



## ARTICLES

### RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

edited by Cristina Fasone, Daniele Gallo and Jan Wouters

## RE-CONNECTING AUTHORITY AND DEMOCRATIC LEGITIMACY IN THE EU: INTRODUCTORY REMARKS

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TABLE OF CONTENTS: I. The disconnection between the *loci* of authority and those of democratic control. – II. The competence problem in the Union. – III. Reconciling Europe with its citizens through democracy and rule of law. – IV. Scope and contents.

ABSTRACT: One of the main problems the Union has to cope with is the difficulty in properly articulating the relationship between authority and democratic legitimacy, in particular the disconnection between the allocation of powers to the EU and to its Member States and the forms of democratic control over their exercise in the Union. Indeed, it seems that the more EU authority expands, the more the democratic legitimacy of the Union is in trouble. In the EU the source of authority is dislocated out of the traditional forms of democratic accountability, which have been shaped domestically by centuries of constitutional history. In addition to this, the “punctiform” nature of many EU decision-making processes, starting at one level of government – regional, national or supranational – and ending up being concluded at a different level, favours this feeling of disorientation amongst European citizens. The attitude of several national governments, which tend to blame the EU for their own failures, exacerbates this problem and leads to the perception of EU institutions as not only distant, but also detached from the needs of ordinary citizens.

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KEYWORDS: authority – legitimacy – disconnection – EU competences – democratic control – rule of law.

## I. THE DISCONNECTION BETWEEN THE *LOCI* OF AUTHORITY AND THOSE OF DEMOCRATIC CONTROL

The problem of the “democratic deficit” in the European Union is probably as old as the process of European integration, being initially ascribed by David Marquand, in 1979, to the weak democratic legitimacy of the then European Community institutions due to the limited authority of the Parliamentary Assembly.<sup>1</sup> Against this backdrop he proposed the empowerment of the soon-to be elected European Parliament.<sup>2</sup> Whether the diagnosis of a “democratic deficit” for the Union is still accurate is, however, a different question. The Treaty of Rome in 1957 entailed a limited, but revolutionary for the time, conferral of powers to the Communities’ institutions, though not particularly in favour of the Parliamentary Assembly, which remained mainly a consultative authority at least until the budgetary treaties of the 1970s.<sup>3</sup> However, most powers, and core state powers in particular, firmly remained in the hands of national institutions, including national parliaments.<sup>4</sup> During the first stage of the European integration process, the idea of national legislatures’ disempowerment derives much more from domestic politics and national executive dominance in parliamentary systems, from the rise of the “administrative state”, and from processes of globalisation in general,<sup>5</sup> than from the alleged transfer of powers to the EU without democratic control.

The self-empowering attitude of Community institutions, starting from the Court of Justice,<sup>6</sup> the European Commission<sup>7</sup> and the same European Parliament,<sup>8</sup> drawing on

<sup>1</sup> D. MARQUAND, *Parliament for Europe*, London: Jonathan Cape, 1979, *passim*, and Y. MÉNY, *De La Démocratie en Europe: Old Concepts and New Challenges*, in *Journal of Common Market Studies*, 2003, p. 8.

<sup>2</sup> D. MARQUAND, *Parliament for Europe*, cit., p. 64.

<sup>3</sup> See the Treaty amending certain budgetary provisions signed in Luxembourg on 22 April 1970 and entered into force on 1 January 1971, and the Treaty amending Certain Financial Provisions, signed in Brussels on 22 July 1975 and entered into force on 1 June 1977.

<sup>4</sup> Or of Member States’ governments acting at Community level in the Council, which explains why liberal intergovernmentalists have disputed the idea of a democratic deficit of the EU. See, amongst many, A. MORAVCSIK, *In Defence of the “Democratic Deficit”, Reassessing Legitimacy in the European Union*, in *Journal of Common Market Studies*, 2002, p. 603 *et seq.*

<sup>5</sup> See S. ISSACHAROFF, *Democracy’s Deficits*, in *The University of Chicago Law Review*, 2018, p. 485 *et seq.*

<sup>6</sup> Since Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, and Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. Enel*. See D. GALLO, *L’efficacia diretta del diritto dell’Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Milano: Giuffrè, 2018, *passim*; R. SCHÜTZE, *Direct and indirect effects of Union law*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of EU Law*, Oxford: Oxford University Press, 2018, p. 265 *et seq.*; J.H.H. WEILER, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, in *International Journal of Constitutional Law*, 2014, p. 94 *et seq.*; A. TIZZANO, J. KOKOTT, S. PRECHAL (eds), *50th Anniversary of the Judgment Van Gend en Loos 1963-2013, Conference proceedings*, Luxembourg: Office of the official publications of the European

an extensive and teleological interpretation of the Treaties<sup>9</sup> and leading to the setting up of a supranational organisation in contrast to “ordinary international organizations”,<sup>10</sup> might have fed the rhetoric of the “democratic deficit”. The argument goes as follows: the Community legal system acquires an autonomy of action – an authority – that Member States might not be willing to confer to supranational institutions in principle, based on a literal interpretation of the Treaty. The first European Parliament’s elections in 1979 and the start of the “season” of Treaty revisions, from the 1980s to the Treaty of Lisbon, have probably changed the picture.

On the one hand, it became clear that Member States were in fact willing to increase the Community-Union’s competences at every treaty change so as to encompass, well beyond a purely economic understanding of the internal market, citizenship, coordination of economic policy, migration and criminal law, just to mention the most sensitive areas for the national sovereignty. At the same time, however, the “blame game” of national governments against the EU institutions – despite them being part of the Council and of the European Council – started.<sup>11</sup> European institutions have often been portrayed by domestic executives and media as being completely detached from domestic constitutional systems, making decisions with a huge impact on European citizens’ lives without clear and effective forms of democratic accountability. This understanding, today further echoed by Eurosceptic and populist parties and governments, dismisses and challenges the fundamental tenets of representative democracy in Europe, provided by Art. 10, para. 2, TEU:

Union, 13 May 2013, *passim*; M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 2010, *passim*; E. EDWARD, *Direct Effect: Myth, Mess or Mystery?*, in J.M. PRINSSSEN, A. SCHRAUWEN (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine*, Groningen: Europa Law Publishing, 2002, p. 1 *et seq.*; S. PRECHAL, *Does Direct Effect Still Matter?*, in *Common Market Law Review*, 2000, p. 1047 *et seq.*; P. CRAIG, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, in *Oxford Journal of Legal Studies*, 1992, p. 453 *et seq.*; P. PESCATORE, *The Doctrine of “Direct Effect”: An Infant Disease of Community Law*, in *European Law Review*, 1983, p. 155 *et seq.*

<sup>7</sup> See L. RYE, *The Legitimacy of the EU in Historical Perspective. History of a Never-ending Quest*, in *European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 191 *et seq.*

<sup>8</sup> As is well-known, the Parliamentary Assembly renamed itself “European Parliament” in 1962 (*cf.* the Resolution of 30 March 1962 on the name of the Assembly) though the new denomination was acknowledged in primary law only with the Single European Act of 1986. On the self-empowering attitude of the European Parliament, see O. COSTA, *Le Parlement européen, assemblée délibérante*, Bruxelles: Éditions de l’Université de Bruxelles, 2001, p. 120 *et seq.*

<sup>9</sup> M. POIARES MADURO, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, in *European Journal of Legal Studies*, 2007, p. 1 *et seq.*

<sup>10</sup> See J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2405 *et seq.*, before the entry into force of the Treaty of Maastricht.

<sup>11</sup> See S. NOVAK, *The silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union*, in *Journal of Common Market Studies*, 2013, p. 1091 *et seq.*; S.B. HOBOLT, J. TILLEY, *Blaming Europe? Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014, p. 123 *et seq.*

“Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens”.

On the other hand, the role and powers of the other pillar of representative democracy in Europe, the European Parliament, have also been severely criticised (Arts 10, para. 2, and 14 TEU). Once being directly elected, high expectations have been raised by the fact that it would have become a parliament like any other. However, in terms of composition and of electoral system(s), there is little doubt that the European Parliament can hardly be equated to a domestic legislature or even to a federal Congress, although comparative studies abound in this regard.<sup>12</sup> Lacking a uniform electoral procedure (Art. 223, para. 1, TFEU), the current mixture of common electoral principles<sup>13</sup> and domestic electoral legislations,<sup>14</sup> even more than the implementation of the principle of degressive proportionality,<sup>15</sup> makes it difficult to perceive the European Parliament as representing European citizenry.<sup>16</sup> Furthermore, once the European Parliament is elected, the current appointment and accountability procedures towards the other institutions and, first of all *vis-à-vis* the Commission, fail to let people understand how their representatives in the Parliament can affect the political directions, the agenda

<sup>12</sup> See A. KREPPPEL, *The Environmental Determinants of Legislative Structure: A Comparison of the US House of Representatives and the European Parliament*, in T.J. POWER, N.C. RAE (eds), *Exporting Congress? The Influence of U.S. Congress on World Legislatures*, Pittsburgh: University of Pittsburgh Press, 2006, p. 137 *et seq.*; S. FABBRINI, *Between Power and Influence: the European Parliament in a dual Constitutional Regime*, in *Journal of European Integration*, 2019, p. 417 *et seq.*, especially in relation to the US Congress.

<sup>13</sup> See Council Decision (EC, Euratom) 2002/772 of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision (ECSC, EEC, Euratom) 76/787 of 21 October 2002, and Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage.

<sup>14</sup> On this point, see Court of Justice, judgment of 19 December 2019, case C-502/19, *Junqueras*.

<sup>15</sup> Particularly criticised, as is well known, by the German Federal Constitutional Court in the Lisbon Treaty ruling (judgment of 30 June 2009, 2 BvE 2/08) and in the judgments of 9 November 2011, 2 BvC 4/10, and of 26 February 2014, 2 BvE 2/13 *et al.*, 2 BvR 2220/13 *et al.*, on the national electoral threshold for the European elections. The most evident distortions of the principle of degressive proportionality have recently been corrected, with a revised distribution of seats amongst Member States, “taking advantage” of 46 of the 73 UK seats that have just been vacated after Brexit. While some seats have been redistributed (46), the remaining 27 seats have remained on hold, waiting for future EU enlargements rather than been assigned to a transnational constituency or to transnational lists, for example. See M. BARTL, *Hayek Upside-Down: On the Democratic Effects of Transnational Lists*, in *German Law Journal*, 2020, p. 57.

<sup>16</sup> And this goes well beyond the so-called “no demos” thesis, which seems to have lost sight in the current debate in favour of a more sophisticated account of the EU democratic polity as a “demoicracy”. See K. NICOLAÏDIS, *The Idea of European Demoicracy*, in J. DICKSON, P. ELEFThERiADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 247 *et seq.*, and R. BELLAMY, *A Republican Europe of States. Cosmopolitanism, Intergovernmentalism and Democracy in the EU*, Cambridge: Cambridge University Press, 2019, especially pp. 95-208.

and the priorities of the Union.<sup>17</sup> The European Parliament typically works by building large majorities, based on changing coalitions of political groups, which often do not mirror the majority formed at the time of the vote of investiture of the Commission.<sup>18</sup> The traditional accounts and alternatives developed within Nation States when it comes to forms of democratic government – parliamentary, presidential and semi-presidential, each of them entailing specific accountability mechanisms – are not satisfactory when referred to the Union. By the same token, the critical assessment of the European Parliament's role in the Union neglects the extraordinary powers which this democratic assembly holds in a comparative perspective. No other parliaments in the Union today can compete with the legislative and budgetary powers of the European Parliament,<sup>19</sup> which has been described as one of the most powerful parliaments in the world.<sup>20</sup>

Does this mean that there is no democratic problem in the Union and that citizens' criticism of EU institutions and the European Parliament especially is only due to a lack of understanding and awareness about the EU institutional set up? In part, as the European Parliament and the European Commission's communication strategies indicate, there is a communication problem on what the EU delivers and how it does so.<sup>21</sup> In part, as happens in many national democracies, the EU is unable to mobilise citizen participation within and beyond the elections, for example through mechanisms of bottom-up civic engagement.<sup>22</sup>

<sup>17</sup> Tasks that Art. 15, para. 1, TEU appears to assign to the European Council, in the first place, on which the European Parliament has very loose tools of control. See W. WESSELS, O. ROZENBERG, *Democratic Control in the Member States of the European Council and the Eurozone Summits*, Study for the European Parliament, Directorate General for Internal Policies, PE 474.392, 2013, and D. DINAN, *Relations Between the European Council and the European Parliament. Institutional and Political Dynamics*, European Parliamentary Research Service, European Council Oversight Unit of the European Parliament, PE 630.288, 2018. On the problem of electoral accountability in the EU see J. NAVARRO, *Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 209 *et seq.*

<sup>18</sup> See R. CORBETT, F. JACOBS, R. NEVILLE, *The European Parliament*, London: John Harper Publishing, 2016, pp. 11-12 and 237.

<sup>19</sup> Even though it is certainly true that the amount of resources that the EP can mobilise through the EU budget are really limited (a little bit more than 1 per cent of the GNI) and is not able, with very limited exceptions, to intervene on the revenues. See C. FASONE, N. LUPO, *The Union Budget and the Budgetary Procedure*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of European Union Law*, cit., p. 809 *et seq.*

<sup>20</sup> S. HIX, A.G. NOURY, G. ROLAND, *Democratic Politics in the European Parliament*, Cambridge: Cambridge University Press, 2007, p. 3.

<sup>21</sup> See the recent application, devised before the 2019 European Parliament's elections, *What Europe does for me*, <https://what-europe-does-for-me.eu/en/home>.

<sup>22</sup> A. ALEMANNINO, *Europe's Democracy Challenge. Citizen Participation in and Beyond Elections*, in *German Law Journal*, 2020, p. 35 *et seq.* Petitions, European citizens' initiatives and the Commission's public consultation can be deemed to tackle this problem effectively.

## II. THE COMPETENCE PROBLEM IN THE UNION

However, the discontent towards the EU may also be significantly affected by the confusion that the process of European integration has triggered, with the responsibility of both the Member States and the EU itself, between the *loci* of authority, where the power is held and exercised, and those ensuring the democratic control of the decision-making processes – and hence, their democratic legitimacy – preferably through institutions that are directly elected. What at first sight is a very straightforward principle, the principle of conferral,<sup>23</sup> the bulwark for the articulation of the relationships between the Union and the States, faces several problems in its implementation.

First of all, except for the fields of exclusive competence (Art. 3 TFEU), in all the other fields – albeit to a different extent depending on whether the competence is shared (Art. 4 TFEU), where pre-emption occurs,<sup>24</sup> or, instead, the EU is deemed to support, complement or supplement national actions (Art. 6 TFEU) – the divide amongst the share of power between the States and the Union is somewhat blurred.<sup>25</sup> Where the authority actually lies depends on other principles, in particular subsidiarity and proportionality (Arts 5, paras 3, and 4 TEU), that have been amongst the most contested in the EU.<sup>26</sup> Suffice it to say that especially to tame the (too) creative and political interpreta-

<sup>23</sup> Like happens in most federations: see K. LENAERTS, *Constitutionalism and the Many Faces of Federalism*, in *American Journal of Comparative Law*, 1990, p. 205 *et seq.*; R. SCHÜTZE, *From Dual to Cooperative Federalism. The Changing Structure of EU Law*, Oxford: Oxford University Press, 2009, p. 76 *et seq.*; D. HALBERSTAM, *Federalism: Theory, Policy, Law*, in M. ROSENFELD, A. SAJÒ (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, especially pp. 589-602. According to Art. 5, para. 2, TEU: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. On the competences of the EU and the principle of conferral, see A. VON BOGDANDY, J. BAST, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, in *Common Market Law Review*, 2002, p. 227 *et seq.*; L. AZOULAI, *Introduction. The Question of Competence*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, Oxford: Oxford University Press, 2014, p. 1 *et seq.*; T. KOSTADINIDES, *The competences of the Union*, *cit.*, p. 191 *et seq.*

<sup>24</sup> See A. ARENA, *The Doctrine of Union Preemption in the EU Internal Market: Between Sein and Sollen*, in *Columbia Journal of European Law*, 2010, p. 477 *et seq.* See, however, the “parallel” competences laid down in Art. 4, paras 3 and 4, TFEU, where no pre-emption takes place.

<sup>25</sup> Up to the point of questioning whether, after all, exclusive Member States’ competences still exist: see B. DE WITTE, *Exclusive Member State Competences-Is There Such a Thing?*, in S. GARBEN, I. GOVAERE (eds), *The Division of Competences between the EU and the Member States. Reflections of the Past, Present and Future*, Oxford: Hart Publishing, 2017, p. 59 *et seq.* By contrast, in some fields of exclusive competence, for example monetary policy, the authority of national institutions, like the national central banks through the ESCB, is still crucial for the monetary governance of the Eurozone.

<sup>26</sup> On the principle of proportionality, see G. DE BÚRCA, *The Principle of Proportionality and its Application in EC Law*, in *Yearbook of European Law*, 1993, p. 105 *et seq.*; T.-I. HARBO, *The Function of the Proportionality Principle in EU Law*, in *European Law Journal*, 2010, p. 158 *et seq.*; T. TRIDIMAS, *The Principle of Proportionality*, in *Oxford Principles of EU Law*, *cit.*, p. 243 *et seq.* On the principle of subsidiarity, see G. DE BÚRCA, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, in *Journal of Common Market*

tions of the subsidiarity principle provided by national parliaments – now involved in its *ex ante* monitoring (Art. 12 TEU and Protocol no. 2)<sup>27</sup> – the Juncker Commission established a “task force” on “Subsidiarity, Proportionality and ‘Doing Less More Efficiently’”, chaired by First Vice President Frans Timmermans, precisely to investigate how to deal with them properly and whose conclusions, except for limited innovations, have largely confirmed the problematic management of those principles.<sup>28</sup>

In addition to this, the exercise of powers at supranational level does not normally go in favour of the European Parliament, and sometimes not even of the Council or of the Commission. The number of legislative acts approved through the ordinary legislative procedure per year is just a minimal proportion compared to the other legislative acts and, most importantly, to non-legislative acts.<sup>29</sup> This comes in addition to the regulatory or quasi-rule-making powers which the many EU agencies are equipped with, with more or less effective control by the Commission.<sup>30</sup>

Given the inevitable complexity of EU policy-making procedures – their preeminent technical nature and multilingualism do not help either – it is difficult to hold the decision-maker(s) accountable in a transparent and public manner. The ordinary European citizen may face troubles in understanding who has the power to do what in the Union. In the European context decision-making procedures take place partly at supranational level and partly at domestic level, particularly for the implementation of EU law; with the involvement, next to truly supranational institutions, like the Parliament and the Commission, of national governments represented in EU institutions and of national officials sitting in the many committees the European Commission hosts.<sup>31</sup> There is no

*Studies*, 1998, p. 217 *et seq.*; G. DAVIES, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Common Market Law Review*, 2006, p. 63 *et seq.*; R. SCHÜTZE, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?*, in *Cambridge Law Journal*, 2009, p. 525 *et seq.*

<sup>27</sup> K. GRANAT, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Oxford: Hart, 2017, *passim*.

<sup>28</sup> The main results of the task force's work have been, as highlighted in the final report, the predisposition of a model grid for subsidiarity and proportionality to be used as common reference for all EU institutions and for national parliaments and the notion of “EU added value” to be proved by the Commission when putting forward a new legislative proposal.

<sup>29</sup> In 2019, for example, 75 basic legislative acts were adopted through the ordinary legislative procedure (plus 51 amending acts), 320 basic legislative acts were adopted through special legislative procedures as Council acts (75 amending acts), there were 60 basic delegated acts (65 amending acts), 513 basic implementing acts (359 amending ones) and 405 other acts, most of which were the Commission's decisions. Source: Legal Acts – Statistics, EUR-Lex, eur-lex.europa.eu.

<sup>30</sup> M. BUSUIOC, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2010, p. 75 *et seq.*; M. SIMONCINI, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Oxford: Hart Publishing, 2018, ch. 2.

<sup>31</sup> On comitology, C.F. BERGSTRÖM, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford: Oxford University Press, 2005, pp. 186-284; M. SAVINO, *The role of Committees in the EU Institutional Balance: Deliberative or Procedural Supranationalism?*, in T. CHRISTIANSEN, J.M. OETTEL, B.

direct accountability chain between the European Parliament and such institutions and bodies, notwithstanding the Parliament's attempt to expand its scrutiny and oversight powers.<sup>32</sup> By the same token, also for national parliaments, despite what was codified in Art. 10 TEU, overall there is still limited access and disclosure by their own government of information regarding the activity of the Council, of the European Council and the other intergovernmental fora.<sup>33</sup> Likewise, for national parliaments, it is anything but easy to control the activity of the EU institutions. Traditionally, accountability tools are designed to work within the same level of government, not across them. Until now, the attempts of both the European Commission and the European Central Bank in the framework of the European Semester and of Banking Union, respectively, to create channels of direct interaction with national parliaments – thus enriching the accountability mechanisms also in favour of the domestic level of government<sup>34</sup> – have not paved the way to an enhanced democratic and streamlined control of EU executive action.<sup>35</sup>

VACCARI (eds), *21st Century Comitology. Implementing Committees in the Enlarged European Union*, Maastricht: European Institute of Public Administration, 2009, p. 19 *et seq.*

<sup>32</sup> The European Parliament has drawn, in particular, on Arts 14 and 15, para. 6, TEU, Arts 230 and 235, para. 2, TFEU, on the inter-institutional agreement on better law-making, and on its rules of procedure (Arts 37 and 118a on annual and multiannual programming; Arts 128, 129, 130 and 210 on parliamentary questions; and Art. 123 on the statements of the Council and the European Council's members in front of the Parliament). Additionally, the Court of Justice has also contributed to this trend, starting from its landmark judgment in: Court of Justice, judgment of 29 October 1980, case C-138/79, *SA Roquette Frères v Council*.

<sup>33</sup> O. ROZENBERG, W. WESSELS, *Democratic Control in the Member States of the European Council and the Euro zone summits*, cit., p. 14 *et seq.*; D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *Modern Law Review*, 2014, p. 1 *et seq.*

<sup>34</sup> See the economic dialogue (e.g. Art. 14 of Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, and Art. 15 of Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area) and the banking dialogue (Arts 20 and 21 of the Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, and Art. 45 of Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010). In addition to these “dialogues” which happened to be established in fields where national interests and national law are still dominant, the European Commission directly interacts with national parliaments in the framework of the early warning mechanism and of the political dialogue (Protocols no. 2 and no. 1 annexed to the Treaty of Lisbon).

<sup>35</sup> On the economic dialogue, see B. CRUM, D. CURTIN, *The Challenge of Making the European Union Executive Power Accountable*, in S. PIATTONI (ed.), *The European Union. Democratic Principles and Institutional Architectures in Times of Crisis*, Oxford: Oxford University Press, 2015, p. 63 *et seq.*; on the banking dialogue, see D. FROMAGE, R. IBRIDO, *The 'Banking Dialogue' as a Model to Improve Parliamentary Involvement in the Monetary Dialogue?*, in *Journal of European Integration*, 2018, p. 295 *et seq.*



Moreover, the problem of the disconnection between the place of authority and the nature of the democratic control that the exercise of EU (conferred) powers entails is further worsened by the asymmetries featuring the degree of integration reached by Member States in a certain policy area or on a single issue. Europe *à la carte* and differentiated integration that tend to materialise through opt-ins and opt-outs, forms of enhanced and structured cooperation (though marginally used so far), agreements amongst some Member States only, not to mention the divide between Eurozone and non-Eurozone, and *de facto* asymmetries (e.g. Northern vs. Southern countries, countries of first arrival vs. countries of final destination, Western vs. Eastern countries, etc.) complicate the disconnection(s) between national and EU decision-makers and the citizens.

The confusion with the powers and limits of the EU is also translated into the academic debate. For one, politics as emerging from democratic discretionary choices is excessively constrained at EU level. The “over-constitutionalisation” of EU primary law thesis argues that the Treaties abound in procedural and substantive details unlike most domestic Constitutions, thus frustrating the possibility for EU institutions to engage with truly autonomous political decisions.<sup>36</sup>

For others, instead, the level of autonomy which EU law has reached – the “unconfined power of EU law” – is able to generate a permanent contestation by national authorities and civil society against the EU that, although potentially positive as long as democratic, can easily be turned into a destructive conflict.<sup>37</sup>

Both visions, though apparently in contrast, highlight the limits of the EU’s political authority and the quest for enhanced democratic legitimacy. The perception of a technocratic domination of the EU, with the many constraints and hurdles posed to democratic scrutiny, both at national and at supranational level, in fact hides the existence of very sophisticated and articulated instances of democratic control of the EU decision-making process within the European Parliament, in national parliaments and through interparliamentary cooperation. All of this fails to provide a coherent system of democratic accountability. Remarkably, in contrast to the “democratic deficit” thesis, some authors argue that the EU is actually affected by a “democratic surplus”.<sup>38</sup> At the same time the idea that the EU has gone too far in “overstretching” its powers without national polities having a say, beyond the occasion of Treaty revisions, has fed the rhetoric of a “re-nationalisation” of EU powers

<sup>36</sup> See D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 460 *et seq.* To some extent this idea also echoes Schmidt’s view of the Union as based on “policies without politics” (V.A. SCHMIDT, *Democracy in Europe: The EU and National Polities*, Oxford: Oxford University Press, 2006, p. 156) and the idea of the EU legislature as constrained by the Court of Justice’s case law, on which see G. DAVIES, *The European Union Legislature as an Agent of the European Court of Justice*, in *Journal of Common Market Studies*, 2016, p. 846 *et seq.*

<sup>37</sup> See D. CHALMERS, *The Unconfined Power of European Union Law*, in *European Papers*, 2016, Vol. 1, No 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 405 *et seq.*

<sup>38</sup> See A. PSYGKAS, *From the “Democratic Deficit” to a “Democratic Surplus”: Constructing Administrative Democracy in Europe*, Oxford: Oxford University Press, 2017, p. 1 *et seq.*

– taking back control! – as the Brexit saga confirms, and as a controversial and dangerous use of the “national constitutional identity” discourse seems to prove.<sup>39</sup>

III. Where do citizens stand in such a complex relationship between the EU and its Member States? The many crises the EU has experienced over the last few years – the financial, eurozone, migration, the rule of law and the Coronavirus crises<sup>40</sup> – have further jeopardised the problem of the disconnection between authority and democratic legitimacy in the Union. This has been exacerbated by the Union’s inability to deliver. For this not only the EU is to blame: Member States bear significant responsibilities as well. For example, national governments have been unwilling to confer further powers to the EU so as to complete the Economic and Monetary Union (EMU), or to create effective solidarity mechanisms across Member States to tackle migration. *A fortiori* the responsibility for rule of law backsliding and democratic decay affecting several Member States lies primarily at national level,<sup>41</sup> even though it has been convincingly argued that a (too) quick accession to the EU without sufficient scrutiny of the respect of these fundamental principles has not helped the situation.<sup>42</sup>

<sup>39</sup> See the case of the Hungarian Constitutional Court, judgment of 5 December 2016, no. 22, on the European Council Decision 2015/1601/EU of 22 September 2015 on the relocation of immigrants and the quota system, on which see, critically, G. HALMAI, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law*, in *Review of Central and East European Law*, 2018, p. 23 *et seq.* A number of Constitutional and Supreme Courts today have drawn on Art. 4, para. 2, TEU, which refers to “national identity” to elaborate their own version of the “constitutional identity review” towards EU law; a tool which has been normally used to signal the existence of national supreme constitutional principles to be protected, in a joint cooperative enterprise with the EU institutions and the Court of Justice in particular. In some instances, like the one just mentioned, however, the “constitutional identity” has been used as a confrontational tool, thus leading some scholars to question the constitutional identity review in its entirety. See for instance R.D. KELEMEN, L. PECH, *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland*, in *RECONNECT Working Paper*, no. 2, September 2018, *passim*; F. FABBRINI, A. SAJÒ, *The Dangers of Constitutional Identity*, in *European Law Journal*, 2019, p. 457 *et seq.*; G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, in *European Public Law*, 2019, p. 347 *et seq.*

<sup>40</sup> On the problematic management of the Eurozone crisis, see C. PINELLI, *The Dichotomy Between “Input Legitimacy” and “Output Legitimacy” in the Light of the EU Institutional Developments*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 225 *et seq.*

<sup>41</sup> See A. SANDULLI, *The Double Face of the Rule of Law in the European Legal Order: An Administrative Law Perspective*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 237 *et seq.* See also T.T. KONCEWICZ, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, in *Review of Central and East European Law*, 2018, p. 116 *et seq.*, and W. SADURSKI, *Poland’s Constitutional Breakdown*, Oxford: Oxford University Press, 2019, p. 58 *et seq.*

<sup>42</sup> See J. WOUTERS, *Revisiting Art. 2 TEU: A True Union of Values?*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 255 *et seq.* See also D. KOCHENOV, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law*, Den Haag: Kluwer Law International, 2008, *passim*.

Yet for a long time the EU has probably been slow and ineffective in its reaction to the rule of law crisis,<sup>43</sup> only recently trying to propose a more comprehensive and coordinated toolkit of measures to face rule of law problems.<sup>44</sup> The active and consistent stance of the Court of Justice in its latest decisions has also supported a shift in the approach,<sup>45</sup> with a view to promote “integration through the rule of law”.<sup>46</sup>

In light of these developments, citizens have remained mainly spectators of this drama, with fundamental rights seriously in danger in those Member States, like Hungary and Poland, that have been affected most by rule of law backsliding: political capture of courts, free media under attack, academic institutions forced to relocate elsewhere and even the right to have free and democratic elections have been put into question.<sup>47</sup> Although the national governments in question have been established through democratic elections, as they gradually dismantled the institutions from within a (formal) constitutional state,<sup>48</sup> the basic tenets of liberal constitutionalism have gone. This is happening while the level of trust of citizens towards national and EU institutions has gradually declined.<sup>49</sup>

<sup>43</sup> See L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq.*

<sup>44</sup> See the Communication COM(2019) 163 final of 3 April 2019 from the Commission to European Parliament, the European Council and the Council on Further strengthening the Rule of Law within the Union. State of play and possible next steps, and Communication COM(2019) 343 final of 17 July 2019 from the Commission to European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Strengthening the rule of Law within the Union. A Blueprint for Action, and the critical remarks by D. KOCHENOV, *Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law*, in *Hague Journal on the Rule of Law*, 2019, p. 423 *et seq.*

<sup>45</sup> See Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*; judgment of 25 July 2018, case C-216/18 PPU, *LM*; order of 17 December 2018 and judgment of 24 June 2019, case C-619/18, *Commission v. Poland*; judgment of 5 November 2019, case C-192/18, *Commission v. Poland*; judgement of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. v. Krajowa Rada Sądownictwa*, and *CP and DO v. Sąd Najwyższy*; all of them emphasising the link between effective judicial protection under Art. 19 TEU and Art. 47 of the Charter of fundamental rights of the EU (Charter) and the principle of judicial independence.

<sup>46</sup> K. LENAERTS, *New Horizons for the Rule of Law Within the EU*, in *German Law Journal*, 2020, p. 29.

<sup>47</sup> See Venice Commission, Draft Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Opinion no. 720/2013 of 29 May 2012, CDL(2012)023, Strasbourg; Venice Commission-OSCE/ODIHR, Draft joint opinion on the Act on the elections of Members of Parliament of Hungary, Opinion no. 662/2012 of 1 June 2012, CDL(2012)033, Strasbourg, and B. MAJTÉNYI, A. NAGY, P. KÁLLAI, “Only Fidesz” – *Minority Electoral Law in Hungary*, in *Verfassungsblog*, 31 March 2018, *verfassungsblog.de*.

<sup>48</sup> This is a point that many scholars highlight, in comparison to the traditional practice of authoritarian *coups d'état*: see A. HUQ, T. GINSBURG, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 2018, p. 78 *et seq.*; D. ZIBLATT, S. LEVITSKY, *How Democracies Die. What History Reveals About Our Future*, London: Viking, 2018, *passim*; M.A. GRABER, *What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy*, in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds), *Constitutional Democracy in Crisis*, Oxford: Oxford University Press, 2018, p. 665 *et seq.*

<sup>49</sup> See the European Council Bratislava Declaration and Roadmap adopted on 16 September 2016 in the framework of the Bratislava Summit of 27 Member States, and the Report by L. VAN DEN BRANDE, Spe-

It can thus be asked whether the EU is apt to restore trust with European citizens and rescue national constitutional democracies like it did, at the start of the integration process, with States in the aftermath of the Second World War.<sup>50</sup> The RECONNECT Horizon 2020 Project on “Reconciling Europe with its Citizens through Democracy and Rule of Law”, in the framework of which this *Special Section* is published, contends that the EU can regain legitimacy if it takes citizens’ aspirations and preferences duly into account. Art. 2 TEU raises high expectations on what the EU can deliver,<sup>51</sup> also in relation to countries that seem to have lost confidence in rule of law and democratic principles. Human dignity, freedom, democracy, equality, the rule of law and protection of minorities are values upon which the EU is founded and are common to the Member States, according to Art. 2 TEU. Moreover, these values are deemed to be implemented in societies in which “pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. In particular, the RECONNECT project emphasises the importance of preserving and promoting justice and solidarity in all areas of the Union’s action as a way to restore citizens’ credibility in the EU institutions. The results of the 2019 European elections, with the defeat and normalisation-institutionalisation of the Eurosceptic front, are to some extent a further confirmation of this.<sup>52</sup>

Through a comprehensive examination of principles, practices, and perceptions of democracy and the rule of law in the EU carried out by a consortium of 18 academic partner institutions led by KU Leuven, RECONNECT aims to detect how democratic and rule of law principles and practices of national and EU institutions resonate with the actual aspirations, perceptions and preferences of citizens so as to build up a new narrative for Europe reconnecting the Union to its citizens.

The *Articles* of this *Special Section* were first presented at the RECONNECT workshop held on 1 February 2019 at LUISS Guido Carli on “Reconceptualizing Authority and Legitimacy in the EU: New Architectures and Procedures to Reconnect the Union with its Citizens”, organised in the framework of Work Package 4 of RECONNECT, looking at concepts like democracy and rule of law, legitimacy and authority in relation to solidarity and justice, and to sovereignty. Since then the papers have been revised and re-worked to provide a more consistent account for the authority and legitimacy challenges which the EU faces.

cial Adviser to the President of the European Commission, Jean-Claude Juncker, on *Reaching Out to EU Citizens: A New Opportunity. “About us, with us, for us”*, October 2017, ec.europa.eu.

<sup>50</sup> See A. MILWARD, *The European Rescue of the Nation-State*, 2000, London: Routledge, p. 21 *et seq.* A Recent Standard Eurobarometer Survey, after the 2019 European elections, however, shows an improvement in the perception of the EU by the European citizens, including a record high support for the euro: Standard Eurobarometer 91, August 2019.

<sup>51</sup> See J. WOUTERS, *Revisiting Art. 2 TEU*, cit., and A. VON BOGDANDY, L.D. SPIEKER, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, in *European Constitutional Law Review*, 2019, p. 391 *et seq.*

<sup>52</sup> See Editorial, *The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?*, in *European Papers*, Vol. 4, 2019, No 1, www.europeanpapers.eu, p. 3 *et seq.*

#### IV. SCOPE AND CONTENTS

As highlighted above, one of the main problems the Union has to cope with is the difficulty in properly articulating the relationship between authority and democratic legitimacy. This leads to the perception of EU institutions as not only distant, but also detached from the needs of ordinary citizens. In the EU the source of authority is dislocated out of the traditional forms of democratic accountability, which have been shaped domestically by centuries of constitutional history. In addition to this, the “punctiform” nature of many EU decision-making processes, starting at one level of government – regional, national or supranational – and ending up being concluded at a different level, favours this feeling of disorientation amongst European citizens. The attitude of several national governments, which tend to blame the EU for their own failures, exacerbates this problem.

The aim of this *Special Section* is to tackle the problem of the disconnection between the allocation of powers between the EU and its Member States and the forms of democratic control over the exercise of authority in the Union. In order to highlight the evolution of this problem, it is investigated at different moments in time of the European integration process, from its foundation to the crises that occurred during the last decade. Indeed, it seems that the more the EU authority expands, the more the democratic legitimacy of the Union is in trouble. Each contribution looks at the problem of the disconnection that has been highlighted from a specific perspective: the design by the Union’s “founding fathers” of mechanisms of democratic accountability of the Commission; the effectiveness of the electoral accountability of the European Parliament; the democratic legitimacy problems caused by the Eurozone crisis and leading to the tension between technocratic dominance and populism; the asymmetry between administrative and constitutional developments of the EU and the limits of the role of law in the Union; and the ability of the EU to effectively control the respect of the fundamental values on which the entire European construction is built. Every article refers to a critical juncture of European integration:<sup>53</sup> the passage from the Treaty of Paris to the Treaty of Rome; the making of an elected supranational Parliament after 1979; the crisis triggered by the rejection of the Constitutional Treaty; the Eurozone crisis; and the rule of law crisis or, more fundamentally, the erosion of the values enshrined in Art. 2 TEU.

All the Authors highlight, from their own perspective of analysis, how one of the controversial points for the legitimacy of the EU is precisely the mismatch between the authority exercised by the European institutions and by the Member States, the reach and the limits of such authority and the mechanisms of democratic accountability. The interdisciplinary nature of the RECONNECT project is demonstrated by the multidisciplinary background of the authors of this *Special Section*, ranging from law, political science and history.

<sup>53</sup> G. CAPOCCIA, R.D. KELEMEN, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, in *World Politics*, 2007, p. 341 *et seq.*

Lise Rye's *Article on The Legitimacy of the EU in Historical Perspective: History of a Never-ending Quest* opens the *Special Section* by focusing on the foundational decade of the European integration process. It critically assesses the idea of legitimacy as "legality" stemming from the Treaty of Paris and from the Treaty of Rome, considering the Member States' decision to create a common market as the justification for the setting up of supranational institutions and for the empowerment of the European Commission. The *Article* argues that while the mechanisms for ensuring democratic legitimacy were weak in the Treaty of Rome, and the democratic relationship between citizens and Community institutions was not a central concern back then, the Treaty provided for basic accountability mechanisms, for example of the Commission *vis-à-vis* the then Parliamentary Assembly, that would acquire more visibility and strength in the decades to come.

Julien Navarro's *Article on Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit* examines accountability in the EU by looking at European elections. The *Article* discusses and challenges the idea that the Union suffers from a democratic deficit. The author advances that it is rather a political deficit that affects the EU and its disconnection from the citizens, linked to a problem of electoral accountability. The European Parliament elections are of special interest as they provide – at least in theory – the most direct channel for institutional accountability as well as the necessary incentives for political actors to act responsively. However, the declining turnout in European elections and the lack of knowledge about the EU on the part of voters reveal flaws in the performance of the accountability mechanisms at EU level. Such deficiencies depend, in part, on the internal procedures of the Parliament and on the design and the practice of the European Parliament's elections, which to a large extent are still reliant on national electoral rules and electoral campaigns.

Cesare Pinelli's *Article on The Dichotomy Between "Input Legitimacy" and "Output Legitimacy" in the Light of the EU Institutional Developments* leads us to the complex legitimacy problem that arose in the aftermath of the Eurozone's sovereign debt crisis. This crisis has triggered a "twin legitimacy deficit", with output legitimacy undermined, in terms of the EU's capacity to react through European-wide redistributive policies, and the input legitimacy of national representative institutions severely limited under the strict conditionality put in place by the new governance system and by the "command-and-control relationship" imposed. According to the author, the case-law of the Court of Justice, in cases like *Pringle* and *Gauweiler*, has revealed the same paradox. On the one hand, we have witnessed the imposition by an "unaccountable technocracy" (or the self-imposition by Member States) of a series of automatisms that limit the autonomy of national governments. On the other hand, the "command-and-control" style of intervention is also meant to impose a structural convergence amongst very different national economies and can be considered as illegitimate. Technocratic and intergovernmental dominance has further worsened the disconnection between the EU and its citizens also from the input legitimacy perspective, favouring a sort of populist backlash against the Union.

Aldo Sandulli's *Article on The Double Face of the Rule of Law in the European Legal Order: An Administrative Law Perspective* turns our attention to the role of law in the Union and its understanding and objectives, in order to explain the disconnection between European citizens and EU institutions. Three main asymmetries of the EU legal system are detected in comparison to the evolution of modern States. The first derives from a predominantly legalistic approach in the development of the Union, with the law being in an imbalanced relationship with other social sciences like economics and sociology. The second asymmetry, linked to the former, depends on the EU process of "juridification" of economic rules, with a specific ordoliberal approach entrenched in EU primary and secondary law and with narrow avenues for national economies to deviate from EU legal "orthodoxy". The third asymmetry arises from the contrast between the growing body of EU administrative law *vis-à-vis* the very limited development of constitutional law in the European legal system, whereby constitutional law refers to the (lack of the) ability of the EU to constitute power and to mobilise resources on its own. This asymmetry is the most problematic from a democratic perspective, as the development of constitutional law, at least at national level, is expected to prepare the ground for the advancement of administrative law, and not the other way around. The *Article* concludes by arguing that the attempt to reconnect European citizens and EU institutions needs to start from a conception of the law that is non-infrastructural nor instrumental to serve a specific economic project and from a more appropriate consistent balance between administrative and constitutional law.

Finally, Jan Wouters' *Revisiting Art. 2 of the TEU: A Union of Values?* offers a critical assessment of this Treaty provision, from its genesis to its implementation so far. The *Article* examines the enforcement of the EU's foundational values both in the accession stage and during the membership of the Union. The author highlights two main weaknesses related to Art. 2 TEU with regard to the main discourse that this *Special Section* seeks to advance. First, there is an asymmetry between the nature of Art. 2 TEU's values, which are foundational of the whole EU architecture, and the limited reach of EU action for their enforcement. Second, the EU and the Commission in particular, have followed quite a legalistic-technocratic assessment of the compliance with the rule of law principles rather than endorsing a broader and far-reaching view on Art. 2 TEU application that could combine all the values together. Under such broader view, other values like democracy, justice and solidarity could be given the same rank and strength as the rule of law, at the time of the accession process and once membership is acquired. This would probably help the Union to connect more strongly with the citizens of the acceding countries and to reconnect with those of the Member States, even though there are limits for the EU alone to deliver without the active cooperation of the Member States.

