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Volume 9

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Teresa Russo • Anna Oriolo • Gaspare Dalia
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Solidarity and Rule of Law

The New Dimension of EU Security

 Springer

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*In loving memory of David Maria Sassoli,
Journalist and President of the European
Parliament*

Preface

Looking for the New Dimension of EU Security

Solidarity and respect for the rule of law are two principles that are variously connected and increasingly evoked. These principles inform not only international relationships, especially in the context of the European Union, but are also among the fundamental values common to all Member States (Article 2 TEU) and their deeply integrated legal orders. In this perspective, they can be deemed ‘inside-outside’ principles inspiring EU internal and external actions toward Member and Third States (Article 21.1 TFEU). Nevertheless, according to the wording of Article 2 TEU, they do not seem to have comparable legal value, facing numerous difficulties in their practical application by both Member and acceding States. Indeed, Member States themselves are questioning their application, giving rise to the need for new protection mechanisms.

Therefore, this book aims to investigate how these two principles are linked within the main research fields of the Jean Monnet Module ‘EU-Western Balkans Cooperation on Justice and Home Affairs’ (EUWEB), financed by the European Commission for the period 2019–2022, concerning EU enlargement (Part I), cross-border security, migration, and asylum management (Part II), criminal justice and human rights (Part III), and police and judicial cooperation (Part IV). In so doing, the book critically analyzes these principles and their connection within the EU legal order as ‘borderline principles’ of EU action toward Member and acceding States, particularly the Western Balkans, now of strategic importance to EU security.

The link between solidarity and the rule of law principles is evident in the enlargement policy anchored to the EU values espoused in Art. 2 TEU, but even more evident in terms of the Western Balkans’ enlargement aimed first at stabilizing the region and then at integration in the EU. In this sense, Erjon Hitaj’s notable chapter reflects on the EU’s efforts to promote stabilization in the Western Balkans, particularly with regard to Kosovo, underlining that the creation of the Kosovo Specialist Chambers and Specialist Prosecutor’s Office was the direct result of diplomatic pressure exerted by the EU and USA on Kosovo’s government to

avoid the Security Council's involvement in the institution of any new tribunals for war crimes in Kosovo. As the author emphasizes, the creation of this special Court is a clear example of transitional justice that might provide a measure of rectitude for victims, guarantee effective accountability for perpetrators, and help stabilize the region. However, only time will show whether this *rule of court* principle will achieve the actual expectations of the Kosovo population and the international community, with the shared intent to democratize Kosovar society and meet the criteria for EU accession.

Similarly, the chapter by Niuton Mulleti focuses on EU Common Security and Defence Policy (CSDP) civilian missions that have greatly contributed to preserving security and stability in the Western Balkans, even if their role in the Europeanization of national political systems has been rather limited. Through an interesting reconstruction of the CSDP conceptualization, the author argues that the experience of CSDP civilian missions in the Western Balkans shows that effective rule of law cannot be established by an international mission, but only by local institutions under strict EU conditionality within the framework of their accession process. Relatedly, in her enlightening chapter, Teresa Russo explains the functions of EU enlargement by reconstructing the prior accession processes to demonstrate the inequality of Western Balkan accession due to the imposition of an endless list of benchmarks. In her diligent investigation, she emphasizes that the EU's approach toward Western Balkans accession consisted in foreign policy tools, intergovernmental mechanisms and instruments for their stabilization and association, regional cooperation, and good neighborly relations, where the backbone of enlargement focuses on the fundamentals linked to core EU values, and above all, the rule of law. Indeed, States aspiring to join the Union would need to establish and promote from an early stage the proper functioning of the core institutions necessary to ensure the rule of law. In particular, this chapter emphasizes the differences between enlargement and the European Neighborhood Policy (ENP) under the framework of EU external action, especially in view of the new applications for membership of Ukraine, Moldova, and Georgia. Furthermore, the author clarifies that the main objective of EU enlargement, namely solidarity among the peoples of Europe, culminates in strong conditionality for respect of the rule of law, without producing the desired results. In this sense, she judicially leads the reader to reflect on how enlargement to the East has allowed access of States that threaten EU values, thus negatively affecting Western Balkan accession.

Part II concerning cross-border security, migration, and asylum management, focuses on the principle of solidarity, specifically EU policies in the field governed by the principle of solidarity and fair sharing of responsibility, including financial implications, among Member States according to Article 80 TFEU. However, this part also highlights how the failure to respect this principle has undermined respect for the rule of law principle. This is evident in two cases of the Italian legal system detailed in Angelo Jr Golia's chapter exposing the dangers of exclusionary conceptions of solidarity and the rule of law detached from legal certainty and right to access as pre-conditions of the effective enjoyment of constitutional and

international rights. Since 2014, the migration crisis has raised a number of issues across Europe that significantly threaten the rule of law. The external borders of countries most affected by the influx of migrants reflect a serious problem at the core of the EU. In fact, failure to respect external border procedures is the first sign of a dysfunctional asylum system. The problems began with the non-application and non-respect of the principle of solidarity, safeguarding the human rights of migrants, refugees, and asylum seekers, and their protection against victimization or involvement in serious crimes.

Correspondingly, the chapter by Lorenzo Cherubini underlines that the Dublin System, aimed at EU cooperation in the field of asylum, was not initially designed to cope with the massive migratory flows that affected the Union in subsequent years. The author carefully shows that it is among the most criticized ‘products’ of European law. His chapter provides stimulating insights concerning the reasons for this failure, highlighting the perspective of the European Commission’s new and recent attempt to modify the Dublin System and introduce new solidarity mechanisms. His conclusions underscore the security risks to the fora and violations of human rights. These risks are the focus of the chapter co-authored by Elena Maksimova and Angelina Stanojoska examining cooperation between the EU and the Republic of North Macedonia in cases of human trafficking and smuggling of migrants. Considering the criminalization of solidarity in the EU, the chapter stimulates reflection on the current practice of investigating criminals, the increased policing of people who help migrants, including through search and rescue operations, reception activities and the provision of food, housing, and services. Part II of the book concludes with an in-depth examination in Ana Nikodinovska Krstevska’s chapter of the principle of solidarity in the context of the externalization of EU security in the areas of asylum and migration. Importantly, the author develops a common framework of EU solidarity and security externalization to illustrate the congruence of these two concepts in the case of North Macedonia, highlighting that EU membership and border enlargement have become issues to be managed under the framework of a new dimension of EU security strongly anchored in safeguarding its identity and inspired by respect for its core values.

Solidarity and the rule of law also imbue EU criminal justice systems and human rights protection, the focus of Part III. This is recalled in Angela Di Stasi and Angela Festa’s thought-provoking chapter on the implications of breaches to the rule of law on the mutual trust principle in the Area of Freedom, Security and Justice (AFSJ). Starting from the evolving jurisprudence of the European Court of Justice (ECJ) on the independence of the judiciary, the authors underline the close link between the principle of mutual trust and EU values, such as the rule of law, solidarity, and human rights protection. As explained in the chapter, the presumption of trust among Member States implies that their judicial systems ensure equivalent and effective protection of fundamental rights, hence calling for the enforceability and recognition of the decisions of other national courts, contributing to interstate cooperation for the creation of a common legal space, such as AFSJ.

As emphasized throughout this book, the legal protection of fundamental human rights is a key area of attention in relation to Western Balkans accession to the

EU. However, in their co-authored chapter, Anja Matwijkiw and Bronik Matwijkiw take a look behind the legal scene by exploring the theoretical stakeholder frameworks that have contributed to different approaches to analyzing and assessing fundamental human rights. In this captivating and inspiring chapter, the authors introduce the reader to the issue of socioeconomic justice as the area that makes *the most sense* in terms of solidarity as a value and principle. In the authors' view, the emerging trend of *jointly* recalling the values and principles of solidarity and the rule of law to direct foreign affairs and cooperation should also be dismissed to the extent that it stresses socioeconomic 'justice'. In other words, the EU has a responsibility to assist its partners, and the endeavors are at best a lofty vision, and at worst a reflection of policymakers' ignorance about the nature and scope of fundamental rights. As such, the authors argue that the body of EU law (*acquis*) should be amended to reflect this fact, and the call for a 'new dimension' of security should hence be dismissed.

The impact of EU values, such as the rule of law and solidarity, in both the criminal justice and human rights domains also emerges in Anna Oriolo's compelling chapter on transnational crimes and the human-rights based approach (HRBA).

In compliance with the aims of the *Springer* series 'The European Union and its Neighbours in a Globalized World', she explores the EU's active role in exporting this *acquis* to transnational crimes (also covering ECJ case-law) in the context of enlargement and accession, the development of the European Neighborhood Policy, and full participation in international fora in the fight against cross-border offences. In her suggestive and in-depth critical investigation, she considers three closely related topics: the 'substantial' dimension of the rule of law and HRBA as a complementary mechanism to the traditional criminal system to counteract cross-border crimes; transnational criminal law as the legal framework to foster the rule of law; and the shortcomings of the HRBA within the EU legal framework mainly based on a criminal or repressive approach to combat multinational violations. In the absence of normative intervention, the chapter emphasizes the ECJ's role in extending HRBA standards to the EU counter-crime regime, contributing to uniform definitions, redresses, and remedies concerning violations of individual guarantees linked to cross-border offences.

The chapter authored by Emanuele Vannata takes a similar approach, providing interesting insights and reflections on environmental rule of law as a legal foundation of achieving solidarity in climate matters. According to the author, in the environmental domain, the effectiveness of access to justice as a relevant element of the rule of law is threatened, especially with regard to the difficulties encountered by natural or legal persons in asserting their legal standing before a judge. In this perspective, his analysis starts from environmental solidarity at the international and EU level to focus on the rule of law as the legal foundation of judicial protection of individual and collective environmental rights, emphasizing the role of national and international courts in the progressive affirmation of HRBA in environmental matters and the construction of more ethical ecological governance.

Solidarity and the rule of law values also permeate Part IV of the book, dedicated to police and judicial cooperation in EU criminal systems and its development in Western Balkan countries.

In particular, the chapter by Steven Blockmans and Ardian Hackaj analyzes Albania's significant efforts in reforming its judicial sector, initiated by the unanimous decision of the Albanian Parliament in 2016 to achieve a corruption-free judicial system, and more generally, eradicate its endemic dysfunctions. Indeed, the authors identify and evaluate the particularities of Albania's new structures and institutions that are part of the 'positive core' of the justice sector's reform, investigating not only the basic infrastructure, embedded knowledge, learning processes, organizational achievements, technical and financial assets and resources, but also the solidarity of partners in the modernization process. In an objective and systematic way, the authors describe the factors that contribute to enhancing the rule of law reform in all six Western Balkan countries, taking inspiration from the experience of some States that joined the EU in 2004 and whose institutions have initiated a slow but much needed adaptation of the judicial system.

Consistently, Stefano Busillo's chapter deals with the mutual recognition of decisions in EU criminal judicial cooperation, with particular attention to the 'conditioned applicability' of the European Investigation Order (EIO) under the Court of Justice case-law. Although the EU relies on the principle of mutual recognition for the circulation of judicial decisions from Member States—shaping their relationships on the premise of mutual trust—the chapter underlines the importance of applying this principle with appropriate limitations so as not to undermine the fundamental rights of those involved in criminal proceedings. In fact, blind and unconditional acceptance of the instruments of judicial cooperation in criminal matters, albeit in the spirit of solidarity, could lead to serious violations of these rights, endangering mutual trust and the substantive rule of law itself, as demonstrated by the analysis of the jurisprudence of the Court of Justice ruling on EIO with consequences also for accession of future Member States.

Part IV concludes with the chapter by Ismail Tafani who stresses the tremendous efforts of Albania in realizing judicial cooperation with the EU, focusing in particular on its constitutional reform toward a real and functioning democracy. The main objective of the reform, in line with supranational requirements, is to fight corruption by creating an electronic register based on cooperation with domestic and foreign judicial authorities, especially in the EU, emphasizing the reforming efforts of Albania to earn the credibility essential to ensuring the existence of 'trust' required by the EU in judicial and police cooperation.

Besides demonstrating the remarkable progress achieved in strengthening the judicial cooperation models, the author affirms that only a digital evolution will provide the fundamental instruments for effective cooperation among States in the exchange of judicial data. However, such exchange must always be inspired by

solidarity able to overcome outdated definitions of sovereignty, as well as efficiency to ensure that full respect of fundamental rights will not be jeopardized.

Fisciano, Italy

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This book promotes a different idea of security through the values of the Union.

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Thank you.



Teresa Russo
EUWEB Leader



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