

Supra-separation of powers.

EU and pluralism of legal orders from the perspective of the theory of the institution

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THEORY OF THE INSTITUTION

Theory of the institution has been elaborated by French public law scholar Maurice Hauriou (1856-1929). Similar approach can be seen in works of Santi Romano (1875-1947) in Italy. Legal institutionalism of the beginning of the 20th century has inspired neoinstitutional theory of law conceived by N. McCormick and O. Weinberger which is one of the most important sources of contemporary doctrines of constitutional pluralism in the EU legal science.

OUTLINE. CRITICAL THEORY

Theory of the institution aimed at adopting methods of historical analysis and social sciences to legal science. Institutional concept of law was essentially a sociological one, based on the assumption that legal acts are socially determined, and their analysis should include all external social, political, and material facts linked to law. Institutional theory of law can be therefore resumed as a criticism of formalistic approach to law, normativism, but also to legal voluntarism, contractualism and, on the other hand, strict naturalisms reducing law to one source of norms. Instead, institutionalism assumed a pluralism of forms and sources of law

Science of law based on the analysis of institutions as social organizations evolving in time (continuity), guided by inner logic based on their 'idea of enterprise' and throughout participation of their members and social auditorium.

INSTITUTIONAL CONCEPT OF SEPARATION OF POWERS

Following the concept of divided sovereignty the state organs ought never be strictly separated in functional sense. All organs should co-participate in the same process of exercising the same competence via different forms of action (decision), competing for social legitimacy and compliance with social constitution ('**auto-limitation**').

Rather than separation of powers, legal theory should insist on the **balancing and cooperation of powers**. Judicial power has special authority of review of acts taken by other state organs.

Classical Montesquieu's concept			
legislative power	executive power	judicial power	
Institutional concept			
law making and law enforcement exercised by			
electoral power	deliberative power	executive power	judicial power

SEPARATION OF LEGAL ORDERS

Importantly enough, following the assumption of pluralism of legal orders in forming social organization, Hauriou insisted also on division of power through 'superposition' of legal orders and their mutual balancing (**équilibres de superposition**)

CONCLUSIONS

Hauriou's institutional theory of law may be reinterpreted in the contemporary context and propose an interesting, radically pluralist vision of mutual competitiveness of potentially equivalent, autonomous legal orders which, brought together, constitute a space for citizens' enhanced vigilance and agency in the protection of their rights.

Under Hauriou's concept of pluralism, separation of legal orders in the EU combined with their mutual counterbalancing can therefore be seen as some sort of **supra-separation of powers on a multi-level European scale**, constituting an additional institutional safeguard for fundamental principles of liberal democratic values.

REDEFINITION OF KEY CONCEPTS OF CONSTITUTIONAL LAW

Democratic representation

Criticism of the concept of delegation of power. Power should be exercised by the whole society through execution of social legitimacy. No political body has monopoly over representation of the society through the concept of 'democratic will'.

Sovereignty

All authorities are social 'constituted bodies', even electoral or constitution-making power of people. None of them can therefore claim exclusive sovereignty. Sovereignty is therefore inherently **divided** between institutions claiming power over society and **competing** for social legitimacy in a **compound social order**.

Hierarchy of norms

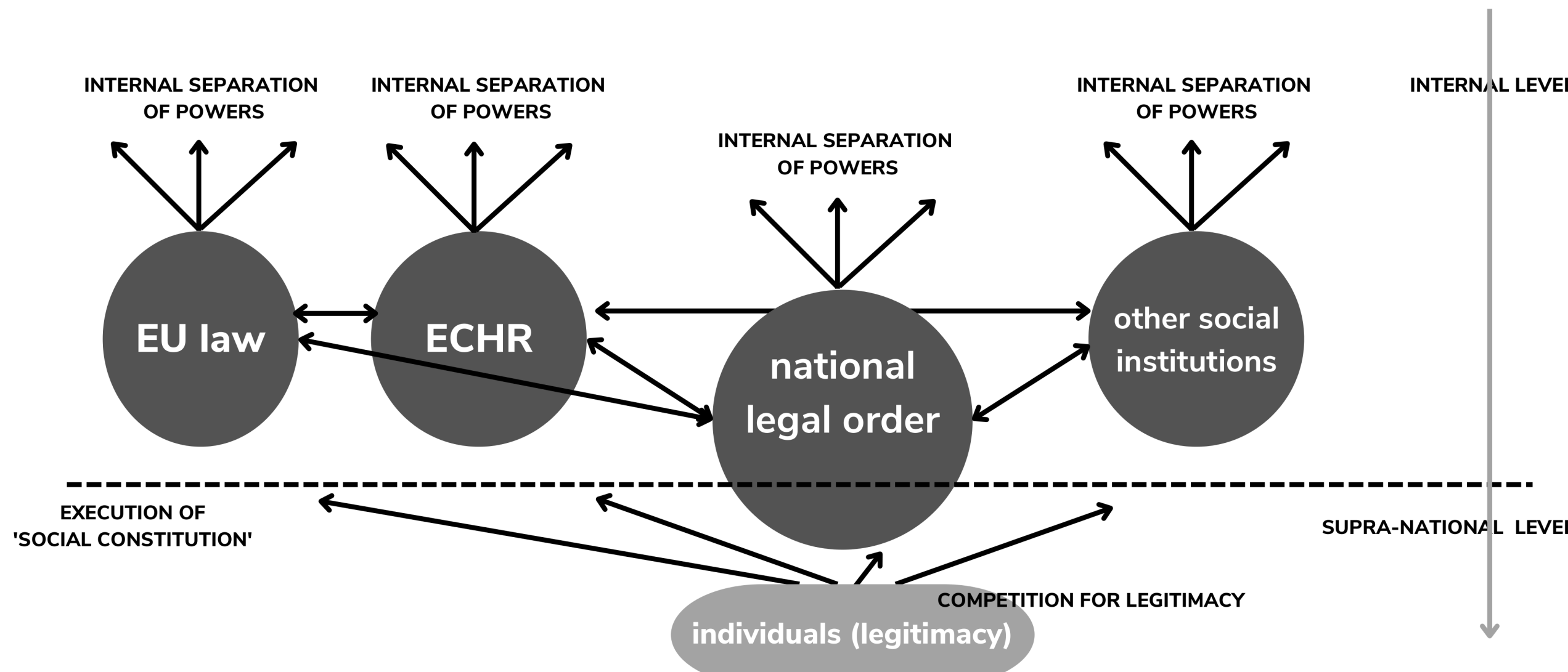
The level of normativity depends on their **social legitimacy** by social 'adhesion to them', not on their formalistic attribution to some legal categories or their legal source

Constitution

Constitution can be divided into '**social**' and '**political constitution**'. Social one is constituted by fundamental values, principles of law and fundamental rights perceived socially. The political constitution, understood as a set of arrangements of power (rules of political order), is subject to them and destined to turn them into reality. This generates hierarchy between different constitutional rules and goals of legal order.

POWERS IN THE COMPOSED EU LEGAL ORDER. SUPRA-SEPARATION

In the context of conflicts between legal orders in the EU (EU law and national constitutional law for instance), it is possible to argue that rules such as primacy of EU law or supremacy of national constitutions belongs to 'political constitution'. In case of conflict between their outcomes concerning substantive issues of fundamental rights, **these orders are in competition** and, therefore, in principle equal (although historical position, such as that of the nation-state, is a part of the social legitimacy that they compete for)



Example: overlapping of claimed competence over rule of law principle interpretation in the context of the reform of justice in Poland since 2015.

POSSIBLE APPLICATION

constitutional pluralism doctrines, doctrine of 'reverse Solange', doctrine of Solange, European constitutional law theory, human rights paradigms

MORE ABOUT THIS RESEARCH

- Maurice Hauriou's theory of the institution. Legal institutionalism and the science of the state, Archiwum Filozofii Prawa i Filozofii Społecznej 3(32)/2022 (Open Access).
- Working paper „Primacy of EU law in the perspective of M. Hauriou's institutional theory of law. Supra-constitutionality thesis as a way out of the fallacy of constitutional pluralism?” (published on my Academia webpage).

Do you want to know more or exchange thoughts?

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