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Théo Fournier

**An essay on rule-
of-law culture and
constitutional resilience**

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Abstract

This essay argues that rule-of-law culture could be an avenue of research to address the issue of constitutional resilience of liberal democratic regimes, i.e. the capacity of liberal constitution to resist the passage of time and to remain legitimate in the eyes of the citizenry. Firstly, I use Rawls' definition of originating and joining consent and Easton's work on diffuse and specific support to explain how constitutions must activate specific mechanisms of support to resist the passage of time. I believe that rule-of-law culture could be a central mechanism. Secondly, I provide an account for a conceptualisation of rule-of-law culture. I identify three dimensions: between citizens, between institutions and between citizens and institutions. I then subdivide rule-of-law-culture in three components: constitutional consciousness, rule-of-law consciousness, and rights consciousness. Thirdly, I explain how direct experience and socialisation can contribute to the strengthening of rule-of-law culture.

Keywords: rule-of-law culture; constitutional resilience; political support; legitimacy of constitutions

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An essay on rule-of-law culture and constitutional resilience

Théo Fournier¹

Introduction

How does a constitution resist the passage of time? How does a legal and constitutional framework remain legitimate in the eyes of the citizenry, years, if not decades after its adoption?

A first way to look at the question of the resilience of a constitution through time, or constitutional resilience, is to understand where the constitution comes from. The context of adoption of a new constitution does matter. In constitutional law studies, constitutions are often detached from their contexts of adoption. Yet, constitutional scholars tend to forget that most constitutions are adopted after a moment of great political crisis, if not after a war. A constitution closes a moment of political uncertainty and opens a new chapter which is supposed to be based on better values than the previous system. How does the constitution resist the passage of time? Through its full implementation. It is the implementation of the constitution and the values it carries that can ensure the resilience of the constitution. This is – in a very summarised way – the view of transitology studies which consider that the adoption of the constitution is not an end but the beginning of the consolidation of democracy.²

Constitutional studies take an opposite view of transitology studies and consider that the flexibility of the constitution can be a guarantee of its resilience. Constitutions are living instruments and the original text of a constitution merely remains the same throughout time. This flexibility is expressed through constitutional amendments and constitutional interpretation.

Constitutional amendments change the text of the constitution. They might change it to the point that the amended constitution can create an institutional system that can be far away from what the original text foresaw. A striking example is how the French constitution, adopted in 1958 in the midst of the Algerian war, evolved throughout time. In 1960, a first amendment transformed the confederal state of the French Community into a unitarian state to take account of the independence processes of former French colonies. In 1962, a new

¹ 2021-22 re:constitution Fellow, PhD in law (European University Institute). Email: theo.fournier@eui.eu. I am grateful to the other Fellows of the re:constitution programme for their precious feedback on this project, especially Catherine Warin, Kevin Fredy Hinterberger and Emre Turkut. I would also like to warmly thank the re:constitution team, László Detre, Lisa Hake, Julia Türtscher, and Dorit Modersitzki for their professionalism, their operational support and editorial work.

² It is what Juan Linz and Alfred Stepan call the missing democratic arenas. The consolidation ends when all the missing democratic arenas are implemented, Juan J (Juan José) Linz and Alfred C Stepan, *Problems of Democratic Transition and Consolidation : Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996) 3.

amendment changed the election of the president of the Republic from indirect suffrage to direct suffrage, redefining the balance of power between the executive and the legislative at the same time. The 2000 constitutional amendment reduced the length of the presidential mandate from seven to five years. The 2008 constitutional amendment created the ex-post constitutional review. Yes, the 1958 constitution is in force for the longest time of French republican history but only because it dramatically changed in 70 years.

Constitutional interpretation also plays a major role in adapting the constitution to changing societies. Constitutional interpretation can be understood as the way institutional actors interpret the constitution. It includes constitutional customs and constitutional review. Constitutional review is the most common understanding of constitutional interpretation, and it is indeed central to adapt a constitution to societal evolutions. France, so often described as the historical champion of human rights, only has a bill of rights in its current constitution because the French constitutional court created one *ex nihilo* in 1971. Such a move was probably necessary to adapt the French constitution to the development of constitutional adjudication worldwide and might have contributed to its resilience. An even more striking example of the influence of constitutional review on constitutional resilience is the concept of "permanently temporary constitution" theorised by the first Hungarian court of the post-communist regime. With this concept, the court decided on its own to consider the temporary post-communist constitution as a permanent instrument despite the political agreement negotiated during the democratic transition, which stated the exact contrary.³

A constitutional law approach to the issue of constitutional resilience offers a technocratic solution. Constitutional resilience could rely on the technicity, on the expertise of lawyers, on the design of constitutional amendment procedures, on the appointment of constitutional judges, and even on the wording of fundamental rights contained in the constitution. This approach was perfect for the 1990s and the 2000s. It was also perfect for a post-Cold War world, and very efficiently exported to Eastern Europe but also to Africa and the Middle East. It created fantastic networks of lawyers sent from one country to the other to find the perfect design. It was put in books, on the agenda of the UN, the Venice Commission, the IMF, and the World Bank. It was a time when people believed, naively, yet beautifully, that democracy was forever there, and that consolidation of democracy was a linear and always progressive process. Unfortunately, history does not like linearity and authoritarian tendencies came back.

Which country represents best the failure of constitutional resilience of a modern democratic system? Hungary does. Hungary, which had everything to be the perfect democratic regime. The post-communist constitution carried the values of liberalism - both economic and societal - agreed upon in negotiations between actors of the whole political spectrum during the political changes, including the representatives of the failing communist regime. Various

³ It had always been the intention of the constitutional drafters to complete the political agreement of the National Roundtable with a constitutional assembly and a final Constitution. The preamble to the 1949 Constitution of 1989 was also clear on this: "To enhance peaceful transition to Constitutional statehood realizing a multiparty system, a Parliamentary democracy, and a social market economy, the national assembly establishes the text of the Constitution of Hungary as follows, pending the adoption of a new Constitution for Hungary", Amended Hungarian Constitution as of 1994, United States, Foreign Broadcast Information Service, United States, FBIS-EEU-05-042-S, available at <https://www.ifes.org/tools-resources/election-materials/fbis-hungarian-constitution> (last accessed on 6 Oct 2023).

constitutional amendments adapted the constitution to changing time. It had the most powerful constitutional court of the world, which could stand against the parliament and could push for its own vision of liberal democracy. Yet, the constitution did not prevent the election of Orbán despite his openly illiberal rhetoric. It did not resist his political agenda of “closing the revolution” and of adopting a new fundamental law in 2011. It could not do anything against the capture of the constitutional court, the manipulation of media, the oppression of minorities, the open conflict with EU values and institutions. And Orbán is not an interval in history. He has been in power for thirteen years in a row, he has been re-elected three times, always with a landslide, constitutional majority. His constitution is ten years old now, already half the life of the post-communist constitution and it could last for another decade. The Hungarian case is a limit to what we thought we knew on constitutional resilience.

Thus, there must be something more than the context of adoption of the constitution or constitutional flexibility to explain the resilience of a constitution or its failure to last. Part of the answer might lie in mechanisms of popular support that a constitution and its institutions can activate throughout time. Rule-of-law culture could be one of these mechanisms.

The paper is divided as follows: part 1 brings into the discussion the concepts of consent and support for a constitution, based on the works of John Rawls and David Easton; part 2 explains why such mechanisms are central to the resilience of liberal democratic constitutions; part 3 provides a definition of rule-of-law culture; part 4 focuses on Easton’s concept of diffuse support and explores if it can be an avenue to improve rule-of-law culture.

1. Consent and support for a constitution

Constitutions – as every other legal norm – are at the core of a legitimacy paradox. Legal norms, to be effective, must be accepted by the population. The legitimacy of legal norms relies on their social acceptance, but also their capacity to regulate social behaviors in the long run. If some legal norms can be changed regularly to match societal expectations, other norms cannot be rewritten for every new generation. Here lies the legitimacy paradox of legal norms: new generations must accept that some legal norms are set in stones, that they are the result of choices made before they were born.

The legitimacy paradox of legal norms affects constitutions to an even greater extent. Constitutions organize the domination of some members of a group over the whole group. Constitution must then be legitimate towards the citizens. Yet, constitutions also structure the state, its institutions, and its relations with the whole society. Constitution must therefore last through time to avoid chaos and anarchy. This requirement of constitutional stability leads constitutions to rule over several generations which is not without consequences for their legitimacy. Indeed, only the first generation, the one which was alive and in age of voting when the constitution was adopted could express a clear and direct support for the constitution in its original form. The following generations can only tacitly approve the constitutional order, the same way they approve existing legal norms.

1.1 Originating and joining consent

In *Lectures on the History of Political Philosophy*, John Rawls and Samuel R. Freeman dedicates one chapter to Locke's account of legitimate political power.⁴ As Rawls explains, Locke's starting point for his doctrine of the social compact (or contract) is that a legitimate political power can only be founded on consent. Such consent is split between the originating consent and the joining consent:

In this passage Locke is describing what we may call “originating” as opposed to “joining” consent. Originating consent is that consent given by those who initially established one body politic through a social compact; whereas joining consent is that given by individuals as they reached the age of reason and consent to join this or that existing political community... Locke takes for granted that we can subject ourselves to political authority by our own consent.⁵

Originating and joining consents are important elements to approach constitutional resilience. When a new constitution is adopted, the citizenry expresses an *originating consent* for the establishment of a new social contract. This originating consent can be expressed in different ways. The most straightforward way would be the approval of a constitutional referendum. Citizens can also consent to the new constitution in a more indirect way with the elections of a constitutional assembly or the organisation of roundtable-type negotiations.⁶

The difficulty comes with time, when the generation of the constitutional drafters is no longer numerically majoritarian. Tenants of the constitutional system cannot indefinitely rely on the originating consent to justify the existence of the constitutional system vis-à-vis younger generations. The latter needs to find good reasons to keep faith in a system designed decades ago and for which they did not have a word to say. Future generations can only give their *joining consent* to the system they live in. Joining consent, as opposed to originating consent, is only a tacit and indirect approval of the constitutional order. This consent is “that given by individuals as they reached the age of reason and consent to join this or that existing political community”.⁷

Joining consent can be expressed in many ways. The organisation of periodical elections is one of its most common expression. When new generations vote, they give their joining consent for the continuation of the institutional and constitutional system they live in. One can question the automaticity of the gesture – are voters aware of such mechanism of consent? – but at least, a high turnout is the sign that citizens indirectly approve the political system they evolve in. That is why a high and constant rate of abstention is so problematic. It is not only

⁴ John Rawls and Samuel Richard Freeman, *Lectures on the History of Political Philosophy* (Belknap Press of Harvard University Press 2007).

⁵ Ibid. 124–25. Locke's passage referred above is the following: “Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another without his own *Consent*. The only way whereby anyone divests himself of his Natural Liberty, and *puts on the bounds of Civil Society*, is by agreeing with other Men to join and unite into a Community”, Ibid.

⁶ Andrew Arato, ‘Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making’ (2012) 1 *Global Constitutionalism* 173.

⁷ John Rawls, *A Theory of Justice*, (n. 4), 125.

the sign of failure of political actors to convince the citizenry to vote, but also a renewal of joining consent that is not given. A continuous high rate of abstention must be taken as a signal sent by a part of the population to their representatives that the system must change quite significantly.

Another key expression of joining consent is the respect for judicial authority. When citizens respect the authority of judicial decisions, they consent to a system based on public justice. They accept to give private justice away for something they no longer control, something based on an obscure language (the legal language) and obscure rules (procedural law) that only a small part of the population (lawyers) can fully understand. Citizens accept that a judge can limit their private interests or their fundamental freedoms for the common good. The respect of judicial authority is even more embedded in crowd psychology than the act of voting. That is why a society in which citizens stop believing in their justice system is a clear sign of defiance towards the state. If citizens start shifting for private settlements of conflict, the risk of generalisation of violence is not far away, and so is the risk of a collapse of the state.

1.2 David Easton's specific and diffuse support

Originating and joining consents contributed to the formation of political support, a concept studied closely by the political scientist David Easton.

In the article, a Re-Assessment of Political Support, David Easton describes support in general terms as "the way in a which a person evaluatively orients himself to some object through either his attitudes or his behavior".⁸ He then provides a more specific view of political support. In a political system, a lack of political support usually fuels discontentment towards the incumbents, but as Easton explains, "political discontentment is not always, or even usually, the sign for basic political change".⁹ It is only in rare cases that discontentment leads to a fundamental change such as the overthrow of a regime.

Political support, Easton explains, can be divided into specific and diffuse support. Specific support is the reaction of individuals to actions taken by political actors. Specific support can exist only if specific conditions are gathered. Firstly, individuals must be aware of who is in charge, and "it is enough that the members have knowledge of the authorities, as a class or undifferentiated group even if they cannot name names or describe functions".¹⁰ The said authorities are not limited to the government. They include "all public official from chief executives, legislators, judges and administrators down to local city clerks and policemen, as well as the institutions, such as legislatures or court, of which they are part".¹¹ Secondly, individuals must be capable of associating the fulfilment of their needs and demands with actions of the authorities. Such connection is central to specific support and citizens must "interpret it in such a way that they are likely to attribute causative force to the behavior of the authorities".¹² Specific support is a component of political support which can evolve quite

⁸ David Easton, 'A Re-Assessment of the Concept of Political Support' (1975) 5 British Journal of Political Science, 436.

⁹ Idem.

¹⁰ Ibid. 437.

¹¹ Ibid. 438.

¹² Idem.

substantially in a short period of time. Specific support is then not the best instrument to evaluate the broader support of a population for its institutional system.

David Easton considers that such evaluation can be found in diffuse support. Diffuse support consists of a “reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed of the effects of which they see as damaging to their wants”.¹³ From a political perspective, diffuse support is therefore a reservoir of favourable attitudes towards a legal and institutional framework. It is the support that “underlies the regime as a whole and the political community”.¹⁴ This reservoir of favourable attitudes helps the institutional framework last through time and resist political crises which could be caused, for example, by a drop of specific support.

As Easton explains, “(diffuse) support, representing as it does attachment to political objects for their own sake, will not be easily dislodged because of current dissatisfactions with what the government does”.¹⁵ However, once diffuse support is dislodged, it is a sign of a need for serious institutional changes or the premise of a serious political crisis. If diffuse support is seriously down, it is a sign that the institutions no longer adequately respond to the needs of the polity. A low diffuse support might be a sign for a renewal of the social compact, or, in other words, a need for the adoption of a new constitution.

Rawls and Easton give a first answer to the question of constitutional resilience. The adoption of a constitution is a moment when citizens can express an originating consent to the institutional system they live in. This originating consent is also an expression of specific support. Citizens would evaluate positively the actions of the authorities who answer to their immediate needs of democracy with the adoption of a new constitution. The problem arises after the adoption of the constitution, when diffuse support and joining consents are needed to preserve the legitimacy of the constitutional order.

2. Why is diffuse support even more important for liberal democracies?

We have so far analysed support and consent in general term and not in connection with a specific type of political regime. Such mechanisms might be even more decisive to approach the resilience or vulnerability of liberal democratic regimes. Liberal democracies are indeed characterized by an inner tension which justifies a closer look at the mechanisms of support and consent to an institutional and legal system can trigger to last through time.

I should start with the distinction between constitutional democracy and liberal democracy. A constitutional democracy is a certain type of regime which organises the state, its institutions and the relationship between political authorities and the citizens around a constitution. A constitutional democracy is democratic, but it is not necessarily liberal. The constitution divides power between the institutions and sets in the stone the rules of election and the rules of political representation. Because of this structural role, the constitution has a higher value than other legal norms and should be protected by a higher threshold of majority. In a

¹³ Ibid. 444.

¹⁴ Ibid. 445.

¹⁵ Idem.

constitutional democracy, the will of the majority, embodied in the Parliament, is only scarcely limited. There is an assumption that the will of the majority cannot do wrong as it represents popular sovereignty.

In a liberal democracy, popular sovereignty is limited by a rule of law pillar. The purpose of the constitution is not only to organize power distribution but to ensure that the outcome of power distribution will not be harmful to minorities.¹⁶ Liberal democracy is both majoritarian and counter majoritarian. Liberal democracy considers that what is embedded in the constitution has a higher value than what the Parliament can decide. Constitutional rights are there to limit popular sovereignty. At the same time, liberal democracy remains a democracy. The constitution must therefore ensure that winners of elections can effectively rule the country.

Liberal democracy is therefore the equilibrium between three components: regular elections, representative political institutions, and the protection of fundamental rights. I use the word equilibrium on purpose. Each component plays a major role in organising a liberal democratic system. If one is missing then the system is no longer a liberal democracy. The equilibrium involves three types of actors: the citizenry, political actors, and counter-majoritarian bodies. Counter-majoritarian bodies include all the non-elected bodies which have the possibility to counter the choice of the majority: courts and judges, media, civil society, and independent administrative authorities. I will only focus on courts and judges in the following paragraphs.

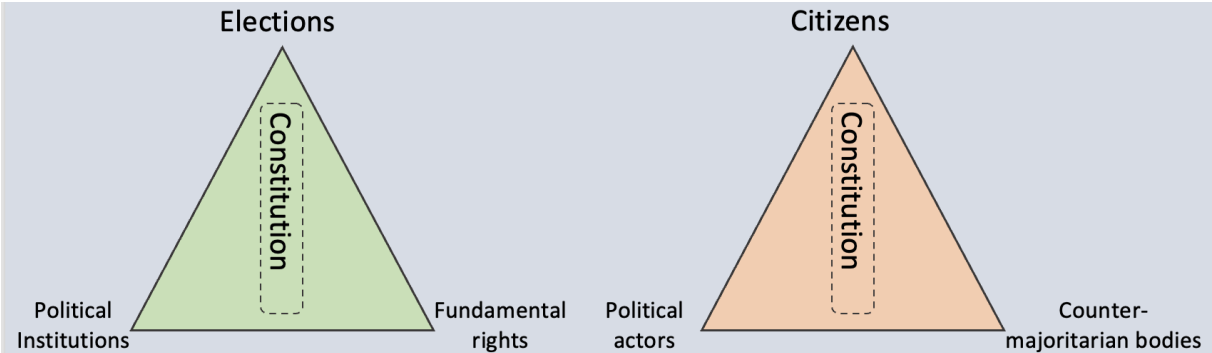


Figure 1: the equilibrium of liberal democracy

Liberal democracy is a fragile equilibrium. Its counter-majoritarian component is, first, not necessarily a logical thing for everyone. Why does a majority in a democracy have to be limited? Why counter-majoritarian bodies have the final word when they are themselves non-elected? The equilibrium of liberal democracy needs a strong discourse to become legitimate in the eyes of its members. History is an efficient discourse. Many mass atrocities were supported by majorities. A majority of Germans, Italians and French supported the installation of Nazism, fascism and collaborationism. History is an efficient mechanism of legitimation of

¹⁶ Minorities are not necessarily minority groups but mainly those who did not agree to be part of the ruling majority.

liberal democracy. The post-war German, Italian and French constitutions were all built against the atrocities of the past and they all implemented a liberal democracy.

History can fuel an original consent and a specific support of members of a polity for a liberal democratic regime. But as in any other regime, such support and consent do not last forever. In Germany, Italy and France, the far-right and illiberal forces are either in Parliament, either in power. In the three countries and in many others, the same illiberal rhetoric is becoming more and more common: according to this discourse, we are now living in a tyranny of minority (rights) which threatens our democratic system.¹⁷ There is a call for a new institutional design which is no longer based on an equilibrium between the three components of liberal democracy but rather on a predominance of elections and majoritarian choices over counter-majoritarian mechanisms.

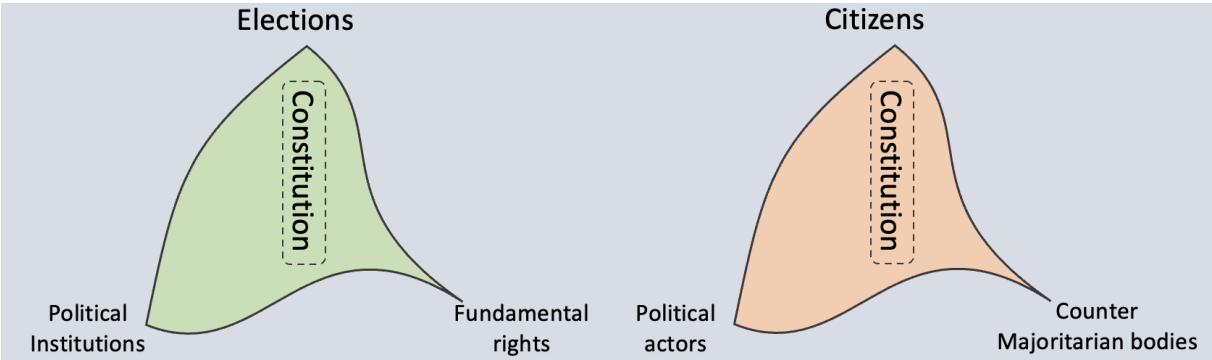


Figure 2: The equilibrium of illiberal rhetoric

3. Rule-of-law culture and the reinforcement of diffuse support

Liberal democratic regimes must establish mechanisms of diffuse support to make them more resilient against illiberal rhetoric. I believe one of these mechanisms is rule-of-law culture.

Rule-of-law culture refers to the general awareness of living in a constitutional system where choices of the majority can legitimately be limited to preserve the rights of the minority. Peter Harbele’s definition of constitutional culture is a good starting point for trying to define rule-of-law culture more precisely. The German constitutional law scholar defines constitutional culture as being:

The sum of attitudes and ideas, subjective experiences, scales of values, subjective expectations and the corresponding objective actions, both at the personal level of a citizen and his associations, as well as the level of government entities and any other institutions related to the constitution.¹⁸

¹⁷ I develop more extensively this argument in a previous paper, Théo Fournier, ‘From Rhetoric to Action, a Constitutional Analysis of Populism’ (2019) 20 German Law Journal 362.

¹⁸ The definition is from Peter Harbele, quoted in Antonio María Hernández and others, *Survey on Constitutional Culture Argentina: An Anomic Society* (Mexico: Universidad Nacional Autónoma de México-Asociación Argentina De Derecho Constitucional-IDEA International 2006) 10.

This definition differentiates two dimensions of culture, one which is focused on the citizens and another one on the institutions. I add a third dimension to my concept of rule-of-law culture. If rule-of-law culture refers to a general awareness of an institutional system based on rule-of-law, this awareness should be three-dimensional: between the citizens and the institutions, between the institutions, and between the citizens.¹⁹ Citizens should be conscious that the institutional practice is based on an equilibrium between choice of the majority and protection of the minority. This is the infra-citizenry dimension. Majoritarian institutions should respect counter-majoritarian institutions and vice versa. This is the infra-institutional dimension. Citizens should be aware that relations within the citizenry is rule-of-law based. This is the vertical dimension.

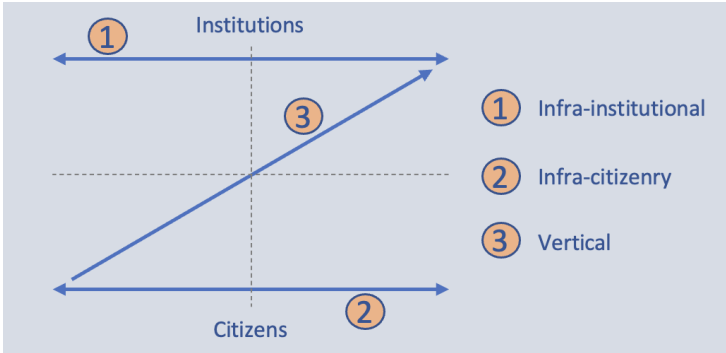


Figure 3: The three dimensions of rule-of-law culture

I also distinguish three components of rule-of-law culture. A first component is *constitutional consciousness* which would be the general awareness of the presence of a constitution which structures political life. Constitutional consciousness is perhaps more a matter of infra-constitutional dimension and vertical dimension. In its infra-constitutional dimension, constitutional consciousness could mean that institutions are aware that their actions are governed by specific rules – constitutional rules – which cannot be changed via the classic legislative procedure. In its vertical dimensions, constitutional consciousness could mean that the citizens are aware that the act of voting, the rule of representation in Parliament, the delegation of powers to political authorities, etc. are foreseen in a constitution.

The second component of rule-of-law culture is *rule-of-law consciousness*. Rule-of-law consciousness would be the general awareness that the constitutional system strikes a balance between majoritarian choices and protection of the minority. Rule-of-law consciousness has a clear infra-institutional and vertical dimension. In its infra-constitutional dimension, rule-of-law consciousness could mean that majoritarian institutions, such as the Parliament, respect decisions of counter-majoritarian institutions, typically the decisions of constitutional courts. In its vertical dimension, rule-of-law consciousness could mean that the citizens accept that the majority in Parliament is limited by fundamental rights.

¹⁹ Rule-of-law culture is then wider than political and civic culture mostly based on the individuals as well as constitutional identity strictly focused on the institutions.

The third component of rule-of-law culture is *right consciousness*. Right consciousness would be the general awareness that liberal democracy is a right-based political system in which the implementation of fundamental rights contributes to the legitimation of the whole system.²⁰ Rights consciousness has first a vertical dimension for example when an administration facilitates access to rights for its users. Rights consciousness has an infra-citizenry dimension for example when some individuals, victims of the same abuse of right, organise themselves to litigate together against the violation.²¹

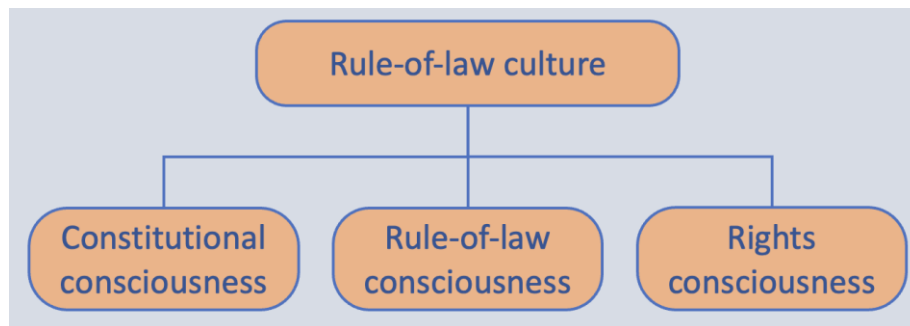


Figure 4: The three components of rule-of-law culture

4. Way forward: socialisation and direct experience as the sources of rule-of-law culture

David Easton identifies two sources for diffuse support. The first source is socialisation. As he explains, “considerable evidence already demonstrates that, if what is learned in childhood does carry over into later life, such socialization would have positive or negative bearings on the level of support for such objects as political institutions and norms”.²² The second source is direct experience. In Easton’s words:

Members do not come to identify with basic political objects only because they have learned to do so through inducements offered by others... Rather, on the basis of their own experiences, members may also adjudge the worth of supporting these objects for their own sake... (personal experiences) become transformed into generalized attitudes towards the authorities or other political objects. They begin to take on a life of their own.²³

Socialisation and direct experiences are not necessarily cumulative sources of diffuse support. Diffuse support can strictly rely on education and not on direct experience. An individual will continue to believe in a justice system even though he or she has never been directly confronted to it. Similarly, diffuse support can rely more on direct experience than on

²⁰ For a focus on right consciousness from a rule of law and EU fundamental rights perspective, see the work of Catherine Warin in this working paper series, Catherin Warin, Taking Rights Consciousness Seriously – A rights-based approach to promoting rule of law culture in the EU.

²¹ I refer here to strategic litigation.

²² Easton (n5) 446.

²³ Idem.

education. Easton seems to prefer such a diffuse support grounded in direct experience: “such belief about what is fundamentally right and proper in politics need not have their origins in what we inherited from others early in the life but in our own assessment of general political circumstances”.²⁴ This is a sign of optimism, it means that the shortcomings of socialisation, for example on education, can be compensated by direct experiences.

Easton’s analyses of the sources of diffuse support opens several avenues to think of mechanisms to reinforce rule-of-law culture. If socialisation and direct experience are central to the consolidation of a rule-of-law culture, what does it mean in terms of constitutional design? Educational policies? Or even courts’ communication strategies?

²⁴ Idem.

Forum Transregionale Studien e.V.
Wallotstraße 14
14193 Berlin
T: +49 (0) 30 89001-430
office@trafo-berlin.de
www.forum-transregionale-studien.de