

Book Review: Lorenza Violini and Antonia Baraggia (eds.) *The fragmented landscape of fundamental rights protection in Europe – The role of judicial and on-judicial actors* (Edward Elgar, 2018, 240pp)

Lorenza Violini and Antonia Baraggia are the editors of a recent collection entitled *The Fragmented landscape of fundamental rights protection in Europe – The role of judicial and non-judicial actors*. The book has taken on a broad and ambitious topic in the notoriously complex and interdependent environment that is the European legal architecture, particularly in terms of relevant actors. The chapters are arranged along three broad themes: (a) the theoretical complexity of fundamental rights protection, (b) the role of courts and (c) the various roles of non-judicial actors.

The book contains some outstanding contributions and generally offers thoughtful reflections on at times under researched subjects. A core challenge to overcome with such a broad topic is that it can be difficult to identify overarching themes and tease out deeper insights, thus offering readers something beyond the sum of the contributions. Unfortunately, the present collection has not been successful in this respect. The chapters stand primarily on their own terms and rarely offer insights beyond their at times narrow topics. Reflections on other chapters are rare, even where they seem to strongly suggest themselves and express engagement with the overarching topic of the book is largely absent, barring a few exceptions. The laudable mission of the book 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’ (1) is thus not quite achieved.

Matej Avbelj opens with a chapter on human rights inflation. In drawing a parallel to monetary inflation, Avbelj suggests that an increase of fundamental rights in the EU, both in terms of substance and in avenues for redress, ultimately risks devaluing the protection standard of all rights. The chapter voices a common critique, especially given the at times equivocal protection regimes in Europe at the regional and domestic level: the required ascension of the EU to the ECHR under the Lisbon treaty may serve to alleviate at least some of these concerns by providing a common framework of reference and judicial interpretation. However, as with many inflation critiques, the chapter neglects to engage with crucial and fiendishly complicated methodological questions: what counts as human rights inflation, given that protection regimes might overlap in some areas and European jurisdictions, but may nonetheless operate

exclusively in others? What metric might we use to determine a decline or improvement in protection standards in practice? And if we could reliably gather such data, how would we isolate an inflation or deflation of human rights as a primary cause, when there are a myriad of possible and inter-dependent causes? These concerns are not addressed through the largely anecdotal evidence that the chapter offers to support its argument.

Federico Fabbrini authored the second chapter, which contributes a thought-provoking analysis of fundamental rights and federalism in a comparative perspective between the EU and the United States. Both systems, the chapter contends, are 'structurally characterized by the existence of a plurality of sources and institutions for the protection of fundamental rights, as well as a plurality of conceptions of what rights ought to be.'(26). The comparison is apt, Fabbrini says, for three reasons: (a) it allows for the development of an analytical model for multi-layered human rights systems, (b) it can contextualize the transformations that occur within these systems, and (c) it allows the questioning of assumptions that inform European approaches to federalism and rights. Perhaps the crucial difference that the chapter does not fully address is that there is ultimately no obvious final arbiter on fundamental rights in Europe: national constitutional legal orders and the EU make conflicting claims to ultimate authority. Fabbrini acknowledges as much (33), but does not explain how this crucial difference affects the comparative work and how it impacts the analytical framework of centralization and decentralization that the chapter posits.

The following chapter by Oreste Pollicino engages with the common constitutional traditions as a source of EU fundamental rights. Most of the chapter is preoccupied with providing a historical overview and account of the relevance of common constitutional traditions in the ECJ case law that will be familiar to most EU law scholars. The author argues for a clearer understanding of how constitutional traditions come into being, and how one should integrate this innovative 'work in progress' (69) more directly into the development of EU fundamental rights protection: a right to broadband internet access and the recognition of same sex marriage are given as examples where these traditions could directly impact the doctrinal approach. However, the author rejects as overly simplistic an approach that focuses only on the quantitative uptake of a certain right as evidence for a common constitutional tradition.

Sejla Imamovic opens the second part of the book which is concerned with judicial fundamental rights protection. The thoughtful and strongly argued contribution focuses on the role of the European Court of Justice (ECJ) in fundamental rights protection, specifically on

two trends in the fundamental rights jurisprudence. First, the author finds markedly fewer references to ECHR case law in ECJ decisions following the adoption of the Charter of Fundamental Rights. The author suggests that this disregard of the ECHR constitutes a missed opportunity for the ECJ to bring its interpretation of the Charter into closer alignment with the Convention and ostensibly runs against the intention of Articles 52(3) Charter and 6(2) TEU. Second, while the ECJ has developed and enhanced its level of fundamental rights protection in some areas, it does have some significant blind spots. As Imamovic shows, the Court has shown a remarkable reluctance to consider fundamental rights implications in cases regarding the Dublin Regulations and the European Arrest Warrant, opting instead to emphasize the effective implementation of EU law and the principles of mutual trust and recognition.

The fifth chapter is authored by Clara Rauegger on the subject of the German Federal Constitutional Court's so-called *Solange III* decision. It is a considerate and detailed account of the Courts struggle with on-going European integration, specifically on the standard that it should apply when reviewing EU acts against domestic fundamental rights. As Rauegger explains, the Constitutional Court applies three tests to EU law. The first is the so-called *Solange II* condition, which states that the Court will refrain from applying German fundamental rights so long as the EU standard of fundamental rights protection is essentially comparable. The second condition is the so-called *ultra vires* condition, which determines whether the EU has acted in conformity with the competences transferred. However, an act will only be considered *ultra vires* if the EU act in question is structurally significant and evidently *ultra vires*. Finally, the Court applies a broader constitutional identity review to EU law. This review seeks to ensure that the constitutional identity of Germany is respected, namely its ability to democratically shape its own destiny. This test is still ill-defined, but has evolved as Rauegger explains, to entail a general protection of human dignity in individual cases: particularly when the question arises how the primacy of EU law can be reconciled with the respect for fundamental rights, for instance in cases concerning the European Arrest Warrant.

Luca Pietro Vanoni authored the sixth chapter, which engages in a comparative analysis of the constitutional system in the EU and the US on privacy and national security, focusing on legal and political approaches to data protection. While the EU protection levels have increased under the Charter and the ECJ jurisprudence, protections have weakened in the US, and are 'inadequate in the face of the challenges of the digital era.'(134). Nonetheless, Vanoni argues there are common themes that could form the basis of a global approach to privacy, especially

as the US – in contrast to the EU – has a unified approach to national security. However, simply asserting ever higher protections on both sides of the Atlantic is to Vanoni’s mind insufficient to achieve improvements on the ground. Instead he argues for ‘joint efforts to find areas of agreement that correctly balance the various interests/rights at play’ (136).

Lorenza Violini contributes a chapter on the EU Fundamental Rights Agency (FRA), which has received little scholarly attention. As Violini notes, the agency is very much a ‘background actor’ on fundamental rights when compared to the EU Parliament, the Commission and the Court of Justice (139). Overall the author suggests that the impact of the FRA on fundamental rights protection has been relatively modest. Violini believes this is a missed opportunity, as a ‘fully-fledged EU fundamental rights policy is a promising path for rethinking the EU integration process’ (150). In order to realise its potential, Violini argues that three historical barriers must be overcome. First, there is lingering uncertainty over the basis in EU law for a more comprehensive approach of the FRA to fundamental rights, beyond existing individual mandates. Second, the FRA monitoring and assessment should be integrated into the EU decision making and legislative process. Finally, the FRA should be empowered to take more independent action, especially in light of contemporary constitutional challenges.

Katrien Meuwissen offers an illuminating account of the potential for fundamental rights protection beyond individual complaints in chapter eight. The author provides an overview of the inception of national human rights institutions (NHRIs) and the promise they hold for a more systematic engagement with fundamental rights violations. The chapter acknowledges significant challenges, but suggests establishing more NHRIs would represent an ‘important shift from human rights enforcement against the state towards joined-up governance for the better implementation of human rights at national level’ (156). The main justification for this role for NHRIs is that courts are overwhelmed with individual complaints and that there is a significant enforcement gap. The gap arises because individual complaints do not primarily focus on preventing human rights violations in a systemic manner, nor can they deal with the often irreversible harm that is often caused. Crucially, violations are underreported and only those with sufficient resources are in a position to bring claims. Meuwissen thus concludes that NHRIs could fill this gap by adopting a more systematic and preventative approach and thus complement conventional adjudication.

Maria Elena Gennusa authored a contribution on the promotion of equality through so-called national equality bodies (NEBs). These bodies are often created by Member States pursuant to

EU law requirements, which has led to a diverse set of NEBs: they deal with a plethora of equality issues with varying competences and enforcement capabilities, as well as institutional roles within the domestic legal system. NEB competences and economic resources are often limited, their mandates only cover some grounds of discrimination, and they experience difficulties in their institutional access to the European level. As a result, Gennusa concludes that these bodies only perform their role in a ‘partial and incomplete’ manner (198) and generally do not reach their potential of promoting equality and combatting all forms of discrimination.

The final contribution to collection comes from Simona Granata-Menghini and Stefania Ninatti, focusing on the work of the Venice Commission. The chapter provides a historical overview of the role and development of the Venice Commission as a leading advisor to states at the crossroads of international law and domestic constitutional law. This role is chiefly fulfilled through soft law instruments, such as opinions, but draws on hard law resources, especially in the area of human rights. The authors argue that the primary reason for the success of the Venice Commission lies in its capacity to build strong relationships with states. Prominent examples where states have rejected the advice of the Commission are rooted primarily, they suggest, in a general scepticism towards any form of European integration and cooperation, rather than specific concerns with the work of the Venice Commission.