



Challenges to EU legitimacy and the role of EU courts

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RECONNECT Workshop:

Re-conceptualizing authority and legitimacy in the EU:
new architectures and procedures
to reconnect the Union with its citizens

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A What are the 'legitimacy challenges' of the EU?

B 4 challenges for the EU

C some tasks for the European courts to strengthen democracy and the rule of law, to enhance the authority and legitimacy of the EU

Conclusion

A What are the 'legitimacy challenges' of the EU?

If the EU institutions are the solution for citizens and EU states,

- what are the problems?
- And do the EU institutions *actually* help solve these problems – without creating too many new problems?



When are the EU institutions
legitimate authorities over citizens and
European member States?

RECONNECT:
When is the EU justified in having and
exercising various legal competences?

... when the EU institutions help citizens and states pursue
their appropriate objectives (Raz).

Citizens have reason to pursue their own life plans, and
interact with others on fair terms within *just* institutions
(Sangiovanni)

States have reason to protect and promote these interest of
their citizens – and, to some extent, for others individuals

*What are the tasks that EU institutions are seen to carry out, to
help citizens and states in these objectives?*

...and the EU, international organizations,
international courts etc ..



“The federal and State governments are in fact but different agents and trustees *of the people*, constituted with different powers, and designed for different purposes.”

(Madison , Federalist Papers #46)

This was easier before ...

EU as a peace project: - a 'global public good'-benefits all



Robert Schumann/Monnet 1950 (Rye)

...Franco-German production of coal and steel as a whole placed under a common High Authority, ...

The pooling of coal and steel production ... setting up of common foundations for economic development as a first step in the federation of Europe, ...

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.

- Still: not clear that the EU was directly necessary to secure peace: Democracies don't fight each other, so European democratic states wouldn't fight anyway...
- BUT: the EU may STILL help European states *remain* democracies...
- NOW: the EU serves several *more* tasks that are *not* 'global public goods' –more contested, with skewed costs and benefits.

The Lisbon Treaty on European Union - Preamble

Some of the tasks – within constraints

... deepen solidarity between the peoples

while respecting their history, culture, traditions...

Enhance the democratic and efficient functioning of the domestic institutions ..

.. strengthen and converge their economies..

.. promote economic and social progress for their peoples, taking into account sustainable development, environmental protection..

Common foreign and security policy (defense policy).. to promote peace, security and progress in Europe and in the world,...

... facilitate the free movement of persons,

... creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity ...

Article 2:...founded on the rule of law and respect for human rights,

How and when can the EU institutions do these tasks - better than the states and citizens cooperate without deferring to common institutions –e.g. by intergovernmental agreements?

- and how *show* this?

How contribute to ‘bring the Union closer to the people’ – 5 ways:

1 address collective action problems e.g. coordination problems, reduce the likelihood of freeriding..

2 Enable states to ‘precommit’ and increase trust also toward own citizens

3 Provide external *independent monitoring* – increase transparency (Mattarella), *assurance* of rule of law and constitutional constraints (Corkin, Sandulli, Montero), and *enable accountability* (Navarro)

4 Manage and implement conflicts about how to specify these objectives, ‘balance’ them, and allocate their benefits and burdens

- Domestically, done by scholars (Lupo), and deliberative, majoritarian democratic constitutional process, variously defined (Montero), ‘input legitimacy’ (Raube)

- in EU opaque, too much by unchecked economic experts? (Sandulli)

5 *Remind* & assure citizens that the EU does the tasks - *if* it does...

B 4 challenges for the EU

as a legal and political order with federal elements:

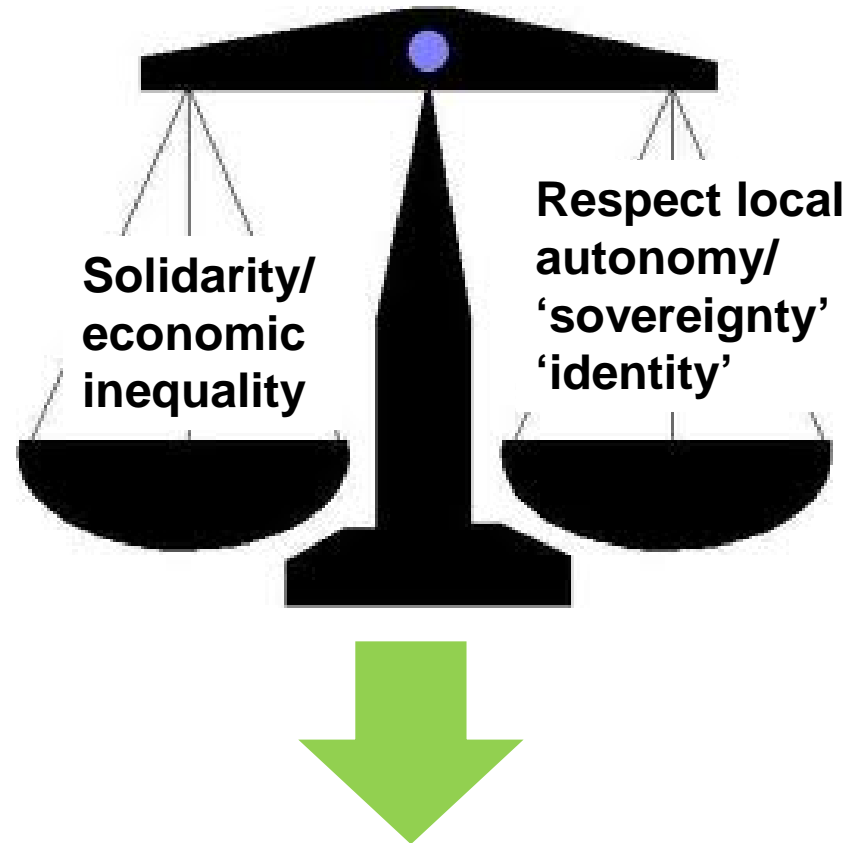
final legal authority is dispersed between (at least) 2 levels of government

1 Many tasks/objectives, with constraints

Requires

- Creativity
- constant monitoring of constraints
- difficult priorities
 - Which objectives to maximize, which to 'satisfice,' which treat as side constraints ...
 - Each choice imposes different bundles of benefits and burdens among states, and among individuals..
 - So will be contestible – and contested

2 Economic inequality & fairness in Federations



- Federations tend to spend less at the local level
- There is greater inequality *within some 'coming together' federations*



3 Instability

Federal legal and political orders are more unstable than unitary states

← Centralization Fragmentation →

- Higher levels of *constitutional* contestation: which tasks should central authorities pursue?
- Even higher stakes in federations that constitutionally permit secession:

Soviet Union, Ethiopia – and the EU.



Exit option affects contestation and bargains:

- tasks,
- burden sharing,
- willingness to bear short term costs for the sake of longer term benefits since some actors may leave before it is their turn to bear the costs

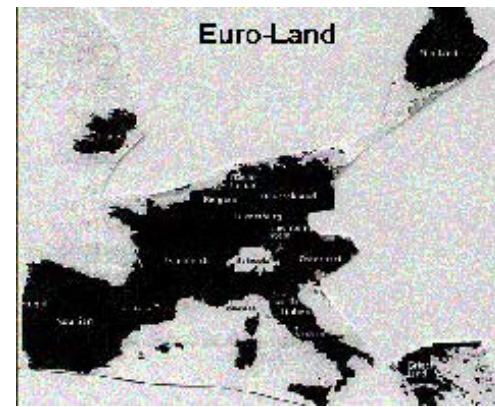
4 Asymmetric union

Different member units enjoy
different competences

- In Spain, Canada.. different regions have varying competences regarding language, education, economic policy...
- EU: Eurozone, Schengen..

For different states and citizens, the federal institutions have different tasks: permanent and correct disagreement about *what the federation is for*.

EU institutions must carry out *different tasks, balanced differently*, to be legitimate authorities for different states and citizens of the EU.

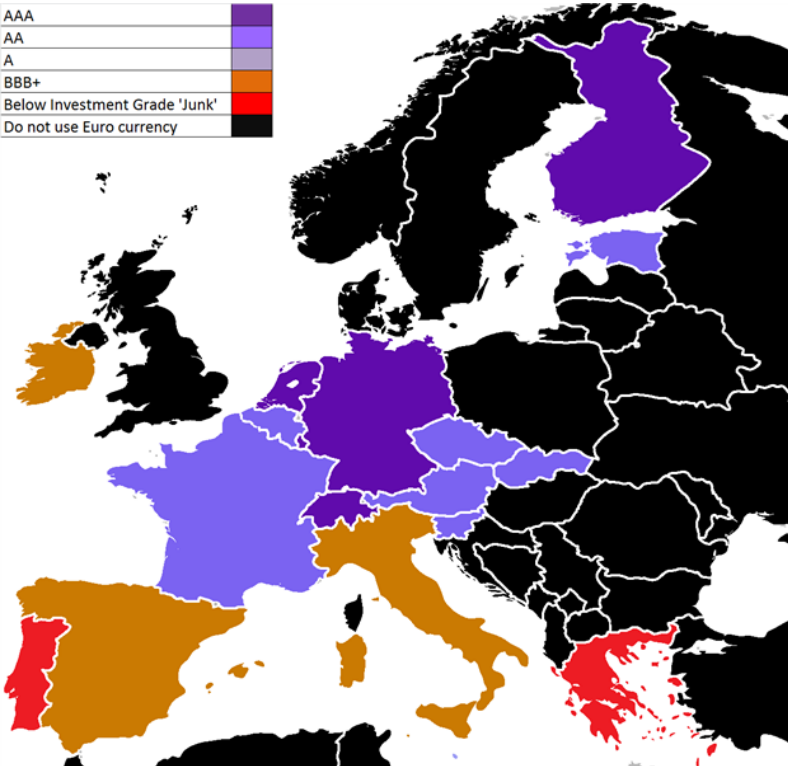


-- combined:

- Who bears responsibility for humanitarian assistance to refugees on Italy's shores?
- who must bear the responsibility, and who must bear the burdens of responses to the Euro crisis:
 - those who are hit;
 - those who chose (democratic) domestic responses;
 - other Euro-states, or
 - all EU member states?



AAA	Dark Purple
AA	Light Purple
A	Medium Purple
BBB+	Orange
Below Investment Grade 'Junk'	Red
Do not use Euro currency	Black



C Some tasks for European courts

– including national judiciaries and the European Court of Human Rights:

1 ***Perform*** some of the tasks that make the EU a legitimate authority:

- Monitor and sanction treaty violations e.g.
 - in pursuit of four freedoms,
 - strengthen domestic democracy (‘input legitimacy’ – Pinelli), rule of law and respect for human rights...

2 'guard the guardians' - Monitor whether domestic authorities and EU institutions

- requires a clear(er) separation of powers (Montero)

- carry out their tasks *as agreed*: collective action, self binding..
- while respecting the various constraints eg concerning environment, human rights, respect for national history and culture..., complying with subsidiarity..

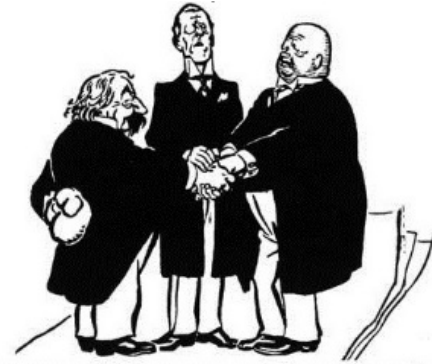
Such review is itself one form of accountability, and necessary to

- *Remind* citizens and officials why the institutions claim to exercise legitimate authority – their tasks – foster understanding of the 'closeness of EU to citizens'
- democratic accountability to help citizens and states check whether EU officials and institutions perform these tasks - 'output' legitimacy (Navarro, Pinelli)

3. Manage and constrain the political and legal contestation

including high temperature 'constitutional contestation' about the proper tasks of the EU (input legitimacy, Pinelli):

- to ensure the conditions for deliberative democratic decision making, domestic and European: freedom of organization, media monitoring and fact checking about promises and actual performance of officials..
- To ensure that no agreements
 - prevent democratic and efficient functioning of the domestic institutions
 - violate 'Union values' – including the human rights obligations of the states and of the EU institutions



4. Provide public credible information to states and citizens – whether the domestic and EU institutions actually carry out the above tasks - *Including the CJEU*

- *Domestic* courts and parliaments important to check & monitor the CJEU to ensure that it avoids *unjustified centralization* –
 - e.g. Subsidiarity mech. to protect national cultures, ‘identities’, welfare arrangements ..
- Domestic authorities and European Parliament – *and the Eur Court on Human Rights (?)*: to reduce risk that the CJEU constitutionalizes 4 freedoms unduly, e.g. over human rights
 - Requires better multi-level separation of powers (Montero):
 - “counter-limits’ by states: Solange, Taricco (Piccirilli, Rye)
 - Role of Eur Court of Human Rights?

Would such monitoring and review of the CJEU make a difference?

- The two courts might *disagree* on how human rights (including the right to strike, and national traditions) should constrain four freedoms –
 - ‘International Transport Workers’ Federation v Viking’ (ECJ 2007) and ‘Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, I-11767 (ECJ 2007).
- It is important to enhance the credibility of EU institutions - including the CJEU
- - by means of independent review bodies such as *domestic* courts and the ECHR

Conclusions...

The legitimacy challenges of the EU will continue:

- The best allocation of tasks and competences, and 'solidarity' are contested in any (quasi) federal legal and political order
- The asymmetric EU -> citizens and states will continue to disagree and bargain about what the EU institutions are for, and what are necessary 'balancing' of tasks

Such public contestation are to be welcome:

–perpetual vigilance to ensure that someone guards the guardians

- to remind citizens and authorities that we should demand public answers to questions:

- what the states and the EU are *for*,
- *Who decides those questions, in sufficiently democratic modes, when we disagree..*
- whether the EU institutions actually perform these tasks

European courts

...may contribute to review and monitor these claims about the tasks and the contestations, and thereby

- Strengthen domestic and European rule-of-law institutions
- facilitate more democratic accountability in the European Union and
- Help states and citizens determine whether they have reason to defer to the legitimate EU institutions,

because they perform important tasks for them even when they disagree and think it unfair in

particular cases [Sangiovanni]

– or disobey –

– or exit...

