Foreword: Fuzzy Borders

Besselink, L.F.M.

DOI
10.1007/978-3-031-60008-1

Publication date
2024

Document Version
Final published version

Published in
EU Rule of Law Procedures at the Test Bench

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.