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- Introductory remarks

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BRILL

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## *Constitutional Imaginaries Symposium*



### Symposium on Zoran Oklopčič's 'Beyond the People: Constitutional Imaginaries and Constituent Imagination' (OUP, 2018) – Introductory remarks

AQ1

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This symposium addresses a new series of interests in social imaginaries not frequently addressed in the *International Journal of Social Imaginaries*, nor in its predecessor *Social Imaginaries*. The scholarly interest in the role of imagination in constitutional law and in imaginaries of constitutions and constitutionalism is by now more than evident, and the volume at the centre of this symposium – Zoran Oklopčič's *Beyond the People*<sup>1</sup>– is one of the landmark contributions to this emerging debate. The book is particularly important as it critically reflects on what it sees as a rather petrified theoretical landscape of constitutional theorizing, demonstrating the difficulties and challenges for a theory of constitutionalism in the wider global empirical context in which constitutional democracy and the idea of modern constitutionalism are

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1 The current book symposium on Zoran Oklopčič's *Beyond the People* (2018, OUP) was originally to appear a few years ago. Due to the discontinuity of the earlier journal *Social Imaginaries*, and the restart in the *International Journal of Social Imaginaries*, the symposium has been delayed and is only published now. The debate has however not lost any relevance as to the importance of Oklopčič's contribution nor with regard to the wider debate on constitutional imaginaries. In many ways, the discussion on the nature of constitutionalism and the role of imaginaries is even more prominent now, not least due to significant challenges in the form of populism, rising authoritarianism, and challenges to human rights and international legal institutions.

increasingly challenged. Oklopcic's *Beyond the People* needs now to be placed alongside inter alia Jiri Přibáň's *Constitutional Imaginaries*, Martin Belov's *Constitutional Semiotics*, and Martin Loughlin's *Against Constitutionalism*. One of the various ways in which Oklopcic's work stands out is in its forceful deconstruction of the different roles of theoretical 'imagers' in the field of constitutional law and its generally critical position toward a range of taken-for-granted concepts and interrelations on which the idea of constitutionalism – or the modern constitutional imaginary – is based (not least the ideas of popular sovereignty and self-government). The book is not only a critique of the limited self-reflexive nature of contemporary constitutional law, but also actively calls for a 'eutopian constituent imagination' as a welcome attempt to instil a creative, imaginative dimension into a field which is immersed in formalistic and normative concerns, in times in which a re-imagination of constitutional democracy is of great urgency.

### Imagining Modern Constitutionalism

In recent decades, there is a heightened interest in constitutions and constitutionalism beyond a strictly legal perspective. This includes attention for cultural and symbolic dimensions of constitutions (Belov 2022; Gephart and Suntrup 2021; Kahn 2011; Přibáň 2005; Vorländer 2017). In various ways, a stable and confident perception of (liberal) constitutionalism being the undisputable core of modern (democratic) societies is facing increased anxiety, both in relation to forms of contestation within democratic systems (not least in the form of populism) and regarding international legal regimes (cf. Krieger 2019; Voeten 2021), and with regard to arising forms of authoritarianism (and authoritarian constitutionalism, cf. Tushnet 2014).

In times of crises, challenges, and rising uncertainty (also in semantic terms), what appeared as robustly instituted forms of democratic rule and legal arrangement seem now much more fragile (cf. Oklopcic 2019; Scheppele 2019). A core test – almost triggering a form of moral panic – is that of (conservative, rightwing) populism. As argued by Kim Lane Scheppele, reflecting on the question of populism particularly,

[t]he populist challenge means that constitutional liberals must address more convincingly our own inability to understand both why democratic publics seem to be rejecting liberalism and how the populists have been able to gain the upper hand in elections. It is not enough for constitutional liberals to argue that democratic publics who support illiberalism are simply misguided. We must provide better answers to explain why liberal

constitutionalism should take priority over what democratic majorities have said that they want to do at any given moment.

SCHEPPELE 2019: 316

Oklopcic takes the populist challenge further in that he understands the constitutional liberals – or what he more broadly calls the ‘anti-populist conjurors’ – as lacking in imagination and as taking the populist phenomenon for granted (Oklopcic 2019), thereby contributing to a dichotomic (unimaginative) understanding of the current problems of democracy (liberalism versus illiberalism) and, in this, failing to address deeper questions of the actual operation and disfunctioning of constitutional democracy.

A rapidly growing literature focusses on the immediate challenges that liberal constitutional regimes are facing, often identified as a ‘backlash’ (Amato et al. 2021; Martinico 2021; Nijman and Werner 2019; Sadurski 2019, 2022). It is, however, probably not a coincidence that in roughly the same period in which this backlash has become visible, we have also witnessed an upsurge of interest in a broader, systemic and more historicized curiosity in constitutional orders, in particular with regard to cultural, symbolic and imaginary dimensions of constitutions and constitutionalism (cf. Angeli 2019; Bartl 2021; Belov 2022; Blokker 2017, 2019; Loughlin 2015; Manderson 2019, 2021; Přebáň 2018, 2021; Tans 2019).

The post-WWII ‘constitutional season’ appeared to consist in a steady building out of legal constitutionalism (Gyorfi 2016; Olechowski 2014) and the formation of post-national and global forms of constitutionalism, beyond the confines of the nation-state. Clearly, this needed an expanded, global imaginary, beyond the nationally confined imagined community (Stegers 2008; Timmerman et al. 2018). In recent years, however, the global imaginary seems to be losing its hold, or increasingly challenged, at least in terms of a loss of a sense of modern constitutions, constitutional-democratic regimes and human rights being largely taken for granted but also due to liberal constitutionalism now being less readily attached to notions of progress and societal advancement. This has surely to do with a wider challenge to liberal democracy as a regime and liberal legalism as its main form of architecture and source of justification. Hence, the suggestion by various scholars to “zoom out” and to regard constitutionalism in an historical and wider, cultural and semantic context is of great importance and utility.

### Imagining Constitutional Democracy

Zooming out, and allowing the historical to inform and ‘irritate’ our established views of constitutions and constitutionalism, is what brings some scholars to

engage with the idea of social imaginaries in the context of constitutions and constitutionalism, resulting in debates on distinct constitutional imaginaries.

The concept of social imaginaries is understood in different ways, but core dimensions are, first, an emphasis on the *cultural* and *symbolic underpinnings* of our societal orders, and, second, the crucial role of imagination (this, for some scholars, includes a creative one) in social life. Imaginaries are hence at the basis of the social-historical world (Thompson 1982). Social imaginaries consist in the socio-historical imagination of social reality, and allow a group of individuals to imagine themselves to be part of the same community in time. Different authors have hence stressed the imagined nature of communities, most notably Benedict Anderson (1983), but clearly also Charles Taylor in his understanding of the role of social imaginaries in bringing about a ‘new vision of moral order’, the ‘modern moral order’ (Taylor 2009: 159). In Taylor’s view, social imaginaries are ‘something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking rather of the ways in which they imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations’ (Taylor 2009: 171). Clearly, there are affinities here with Durkheim’s notion of ‘conscience collective’ and his later collective representations. Social imaginaries stress a structural dimension to culture, where it becomes an external dimension to social interaction that determines the latter (VandeVoordt et al. 2018).

In one dominant reading, social imaginaries can therefore be understood as vehicles of order, integration, and the imagination of social unity. Imaginaries in modern times provide the means by which society can imagine itself as a political and social community, and its members as equal associates of a common project.

This also means that specific institutions and collective practices are informed by distinctive imaginaries. Charles Taylor, for instance, provides an account of the emergence of popular sovereignty through notions of an original consent to society (Taylor 2009: 160). In due course, specific institutions such as the political constitution and parliament come to embody the imaginary idea of popular sovereignty. In a related way, Joanne Innes and Mark Philp, focussing on the idea of ‘democracy’, have investigated the ‘reimagining’ of the notion of democracy in various European societies in the 18th and 19th centuries, showing how an originally pejorative understanding of democracy turned into a positive assessment of an idea of modern democracy in due

course (Innes and Philp 2013, 2018). In fact, the concept of social imaginary stresses not only the reproductive nature of imagination, reproducing existing forms and order, but also the productive, creative potential of imagination, in which new forms may be posited. In this understanding, social imaginaries allow for a variety of ways in which reality may be imagined (Taylor 2018: 223), which may however also lead to forms of closure of knowledge and totalitarian views of society (Lefort 1988).

Hence, in contrast to the more holistic understanding of culture and of collective representations, the concept of social imaginaries stresses the potentiality of creative imagination. While, on the one hand, social imaginaries consist in trans-subjective structures of meaning that historically emerge in complex ways over longer periods of time (think for instance of the tormented way in which democracy emerged as a positive way of understanding the political in the 19th century, see Innes and Philp 2018). On the other hand, the imagination is clearly an individual capacity which provides individual human beings not only with the capacity to creatively utilize the structures of meaning that they are socialized into, but also allows them to engage in radical forms of imagination which contrast with the existing, dominant social imaginaries. In other words, the notion of social imaginaries contains a critical dimension that the concept of culture is often lacking.

### Social Imaginaries and Constitutional Theory

Social imaginaries are relevant for constitutional theory, constitutionalism, and constitutional practices in at least four ways. First, social imaginaries help putting into relief some of the background understandings underpinning modern constitutionalism. Oklopcic's book *Beyond the People* is in essence a critical analysis of the non-reflected status of notions of popular sovereignty and the people – the imaginary of popular sovereignty – in imagining constitutional orders as well as in relation to constitutionalism as a normative idea and project. As elaborated by Anderson and Taylor in particular, the imaginaries of the nation and of peoplehood allow for the imagination of a political community which transcends the immediate, local context. This political community imagines a specific macro-group with distinctive characteristics constituting a unity, which exercises – or ought to exercise – sovereign power (Anderson 1983: 6–7). Oklopcic in fact teases out various forms of imagination that underpin the idea of the political community grounded in the people: purposeful and practical (problem-solving) imagination, visual imagination, narrative

imagination, affective imagination, ambiental/contextual imagination, and conceptual imagination (Oklopcic 2018). These various forms of imagination inform the modern idea of peoplehood, which for Oklopcic (2018: 43) is the 'figurative ventriloquist of our aspirations, a security blanket for our anxieties, and a projectile that we launch against those who stand between us and the horizon of our aspirations'.

A second dimension of imaginaries and the imagination, which stands out in Oklopcic's work, is the role of scholars and of conceptual, abstract, theoretical imagination. Clearly, there is no easy way of conceptualizing the relation between individual imaginative and conceptual thinking and the transsubjective imaginaries that underlie social life. VandeVoordt et al. (2018), among others, stress an individual dimension to the imagination in relation to everyday conduct, which relates to specific value-ideas. Here, the imagination takes the form of a reproductive imagination in replicating background knowledge in everyday practice (as equally stressed by Taylor). This Weberian dimension calls into play the role of 'professional' imaginers, that is, those that construct ideal-types which bring out the value-ideas that guide practical conduct (VandeVoordt et al. 2018. 171–2).

In Oklopcic's analysis, the theorization of constitutionalism is critically revisited, by highlighting the crucial role of the imagination in this endeavour. Modern constitutionalism is often portrayed as an ethic or position external to (everyday) political struggles, specified and reified in notions such as the rule of law (and not of men) and constitutionalism. The imaginary dimension to this pre-societal, higher form of knowledge and its theorizing is often downplayed, hidden, or denied in constitutional thought. Oklopcic makes forceful claims in order to bring back the imagination as a central dimension in constitutional thinking. One way in which he approaches constitutional theory is by understanding 'theory as ventriloquy', in which major theorists in the constitutional(-ist) pantheon – Edmund Burke, Hans Kelsen, Carl Schmitt, and (less usual in constitutional scholarship) Claude Lefort – are approached as 'ventriloquist dummies', used as 'rhetorical weapons' in the polemics of constitutional theorizing (Oklopcic 2018: 352). One effect of the usage of such dummies by the 'theorist-imaginer' is its disciplining one. One example is the figure of Hans Kelsen, who is clearly a predominant 'imaginer' of modern constitutionalism. According to Oklopcic, the scholarly (reproductive) imagination of Kelsen's thinking contributes to a form of circular reasoning, in which the imagination of alternative understandings is eroded. In fact, one way in which a circumscribed imagination takes its form is by means of binary thinking ('revolution-amendment, norm-exception, universalism-particularism, nationalism-cosmopolitanism, monism-pluralism' (Oklopcic 2018: 347). And



one might add the currently hotly debated dichotomy constitutionalism-illiberalism/populism (Amato et al. 2021; Sadurski 2022).

A third dimension is the conception of social imaginary in a more structural sense. Alexander Latham-Gambi (2021: 29) has, for instance, likened the social imaginary to a 'grammar' or a 'vocabulary'. In Oklopcic's *Beyond the People* this dimension is in some ways reflected in the form of narratives.<sup>2</sup> The social imaginary provides the ontological fundamentals of what society is made up of, what constitutes society, and what are the relations between its constituent parts. Relating this more strictly to constitutions, it brings into the relief the question of why and how constitutions came to play a fundamental, constitutive role in modern societies. Under conditions of modernity, constitutions have become a *conditio sine qua non* for society as such to be (recognized, acknowledged), and are understood as to provide a fundamental legitimacy grammar to societies (cf. Thornhill 2011). The modern constitutional imaginary is however put to the test by the emergence of transnational and global forms of constitutionalism (as also discussed by Oklopcic in his contributing article to this symposium), indicating how the constitutional imagination may detect (or reject) constitution-like entities or arrangements beyond the core imaginary of nation-state-centred constitutions. Admittedly, while Oklopcic's book reflects in particular on the scholarly imagination of constitutionalism, it pays less attention to the structural dimensions and the potential historical shifts between imaginaries, as for instance explored Manfred Stegers (2008) in relation to the national and the global imaginaries.

This brings us to an aspect of imaginaries which appears in need of more thorough reflection. In general, social imaginaries are related to the self-constitution and self-representation of *societies*. Distinctive social imaginary significations, however, evidently transcend specific societies, constituting regional/civilizational or even global dimensions of meaning-making and self-understanding (cf. Arnason 2003). A relevant instance is Castoriadis's discussion of the pseudo-rationality of capitalism (which can be understood as a trans-societal imaginary, but which equally finds specific regional or local elaborations and specificities). More to the point here is the idea of a constitutional imaginary which in particular in modern times, or more specifically since 1945, has become a major focal point for modern societies, clearly so in the case of constitutional democracies but equally in relation to non-democratic societies. A further example is the imaginary of popular sovereignty, at the heart of

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2 Oklopcic (2018: 22–24) stresses both the role of theorists as contribution to constitutional narratives and of the more general role of what he calls quasi-narrative imagination in imagining moments of societal self-constitution.

Oklopčić's discussion, which has returned importantly in its close connection to the national imaginary, after a period of the flourishing of an alternative imagination in terms of forms of cosmopolitanism and global democracy.

### Constitutional Imaginaries

Let us return to the more specific notion of *constitutional imaginaries*. Specific imaginaries can be related to the political dimension (Ezrahi 2012) as well as more distinctly to the constitutional order (Blokker 2017, 2019; Přibáň 2021), and hence to the constitution of society, through what has in modern times become the archetypal underpinning of modern society: an explicit, written constitution. *Constitutional imaginaries* as a concept are hence a means to identify and render explicit the specific historical process of the emergence of modern constitutionalism and the precise forms of meaning that underpin our understandings of the constitution as a core, existential dimension of modern society. As stressed by Desmond Manderson (2021: 304), 'constitutions are more than just legal structures', '[t]hey are cultural resources'. In modernity, the constitution has become a distinctly formal cultural resource, taking a predominant form of political governance, a technocratic tool to limit power and to arrange societal functioning through instruments such as the rule of law and human rights (cf. Manderson 2021: 305).

One way of understanding both the opening and closure in the idea of constitutionalism is through the relatively frequently observed tension in modern constitutionalism between constitutions' orderly and emancipatory dimensions (Loughlin and Walker 2007), understood as partially conflicting imaginaries (Blokker 2017) or as informing distinctive legal mindsets (Koskenniemi 2006; Brunkhorst 2014). The first imaginary emphasizes order, stability, and the status quo, whereas the second emphasizes emancipation, popular sovereignty, and change. The first can be understood as a negative (against despotism, disorder), functional-legalistic (hierarchy, rights) dimension, whereas the second can be understood as a positive, enabling (expansion of self-government, inclusion) one. This tension maybe productive in terms of an inclusionary thrust, but, when unbalanced, the relationship may also, as recently indicated by Martin Loughlin (2022), result in the erosion of the connections between the constitution and its constituent origin in popular sovereignty. In a different vein, however, the theoretical prioritization of this tension between order and popular sovereignty may shift attention away from comparative-empirical explorations of highly diverse manifestations of collective self-government in practice, as suggested by Oklopčić (2018: 350).

The recognition of an original duality may however imaginatively be expanded by considering a plurality of legal and constitutional rationalities (which is certainly not to be understood as limited to discussions of ‘constitutional pluralism’ and *Kompetenzkompetenz* or jurisdiction in relation to a set of overlapping and clashing constitutional regimes), as well as empirical realities, which form an important dimension of the imagination of constitutionalism in specific socio-historical contexts. This observation is relevant in a comparative constitutional sense but gains further importance with respect to forms of constitutionalism beyond the state. As a matter of fact, the status, form, and substance of constitutional matter on the transnational level remains highly contested, and hence the ‘constitutional question’ of the transnational order indicates the complexity of the imaginative forces behind the idea of constitutionalism. Considering the post-national constitution helps both bringing out the limits of a liberal-constitutional imagination which remains wedded to the nation-state and indicates the possibilities of creative imagination. Oklopcic’s claim that any theoretical conceptualization of constitutionalism is fruit of the imagination (putting national-liberal as well as Kantian, cosmopolitan views in a critical light) is of great relevance here.<sup>3</sup>

### Beyond the People: Social Imaginary and Constituent Imagination

Zoran Oklopcic’s call for a constitutional imagination is in line with the need for a broader rethinking of the notion of constitutionalism, which is stimulated by the emergence, or evermore evident, transnational dimension of constitutional law as well as by a ‘backlash’ against international law. The ‘safe haven’ of the nation-state as the unquestioned cradle of constitutionalism is being ‘tested’ by the revelation of other constitutional sites, on the regional or even global levels. It is hence the emergence of novel social realities that begs us to question knowledge that was deemed static or stable until recently. But equally the call for a return to a phantomatic status quo ex ante – as apparently called for by populist and sovereignist forces – requires critical rethinking of the constitutional imaginary.

Oklopcic’s approach is nevertheless importantly different from other approaches to the constitutional question, in his strong insistence on the role

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3 It may, however, also be argued that Oklopcic’s account ultimately remains predominantly focused on the theoretical imaginers of constitutionalism (despite rich discussions of cases of secessionism, federalism and so on), contributing less to an empirically and historically grounded discussion of constitutional imaginaries in the practice of constitutional politics.

of the imagination in a radical sense. Debates on constitutionalism often show a limited employment of the productive imagination. They either remain confined to positions that reify the nation-state (Grimm 2016) and hence reproduce taken-for-granted knowledge. Or, in contrast, they tend to exalt in Kantian fashion the cosmopolitan nature of constitutional norms (Kumm 2006) or exalt a monistic idea of transnational law, to the detriment of societal diversity (Kelemen 2018), and thereby simply lift the idea of ultimate, foundational norms up to the supranational level. Such a transcendental version, however understood, is frequently taken to be the only true way to imagine (liberal) constitutionalism. Oklopcic's view is different in that he sustains that *all* theorization of constitutions is ultimately – and necessarily – grounded in the imagination. Indeed, he explores the 'imaginative underpinnings of constitutional theory'. His call is of great importance, because it steps out of the vicious circle of the monistic quest for the ultimate form of constitutionalism (a normative project) and invites us to engage in a self-critical, locally, historically, and diversity sensitive way of exploring constitutionalism, both as a theoretical form of imagination and as a mode of imagining of collective lives in practice. In my view, this is highly needed in times in which the predominant constitutional imaginary of the post-war period seems to be shifting or at least is being strongly challenged from various sides (Ezrahi 2012; Koskenniemi 2019; Thornhill 2020). What is more, it stresses the importance of a sociology of constitutionalism, which rejects the normative, theoretical claim on constitutionalism, and recognizes the social role and life of constitutions (Blokker and Thornhill 2017).

In fact, a significant contribution of Oklopcic's book lies in his contribution not merely to constitutional theory, but to social theory in a wider sense. It puts law and constitutional law in a societal perspective, emphasizing how it is one of the key modern societal languages and human forms of meaning-making. As recalled by Alain Supiot (2017: 2), the concept of 'social imaginary' is of great relevance for the analysis of law, not least because it stresses how law is neither the simple reflection of society's material relations nor operates on a fully transcendental dimension, independent from society. The imaginary identifies exactly the practices of meaning-making and signification that make society possible in the first place (Supiot 2017: 1). Hence the great importance of endeavours such as that of Oklopcic that show that critical, self-reflexive analyses of the imaginary foundations of law are essential in order to understand the way law operates in society, contributes to the continuous quest of meaning-making, and allows us to imagine specific societal forms but also to ignore or be blind to distinctive forms of exclusion and marginalization.

This means that normative commitments to liberalism, constitutional democracy, and constitutionalism do not exempt the ‘theorist-imaginer’ from investigating the conflictive and historical origins of these ideas and hence the need for a situated understanding, which reflects on the imaginary underpinnings of the modern political and legal regime identified as constitutional democracy. A closed, dogmatic insistence on the normative superiority of liberal constitutionalism in facing the widespread challenge of populism, prevents societies from re-imagining existing arrangements in the light of great inequalities and injustices. In fact, Oklopcic calls for a ‘eutopian imagination’ that invites us to go beyond simplifying dichotomies such as liberalism-illiberalism, constituent-constituted power, and nationalism-cosmopolitanism, and to critically reflect on the imaginary of self-government as such. Surely, this cannot be limited to scholarly conceptual reflection but would need to reach beyond legalistic fetishism and illusions, and to contribute to an imagination of constitutionalism that grounds the idea of the constitution as a core dimension of the everyday lives of anyone. As Oklopcic (2018: 363) puts it: ‘[a]n imagination capable of making such answers imaginable [answers that reflect on ‘other horizons of expectation’] must have a particular kind of object in focus: not the scenes of the foundations of the past, nor a utopian future nowhere, but a concrete better somewhere’.

The symposium consists in Zoran Oklopcic’s stand-alone article – which in important ways reflects on core themes of the book *Beyond the People* –, and three comments by constitutional scholars (Graziella Romeo, Giacomo Delledonne, and Giuseppe Martinico). The three comments are followed by an elaborate response by Oklopcic.

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