

RECONNECT

Reconciling democracy and the rule of law in the EU and its member state A challenge of constitutional isomorphism

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**Re-conceptualizing authority and legitimacy in the EU: New architectures
and procedures to reconnect the union with its citizens**

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Open ended concepts

- Meaning of the rule of law (Venice Commission Rule of Law Checklist 2016): 5 categories with 23 sub-categories
 - Legality, legal certainty, prevention of abuses, equality before the law and non discrimination, access to justice,
 - Polysemy and lack of specificity/excess of specificity sources of disagreement
- Meaning of democracy (ruling of the people, by the people and for the people)
 - Equal vote and universal suffrage
 - Mechanism for alternance in power (periodic elections)-Free competition for office
 - Beyond that: huge variety in the models of democracy. Frequent association with qualifying adjectives: liberal, representative, participatory,



Democracy and rule of law...values or principles?

- Ethics: value beliefs that are given the capacity of determining what actions are best to do or what way is best to live (deontology), or to describe the significance of different actions (axiology).
 - Examples: solidarity, freedom, equality, fraternity
- A principle : law or rule that has to be, or usually is to be followed, or can be desirably followed, or is an inevitable consequence of something, such as the laws observed in nature or the way that a system is constructed. Users understand principles of such a system as the essential characteristics of the system, or reflecting system's designed purpose, and the effective operation or use of which would be impossible if any one of the principles was to be ignored.
 - Examples of principles (in constitutional law): consent of the governed, separation of powers, rule of law, respect for fundamental rights
- Difference between:
 - Principles of law
 - **Constitutional principles**
- Relationship: Values inform constitutional principles...but also overlap



Values and principles in the EU composite two-level polity

EU level

values (art. 2)

- respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities
- pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men

Constitutional principles

- Explicit identification in treaties: **Proportionality, subsidiarity, conferral, equality before the law (value) and the “democratic principle”**
- Implicit (jurisprudential construction): legal certainty, **institutional equilibrium**

Member state level

values

- Recognition of isomorphism in values (art. 2 values are common to the Member States)

Constitutional principles

- Variety (federalism, for instance)
- **Separation of powers**
- Representative democracy



Commitment to the principle of separation of powers in EU Member States

Explicit identification of the principle of separation of powers

France (Declaration of Rights of Man), Poland, Hungary, Romania, Slovenia, Croacia,

Attenuated explicit reference to separation of powers (no principle)

Bulgaria, Germany, Finland, Portugal

Implicit: clear delimited boundaries among state powers

Belgium, Luxemburg, Italy, Austria, Sweden, Czech Republic, Spain, Greece

Looser implicit constuction of separation of powers

Netherlands, Ireland, Cyprus, Estonia, Denmark, UK



The problem.....

- Violations of the value “rule of law” by national authorities do not affect significantly the central categories of the value (legality and legal certainty, equal access to the law –of individuals). Rather, they refer to the attempts by executives to eliminate checks and balances on their own powers.
- Breachers appeal to the democratic principle to justify their actions: no state operates a perfect principle of separation of powers and the interaction with the democratic principle determines the intensity of checks and balances



...and the derived constitutional challenge: a two level relationship between constitutional principles

- Domestic democracy and rule of law provide a solid basis to question EU democracy
- EU side: only adherence to rule of law permits the challenge to domestic democratic (extreme) modulation of the principle of separation of powers. However, EU rule of law is only isomorphic with domestic rule of law as far as legality, legal certainty and legal equality are concerned. But:
- The EU does not adhere to the principle of separation of powers and it permits the fusion of law-making powers (at the supranational level) with national executive powers.
- Despite its adherence to democratic principle, EU is systematically accused of non being democratic. Hence, the critique goes; a non democratic entity mediates in decisions concerning the articulation of the separation of powers within democratic states
- Challenge to legitimacy (justification to the exercise of public authority) question: do EU values inspire EU constitutional principles?



Conclusion: reconciling democracy and rule of law?

- Is there an alternative way to reconcile RoL and Democracy than the one infinitely rehearsed at the state level?
- Deepening EU constitutional principles (specifically, separation of powers) → enhancing democracy too: towards a more federal model

