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JUDICIAL NARRATIVE SOVEREIGNTY: NORMALIZATION OF EMERGENCY THROUGH UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN TIMES OF CRISIS

Abstract: *This paper explores the role of the courts in times of crisis and emergency. It focuses on the tension between the imaginary conceptualizations regarding the status of courts in times of normalcy and emergency that exist in the theoretical discourse and the constitutional anthropology and the empirical ways the courts contribute to the normalization of emergency in socio-legal practice by justifying crisis and emergency as “the new normal”. The paper outlines several key constitutional imaginaries related to the courts in times of normalcy. The imaginaries are structured through analytical reconstruction of the main approaches to the concept of courts provided in modern constitutionalism in pursuit of justifying the proper engagement of courts in the constitutional crisis management. This reconstruction is meant to produce both novel approaches to the role of the courts and an original typology of the imaginaries of the courts.*

Key words: Narrative, Sovereignty, Emergency, Crisis, Constitutional Amendment, Courts, Constitutional Courts, Constitutional Imaginaries.

1. INTRODUCTION

This paper explores the role of the courts in times of crisis and emergency. It focuses on the tension between the imaginary conceptualizations regarding the status of the courts in times of normalcy and emergency that exist in the theoretical discourse, the constitutional anthropology, and the empirical ways the courts contribute to the normalization of emergency in socio-legal practice by justifying crisis and emergency as “the new normal”. This is done through the prism of constitutional imaginaries as epistemic and ordering matrixes.¹

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1 More about constitutional imaginaries see Přebáň, J., 2018, Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitution-

The constitutional imaginaries are socio-legal phenomena that exist in parallel with the normative-institutional design of the constitutional order and the ways it is applied in the empirical reality. They do not negate the structural importance of the institutional design or the durable patterns of social and political behavior. Rather, they aim to add an additional layer of meaning, allowing for enhanced understanding of the ways that people perceive, understand, and organize reality – especially the constitutionally relevant phenomena in their individual consciousness. They are also tools for epistemic advancement on how people share and preserve such structural meaning in the collective constitutional unconscious and in clouds of constitutional meaning and cloud constitutionalism². The constitutional imaginaries are nodes of condensed meaning that is either broadly shared by the members of the constitutionally framed community or are imposed by authoritative and semi-authoritative narrators (apex courts, leading theorists, *etc.*). The constitutional imaginaries are signifiers of meaning that is abstract, fuzzy, and symbolically loaded. This symbolic-imaginary bundled meaning has the potential to unfold on the plains of the normative and the real. Reversely, the constitutional imaginaries are containers of meaning that has been induced from the facts and norms. It has then been wrapped in symbolic-imaginary bundles of meaning, which are emotionally appealing and can trigger the individual and collective subconscious. The constitutional imaginaries are epistemic matrixes because they enable the gaining of additional layers of meaning and extracting knowledge about the ways people perceive the courts-in-action and the courts-in-imagination. They are ordering matrixes due to their role in organizing the public understanding and the durable attitudes of the public regarding the role of courts in constitutional, legal, and socio-legal orders.³

The constitutional imaginary approach allows us to look at the courts through an additional epistemic viewpoint. They provide an epistemic paradigm that derives meaning from the institutional design of the courts and their broader conceptualization by various theories. It does not ne-

alism, *Journal of Law and Society*, Vol. 45, No. S1, pp. 30–51; Přibáň, J., 2020, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism*, Abingdon, Routledge, pp. 1–251; Komárek, J., 2020, Political Economy in the European Constitutional Imaginary – Moving beyond Fiesole, *Verfassungsblog*, (<https://verfassungsblog.de/political-economy-in-the-european-constitutional-imaginary-moving-beyond-fiesole/>), 18. 3. 2026).

2 See Belov, M., 2022, *Constitutional Semiotics: The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, Oxford, Hart Publishing, pp. 289–297.

3 The concept of constitutional imaginaries is defined and explained in section 3.1. of this paper.

gate previous successful attempts at theoretical conceptualization of the courts, which have resulted in powerful metaphors, e.g., Ronald Dworkin's Hercules judge⁴ and Martin Shapiro's "triad" conceptualization of the judge.⁵ However, it attempts to provide a more systematic account of the imaginary dimension of the courts, thus further developing previous symbolic-imaginary and theoretical approaches. Hence, the constitutional imaginary paradigm is an attempt to expand the metaphoric definitions of the courts, which have been used in the past for signifying concrete normative ideas and models of courts by providing a coherent and upgraded analytical framework. It should be noted that this paper, while providing an extensive analysis of various constitutional imaginaries of the courts, is not claiming to offer an exhaustive typology. The types of imaginaries outlined in the subsequent parts of the paper are just an invitation for reflection on the role of the courts from this particular and innovative perspective, which does not prevent the creation of additional forms of imaginaries of courts. This paper also builds upon and critically deconstructs preexisting theories, such as Montesquieu's conceptualization of the judge as the "mouth of the law".

The paper outlines several key constitutional imaginaries related to the courts in times of normalcy. The imaginaries are structured through analytical reconstruction of the main approaches to the concept of courts provided in modern constitutionalism in pursuit of justifying the proper engagement of courts in the constitutional crisis management. This reconstruction is meant to produce both novel approach to the role of courts and an original typology of the imaginaries of courts. Thus, the imaginaries are extrapolated in the context of crisis and emergency.

The analysis starts with clarification of the concepts used as part of the analysis. It outlines the concepts of emergency, normalcy, and crisis. It also explains why judicial activism⁶ and unconstitutional constitutional amendments⁷ are perceived as conceptual devices in this analysis. Special focus is devoted to the concept of narrative sovereignty as the master tool behind judicial activism, which can be used to normalize emergency through judicial activism.

4 Dworkin, R., 2003, *Law's Empire*, Oxford, Hart, p. 239ff.

5 Shapiro, M., 1981, *Courts: A Comparative and Political Analysis*, Chicago, University of Chicago Press.

6 See e.g. Belov, M., (ed.), 2021, *Courts and Judicial Activism under Crisis Conditions: Policy Making in a Time of Illiberalism and Emergency Constitutionalism*, Abingdon, Routledge; Hausegger, L., Urribarri, R., (eds.) 2024, *Judicial Activism in Comparative Perspective*, Frankfurt am Main, Peter Lang.

7 See Roznai, Y., 2019, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford, OUP.

The paper outlines the frames of a theory of narrative sovereignty. These theoretical assumptions are tested against the performance of a concrete apex court functioning as the narrative sovereign. They are proven at the end of the paper in the context of a case-study presenting the role of the Bulgarian Constitutional Court (BCC) as the narrative sovereign.

2. HOW DO COURTS NORMALIZE EMERGENCY – A CONCEPTUAL APPROACH

2.1. NARRATIVE SOVEREIGNTY

Sovereignty represents the structural core of modern constitutional ontology. It is a principle, organizing skeleton, but also fundamental narrative for structuring the Westphalian constitutional order.⁸ Hence, sovereignty has a normative and ideological role for the construction and functioning of the constitutional order serving as both ordering and explanatory matrix. It is the socio-political pillar around which the constitutional order is organized. Sovereignty, together with constitutional supremacy, are the two main manifestations of hierarchy as an epistemic and ordering matrix of the constitutional geometry of modern constitutionalism.⁹

Sovereignty is an object of mythologies of constitutional foundation and is the core of pivotal normative ideologies. Thus, it is an element of symbolic-imaginary constitutionalism¹⁰ and is signified by constitutional imaginaries, including constitutional imaginaries of representation.¹¹

Narrative sovereignty belongs to the entity (person, political player, office holder, group, *etc.*) that is capable of imposing the framing and fundamental narrative of the constitutional order. This is the narrative that structures the constitutional discourse and serves as a pillar around which the overall perceptions of the members of the constitutionally based socio-political community are organized. Narrative sovereignty consists in

8 See e.g. Jackson, R., 2007, *Sovereignty: The Evolution of an Idea*, Cambridge, Polity; Jouvenel, B. de, 1998, *Sovereignty: An Inquiry into the Political Good*, Liberty Fund; Krasner, S., 2024, *Sovereignty: Organized Hypocrisy*, Princeton, Princeton University Press. For the concept of Westphalian constitutionalism, see Belov, M., 2022, Three Models for Ordering Constitutional Orders, *Pravni zapisi*, No. 2, pp. 361–387.

9 See Belov, M., 2022, *Constitutional Semiotics: The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, Oxford, Hart Publishing, pp. 241–314.

10 *Ibid.*, pp. 107–197.

11 See Belov, M., Imaginaries of Representation: There and Back Again, in: Belov, M., (ed.), 2025, *Representative Democracy in Flux: Deconstructive Narratives from a Legal and Constitutional Perspective*, Abingdon, Routledge, pp. 17–49.

the ultimate control over the narrative that serves as main epistemological story of the legal, socio-legal, and imaginary aspects of the constitutional order. Usually, many players are engaged in battles over the narrative; these are battles for the constitutional past (at times amounting to constitutional memory wars), the constitutional present, and the constitutional future. They attempt to impose a leading, official story that is sufficiently convincing for the people and can claim legal validity. This story or narrative is signified in the constitutional text and texture via textual, visual, and performative signifiers. The imposition of an official narrative requires not only and even not necessarily the existence of substantial convincingness derived and shared rationally. The key to the imposition of the narrative is the emotional control and the affectual predominance in the constitutional conscious, subconscious, and unconscious. Hence, the battle over the narrative is both rational and emotional, intellectual and intuitive. It is a battle for the control of the means of imposing valid law, but also a war for the emotions and affectual attitudes that are activated and sustained via constitutional imaginaries.

Consequently, narrative sovereignty comprises the control over the ultimate constitutional narrative. It is achieved and sustained through the activation of emotions and imaginaries via the recourse to deeper levels of consciousness and control of awareness. Constitutional imaginaries are signifiers of emotional experience and condensed meaning.

2.2. EMERGENCY, CRISIS, NORMALCY, AND NORMALIZATION OF EMERGENCY

Crisis is a multifaceted phenomenon: it is an empirical phenomenon unfolding in the realm of facts; it is a legal phenomenon that is indirectly regulated by law through emergency and its various regimes; and it is also an imaginary phenomenon because it is represented in the individual and collective conscious, subconscious, and unconscious via forms of condensed, emotionally appealing, intuitive meaning that can be defined as imaginaries. These crisis imaginaries are signified through textual, visual, and performative meaning.

Crises can have legal and extralegal dimensions. A legally relevant crisis is regulated by public law – mostly constitutional and to lesser extent administrative law and other branches of public law (e.g., financial law in the case of financial crises). A constitutional crisis projects itself in the legal, socio-legal, and imaginary dimensions of the constitution and constitutional law. Thus, it is manifested in rational and textual constitutionalism, but also in emotional, symbolic-imaginary, visual, and performative constitutionalism.

There are various imaginaries of crisis. Some of them are tools for allocation of the crisis in space-time through consciousness.¹² Crisis can be imagined as a singular phenomenon. It can be perceived as a unique event that distorts the fabrics of normalcy, occurs suddenly and unexpectedly, and divides the space-time into the realms of “before” and “after”. A crisis can also be experienced and explained as a linear event that unfolds and gains momentum in space-time after an initial decisive push produced by a triggering event. A crisis can also be conceived as a cyclic and recurrent event. In this case it unfolds in alternating phases of normalcy and emergency. A cyclic crisis produces a sense of entrenchment of crisis in overall normalcy,¹³ thus leading to the normalization of crisis. This is because in a cyclic imaginary crisis and non-crisis alternate, thus embedding crisis as part of normalcy.

In that regard, there are three types of imaginaries of normalcy: the first is normalcy-as-non-crisis, the second is normalcy as standard with elements of (singular, linear, or cyclic) crisis embedded in overall crisis cycles, and the third is crisis as normalcy where crisis is the norm and non-crisis is the exception.¹⁴ This third imaginary can be related to concepts such as constitutional polycrisis and emergency constitutionalism.¹⁵

The imaginary of normalcy-as-non-crisis suggests that the crisis is an entirely extra-legal and non-constitutional phenomenon: the constitutional space-time is organized as fabrics of normalcy; emergency is incapable of normalizing the crisis since the crisis is fully incompatible with any form of normalcy.¹⁶

12 See Belov, M., Pulsing Constitutionalism and the Dichotomy between Dark and Bright Constitutionalism as Driving Force in Constitutional Space-Time, in: Belov, M., (ed.), 2026, *Legal Imaginaries of Crisis and Fear*, Abingdon, Routledge, pp. 297–307.

13 See Agamben, G., 2019, *Homo Sacer II*, Sofia, Critique and Humanism Publishing House (in Bulgarian); Durantaye, L. de la, 2009, *Giorgio Agamben: A Critical Introduction*, Redwood City, Stanford University Press, pp. 335–365.

14 See Belov, M., Crisis as Opportunity and Emergency as Normalcy in Transformative Age, in: Belov, M., (ed.), 2026, *Constitutional Polycrisis and Emergency Constitutionalism*, London, Palgrave, pp. 1–23.

15 See Belov, M., 2023, The Conceptual Shapes of Constitutional Polycrisis: Deconstruction, Asymmetries and Post-Modern Anxieties of Constitutional Normalcy, *Irish Jurist*, Vol. 70, pp. 393–410; Belov, M., 2023, Rule of Law in Europe in Times of Constitutional Polycrisis, Constitutional Polytransition and Democratic Discontent, *Diritto pubblico comparato ed europeo, Rivista trimestrale*, Vol. 25, No. 3, pp. 875–884; Belov, M., (ed.), 2026, *Constitutional Polycrisis and Emergency Constitutionalism*, London, Palgrave.

16 See Schmitt, C., 2005, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago, University of Chicago Press, p. 5; Benjamin, W., 1999, *Gesammelte Schriften*, Vol. II.1, Frankfurt am Main, Suhrkamp, p. 179; Benjamin, W., 2003, *Über den Begriff der Geschichte*, textz.com, (http://www.burg-halle.de/home/129_baetzner/)

The imaginary of predominant normalcy, with possible ruptures of its continuum via crisis, dominates the constitutional discourse. It suggests that while normalcy – defined explicitly or implicitly by the constitution – is the rule, the crisis is a possible exception. A crisis is a temporal exception from normalcy and can be normalized in a certain narrow framework and as a matter of exception – through emergency. The emergency is a temporally and spatially limited instrument for partial normalization of crisis.

The imaginary of crisis and emergency as normalcy is grounded in the belief of the overwhelming nature of crisis. This imaginary and emotional approach to constitutional order implies that crisis is an inevitable, perpetual, multifaceted and overwhelming phenomenon. This situation can be defined as a constitutional polycrisis conceived not as unique and transformative events in the context of civilization shift and constitutional polytransition,¹⁷ but rather as a durable, long-lasting, and persistent process. Thus, crisis as normalcy can be managed only through emergency constitutionalism¹⁸ as a holistic legal response. This shifts normalcy and transforms emergency and its forms, procedures, and regimes into the “new normal”.

Emergency is the legal response to crisis. It is the constitutional model for crisis management. Most constitutions provide for different types of emergency – institutional, formal, and procedural modalities through which emergency facilitates crisis management, with various safeguards for human rights. The constitutional models of emergency are then further developed by acts of parliament, acts of government, judicial decisions, *etc.* Conversely, the institutions for crisis management through emergency regimes are supposed to act within the framework of the emergency regimes and the types, forms, and procedures provided by the

SoSe_2017/benjamin_Ueber_den_Begriff_der_Geschichte.pdf, 23. 8. 2023); Kistner, U., 2011, *The Exception and the Rule: Fictive, Real, Critical*, *Telos*, Vol. 157, pp. 43–59.

17 See Belov, M., 2023, *Rule of Law in Europe in Times of Constitutional Polycrisis, Constitutional Polytransition and Democratic Discontent*, *Diritto pubblico comparato ed europeo, Rivista trimestrale*, Vol. 25, No. 3, pp. 875–884.

18 See Belov, M., *Rule of Law and Democracy in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?*, in: Belov, M., (ed.), 2023, *Rule of Law in Crisis: Constitutionalism in a State of Flux*, Abingdon, Routledge, pp. 21–47; Belov, M., *Mastering emergency situations: The activist role of the Bulgarian Constitutional Court in redefining the constitutional design of war, state of siege and state of emergency*, in: Belov, M., (ed.), 2021, *Courts and Judicial Activism under Crisis Conditions: Policy Making in a Time of Illiberalism and Emergency Constitutionalism*, Abingdon, Routledge, pp. 171–194.

constitution. If they begin to master emergency regimes and impose their stories and versions of crisis, emergency, and normalcy, they act as narrative sovereigns. In such cases, they go beyond the constitutional models of emergency and the constitutional allocation of the relationships between crisis, emergency, and normalcy. More specifically, courts performing as normative story tellers become narrative sovereigns producing unconstitutional constitutional amendments through judicial activism.

2.3. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS PRODUCED THROUGH JUDICIAL ACTIVISM STEMMING FROM NARRATIVE SOVEREIGNTY OF THE APEX COURTS

All constitutions provide a model for their amendment or for the adoption of a new constitution. Unconstitutional constitutional amendments occur when the preconditions, forms and procedures for constitutional reform are not observed.

Unconstitutional constitutional amendments can be accomplished by political institutions. This can happen when a constitutional amendment is not adopted by the required institution (*e.g.*, special covenant, constituent or Grand National Assembly) or when it is produced circumventing the formal and procedural rules (*e.g.*, by non-observing the required quorum, majorities, or number of voting *etc.*). Unconstitutional constitutional amendments may occur also through the circumventing of a compulsory constitutional referendum or lack of approval of the constitutional amendments by multiple subsequent parliaments. To sum up, an unconstitutional constitutional amendment is a constitutional amendment that contradicts the model for constitutional reform provided by the constitution. This can differ according to the institutional, formal, and procedural requirements provided by the specific constitutional model of the constituent power.

Traditional theories of constituent power reject the engagement of institutions of constituted powers, *e.g.*, the apex courts,¹⁹ in constitutional reforms. Thus, the courts and even the apex courts (supreme courts and constitutional courts) are not allowed to carry out the so-called “virtual amendment” of the constitution.²⁰ This consists in implying of meaning

19 For the concept of apex court see Schlegel, *St. Activism as Defence: The Role of Courts in Shaping the Relationship between Constitutions and International Law. A comparison of the apex Courts of Switzerland, Germany, and Austria*, in: Belov, M., (ed.), 2022, *Courts and Judicial Activism under Crisis Conditions: Policy Making in a Time of Illiberalism and Emergency Constitutionalism*, Abingdon, Routledge, pp. 43–61.

20 See Massey, I. P., 1972, *The Process of Amendment and The Constitution. A Study in Comparatives*, *Journal of the Indian Law Institute*, Vol. 14, No. 3, pp. 407–419.

in the constitutional concepts by virtue of constitutional interpretation by the constitutional or other apex courts, without formal amendment of the constitutional text. Hence, the traditional theory of constituent power attempts to prevent the narrative sovereignty of the courts by prohibiting their engagement in virtual amendment of the constitution.

The capacity to accomplish virtual constitutional amendments results in judicial activism, which transforms the courts into political players, fostering their engagement in battles for control of the overarching and framing constitutional narrative. Thus, judicial activism is an instrument for the production of unconstitutional constitutional amendments through (mis)use of the open texture of the constitutional provisions and narrative control, resulting in narrative sovereignty.

It must be noted that virtual amendments of the constitution, although incompatible with traditional understandings of the role of constitutional courts and the separation between constituent and constituted powers, do not necessarily result in unconstitutional constitutional amendments. Such amendments occur when constitutional courts clearly depart from the meaning of the constitutional provisions and/or approve unconstitutional constitutional amendments carried out by another institution. This is the case, *e.g.*, when the parliament adopts a new emergency regime through an act of parliament, which contravenes the constitutional model of emergency and the models of emergency provided as an exhaustive list by the constitution. This has been the case in Croatia and Bulgaria where the constitutional courts approved such unconstitutional new regimes of emergency adopted during the COVID-19 pandemic.²¹

3. CONSTITUTIONAL IMAGINARIES OF THE ROLE OF COURTS AND THEIR IMPLICATIONS IN THE CONTEXT OF CRISIS AND EMERGENCY

3.1. THE CONCEPT OF CONSTITUTIONAL IMAGINARIES IN A NUTSHELL

Constitutional imaginaries are containers of condensed meaning. They serve as proxies of meaning spanning the realms of the legal, the socio-legal, the theoretical, and the imaginary aspects of constitutionalism. They are nodes in a web of constitutional consciousness that organizes

21 See Gardasevic, Dj., *Activism of the Croatian Constitutional Court and COVID-19: A Bridge Too Far*, in: Belov, M., (ed.), 2021, *Courts and Judicial Activism under Crisis Conditions: Policy Making in a Time of Illiberalism and Emergency Constitutionalism*, Abingdon, Routledge, pp. 194–213; Belov, M., 2021, pp. 171–194.

meaning in the form of cloud constitutionalism.²² The clouds of constitutional meaning are the transpersonal containers of meaning that frame the collective constitutional consciousness. In that regard, both constitutional imaginaries and clouds of constitutional meaning are containers of meaning and forms for the manifestation of the phenomenology of constitutional consciousness.

The constitutional imaginaries are symbolic-imaginary signifiers of constitutional meaning derived from the permutations of the constitutional consciousness in the realms of valid law, social life, and emotional, affectual, intuitive, and imaginary experience. They are organized in a network of imaginaries that signifies constitutional meaning in a quantum manner. The clouds of constitutional meaning are forms for organization of cloud constitutionalism. Cloud constitutionalism is the imaginary container of constitutional consciousness in the process of its permanent quantum unfolding and projection in space-time.

In parallel to this conceptual essence, constitutional imaginaries also have a pragmatic aspect consisting in their role for organization and understanding of the constitutional order. Constitutional imaginaries serve as epistemic nodes in a web of meaning and tools for organization of the understanding of the constitutional actors. These are the people acting in different roles as citizens, office holders, civic activists, *etc.* Constitutional imaginaries organize understanding of the quantum unfolding of constitutional phenomena in a way that combines their rational and emotional, intellectual and intuitive, pragmatic and symbolic-imaginary understanding. Constitutional imaginaries are induced, derived from, and reconstructed through their manifestations in space-time where their quantum meaning is signified through norms, institutions, facts, and ideals, emotions, affects, and symbols.

This paper outlines the main constitutional imaginaries of courts as central phenomena (institutions, players, normative constructs, and empirical performers) of the constitutional order.²³ At the same time, it exposes the adequacy and epistemic capacity of these imaginaries to explain the role of courts in the context of crisis and emergency. It should be mentioned that “judge” and “court” are used at times synonymously and on other occasions as different concepts. This is because the judges and the courts are addressed in this perplexed and intermingled way by the con-

22 See Belov, M., 2022, *Constitutional Semiotics: The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, Oxford, Hart Publishing, pp. 289–297.

23 For alternative imaginaries of courts, see Gava, J., 2001, The Rise of the Hero Judge, *University of New South Wales Law Journal*, Vol. 24, No. 3, p. 32.

stitutional imaginaries produced in constitutional and political theory or in collective constitutional consciousness. It should be noted that this classification of constitutional imaginaries is not exhaustive. There are also other rather important approaches to understanding the role of courts and judges from metaphorical, imaginary, and typological standpoints. There are court typologies proposed from conceptual, comparative, historic and other perspectives. However, most of them do not employ the constitutional imaginary approach that I try to offer in this paper. Here one can mention the famous triad scheme proposed by M. Shapiro,²⁴ the evolutionary typology of Laurence Tribe, *etc.*

The first three imaginaries outlined below represent the courts as institutions massively shaped by and allocated in rational and textual constitutionalism.²⁵ Thus, they are embedded in the rationalist entrapment of Modernity²⁶. They are variations stemming from rationalist, positivist, and systemic thinking. Hence, they are interrelated – in various ways and to different extents – with the predominant schools of legal thought – namely legal positivism, legal institutionalism, and system theory of law.²⁷ Some of them can also be related to other doctrinal paradigms as well. For example, the *Begriffsjurisprudenz* is traditionally embedded in German pandectism and the German historical school, but its climax, under Bernhard Windscheid, resulted in a particular variant of legal positivism.

The final section discusses constitutional imaginaries devoted especially to the constitutional courts. They are related to a certain extent to the overall imaginaries of courts. For example, the imaginary of the constitutional courts as just courts and the imaginary of the constitutional court as a negative legislator are variants of the imaginary of the judge as the “mouth of the law” and the courts as syllogistic law-administering and law-implementing machines, and the imaginary of the courts as legal computing machines. The imaginary of the constitutional court as a positive legislator is related to the imaginary of courts as system agents and the imaginary of the courts as narrative sovereigns.

24 Shapiro, M., 1981, *Courts: A Comparative and Political Analysis*, Chicago, University of Chicago Press.

25 *Ibid.*, pp. 55–107.

26 *Ibid.*, pp. 49–55.

27 For a very interesting modern conceptualization of the role of courts with regard to the impact of automation of the judicial process, see Kelemen, K., Miranda, L. de, 2024, Courts as Anthrobots: Learning from Human Forms of Interaction to Develop a Philosophically Healthy Model for Judicial Automation, *International Journal for Court Administration*, Vol. 15, No. 2, p. 1.

3.2. THE IMAGINARY OF THE JUDGE AS THE “MOUTH OF THE LAW” AND THE COURTS AS SYLLOGISTIC LAW-ADMINISTERING AND LAW-IMPLEMENTING MACHINES

The imaginary of the judges and the courts as the “mouth of the law” (*la bouche de la loi*) is probably the most traditional, well-established, powerful, and wide-spread judge-related imaginary in constitutional modernity.²⁸ It was proposed by Charles de Montesquieu in his book *The Spirit of Laws (De l'esprit des lois)*. This imaginary represents the judge and the courts as fully politically detached and even sterile institutions²⁹. They are deprived of any political discretion on the meaning of law. According to Montesquieu, the power of the judges is inexistent,³⁰ at least in political, discretionary, and socio-constructive sense. The judges and the courts are law-implementing machines that are focused on the function of implementation and control of application of laws. They administer justice in simple, transparent, non-discretionary, and syllogistic ways. The courts are deprived of any instruments for implying of meaning. Law is understood in an entirely non-quantum way: predetermined, clear, definitive, and unambiguous. The legal order is conceptually predetermined and ontologically bound by the will of the nation functioning as a “secular God” and speaking through the mouth of the parliament and possibly other political institutions.³¹ This concept was later developed in representative democratic³² and radical democratic ways in the post-revolutionary age, in the course of the “long 19th century”.³³ However, both trends preserve the role of courts as politically sterile law-implementing devices.

28 For a recent critical analysis of Montesquieu’s theory of separation of powers and the conceptualization of the role of courts it provides, see Claus, L., 2004, *Montesquieu’s Mistakes and the True Meaning of Separation*, *University of San Diego Public Law and Legal Theory Research Papers Series*, Art. 11.

29 See also Spruk, J., 2024, *Montesquieu’s Image of a Judge in the Light of the Separation of Powers Doctrine*, *Pravnik*, Vol. 79, Nos. 1–2. pp. 69–85.

30 According to Montesquieu, “Of the three powers we have spoken of, that of judging is in some way null” (*des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle*). See Montesquieu, C., 2010, *De L’Esprit Des Lois*, Whitefish, Kessinger Publishing, pp. XI, 6. For different roles and figures of the judge in Montesquieu’s theory, see also Spector, C., 2015, *La bouche de la loi? Les figures du juge dans L’Esprit des lois*, *Montesquieu Law Review*, No. 3, pp. 87–102.

31 See Belov, M., *Imaginariness of Representation: There and Back Again*, in: Belov, M., (ed.), 2025, *Representative Democracy in Flux: Deconstructive Narratives from a Legal and Constitutional Perspective*, Abingdon, Routledge, pp. 17–49.

32 See Carrese, P., 2003, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism*, Chicago, University of Chicago Press, pp. 11–105.

33 See Hobsbawm, E., 1996, *The Age of Revolution: 1789–1848*, New York, Vintage.

The judge cannot play with the meaning contained in law. The meaning is stable, unchangeable, univocal, and impossible to be shifted, e.g., through interpretation, virtual amendment or other techniques for judicial law-making. Even if this is possible, the judge is prohibited from performing as an implicit policy-maker through interpretative tool-kits and tactics. Interpretation is either prohibited or limited to grammatic and systematic interpretations, which should not vest judicial discretion for linguistic maneuvering.

The imaginary of the judge as the “mouth of the law” is supplemented with the imaginary of the judge as a syllogistic law-administering and law-implementing machine. This second imaginary is inspired by the Aristotelian syllogistic logic.³⁴ It is also manifested in the Roman *sententia Da mihi factum, dabo tibi ius* (“Give me the facts and I will give you the law”). It suggests the automatic delivery of legal solutions once the facts are subsumed under the norm. The judge is just the medium, channel or facilitator of this process of subsuming the facts under the norms. The imaginary of the judge as a syllogistic law-administering and law-implementing machine is a logical and pragmatic extension of the substantial-political claim by Montesquieu and his followers.

Consequently, we are confronted with an early modern liberal imaginary, organized around the theories of Montesquieu and Aristoteles. It emerged in the early phases of modern Western constitutionalism, assigning meaning to the role of courts in constitutional Modernity and their function in the “new regime”, established after the bourgeois revolutions that marked the constitutional transition brought about by the industrial and mobility revolutions of the 18th and 19th centuries.

According to this imaginary, the courts are technocratic institutions of secondary importance in the overall scheme of the constitutional and political order. They are fully subjugated to the fundamental political decisions adopted by the political institutions speaking on behalf of the sovereign (the people, the nation, the monarch, *etc.*). Thus, the imaginary of the courts as “the mouth of the law” and syllogistic law-administering and law-implementing machines is entrenched in Westphalian constitutionalism.³⁵ The imaginary of the courts as the “mouth of the law” and the

34 For more on Aristotelian syllogistic logic, see Novaes, C. D., *The Dialogical Roots of Deduction: Historical, Cognitive, and Philosophical Perspectives on Reasoning*, Cambridge, Cambridge University Press, pp. 108–130.

35 See Belov, M., Judicial Dialogue: Westphalian or post-Westphalian Constitutional Phenomenon, in: Belov, M., (ed.), 2019a, *Judicial Dialogue*, The Hague, Eleven, pp. 25–51; Belov, M., Global Rule of Law instead of Global Democracy? Legitimacy of Global Judicial Empire on the Edge between Westphalian and post-Westphalian

courts as syllogistic law-administering and law-implementing machines is combined well with the imaginary of the legal order as a perfect, non-controversial, logical, rational, and textual system of rules (organized as a normative and institutional system) and with the imaginary of the parliamentary government as a rational, logical, and systematic chess board.³⁶ Together they form the rationalist-textualist imaginary matrix of Western Modernity, leading to its “rationalist entrapment”.³⁷

The imaginary of the courts as “the mouth of the law” and syllogistic law-administering and law-implementing machines implies that the courts must remain fully neutral in the event of crisis and emergency. They must entirely follow the political directives adopted by the political institutions in range of forms – acts of parliament, executive orders, *etc.* Thus, the courts have no role in managing the crisis and emergency. They are just channeling the will of the parliament, the government, the ministers and controlling the formal-procedural legality of the crisis management.

3.3. THE IMAGINARY OF THE COURTS AS LEGAL COMPUTING MACHINES

This is another imaginary that frames the courts as technocratic and policy-detached law-implementing institutions. This imaginary represents the courts as technocratic promoters of normalcy embedded in law-as-humanitarian-mathematics.³⁸ It implies that normalcy is a textual, logical, rational phenomenon that frames the social and legal world as a natural science matrix. Normalcy stems from order and order is a predetermined, systemic, logical, and non-quantum phenomenon.

In this regard, the imaginary of the courts as legal computing machines³⁹ resembles the imaginary of the courts as syllogistic law-admin-

Constitutionalism, in: Belov, M., (ed.), 2019b, *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven, pp. 99–133.

36 See Belov, M., Imaginaries of Representation: There and Back Again, in: Belov, M., (ed.), 2025, *Representative Democracy in Flux: Deconstructive Narratives from a Legal and Constitutional Perspective*, Abingdon, Routledge, pp. 17–49.

37 Belov, M., 2022, *Constitutional Semiotics: The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, Oxford, Hart Publishing, pp. 49–55.

38 For an interesting example of this approach, see Termini, M., 2019, Proving the Point: Connections Between Legal and Mathematical Reasoning, *Suffolk U. L. Rev.*, Vol. 52, No. 5, pp. 5–35; Jarvad, M., Mathematical Thinking and International Law, in: Booß-Bavnbek, B., Høystrup, J., (eds.), 2003, *Mathematics and War*, Basel, Birkhäuser, pp. 367–389.

39 For contemporary versions and interpretations of the same idea, see e.g. Susskind, R., 2019, *The End of Lawyers?: Rethinking the nature of legal services*, Oxford, Oxford University Press; Ronkainen, A., From spelling checkers to Robot Judges? Some

istering and law-implementing machines. The imaginary of the courts as legal computing machines suggests that the courts operate in a systemic field, whereas the imaginary of the courts as syllogistic law-administering and law-implementing machines is a simplified and early modern version of a simple model of rationality. This imaginary is not directly interrelated with liberal normative ideologies. Instead, it is neutral to ideological variations and thus can be practiced in a range of ideological contexts. However, the imaginary of the courts as legal computing machines serves the same function to promote the role of the courts as neutral arbiters and non-politic experts allowing a *laissez-faire* type of political economy. This imaginary has gained momentum with the rise of historical school of law, during the second half of the 19th and the first half of the 20th century. Nevertheless, it was later excessively used beyond its natural law and historic school of law origins, within the legal positivist paradigms that thrived during the 20th century. It is embedded in excessive rationalism serving as a key normative ideology of Western Modernity. Hence, the imaginary of the courts as technocratic promoters of normalcy, embedded in law-as-humanitarian-mathematics, is part of “rationalist entrapment” of Modernity.⁴⁰

According to this imaginary, the courts are entrenched in a logical, rational, and systematic constitutional order. This order is provided by the written law, serving its framing function as *ratio scripta* or “written reason”. It is composed of a perfect system of concepts ordered in rational matrixes. This crystal-like structure of the constitutional order, where the concepts are the nodes, is perfect. Its perfection is achieved through rationalization, textualization, and systematization. The system functions in a purely rational way. The epistemology of the conceptual matrix is accomplished through the logical manipulations of conceptual induction, deduction, multiplication, comparison, *etc.*

Hence, the law, the legal order, and the constitutional order function as “humanitarian mathematics”. This imaginary was coined for private law by Bernhard Windscheid, one of the most prominent scholars of the German theory of the “jurisprudence of concepts” (*Begriffsjurisprudenz*). He declared the ideal of this theory to reduce law to “humanitarian mathematics” allowing for “counting with concepts” (*Rechnung mit Begriffen*).

implications of normativity in language technology and AI & law, in: Branting, K., Wyner, A., (eds.), 2021, *Proceedings of the ICAIL 2011 workshop applying human language technology to law* (Masaryk University), pp. 48–53; Vermeys, N., The Computer as the Court: How Will Artificial Intelligence Affect Judicial Processes?, in: Kramer, X., Biard, A., Hoevenaars, J., Themeli, E., (eds.), 2021, *New Pathways to Civil Justice in Europe: Challenges of Access to Justice*, Berlin, Springer, pp. 61–80.

40 *Ibid.*

Thus, the imaginary of the courts as legal computing machines is embedded in the overall *Zeitgeist* of the codification movement of the 18th and 19th century and the rationalist project of Modernity.

According to this imaginary, the court is merely an arithmetic machine. It is part of the overall enterprise of the legal order to function as a fully predictable mathematical system. In this context, the only role for human intelligence, performed by the judge, is to be aware of the predetermined and objective meaning of the legal and constitutional concepts. This meaning is only discovered by the judge, but it is created in a determinist way by the political institutions. The judge must be able to induce, deduce, and compare the concepts as embedded in the textual, rational, and logical system of meaning.⁴¹

Hence, this theory also relies on a phenomenological network for production of meaning. However, in contrast to quantum constitutionalism, it suggests that the meaning is predetermined as well as initially univocally universal and epistemically accessible. Moreover, in contrast to cloud constitutionalism, this theory presupposes the textual entrenchment of meaning. In other words, it rests upon the axiom that meaning cannot exist in irrational containers, such as imaginaries and emotions, as proxies for higher consciousness, or in the constitutional conscious, subconscious, and unconscious. Last but not least, the mathematical conceptualization of the constitutional order is structured through concepts of law contained in rational and textual constitutionalism, which are derived by way of human reason through textual interpretation. This is quite different from the web of meaning structured around constitutional imaginaries, which is spread in constitutional consciousness and dependent on the quantum unfolding. In contrast to the web of concepts of the *Begriffsjurisprudenz*, which is textual, rational, and objective, the web of imaginaries is powered by human consciousness and mastered through intent as a tool for the reduction of conceptual uncertainty. This intent is achieved through a mixture of reason and affectual attitudes, through intellect and intuition.

The imaginary of the court as a machine for counting with concepts and of the judge as a legal and constitutional mathematician suggests more than an entirely neutral, politically sterile, and non-discretionary role of the courts in crisis and emergency conditions. It also promotes the idea that the judge is an agent of pure rationality and source of quasi-mathematic solutions, derivable from a fully predetermined system of emergency rules. Hence, it presupposes that emergency is a mathematical model written in law and capable of rationally mastering crises. It

41 See also Schmitt, C., 1934, *Über die drei Arten rechtswissenschaftlichen Denkens*, Hamburg, Duncker&Humblot.

suggests that the courts are mastering the conceptual network for crisis management in a systematic, logical, and rational way. This imaginary is a technocratic upgrade of the imaginary of the courts as “the mouth of the law” and syllogistic law-administering and law-implementing machines. It not only claims that the courts are non-political, apolitical, and politically inferior. It implies that the courts are like humanitarian computers operating in a sterile context, detached from emotions, interests, and other meta-legal factors. Thus, they are supposed to produce fully predictable and entirely rational outcomes.

3.4. THE IMAGINARY OF COURTS AS SYSTEM AGENTS

This imaginary is an alternative and enhanced version of the previous imaginary of the courts as syllogistic law-administering and law-implementing machines and imaginary of the courts as legal computing machines. It rests upon similar claims of the rationality and technocratic nature of courts. However, this is a more complex imaginary embedded in the system theory of law, which perceives the courts as neutral agents of the system following its implicit teleology.⁴² The courts serve as tools for the adjustment of the legal order in response to the shifts in the socio-legal context. Hence, the process of law application is not simplistic and reductionist as is the case with the imaginary of the courts as syllogistic law-administering and law-implementing machines. It is detached from the structuralist rationale of the courts as legal computing machines and is bound to serve the more complex and neutral logic of the system theory.

The imaginary of the courts as system agents allows for their implicit engagement in the overall political system. The courts cannot adjust the system to the context without a degree of embeddedness in the political process. Nevertheless, the courts are promoters of the system logic and not political agents with discretionary power.

The imaginary of the courts as agents of the legal and constitutional system is very much applicable in the context of constitutional polycrisis and constitutional polytransition. Constitutional polytransition presupposes deep, multilayered, and structural shifts in the legal and the constitutional order. They stem from the multitude of challenges produced by the plentitude of transitions. They overburden the system thus leading to multiple crises. These crises overlap and jointly produce a constitutional polycrisis, adding to the pressure of constitutional polytransition on the constitutional order.

42 See e.g. Luhmann, N., 2008, *Law as a Social System*, Oxford, Oxford University Press; Teubner, G., 2012, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford, Oxford University Press, pp. 38–42.

Hence, the role of the courts, as systemic agents, is to help the system to adjust to the dynamic, manifold, deep, and structural transformations. In this context, the courts are tools for self-adjustment of the constitutional system to external and internal shocks related to the constitutional polycrisis and constitutional polytransition. The courts are instruments for reproduction of order out of disorder.

3.5. THE IMAGINARY OF COURTS AS THE PURIFIERS OF THE CONSTITUTIONAL BODY

The imaginary of the courts as ultimate purifiers of the legal and constitutional order is a very powerful one. It implies automatic self-cleansing of the constitutional system from negative phenomena, *e.g.*, corruption, nepotism, clientelism, political patronage, which lead to inefficiency and injustice by virtue of the activity of a powerful and autonomous court system that abides only by the law and is safeguarded against political influence. This is originally a liberal Anglo-American imaginary that is at the core of the very concept of rule of law instead of rule of men. It stands behind the massive push for constitutional, legal, and judicial reform in Central and Eastern Europe during the transition from communism to liberal democracy. The “rule of law instead of rule of men” imaginary can be embedded in systemic logic and thus serve as justification for the imaginary of the courts as system agents. However, it can also be applied as a core for the crystallization of the imaginary of the courts as ultimate purifiers of the legal and constitutional order.

The ultimate goal of this imaginary is to allow for the legal and constitutional order to be structured in a way that limits the impact of political institutions on the machinery of law. Law is imagined as self-sufficient system that relies on its implicit and implied logic – embedded in its internal values, forms, and procedures. Thus, the political institutions (*e.g.*, parliaments, presidents, governments, *etc.*) must be restrained to follow the rules since their discretion is limited to making the system run in line with its own values, goals, and principles.

The central role in minimizing rule of men and maximizing rule of law is assigned to the courts. According to this imaginary, if the court system is well-organized, independent and autonomous then it serves as an ultimate check on misuse of power. This is a fundamental precondition for smoothing the operation of the law, conceived as an autopoietic system. In that context, order is derived from order and constitutional order is achieved through the autonomous operation of the law and its safeguards. The self-regenerating order and the constitutional balance maintained in

an autopoietic way are themselves important constitutional imaginaries. Crucially, the courts play a special role for their practical fulfilment or at least for their imaginary representation as part of a liberal constitutional imaginary landscape. In that context, the courts are imagined as neutral engines of rule of law and purifiers of the system.

In the framework of this imaginary, the courts must also be able to perform the functions of purification and autopoiesis in times of crisis and emergency. They should serve as the agents allowing for rule of law instead of rule of men in the context of an emergency regime introduced due to crisis – whether real or imaginary. Hence, the courts should be safeguards of normalcy in times of emergency too. They must prevent the turning of emergency into normalcy through fear politics, and this should be the ultimate goal of the rule of law achieved through the courts.

3.6. THE IMAGINARY OF THE JUDGES AS PRIESTS OF THE LAW AND THE COURTS AS TEMPLES OF RULE OF LAW

The imaginary of the judges as priests of rule of law⁴³ is interrelated with the function of the courts as purifiers of the system. These are two different imaginaries that serve the purpose of representing the centrality of courts for rule of law, based constitutional autopoiesis. These are both rule-of-law-centered imaginaries. They imply the centrality of rule of law for ordering the constitutional order, emphasizing liberal values, and suggesting the courts as key elements in maintaining constitutional autopoiesis, and the self-development, self-sustaining and self-perpetuation of constitutionalism as a rules-based process.

Nevertheless, the imaginary of the courts as the purifiers of the constitutional body is more neutral and systemic. It suggests the capacity of the system to maintain a substantial level of integrity through its agents and with regard to freedom, liberty, and rule of law and these agents ought to be the courts.

At the same time, the imaginary of the judges as priests of rule of law and the courts as temples of rule of law is prone to technocratic aspirations. This occurs because if the judges are legal priests preserving a sacred object, *e.g.*, the constitution, the constitutional order, the legal autopoiesis, *etc.*, then they may legitimately claim exclusive access to this knowledge and even a privileged position within the constitutional order. This automatically turns them into political players and assigns

43 For the metaphor of the judges as priests of law, see also Soper, P., 1977, *Metaphors and Models of Law: The Judge as Priest*, *Michigan Law Review*, Vol. 75, No. 5, pp. 1196–1213.

them an active and discretionary role in emergency constitutionalism and crisis management.

Hence, the imaginary of the judges as priests of rule of law and the courts as temples of rule of law is a gateway for imaginary justification of technocracy, which departs from the initial liberal foundations of the idea of courts as neutral and independent guardians of law. The imaginary of the judges as priests of rule of law and the courts as temples of rule of law is the bearer of non-democratic and quasi-caste implications, representing the judges as bearers of privileged knowledge. Thus, this imaginary is diametrically opposite to the imaginary of the judges and the courts as the “mouth of the law” and Montesquieu’s strive to prevent the government of judges (*gouvernement des juges*). Hence, the imaginary of the judges as priests of rule of law and the courts as temples of rule of law can be used as a legitimation strategy for juristocracy⁴⁴ and a global judicial empire.⁴⁵

The main rationale behind the imaginary of the judges as priests and the courts as temples of rule of law lies in their function as safeguards of rule of law in general and of the constitution, its principles, and human rights, in particular. Themis, as a goddess of justice, is a well-established symbolic representation of this idea, having multiple manifestations in various forms of visual constitutionalism. She has been depicted in paintings, but especially in sculptures and the architecture of the courtrooms and courthouses, perceived as “temples of justice” or “temples of Themis”. This is in line with the pretentious claim that “law is the art of the good and the just” (*Ius est ars boni et aequi*). This gives the courts double legitimacy. They are both technocratic bearers of legal knowledge and channels for penetration and permeation of meta-legal standards into the legal order. Metaphorically, the role of the courts as temples of the law as “the art of the good and the just” puts the judges in the position of both secular experts and mediums channeling meta-legal wisdom. This is a powerful standing, which justifies the distinction of the judges as a privileged caste of priests of Themis.

The courts, as seen from the perspective of this imaginary, are supposed to play an important role in crisis and emergency. In their capacity as servants of justice and safeguards for constitutional standards and human rights, they should serve as protectors of normalcy. They must be the ultimate guardians of human freedom and human autonomy. Moreover, they should be the ultimate safeguards for rule of law and especially for

44 See Hirshl, R., 2007, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Harvard University Press.

45 Belov, M., 2019b, pp. 99–133.

the principles of proportionality and balancing of human rights, as well as ensuring the legal certainty and the legitimate expectations of the people.

Nevertheless, this elitist, quasi-caste imaginary can also be a promoter of undisputed axiomatic imposition of jurisprudential standards in times of crisis and emergency. This is especially problematic in combination with calls for blindly trusting science. Such appeals are transforming science into an object of quasi-religious belief. Thus, crisis and emergency, governed by two casts of modern priests – scientists and judges – can be the source of technocratic imaginaries that are intrinsically detrimental to rule of law, democracy, and freedom.

3.7. THE IMAGINARY OF THE COURTS AS NARRATIVE SOVEREIGNS

This is the most novel imaginary of courts and it is hardly compatible with the well-established theories of constitutional law, which claim that the law must be produced by political players, and the courts should be just “the third branch of power” (which is an imaginary in itself) and must only apply and safeguard the legal application of law.

The court as a law-making institution is a clear departure from constitutionalism of the 18th, 19th and most of the 20th century. The court as a law-maker is the highway to juristocracy,⁴⁶ the government of judges,⁴⁷ and a global judicial empire. These are regimes that must be prevented, according to modern constitutional theory, in both its democratic form aimed at protecting the central role of the people and the parliaments, and its monarchic or aristocratic versions preserving the centrality of the monarch and the privileged classes throughout the “long 19th century”.⁴⁸

Courts as narrative sovereigns is an imaginary that goes way beyond the imaginaries of juristocracy and government of judges.⁴⁹ It not only affirms the policy-making and law-making function of courts but also implies a special role for the courts as key players in constitutionalism, as a narrative-based project. The courts are imagined as controllers – even ultimate controllers – of the narratives. Thus, they can produce and repro-

46 Hirshl, R., 2007.

47 See Heuschling, L., Foulquier, N., Brondel, S., 2001, *Gouvernement des juges et démocratie*, Paris, Publications de la Sorbonne, pp. 1–373; Rouvillois, F., Boutin, Ch., 2023, *Le gouvernement des juges*, Paris, Desclée De Brouwer.

48 See Hobsbawm, E., 1996.

49 See e.g. Krakoff, S., A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation, in: Christensen, G., Tatum, M., (eds.), 2019, *Reading American Indian Law: Foundational Principles*, Cambridge, Cambridge University Press, pp. 188–210.

duce meaning and frame the collective consciousness through the stories they tell through judicial activism. Hence, the courts are not just “priests” of law or experts adjusting the law to the context, as suggested by some of the previous imaginaries allowing for a broader, political and discretionary role of the courts. They are the masters of meaning shaped through normative narratives, a source of creative intention that frames and forms the constitutional phenomenology and masters the matrix of meaning. Hence, this imaginary contains the risk of technocratic governance, where narratives can be weaponized by non-elected players, such as the courts.

Such a weaponization can be accomplished by the courts alone or in partnership with political institutions. A clear example is the misuse for establishment of new forms of emergency in times of crisis by justifying unconstitutional constitutional amendments made by parliaments and the constitutional courts in their decisions. These decisions not only validate the normalization of emergency and the unconstitutional redrawing of the boundaries between crisis and normalcy, but also produce narratives tracing possible shapes of non-normalcy for the constitutional future. Thus, willingly or not, the constitutional courts assume the positions of narrative sovereigns. This has been the case of the Croatian and the Bulgarian constitutional courts, which have justified new emergency regimes related to health emergency, which were produced in unconstitutional way by the parliaments of these countries.⁵⁰ The task of the constitutional jurisdictions has been to normalize emergency and to drop a veil of constitutional compliance over unconstitutional constitutional amendments triggered in times of the COVID-19 crisis (mis)management.

3.8. IMAGINARIES OF THE CONSTITUTIONAL COURTS

3.8.1. The Imaginary of the Constitutional Court as Just a Court

The constitutional court is a belated institution in the history of constitutionalism. Constitutional review and the control for constitutionality first emerged in the USA in the form of diffuse control triggered and justified by the 1803 Supreme Court decision *Marbury v. Madison*. The reason is that the courts were imagined as purely technocratic, non-political institutions that must have no discretion in the application of law. It has been already explained that during the “long 19th century” and the “short 20th century”⁵¹ they were imagined primarily as the “mouth of the law”

50 See Gardasevic, Dj., 2021; Belov, M., 2021, pp. 171–194.

51 See Hobsbawm, E., 1995, *Age of Extremes: The Short Twentieth Century 1914–1991*, New York, Time Warner Books.

and as syllogistic law-administering and law-implementing machines, or as legal computing machines performing “humanitarian mathematics”.

The imaginary of the constitutional court as just a court is in line with this reasoning and imaginary institution-mapping. According to it, the constitutional court adopts decisions that do not imply any meaning in the text of the constitution. They do not invalidate or bloc any norms. The constitutional court merely discovers and declares eventual discrepancies between the constitution and different legal acts, without having any role in their further destiny. The consequences for the engagement of the constitutional courts in crisis and emergency are, thus, similar to the first three groups of the imaginaries of courts described above.

3.8.2. The Imaginary of the Constitutional Court as a Negative Constitutional Legislator

This imaginary was created by Hans Kelsen, who is known as the intellectual father of the European model of control of constitutionality, centralized in a constitutional court.⁵² Paradoxically, Kelsen, who tried to create a “pure theory of law” that is genuinely legal, solipsistic and detached from meta-legal reasoning, has produced various powerful imaginaries, including the Grundnorm imaginary, the imaginary of the pyramid-like structure of the legal order, and the imaginary of the constitutional court as a negative legislator.

The imaginary of the constitutional court as a negative legislator suggests that the constitutional court is not just a court, because it produces norms. These are specific norms – norms related to norms, norms about norms. According to the different versions of this imaginary, the constitutional court “blocks”, “invalidates” or “abolishes” the unconstitutional norms. Hence, the constitutional court acts partially as a legislator, but only as a negative one, by erasing the non-compliances in the normative structure of law. However, the constitutional court is not a proper, discretionary or “positive legislator” because it does not adopt norms of how social relations should be regulated in the future. Hence, in contrast to the proper legislator, *e.g.*, the parliament, the constitutional court has no political discretion while performing its limited, negative norm-setting function.

According to this imaginary, the constitutional courts may invalidate unconstitutional legislation in times of crisis and emergency. Thus, they

52 See Yowell, P., The negative legislator: On Kelsen’s idea of a constitutional court, in: Belov, M., (ed.), 2020, *Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary*, Abingdon, Routledge, pp. 125–152.

function as ultimate safeguards of the constitution, including the constitutionally provided regimes of emergency. However, the constitutional courts can neither establish emergency regimes, nor justify unconstitutional constitutional amendments introduced by the ordinary legislator – the parliament.

3.8.3. The Imaginary of the Constitutional Court as a Positive Constitutional Legislator

This imaginary suggests that the constitutional court is not just a court or institution that invalidates unconstitutional legislation (negative legislator), but rather that it is an institution that can discretionarily set normative standards for the future and provide normative solutions. It can even imply meaning in the constitutional texts, accomplishing a virtual amendment of the constitution on the basis of its open texture.⁵³

This imaginary is very similar to the imaginary of the court as a narrative sovereign. It is a specific version of this imaginary that particularly addresses the role of the constitutional courts and not the role of courts in general. Moreover, the imaginary of the constitutional court as a positive legislator does not necessarily imply narrative sovereignty. This is due to the fact that the court may serve as a norm-setting institution with discretionary power and as an authoritative interpreter of the constitution and the constitutional text. However, it may not necessarily take the position of narrative sovereign aiming at ultimate control of meaning and at imposing the predominant narrative.

Hence, in the framework of the imaginary of the positive legislator, the constitutional court is not necessarily a narrative sovereign in crisis and emergency. It may further develop constitutional regimes of emergency without automatically justifying unconstitutional constitutional amendments through narrative sovereignty. Rather, it may engage in emergency and crisis narratives. However, the engagement of the constitutional court and whether it will misuse its position to justify unconstitutional constitutional amendments, thus normalizing emergency in a non-constitutional way, depends on concrete judges in the specific socio-legal context. Thus, the imaginaries of the constitutional court as a narrative sovereign and the constitutional court as a positive legislator can be combined with the imaginary of the constitutional court as a systemic agent adapting the constitutional order to the shifting context.

53 On the open texture of law, see Hart, H. L. A., *The Concept of Law*, Oxford, Oxford University Press, 1997, pp. 124–136.

4. THE BULGARIAN CONSTITUTIONAL COURT: NARRATIVE SOVEREIGN OR PROTECTOR OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS INTRODUCED BY THE POLITICAL BRANCHES OF POWER?

Unconstitutional constitutional amendments are not limited to explicit constitutional amendments carried out by the typical constitutional legislator, which may be a special covenant, the parliament, the people via referendum, *etc.* In some countries, *e.g.*, Bulgaria, the constitutional courts are accomplishing virtual amendment of the constitution⁵⁴ based on the open texture⁵⁵ of the constitutional provisions. Thus, they serve as positive constitutional legislators, despite the predominant understanding that the constitutional courts are just a special type of courts. The Bulgarian Constitutional Court acts as a positive constitutional legislator,⁵⁶ further developing the values, principles, non-self-executable norms, and the abstract provisions enshrined in the constitution. This is due to the fact that the Court is allowed to provide abstract interpretations of the constitutional provisions. Moreover, the Bulgarian Constitutional Court is a very activist court. It regularly extensively implies meaning in the constitutional provisions far beyond textualist and originalist approaches. The provision of a new form of emergency, through the “unholy alliance” between the National Assembly and the Constitutional Court, is an example of such activist further-development of the constitution. The two institutions have created an emergency regime that is clearly neither intended nor provided by the constitution. Hence, this constitutes a case of unconstitutional constitutional amendment jointly produced by the parliament and the constitutional court.

This case study aims to demonstrate the performance of a constitutional court as a narrative sovereign protecting and promoting unconstitutional constitutional amendments through control of the narrative. The analysis focuses on a particular but very important decision of the Bulgarian Constitutional Court – Decision 10 of 2020. The decision was adopted

54 See Tanchev, E., Belov, M., 2008, Constitutional Gradualism: Adapting to EU Membership and Improving the Judiciary in the Bulgarian Constitution, *European Public Law*, Vol. 14, No. 1, pp. 3–19.

55 See Hart, H. L. A., 1997, pp. 124–136.

56 Belov, M., Tsekov, A., The Constitutional Court of the Republic of Bulgaria as Law Maker, in: Florczak-Wator, M., (ed.), 2020, *Judicial Law-Making in European Constitutional Courts*, Abingdon, Routledge, pp. 91–111.

in the context of the COVID-19 pandemic crisis and emergency, as part of the political normalization of emergency through narrative control.

Decision 10 of 2020 of the Bulgarian Constitutional Court concerns the constitutionality of the legislative amendments introduced in the Health Act and organized around the concept of a “extraordinary epidemic situation”.⁵⁷ This emergency regime was created by the Parliament. It constitutes a fourth type of emergency regime that was added to the existing three regimes – war, state of siege, and state of emergency – provided for by the Bulgarian Constitution.

The creation of the “extraordinary epidemic situation” constitutes an unconstitutional constitutional amendment. This is due to the fact that the Constitution explicitly only provides for the abovementioned three emergency regimes. Thus, they are the only constitutionally permissible forms for crisis management beyond the constitutional normalcy. Additional and new emergency regimes can be created, but only through an explicit constitutional amendment. It cannot be introduced through a simple legislative amendment justified by the Constitutional Court through an unconstitutional constitutional amendment.

The introduction of this fourth form of emergency regime was politically motivated by the government, which needed to limit human rights in the context of the COVID-19 pandemic, but without permanent recourse to a state of emergency. The reason for this was that the narrative of emergency was politically problematic since the majority of the Bulgarian citizens were strongly opposed to the rather unpopular pandemic measures. Hence, the problem was also related to political rhetoric, in addition to the legal and medical issues. Thus, it was also a matter of narrative control and resulted in narrative games and efforts to impose narrative sovereignty in times of crisis.

The linguistic game is also visible in the consultative opinions delivered to the Constitutional Court by the interested parties and experts. The President of the Republic was the initiator of the case for the unconstitutionality of the legislative provisions introducing the “extraordinary epidemic situation”. In the rationale of his decree, he criticized the legislative approach used in the definition of an emergency epidemic situation in the Health Act, using a generic concept of disaster. In his opinion, it aimed to distinguish an extraordinary epidemic situation from a state of emergency. The President believed that despite the difference in the wording, a state of emergency and an “extraordinary epidemic situation” are identical. Thus, the linguistic difference concealed the substantial identity. The

57 For a detailed analysis of this decision, see Belov, M., 2021, pp. 171–194.

Minister of Health, who was the formal initiator of this fourth form of emergency regime, stated that “the legislator uses the category ‘extraordinary epidemic situation’ to qualify the disaster, but not to introduce a state of emergency as it is known by the constitutional provisions.” In his opinion, Prof. Kamen Plochev, one of the experts, largely explained the medical terminology used by the legislator and the preconditions that can activate the “extraordinary epidemic situation”.

Hence, constitutional issues and political battles were reduced to linguistic matter. This clearly demonstrates the power of narration to control substantial crisis and emergency issues. Narrative control as a tool for imposition of meaning functions as narrative sovereignty in times of crisis.

Such linguistic battle over terminology and linguistic concepts was used by the Constitutional Court to justify its engagement in linguistic games, obscuring the constitutional and socio-political essence of the issue. In other words, the power games related to human rights and constitutional principles were masqueraded as linguistic games. The Constitutional Court went into a detailed conceptual analysis of the state of emergency and the “extraordinary epidemic situation”. This approach allowed the Court to take control of the narrative and subrogate itself in the position of a narrative sovereign. The narrative sovereignty consisted of the approval of the “extraordinary epidemic situation”, on the basis of primarily linguistic arguments, which led to the confirmation of an unconstitutional constitutional amendment.

The Constitutional Court carried out a conceptual overview of the state of emergency in the history of Bulgarian constitutionalism. It also makes an overview of the use of the concept of the state of emergency in international law and in domestic legislation. The main reason behind such a terminological analysis was to demonstrate an attempt at a conceptual definition of the state of emergency stemming from historical, international, and legislative discourses, transferring the linguistic findings also to the constitutional level. The Court went beyond the clear hierarchy of norms in Bulgarian law where the constitutional provisions (including the meaning of constitutional concepts provided by them) have supremacy over all other sources of law, with the exception of EU law. Thus, the courts made logically and legally unacceptable impositions of meaning, derived from inferior acts or from abolished acts, on the concepts regulating crisis and emergency provided by the Constitution. Moreover, these conceptual overviews were made superficially, in a perfunctory manner, and with the clear intent to justify the predetermined approval of the unconstitutional constitutional amendment by the Court. Consequently, this shallow reasoning was used merely as a smoke screen for the Court’s po-

litical task of approving a fourth type of emergency regime that had been adopted in an unconstitutional way.

The Constitutional Court made a stunning and wrong suggestion that the state of emergency is equal to constitutional dictatorship. It attempted to justify this unsustainable statement with linguistic games, *e.g.*, by defining the state of emergency through various concepts which are synonymous according to the Constitutional Court. For example, the Constitutional Court suggested that the state of emergency is constitutional dictatorship and “emergency or crash mode of functioning of the constitutional system.”

The Constitutional Court entered into a detailed linguistic analysis of the emergency. It outlined its concept, types, common features for different variants of emergency, *etc.* The Constitutional Court suggested that “the sparing regulation of the state of emergency at the constitutional level shows that the regulation of individual specific manifestations of this regime is provided by the legislator through acts of parliament.” This wrong assumption by the Constitutional Court lead to the false conclusion that, because the three constitutionally provided forms of emergency are regulated laconically, this allows the Parliament to create a fourth type of emergency. This is both legally and logically wrong, but the deficiencies in the argumentation were wrapped up in linguistic games. The Constitutional Court, for example, played with the words “extraordinary”, “exceptional”, “sudden”, and “devastating”. According to the Constitutional Court:

“it can be assumed that being an ‘emergency’, a crisis threatening society does not necessarily lead to the declaration of a state of emergency. When it is to a degree that does not require crisis management of the state, its control can be related to the introduction of a situation that will help the state’s efforts to overcome it, without the need to declare a state of emergency.”

Furthermore, the Court cites some dictionaries in order to conclude that:

“... the legislator does not use the word ‘circumstance’ (temporary, but relatively permanent) ‘state of public life’ in the expression used in Article 63 of the Health Act, but uses the word ‘situation’ (having rather an incidental character) and meaning: situations, conditions under which something exists or manifests itself, in this case – a disaster caused by an infectious disease, which leads to an epidemic spread with immediate danger to the life and health of citizens. Obviously, the aim is not to deviate from the established order of state management, but to introduce a special regime of protection, through which urgent measures should be taken to protect and preserve the life and health of citizens.”

Due to space constraints, the analysis of Decision 10 of 2020 of the Bulgarian Constitutional Court is limited to the abovementioned citations from its rationale. They clearly demonstrate the concept of narrative sovereignty and its (mis)use for the justification of unconstitutional constitutional amendments in times of crisis and emergency. They also show that the performance of the Bulgarian Constitutional Court matches the imaginaries of the court as a narrative sovereign and a positive legislator.

5. CONCLUSIONS

This paper has outlined several key constitutional imaginaries of courts. These imaginaries have been structured around the main narratives on courts, their essence, standing, functions, and tasks produced in constitutional Modernity. These narratives are contained in political and legal philosophy, theory of state, and constitutional theory. Together they form a general narrative on the concept of courts and their allocation in the constitutional order. These imaginaries have also been signified in textual, visual, and performative constitutionalism. The paper demonstrates the main implications of these imaginaries in the context of crisis and emergency.

The imaginary of the courts as narrative sovereigns, or at least as participants in narrative games in textual constitutionalism, and the imaginary of the constitutional courts as positive legislators have been used as epistemic paradigms for understanding the performance of the Bulgarian Constitutional Court in the context of the COVID-19 pandemic. The analysis demonstrates that in the COVID-19 pandemic the BCC functioned as a narrative sovereign. It justified and even enhanced an unconstitutional constitutional amendment produced by the Parliament.

Hence, the Court did not function as the “mouth of the law”, *i.e.*, a technocratic body limited to law implementation or a safeguard against unconstitutional constitutional amendments introduced by the political branches of power – the government and the Parliament. Instead, it paved the way for the normalization of emergency and justified the crisis as “the new normal”, by virtue of linguistic games, misusing the constitutional narrative established by the constitutional legislator.

This case-study has been used to show the epistemic power of the concept of narrative sovereignty and the definition of the court’s performance through the prism of constitutional imaginaries. The constitutional imaginary approach can be applied to all courts – the Bulgarian case-study has just been a demonstration of its epistemic power and advantages.

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SUDSKI NARATIVNI SUVERENITET:
NORMALIZACIJA VANREDNOG STANJA KROZ
NEUSTAVNE USTAVNE AMANDMANE
U VREMENIMA KRIZE

Martin Belov

APSTRAKT

Ovaj rad istražuje ulogu sudova u vremenima krize i vanrednog stanja. Fokusira se na napetost između imaginarnih konceptualizacija statusa sudova u normalnim i vremenima vanrednog stanja koji postoje u teorijskom diskursu i ustavnoj antropologiji. Takođe, ovaj rad istražuje i empirijske načine na koje sudovi doprinose normalizaciji vanrednog stanja u društveno-pravnoj praksi, opravdavajući krizu i vanredno stanje kao „novu normalnost“. Rad opisuje nekoliko ključnih ustavnih pretpostavki u vezi sa sudovima u normalnim vremenima. Pretpostavke su strukturirane kroz analitičku rekonstrukciju glavnih pristupa konceptu sudova koje pruža savremeni konstitucionalizam, u nastojanju da se opravda pravilno angažovanje sudova u upravljanju ustavnim krizama. Ova rekonstrukcija ima za cilj da proizvede novi pristup ulozi sudova i originalnu tipologiju pretpostavki o sudovima.

Ključne reči: narativ, suverenitet, vanredno stanje, kriza, ustavni amandman, sudovi, ustavni sudovi, ustavne pretpostavke.

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