

Protection of Fundamental Rights in Europe

Sonia Morano-Foadi • Stelios Andreadakis

Protection of Fundamental Rights in Europe

The Challenge of Integration

 Springer

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Endorsements



The European integration project is at crossroads. The beginning of 2020 is marked not only by Brexit but also by increased importance of the case law of the European courts in Luxembourg and Strasbourg. Both courts mutually enrich their case law, developing truly European standards which deeply penetrate national legal systems. At the same time, the human rights and rule of law situation in some countries have deteriorated to a point that both the European Union and the Council of Europe are devising new procedures to deal with such threats.

Against this backdrop, the authors present a thought-provoking analysis of the current state of Europe's system of human rights protection and the challenges facing it. The book presents the history and theory of European constitutionalism from a resolutely human rights point of view. Its originality lies in the fact that it combines thorough research with interviews of main actors in Brussels, Luxembourg and Strasbourg. It is a delightful read and I really enjoyed it.

The authors strongly argue to re-define the European Union as a polity with a much stronger focus on human rights which immediately raises the question of its relationship with the Council of Europe. In this context, the process of the European Union's accession to the European Convention on Human Rights is analysed. After more than five years of interruption, this process is now starting again, hopefully leading soon to a successful completion, which will ensure coherence of standards and effective human rights protection for individuals all over Europe.

Strasbourg, 6 February 2020

Jörg Polakiewicz, Legal Adviser, Council of Europe

Professor of Law, Europa-Institut at Saarland University in Saarbrücken

Sonia Morano-Foadi's and Stelios Andreadakis's book on European Integration and Fundamental Rights concludes a ten-year research project. In addition to the unfavourable Opinion of the Court of Justice of the EU on the accession of the European Union to the European Convention on Human Rights in 2014, this ten-year time span has covered the implementation of the Lisbon Treaty, the Euro crisis, the massive influx of asylum seekers to the EU in 2015, and the Brexit process. Moreover, the occupation of Crimea and the presidency of Mr. Trump in the USA have deeply challenged the rules-based world order that in 2010 represented a common ground in international and European politics.

The book combines into a polyphonic whole various themes such as empirical findings from the interviews conducted with judges of the Court of Justice of the EU and the European Court of Human Rights and policy makers, an analysis of the doctrinal academic debates around the constitutional pluralism movement and case studies of recent political processes as the negotiations of the Treaty of Accession of the European Union to the European Convention on Human Rights and the Brexit withdrawal agreement. The authors boldly defend the so-called ITR (Integration Through Rights thesis), i.e. focusing on the defence of the (fundamental) rights of individuals as a key to revitalizing the European integration project based on shared common values. S. Morano-Foadi's and S. Andreadakis's book is an enjoyable and thought-provoking read. It is an important learned contribution to the constitutional law and integration theory debate of the post-Brexit EU.

Mäntyhärju, 18 February 2020

Niilo Jääskinen, Judge of the Court of Justice of the European Union, former Advocate General of the Court of Justice of the European Union, former Judge and Vice-President of the Supreme Administrative Court of Finland

The book has looked at the first decade of implementation of the Lisbon Treaty. The authors could hardly find a more thrilling momentum for their volume to appear. Its publishing coincides with Brexit. For the first time, a Member State of the European Union left the European integration as embodied in the pattern that has been developing for more than sixty years. The United Kingdom has returned to its allegedly privileged insular position in terms of international politics. Questions therefore inevitably arise, e.g. Is Britain still in Europe? Will the European integration survive? Will the European Union have to adapt its structure in future, so as to face new challenges and provide response to those?

The method chosen by the authors to approach the key issue of their study enabled them to overcome the troubles of the day and take a perspective, which made the book a valuable insight into recent developments, as well as a volume that provides guidelines for the future. Notably, the authors focus on the role that two European courts play in the process of European integration. The two courts—CJEU and ECtHR—belong to two different albeit overlapping families of European nations. On the one hand, Europe of now 27 Member States founded the CJEU within the framework of the European Union. On the other hand, the broader family of 47, aiming to be pan-European, founded the ECtHR within the framework of the

Council of Europe. The former court was not originally designed to protect human rights, which was the case of the latter. Both courts nevertheless significantly contributed to the European integration.

The two courts have pursued a dialogue for a long time. Their judges organise regular annual meetings in order to exchange views on specific topics concerning their activities. The judges of the two courts had to deal with similar issues in certain cases or sometimes even tackle identical problems. Last but not least, the CJEU has made considerable contribution to the protection of human rights by its rulings. From my personal perspective as a judge who sat at the bench in the ECtHR in some of the cases referred to in the book, it suffices to say that there was a permanent awareness of the jurisprudential evolution of the CJEU among the ECtHR judges. Although in an informal way, fruitful discussions were organised from time to time in order to analyse crucial stances of some of the CJEU decisions.

That is what justifies the method of this study. The integration through law is, for the European continent, the only reasonable path to follow. There may be a crisis of shared visions in European cooperation or deviations from the patterns of behaviour chosen decades ago. From time to time, there may be re-orientation, as well. In spite of all that the 'integration through rights' will certainly persist as a model for Europe. It is true that Europe, as we know it today, is not a nation-state, but it is nevertheless a polity. It started after World War II from the market ideology, which provided a foundation of post-war reconciliation, and evolved into a proper community of values with a rather sophisticated structure. Whether that polity will take a certain shape or reach a degree of cooperation, making it a closer union of its Member States, or not; and whether it will tend to become a confederation, or remain a loose union of states, does not seem to be paramount. It is however of the utmost importance that Europe will remain based on the protection of rights, one of the most valuable features of the Western political culture that has spread worldwide. The two European courts have been actively involved in the process of what the authors labelled as dialogic constitutionalism at the continental level. They will continue to thread for the benefit of the Europeans, and the authors of this volume can be proud of their contribution, which provides a thorough analysis of such developments.

Lausanne 2 February 2020

Dragoljub Popović

Former judge of the ECtHR

To Konrad Adenauer, Joseph Bech, Johan Willem Beyen, Winston Churchill, Nicole Fontaine, Alcide De Gasperi, Walter Hallstein, Ursula Hirschmann, Marga Klompé, Anna Lindh, Helmut Kohl, François Mitterrand, Sicco Mansholt, Melina Mercouri, Jean Monnet, Robert Schuman, Paul-Henri Spaak, Altiero Spinelli, Simone Veil and Louise Weiss for their bold vision and enduring determination in the construction of a modern and united Europe.¹

¹See https://europa.eu/european-union/about-eu/history/eu-pioneers_en.

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Although there are only two names in the front page of this monograph that correspond to the authors, it is essential to make reference to and acknowledge the contribution of a wider group of people that helped us in several different ways from the outset of our project until the moment that we submitted the final manuscript to the publisher.

Having spoken about the publisher, we would like to express our gratitude to Springer for believing in our idea and giving us the opportunity to put our ideas, thoughts and arguments on a very contemporary and controversial topic on paper. At the same time, we want to thank Ms. Anke Seyfried, Ms. Julia Bieler and the Springer team for always being helpful, flexible and supportive throughout the process of writing and finalising this monograph.

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The British Academy should also be acknowledged for its financial support through the Small Grants Scheme, as this funding allowed us to lay the foundations for what gradually developed into a wider and more far-reaching overview of the integration process in Europe.

More specifically, ‘a special mention needs to be made to the participants of the empirical phase of our project.’ All interviewees and participants offered their personal insights, and their contributions have been invaluable for the formulation of our arguments and the discussions included in this book. We feel blessed that we were able to speak to judges from the two highest European Courts, the Court of Justice of the European Union and the European Court of Human Rights as well as policymakers and officials from the Council of Europe, the European Commission, the European Council and the European Parliament.

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Finally, this monograph would not have been written without the patience, respect, understanding and support that we have offered to each other during the past 10 years. Finding a person that you can share the same vision and aspiration with for such a long period is not easy, and we feel lucky that we were able to work as a team and put together everything we had in order to deliver this monograph.

Prologue

*Keep Ithaka always in your mind.
Arriving there is what you're destined for.
But don't hurry the journey at all.
Better if it lasts for years,
so you're old by the time you reach the island,
Wise as you will have become, so full of experience,
you'll have understood by then what these Ithakas mean.²*

In many occasions in our lives, it is not the destination that counts; it is the journey itself. It is the journey that makes us wiser and richer in terms of knowledge, experience and life lessons. Ulysses wandered around for 10 years before managing to return to his initial destination, Ithaka. During these 10 years, he experienced difficulties, obstacles, disasters, setbacks and all kinds of unexpected complications that kept him away from his birthplace and his family. However, this long journey allowed him to see life through a very different perspective, because he experienced suffering, homesickness, loneliness, disappointment and eventually understood the value of returning to his roots.

Our journey started in December 2009, when the Treaty of Lisbon entered into force, and for 10 years we have wandered in the uncharted waters of EU and international law, dealing with integration, human rights, agency, constitutionalism, accessions and withdrawals. After 10 years, we see Ithaka on the horizon; this journey is ending with this book. We have realised that we wish to share our learning during this journey, as this project that started as a forward-looking idea has been condensed in seven chapters and a total of about 250 pages. We were troubled with the idea of having a monograph written by two authors, but after so many hours of planning, elaboration, brainstorming and drafting during many years of joint research, we are now convinced that our monograph was enriched by our diverse personalities and backgrounds, as we believe consistency and coherence were achieved. Our experience of joint writing proved to be successful, and we are

²C.P. Cavafy, *Collected Poems* (Princeton University Press, Princeton, 1975).

proud of the final product which represents the mental labour of two authors speaking with a single voice.

When the Lisbon Treaty was ratified and entered into force, one of the provisions that attracted considerable attention was Article 6(2) TEU, according to which the European Union (EU) shall accede to the European Convention on Human Rights (ECHR). Although it was not the first time that we heard about the prospect of accession, we were not provided with useful information at the time about the process, the requirements and the modalities of this huge step for the two supranational legal orders in Europe. As researchers interested in EU law and fundamental rights, we felt the need to delve more into this obligation of the Union and attempt to decrypt this new and mysterious project. At that time, we had two options before us: to wait for the negotiation process to be completed in order to analyse the outcomes and evaluate the efficiency of the adopted measures and agreements; or to design a project that would enable us to obtain first-hand data about the accession and consequently follow the process step-by-step before reflecting on the new status quo in Europe. The former option was more conventional, although it entailed an unpredictably long (probably too long) period of waiting for any substantial developments. The latter was more demanding, as it required clear planning and socio-legal research skills. Moreover, we could not be sure that the actors involved in the process of accession, i.e. judges, policymakers, negotiators, politicians, etc., would be willing to participate in such a project.

We opted for the second option, because we wanted to engage actively with the process of the EU's accession to the ECHR and get an insight from the negotiations, the agreement-making, the diplomacy and the dynamics between the two legal orders in Europe. One of the most notable parts of the project was the interviews at the Court of Justice of the EU (CJEU), the European Court of Human Rights (ECtHR), the European Parliament, the Commission and the Council of Europe (CoE). We had the opportunity to speak with and hear the views of more than 30 key informants, who were involved in the accession project holding different roles, but all had a saying, directly or indirectly, not only over the final outcome of the accession but in general about European integration and fundamental rights. The interview data allowed us to put our ideas into a wider context and paved the way that led us to transform our project and base our research on the European integration and fundamental rights. Wandering inside the Courts in Luxembourg and Strasbourg made us richer in terms of insights, because the atmosphere is truly European and made us reflect on the past, the present and the future of the continent.

As we were transcribing the interview recordings, we found ourselves tracing the steps of the Union during the last 60 years and evaluating what went wrong, what exceeded the expectations, what could have been done differently and what needed to be addressed as a way forward for the future. We found the practical application of the concept of collective agency fascinating when trying to understand how different agents, policymakers, judiciary and government officials balance the need to be objective and independent with the pressure to achieve their goals as per their mandates. Negotiations resemble a game of chess, where the players should stay loyal to their strategy. Compromises are necessary, but at the same time they need to

come up with realistic and practical proposals and solutions. The empirical phase of the project, which involved the policymakers inevitably influenced our perspective about the way forward for Europe as they were optimistic about the outcome of the EU Accession.

The unfavourable Opinion of the Court of Justice was definitely a setback, and it created surprise and disappointment across Europe and it also challenged us and our project. A reflection phase lasting a couple of years started during which we decided to shift our focus to the bigger picture: the process of integration in the European continent. An invitation to participate in the Public Hearing³ on the EU Accession organised by the European Parliament served as a confirmation to us that our project should extend beyond the EU's accession to examine the future direction of Europe. We were aware that the EU was transforming from a purely economically driven organisation to something more diverse, encompassing socio-political elements, such as fundamental rights, accountability and inclusiveness. The post-Lisbon era brought different obstacles and challenges in the pathway of the EU and the CoE, so it was a strategic moment to divert our attention to the new reality that was slowly being unveiled in Europe.

In order to be able to capture elements of European integration, we agreed that it was necessary to have a strong theoretical framework as a starting point for our study of the EU trajectory. Our first choice was legal pluralism, when we realised that many of the interviewed judges had made references to this concept when talking about the different human rights instruments and overlapping regimes in Europe. Pluralism was widely accepted as a theory in the EU, as part of the wider objective to be 'united in diversity'; it requires the co-existence of different national constitutional traditions and a common European idea. This combination was meant to keep the institutional framework of the EU stable and connected, creating a new notion of holistic and pluralist EU constitutionalism.

We had to continue digging into the conundrum of theories, as constitutionalism was an ideal theory in terms of accommodating diversity, but it has limitations when exploring the relationship of two separate but overlapping legal orders. Since our analysis was focusing on constitutional principles and constitutional value systems, as expressed in Art 6(1) TEU, we had to find a variation of constitutionalism that would be more suitable for the European reality which would also encompass the Council of Europe's Convention of Human Rights. The theory that we singled out was dialogic constitutionalism, which appeared to facilitate a constructive contestation of the European project with a view to achieve coherence through the examination of a growing number of principles and actors. The process of transforming the EU and the European space in general requires a consistent and thorough deliberation on how best to interpret and implement key constitutional principles and

³European Parliament (2016) Committee on Constitutional Affairs – Meeting 20/04/2016. AFCO_PV (2016)0420_1. <https://www.europarl.europa.eu/news/en/press-room/20160414IPR23145/committee-on-constitutional-affairs-meeting-20-04-2016-am>. Accessed 23 Mar 2020.

concepts. We opted for this theory, because of the characteristics of the challenges we had to deal with and the importance of the dialectic approach which was required.

Europe's crisis is not a purely economic one. The problem with the EU is that it promised a community based on peace, prosperity and stability. However, neither perpetual peace nor perpetual prosperity can be guaranteed without renounces and difficulties and the Union consists of a number of nations with different history, traditions and expectations that have joined powers to serve a common project. This project requires a vision to succeed and it proceeds step-by-step, in an experimental manner based on trials and errors. The UK referendum for leaving the EU is a symptom of this experiment, as Europe has become the 'escape goat' used by politicians to justify the incapacity of the current institutional and legal set-up of Europe and also its States. Yet, it worked in the short run, as Brussels is too far from the people and the elite there appears, from a distance, as not focused on people's needs. What we have realised is that Europe would benefit from an optimistic vision for its future, even though it is not easy to think positively in times of such economic, social, and political uncertainty. We relied on the idea of 'Integration Through Rights', to unravel the knot, as we believe that the EU needs to shift its focus on the common values for its unity and ultimately its survival.

As we claim several times in the pages of the book, Europe is at a crossroads and it is experiencing an existential crisis, as a result of consecutive, unresolved financial, economic, political, humanitarian and security crises. It is therefore essential that it takes a step back, reflects on its condition and decides on its future direction. What is clear is that it needs to move outside its comfort zone, to avoid disintegration and separationist trends. Despite the challenges, Europe has to move forward, not backwards, because the economy, migration and climate change are all problems that must be dealt with not only at a local level but also at regional and international levels. At the same time, the EU must find a way to restore its connection with the peoples of Europe, who have lost their faith in the ability of the EU institutions to bring a change in their life. Economic and market integration are important, but strong voices claim democratic deficit and lack of legitimacy in the operation of the EU. Even after the gradual strengthening of the European Parliament's role and the introduction of the Charter of Fundamental Rights, these voices did not stop.

Democracy and human rights' protection are abstract concepts, and everyday people often find it hard to understand them and do not perceive them as an integral part of their life. For example, human dignity, a right of fundamental importance, has meaning and content in accordance with different countries and variety of people, within the EU, and even more, within the CoE with its 47 States. Promoting a set of common values, which speak to the heart of people, would unite all individuals in Europe. A good illustration and a positive indication could come from, for example, the four priority areas that the European Council put forward in its Strategic Agenda for 2019–2024. More specifically, the four priorities for Europe to focus on are the citizens and their freedoms; a strong and vibrant economic base; a climate-neutral, green, fair and social Europe; and emphasis on European interests and values on the global stage. As it becomes apparent, they are modern, apt, and everybody can understand their importance for their life in the short as well as the long run.

The two highest European Courts play a central role in promoting common values and providing a content that is both clear and uniform across Europe. We have recognised the remarkable work that the judges of both Courts have done so far in furthering integration and convergence across the European continent, and we consider it an essential requirement for the success of the integration project. Their dialogue, both direct and indirect, has been constructive and has allowed a cross-fertilisation, especially in the area of fundamental rights. However, as integration is a dynamic and evolutionary process, reference should also be made to the role of policymakers, as law does not operate in a vacuum and needs to be seen together with its wider political and social environment. Our analysis has reflected on the inspiring messages sent by the Founding Fathers first, and then followed by the charismatic individuals in key positions, such as the judiciary, government officials, politicians and policymakers. We have used Weber's theory of authority and charisma, which combines the elements of gift, power, values and trust. A charismatic leader inspires others and shows strong leadership skills but needs to ensure the faith and belief in his/her plan are kept. Nowadays, there are fewer and fewer charismatic leaders, but even in democratic societies we have observed the concentration of power and the establishment of an unquestioned hierarchy. Checks and balances are essential, to avoid a paralysis of democracy.

The years that followed the 2016 referendum for the UK Withdrawal from the EU were particularly difficult for us as our focus on integration was shaken. However, the event itself gave us the idea to use case studies in our monograph, which would allow us to contextualise the theoretical underpinnings of the project and test our findings with reference to real-life scenarios. The migration crisis in Europe, the accession project and the Brexit saga offered us numerous stimuli to re-think our findings and reflect on our remarks before finalising the monograph. Our aim was to write a monograph that not only has unique methodological approach and solid academic foundations but also makes a meaningful contribution to the development of European policies.

It was extremely challenging to decide where we should stop following the latest developments and give emphasis to what we had already included in our research. We are experiencing history in the making, and the last decade has been a period characterised by tensions, crises and unexpected turn of events. On a number of occasions, we had to revise or even re-write sections of the book because new developments unfolded, and we were obliged to take them into consideration. One good example is the Brexit negotiations and the attempts of the Government to make the Withdrawal Agreements approved by the UK Parliament. In communication with our publisher we agreed that January 2020 would be the final date of our writing. We do not claim our book contains all the details and the latest information about Brexit or the EU Accession. It is our hope that the analysis that follows will be read by researchers, policymakers, judges, practitioners and students working in the field with an interest in the European state of affairs. Thus, we will be grateful for a fruitful exchange of ideas with the readers as we believe this book could be an opportunity to think 'outside the box' when considering the different pathways

towards the future of Europe. We wish the reader to perceive our journey presented in an academic fashion in the analysis that follows.

To refer back to Cavafy's lyrics, we are satisfied with our journey and we feel blessed, because without Ithaka, we 'wouldn't have set out' in the first place.

Oxford, UK
Uxbridge, UK
January 2020

Sonia Morano-Foadi
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Abbreviations

| | |
|------------------------|--|
| AFSJ | Area of Freedom Security and Justice |
| AG | Advocate General |
| BVG or BVerfGE | Bundesverfassungsgericht (German Constitutional Court) |
| CDDH | Steering Committee for Human Rights |
| CFR or Charter | Charter of Fundamental Rights of the European Union |
| CJEU | Court of Justice of the European Union |
| CoE | Council of Europe |
| DAA | Draft Accession Agreement |
| ECHR or the Convention | European Convention on Human Rights |
| ECJ | European Court of Justice |
| ECSC | European Coal and Steel Community |
| ECtHR | European Court of Human Rights |
| EEA | European Economic Area |
| EEC or EC | European Economic Community |
| EU | European Union |
| FREMP | Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons |
| ITR[s] | Integration Through Rights |
| MS[s] | Member State[s] |
| NGOs | Non-Governmental Organisations |
| TEU | Treaty of the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UK | United Kingdom |
| UN | United Nations |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNHCR | United Nations High Commissioner for Refugees |