Differentiation or dialectic: pluralism and contestation in European economic constitutionalism

Marija Bartl[1] and Paul Linden-Retek[2]

[1]Law School, University of Amsterdam, Amsterdam, The Netherlands and [2]School of Law, University at Buffalo, Buffalo, NY, USA
Corresponding author: Marija Bartl; Email: m.bartl@uva.nl

Abstract

In this contribution we ask how Přibáň's theoretical choices shape the capacity of 'European constitutional imaginaries' to account for the ever more necessary work of recognition and redistribution within European society. While 'European constitutional imaginaries' reveal the intricate ideologies at play within European law and politics, as well as their power in motivating dominant currents of European political life, the project remains limited in that it accepts essential tenets of functional differentiation in society, obscuring the conditions of possibility for the formation of differentiated systems. Put differently, 'European constitutional imaginaries', both as forms of life and analytic concepts, have difficulty in conceiving the frontiers of imaginaries, their beginning and end, their formation and transformation—and in so doing, risk naturalizing their initial differentiation as a priori excluded from political contestation.

How does the European project secure legitimacy among all Europeans—in particular, among socially and economically disadvantaged Europeans? We take this question as the point of departure for our critical engagement with Jiří Přibáň's inspiring work on 'European Constitutional Imaginaries'. This question introduces an explicitly 'political' orientation to the analysis of constitutional imaginaries: whose imaginaries are privileged in European law and what account does Přibáň's approach to societal constitutionalism, even its pluralist cast, give of the necessary work of recognition and redistribution within European society?

Taking seriously Přibáň's definition of social imaginaries as 'collective form[s] of the ethically meaningful life constituted by shared values and legal rules', this contribution will question the ability of systems theory to give proper voice to traditional social imaginaries founded in conscious constitution and control of the economy, in the correction of 'unjust' instantiations of economic life. The conclusion suggests both promising and limiting aspects of Přibáň's project: promising because constitutional imaginaries reveal the intricate ideologies at play within European law and politics and their power in motivating dominant currents of European political life; but limiting because the framework of 'constitutional imaginaries' accepts essential tenets of functional differentiation in society common to systems theory in a manner that risks obscuring the conditions of possibility for the formation of differentiated systems. Put differently, constitutional imaginaries, both as forms of life and analytic concepts, have difficulty in conceiving the frontiers of imaginaries, their beginning and end, their formation and transformation—and in so doing,

systems theory risks naturalizing their differentiation as a priori excluded from political contestation. As we shall argue, however, it is precisely this political contestation of forms of accepted differentiation that seems missing yet necessary for European legitimation.[1] And for this reason, the analytic of 'constitutional imaginaries' should be pressed to consider its own foundational commitments critically and dialectically. It should, one might say, reflect on the very particular 'imaginary' out of which the present constellation of European constitutional imaginaries emerges and in which it is sustained. This more self-reflective take on constitutional imaginaries reveals a curious conclusion: that the framework of constitutional imaginaries must grapple with an infinite regress or an infinite deferral ('to come') of its own conceptual presumptions, which brings systems theory into closer contact with the project of critical social theory and a more critical theoretical account of European constitutionalism.

Our argument proceeds by way of four observations.

I.

The first observation is that legal *pluralism* is elevated in Přibáň's account as the predicate, if not foundational imaginary.

Pluralism is the imagined landscape through which Přibáň's other imaginaries—*calculemus*, *imperium*, and *communitas*—function and develop as constitutional imaginaries. Pluralism is where differentiation as such becomes constitutionally *intelligible* as a legitimating value. This entails less that there is hierarchy of operational importance among the imaginaries as they are experienced and developed and more that there is a conceptual priority, in which plurality's ideational claims make possible the workings of others. The other imaginaries are nested, so to speak, within the pluralist imaginary, such that they become 'constitutional' imaginaries in their own right and not merely fragments of differentiated areas of law that lay subsidiary claims to expertise, but not legitimation in the manner Přibáň argues they do. Pluralism rejects the expectation that administration, economic ordering, or democratic self-authorship are spheres of life which *independently* grounded political or legal power (sovereign nationhood) simply domesticate.

Přibáň's theory, drawing deeply from Luhmann, allows for a different approach, by which systems are self-referential or autopoietic. They are discursive formations, the 'closure' of which is contingent on historical and artificial practices of inclusion and exclusion coded self-referentially in the language of the system itself.[2] As Přibáň writes, 'the function of imaginaries is the constitutionalisation of *facts* of differentiated societal power as legitimizing *values* of one polity'.[3] The claims to legitimacy of these systems begin to stand, as it were, on their own two feet.[4]

The virtue of this account is that it abandons the traditional constitutional search for a foundational 'subject' or 'center' around which legitimation would cohere, instead rendering constitutional legitimation as essentially a discursive construct.[5] This is what makes systems theory and societal constitutionalism so apt as an explanatory framework for the European project, at least in the sense of that project as a post-national process of legal experimentation in

---

[1] Přibáň frames de-differentiation as a persistent risk but does not at the same time suggest how such a risk can be considered (dialectically) as a form of productive contestation, rather than an ever-present 'totalitarian' danger. See also J Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge 2022) 9.

[2] See generally N Luhmann, *Social Systems* (Stanford University Press 1995); S Dellavalle, On Sovereignty, Legitimacy, and Solidarity, Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified? 16 (2015) Theoretical Inquiries in Law 367, 382.

[3] J Přibáň, *Constitutional Imaginaries A Theory of European Societal Constitutionalism* (Routledge 2022).

[4] Ibid., 7.

[5] Compare Luhmann, above (n 2), 208.

the absence of 'constitutional moments', pre-given and pre-political notions of peoplehood or statehood, or a hierarchically ordered system of legal authority. System theory's plurality of societal legitimation supersedes, in Přibáň's terms, the organic unity of *topos-nomos-ethnos* that had characterized the imaginary of the national constitutional project.[6]

II.

This said, Přibáň's approach is in a central respect equivocal. If Přibáň, on the one hand, embraces the differentiated and 'self-limiting' character of legitimation in the European constitutional system, he is drawn, on the other, to an account of individual imaginaries as systems in which their individual logics control their development. That is to say, Přibáň's theory endorses a pluralism of a particular sort. By virtue of its distinctive understanding of differentiations among systems, it risks obscuring another sort of pluralism, that would reflect critically on those very grounds of differentiation. Pluralism comes detached from the antagonisms that animate it. Self-limitation is found at the borders of differentiated systems but does not reach internally. We find plurality without the political; differentiation without dialectic.

This exposes Přibáň's theory to a paradox of legitimation—a paradox familiar to critical democratic theory and post-Marxist perspectives on politics and law.[7] One rendering of this paradox concerns the work of representation in the service of Přibáň's 'polysemic' ambition for constitutional imaginaries to constitute 'unity as difference, yet also describe[] itself through symbolic communication of differences as unity'.[8] Přibáň writes that '[i]maginaries represent a society to itself'.[9] But much turns on whether to understand representation as a mirroring, an *ipseity*,[10] or instead as an act essentially of imagination, creation, iteration, and new possibility. Do the imaginaries of societal constitutionalism merely reflect what is already *there*; or is the imagined projection itself a site for creative reflection on the society's selfhood? If the latter, how so?

Přibáň himself has articulated this concern in his earlier critical treatment of Gunther Teubner's revisitation of Luhmann's theory,[11] one dimension of which is the complex relation between constituent and constituted power.[12] But our point is slightly different. The paradox of *ipseity* concerns not the control by 'the people' over the institutionalized agents of their power but about the endurance of the 'political' as such—that is to say, the plural quality of legitimation as an ongoing struggle to articulate public value within, through, and among social antagonisms. This paradox presses the theory of constitutional imaginaries, informed by systems theory, to devote

---

[6]Přibáň, above (n 3) 4.

[7]See, eg, B Honig, 'Between Decision and Deliberation: Political Paradox in Democratic Theory' 101(1) (2007) American Political Science Review 1; G Daly, 'Radical(ly) Political Economy: Luhmann, Postmarxism and Globalization' 11(1) (2004) Review of International Political Economy 1 (citing the work of Lefort, Laclau and Mouffe, Hardt and Negri, and Rancière, among others).

[8]Přibáň, above (n 3) 2.

[9]Ibid.

[10]*Ipseity*, the claim that sovereign authority merely *is* what the people are, draws attention to the ways that the force (*kratos*) of democratic rule threatens to sink the promise of democratic politics and self-authorship. For Derrida, 'the people' as a project of self-identity seize power from the people themselves. 'As soon as there is sovereignty, there is abuse of power and a rogue state'. J Derrida, *Rogues: Two Essays on Reason* (PA Brault and M Naas trans, Stanford University Press 2005) 102; see J Martel, 'Can There Be Politics Without Sovereignty? Arendt, Derrida and the Question of Sovereign Inevitability' 6(2) (2010) Law, Culture and the Humanities 153, 160ff.

[11]Přibáň, above (n 3) 6; see also J Přibáň, 'Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner's *Constitutional Fragments* and Thornhill's *A Sociology of Constitutions*' 39(3) (2012) Journal of Law and Society 441, 457 ('The paradox of the political self-denial and external expansion of the concept of constitution is a hallmark of societal constitutionalism which both completely depoliticizes the concept of constitution and gives it the most prominent political role by relocating it to a higher level of theoretical abstraction and identifying it with both functional differentiation and societal alternatives to institutionalized politics').

[12]See Blokker in this symposium.

more scrutiny to the ways it at once might enable and stifle a contestatory, dynamic account of legitimation.

It is not clear whether Přibáň's theory sufficiently attends to this problem and thus whether he successfully avoids the two traps—ontological and ideological—that he identifies early in the essay.[13] Some of Přibáň's formulations suggest that this remains a weakness of the constitutional imaginaries as he has outlined them. Recall his statement that imaginaries constitutionalise *facts* of social differentiation as legitimating forces. Here, the image seems to be precisely of *ipseity*, in which facts of differentiation are taken as settled and the basis for value formation. But this risks concealing how 'what is there and settled' has come to be and, more precisely, the role of social and constitutional imaginaries themselves in creating the 'conditions of possibility'[14] in which those facts appear as fully settled, to begin with. The otherwise unstable and contested work of representation here risks turning into a sleight of hand. One enduring point that comes from pressing Přibáň on this ambiguity is to suggest that systems theory—even as it overcomes the simplistic renderings of identity politics' appeal to ontological truth or the Marxist reduction of imaginaries to mere superstructure of underlying material conditions—nevertheless fails the critical theoretical project of constantly and self-reflectively submitting its own categories of thought to scrutiny. Put differently, as Glyn Daly has written, the problem might lie in the extent to which systems theory, while rejecting the totalizing concept of a 'center' as the basis for collective legitimation, posits a conception of systems development that is equally, albeit differently, totalising.[15]

In one sense, this dilemma is an inheritance that Přibáň, like Teubner, bequeaths from Luhmann, who conceived contradiction and contestation in functionalist terms. The development of systems through differentiation for Luhmann is the creation of 'order from noise',[16] with the system responding to antagonisms or contradictions through autopoietic adjustments; political contestation is here always already translated into the existing systemic language, as an 'irritation' that is dealt with internally by the system as a whole.[17]

But is this picture of systemic reflexivity suitable to the generation of legitimacy? From the perspective of post-Marxist or critical theory, this view is only one particular rendering of reflexivity and an inadequate one.[18] In the first place, the differentiation of systems occurs through the construction of power that entails the repression, in some sense, of the excluded.[19] The conceptual consequence of this is that systemic differentiation—as much as it might be assessed sociologically from the perspective of operability or functionality—always contains a political dimension. Because differentiation as an act of exclusion enforces a choice among rival constructions of understanding, there inevitably comes a limit to the extent one can comprehend a system as a process of self-referential legitimation. A lack of an extra-discursive foundation does indeed helpfully displace the pretension of a 'center' familiar to traditional theories of politics or society (the individual self-possession of liberal subjecthood or the contractual freedom underwriting efficient market exchange, for example); but it also belies, as Daly argues, the pretension that systemic differentiation can progressively master or tame the political through autopoietic adjustment.[20] Systems are in this sense political all the way down, never entirely

---

[13]Přibáň, above (n 3) 3.

[14]See Daly, above (n 7) 13–14.

[15]See Ibid., 4, 13.

[16]Luhmann, above (n 2) 171.

[17]See Daly, above (n 7) 13.

[18]For a critique of systemic differentiation as an imaginary of European constitutionalism, see P Linden-Retek, 'History, System, Principle, Analogy: Four Paradigms of Legitimacy in European Law' 26(3) (2021) Columbia Journal of European Law 1, 14ff.

[19]See Daly, above (n 7) 3, 15.

[20]See Ibid., 11, 13.

innocent of the Derridean 'violence of the law before the law'.[21] Put more simply, a functioning of a system always encounters the question: functioning in what sense, since when, and for whom? Answers to these questions, however, cannot be found within the terms of the system itself; it instead requires an assessment of those terms and the boundaries and edges of the system as it has heretofore been differentiated. Legitimation requires that we not mistake the particular ends of public administration for the political process by which such ends are put into question and settled; to equate differentiation with ipseity is to corrupt legitimation.

The critical lesson of this perspective is, first, to see that systemic differentiation preserves the closure of systems by constantly insulating them from the full scrutiny of such violence. They function only through a form of political repression and accordingly also through a struggle, however acute or seemingly benign, to mystify or obfuscate the nature of such repression. This explains, second, that systems must be viewed as essentially on the precipice of failure, always assailed by the antagonisms they repress and cast as merely 'external'; in turn, systemic failure—crisis—must not be seen only as an occasion for further autopoietic adjustment and internalization.[22] It is instead better understood as an opening for the political and for the recomposition of those societal forces that have previously rendered the system intelligible as such. Failure is where the question of intelligibility of the systemic form is presented, where the previous architecture of hegemony is exposed as such, and in turn subject to contestation. It is this *emergence* of systemic intelligibility to which a theory of legitimation must attend, and which Přibáň's theory, so goes the worry, might risk obscuring.

III.

Perhaps nowhere is such a dynamic more evident than in the internal hegemonic struggles of the economic imaginary of prosperity—*imperium*. For systems theory, consideration of the space of economic relations poses the question of how far a market system can expand to accommodate competing demands beyond efficient exchange before the market's systemic qualities become something else entirely.[23] Evidence from Europe's 'constitutional mutation', as Přibáň cites, suggests the systemic development of the European economy and its presuppositions about the value and meaning of prosperity itself.

But a great deal matters how we describe such development within the imaginary of *imperium*—whether such newfound accommodation of social concern and social justice is merely autopoietic adjustment and the maturation of a market that better internalizes its externalities; or, conversely, it is the result of political mobilization of those previously excluded from standing in Europe's political economy. The first alternative strengthens the conceit of a market self-regulation, as reforms are cast as the necessary alterations that would enable the system to 'keep working'; the second suggests that the previously differentiated economic system—the very meaning of what it means to work and for whom—must be rethought from the perspective of sites of antagonism and exclusion.[24]

---

[21]J Derrida, *Specters of Marx* (Routledge 1994) 31 (cited in Daly, supra (n 7) 16).

[22]See Daly, above (n 7) 16.

[23]Compare Ibid., 20.

[24]See Ibid.; Consider here analysis by Agustín José Menéndez on the ideologically charged 'evolutionary' developments in the wake of *Cassis* (holding that the right to free movement of goods is breached when otherwise non-discriminatory national law places obstacles to free movement), whereby the fundamental economic freedoms of the European Community were cast as autonomous, self-standing freedoms not tied to discriminatory practice and, ultimately, furthered a right to individual entrepreneurial freedom and to private property. See AJ Menéndez, 'The Past of an Illusion? Pluralistic Theories of European Law in Times of "Crises"' 3(2) (2018) European Papers 623. See also M Bartl, 'Socio-Economic Imaginaries and European Private Law' in PF Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 228.

Přibáň seems to be aware of this problem, which he n as the (improper?) 'expansionist tendencies of the economic system and its internal colonization of other system'.[25] He understands this dynamic, however, as the problem of 'functional de-differentiation' of the economic system, presumably with the solution being a better policing of systemic boundaries. But the question immediately arises: what are the proper boundaries for the economic system and market(s)? When are markets 'just right'—not too expanded and not too 'de-differentiated'— somehow aligned with their internal economic rationality? The response to these questions is deeply *political*, however, and fundamentally *distributive* and *structural*: framing the response in the language of 'de-differentiation' of the economic system might not only conceal the political but also threaten to brush over the histories of distributive injustice and the structural imbrication of one's agency (including its constitutive limits) within such injustice.[26]

Much ink has been spilled to argue that what Přibáň understands as the exchange driven, non-coercive rationality of markets,[27] is a chimera at best. Market exchange is constituted on and by coercion. The more obvious type of coercion via legal institutions makes sure that private obligations are honored: however hungry you are, you must pay your baker for the bread. If you don't, a number of legal institutions will be mobilized to punish you for the transgression.[28] Second, and perhaps more aberrantly so, coercion is also *inherent* in the very fact that people have to participate in the 'economic system' since they cannot provide for themselves but via market exchange, as workers, consumers, tenants and so forth. This 'expansion' of the economic system has not started with neoliberalism and a privatization of public and social services: rather, this most radical utopia, as Karl Polanyi called it,[29] has historically pauperized too many to be taken as a given fact, an outcome of the process of some logical or natural 'functional differentiation'.

Each and every 'expansion' or 'reconstitution' of the economic system—be it the establishment of the market society in the 18th and 19th century, the collectivization efforts of the welfare state or really existing socialisms, or the privatizations and liberalizations that we have seen over the past forty years—was driven by hegemonic projects aiming to reimagine and reconstitute the boundaries and relations between economy, politics, government, law and society. Such transformations seem to have little to do with the autopoetic adjustments within various 'functional subsystems' and more to do with large political projects to reconstitute the boundaries and logics of systems themselves. These 'great transformations' are difficult, if not impossible, to understand through the prism of systems theory and functional (de)differentiation.

IV.

Where does this leave the ambition of constitutional legitimation? In the first instance, it recasts pluralism away from the maintenance of societal differentiation. Instead, pluralism as itself an imaginary of legitimation would need to recenter the disclosure of antagonism and the re-negotiation of systemic boundaries—that is to say, the ongoing submission of its own categories for legitimation, at present, to critical scrutiny. This would notably entertain the possibility of de-differentiation of systems as a form of productive contestation for the creation of new imaginaries within the pluralist constellation—and not simply their deformation. Pluralism in this sense would be refracted as a pluralism across time, not just spatially across various differentiated fields—a temporal project of 'bringing out' the struggle within European constitutional imaginaries for very different articulation and among those imaginaries for hegemony.

[25] Přibáň, above (n 3) 13.

[26] Consider A Nuti, 'Temporary Labor Migration within the EU as Structural Injustice' 32(2) (2018) Ethics & International Affairs 203.

[27] Přibáň, supra (n 1) 177.

[28] RL Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' 38(3) (1923) Political Science Quarterly 470.

[29] K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd ed, Beacon Press 2002).

But this is a reorientation of the imaginative purpose and function of the concept of constitutional imaginaries beyond its Luhmannian tenets. To slightly modify Přibáň's account, European constitutional imagination, precisely as a plural system of imaginaries, would be premised on the persistent failure of systemic appeals to prosperity, democratic rule, or effective administration to cohere as appeals to essentially known functional imperatives, as varied as these might be. It would find its legitimating power not in the coherence of systemic development but instead in the articulation of openings for the self-reflective negotiation of systemic imperatives; in the promise of the political itself.

Competing interests. The author has no conflicts of interest to declare.