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**DOI**

[10.1093/oso/9780192855480.003.0017](https://doi.org/10.1093/oso/9780192855480.003.0017)

**Publication date**

2023

**Document Version**

Final published version

**Published in**

European Constitutional Imaginarities

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[Link to publication](#)

**Citation for published version (APA):**

Bartl, M. (2023). Imaginarities of Prosperity as Constitutional Imaginarities. In J. Komárek (Ed.), *European Constitutional Imaginarities: Between Ideology and Utopia* (pp. 360-377). Oxford University Press. <https://doi.org/10.1093/oso/9780192855480.003.0017>

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# Imaginarities of Prosperity as Constitutional Imaginarities

Marija Bartl\*

## I. Introduction

This chapter explores the question of what makes imaginaries *constitutional*. Should we look for them in constitutional texts and doctrine? Or should we give them a more sociological reading, and consider as constitutional those shared imaginaries that hold our societies together? If the latter, how do these shared imaginaries actually relate to constitutional texts? For instance, were they expressed in the proposal for the ‘Constitutional Treaty’—which, as the ‘last utopia,’ features prominently in the introduction to this volume?<sup>1</sup> Or are they to be found in EU’s governmental practices, the handling of Covid crisis, the Brexit movement, or national party programmes?

In order to respond to this query, I will take us to another context and another time, for this will hopefully allow me to productively reframe the concerns underlying constitutional imaginaries in general, and those of European constitutionalism in particular. In a recent symposium on socialist constitutionalism,<sup>2</sup> published on the (web)pages of the *Law and Political Economy* blog, William Forbath attempts to outline some of the ills of the contemporary constitutionalism. Unlike the constitutionalism of the Weimar era, he argues, contemporary constitutional theory is indifferent to the core questions of political economy, ‘namely how to imagine and construct a constitutional order that helps redress and undo the ways that class inequality and deep asymmetries in the distribution of social and economic power undermine the guarantees of political equality on which constitutional democracy rests.’<sup>3</sup>

Contemporary constitutionalism does not seem to care for real concerns and (distributional) conflicts, failing to address very real constitutional questions in their background.<sup>4</sup> Weimar, like some other later

\* I would like to thank Ronan Condon, Jan Komarek, Candida Leone, and Rafal Manko for their invaluable comments on the earlier drafts of this chapter. All remaining errors are mine.

<sup>1</sup> See the introduction to this volume.

<sup>2</sup> Forbath’s definition of socialism is as follows: ‘Socialism means the extension of democracy and democratic institutions into economic life. Liberal democracy could not deliver on its promises of liberty and equality unless the precepts of democracy and republican self-rule were extended from the sphere of politics into the sphere of social and economic life.’ In William E Forbath, ‘Socialism Past and Future,’ *LPE Blog* (22 June 2020). Available at <<https://lpeproject.org/blog/socialism-past-and-future-part-i-of-ii/>> and <<https://lpeproject.org/blog/socialism-past-and-future-part-ii-of-ii/>> accessed 25 May 2021.

<sup>3</sup> *Ibid.*

<sup>4</sup> Etymologically, the word constitution comes from *constituere*, to establish. The constitution is, in this light, an act of the constituent power (*pouvoir constituant*), establishing an order from nothing, and giving birth to constituted power (*pouvoir constitué*), which derives its legitimacy from the constitution.

constitutions,<sup>5</sup> epitomizes a different kind of constitutionalism, according to Forbath—constitutionalism interested in the questions of the distribution of power and authority in society, where the economic power is accounted for in the constitutional settlement.

In (an, as always, thoughtful) response, Samuel Moyn points out that while the Weimar constitution may have incorporated important progressive provisions, it failed, in the years following its enactment, to entrench its progressive agenda. Moyn raises two main objections to Forbath's attempt to learn from Weimar. First, he suggests that 'our economic situation is such that the Weimar experiment provides a little but not a lot of guidance in establishing a progressive or socialist alternative.'<sup>6</sup> The Weimar constitution is thus not a promising source of inspiration for our contemporary problems. Second, he argues that we need to 'question, cautiously and respectfully, whether we should sign on to the contemporary project of constitutionalizing progressive political economy.'<sup>7</sup> Moyn presses on the role of constitutions in empowerment—beyond giving constitutional law professors a role in the elaboration of socialism. Specifically, he is concerned that, if the opposite agenda wins, the 'constitutional lawyers would have the job of getting their constitutions out of the way of political success.'<sup>8</sup>

This conversation, as many others in recent times, builds on efforts to understand and re-articulate the relations between law and political economy at a time in which the 'neoliberal consensus' is breaking.<sup>9</sup> While Samuel Moyn may be right that the constitutional texts are certainly not places where one can permanently institutionalize progressive agendas, a generous reading of Forbath's project is that he is after something slightly different; that is, to recover a certain *constitutional imaginary* that prevailed in the Weimar period in many countries<sup>10</sup>—a constitutional imaginary which stands for a very different understanding of how the world 'fits together' than the contemporary (neoliberal) one. In this chapter, then, I will try to articulate what the constitutional imaginary lying behind the Weimar constitution may have been, and its continued relevance today in Europe and beyond. While doing so, I will also articulate the role of legal and constitutional imaginaries when attempting to bring about social change.

The main argument I would like to make in this chapter is that we should identify as *constitutional imaginaries* those imaginaries that have fundamentally shaped the ways in which we have gone about making and re-making our societies, whether they are expressed in constitutional texts or not. I will argue that the two most consequential imaginaries in high and late modernity,<sup>11</sup> which have periodically mobilized vast

<sup>5</sup> See for instance the Italian Constitution post-Second World War (1948).

<sup>6</sup> Samuel Moyn, 'The Relevance of Weimar', *LPE Blog* (24 June 2020) <<https://lpeproject.org/blog/the-relevance-of-weimar/>> accessed 6 April 2021.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> See for instance a symposium on *Verfassungsblog* edited by Poul Kjaer, 'What Comes after Neoliberalism?', *Verfassungsblog* (August 2020) available at: <<https://verfassungsblog.de/what-comes-after-neoliberalism-2/>> accessed 6 April 2021.

<sup>10</sup> The Weimar Constitution was signed by the German president in 1919. It was preceded by a major workers' strike and the proclamation of socialist republics across several German states.

<sup>11</sup> I take high and late modernity to be the period from the second industrial revolution, ca. 1870, until the present.

social energies and brought about significant constitutional changes—in the distribution of power, conduct of politics, administration of justice, distribution of voice and resources—presented us always with a story of *prosperity*. It was the most credible story of prosperity, at a particular point of time, that has steered where our individual and collective efforts and resources were invested, and thus what kind of society we have instituted.<sup>12</sup> These ‘imaginaries of prosperity’ are properly constitutional because they have not only justified vast redistributions of power over the past 150 years, but also co-produced their own imaginaries of economy, politics, or law, always driving the knowledge production towards its desired recipe for social change.<sup>13</sup>

One imaginary of prosperity, encapsulated in the Weimar constitution, can be described as a ‘imaginary of collective prosperity’.<sup>14</sup> In this imaginary, trust is placed in public institutions and collective bodies as the drivers of social change and prosperity, and thus power—also by means of law—has to be vested in the hands of these bodies and institutions in order to bring about a better future. The Weimar constitution thus, for instance, empowered workers councils at all levels of economic and political organization, protected workers and the middle class (!), and put in place provisions for the ‘socialization’ of enterprises against *adequate* (rather than full) compensation.<sup>15</sup>

The imaginary of collective prosperity has been preceded,<sup>16</sup> and gradually succeeded,<sup>17</sup> by the ‘imaginary of privatized prosperity’, which informs contemporary constitutionalism. In this imaginary it is private actors (individuals as consumers, but vitally capital, industry, and innovators) who are seen as the drivers of social progress and who need to be given space and power—also by means of law—in order to bring about a better future. Remarkably, thanks to a particular historical context, the imaginaries of privatized prosperity have *avant la lettre* shaped the constitution

<sup>12</sup> I use the term society to indicate that what is being constituted encompasses political, economic, or social spheres, the public and the private. What is constituted are the ways of life. See also Cornelius Castoriadis, *The Imaginary Institution of Society* (MIT Press 1997).

<sup>13</sup> Marija Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ (2015) 21 *European Law Journal* 5.

<sup>14</sup> As will become clear later, the imaginary of collective prosperity has had both more progressive inclusive variants (social-democratic, and in part socialist) and more regressive exclusionary variants (Nazism, fascism, some religious movements). In terms of Weimar, I focus in this chapter mainly on the exploration of the social-democratic imaginary of collective prosperity, for I see the articulation of the new progressive imaginary of collective prosperity as a crucial step for responding to both the social and the environmental challenges we face today. The development of more nationalist and populist versions of collective imaginaries is anyway already taken care of by relatively successful right movements from India to Brazil, the US, Russia, the UK, and so on.

<sup>15</sup> Weimar Constitution, section on ‘Economic Life’, Art. 152 ff.

<sup>16</sup> The end of the classical liberal imaginary of prosperity is usually dated to the end of the First World War. The rise of the social democratic imaginary of collective prosperity is formed from the end of the nineteenth century, with the growth of labour movements across Europe and the US, accompanied by the growing body of critical and progressive scholarship. FA Wieacker, *History of Private Law in Europe* (Clarendon Press 1995).

<sup>17</sup> I refer to the 1980s as a moment when the shift toward the new imaginary became more prominent, with the victory of Margaret Thatcher in the UK and Ronald Reagan in the US, the Wassenaar consensus in the Netherlands in 1982, and the White Paper on the Completion of the Single Market and a Single European Act in the EU in 1986. But of course, the crises that enable this shift took place in the 1970s and include several consequent economic crises and the breaking up of Bretton Woods. However, the second half of the 1970s was also the period of the first, more genuinely global progressive imaginary of collective prosperity, within the New International Economic Order.

of European communities,<sup>18</sup> during the heyday of the imaginaries of collective prosperity among its member states.<sup>19</sup>

The imaginaries of prosperity have, importantly, shaped our understanding of what the proper role of law is and should be, with sweeping consequences, not least for democracy. When *imaginaries of privatized prosperity* prevail, the legal community will mostly see social and economic reality as pre-legal, exogenous to law, not constituted by law in any fundamental sense.<sup>20</sup> Law's role will then be to facilitate and optimize exogenous social processes—while unavoidably having to conform to their particular (spontaneous) laws, orders, and principles. If we thus adopt this understanding of the law's proper role, we immediately perform the privatizing logics—for a large number of social interactions will stay outside of the purview of both legal normativity and democratic politics.

In contrast, when *imaginaries of collective prosperity* prevail, lawyers will see much of social reality<sup>21</sup> as institutional, constituted through law and politics.<sup>22</sup> Law, in this

<sup>18</sup> The main goal, as well as the main means of European integration, was the progressive establishment of the common market, where the *free* movement of goods, services, capital, and workers would lead to the most optimal allocation of resources, prosperity, and increased interdependence on its territories. The Court of Justice was soon to turn the fundamental freedoms into individual rights, making industry the main driver of European integration. At the same time, a set of competences of the EU in the field of social or cultural policy were close to non-existent at the time. Despite this, European Court of Justice notwithstanding, EU policies in the 1960s, 1970s, and 1980s generally remained embedded in the then prevalent collective imaginary: with the concerns for power asymmetries and antagonistic interests, especially between labour and capital, and the protection of weaker parties (workers, consumers) as central concerns. This changed only with a broader shift to the imaginary of privatized prosperity from around the mid-1980s. The Treaties, updated with the Single European Act, helped to unleash (if unevenly) processes of marketization and privatization of public power in Europe.

<sup>19</sup> Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (HUP 2020).

<sup>20</sup> I see several different strands of scholarship as representative of privatizing imaginaries in law, including law and economics, law governance, behavioral turn in law, social norms scholarship, reflexive law, and so on. Notable examples of such scholarship are, for instance, Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law and Society Review* 239–85; Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory' in Christian Joerges et al (eds), *Transnational Governance and Constitutionalism* (Bloomsbury 2004) 3–28; Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144(5) *University of Pennsylvania Law Review* 1765–1821; Gráinne De Búrca and Joanne Scott, *Law and New Governance in the EU and the US* (Bloomsbury 2006); Christine Jolls, Cass R Sunstein, and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471–1550; Richard A Posner, 'The Law and Economics Movement' (1987) 77(2) *The American Economic Review* 1–13; Norman I Silber, 'Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law' (1989) 2 *Loyola Consumer Law Review*.

<sup>21</sup> By social reality I mean socially constructed, shared reality that includes both the aspects of the social world (practices and institutions) and the natural world as they are perceived and experienced by people, individually and collectively.

<sup>22</sup> There are many typical examples of legal scholarship that understand law as constitutive of social reality, including law and political economy scholarship, critical legal studies, TWAIL, sociological approaches to law, the historical turn in international law, and so on. Some limited, examples are Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Vol. 37 (CUP 2007); Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2001) 10(1) *European Review of Private Law* 7–28; David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (PUP 2016); Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (OUP 2014); Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (PUP 2019); Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford Monographs on Labour Law 2014); Isabel Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation' (2019) 30(2) *European Journal of International Law* 601–33; Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012); Harm Schepel, 'The

view, is clearly endogenous to social reality and an important vehicle for social change. If we then adopt this understanding of law, we will be much more confident and ready to intervene to change the existing ‘rules of the game’, as well as distributive outcomes by means of legal normativity and democratic politics, with far less presumed deference for the ‘laws’ of economy or any other traditional or ‘natural’ social arrangements.

These imaginaries of prosperity are thus conceived in this chapter as *families* of imaginaries and corresponding institutions and practices that share the background understanding of economy, law, politics, and government, woven by and through a story of prosperity, which places either private actors or collective actors in the driving seat towards a better future. If used in the singular, the ‘imaginary of prosperity’ refers to the shared *background conception* of economy, law, politics, and government that prevails at a certain point of time. If used in the plural, as the ‘imaginaries of prosperity’, I aim to stress the performative dimension of social imaginaries, that is, the plurality of imaginaries, projects, institutions, and practices necessary to maintain (and change) the deeper imaginary of prosperity. It is in the performance of imaginaries of prosperity, through various imaginaries, projects, institutions, and practices that we see the variation in the background understanding of economy, law, politics, and government emerge—setting the ground for change.<sup>23</sup>

What Forbath then calls for when he demands that certain aspects of Weimar-like constitutionalism are revived is not just the recovery of a particular type of constitutional crafting; his plea is for a different constitutional imaginary of prosperity altogether. I see Forbath, and increasingly many others for that matter,<sup>24</sup> calling for a turn towards a new *imaginary of prosperity*, which would rely on public and collective institutions and interventionist law, as the Weimar constitution did, in order to counter the excesses of the great privatization that has taken place over the past forty years across the world. This new collective imaginary will certainly have to be a considerably revamped version of the social democratic one,<sup>25</sup> as Moyn rightly observes.<sup>26</sup> Yet what needs to be saved from the previous collective imaginary is the revival of trust in public and collective institutions, as well as law, as the vehicle toward an inclusive, liveable future.<sup>27</sup>

Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone’ (2017) 44(1) *Journal of Law and Society* 79–98; Gert Bruggemeier et al, ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10(6) *European Law Journal* 653–74.

<sup>23</sup> Importantly, the shift between the imaginaries is both gradual and radical. The gradual variation in the background understanding of economy, law, politics, and government at first only weakens the old imaginary. Once a sufficient degree of variation has been cumulated, a qualitative rather than a quantitative shift takes place—with a clear appearance of an articulate, coherent, self-assured, and elegant paradigm of understanding the world.

<sup>24</sup> For a specific outline of the actors who foreground the imaginary of collective prosperity, that is to say who see public and collective institutions as a path towards a livable future, see the Conclusion to this chapter and in particular footnotes 104–114.

<sup>25</sup> Ranging from around the end of the First World War until the 1970s, with clear breaks on the way.

<sup>26</sup> See Samuel Moyn (n 6).

<sup>27</sup> Importantly, a broader shift toward imaginaries of collective prosperity will not be without effect in the EU, despite the deep institutional entrenchment of the imaginaries of privatized prosperity. The encouraging message of this chapter is that we are not entirely dependent on the constitutional texts, and the institutional constraints can be overcome. If we are to judge on the basis of history, with all the caveats that apply, a broader shift towards a more collective imaginary of prosperity would reshape EU policies as well as

If there is a role for legal scholars in helping to usher the new collective imaginary of prosperity, it is in challenging the still prevailing privatizing imaginary and its laws. They should—as Forbath himself does—continue to bring to the fore the preoccupations of imaginaries of collective prosperity, such as power and antagonistic interests, stressing that law is *endogenous* to social reality and can be a *vehicle* for social change. Such efforts to de-naturalize social realities need to take place also at the level of constitutional law and scholarship, in Europe and beyond: not least because vacating this space of political and legal struggle leaves it up for grabs for those who see such constitutionalization as their main political agenda.<sup>28</sup>

This chapter will be structured as follows. I will first articulate what social thought on social imaginaries brings to the discussion of constitutional imaginaries (section II). Then, I will develop the concept of ‘imaginaries of prosperity’ as the proper constitutional imaginaries of high and late modernity, and outline the two different routes to prosperity they foster: either through public and collective institutions, on the one hand, or private actors and firms, on the other (section III). Subsequently, I bring my account back to analysis of some of Forbath’s observations about Weimar constitutionalism, both as an illustration of what the imaginaries of collective prosperity stand for and to provide some reasons why Forbath’s project may be broader than what Moyn suggests (section IV). Next, I turn to reflect on the relevance of the constitutional imaginaries of prosperity for the EU constitutional settlement (section V). Finally, I conclude with some observations on the new collective imaginary of prosperity and the role of law and lawyers in the re-making of society (section VI).

## II. Constitutional Imaginaries as Social Imaginaries

In recent years,<sup>29</sup> a number of leading constitutional law scholars<sup>30</sup> have relied upon the concept of *constitutional imaginaries* as a means to gain a better understanding of

the reading of its constitution. And while the ongoing Covid crisis has set the shift in train, it is on all of us to foster a convincing and inclusive imaginary of collective prosperity for the EU, which could successfully replace the neoliberal privatized one.

<sup>28</sup> In his excellent book *Globalists*, Slobodian shows that ‘constitutionalization’ was a political project of a sizeable number of neo/ordoliberal. Slobodian, *Globalists* (n 19). For reflection on the European constitution, see section 6 of this article.

<sup>29</sup> The heading for this section winks to Castoriadis (n 12).

<sup>30</sup> See for instance, Martin Loughlin, ‘The Constitutional Imagination’ (2015) 78(1) *The Modern Law Review* 1–25; Jiří Pribán, ‘A Social Theory of Constitutional Imaginaries: Beyond the Unity of Topos-Ethnos-Nomos and Its European Context’ in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Constitutionalism Under Stress: Essays in Honour of Wojciech Sadurski* (OUP 2020); Paul Blokker, ‘Populism as a Constitutional Project’ (2019) 17(2) *International Journal of Constitutional Law* 536–53; Paul Blokker, ‘The Imaginary Constitution of Constitutions’ (2017) 3(1) *Social Imaginaries* 167–93; Kim Lane Scheppele, ‘The Social Lives of Constitutions’ in Chris Thornhill and Paul Blokker (eds), *Sociological Constitutionalism* (CUP 2017) 35–66, <<https://doi.org/10.1017/9781316403808.002>> accessed 25 May 2021; Zoran Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (OUP 2018); Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (CUP 2011); Jiří Pribán, ‘Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism’ (2018) 45(S1) *Journal of Law and Society* 30–51; Jan Komárek, ‘European Constitutional Imaginaries: Utopias, Ideologies and the Other’, University of Copenhagen Faculty of Law Research Paper No. 2020-88; Thornhill (n 29).

how constitutions actually constitute societies we inhabit. Their main aim was to go beyond constitutional texts and explore the less tangible but no less significant role of *constitutional imaginaries* in social practices and shared imagination.<sup>31</sup>

This growing constitutional scholarship builds on a wide-ranging tradition in social thought, which revolves around the concept of ‘social imaginaries’, as developed within several different traditions: liberal communitarian,<sup>32</sup> psychoanalytic,<sup>33</sup> science and technology studies,<sup>34</sup> political economy,<sup>35</sup> and so on. What makes the scholarship on social imaginaries noteworthy is that it sheds—with some success, I would say—new light on the questions of social integration and social change, by reinterpreting—or complicating—the relationship between thought and practice, agency and structure, the imaginary and the real, collective and individual, form and substance.

The literature on social imaginaries has a number of important implications for the study of constitutionalism, which is taken on board, if to varying degrees, by the aforementioned constitutional scholarship. First, and for lawyers perhaps the most obvious message, is that any broadly shared conception of how the world works, and should work (a social imaginary), will end up incorporated in laws, regulations, institutions, organizations, or governmental and social practices. This institutionalization makes social imaginaries stick, both naturalizing and amplifying them across time, space, people, and their environments.<sup>36</sup>

Second, the reference to social and constitutional *imagination* highlights an important departure from rationalist tradition in social thought. To maintain a social order, as well as to bring about change, we need more than just ideas.<sup>37</sup> The stickiness of social imaginaries is closely related to the affective ways in which we relate to the world, individually and collectively.<sup>38</sup> Imaginaries not only ‘make sense’, but also engender identification, (mis)trust, and belonging, and give us a home (or not) in the

<sup>31</sup> Blokker (n 29).

<sup>32</sup> Charles Taylor, *Modern Social Imaginaries* (DUP 2004).

<sup>33</sup> Castoriadis (n 12).

<sup>34</sup> Sheila Jasanoff and Sang-Hyun Kim, *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power* (CUP 2015).

<sup>35</sup> Ngai-Ling Sum and Bob Jessop, *Towards a Cultural Political Economy: Putting Culture in Its Place in Political Economy* (Edward Elgar Publishing 2013).

<sup>36</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 2006).

<sup>37</sup> Some articulations of the ‘competitor’ concepts, such as *ideology* (as in the work of Slavoj Žižek or Louis Althusser) or *paradigms* (such as in the philosophy of science), do capture some of the concerns raised here, but miss others. The concept of *paradigms*, or its variant *episteme*, aims to capture a framework of thought, a set of concepts and practices within which a (scientific) discipline is thinkable. Paradigms are rather static, however—until they are not. Social imaginaries, instead, merge the concern for structure with the concern for agency. While (some) social imaginaries will become dominant, and thus in important ways institutionalized, individuals and groups come up with new imaginaries all the time, in order to remake the social order. And while new imaginaries will come with a different level of ‘imaginativeness’, that is, the degree to which they will incorporate the elements of already shared imaginaries, they are always part of projects and thus working to bring about a change in social reality. The concept of ideology, on the other hand, especially in its more recent articulations in the work of Slavoj Žižek, also captures important aspects of social imaginaries that I present in this chapter. However, I find the concept distracting for two reasons: first, the reference to ‘ideas’ distracts from more affective and imaginary dimensions of what is at stake; second, the concept comes with a slightly negative connotation, or even baggage, of falsity and something that we need to escape. Yet, not only is such an escape impossible, but the new social imaginaries are important preconditions for social change and thus potentially also empowerment.

<sup>38</sup> Judith Butler, *The Force of Nonviolence: An Ethico-Political Bind* (Verso 2020).



present and in the future.<sup>39</sup> Consider just the affective and mobilizing effects of *‘liberté, égalité, fraternité’* that found expression in the 1791 French constitution, or the *‘Life, Liberty and the pursuit of Happiness’* of the American Declaration of Independence. But similar affective and mobilizing forces have also other social, if not necessarily constitutional, imaginaries. Consider the success of the neoliberal imaginary in recent decades. It not only appealed to us on the level of common-sense ideas about the working of economy (‘the Swabian housewife’<sup>40</sup>), but also provided us with a credible hope for a better future, whereby empowering private actors (capital, industry, and innovators), in a globalizing world, would bring about economic prosperity for all.<sup>41</sup> As such, the neoliberal imaginary has found expression in numerous laws, institutions, and social and governmental practices.

Social change then, third, requires *simultaneous* work on at least two levels. Social change requires new imaginaries, new visions of how the world is and should be, that are both ideationally and affectively convincing and appealing. That new understanding is, however, co-produced and carried out through a number of world-making projects, not only introducing changes in the way we see the world, but also ushering in a new set of laws, practices, and institutions.<sup>42</sup>

This brings me to the fourth, and perhaps most overlooked, message. Major sociopolitical transformations, fundamental for the kind of society we have instituted, have come in the wake of changes that many would not see as meriting constitutional concern. New technological imaginaries and projects (eg space travel, the internet, AI, and self-driving cars) or economic imaginaries and projects (eg Keynesianism, neoliberalism, Fordism, online shopping, etc) have mobilized vast social energies, and brought about constitutionally significant changes in the way we how we distribute power, conduct politics, administer justice, allocate power and voice, and so on. Yet they are usually not part of the traditional constitutional discourse.

The core constitutional question then has to be who gets space and power to bring projects, with their underlying imaginaries, into the world, and on what terms. The world we inhabit is constituted through the different projects people pursue—political, economic, academic, social, family, public or private. Each and every project has to draw on, and thus also aims to institute, its own imaginaries of how economy works, how politics works, what is the role of government, industry, science, the future of work, and so on.<sup>43</sup> For instance, those trying to market ‘self-driving cars,’ a

<sup>39</sup> Scholars have provided the evolutionary explanations for this identitarian and affective dimension of social imaginaries. Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Random House 2014).

<sup>40</sup> ‘Steve Keen—Can’t We All Be Swabian Housewives?’ (*Brave New Europe* blog, 31 January 2019) <<https://braveneweuropa.com/steve-keen-cant-we-all-be-swabian-housewives>> accessed 6 April 2021.

<sup>41</sup> Importantly, this is not to say that ‘evidence’ or ‘knowledge’ production does not play a role in ushering in a new imaginary. New imaginaries are not born ‘complete’. Instead, they are made through knowledge production and political action, which prepares grounds for the reimagination of social order. For most people, however, accepting a social imaginary still requires a step into the unknown: it requires trust in their individual and collective chances for a livable future in such a new imaginary.

<sup>42</sup> One of the most articulate accounts of the relation between social imaginaries and social change, which has considerably influenced this contribution, is Sum and Jessop (n 35).

<sup>43</sup> A holistic set of background imaginaries need not enter into projects intentionally; rather, they are demanded by the fact that one has to (more or less consciously) understand the world one aims to intervene in. Thus any project has to start from an understanding of a relevant ‘whole’ toward which the intervention is directed (market? ecosystem? economy, made or found? state? city? family?); an understanding of the relevant actors or agents one is or has to deal with (private actors? public institutions? groups? women?);

socio-technical imaginary of its own promising increased safety and efficiency, will do so against the background of a set of shared imaginaries: an imaginary of economy (competitive data economy, the driving role of private actors—especially Google and Uber); an imaginary of the proper role of state or government (the best role for the state is to foster such projects); a conception of law as reactive and facilitative (as one can gather from numerous Master's theses dealing with questions as to who carries the responsibility when things go wrong with self-driving cars), and many more. Importantly, while the individual producers of self-driving cars may aim to change just one limited aspect of reality, the imaginaries with which self-driving comes into the world are always such '*patterned convocations of the social whole*,'<sup>44</sup> carrying within themselves, and eventually instituting, a certain vision of how the world 'fits together.'<sup>45</sup>

With each small and big success, projects will re-enforce those background understandings with which they come into the world. Be it an economic project of introducing self-driving cars into the market or a political project to lower taxes, these projects will reconstitute simultaneously the forms of politics, government, economy, law—thus the very constitutional domain—in line with their own presuppositions. Moreover, the projects that share some of the important underlying assumptions, such as an understanding of the proper role of government, will cumulatively reinforce this shared social imaginary, instituting thus over time, for instance, different 'varieties of capitalism.'<sup>46</sup>

Hence, whatever constitutional 'whole' a formal constitution sets out, with whatever boundaries, this compromise will not hold forever, since each and every project will to some degree reconstitute the relevant constitutional world, both independently and in concert with others. The core constitutional question then has to be who gets space and power to bring projects into world, and on what terms: the whole constitutional boundary between public and private should be retold in line with this understanding.<sup>47</sup> Or, put differently, the choice to tag only some of those projects as constitutional (ie an attempt to bring about a change in a constitutional document or law) and not others remains arbitrary, unless the decisive point is their actual impact on issues that we deem of constitutional relevance, such as the distribution of power, the conduct of politics, administration of justice, allocation of voice and resources, and so on.

and an understanding of what concrete form of intervention is required (through competition? Innovation? politics? law? entrepreneurship? competition? marriage? scientific discovery? etc.)

<sup>44</sup> Manfred B Steger and Paul James, 'Levels of Subjective Globalisations: Imaginaries, Ideologies, Ontologies' (2013) 12 *Perspectives on Global Development and Technology* 1–2.

<sup>45</sup> Taylor (n 32).

<sup>46</sup> We may interpret the 'varieties of capitalism' literature as ultimately articulating different social imaginaries—that is, different understandings of how economy, politics, government/state, technology, nature, law, and so on fit together—around which various capitalisms are organized. Martin Höpner and Armin Schäfer, 'Integration among Unequals: How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU' (MPIfG Discussion Paper, 2012) <<http://www.econstor.eu/handle/10419/60484>> accessed 25 May 2021. But also Thomas Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10(6) *European Law Journal* 712–33.

<sup>47</sup> Similarly also Nancy Fraser and Rahel Jaeggi, *Capitalism: A Conversation in Critical Theory* (John Wiley & Sons 2018).

### III. Imaginaries of Prosperity as Constitutional Imaginaries

In this section I will argue that some social imaginaries in high and late modernity have been particularly powerful in mobilizing action and bringing about vast constitutional changes. These imaginaries should be considered as modern constitutional properly so understood, for they are sociologically vital, politically central, and constitutionally fundamental.

If we were to line up the political, legal, and economic projects undertaken in the past 150 years in the West—something I do at least partially elsewhere<sup>48</sup>—we would find that two deeper social imaginaries have driven many projects, periodically mobilized vast social energies, and brought about significant constitutional changes in the distribution of power, conduct of politics, administration of justice, distribution of voice and resources, and so on. I will call these ‘imaginaries of prosperity’ since they have organized the world around two particular routes towards prosperity. The imaginaries of prosperity are properly constitutional because they have not only justified vast redistributions of power over the past 150 years, but also co-produced their own imaginaries of economy, politics, and law.

On the one side of the spectrum, we find *imaginaries of privatized prosperity* (that prevailed before the First World War and after 1980), which see private actors (individuals, often as consumers, but foremost industry, capital, or innovators) as the drivers of social progress and require that power is vested in their hands in order to bring about a better future. In such privatizing social imaginaries, social change and prosperity are located usually in some pre-political social reality—such as the private sphere, the market, or fields of human ingenuity such as science—*external* to law and politics. The development in these spheres of human action is then seen as organic and bottom-up, attributed to the natural characteristics of people or to the automatic operations of systems (such as self-regulating markets). The economy is seen as natural or self-regulated, and in need of respect for its inner logic. Government should not intervene, or if it is to intervene it should do so in a way that does not go against the natural propensities of individuals or self-organizing principles of the systems. The conception of politics in this imaginary is also rather narrow, insofar as much is left outside the political process—to the nature or the system. Ultimately, what social progress demands in privatizing social imaginaries is to untie the hands of, and incentivize, those who are situated in private domains (industry, innovators, scientists, and so on) to bring about a better future.

On the other side of the spectrum, we find *imaginaries of collective prosperity* (mid-twentieth century) which see public and collective institutions as the main drivers of social progress.<sup>49</sup> More specifically, imaginaries of collective prosperity start from a

<sup>48</sup> Marija Bartl, ‘Socio-Economic Imaginaries and European Private Law’ in Poul F Kjaer (ed) *The Law of Political Economy: Transformation in the Function of Law* (CUP 2021), 228–53. Currently, the present author is working on a book project that aims to make this point far more robustly.

<sup>49</sup> It is beyond the scope of this project to discuss whether, and to what extent, this imaginary has also animated earlier events, such as the 1789 revolution, the nationalist revolutions of 1848, the Paris Commune, etc.

less ‘systematic’ and more disaggregated, socially constructed understanding of the social whole. They see the world populated by collective actors (workers, women, farmers, nations, minorities, etc), with antagonistic interests, that struggle over *how* social reality should be shaped. Social change comes through struggle, among groups, in political as well as economic arenas. Politics plays a central role in this imaginary, insofar as it stages struggle over the distribution of power and resources. The state has an important role in steering social and economic life, as well as political responsibility for the acceptability of outcomes. The economy in this imaginary is constructed, rather than natural or self-regulating in any essentialist sense, and it can be made to function more or less fairly. Ultimately, what social progress requires is to vest power in public and collective institutions<sup>50</sup> in order to drive us towards a better, fairer, or more liveable future.<sup>51</sup>

Fundamentally, then, the two imaginaries allow for quite some internal differentiation, while drawing on important epistemic presuppositions and striking similar affective chords. Thus imaginaries of privatized prosperity accommodate classical liberal, ordoliberal, neoliberal, and meritocratic<sup>52</sup> conceptions of progress and society, while imaginaries of collective prosperity can accommodate both nationalist variants (fascism, Nazism) and more progressive variants (social democratic or (democratic) socialist) of conceptions of prosperity and society. The differences between its different incarnations should not hide the analogous affective appeals of two different visions of prosperity, which place either public and collective actors on the one hand or private actors on the other in the driving seat of progress.<sup>53</sup>

The imaginaries of prosperity are constitutional imaginaries of western modernity insofar as they have co-produced their corresponding economic, political, governmental, and—for the purposes of the present discussion, most importantly—*legal imaginaries*. By legal imaginaries I mean here a conception of the proper role of law. Namely, if one assumes a more privatized social imaginary, considerable chunks of reality will appear as natural or pre-legal, that is, as not constituted by law in any significant sense. In such imaginary, law’s normative power to intervene and change

<sup>50</sup> Some examples of such public or collective institutions that have been seen as important drivers of social progress are (powerful) legislatures, selected on the basis of general suffrage; workers’ councils/strong forms of workers’ co-determination; workers’ self-governance; cooperative economy; communing; some forms of corporatist arrangements, etc.

<sup>51</sup> It is important also to stress that the transitions between these two visions of prosperity have been gradual, accommodating different varieties of social and institutional arrangements in the meantime. The transition between different imaginaries is moreover never perfect—in part thanks to the sticky nature of law and legal institutions. An excellent example in the EU context is the ‘precautionary principle’, which builds on an imaginary of collective prosperity, whereby it is public institutions that steer technological progress. The precautionary principle has maintained its importance over the past thirty years, despite many contestations within the framework of the WTO or domestic courts.

<sup>52</sup> At least more extreme versions thereof. See Michael J Sandel, *The Tyranny of Merit: What’s Become of the Common Good?* (Allen Lane 2020); Daniel Markovits, *The Meritocracy Trap: How America’s Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite* (Penguin Books 2020).

<sup>53</sup> The two opposing imaginaries appeal to two different propensities of the human psyche, described by social psychologist Jonathan Haidt as the self-interested as opposed to (less dominant) bee-like tendencies of the human mind. The latter, however, is stronger in providing meaning through the transcendence of petty ego drivers for a greater good—be it of a nation, religious movement, a party, a labour movement, or any kind of other social movement (environment, minorities, rights, etc). See Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Vintage 2012).

(social) reality will appear limited—if not directly futile or perverse.<sup>54</sup> Privatized law will be soft-touch, meant mainly to facilitate or support natural-like processes, spontaneous orders, and pre-legal principles and laws.<sup>55</sup> Law and public institutions are there to maintain and foster innovative, future-driving activity in a private sphere—all the while legally divesting both power and responsibility from public or collective institutions.

If one instead assumes a more collective social imaginary, reality appears as socially and *legally* constructed, and law is endogenous to its constitution. Power is a central category in this imaginary of law—for instance, bargaining power, or power to struggle for distribution of authority, voice, resources. In this imaginary, law is seen as a vehicle for social *change*:<sup>56</sup> given that law is *endogenous* to social reality, actors can have more confidence in the capacity of law (and collective action in general) to intervene and remake social reality. Collective law will be more interventionist and its progressive variant focused on equalizing power between different groups, including between labour and capital, structuring the space for struggle and protecting by law those who are deemed vulnerable. In collective imaginary, the control over technological development remains in the hands of collective and public institutions, while generally reserving power (and responsibility) for the shape of the future to those same institutions.<sup>57</sup>

Clearly, the two imaginaries of prosperity will have important consequences for any regime of power. In democracies, for instance, the privatizing legalities will have a tendency to limit the range of issues on which the collective can act through law and collective action, by means of ongoing privatization of power. The expression of collective self-determination is here mainly directed at fostering private action and untying the hands of industry and innovators. This is also what has happened over the past forty years, when our technological, labour, environmental, financial, and collective futures have been increasingly shaped through private projects, beyond the purview of democratic decision-making. A need to recuperate a sense of collective control over the privatized, uncontrollable futures has already brought back more collective imaginaries of prosperity.<sup>58</sup> What still remains an open question is, however, whether imaginaries of collective prosperity of a more progressive kind still have a chance.<sup>59</sup>

<sup>54</sup> Albert O Hirschman, *The Rhetoric of Reaction* (HUP 1991).

<sup>55</sup> Reflexive law is one example, the theory of the regulatory state another. Teubner (n 20) 239–85; Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17(2) *Journal of Public Policy* 139–67.

<sup>56</sup> Both nationalist and socialist versions of the imaginaries of collective prosperity usually take a very instrumental view of law, having a considerably more ambiguous relationship to liberal 'rule of law' principles than the social-democratic collective imaginary.

<sup>57</sup> In the nationalist version the perspective remains similar, but the interventions may go along different lines (different groups favoured, etc).

<sup>58</sup> The successful populist movements across the world draw on such nationalist collective imaginaries, combining highly performative nationalist and sometimes racist discourses, as well as disrespect for the liberal rule of law, with the simultaneous endorsement of many of the neoliberal economic policies.

<sup>59</sup> The new progressive imaginaries of collective prosperity are still, however, not without hope. These imaginaries give pride of place to the two main challenges of the day—environmental degradation and inequality—and see public and collective institutions as the main vehicle to socio-ecological transformation, tasked with delivering a more just and a more sustainable future, both locally and globally.

#### IV. Imaginaries of Prosperity behind Weimar

Forbath's call to learn from the Weimar constitutionalism is, to my mind, a call to revive the social democratic imaginary of collective prosperity that has inspired it. What conceptions of economy, state, politics, and government, and what kind of legal-constitutional designs, can invigorate a more inclusive conception of prosperity? In what follows, I will trace the collective imaginary of prosperity lying behind the Weimar constitution, drawing on its provisions as well as Forbath's interpretation thereof.

The *avant la lettre* Weimar constitution is a product of a particular historical circumstances present in Germany at the end of the First World War.<sup>60</sup> In the months preceding the signing of the constitution (August 1919), post-war Germany went through a series of large workers' strikes and several local communist insurgencies (Berlin Soviet Republic, Bremen Soviet Republic, Bavarian Soviet Republic, etc), all of which were violently suppressed. These uprisings played an important role in shaping the constitutional agenda.<sup>61</sup>

One of the most interesting elements of the Weimar constitution is the social whole it conjures. Similar to the later Italian constitution (1948) but unlike the French constitution (1958), the 'economic life' is part of what needs to be constituted through the Weimar constitution. The world and economy which Weimar reconstitutes is neither natural nor self-regulating; rather, it must be constitutionally, thus collectively, structured.<sup>62</sup> As Forbath puts it: '[T]he ordering of the economic life must conform to the principles of justice, with the assurance to all of an existence worthy of a human being as the goal.'<sup>63</sup> That is to say, the social whole envisaged by the constitution encompasses both the 'public' and the 'private', both of which have to be constitutionally, and subsequently legally, *structured*.

The conception of politics behind Weimar is certainly not that of common interest, but rather that of struggle. While the Weimar world is populated by groups with antagonistic interests, its provisions aim to empower workers and the middle classes,<sup>64</sup> while property owners are required to use their property 'to the service of the best good of [the] public.'<sup>65</sup> The constitution is there to create a 'level playing field' among different groups since democratic politics requires 'redistribution of power and authority, and not simply the redistribution of wealth and goods.'<sup>66</sup> In turn, '[o]nly serious democratic power-sharing would ensure a political economy that produces not just goods but citizens.'<sup>67</sup>

<sup>60</sup> Mark Jones, *Founding Weimar* (CUP 2016).

<sup>61</sup> The Weimar Constitution was signed only four months after the suppression of the Bavarian Soviet Republic.

<sup>62</sup> Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford Monographs on Labour Law 2014).

<sup>63</sup> Article 153 of the Weimar Constitution.

<sup>64</sup> Articles 157–165 of the Weimar Constitution.

<sup>65</sup> Article 153 of the Weimar Constitution.

<sup>66</sup> Forbath (n 3).

<sup>67</sup> *Ibid.*

In terms of the economic imaginary behind Weimar, the idea was that of collectivism, and *the extension of democracy and democratic institutions into economic life*.<sup>68</sup> In its constitutional text, this is reflected in the empowerment of trade unions and by giving workers not only individual rights but also a share of control over economic life, through workers' councils, at all levels of economic ordering.<sup>69</sup> Labour had a central position in this (social democratic) collective imaginary, and had to be provided with ample opportunity to 'constitute themselves as collective political-economic actors,'<sup>70</sup> for only through 'their economic independence—and the social and political power it imparted—not via individual property-holding, but collectively, via the security, voice and authority that came with unions,'<sup>71</sup> would the democratization of economic, and consequently also political, life be ensured.

The imaginary of law behind the Weimar constitution, in Forbath's account, clearly stresses the elements that I have outlined above as constituent of a collective social imaginary: (1) law is endogenous to social reality, constitutive and (infra)structural;<sup>72</sup> (2) power and distribution are central dimensions of thought (bargaining power, distributive arguments); (3) law is relentlessly interventionist and seen as a vehicle of (social) change. Let me address those in turn.

Forbath argues that 'the social law portions of the Weimar Constitution are not a baby version of the grown-up post-World War II welfare rights constitution.'<sup>73</sup> Rather, while '[t]he social law provisions of the Weimar Constitution included rights, they were chiefly about structures and powers.'<sup>74</sup> That is to say, the imaginary of law that lies behind the Weimar constitution views law as constitutive of economic structures, capable of distributing powers and endowments that ultimately designate winners and losers in the economic game. Rights, individual and collective, in this imaginary are seen as an element of the *armoire* to bring about a more 'level playing field.'<sup>75</sup>

In order to perform its task of justly structuring economy, law had to provide for an 'interlocking framework of rights, structures and powers that aimed to empower workers and other lower class and subordinate groups to participate on an increasingly equal footing in running individual firms and in shaping and governing the broader political economy.'<sup>76</sup> The way this is done is, then, by changing the relative bargaining power in individual relations (also through provisions of what will later be called social security), by empowering workers (rather than shareholders) to decide on 'corporate governance', and finally by creating institutions (workers' councils at all

<sup>68</sup> Ibid.

<sup>69</sup> In his recent book, Piketty argues that in countries where there was workers' co-determination the pay of CEOs has not exploded to the same degree as in the countries where no such institutional forms are to be found. Thomas Piketty, *Capital and Ideology* (HUP 2020).

<sup>70</sup> Forbath (n 3).

<sup>71</sup> Ibid.

<sup>72</sup> Michael Mann, 'Infrastructural Power Revisited' (2008) 43(3–4) *Studies in Comparative International Development* 355.

<sup>73</sup> Forbath (n 3).

<sup>74</sup> Ibid.

<sup>75</sup> In the EU law's 'internal market' parlance, the level playing field however concerns only supply side/competition, rather than the structural power between groups with antagonistic interests.

<sup>76</sup> Forbath (n 3).

levels of government) that were supposed to enable the workers to have a direct political say.<sup>77</sup>

Law in general, and constitutional law in particular, in the Weimar period was relentlessly interventionist: it aimed to create institutional arrangements in both public and private spheres in order to deliver on its promise. The ‘constitutional vehicles here were both trade unions and also a federated structure of democratically constituted workers’ councils at local, regional and national levels of economic governance.’<sup>78</sup> Such constitutional and legal arrangements ‘outlined a broader institutional order that aimed to empower them to participate fully in the larger decisions about the nation’s political economy.’<sup>79</sup> Forbath thus sees the Weimar constitution and its social law as direct vehicles to pursue change (if within the system that Weimar had in mind),<sup>80</sup> that aimed to ‘provide a framework for building democratic socialism.’<sup>81</sup>

Today, the provisions of the Weimar constitution, but also of other ‘social democratic’ constitutions such as the Italian one (1948), are read in a very different light. As Forbath notes, ‘the literature on constitutional SER [socio-economic rights] misses a great deal when it casts the Weimar Constitution as a weak, infant version of later SER constitutions, which grew stronger over time.’<sup>82</sup> If we read these provisions through the prism of an imaginary of privatized prosperity, however, their meaning, moral appeal, and eventual strategic use will change—since they are viewed against the background of a very different understanding of the appropriate role of economy, government, politics, nature, and so on.

## V. Imaginaries of Prosperity behind the European Project

The Treaty establishing the European Economic Communities, in its numerous incarnations since 1957, is, like the Weimar constitution, also *avant la lettre* in many respects. Despite the fact that imaginaries of collective prosperity prevailed among its founding member states, the Treaties are predominantly reliant on the imaginary of privatized prosperity,<sup>83</sup> while also focusing foremost on constituting the economic domain. The main goal, as well as the main means of European integration, was the progressive establishment of the common market, where the *free* movement of goods, services, capital, and workers would lead to the most optimal allocation of resources, increased interdependence, and prosperity within its territories. The Court of Justice was soon to turn the fundamental freedoms into individual rights, making the

<sup>77</sup> Article 165 of the Weimar constitution.

<sup>78</sup> Forbath (n 3).

<sup>79</sup> *Ibid.*

<sup>80</sup> Jones (n 60).

<sup>81</sup> Forbath (n 3).

<sup>82</sup> *Ibid.*

<sup>83</sup> The reasons for this development have been broadly discussed in academic literature. Beyond political possibilities and constraints, and with the usual caveats, many attribute this format of the European Treaties to the formative influence of the German ‘ordoliberal’ school of economic thought. See Slobodian (n 19); Christian Joerges, ‘Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation’, *ZenTra Working Paper in Transnational Studies* No. 06/2012; Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart 1998).



industry the main driver of European integration.<sup>84</sup> At the same time, a set of competences of the EU in the field of social or cultural policy was close to non-existent.

Leaving aside the jurisprudence of the European Court of Justice, in the period when the imaginaries of collective prosperity prevailed in Europe (the 1960s, 1970s, and even 1980s), the policies of the EU institutions, and legislation that came in its wake, remained embedded in the collective imaginary—with its concerns for power asymmetries and antagonistic interests, especially between labour and capital, and the protection of weaker parties (workers, consumers).<sup>85</sup> However, once the neo-liberal consensus begun forming, from around the 1980s onwards, the European Communities had the entire institutional structure ready to marketize large swathes of economic activity—with, as a bonus, a pull of decision-making power toward the centre.<sup>86</sup> The European Commission, after the White Paper on the Completion of the Single Market<sup>87</sup> and emboldened by the Single European Act, made a grand push toward all forms of privatization (euphemistically termed as ‘liberalization’). The privatization of power in Europe was crowned through European Monetary Union, which introduced joined monetary policy without joint fiscal policy—making the imagined ‘market discipline’ the main governance tool in the EU.<sup>88</sup>

The 2004 proposal for a change of European treaties, to assume the name ‘Constitutional Treaty’, did little if any significant constitutional work. It focused mainly on introducing statist symbolism (hymn, flag, the term ‘laws’, etc) but cared little, for instance, about advancing democratic institutions that would foster mobilization and collective self-determination of EU citizens.<sup>89</sup> One could perhaps not have expected more from a treaty that came in the wake of the Lisbon Strategy, focused on making the EU ‘the most competitive and dynamic knowledge-based economy in the world.’<sup>90</sup> The then prevailing constitutional compromise, based on imaginaries of privatized prosperity, was a perfectly suitable fit, since the role of government was to foster private action and spontaneous private ordering. Given that such task hinges much more on knowledge than on democratic politics, it is best left to the (existing) technocratic institutions.<sup>91</sup>

Years after, with new crises not only on our doors but literally in our homes, the European Union is struggling to find ways to respond collectively and in solidarity. The EU suffers from many serious institutional deficiencies that make positive projects

<sup>84</sup> Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Bloomsbury 2016).

<sup>85</sup> Bartl (n 48); Hans-W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (CUP 2018).

<sup>86</sup> Bartl (n 13).

<sup>87</sup> Jeff Loder, ‘The Lisbon Strategy and the Politicization of EU Policy-Making: The Case of the Services Directive’ (2011) 18(4) *Journal of European Public Policy* 566–83 <<https://doi.org/10.1080/13501763.2011.560488>> accessed 15 May 2021; Hans-W Micklitz and Stephen Weatherill, ‘Consumer Policy in the European Community: Before and after Maastricht’ (1993) 16(3) *Journal of Consumer Policy* 285–321.

<sup>88</sup> Harm Schepel, ‘The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone’ (2017) 44(1) *Journal of Law and Society* 79–98.

<sup>89</sup> Hans-W Micklitz, ‘Failure or Ideological Preconceptions—Thoughts on Two Grand Projects’ in Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Ashgate 2010).

<sup>90</sup> For a short description, see <<https://portal.cor.europa.eu/europe2020/Profiles/Pages/TheLisbonStrategyinshort.aspx>> accessed 6 April 2021.

<sup>91</sup> Giandomenico Majone, ‘Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach’ (2001) 157(1) *Journal of Institutional and Theoretical Economics* 57–78.

of collective self-determination more difficult than projects of marketization and privatization of (ultimately political) power. At least two issues are at stake here. First is the lack of institutional (pre)conditions to mobilize Europe-wide collective political projects, which no reform of representative institutions has been able to address.<sup>92</sup> Second, the limited set of issues with which the EU can deal has made it particularly difficult to pursue more ambitious redistributive and social policies.<sup>93</sup> Many scholars, myself included, have been concerned and speculated as to how to remedy this so-called democratic deficit or improve the EU's 'republican' credentials.<sup>94</sup>

However, if we are to learn from the past, with all the caveats, a broader shift toward more collective imaginaries of prosperity will also not leave the EU untouched. We can already see the first, if imperfect, gestures in that direction. Thus, the need to react to the colossal economic impacts of the Covid crisis have resulted in a first-instrument 'Recovery Plan for Europe', however insufficient in its size, that will be in part distributed to the member states on a solidaristic basis.<sup>95</sup> The environmental crisis, which is to stay with us longer than the Covid one, is to be met with a 'Green European Deal', making it obvious that addressing the ongoing climate urgencies will require both more economic planning and more democratic support.<sup>96</sup> These initiatives indicate a growing demand for a more collective social imaginary of prosperity in the EU, where public institutions take power and responsibility for the actual shape of the future. And while that same future remains open, we should not miss the constitutive character of these interventions: they signal a shift in the way we think about change and prosperity in the EU.

## VI. Conclusion

Over the past forty years we have entrusted ever more power into the hands of private actors (industry, innovators, capital), both by increasing their economic power (eg through tax cuts) and enlarging operational space ('freedom to operate flexibly' in the newly liberalized markets), in order to allow them to pursue private projects as means

<sup>92</sup> Marija Bartl, 'Hayek Upside-Down: On the Democratic Effects of Transnational Lists' (2020) 21(1) *German Law Journal* 57–62; Jürgen Habermas, 'Bringing the Integration of Citizens into Line with the Integration of States' (2012) 18(4) *European Law Journal* 485–88.

<sup>93</sup> Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2014) 21 *European Law Journal* 1; Fritz Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy' (2011) *LEQS Paper no. 36*; Fritz Scharpf, 'The Joint-Decision Trap Revisited' (2006) 44(4) *Journal of Common Market Studies* 845–64; Marija Bartl, 'The Way We Do European: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 *European Law Journal* 1.

<sup>94</sup> Richard Bellamy and Dario Castiglione, 'Reflections on the European Democratic Deficit' in Erik Oddvar Eriksen and John Erik Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (Routledge 2000) 65–84; Bartl (n 92).

<sup>95</sup> Recovery Plan for Europe, available at <[https://ec.europa.eu/info/strategy/recovery-plan-europe\\_en](https://ec.europa.eu/info/strategy/recovery-plan-europe_en)> accessed 25 May 2021.

<sup>96</sup> To be sure, (a) the instrument's financing is nowhere close to what would be necessary for the transition, and (b) it still strongly relies on the institutional frameworks that are favoured within imaginaries of privatized prosperity. Euromemo Group: 'EuroMemorandum 2020', available at: <[http://www.euromemo.eu/euromemorandum/euromemorandum\\_2020/index.html](http://www.euromemo.eu/euromemorandum/euromemorandum_2020/index.html)> accessed 6 April 2021.

of prosperity.<sup>97</sup> Environmental degradation, rising inequality, and foremost the sense of not having a home in the future, has for large segments of society undermined the credibility and affective appeal of privatizing imaginaries of prosperity in recent years. The backlash has come paired with a growing demand for imaginaries of collective prosperity,<sup>98</sup> foregrounding public institutions and collective actors as the drivers toward a less unpredictable and less unequitable tomorrow. The jury is still out, however, as to whether we will see more regressive or more progressive collective imaginaries take hold in the future.

Legal scholars can play a modest but not insignificant role in ushering in a new progressive imaginary of collective prosperity, as Forbath hopes. How we imagine the proper role of law is co-constituted as part of broader social imaginaries of prosperity. By implication, a relentless focus on the aspects of the collective social imaginaries in legal scholarship, teaching, and practice—such as questions of power, groups with antagonistic interests, and the potency of law as a vehicle of change—may contribute to subverting privatized imaginaries and de-naturalizing social realities, with all the distributions of power they hold. Furthermore, legal scholars could also elaborate on how the proposals for the new imaginary of collective prosperity—proposals including the work of economists, social scientists, philosophers and so forth, as well as many political actors and movements—can be institutionalized and operationalized through law. It is in this dual way that they can contribute their modest share towards articulating a new progressive collective imaginary.

<sup>97</sup> Nancy Fraser, in a recent book, states that one of the most perverse characteristics of capitalist society is the degree to which it allows private actors, or markets, to direct the use of social product—without regard to public interest. Fraser and Jaeggi (n 47).

<sup>98</sup> The success of populist politicians in recent years, across the world, makes this painfully clear. There are, however, also signs that progressive imaginaries of collective prosperity are emerging, at all levels of governance. Cities have formed transnational alliances (see <<https://citiesfordigitalrights.org/>> accessed 6 April 2021) and the political spectrum in even the most neoliberal member states has seen a turn to the left (see <<https://fd.nl/economie-politiek/1368260/politieke-partijen-maken-sociaaleconomisch-een-ruk-naar-links>> accessed 6 April 2021), while we have discussed some EU developments above. In scholarship, perhaps the most important contributions have been in economic thought, including Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Chelsea Green Publishing 2017); Tim Jackson, *Prosperity Without Growth: Economics for a Finite Planet* (Routledge 2009); Piketty (n 69); Mariana Mazzucato, *The Value of Everything: Making and Taking in Global Economy* (Saxo 2019); Stephanie Kelton, *The Deficit Myth: Modern Monetary Theory and How to Build a Better Economy* (Hachette UK 2020).