Mountain Seminar

Academic Workshop

Friesovy Boudy, Krkonoše, Czech Republic

12-15 June 2019

PROGRAMME:

Wednesday, 12 June:
Arrival to the Mountains.

Dinner - the Restaurant accepts orders until 21:00.

Thursday, 13 June:
8:00 Breakfast

9:00-10:30 PAPER: Joana Mendes: Constitutive powers, public interest, and constitutional embeddedness

Discussion introduced by Marco Dani

10:30-11:00 Coffee Break

11:00-12:30 PROJECT: Marco Goldoni: The Euro Material Constitution: Governing Through Money

Discussion introduced by Jan Komárek

12:30 Lunch

13:30-15:00 PAPER: Giulio Itzcovich: For a genealogy of judicial dialogue in Europe

Discussion introduced by Martin Loughlin

Hike no 1 – we may have our dinner on the way, depending on the weather

Friday, 14 June:
8:00 Breakfast

9:00-10:30 PAPER: Sacha Garben, Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers

Discussion introduced by Cristoph Krenn

10:30-11:00 Coffee Break

11:00-12:30 PROJECT: Jan Komárek: The Transformation of Europe's constitutional imaginary

Discussion introduced by Elise Muir

12:30 Lunch

13:30-15:30 SPECIAL GUEST: Martin Loughlin: The Theory of Popular Sovereignty

Discussion introduced by Matej Avbelj and Marco Dani

Hike No 2

Evening: Dinner, Drinks

Saturday, 15 June:
8:00 Breakfast

Leaving the Mountains – the first car will depart at 7:00 in order to make it to the Airport in time – I will ask to have breakfast for you earlier or to have it pre-packed for you.

PARTICIPANTS AND PAPERS:

Jan Komárek and Marco Dani (convenors), Matej Avbelj, Sacha Garben, Marco Goldoni, Cristopher Krenn, Martin Loughlin (special guest), Giulio Itzcovich, Joana Mendes, Elise Muir.

JOANA MENDES: CONSTITUTIVE POWERS, PUBLIC INTEREST, AND CONSTITUTIONAL EMBEDDEDNESS

EU agencies' central role in core fields of EU integration has gained prominence in the past decade in particular in the financial sector. The regulatory and supervisory powers of the EU financial agencies have strained the constitutional boundaries of agencies' powers that, nevertheless, still rely on a misconceived conceptual distinction between the interpretation of undetermined legal concepts and the exercise of administrative discretion. This paper will argue that this conceptual distinction does not preclude a situation in which the executive decision-maker defines the meaning of the legal conditions that delimit its authority to act. It characterises the powers of the EU financial agencies as constitutive powers, which allow the agencies to define via their own practices and decisions how law is completed and concretised and to perform a deeply political function in defining how public interests are protected in the EU. This analysis prompts a critical assessment of the role of law in relation to such powers. Law's function should be normatively thicker than just constituting and controlling public authority. Law should ensure the constitutional embeddedness of the constitutive action of executive bodies, steering their decisions in a way that these can become an expression of the constitutional commitments that found the EU or, at least, can be assessed in their capacity to realize those constitutional commitments.

MARCO GOLDONI: THE EURO MATERIAL CONSTITUTION: GOVERNING THROUGH MONEY

This is a book project for a monograph on the constitutional nature of the Eurozone. The research question revolves around the constitutional role of monetary arrangements and their relevance for determining the relation between sovereignty and government. The assumption (which will need to be verified) behind the project is that the EURO is not a State-based nor a federal currency, hence its constitutional function is not comparable to those of standard sovereign currencies. In short, rather than a single currency, it is a common currency that works with a cooperative arrangement along lines very similar to those adopted for the Gold Standard. In the case of the EURO, however, the exit option is much more complicated and this is because, unlike the Gold Standard, the common currency is also part and parcel of the construction of a specific kind of internal market.

The intention is to structure the book into three parts. The first one will be devoted to the reconstruction of the main tenets of the EURO material constitution. Obviously, chapter 1 will be dedicated to the presentation of the material constitution as an epistemic device for understanding the constitutional nature of the EURO-zone. In doing so, I will compare this methodology with other approaches, in particular those dominant in EU-related scholarships. In particular, I will compare the study of the material constitution with the streams of constitutional pluralism (in both variants: either a' la Maduro/Walker or a' la Tuoori), sociological understanding of the constitutional system (Teubner/Thornhill) and State sovereign-based accounts (Grimm, Loughlin).

In light of the methodology set up in the first chapter, the second chapter will analyse the main features of the EURO material constitution: its bearers (subject), its social relations

(labour and circulation), its fundamental aims (restructuring of the Welfare State and consolidation of the common market), and the relation with its formal constitution. the target of this reconstruction is the discourse on governance as a mystifying discourse. Instead, it is proposed to retrieve a classic institutionalist insight which understands legal orders as anchored to a *governing function*.

Part II of the book will be focussed on the institutions of monetary governance and it will aim to show that the governing function in the EURO-zone is pursued mostly by money. Chapter 3 offers an account of the nature of money in contemporary legal orders and of the specific traits of the EURO. The chapter will also offer an analysis of the role played by the common currency in pursuing the two fundamental aims of the material constitution. It is crucial, in fact, to understand how the EURO is not only functional for austerity, but also for the consolidation of a certain type of single market.

Chapter 4 and chapter 5 will put forward an analysis of the key formal and informal institutions of the EURO material constitution. Chapter 4 is dedicated to the ECB and the ESCB, with the aim of formalising the constitutional function of the aggregate of European Central banks. The analysis is conducted as a material study, hence it will revolve mostly around the exercise of the governing function in the EUROzone and the use of conventional and unconventional measures. The target is to criticise reconstructions of central banking as guardianship of the economic constitution or part and parcels of a system of checks and balances. Rather, if governing is exercised through money, then central banking is governing.

Chapter 5 takes up the other institutions of monetary governance in the EU: the Euro Group, the functioning of the European Semester, the European Stability Mechanism, the role of European and national courts.

Part III is devoted to case studies on the impact of the monetary regime. The first case study (chapter 6) is on social rights, in particular in countries mostly affected by the financial and economic crises. The research hypothesis is that monetary government, in the end, pushes for achieving a certain type of market and for this reason requires a re-structuring of labour and its protection. The chapter will look at potential avenues for a Polanyian countermovement, but the key point is analytical: monetary government uses private and public debt as a leverage, but the ultimate aim is the capture of labour.

Chapter 7 will take up another potential countermovement: the introduction of parallel, alternative and crypto-currencies as a way to build an alternative to what is, in the long term, the destructive effect of the EURO-arrangement. It will be first necessary to establish the legality of these options and, in light of the previous analysis, the hypothesis will be that these measures are marginal and cannot open up an uncolonised political space within the EURO-zone.

In the conclusion, the brief summary of the findings will be used in order to illustrate the EURO material constitution as a way to think at two classic European constitutional questions: first, the relation between sovereignty and government; second, the relation between ordinary and extraordinary politics.

GIULIO ITZCOVICH: FOR A GENEALOGY OF JUDICIAL DIALOGUE IN EUROPE

Over the last decades, the concept of judicial dialogue has emerged and increasingly grown in popularity among legal scholars. As a legal concept, the notion of dialogue shows a certain descriptive capacity and a marked normative character: it allows to account for new kinds of interaction between courts, and even between courts and other authorities, and it also performs a legitimising or critical function, expressing a requirement that the courts should take into consideration and impinging on the kind of legal reasoning they are expected to develop. The need for dialogue as an explicative tool and as a goal to be pursued, however, is not only relatively new but also surprising, at least from the perspective of formalist legal positivism. The paper intends to identify some points of tension between the spread of dialogue as legal concept and a traditional conception of the role of the judiciary: from the judge as bouche de la loi to the judge as voice of the community, communication expert and diplomat? Moreover, the paper intends to sketch out a genealogy of the concept of dialogue in the legal culture by highlighting a few important moments of its emergence: when, how and why did we start thinking that the judges could, and even should, engage in a mutual dialogue in the exercise of their functions? The goal is to clarify the nature of the processes that the notion of judicial dialogue intends to capture and to promote in order to contribute to the ongoing discussion on the perspectives and limits of judicial dialogue.

SACHA GARBEN: COLLECTIVE IDENTITY AS A LEGAL LIMIT TO EUROPEAN INTEGRATION IN AREAS OF CORE STATE POWERS (OR 'COMPETENCE CREEP')

This contribution adds a legal dimension to this special issue's topic of the role of collective identity in limiting European integration in areas of core state powers. Law can be considered a tangible expression of collective identity, as well as a factor in shaping it. In fact, more than perhaps recognized, it may be one of the most useful proxies for establishing the content of a collective identity: the fact that a value has been considered important enough by the necessary and legitimated majority to entrench it in a binding norm says something about that collective. Of course, not all laws, even if they can be seen as specific expressions of the collective's identity, are fundamentally and intrinsically connected to that identity. It seems reasonable to limit such claims to constitutions, which could be conceptualized as the legal essence of a polity; embodying and reinforcing its core character. While law in general and constitutions specifically may be considered rather static and rational for something so emotional as identity, precisely these features bring important advantages. Conceptualizing collective identity in legal terms ensures a degree of stability and, not unimportantly in this politically charged context, objectivity. This aligns, to a certain extent, with the idea that 'constitutional patriotism' could provide an alternative to nationalism (Habermas 2001, Cronin 2003).

While perhaps not as toxic as nationalism, constitutional patriotism (or 'parochialism', Kumm 2012) however still poses a profound problem for the EU and its Member States. Composed of several (federated) polities with their own constitution(s) embedded in an overarching legal order that most EU legal scholars agree can be referred to as a constitutional order of its own

(Weiler 1999), the EU contains various overlapping and possibly competing expressions of collective identity that have to be mediated and accommodated in legal terms. In particular, a fundamental conflict has emerged on precisely our topic of inquiry: whether national collective identity provides a legal limit to European integration in areas considered as core state powers. As discussed in Part 2.a., the CJEU has held that Member States have permanently limited their sovereign rights in 'ever wider fields' and has refused to acknowledge any 'nucleus of national sovereignty' that can be invoked 'as such' against the EU (Lenaerts 1990). Any EU law takes precedence over any national law in any area, and Member States need to exercise all their competences concordant with their positive and negative obligations under EU law, regardless of whether the EU's competence is limited, or even excluded, in that area or whether the issue is considered central to national identity. As we shall see in Part 2.b., this absolutist interpretation can, however, be juxtaposed to the view of a group of national constitutional courts, epitomized by the German Constitutional Court (Bundesverfassungsgericht; 'BVG'). Most specifically, in its Lisbon judgment, the BVG reiterated its prior stance that the identity of Germany and its constitution needed to be protected, and it held that in light thereof European unification would be unlawful if 'insufficient space is left to the Member States for the political formation of economic, cultural and social living conditions', identifying as particularly sensitive fields: (1) criminal law (2) the use of force (3) fiscal decisions (4) the social state, and (5) cultural decisions.

Introduced by the Maastricht Treaty and strengthened by Lisbon, the principle of national constitutional identity enshrined in Article 4(2) TEU has been touted as a possible platform to mediate such constitutional conflict about the limits of EU powers. It obliges the EU, by virtue of EU law, to respect Member States' national identities, 'inherent in their fundamental structures, political and constitutional' and their 'essential State functions' such as 'ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. In Part 3, it will be argued that while in principle Article 4(2) TEU may be relied on to challenge EU legislation as well as negative integration through the direct application of Treaty provision, the way it is interpreted by the CJEU means it will not likely lead to the annulment of an EU provision for offending a specific feature of national (constitutional) identity that is not shared by other Member States, nor for interfering with 'essential state functions'. As regards limiting negative integration, Article 4(2) has not added much to the pre-existing case law.

Part 4 will be devoted to the consideration of our core question: to what extent does collective identity provide a legal limit to competence creep. It reiterates that EU law does not provide very effective limits and that while the limitations defined at national level, on the national view , can be used to limit all manifestations of competence creep within EU law stricto sensu, EU law can actually resist such national defiance. In any event, even from a national legal perspective, the extent to which the notion of (constitutional) identity could be really useful in addressing the bulk of competence creep is, ultimately, rather small: by its nature it is reserved for exceptional situations and thus can only ever throw incidental counterpunches without providing an effective structural limit. Furthermore, European integration in areas of core state powers may also occur outside EU law stricto sensu, through non-binding policy coordination or parallel integration. In these cases, the constitutional configuration is radically different, as any binding norms implementing EU soft law or international law are adopted by the national legislator: bringing them potentially within the full remit of judicial review. When parallel integration takes the shape of an international Treaty, national constitutional identity

may provide a limit that can be enforced at the national level without offending EU law. In the case of soft law, however, the national 'implementing' measures effectively mask their European origin, meaning that they logically escape any constitutional limit placed on European integration in areas of core state powers.

JAN KOMÁREK: THE TRANSFORMATION OF EUROPE'S CONSTITUTIONAL IMAGINARY (PAPER+PROJECT)

The editors of a collection of essays reflecting on Joseph Weiler's article 'The Transformation of Europe' are certainly right when they introduce the volume in the following way:

> What made *The Transformation of Europe* (ToE) a profoundly original contribution was the deep diagnosis of the legal and political interplay in the construction of a supranational Europe. It was original in how it presented the process of European integration and reinvented its narrative, but it was equally original in how it reached that result: by a unique methodology combining law and political science to challenge the conclusions on European integration each discipline had reached on its own. (Miguel Poiares Maduro and Marlene Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (CUP 2017), 100)

Almost everybody in the field would agree – despite possible disagreements about the particular elements of Weiler's analysis or, as seen from today's perspective, its rather crude methodology. But should we read the essay today? Is it a true classic, in the sense that despite having been published more than 25 years ago (and in parts written much earlier) *it still speaks to us – today*?

There are several ways of answering this question, besides (and beyond) celebrating the essay's – and its author's - contribution to European studies and to European integration itself.

First, we may find the legal-political analysis conducted at a time when the European *Union* did not formally exist and the integration project involved only twelve Member States still illuminating, or at least worth discussing. What comes to mind here is the 'equilibrium theory', concerning the interplay between political processes and the legal structure of the Union, or the very reconstruction of the process through which law became a key structural constraint of EU politics, with the Court of Justice in charge. Interestingly enough, two political scientists who contributed to the volume have characterized the essay as 'arguably the most influential paper ever published *on the European Court of Justice*'. Does it mean that the world of political science has read the essay to be mostly about law and legal institutions, rather than a synthesis of both offering a holistic reconstruction of the integration process?

Second, we may find various normative concerns, expressed in the final parts of Weiler's original essay, still pressing, or at least relevant. The perennial themes in Weiler's work, the legitimacy problem of the Union, but especially his desire to find a new arrangement through which individuals and their political communities could relate one to each other, arguably still inform our debates about the future of European integration. We may say, perhaps with

regrets, that only the context has changed since 1980s. Today we discuss the same basic questions while people are dying inside and outside of Europe's borders as at least indirect consequence of policy choices made by the EU.

'Supranationalism' represented this new hoped-for arrangement. Weiler later replaced this key concept by the principle of 'constitutional tolerance', to carry out the demanding task. The principle should govern what was to be a 'community' rather than a new 'unity' among the peoples of Europe. Weiler's ambiguity about these concepts and his changed assessment of the EU as being capable to realize them is perhaps symptomatic of the whole discipline of EU constitutional law. This provides the *third* reason to read the original essay today – and the one I find the most compelling. It is the key to reading the collection of essays together with a number of other recent books which deal in one way or another with the interaction of constitutional law and politics in European integration.

This third reason relates to what I will call here 'European constitutional imaginaries' – sets of ideas and beliefs that help to motivate and at the same time justify the European integration *praxis*.

Constitutional imaginaries are as important for the practice of government as are the institutions and office-holders. They provide political action with an overarching sense and purpose recognized by those governed as legitimate. This can be seen as a 'necessary fiction' that makes political rule possible, or as an ideology understood in (post-)Marxist terms as a 'means of domination'. Assistance to refugees can thus be explained to citizens as something that a democratic state honouring its international commitments and respecting fundamental rights should do. Citizens, especially the constitutional patriots among them, can then accept or even require such assistance from their state. But constitutional imaginary can also conceal from citizens some negative impacts of its central principles. Unconstrained commitment to international free trade agreements can make some people feel 'left behind' – and dominated by those who benefit from intensive international cooperation. Beneficiaries of a certain imaginary may not even realise their domination – until it is revealed by a radical result of a referendum of presidential elections as we saw after the Brexit vote or the election of Donald Trump to the presidency of the United States.

Lawyers, and especially more philosophically oriented lawyers with a foot in legal and political practice, are important producers of constitutional imaginaries. Joseph Weiler's *The Transformation of Europe* represents one of them, arguably most influential in the two decades between 1989 and the beginning of the Eurocrisis in 2010. It is an imaginary that mostly borrows from liberal, United-States-inspired constitutionalism which resonated also globally at the time. It was a structure for a new world order at the 'end of history', putting emphasis on individual freedom, its juridical guarantees, and a free market economy. The unique context of that era made the imaginary particularly influential.

In the context of the EU, this liberal constitutional imaginary functioned as a utopia: something that still was not true *for the EU* at the time but was widely considered worth pursuing. In the absence of other utopias, the idea of united Europe was presented as one. In the Old Europe the liberal constitutional imaginary represented the utopia of 'an Ever Closer Union'. In the post-communist Europe the same imaginary marked the return from 'abduction to the East', as the Czech writer Milan Kundera once described the Soviet domination over the region.

This particular constitutional imaginary is now declining. The need to adopt a new constitutional settlement is seen not as a further step in European integration but as an obstacle better to be avoided. Only few actors now call for the reinvigoration of constitutional process.

This decline however does not mean that the ToE cannot give rise to another one – another reason to read the essay today. As we will see, it is full of contradictions that can give rise, once again, to a different utopia.

In this essay I will first re-read the ToE and identify the key components of its imaginary (section 2), that I will connect to several individual contributions to the volume (section 3). Altogether sections 2 and 3 reconstruct the ToE's constitutional imaginary. Then I move to the three other books (section 4). They each complement the anniversary volume by a perspective that is missing in the former. I will therefore discuss the recent work in the sociology of EU law by Antoine Vauchez, contributions in the "new legal history" initiated by Morten Rasmussen and Bill Davies, and also the remarkable book by Christopher Bickerton, which brings together the political economy of European integration and the participating member states, with their international relations and internal politics in a longer historical perspective.

In the final section 5 I will offer my own perspective: critical intellectual history of EU constitutionalism which is yet to be written – and is key to understanding the constitutional imaginary of European integration.

MARTIN LOUGHLIN: THE THEORY OF POPULAR SOVEREIGNTY

That sovereignty vests in the people is accepted as an orthodox tenet of modern constitutional thought. It gets its traction from the modern idea of the state as an institution that brings together territory, people and ruling authority into a scheme of intelligibility. And it is through such a scheme that we are able to conceive the political world as a set of legal relations. Thus understood, sovereignty – an expression of the absolute authority of that political worldview – is commonly believed to vest in 'the people'. Initially, the idea that the people is the ultimate source of authority was simply a construct of social contract thought experiments such as we find in Hobbes or Rousseau. But, first tentatively through rebellions during the Reformation and then more rigorously through the American and French Revolutions, the people began to acquire a standing not simply as a fictional construct but as an entity capable of giving expression to collective will. This conception has been given positive impetus in the practice of drafting modern documentary constitutions.

The question I want to examine is: what is the standing of popular sovereignty today? It is a topical question, not least because of the emergence across Europe of so-called populist movements. It may be difficult to define populism – populist politics varies according to context - but one general theme is a common scepticism towards constitutions, which are seen as devices that establish elaborate institutional mechanisms that check expressions of popular will and enable political elites to maintain their power of rule. On this interpretation, what we call constitutional democracy is a regime of aristocratic rule rather than an institutional form the expresses the idea of popular sovereignty.

The question I am raising is complicated, in part because modern political discourse is erected on a distinction between state and government, and sovereignty belongs to the regime of state, not government. But it seems evident that the notion of popular sovereignty is now giving expression to a real and pressing issue in modern politics. It is generally accepted that the interest of the people as a whole is the ultimate principle of legitimacy, but the political question at issue concerns the means by which that interest might be identified and the best method of securing its supremacy.