PALGRAVE STUDIES IN EUROPEAN UNION POLITICS
SERIES EDITORS:
MICHELLE EGAN · WILLIAM E. PATERSON · KOLJA RAUBE

EU Rule of Law Procedures at the Test Bench

Managing Dissensus in the European Constitutional Landscape

Edited by
Cristina Fasone · Adriano Dirri · Ylenia Guerra

palgrave
macmillan

Palgrave Studies in European Union Politics

Following on the sustained success of the acclaimed European Union Series, which essentially publishes research-based textbooks, Palgrave Studies in European Union Politics publishes cutting edge research-driven monographs. The remit of the series is broadly defined, both in terms of subject and academic discipline. All topics of significance concerning the nature and operation of the European Union potentially fall within the scope of the series. The series is multidisciplinary to reflect the growing importance of the EU as a political, economic and social phenomenon. To submit a proposal, please contact Senior Editor Ambra Finotello ambra.finotello@palgrave.com.

This series is indexed by Scopus.

Cristina Fasone · Adriano Dirri · Ylenia Guerra
Editors

EU Rule of Law Procedures at the Test Bench

Managing Dissensus in the European Constitutional Landscape

palgrave
macmillan

Editors
Cristina Fasone
Department of Political Science
Luiss University
Rome, Italy

Adriano Dirri
Department of Political Science
Luiss University
Rome, Italy

Ylenia Guerra
Department of Political Science
Luiss University
Rome, Italy

ISSN 2662-5873 ISSN 2662-5881 (electronic)
Palgrave Studies in European Union Politics
ISBN 978-3-031-60007-4 ISBN 978-3-031-60008-1 (eBook)
https://doi.org/10.1007/978-3-031-60008-1

Cover illustration: Magic Lens/Shutterstock

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Foreword: Fuzzy Borders

Certain things about shared political values are so evident that dissensus on them is out of the question; dissensus, in its strongest meaning of the rejection of what is shared, places dissenters beyond the pale. But other things concerning the same values may neither be clear nor require consensus. And, in between these two, the boundary line may be fuzzy.

The rule of law is uncontestably fundamental to democracy in the European Union and its member states ever since the 1950s, so much is certain and clear. From its inception, pluralist liberal democracy under the rule of law was, more than just the accepted standard, the very criterion of like-mindedness of the countries that participated in the process of European integration. In this respect, it was an ideological rival of communism East of the Iron Curtain. Moreover, this criterion was the reason to refuse any formal arrangement of association or cooperation with the fascist regimes in Spain and Portugal (Janse 2018).

At the same time, it was quite clear that the constitutional shape of the institutions of democracy under the rule of law differed quite a bit between the original partners. The new Constitutions of Italy and Germany of 1947 and 1949, and constitutional reforms in France in the 1950s, as compared to the old nineteenth-century Constitutions of the Benelux countries, confirmed the fact that systems of government, electoral systems, vertical and horizontal conceptions of division of powers, and the shape of the administration could differ considerably, without

questioning the very nature of the member states as politically pluralist democracies under the rule of law.

This state of affairs has not changed. From the Treaty of Maastricht onwards to the Lisbon Treaty, the pluralist democratic foundations and rule of law have been canonized in what is now Article 2 of the Treaty on European Union. Liberty, democracy, fundamental rights, the rule of law and pluralism are foundations both of the member states and of the Union. On this, there can be no uncertainty, ambivalence or ambiguity. Equally, there is no doubt that reasonable differences can legitimately exist as to how these principles are to be given shape in constitutional and politico-institutional arrangements.

Rejection of the underlying political values—dissensus in a strong sense—is impossible, as that would undermine the very foundations of the Union; rational disagreement on their implications for the, often 'path-dependent', institutional design and practical application in the member states is part of the pluralist nature of the Union.

It is easy to agree on this. It is less easy to make out when rational disagreement on the implications of the foundational values for institutional design and political practice turns into dissensus on the foundational values themselves.[1] Clearly the borders between the one and the other are fuzzy.

This difficulty of distinguishing with exactitude between allegiance to the foundational value of the rule of law, deciding when it is transgressed, and when it is rejected, spills over in the issue of how to deal with the infringement, the transgression and rejection of the rule of law, which is the central theme of this very important book.

The matter is further complicated by the boundaries of European integration as a political and legal project, which for us lawyers raises the question of the scope of European law, and of its demarcation from matters that are left to the legal and political orders of member states. For one thing, this issue is decisive for the competence of the Union, which hinges on the concrete conferral of powers on the Union.

There is a striking consensus among legal scholars that the scope of Article 2 of the Treaty on European Union is quite different from that of the scope of EU law in the ordinary sense in all other legal contexts. The ordinary scope of EU law hinges on the question of whether a matter is

[1] See in particular Parts II and III of this book.

the object of a competence found in the EU treaties, or is regulated on the basis of a norm that is ultimately based on the treaties, or otherwise touches on such powers or rules. This kind of demarcation is absent in Article 2 TEU, because it concerns the broad political values on which both the Union and the member state legal orders are based. It does not separate the legal orders, but emphasizes the commonality in values that transcend specific powers and normative scopes. Article 2 sums up the values on which the Union is founded and which are common to the Member States. From the Union perspective, these values are not restricted to the Union's specific competences or the operation of Union law; from the Member State perspective, these values do not target the specific operation or realization of the Union and its laws in the Member States. They are foundational values which are at the basis of the exercise of all public authority both by the Union and by the Member States.

Article 2, therefore, necessarily refers not solely to the activity of the Union within the Member State, nor solely to Member State activity concerning the implementation of Union law or the Union's specific competence. This wide scope of the values spills over into the scope of the mechanisms for compliance with and enforcement of Article 2 values, notably the value and principle of the rule of law. Generally, the specific enforcement mechanism of the EU Treaty, Article 7, has been considered the only provision conferring a power on the Union over matters which relate to Member State activity which can be outside the scope of EU law in the ordinary, narrower sense. As this activity concerns values which are also the values of the Member State concerned, we are in a situation that is doubly sensitive: on the one hand, this is due to the constitutional nature of the Member State activity and on the other hand, due to the Union acting with regard to Member State activity which can be completely outside the scope of Union law in the strict sense. This sensitivity may explain the quite 'political' nature of the Article 7 procedure, where it is the European Council and Council that hold the most decisive powers.

In the classic 'legal' instruments for the respect and enforcement of the founding values, such as the preliminary reference and infringement proceedings, the decisional power lies with the Court of Justice. In its case law, one can see how the Court tends to tie the scope of its review powers to the scope of EU law in the ordinary sense, for instance when it comes to the independence of the national courts, which are viewed in as far as they are Union courts under Article 19 TEU. Somewhat similarly,

in infringement proceedings regarding the foundational value of the rule of law, there has mainly been an emphasis on elements of a 'thinner' or more formal understanding of the concept of the rule of law (a *locus classicus* is Tamanaha 2004, Chapter 7). But this, of course, cannot be said of the infringement proceedings that were started on the *lex Tusk* for reason of its infringement of the principle of democracy—of which we will have to wait and see whether and how the Court will get the chance to delimit its justiciability (see in particular Piccirilli, Cecchetti (Chapter 4), and Cecchetti (Chapter 5) in this Volume).

The importance of competition law and state aid law would traditionally be understood to be at the core of the market economy. As is argued in this book, when looked at more closely, they are also at the service of democracy and the rule of law (see Cseres in this Volume). This highlights the links between on the one hand what may at first sight seem strictly technical economic market control as an instrument of economic integration, and on the other hand the broader impact of the economic constitution of the Union and the member states on their political constitution. This has also become evident in the sphere of fiscal and other economic governance mechanisms (see Capati and Christiansen, Fasone and Simoncini, Hegedus and Christiansen, and Lupo in this Volume). The fuzzy borders between EU law in the strict sense and national constitutional competence become perhaps most acute in the area of soft law and voluntary Union *cum* member state instruments, which have recently become topical in the context of the recovery and resilience facility, and in particular through their being subjected to 'rule of law conditionality'.

Most, if not all, of the contributions to this volume implicitly or explicitly are confronted with the fuzzy boundaries of Union and member state law as regards the founding principles of Article 2 TEU of which the rule of law is the one that is focused on in this volume.

This book provides a unique analysis of all available instruments of rule of law enforcement and maps out the issues of the border areas of the rule of law as a shared value of Union and member states, conceptually, legally and politically. It thus provides us with an intriguing sketch of the present state of European integration.

Leonard F. M. Besselink
University of Amsterdam
Amsterdam, The Netherlands

References

Janse, R. (2018). The evolution of the political criteria for accession to the European Community, 1957–1973, *European law journal: review of European law in context*, 24:1, 57–76.

Tamanaha, B. Z. (2004). *On the Rule of Law: History, Politics, Theory*, Cambridge University Press.

Leonard F. M. Besselink (Ph.D. at EUI) has been Professor of Constitutional Law at the Faculty of Law of the University of Amsterdam since 2012. He is affiliated to the Amsterdam Centre for European Law and Governance, ACELG, and is emeritus since September 2021. Prior to his position in Amsterdam he held the chair of European Constitutional Law at the University of Utrecht. Since 2021 he teaches at Luiss University's Law Department and School of Law, Rome. He is a member of the Royal Dutch Society of Sciences and Humanities, and was a member of the Royal Committee on the Constitution (Staatscommissie Grondwet 2008–2010) tendering advise to the Netherlands government on amending the Dutch Constitution to bring it up to date in various respects. He has participated in many research consortia and has published mainly in the fields of national constitutional law, European constitutional law and comparative constitutional law, with a particular thematic focus on the nexus between public international, European Union and national law, as well as issues of the rule of law and fundamental rights protection in Europe. He is one of the editors of the European Constitutional Law Review and among his many publications, he has authored a monograph on A Composite European Constitution (Europa Law Publishing, 2007).

Acknowledgments

This Volume has been drafted and funded in the framework of the European Union under Grant Agreement no. 101061621, RED-SPINEL—HORIZON-CL2-2021-DEMOCRACY-01, Work package no. 2. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union. The European Union cannot be held responsible for them.

Contents

Notes on Contributors

Andrea Capati is a Postdoctoral researcher and teaching assistant in the Department of Political Science at LUISS Guido Carli University, Rome. His research interests lie in the institutions and policies of the Economic and Monetary Union, with a focus on financial assistance and fiscal integration. He obtained his Ph.D. in 2023 with a thesis titled "European Integration in the Pandemic Era: A 'Critical Junctures' Analysis of EU Financial Crisis Management following the Outbreak of COVID-19". Some of his recent publications have been featured in *Journal of European Integration*, *Politics and Governance* and *European Politics and Society*.

Lorenzo Cecchetti is Postdoctoral Research Fellow in EU Law at Luiss University. He holds a Law Degree (magna cum laude) from Luiss (2015), a Ph.D. in European Law from the University of Bologna, and a *Doctorat en Droi*t from the *Université Paris II* (2021). He has been Trainee Judicial Clerk in the Chambers of Judge Prof. Lucia Serena Rossi at the European Court of Justice (2019) and of Justice Silvana Sciarra at the Italian Constitutional Court (2022–2023). His main research interests are focused on EU Constitutional Law, EU Social Law, EU Internal Market Law and EU Procedural Law and he is working on a monograph on the fundamental labor rights and the Charter of Fundamental Rights of the EU. He has been Visiting Scholar at Durham University, Research Visitor at the University of Cambridge and Academic Visitor at the University of Oxford.

Thomas Christiansen is Professor of Political Science and European Integration at Luiss University, Rome. He previously held positions at Maastricht University, at the European Institute of Public Administration, at Aberystwyth University of Wales and at Essex University. He is Executive Editor of the *Journal of European Integration* and co-editor (with Sophie Vanhoonacker) of the "European Administration Governance" book series at Palgrave Macmillan. He has published widely on different aspects of European Union politics. He co-authored, with Emil Kirchner and Uwe Wissenbach, *The European Union and China* (London: Palgrave, 2019) and co-edited, with Emil Kirchner and Han Dorussen *Security Relations between the European Union and China* (Cambridge: Cambridge, 2016). *The Contestation of Expertise in the European Union* (London: Palgrave), co-edited with Johan Adriaensen and Vigjilenca Abazi, *The Making of European Security Policy*, co-edited with Roberta Haar, Sabina Lange and Sophie Vanhoonacker (London: Routledge) and *Security Relations between the European Union and Asian Partners*, co-edited with Emil Kirchner and Tan See Seng (London: Palgrave) were all published in 2021, followed by the publication of *The Routledge Handbook of Parliamentary Admnistrations* (London, Routledge), co-edited with Elena Griglio and Nicola Lupo, in 2023. In the period 2019–2023 he was academic coordinator of the EU-funded research network EAST (EU-Asia Security and Trade Relations) involving seven universities and think tanks across three continents.

Ylenia Maria Citino is a Postdoctoral Research Fellow of Public Law at Scuola Superiore Sant'Anna (Pisa) and a Member of the Center for Studies on Parliament (CESP). Prior to her current role, she served as a Post-Doc at Luiss University. She currently holds positions as a Contract Professor of Public Comparative Law at the University of Tuscia in Viterbo, of EU Law at the LUISS School of Government and of Comparative Parliamentary Law at the University of Luxembourg.

Dr. Citino contributed as a Visiting Researcher at the European Commission, DG CONNECT, and the Center for European Law at Maastricht University. Her doctoral thesis earned her the prize for the Best Doctoral Dissertation on Public Law by the Book Series "Sovranità, Federalismo, Diritti", a collaboration between the University of Insubria and the Gruppo di Pisa in 2019. She is an alumnus of the École Nationale d'Administration in France.

Ramona Coman is Professor in Political Science at the Université libre de Bruxelles, where she served as Director of the Institut d'études européennes (2014–2019) and as its President (2019–2023). She is the author of The Politics of the Rule of Law in the EU Polity Actors, Tools and Challenges (2022, Palgrave Studies in European Union Politics) and co-editor of the textbook Governance and Politics in the Post-Crisis European Union (2019). Her research focuses on dynamics of policy/institutional change, democratization and Europeanization. Particular attention is devoted to the EU's rule of law policy tools and judicial reforms in Central and Eastern Europe. As of October 2022, she is the Principal Investigator of the Horizon Europe project "Respond to Emerging Dissensus: Supranational Instruments and Norms of European Democracy" (RED-SPINEL, 2022–2025) and the academic coordinator of the GEM-DIAMOND Marie Sklodowska Curie Action Joint Doctorate Network. She has published in several peer-reviewed journals, including Democratization, the New Political Economy, Journal of European Public Policy, The British Journal of Politics and International Relations, Journal of European Integration, Europe-Asia Studies, Perspective on European Politics and Societies, Revue française de Science politique, Politique européenne.

Katalin J. Cseres is Associate Professor of Law at the Amsterdam Centre for European Law and Governance (ACELG) and Program Director of the EU Law Masters at the University of Amsterdam. She is the Co-Director of The Good Lobby Profs initiative, which monitors the respect of the rule of law by holding the EU and national institutions and leaders accountable. Kati is Editor of the Journal Legal Issues of Economic Integration.

Kati's research investigates uneven power structures and relations in *(EU) competition law, consumer law, constitutional law and sector regulation (energy law)*. She interrogates how various sub-disciplines of law, formal and informal institutions structure power relations in the oversight of markets and which tools they provide for controlling power. She investigates how prevailing models of economic law and its enforcement can respond to challenges of growing political and corporate concentration as well as social inequalities.

Adriano Dirri is a Postdoctoral Research Fellow in Comparative Public Law at Luiss University, within the EU Horizon project RED-Spinel ("Responding to Emerging Dissensus: SuPranational Instruments and

Norms of European Liberal democracy"). Previously, he was Postdoctoral Researcher in Public Law at the University of Rome-"La Sapienza", lecturer at SciencesPo-Menton Campus in Law and Political Institutions and he benefited from a Scholarship of the University of Fribourg (Institute for Federalism) at the postdoctoral level. He was awarded of the Giancarlo Doria Prize for the best PhD thesis in 2021. He holds a Ph.D. in State Theory and Comparative Political Institutions at the University of Rome-"La Sapienza". He was Visiting Ph.D. Student at the University of the Western Cape-South Africa and Visiting Ph.D. Student at the Institute for Comparative Federalism at the Eurac Research. His main research interests are Comparative Constitutional Law, focusing on comparative federalism both in European and non-European Countries, especially in Africa. Currently is working on the European Union federalizing process as well as over the Rule of Law in the European Union in its interplay with the Conditionality Regulation.

Cristina Fasone is Associate Professor of Comparative Public Law at Luiss University, where she is also the Director of the BA in "Politics, Philosophy, and Economics", and Visiting Professor at Nicolaus Copernicus University of Toruń since 2020. She holds a Ph.D. in Comparative Public Law from the University of Siena and has been Max Weber postdoctoral fellow in Law (2013–2015), at the EUI. Holder of a Jean Monnet Module 2016–2019 "Parliamentary accountability and technical expertise: Budgetary Powers, Information and Communication Technologies and Elections" (PATEU), until January 2023 she has been the coordinator at Luiss research unit of the Horizon Europe Project RED-SPINEL. She was member of the Steering Committee of the ECPR Research Network on Differentiated Integration in the EU (2021–2023) and she is currently the co-coordinator of the Research Group on "Judicial Review and Electoral Law" of the International Association of Constitutional Law for which she has recently co-edited *Judicial Review and Electoral Law in a Global Perspective* (Hart Publishing, 2024). She has been Visiting Scholar at the Victoria University of Wellington, Georgetown Law Center, Uppsala University, Complutense University, the University of Copenhagen, Durham Law School.

Ylenia Guerra is Postdoctoral Research Fellow in Constitutional Law at Luiss University, within the EU Horizon project RED-Spinel ("Responding to Emerging Dissensus: SuPranational Instruments and

Norms of European Liberal democracy"). Previously, she was Postdoctoral Researcher in Constitutional Law at the University of Macerata. She holds a Ph.D. in Constitutional Law at the *Alma Mater Studiorum*-University of Bologna (with excellent marks) and an LL.M. in European Legal Studies from the College of Europe, in Bruges. She was Visiting Researcher at the University of Toulon, in the "Centre de Droit et Politique Comparés" (CDPC) and Visiting Researcher at the Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht in Heidelberg, where she attended the Italian dialogues, presenting the first results of her research on the way of conditionality in Europe. Her research interests are concentrated on Constitutional Law, with a focus on the constitutional protection of the Environment, the theoretical dimension of future generations and their representation, as well as the intersection between the "Rule of Law" and the use of conditionality, in connection with the Horizon Project RED-Spinel.

Dora Hegedus is Ph.D. Candidate in the Department of Political Science at LUISS University in Rome, conducting research for a doctoral thesis with the provisional title "Towards a Europe of Subregions? Investigating the Illiberal Challenge of the Visegrad Group". Prior to coming to LUISS, she studied International Relations at Queen Mary University, and then worked at the Hungarian Embassy in London for two years before obtaining an M.Sc. degree in "Global Europe: Culture and Conflict" from the London School of Economics and Political Science. Her research interests include EU integration, subregionalism, democratic backsliding, the rule of law and Central Eastern European politics.

Nicola Lupo is Professor of Public Law and Director of the Center for Parliamentary Studies (Centro di studi sul Parlamento) at LUISS University in Rome. He has been the holder of a Jean Monnet Chair on "Understanding European Representative Democracy" (2018–2021) and visiting professor at several universities. His publications concern sources of law, parliamentary rules of procedures, legislative drafting, budgetary procedures, regional councils, EU parliamentary democracy. Among them, *The Constitution of Italy. A Contextual Analysis* (Hart, 2022, con Marta Cartabia), *Corso di diritto parlamentare* (Il Mulino, IV ed., 2023, with Luigi Gianniti) and *Il Parlamento europeo. Una introduzione* (Luiss University Press, II ed., 2024, with Andrea Manzella).

Alessandro Nato is Assistant Professor (Tenure Track) and former Postdoctoral Research Fellow at the Luiss University, Department of Law, Postdoctoral Research fellow and Assistant Professor at Faculty of Law, University of Gent. He holds a Ph.D. in Civil, Corporate, and International Law at the University of Genoa. His research interests concern EU Law. He is the author of the monograph "La Cittadinanza sociale europea ai tempi della crisi economica" [European social citizenship at the time of the economic crisis] (Cacucci editore: Bari, 2020). He was part of the research project Horizon 2020 RECONNECT (2019–2022), Hercule III BETKOSOL on the protection of EU financial interest (1 January 2021–30 June 2022), and EUARENAS. Furthermore, He was part of the teaching academic team of EUPRACT JM Chair led by Prof. Daniele Gallo, LUISS University. He is also Adjunct Professor in EU Law at University of Macerata, Department of Political Science (from 1 September 2022).

Giovanni Piccirilli is Associate Professor in Constitutional Law at the Law Department of LUISS University in Rome, where he is also Deputy director of the Center for Parliamentary Studies and Coordinator of the Executive Programme in Legislative drafting.

He holds a Ph.D. from the University of Genoa.

In 2016 he has been awarded of a Jean Monnet Module on "Legislative drafting in implementing EU law in Italy" by the EACEA. In 2019 he received funds from the Ministry of Education, University and Research as part of the consortium led by Scuola superiore Sant'Anna in Pisa on the topic "The challenge of Interlegality: A new perspective on Law".

He was Emile Noel Fellow at the Jean Monnet Center, New York University (USA, 2013), and visiting professor at the Institute of Advanced Legal Studies (UK, 2017), at the Center of European Studies, University of Florida (USA, 2012), and EUOSSIC Visitor at the Monash University (Australia, 2013).

Maciej Serowaniec is prof. NCU—Full Professor at Nicolaus Copernicus University in Toruń (Poland); Head of the Department of Constitutional Law of the Faculty of Law and Administration of NCU; Vice-Dean for International Cooperation of the Faculty of Law and Administration; A principal investigator of the project "Supreme Audit Institutions in the constitutional systems of the Member States of the European Union", funded by the National Science Center (grant No. 2018/02/X/HS5 /00047). Participated as a coordinator and investigator in

the project "Responding to Emerging Dissensus: Supranational Instruments & Norms of European Liberal Democracy (Horizon Europe) and in the research project "BETKOSOL—Better Knowledge for Better Solutions", founded by the European Union's Hercule III Programme). Laureate of the European Court of Auditors Postgraduate Research Grant Programme. Laureate of the Scholarship of the Minister of Science and Higher Education for outstanding young scientists. A member of the ICON-S and Scientific Society in Toruń.

Marta Simoncini is Associate professor in administrative law at Luiss University. Marta holds a Ph.D. in administrative law (University of Pisa), a Laurea in Political Sciences, majoring law (University of Pisa) and a University Diploma in the same area (Scuola Superiore Sant'Anna in Pisa). Prior to joining Luiss University, Marta was an FWO postdoctoral fellow at King's College London and the University of Antwerp, a fellow in EU law at University College London and a Max Weber fellow at the European University Institute. Marta is also a fellow of the UK Higher Education Academy.

Her research interests cover European administrative law and governance, in particular the check-and-balances applicable to discretion. She published in peer-reviewed journals, including the Yearbook of European Law and Common Market Law Review. She authored two monographs for Hart Publishing (2018) and for Editoriale Scientifica (2010). She also co-edited a volume for Routledge (2017).

Pauline Thinus is a Ph.D. researcher at the Institute for European Studies (IEE-ULB) since 2022. Her research is focused on rule of law spending conditionality in the European Union throughout the 2021–2027 budgetary cycle. She holds a M.A. in European interdisciplinary studies from the College of Europe (Natolin, Poland) and a M.A. in European studies and political science from Sciences Po (Rennes, France). She has previously worked as an Academic Assistant at the College of Europe from 2020 to 2022 in the European Political and Governance Studies Department (Bruges, Belgium). She has also worked for the French Institute in Budapest in 2019–2020 as a lecturer in European and international relations at the Faculty of Law and Political Science in Szeged (Hungary).

List of Figures

List of Tables

CHAPTER 1

Introduction: Dissensus as a Trigger and Consequence of the Rule of Law Crisis in the EU

Cristina Fasone, Adriano Dirri, and Ylenia Guerra

1 The Context and the State-of-the-art in the Literature

Unfortunately, it is anything but new to claim that constitutional democracies and the entrenchment of the rule of law values are in crisis (Ginsburg & Huq, 2018; Graber et al., 2018). Over the last few years, the rule of law crisis in the EU has increased in scope and intensity, triggering the proliferation of academic work in the area. Some have particularly

C. Fasone · A. Dirri (✉) · Y. Guerra
Luiss University, Rome, Italy
e-mail: adirri@luiss.it

C. Fasone
e-mail: cfasone@luiss.it

Y. Guerra
e-mail: yguerra@luiss.it

C. Fasone et al. (eds.), *EU Rule of Law Procedures at the Test Bench*, Palgrave Studies in European Union Politics,
https://doi.org/10.1007/978-3-031-60008-1_1

engaged with the unfolding of the rule of law at the domestic level and the rise of illiberalism (Drinóczi & Bień-Kacała, 2021; Sadurski, 2019; Sajò, 2021; Sajò & Uitz, 2021). Others have considered the influence of the "polycrisis" in Europe on the rule of law (Wacks, 2021) and have engaged with the tension between democracy, underpinned by extreme majoritarianism and populism, and the rule of law principle in the broader EU context (Amato et al., 2021).

Scholars have further explored the EU rule of law crisis by looking at the problematic reception of supranational "counter-measures" at the Member State level, highlighting the deterioration of separation of powers at the domestic level and the lack of cooperation by national institutions (von Bogdandy et al., 2021). They have traced the evolution of the rule of law concept in the EU from its origins, unpacked the notion into its various components, and dealt with selected instruments like infringement proceedings, the rule of law conditionality regulation, and the EU external action (Pohjankoski et al., 2023).

Moreover, academic contributions have devised further rule of law mechanisms to be introduced in the EU and have advocated for refining the existing ones (Closa & Kochenov, 2016; Jakab & Kochenov, 2017; Södersten & Herkock, 2023). The scholarly solutions put forward have often served to orient institutional debates or form the basis for policymaking; this was the case for studies linking spending conditionality to rule of law purposes (Halmai, 2019; Kelemen & Scheppele, 2018). At times, the literature has even anticipated institutional needs. This is exemplified, for example, by research published just prior to the Polish national elections of October 2023 disclosing the paths to and difficulties of undergoing a second transition to democracy in countries that have experienced recent rule of law backsliding (Bobek et al., 2023),

This edited collection seeks to assess the variety of EU rule of law instruments as they function in their actual deployment by looking at their diverse nature and the mutual interplay between them. It aims to do so by taking as its starting point the study of the political dynamics of rule of law oversight in the EU, which will be framed according to the tension between consensus and dissensus (Coman, 2022).

2 Dissensus on the EU Rule of Law Instruments as a New Paradigm of Constitutional Analysis

The rule of law is a founding value of the EU and, together with other values enshrined in Article 2 TEU, forms its constitutional skeleton. The crisis of the rule of law, to which scholars have devoted considerable attention (for the most recent studies, see Pohjankoski et al., 2023; Södersten & Herkock, 2023; Spieker, 2023; von Bogdandy, 2024), has been an important test bench for the enforcement of several hard and soft law instruments in the EU.

On the one hand, these instruments were adopted in reaction to the rising dissensus against the rule of law principles seen at the national level with reforms undermining judicial independence and media freedom, for instance. On the other hand, the instruments themselves have become the targets of dissensus, for different reasons, by both the autocrats dismantling the constitutional democracy and those advocating for a prompt, coherent and decisive reaction by EU institutions surrounded instead by the rhetoric and practice of inaction (Emmons & Pavone, 2021: 1611 ff.).

Over the years, particularly since 2014, EU institutions have deployed an increasing number of instruments of varied nature as rule of law-related issues have gradually worsened within the EU (Closa & Kochenov, 2016; Jakab & Kochenov, 2017). These tools include mechanisms regulated under EU primary law (Part I) and legislation (Part II), soft law measures (Part III) and instruments linked to the EU budget and economic interests (Part IV). This volume aims to provide a comprehensive understanding of the interaction among the EU tools adopted or re-adapted to face the rule of law crisis, using dissensus as a new paradigm for constitutional analysis and as a form of contestation against liberal democracy that has become somewhat mainstream (Coman & Brack, 2023). The effort spent countering illiberal practices and rule of law deterioration in some EU member states through a growing arsenal of legal instruments devised by the EU has been the target of mounting academic and institutional dissensus. It is precisely this dissensus that is the object of the volume when analyzing existing EU rule of law instruments in action. The volume is not meant to endorse a specific or strict definition of dissensus nor to provide an analytic examination of each tool across time and space (for such an analysis, see, e.g., Coman, 2022: 37 ff.). Rather,

it explores the emergence of contrasting academic views on the functioning of the various instruments, contestation of their enforcement and effectiveness, criticisms raised from within EU institutions, and potential conflicts, including inter-institutional conflicts, that have been triggered by the implementation of the various tools.

Framed this way, dissensus can materialize in different forms. It can be led by criticism of the doubtful enforcement of a particular tool, such as Article 7 TEU and the lack of follow-up on the activation of its paragraph 1 against Poland and Hungary; the volume looks at how the literature has dealt with this questionable stalemate (see R. Coman and P. Thinus in this volume). Dissensus can also be triggered by the interpretation of legal instruments, as has been the case for the reach and scope of the application of the Charter of Fundamental Rights (in particular Article 47) in combination with other Treaty provisions (see L. Cecchetti, Chapter 5 in this volume). This has also arisen for some procedures shaping the process of EU integration since its formation, like the infringement proceeding and the preliminary ruling procedure (PRP; see G. Piccirilli and L. Cecchetti in this volume). These tools have been adapted to serve the protection of the rule of law principles and have become channels of dissensus, either in the struggle between the EU and the Member State under review or between private parties and the national authorities contested, with the Court of Justice (CJEU) and national courts acting as arbiters in the disputes. The CJEU itself has been criticized, however, for its inconsistent and ambiguous attitude toward the rule of law and, especially, for its compliance with the standards of judicial independence (Kochenov & Bárd, 2022). The rise in the number of court cases dealing with rule of law issues in the EU (Pech & Kochenov, 2021) is proof of the level of dissensus currently experienced and the inability of politics to solve the issue, being that it is quite difficult to compromise on fundamental values such as the rule of law. Even when a (questionable) political compromise has been sealed, for example on the rule of law conditionality regulation (Baraggia & Bonelli, 2022; D. Hegedűs & T. Christiansen, in this volume; Sheppele et al., 2020), this has not prevented the use of strategic litigation in front of the CJEU (see cases C-156/21 and C-157/21).

The dissensus surrounding the use of the EU rule of law instruments is somewhat inherent in their design, especially for the binding instruments and those with the most far-reaching consequences in principle. They touch upon the sensitive area of domestic constitutional law, principles

and values, which is closely related to the remains of national sovereignty and is typically used to resist EU law and policies. It was not by chance that the alleged variety of (national) definitions of the rule of law has been instrumentally mobilized to this end (Pech et al., 2020: 45 ff.), even though there is a clear and univocal understanding of the rule of law in the EU that was derived from the CJEU's case law and is now enshrined in Article 2 of Regulation No. 2020/2092 (Pech, 2022):

> It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.

Dissensus, also on legal measures, is certainly not new in the EU. As an example, the "jurisprudence of constitutional conflict" (Bobić, 2022; see also Martinico, 2022) at times featured the relationship between the CJEU and national constitutional judges, which tends to be quite destructive to the rule of law on the national level and moves away from the basic principle of sincere cooperation (Article 4, para 3 TEU: see, e.g. the Polish Constitutional Tribunal's ruling K 3/21, of 7 October 2021). The level of inter-institutional dissensus surrounding the rule of law has also increased, with the European Parliament being usually more vocal on rule of law concerns than the Council and the Commission. This was exemplified by the European Parliament's action for failure to act, under Article 265 TFEU, against the Commission for delaying the implementation of the rule of law conditionality Regulation, however problematic that was from the point of view of effectiveness (Platon, 2021).

Dissensus often has a negative connotation, made worse by the destructive nature of rule of law conflicts fueled by populism and legalism (Groussot & Zemkova, 2022). However, dissensus can also show a positive side being typically the outcome of pluralism and of different points of view, to be reconciled through democratic and political procedures. Dissensus can also enable EU institutions to engage in self-reflection and self-criticism when needed. The perspective of dissensus is also promising in that it enables the study of rule of law instruments from the perspective of how powers and competencies are effectively channeled in procedural terms. One of the major sources of tension between the domestic and the

supranational levels of government is precisely the scope of EU action in this domain.

The volume looks at dissensus on the rule of law's toolbox as a problem targeting European integration, especially in its legal and constitutional dimensions. The growth and the broadening of the scope of such instruments, whether directly or indirectly dedicated to the protection of the rule of law, have proven not to be as effective as it was foreseen. Even the resort to the economic and financial leverage, which has marked an upgrade in the EU rule of law strategy is not exempted from some pitfalls and shortcomings. For example, in a recent Special Report, the EU Court of Auditors assessed the difficulties in the application of the new conditionality Regulation, mainly related to the requirement to establish a sufficient link between breaches to the rule of law principles and the protection of EU financial interests (European Court of Auditors, 2024: 5).

3 The Main Trends in EU Rule Toolbox's Dissensus

From the review of the various instruments three elements and trends seem to deserve special attention from the perspective of dissensus. First, the circumstance that the growing set of rule of law instruments is not necessarily promoting better results, as the detachment between the theory and the practice of the rule of law seems to prove. The relationship between the various instruments is to a large extent unsettled, thereby creating some confusion as to when it is appropriate to use each of them. Some tools, like the PRP or the rule of law conditionality regulation, are certainly complementary to the already existing ones, some being more generic (e.g., the infringement proceeding) and some being narrower in focus (e.g., the technical support instrument, on which see A. Dirri and Y. Guerra in this volume). In general, the dissensus can also be seen, at least from an academic perspective, as criticism and disappointment against the uncoordinated proliferation of soft law instruments (rule of law reports, rule of law dialogue, etc.: Part III) none of them alone is decisive to tackle rule of law problems. There is also the issue of overlapping between instruments as it was, just to mention one case, between the Cooperation and Verification Mechanism (see A. Dirri in this volume) and the Rule of Law Reports (see Y. M. Citino in this volume), with

the former that has been embodied in the latter. At times, the overlapping, instrumental in creating synergies between the tools, as it is for the many conditionality regimes all targeting the lack of independence of the judiciary (RRF conditionality, Charter enabling condition under the CPR and the rule of law conditionality Regulation) if not well explained to the stakeholders and the public may create uncertainty, confusion and the allegation of an inconsistent approach by the Commission (see C. Fasone and M. Simoncini in this volume).

Second, there is a certain degree of disagreement and, hence, of dissensus, especially in the literature, on the qualitative and quantitative indicators setting the scoreboard for the assessment of the national performance on the rule of law and, in general, on how to check compliance with the rule of law principles in a systematic manner. For example, the EU Justice Scoreboard, which forms the basis for drafting the rule of law reports and part of the data grounding the elaboration of Country Specific Recommendations, has been contested both in terms of methodology and for the mechanism of data evaluation (see Y. Guerra in ths volume). If there is no convergence on the scoreboard to be used, then any position taken by the Commission can be subject to contestation and accused of arbitrariness and too broad discretion, which could run exactly in contrast to what the values of legal certainty and predictability the rule of law aims to represent.

The third element to consider is the extent to which the economic and financial leverage to deal with rule of law issues has become a central element of dissensus. This is clear, for instance, from the reach of the Country Specific Recommendations within the European Semester that have come to cover judicial reforms and the adoption of anti-corruption measures (see A. Capati and T. Christiansen in this volume) and from the way EU competition rules have been used to deal with problems of media freedoms (see K. Cseres in this volume). The increasing use of the economic leverage and of EU funds to tackle rule of law issues is also prompting a more active involvement of OLAF and, in the prospect of EPPO, as the fight against EU frauds and the protection of the rule of law principles can now more easily be paired (Rubio et al., 2023). Indeed, over the last five years and especially since the Next Generation EU package was adopted (see N. Lupo; C. Fasone and M. Simoncini in this volume), the rise of spending conditionality and the greater attention to the protection of the EU financial interests have indirectly led to further politicization and polarization of the debate on the rule of