Constitutional Imaginary

A contribution to a blog to honour a lifetime of achievements of Professor Roberto Toniatti in comparative constitutional law.

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This post asks whether there is room for a concept of 'constitutional imaginary' in the methodology of comparative constitutional law. The question has been bubbling in my mind for a while, prompted by occasional references to the concept in the literature and my own reflections on the challenges of effective constitutional comparison. I can think of no better occasion to begin to engage with it than this innovative series of blog posts to honour the scholarly work of my colleague and friend, Professor Roberto Toniatti, who has done so much to further understanding of comparative constitutional law.

In a recent working paper, Jan Komarek defined constitutional imaginaries as 'sets of ideas and beliefs that help to motivate and at the same time justify the practice of government and collective self-rule'. In doing so he drew on an article published by Martin Loughlin several years before, identifying 'constitutional imagination' as 'the manner in which constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape – and re-shape- political reality'. The difference in terminology can be rationalised by treating 'imagination' as the generic phenomenon and 'imaginary' as its application in particular cases. Thus defined, both speak to the instinct of any constitutional scholar that beneath the layers of constitutional text, interpretation and practice are more nebulous influences that can be critical for adequate understanding of a constitutional system.

The contemporary concept of the imaginary derives from philosophy and sociology, where it has been in play at least since Sartre wrote L'imaginaire, in 1940. In one recent interdisciplinary work, 'social imaginary' was claimed to be 'constitutive of social reality', providing 'meaning-giving background', offering a 'bridge between the sensory impression and the intelligible, the conceptual' (Taylor). The usefulness of its adaptation to comparative constitutional law depends on at least two factors. One is whether it is redundant, because it already is adequately covered by existing concepts. The other is whether it has a significant role to play.

The most obvious competitor concept is constitutional identity. Constitutional identity has attracted significant scholarly attention in the first two decades of 21st century. It has links to the potential for constitutional amendment to infringe the 'basic structure' of a Constitution; has been fuelled by the dynamics of the relationship between national and European courts; and has been adapted for use in Russia to challenge the applicability of decisions of the European Court of Human Rights. Not surprisingly, given

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the variety of purposes for which it is invoked (and those identified above are by no means exhaustive), it has no fixed meaning.

In one early, influential piece, Rosenfeld distinguishes three extant usages of constitutional identity only one of which, deriving identity from context, seems potentially relevant for present purposes. Context has many dimensions, however, and in relation to identity, is used in different ways. Rosenfeld explains his own relatively expansive view of identity in terms of the 'distinct self-image' that an 'imagined community' might seek to reflect. On this view, however, constitutional identity is a form of expressivism, which does not capture the concept of imaginary either. To the extent that Rosenfeld's idea of constitutional identity speaks to the manner in which a Constitution is justified it may overlap with the concept of imaginary to some degree. The two are by no means co-extensive, however; at best, constitutional imaginary comprises an element of one version of constitutional identity. There is a danger, moreover, that a focus on identity alone would overlook the more subtle influences inherent in the concept of constitutional imaginary, which draws on sources beyond the Constitution and may be hard for an outsider to ascertain.

The second question, then, is whether constitutional imaginary has a role to play in comparative constitutional law. The scholars who have explored the concept have not necessarily done so in this context. Komarek, for example, uses the concept of constitutional imaginary to argue that two quite different visions of Europe underlie Weiler's 1991 article on 'The Transformation of Europe'. His is part of a larger project on the 'constitutional imaginaries of Europe', designed to interrogate 'deep structure' in order to resolve disagreement over, for example, the appropriate European response to actions by Hungary and Poland. Loughlin argues that 'constitutional imagination' is a key element in a process whereby written Constitutions have 'been able to colonise the political domain', an outcome he characterises as an 'ambiguous achievement'.

Both throw light on the possibilities of constitutional imaginary for comparative constitutional law, however. In Komarek, the choice between a vision of the European Union as 'unity' or 'community' offers insight in itself. It also demonstrates how imaginary may be both contested and a necessary or at least relevant resource to resolve more concrete questions. Loughlin identifies three 'contrasting visions' of political authority, drawing respectively on Hobbes, Locke and Rousseau. While his final argument is that the rise of human rights may have eroded both the space for constitutional imagination and, by inference, the differences between particular imaginaries, his analysis is illuminating, nevertheless. For a comparativist, moreover, who is inherently suspicious of universalist conclusions, it continues to hold explanatory power.

There is more to be done in determining the scope of the concept of constitutional imaginary, overcoming the challenges of identifying it and exploring the uses to which it might be put for the purposes of comparative constitutional law. Even this brief examination of the concept, however, suggests that it has potential. Awareness of the possibility of underlying constitutional imaginary, alone, might inform a comparative project. Instinctively, it may provide insight into a range of phenomena including, for example, the very different reactions of both governments and peoples in states around

the world to the measures taken to contain COVID-19. It may also explain the challenges of state-building over the course of the past three decades, in the absence of a constitutional imaginary to sustain the constitutional arrangements that are put in place. In my own country, Australia, it may point to another element that could be critical to the success of Indigenous constitutional recognition, should that occur as envisaged by the Uluru Statement from the Heart. All these are questions for another day.

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