of the Eurocrisis in 2010. *Transformation* (which was being conceived in the long period from 1978, when he joined the EUI, until its publication in 1991), became a central piece of constitutional imaginary that dominated the period after the fall of communism (as the events of 1989 are commonly called).

It was an imaginary which mostly borrowed from liberal, United-States-inspired constitutionalism that resonated globally at the time. It was a structure for a new world order at the 'end of history'. It put emphasis on individual freedom, its juridical guarantees, and a free market economy. Copenhagen criteria expressed this imaginary at the political level, while the Washington consensus embodied its economic dimension.

In the context of the EU, this liberal constitutional imaginary functioned as a utopia: something that still was not true *for the EU* at the time but was widely considered worth pursuing. In Old Europe it was the utopia of 'an Ever Closer Union', in the post-communist Europe the same imaginary marked the return from 'abduction to the East', as the Soviet domination was described by the Czech writer Milan Kundera.

The same imaginary functioned as an ideology too, however. 'The Ever Closer Union' does not ask who in the end bears the burden of bringing 'poor cousins' back to old Europe. It also made the return to Europe something that could not be questioned by those who suffered from the massive restructuring of the economy required by that.

The Failure of European Economic Constitutionalism

Someone reading the book under discussion may wonder whether there is some link to the recent movement for law and political economy, which started some five or so years ago in the United States. In 2016 *Texas Law Review* published a symposium entitled 'Reclaiming Constitutional Political Economy'. At about the same time Law and Political Economy Blog was established. The point of 'reclaiming' was to overcome a 'Great Forgetting' of questions of political economy, despite the interest which e.g. Critical Legal Studies took into issues of social justice and material inequality as created and sustained by liberal law.

A European observer may think, mistakenly, that this call to reclaim constitutional political economy is (yet another) parochial American affair. After all, we not only have people who have studied European Economic Constitution (besides Christian Joerges particularly Julio Baquero Cruz and Miguel Poiares Maduro); the whole study of EU law has always put the internal market at its centre. To think about European constitutionalism without the market would be unimaginable.

And yet precisely this has been happening, and our predicament may not be that different from our colleagues across the Atlantic (at least when it comes to the intellectual condition of our discipline; materially there is more than an ocean separating our and their world). How comes?

As argued before, the mainstream constitutional law and theory of the EU benignly neglected the questions of political economy. However, there is one gap in "economic constitutionalism" as well: one, which may keep its many insights outside the mainstream debate. It is built on the separation between law and economy. As described by Christian Joerges and Michelle Everson, it seeks to define the 'proprium' of each. Analytically it may make sense, however, only to a point. The separation may hide from sight how many of the 'legal-constitutional' questions are in fact issues with an important political-economic dimension and vice versa.

To give some examples of each: only very few people have noticed that the debate on the 'rule of law' and the principle of primacy, apparently threatened by the German Federal Constitutional Court in *Weiss*, was overlooking (or glossing over) the impossibility of the status quo, helplessly maintained by the ECB and the ECJ. It may be a constitutional travesty to try to justify the principle of primacy with reference to equality among the member states, when the same law produces so unequal effects for them.

Relatedly, all the fighters for the rule of law and democracy in the post-communist Europe should start asking how much economic injustice there is, the real, not only "perceived" by those who suffer as a result of their country's race back to Europe. The rule of liberal law may then start appearing as an ideology which imposes un-freedom. Orbán or Kaczynski may start looking as 'liberators' (fake, needless to say – but what is the alternative?)

On the other hand, there seems to be consensus on the need to keep economic and monetary policy in the hands of economic experts. This is not something with a democratic/constitutional dimension, unless we want to allow populist politicians to play with the rules of the game determined by economic science. Again, imaginaries play a big role in such beliefs.

The recent article by some of the people behind the Law and Economic Blog, published by Yale Law Journal concludes:

> a legal imaginary of democratic political economy, that takes seriously underlying concepts of power, equality, and democracy, can inform a wave of legal thought whose critique and policy imagination can amplify and

accelerate these movements for structural reform- and, if we are lucky, help remake our polity in more deeply democratic ways.

I think the volume is a first step in the right direction, but to put the whole new way of thinking about law of political economy, new intellectual and disciplinary coalitions will have to be formed – and new imaginaries construed. We need to move beyond Fiesole.
