

# The fragmented nature of fundamental rights protection in Europe: An introduction

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The multiple crises faced by the European Union (EU) and its Member States in the last decade (the economic and refugee crisis and the recent events in Poland and Hungary, just to mention some examples) have unveiled the difficulty in finding a coherent and comprehensive system of fundamental rights protection within the EU.

Indeed, the pluralistic nature of the EU constitutional legal framework and the presence of different (and overlapping) fundamental rights protection actors in the European landscape design a complex and fragmented scenario, still in search of a coherent structure.

This collective volume aims to address the flaws and the challenging overlaps fostered by the fragmented and complex landscape of fundamental rights protection in Europe from a novel perspective: the dualism between judicial and non-judicial bodies in the European fundamental rights architecture.

Although judicial and non-judicial bodies have been extensively studied by legal scholars in all their different features and implications at national, supranational and institutional levels, little attention has been given to their mutual role and interaction for a comprehensive fundamental rights policy, encompassing both the individual dimension of rights protection and the systemic dimension of rights monitoring and advisory.

However, the recent events regarding the constitutional crisis in Poland and Hungary and the European activation of the Art. 7 provision have clearly demonstrated that the role of non-judicial actors (the Fundamental Rights Agency and the Venice Commission, specifically) is essential in order to tackle the *systemic* challenges to fundamental rights protection and to the rule of law, even within the European boundaries.

In order to address such a multifaceted and still changing scenario, the first section of the book joins the recent scholarship on the theoretical challenges and flaws of fundamental rights protection (pluralism, inflation of fundamental rights, the standard of protection), highlighting the complexity of the EU system of fundamental rights. This manifold set of relationships is investigated using the EU multilevel space as the framework of analysis, which is grounded at the same time on the national constitutions of the Member States and on the European treaties (by which we refer to TEU, TFEU, Charter of Fundamental Rights). National constitutions and European treaties recognize each other, therefore self-restraining their original sovereign power and giving rise to a composite constitution. Given this reading of the EU as a composite constitutional order, the contributions of the first part of the book will investigate how the different levels interact in fundamental rights protection.

Federico Fabbrini examines from a theoretical standpoint the European multilevel system for the protection of human rights, analyzing in comparative perspective the challenges triggered by the overlap between the constitutional orders of the Member States, of the EU and of the Council of Europe Convention on Human Rights (ECHR).

Matej Avbelj's contribution challenges the conventional narrative of fundamental rights protection, arguing against the inflationary trend of the human rights discourse in Europe. He argues in favor of a new understanding of fundamental rights protection, focused on the role of the actors committed practically to fundamental rights protection.

Finally, Oreste Pollicino addresses, critically, key issues of the European constitutional law and its future development: the role of common constitutional traditions in the era of rights codification, especially after the entry into force of the Charter of Fundamental Rights of the European Union.

After having defined the theoretical background of the project, the second and the third sections of the book address respectively the judicial and non-judicial side of fundamental rights protection in Europe.

With regard to the courts' role, the chapters explore the role of national constitutional courts acting as "common courts of EU fundamental rights", as well as the role of the ECJ and of the ECHR. In particular, the judicial branch, despite already being at the center of wide and authoritative studies, is considered, looking at the core of its problematic features: the relationship between supranational courts and national judges, the role of the latter as common judges of EU fundamental rights, the problems related to the interpretation of the Charter of Fundamental Rights by the ECJ, and the still open issue of the role of supranational courts in adjudicating social rights.

The second session opens with the contributions of Clara Rauchegger and Šejla Imamović. Rauchegger addresses the interaction between national constitutional courts and the ECJ and in particular she discusses the standards of review deployed by the Bundesverfassungsgericht with regard to the application of the EU law. The contribution is focused on the standard developed in the so called “Solange III” (decision of 15 December 2015), in which the Bundesverfassungsgericht turned the identity condition into a mechanism for the protection of human dignity in case of individual rights violation. Imamović’s contribution explores the role of the ECJ as a human rights court, within the overall system of fundamental rights protection, assessing the critical relationship between the ECJ and ECHR, also in light of Opinion 2/13.

Luca Pietro Vanoni’s contribution is focused on the practical consequences of the inconsistencies and the flaws of fundamental rights protection. The author debates the case of data protection and the balance between privacy and security, also looking at and comparing the US approach to the topic.

Finally, the third section discusses the role of non-judicial bodies, namely the Fundamental Rights Agency (FRA), the National Human Rights Institutions (NHRI), equality bodies and the Venice Commission, in promoting and complementing the judicial protection of fundamental rights. This analysis sheds new light on the more traditional approach to fundamental rights protection in Europe.

The analysis of the role of agencies and the Venice Commission represents really a unique contribution to the scholarship on fundamental rights protection under a constitutional law perspective.

Whereas court action has been extensively studied both at national and supranational levels, the monitoring functions carried out by agencies and international bodies, although increasingly popular at national, regional and international levels, have obtained scattered attention. Moreover, differently from courts, which have engaged in dialogue, in order to enhance the effectiveness of their actions, agencies and international bodies still act in a discrete and insular way.

The need for a theoretical study of fundamental rights protection through the action of agencies was envisaged in the last decade of the 20th century, exactly when the Venice Commission started its operations, helping countries of Eastern Europe to complete a peaceful constitutional transition. In the same years, legal scholars started to debate over the improvement of the fundamental rights protection system in Europe,

which was “lacking a comprehensive or coherent policy at internal and external level”.<sup>1</sup>

The subsequent adoption of the Charter of Fundamental Rights, in turn, was not considered a full solution to this problem; indeed, even after the adoption of the Charter, legal scholarship reiterated the appeal to broaden the horizon of rights promotion, emphasizing that “[the] constitutional commitment to fundamental rights and their application by courts is not sufficient for their full implementation”,<sup>2</sup> but needs to be complemented with a political and administrative strategy.

Despite the non-judicial side of fundamental rights encompassing different institutions with different scope and tasks, they share a common original ratio: the need for technical tools to assess fundamental rights violations and to support public institutions that go beyond the inherent “conflictual force” of fundamental rights in divided societies.

The final section of this collection intends to take over again the initial momentum that brought the creation of the FRA. In order to achieve this purpose, the last four contributions give an insight into the complex interaction of different non-judicial actors.

Lorenza Violini addresses the current challenges and the flaws faced by the FRA system. The author, on one hand, highlights the origins and the rationale of the creation of the FRA and, on the other, stresses the discrepancy between the original momentum and the concrete realization of it.

Katrien Meuwissen focuses on the role of the NHRIs, their main features and tasks, in particular with regard to their role beyond individual complaints handling. NHRIs are increasingly established by European governments to promote and protect human rights in an independent manner, as required by the UN Paris Principles. Beyond the handling of individual complaints, NHRIs can address structural human rights problems, prioritise gaps in national human rights implementation and prevent human rights harm from being done.

Maria Elena Gennusa’s chapter deals with the role of equality bodies, established by many EU Member States as the implementation of the EU equal treatment legislation. The contribution analyzes the equality-bodies “mosaic”, highlighting the main institutional features of such bodies,

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<sup>1</sup> P. Alston, J. Weiler, “An ever closer union in need of a human rights policy” (1998) 9 *European Journal of International Law* 658–723.

<sup>2</sup> A. von Bogdandy, J. von Bernstoff, “The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law”, (2009) 46 *C.M.L.R.*, 1036.

their networking and other activities, and their relationship with the EU institutions (particularly the Commission) on one hand, and the domestic ones on the other, with the aim of exploring the role they play in fostering equality within the European system of governance.

The section concludes with Stefania Ninatti and Simona Granata-Menghini's reflection on the development of the role of the Venice Commission in fundamental rights issues through its proper function as an independent advisory body on constitutional matters.

The recent constitutional crisis in Poland and Hungary and the EU activation of Art. 7 procedure have clearly stressed the potential of these advisory bodies, especially in time of crises and of fundamental rights violation by state actors.

Despite the system of fundamental rights protection in Europe still being fragmented and in continuous evolution and adaptation, the ongoing crises Europe is facing may represent an invaluable chance for actors involved in fundamental rights protection to better define their role and their mutual relationship in an ever more refined and combined legal framework.