

Sonia Morano-Foadi
Stelios Andreadakis

Protection of Fundamental Rights in Europe

The Challenge of Integration

 Springer

Protection of Fundamental Rights in Europe

Sonia Morano-Foadi • Stelios Andreadakis

Protection of Fundamental Rights in Europe

The Challenge of Integration

Sonia Morano-Foadi
School of Law
Oxford Brookes University
Oxford, UK

Stelios Andreadakis
Brunel Law School
Brunel University London
Uxbridge, UK

ISBN 978-3-030-42366-7 ISBN 978-3-030-42367-4 (eBook)
<https://doi.org/10.1007/978-3-030-42367-4>

© Springer Nature Switzerland AG 2020

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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.

Mäntyharju, 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.

Acknowledgements

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.

A special ‘thank you’ should go to our employers, Oxford Brookes University, University of Leicester and Brunel University London for their continuous support that took many different forms, including study leaves and funding. Having the time and resources to dedicate to our project was incredibly helpful, and we would have not been able to pull this task off without their help.

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.

We would like to recognise the priceless assistance provided by our Research Assistants, Dr. Lucia Brieskova, Mr. Luke Campbell, Mrs. Johanna Diekmann

Kroeber, Dr. Jen Neller, Dr. Louise Borg Haviaras and Mr. Jacky Cheng. All of them worked really hard during different stages of our project showing dedication and commitment, and we are indebted to them. A special thank goes to Ms. Casey Alves for her constant assistance during the writing process.

We want to make a reference to our colleagues, who kindly agreed to read and comment on earlier drafts of our chapters. Their feedback significantly helped us shape and polish the content of our monograph. Many thanks to Professor Alexandra Xanthaki, Dr. Clara della Croce, Dr. Katia Bianchini, Dr. Jörg Polakiewicz and Dr. Samantha Velluti. At the same time, we would like to include here all the colleagues, academics or not, who gave us ideas, inspiration, critique and food for thought during presentations, discussions, exchanges of ideas or even chats in the corridors or at the cafeteria. You helped us more than you can imagine.

A big ‘thank you’ goes of course to our families and friends, who were there for us from the beginning till the end of this project. They kept us focused, gave us the push that we needed at various difficult moments, but most importantly believed in us.

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
Stelios Andreadakis

Contents

Integration and Fundamental Rights in Europe	1
I. Introduction	1
1. The Scope of the Monograph	5
2. An Overview of the Chapters	7
II. The Theoretical Approach: ‘Integration Through Rights’ (ITRs) as a Normative Concept	10
1. The Theory of Dialogic Constitutionalism: A Brief Introduction	11
2. Authority or Agency Governing Europe? A Framework for Discussion	13
III. The Methodology	16
1. Socio-Legal Research	17
2. Comparative Methodology	18
3. Case-Study Approach	19
IV. The Key Argument	20
References	21
 Expanding Theories of Constitutionalism and Legal Pluralism: ‘Integration Through Rights’ in Europe	 25
I. Introduction	25
II. Council of Europe (CoE) and European Union (EU)	27
III. Court of Justice of the EU (CJEU)	29
IV. CJEU and European Court of Human Rights (ECtHR)	32
V. The Accession Process So Far	34
VI. Constitutionalism and Legal Pluralism: An Understanding of the Concepts in Their National Application	36
VII. Constitutionalism and the European Union	39
VIII. Theories to Describe the Relationship Between the EU and Its Member States	40
IX. European Convention of Human Rights (ECHR)	45

X. What Theory for (a Future) Europe?	48
XI. Conclusions	49
References	50
Dialogic Constitutionalism and Its Application to Fundamental Rights	57
I. Introduction	57
II. The Interplay Between Overlapping Legal Sources on Fundamental Rights in Europe	60
III. Dialogic Constitutionalism for a New Judicial Harmony in Europe	63
IV. The Application of the Theory of Dialogic Constitutionalism to Fundamental Rights	67
1. The ‘Area of Freedom, Security and Justice’ (AFSJ) and the Constitutional Principle of ‘Mutual Trust’	70
2. An Evaluation of Dialogic Constitutionalism Through an Analysis of Case Law on Dublin Transfer Mechanisms	72
V. Conclusions	78
References	79
European Integration Through Rights: A Balancing Exercise and the Quest for Uniformity	85
I. Introduction	85
II. The Role of the Two Supranational Courts as Protectors of Fundamental Rights	87
1. The Fundamental Rights Agenda and the Strive for Uniformity	87
2. The Margin of Appreciation and the Quest for Consensus	91
III. Human Dignity Through the Lens of the European Courts	94
1. <i>Omega</i> and Dignity: The Interplay Between Fundamental Rights and Fundamental Freedoms	95
2. <i>Vinter</i> : Life Sentences, Dignity and the Right to Hope	99
3. Re-thinking the Pan-European Concept of Human Dignity	102
IV. Luxembourg and Strasbourg: So Close, No Matter How Far	104
V. Conclusions	105
References	106
The Concept of Agency in Making Policy on Fundamental Rights	111
I. Introduction	111
II. Making Law and Policy in the European Union	113
1. The ‘Trade’ of Negotiating Agreements	114
2. Democratic Legitimacy and Accountability of Policymaking	116
3. Collective Agency, Integration and Policymakers	118
III. Negotiating the EU Draft Accession Agreement to the ECHR: A Step Forward Toward Europeanisation?	122
IV. Negotiating the UK Withdrawal Agreement from the EU: A Step Backwards?	126

V. Assessing the Role of the Policymakers in the Current Cycle of Integration	131
VI. Conclusions	133
References	134
Current Obstacles and Future Challenges of Integration in Europe	141
I. Introduction	141
II. Any Policy Priority for Europe? An Analysis of EU Policy of the Last Decade	143
III. The Court of Justice: Past, Present and Future Actor of Integration	146
IV. The CJEU's Legitimacy Control of the Policymakers' Accession Agreement: The Logic of Opinion 2/2013	151
1. The Scope of the Notion of Autonomy in the CJEU's Case Law	154
2. European Integration at a Crossroads: Does No Accession Mean Less Integration?	157
V. The Role of the ECtHR in European Integration	159
VI. Conclusions	162
References	164
Conclusions	171
I. Introduction	171
II. The Main Contributions of the Monograph	173
1. The Objects of Integration: A Set of Common Values	174
2. The Main Actors Involved in the Process of Integration	176
3. Interactions Between Actors: Conflicting Interests and Tensions	180
III. Final Remarks: The Way Forward	181
References	186
Appendix 1	191
Interview Templates	191
A) CJEU Judges	191
B) ECtHR Judges	195
C) EU Officials	199
Appendix 2	203
Ethical Documentation	203
A) Information Sheet Judges	203
B) Information Sheet Policymakers	206
C) Consent Form	209
References	211

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

Integration and Fundamental Rights in Europe



Contents

I. Introduction	1
1. The Scope of the Monograph	5
2. An Overview of the Chapters	7
II. The Theoretical Approach: ‘Integration Through Rights’ (ITRs) as a Normative Concept	10
1. The Theory of Dialogic Constitutionalism: A Brief Introduction	11
2. Authority or Agency Governing Europe? A Framework for Discussion	13
III. The Methodology	16
1. Socio-Legal Research	17
2. Comparative Methodology	19
3. Case-Study Approach	19
IV. The Key Argument	20
References	21

I. Introduction

Every time there is the creation of a form of Union of States, a process of integration is put in motion.¹ A sequence of crises and achievements characterises such a development, which in the case of the EU can be defined as Europeanisation/European integration.² This monograph re-thinks the path towards European integration, which is intended as ‘the process of creating an ever closer union among the peoples of Europe’ (Article 1(2) Treaty of the European Union (TEU)).³ Challenges to this project have largely occurred due to tensions between the process of closer integration and the protection of nation-states’ sovereignty. Our

¹Frowein et al. (1986), p. 231.

²The terms ‘Europeanisation’ and ‘European integration’ are used in our work as synonymises.

³Article 1(2) of the Treaty of the European Union (TEU) provides that: ‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.’

major contribution is to offer a fresh look on integration, posing EU foundational legal values at its heart. These values are enshrined in Article 2 TEU, which states that ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. We submit that, amongst the common values, fundamental/human rights⁴ constitute the drivers of European integration and should be at the core of all EU’s working and initiatives. Thus, to re-think the path towards Europeanisation, we propose to re-focus the attention on the ‘Integration Through Rights’ (ITRs) idea⁵, which constitutes the backbone of this work.

Our approach to integration based on rights is both selective and reconstructive. It is selective for the following reasons. Firstly, it focuses on what we define as the main agents of integration within the EU, i.e. the EU policymakers, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Secondly, albeit being informed by the past in discussing events and stages of integration, the analysis is limited to the first decade after the entry into force of the Treaty of Lisbon, and specifically from December 2009 to December 2019.⁶ Thirdly, even though we recognise the strong role played by national courts, particularly constitutional courts, in this process of integration, our book does not focus on the relationship between the CJEU and ECtHR and their respective national courts. Finally, in relation to the content of fundamental rights, we are discussing issues in a more general way, but we provide examples of integration, examining relevant case law on human dignity and in the area of freedom, security and justice.

Our approach is reconstructive as it reflects on the EU Founding Fathers⁷ as inspiring promoters of integration. Our monograph uses Weber’s concept of charismatic authority and power,⁸ as a source of inspiration, even if it does not provide an in-depth analysis of his work. The analysis of the role of policymakers in negotiating the EU’s Accession Treaty and the EU-UK Withdrawal Agreement is undertaken

⁴The terms ‘fundamental rights’ and ‘human rights’ are used in this work in an interchangeable fashion.

⁵The concept was originally used by Mauro Cappelletti, who characterised Integration Through Law as ‘an inherently and proudly pluralistic product. See Cappelletti et al. (1986), p. v.

⁶This book is grounded on findings collected during a theoretical and empirical project started in 2009. The first empirical phase was funded internally by Oxford Brookes University’s Social Sciences and Law School Strategy Fund in 2010 and involved interviews with judges and Advocates General of the Court of Justice of EU (CJEU). The second phase, which included interviews with policymakers at EU and CoE levels and the judges of the European Court of Human Rights, was externally funded by the British Academy (BA Small Research Grants scheme, SG 2011 Round, Ref No: SG110947).

⁷Konrad Adenauer, Joseph Bech, Johan Beyen, Winston Churchill, Alcide De Gasperi, Walter Hallstein, Sicco Mansholt, Jean Monnet, Robert Schuman, Paul-Henri Spaak and Altiero Spinelli are the 11 individuals that are regarded as the Founding Fathers of the European Union.

⁸Weber (1958). See also Weber (1980), pp. 124 et seq.; Runciman (1991), p. 7.

reflecting on the concept of ‘agency’⁹ and Weber’s work on charisma.¹⁰ Our analysis touches upon the way in which the lack of accession and the Brexit phenomenon have and will affect the EU legal framework and its development. We compare the negotiations for the EU Accession to ECHR with the Brexit negotiations as these processes offer insights into the current process of European integration. There has never been so much interest in EU Accession negotiations as in the Brexit process by the press or other media. Brexit is certainly an important development, considering that it is the first time a Member State expresses its intention to leave the Union at free will. However, fundamental rights protection is also of paramount importance for the every-day life of citizens across Europe. The fact that Europe has not yet created a coherent system, as accession has not yet happened, seems to be an issue of much less interest and this reality requires some consideration.

The European human rights system is not a monolithic order. Many variables play a role in the polycentric legal reality where not only the EU and the Council of Europe (CoE) but also the diverse political and legal structures of their overlapping States play a part. This is why the ITRs concept is analysed in the present monograph through studying its dual aspects, which we define as the ‘macro’ dimension of integration (the main drivers/actors of integration) and the ‘micro’ dimension (‘substance’ of integration). The first feature focuses on the law as an instrument and looks at the role of legal institutions and mechanisms in the process of European integration. The second feature examines the law, using fundamental rights, as an object of integration in itself. This aspect looks at the ‘micro’ cosmos, examining examples of integration through the lens of rights. Thus, integration in this dimension captures the common standard of protection of human rights in different areas of law in the development of a closer union between states and peoples. We argue that questions challenging the future of Europe cannot properly be answered without understanding both dimensions of integration. Together, these two approaches create an original contribution to knowledge, highlighting the multifaceted and multidimensional complexities of the concept of integration and the wider implications that need to be taken into account when approaching this concept.

When considering integration and fundamental rights, we need to reflect on the rule of law and the relationship between democracy and legitimacy as underlining concepts. Starting from the consideration that ‘politics is monopolized by political elites, entrenched interest groups, bureaucratic parties, rigid institutionalized procedures, the principle of representation, and parliamentary-electoral processes’,¹¹ we observe how Europe has achieved integration in the post-national phase, a stage that goes beyond the national borders. The EU is not a nation-state, it is a polity described as ‘something more than a confederation but less than a federation — an association of sovereign states which pool their sovereignty only in very restricted areas to

⁹See the chapter “The Concept of Agency in Making Policy on Fundamental Rights”, section “Making Law and Policy in the European Union”.

¹⁰Eisenstadt (1968).

¹¹Kalyvas (2008), p. 6.

varying degrees'.¹² However, the issue of legitimacy of the EU has always been at the core of the debate, as the EU has long been criticised for its democratic deficit.¹³

An underlying question this work is reflecting on considers whether the common values that have been identified in the TEU are legitimising European integration. These common values have been included by the drafters of the Treaties in the legal framework without full popular participation. The Lisbon Treaty was indeed based on the work carried out for the Constitution of Europe, which as a project did not go ahead. Although the Draft Constitution Treaty was based on a form of participatory democracy involving different stakeholders,¹⁴ it is difficult to establish the extent to which these shared values are effectively common to the peoples of Europe. Although, we believe that the exact meaning of these values could vary among States and peoples in Europe, the task of the Courts in the project of integration is to interpret these values, translating abstract connotations into concrete enforceable rights, when their practical applications are challenged.

Thus, the present monograph explores the role of the two European Courts in promoting integration and emphasises the multi-level dialogue between these two judicial institutions as the main platform available to achieve convergence across the European continent. The doctrine of dialogic constitutionalism is applied, in order to map the development of convergence trends and examine the interaction not only between the Courts themselves, but also between the Courts, the legislatures and the civil society.¹⁵ On the one hand, the CJEU has continued constructing the Treaty obligations to establish an internal market and the four fundamental freedoms not as a programmatic goal to be realised through political legislation, but as a set of directly enforceable individual rights.¹⁶ On the other hand, the ECtHR has defined the 'common minimum denominator' for the protection of human rights in Europe, while leaving States the freedom to apply a more generous protection.

Our analysis is not limited to the Courts' jurisprudence and the legal framework towards integration; it adopts a socio-legal perspective and covers common concepts, shared meanings, the re-orientation of values, and the construction of new paths towards Europeanisation. We delved into an investigation of the founding moments and institutional work not solely to study the effects and consequences of policymakers' actions or judicial rulings on integration, but also to trace the path of Europeanisation. In certain instances, fundamental principles and higher legal norms are not democratically produced but are instead the outcome of work carried out by ordinary law-making. Such law-making does not exist in a vacuum and it is heavily influenced by the surrounding social, political and economic circumstances. In this monograph, we concentrate our attention on integration examining the role and

¹²Siedentop (2001), pp. 1–2.

¹³There is large literature on the democratic deficit. For a leading account of the issue linked to integration, see Majone (1998).

¹⁴Article I-47 of the Draft Treaty Establishing a Constitution for Europe.

¹⁵Roach (2005), p. 752.

¹⁶Scharpf (2009), p. 181.

conduct of all main actors involved as well as the forces of integration and disintegration.

1. The Scope of the Monograph

As a ghost emerging from the past, at present times we are experiencing the surge of populism and other movements animated by nationalistic ideologies, xenophobic threats and propagandistic messages of closure and isolationism. Consequently, the development of a European Union based on fundamental rights has significantly slowed down. Europe is suffering a ‘borders crisis’ due to the uncertainty about the very concept of ‘border’ and ‘border security’.¹⁷ Different stages of integration have marked the history of the EU from the founding European Economic Community (EEC) Treaty to the most current developments, which include Opinion 2/2013 and the UK’s withdrawal from the EU. Crucial institutional decisions on Europe’s future are urged, as the EU is affected by an existential crisis. This is essentially a crisis of values on the shared vision, despite the European common values having been codified in Art 2 TEU. A focus on shared values would revert the governance approach from an emergency mode to a sustainable and planned long-term agenda. Currently, domestic and European politics have become more entangled as governments are responsive to public pressure on European integration. Amongst these issues, there are some dilemmas, which might require some thinking; for instance, what are the reasons behind the outcomes of referenda or the negative decision from the CJEU to accede to the ECHR; what are the consequences of populist pressures that have thrust Europe into domestic politics? What is the role of public opinion or political parties’ competition in decision-making over Europe?

Scholars have substantiated three claims in an attempt to provide solutions to the current crisis: ‘(a) European integration has become politicised in elections and referenda; (b) as a result, the preferences of the general public and national political parties have become decisive for jurisdictional outcomes; (c) identity is critical in shaping contestation on Europe’.¹⁸ They justify the preferences accorded to jurisdictional architecture as a consequence of efficiency, distribution and identity. At times of crisis, the rule of law, democracy and respect for human rights are endangered and yet these values are the bedrock of our society.

Based on these backdrops, we submit that the European project should re-focus on the common values of European peoples and Member States and proceed towards integration. The main pillar on which this monograph is based is ‘Integration Through Rights’ as human rights are part of the European common values together

¹⁷For an interesting account of the critical border and migration studies see Vaughan-Williams (2015), p. 5.

¹⁸Hooghe and Marks (2001, 2009).