Introduction

1 Still an Ever Closer Union in Need of a Fundamental Rights Policy?

In 1998, Philip Alston and Joseph Weiler dubbed the EU 'an ever closer Union in need of a human rights policy'.[1] Their plea followed two decades of gradual incrementalism in the development of EU fundamental rights (FR) as well as stinging criticism of EU fundamental rights as being instrumentalised[2] and marginalised[3] in the EU's development. The argument that the EU required an FR policy was compelling given the shift of the EU into new areas of policy in the 1990s from Justice and Home Affairs to a greater role on the world stage.

Fast-forwarding some 18 years, our picture of EU FR is in need of re-evaluation. FR may be much more totalising today than they were then. Increasingly, the EU's crises and central policy dilemmas are seen and debated through the parameters of FR. To take the 'twin crises' gripping the EU during the completion of this book – the ongoing turmoil in the Eurozone and the Union's difficulties in re-settling refugees – FR are no longer on the periphery of EU action but central to the political debate over how the EU ought to act and evolve. If once FR – as Alston and Weiler complained – were overly judicialised,[4] or the preserve of elite institutions, today they are politicised at the centre of questions over Europe's very purpose and identity.

[1] P. Alston and J. Weiler, 'An Ever Closer Union in Need of a Human Rights Policy: The European Union and Human Rights' in P. Alston (ed.) *The EU and Human Rights* (Oxford: Oxford University Press, 1999).

[2] J. Coppel and A. O'Neil, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 4, 669–692.

[3] P. Twomey, 'The European Union: Three Pillars without a Human Rights Foundation' in D. O'Keefe and P. Twomey (eds.) *Legal Issues of the Maastricht Treaty* (London: Chancery Law, 1994), 212–131. See also (on the challenging implications of the first ECHR accession ruling) A. Toth, 'The EU and Human Rights: The Way Forward' (1997) 34 *Common Market Law Review* 3, 491–529.

[4] Alston and Weiler, n. 1 above, at 12.

We also, however, have deep changes in terms of the Union's institutional architecture – as well as its architecture for FR itself. 'Politicisation' of the role of the EU as an FR actor has gone hand in hand with politicisation of the EU's institutional structure, with the 'guardian of the Treaties' – the Commission – increasingly defining itself in more partisan terms. The Union's institutional and political structure is increasingly fractured, with one major Member State on the verge of abandoning the Union altogether. Within the field of FR itself, while not all of Alston and Weiler's suggestions were taken up, many were:[5] the EU carries a far higher degree of institutional complexity in the FR field with a number of distinct institutions devoted to FR protection, as well as new procedures for the 'mainstreaming' of FR within the principal institutions. Finally, EU FR are increasingly fractured, with the traditional conflict between national and EU bodies over the scope and content of FR complemented by the Union's dual human rights structure: partially centred on the EU Charter and partially on the ECHR.

These radical contextual and institutional changes demand a closer look at how – to coin a term of new governance literature – the 'governance architecture' for EU fundamental rights now looks. The essential purpose of this book is to meet this demand.

2 Governance in the European Union

'Governance' was not a term used by Alston and Weiler to describe the architecture of EU fundamental rights of the 1990s. Why use it now? Governance has been a well-used term in the social sciences, and in the study of the EU, for over 20 years.[6] It remains, however, misunderstood, contested and vague.[7] Anyone working at a school or department of governance will tell a similar story: an interesting first task for students is to ask them to define 'governance' as a term. The response is often a wall of blank looks.

At the same time, for such a thorny concept, governance is also an essential one. It refers to a phenomenon that has increased rather than

[5] See e.g. the proposal to upgrade the Vienna Monitoring Centre on Racism and Xenophobia into a fully fledged EU agency, ibid., at 55.

[6] See e.g. the influential early collection of Gary Marks, Fritz Scharpf, Philip Schmitter and Wolfgang Streeck, *Governance in the European Union* (London: SAGE, 1996).

[7] See C. Offe, 'Governance: An Empty Signifier?' (2009) 16 *Constellations* 4. For a helpful exercise in clarification, see C. Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 2.

decreased in the course of those 20 years, especially in the EU context. This phenomenon could be broadly described as one of dispersal. Dispersal is the basis for the definition of governance that I will use in this book (among the many that already exist[8]), which is to define governance as the exercise of public power in conditions under which normative authority and steering capacity are dispersed.[9] In this sense, governance refers to two different varieties of dispersal.

The first variety of dispersion is normative. A long-held observation of positivist theories of law is the need to separate law and morality, given the erosion of societies with a high level of ethical homogeneity.[10] In a society where individuals do not share a common sense of 'the good life', the anchoring of law in a universal set of 'natural' moral principles is precarious. The EU adds a further element into this mix. While national societies are already a mix of pluralistic worldviews, the EU is a conglomerate of different national visions of justice, equality, democracy and other values. EU governance must deal with normative dispersal, i.e. that 'legitimate authority' in the EU is contested and arranged through a series of overlapping constitutional orders.[11] The recent conflicts between the German Constitutional Court and the CJEU[12] are just one element of the difficulties associated with constructing European society along a single chain of hierarchical rule.

The second variety of dispersion is capacity based. The rise of the nation state, and the Weberian bureaucracy attached to it, was premised on the notion that the state could contain regulatory power (or a monopoly on the legitimate use of force) within its boundaries.[13] While this

[8] See e.g. the definitions offered by F. Fukuyama, 'What is Governance?' (2013) 26 *Governance* 3, 350; or the World Bank: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREGTOPGOVERNANCE/0,,contentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html.

[9] In this sense, this definition is developed from a public law perspective: I refer to governance as a medium of advancing public rather than private objectives (excluding for example corporate governance from the ambit of this particular definition).

[10] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 4, 623.

[11] See e.g. the work of the Normative Orders cluster based at Goethe Universität Frankfurt: www.normativeorders.net/en/. In the context of international law more broadly, see N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law* (Oxford: Oxford University Press, 2011).

[12] Case C-62/14 *Gauweiler and Others*, Judgment of 16 June 2015; Order of the Second Senate of 14 January 2014, 2 BvR 2728/13.

[13] M. Weber, *Economy and Society. An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978), 54.

was always an idealised vision, the early twenty-first-century state is one that must share and delegate power – to private actors, independent agencies and civil society – in order to wield it effectively. Once again, the EU only amplifies these problems.[14] The EU's governing institutions carry significant steering power yet ultimately have to rely on domestic Courts and administrations to implement their policies. They may have to engage in similar forms of 'contracting out' as states (e.g. to private standard setting bodies or regulatory agencies[15]), reflecting the lack of knowledge of central institutions on how their policies are being domestically applied.[16] Even when all agree on the desirability of EU rules, the Union's capacity to hierarchically enforce them is decidedly limited. Governance, therefore, refers to the exercise of both *shared* authority and *conditional* authority.

Governance is an essential concept for the study of the EU in so far as it seeks to describe and reflect these two varieties of dispersal. If we seek to govern in the twenty-first-century EU, we seek to rule in a political landscape where the capacity and authority of central actors is grounded on uncertain terrain.

3 Governance as a Fundamental Rights Concept

How suitable is a concept like governance, however, for the world of fundamental rights? At first sight, there is a basic incompatibility. Governance is an essentially political concept: it refers to the exercise of political power. Fundamental rights, on the other hand, are an instrument of legal constraint: of limiting power. Governance refers to the fracturing of rule: its displacement among different institutions and levels of governing.[17] Fundamental rights, on the other hand, carry a universal element.[18] They

[14] For some well-known accounts of difficulties associated with the implementation of EU action, see T.A. Börzel, T. Hofmann, D. Panke and C. Sprungk,. 'Obstinate and Inefficient? Why Member States do not Comply with European Law' (2010) 43 *Comparative Political Studies* 11.

[15] On standard setting, see D. Schiek, 'Private Rule-making and EU Governance: Issues of Legitimacy' (2007) 32 *European Law Review*.

[16] This is a central insight of experimentalist literature. See C.F. Sabel and J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford: Oxford University Press, 2012), 9.

[17] See G. Marks, L. Hooghe and K. Blank, 'European Integration from the 1980s: State Centric v Multi-Level Governance' (1996) 34 *Journal of Common Market Studies* 3.

[18] See M. Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25 *Human Rights Quarterly* 4.

are designed to carry a common, mutually accessible core of protection and to be enforced by authoritative central institutions.

Finally, governance has often been seen – at least in the EU context – as in tension with the kind of hierarchical and static rule implied by the 'rule of law'.[19] Whereas law – and fundamental rights too – must exist in a state of relative stability to be meaningful, governance is something fluid and changing. Its very responsiveness to altered social and environmental conditions makes governance seemingly unsuitable for the idea of a fundamental set of rights that remain relatively constant regardless of external political, social or environmental conditions. As Gráinne de Búrca has summarised:

> One should question whether the so-called new modes of governance, with their emphasis on non-binding, non-justiciable instruments and on coordinating and informational mechanisms, are appropriate for the area of human rights protection, given what is generally said to differentiate 'rights' in law from other claims and interests is the availability of a legal remedy, usually a remedy which can be legally enforced, and usually in judicial proceedings. Is there a risk that the shift towards new modes of governance for the protection and implementation of human rights could denude them of their character as rights, undermining the idea of a core content and rendering the standards of protection ultimately fluid and flexible.[20]

While this critique is persuasive, it also carries a fundamental objection. Precisely, the challenges of 'decentering' and fracturing of authority that have made the concept of governance attractive to political scientists also apply to the legal world, and by extension to the world of fundamental rights. In many senses, the shift to governance was predated by legal movements such as the realist approach, which long observed the significant divergences between 'law in the books' and 'law in action'.[21] Law's claim to authority, backed up by a single set of central institutions able to project their unified reading of FR across a single normative space, is weak, particularly in a European context.

[19] M. Dawson, 'Soft Law and the Rule of Law in the European Union: Revision or Redundancy?' in A. Vauchez and B. de Witte (eds.) *European Law as a Transnational Social Field* (Oxford: Hart, 2013).

[20] G. de Búrca, 'New Modes of Governance and the Protection of Human Rights' in P. Alston and O. de Schutter (eds.) *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart: 2005), 31.

[21] O.W. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 460.

To take the fundamental rights example, EU FR have to deal with both of the varieties of dispersal mentioned above. First, in terms of 'normative dispersal', our understanding of fundamental rights is heavily conditioned by the legal and political systems in which we live. Legal interpretations of, and individual claims to, EU FR are fractured between different institutions and levels of governance, which sit in an unclear hierarchy. The Treaties themselves embody this dispersal, anchoring EU FR not just in the EU Charter but in 'constitutional traditions common to the Member States' and in the ECHR.[22]

National constitutional orders have, as a result, shown varied levels of resistance to the idea of a unified FR acquis in Europe.[23] As Joseph Weiler has argued, European fundamental rights may also come with 'fundamental boundaries', i.e. rights that only fully make sense within particular political communities, in which individuals carry certain reciprocal duties and rights.[24] If our critique of governance comes from the perspective of a unitary, stable, universal legal order, it is highly questionable whether – in an EU context at least – such an order exists. What we are left with instead is an interlocking, and often conflicting, set of fundamental rights regimes, all of which have to be coordinated for an effective system of protection to take hold.

Secondly, in terms of 'capacity dispersity', the ability of EU FR to be successfully implemented is highly conditional. If a Court or other institution agrees to an FR claim, that claim must still be implemented like any other EU policy. In this regard, the EU faces all of its traditional capacity limitations. It must rely on national Courts and administrations to execute FR.[25] It faces internal divisions between institutions over who has the responsibility for FR.[26] It may lack knowledge on how to apply and alter its FR policies among diverse and changing national polities. Finally, the effective protection of FR may involve entrusting alternative

[22] Article 6 TFEU.
[23] See the special issue of E. Muir and C. Leconte, 'Understanding Resistance to EU Fundamental Rights Policy' (2014) 15 *Human Rights Review* 1.
[24] J. Weiler, 'Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in European Space', in R. Kastoryano (ed.) *An Identity for Europe, The Relevance of Multiculturalism in EU Construction* (London: Palgrave Macmillan, 2009).
[25] See e.g. the selective compliance regarding judgments dealing with social rights issues and posted workers discussed in M. Blauberger, 'With Luxembourg in Mind. The Remaking of National Policies in the Face of ECJ Jurisprudence (2012) 19 *Journal of European Public Policy* 1.
[26] See e.g. Case C-540/03 *Parliament v Council* [2006] ECR I-05769.

regulatory actors either within the EU framework (e.g. the EU Fundamental Rights Agency or EU Ombudsman) or outside of it (e.g. institutions of the Council of Europe) with tasks that central EU bodies are unable to conduct on their own. Even if we agree on who has the authority for EU FR, their execution relies on the effective coordination of an increasingly varied set of actors.

None of these arguments are designed to dispute the normative uneasiness of applying a concept like governance to FR. At a normative level, the tense relation between the fluidity and decentering of governance and the idea of a normative core implicit in FR protection remains. Chapter 1 will explore this normative tension, arguing that it demands a procedural vision for the role of Courts and central institutions in protecting EU FR. Others may simply argue that – given these problems of normative and capacity dispersal – to talk of EU fundamental *rights* (rather than simply policies) is meaningless.[27]

At a descriptive level, however, our normative claims about EU FR, particularly from those in favour of a robust EU policy, should not blind us to the empirical landscape in which EU FR must live. *If* we agree that there is something like EU FR, an effective system for their protection must cope with the two varieties of dispersal discussed above. EU FR must establish a regime that is able to withstand the tensions both of overlapping and heterarchical normative orders and of limited central capacity. If the EU wishes to develop a robust FR regime, those rights cannot live in the ether but must be implemented in the real EU, with all of the institutional and political shortcomings that come with it. How has this task of 'governing' EU FR been conducted and how is it likely to be conducted in the immediate future?

4 What Are EU Fundamental Rights for?

The book begins in Chapter 1 by addressing a more foundational question: To what extent is there a strong rationale for EU fundamental rights protection above the multiple protections offered via other orders? Human rights scepticism permeates much of academic and societal discourse, with the EU being no exception.[28] In particular, scholars have questioned the depoliticising and individualising effects of EU

[27] I am grateful to Martin Loughlin for a discussion on this matter.
[28] See e.g. T. Campbell, K.D. Ewing and A. Tompkins, *The Legal Protection of Human Rights: Skeptical Essays* (Oxford: Oxford University Press, 2011).

fundamental rights: their ability either to act as instruments of centralisation, which displace and undermine other rights-based orders, or to promote an individualistic and market-based conception of EU citizenship, antithetical to the development of greater bonds of solidarity between European citizens.

While this is a real risk, the normative defensibility of a strong EU role in FR protection may rely on the EU's procedural role in patrolling FR violations. Drawing on the accounts of John-Hart Ely[29] and Jürgen Habermas,[30] the chapter argues that judicial review on FR grounds, or the activities of other EU monitoring bodies, is grounded not only in their ability to defend the dignity and autonomy of individuals but also to guarantee full equality and access to the political process. The contestation of transnational rights within diverse national polities (Weiler's problem of 'fundamental boundaries') need not be debilitating in so far as the question of how to define rights, and who may hold them, encourages individuals to engage in the political process. Similarly, EU FR should not be seen as purely pre-political standards but also as objects of deliberation and debate, connecting individuals to the political sphere and encouraging the elaboration of new law. It is the very possibility to positively elaborate rights – and not just supervise their execution – that sets the EU apart from other international bodies attempting to guarantee or 'monitor' rights protection.

The procedural approach, thus, sees FR in the EU as a shared constitutional responsibility.[31] The primary duty to elaborate and guarantee FR rests with national and EU legislatures. A key governance challenge is how to divide these responsibilities (a question taken up in Chapter 2). At the same time, EU judicial review guarantees the representation of political outsiders and minority viewpoints within the political game of defining concrete rights, clarifying the roles and responsibilities of public actors at different levels of governance. The EU's Courts and other FR bodies, under this model, may be required either to address imbalances and exclusions within the EU political process or to act where the

[29] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

[30] J. Habermas, 'On the Internal Relation between the Rule of Law and Democracy' in *The Inclusion of the Other* (Cambridge: Massachusetts Institute of Technology Press, 1996); *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Massachusetts Institute of Technology Press, 1996).

[31] On the notion of shared responsibility in the context of EU judicial review more broadly, see M. Dawson, 'Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits' (2013) 19 *European Public Law* 2.

constitutional and democratic character of national political orders is fundamentally eroded (conditions that, as the case studies will explore, are real risks in the present European constitutional space).

5 Which Institutions?

Ultimately, the question of whether the EU's legal and political institutions can fulfil their FR tasks is an empirical one. Answering it requires tracing the institutional performance and FR processes of the EU's main bodies; a task taken up in Chapters 2 and 3. The principal division between the chapters is between legal and political bodies – Chapter 2 focuses on the Court of Justice, examining its case law in the FR field, while Chapter 3 focuses on the EU's political institutions. In both cases, governance approaches shed light on understanding institutional engagement with FR.

In the case of the Court, the key question raised by governance research is how legal institutions deal with the varieties of dispersals discussed above. For other human rights bodies – such as the ECtHR – dispersal is managed via providing governments with a 'margin of appreciation', which allows them to safeguard FR standards in diverse polities depending on whether particular variables are present.[32] The chapter, following the Strasbourg Court, outlines three such variables: diversity (i.e. whether rights are implemented in varied ways across states), the nature of rights (i.e. whether a particularly important right or its 'core' is affected) and procedural integrity (i.e. whether limitations on rights were democratically deliberated). The effective governance of FR in the EU similarly seems to require a Court of Justice able to balance the demands of the Charter for universal protection across the European legal space with the 'fundamental boundaries' of national constitutional orders, who themselves carry robust mechanisms for rights protection.

As the chapter argues, the CJEU's problems in managing this balance should be understood in light of the distinctive features of the EU system. While Strasbourg's 'margin of appreciation' concerns deference to the national level, the EU order faces two margins – one to national legal orders and the other to the EU's political institutions, who themselves

[32] See S. Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights', *Human Rights Files* (Strasbourg: Council of Europe, 2000).

may harmonise FR standards politically. These two margins may often stand in tension: defending the primacy of the EU legislature may involve subverting national constitutional orders aiming for a higher level of FR protection,[33] while defending national FR may involve unravelling EU attempts to elaborate FR standards at a transnational level.[34]

It may be in these circumstances that the procedural approach developed in Chapter 1 is of use. The level of deference to one level of governance or another may depend on the robustness of the political process through which FR have been elaborated or restricted. While the CJEU, for example, may be justified in defending EU legislation elaborating FR against national challenge where that legislation has been developed through a robust political process, it may be less confident in doing so for measures in which the EU's main representative institution has not been involved. In this sense, a governance approach urges legal institutions to understand their judicial role in 'protecting' FR in light of the EU's political system as a whole, and the relative capacities and roles of its main bodies.

A similar message applies in the case of the EU's political institutions. Political engagement with FR also needs to be understood within the context of the larger institutional balance of the EU and the competition between institutions defending their roles in the EU's policy-making process. This again is a key insight of governance research: institutions engage in policy-making with an eye to their mandates and are likely to use FR, like other areas of policy, as opportunities to either deepen their institutional reach or prioritise their core missions as institutions.[35]

As the chapter will argue, institutional engagement with FR ought to be understood in these terms. A useful example is the interaction of the EU institutions with bodies specifically mandated to supervise FR violations, such as the EU FRA. While a legislative initiator like the Commission may see FRA involvement as potentially disruptive to the unity of its legislative proposals, the European Parliament has often used FRA opinions – or those of the Article 29 Working Party on data protection – as useful tools in bolstering its legislative position against

[33] See (discussed in greater detail in Chapter 2) Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR I-0000.

[34] See Case C-362/14 *Maximilian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015.

[35] See M. Jachtenfuchs and B. Kohler-Koch, 'Governance and Institutional Development' in A. Wiener and T. Diez (eds.) *European Integration Theory* (Oxford: Oxford University Press, 2004).