

Book review:

# Mark Dawson, *The Governance of EU Fundamental Rights*. Cambridge: Cambridge University

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Whilst the issue of fundamental rights protection is at the core of the EU regulatory agenda, its development has been gradual. Ab initio, the European Community did not have a clear policy of human rights. Then, fundamental rights legislations and policies were gradually introduced within the EU legal system, first via the general principles of EU law and then, through the EU Charter of Fundamental Rights. Consequently, research in this area has expanded.

The scholarship of EU governance has also seen a huge development. According to a 2006 survey undertaken as part of the “Network of Excellence” on “Efficient and Democratic Governance in a Multi-Level Europe” (CONNEX), an “explosion of EU governance research” has manifested in the recent decade (Kohler-Koch and Rittberger, 2006). Indeed, scholars have associated the concept of governance with theory of European integration and examined governance in relation to “intergovernmental” or “supranational” modes of decision-making in the wider discourse on EU politics (Weiler; Moravcsik; Stone Sweet and Sandholtz). In addition, research has explored different modes of governance (Sabel and Zeitlin) and studied this concept in relation to the internal market, employment policies and the European research area, just to name some fields (Bulmer; Mosher and Trubek; Morano-Foadi).

More recently, academics have reflected on how the EU is managing its current crises, i.e. the Eurozone and the refugee resettlements in the light of fundamental rights protection. Within this context, Dawson’s book offers a unique critical overview of the governance of EU fundamental rights in a dynamic and original vein. Its aim is to shed light on the mechanisms through which fundamental rights are protected and enforced. Accordingly, this volume accounts for the evolution of fundamental rights within the EU over the last decade.

Dawson has focused on the concept of “governance of fundamental rights”, also known as

the “architecture of EU fundamental rights”. He has defined this thorny concept in negative terms and gone on to examine the constraints on to the enforcement of fundamental rights’ legislation. He defines governance as the exercise of public power in conditions under which normative authority and steering capacity are dispersed. Dispersal, however, is not a homogeneous concept; it is expressed in two different varieties. The first form is defined as “normative dispersal” and relates to the EU legitimate authority to govern. The authority of the EU is contested and arranged through a series of overlapping constitutional orders. Conflicts between different national constitutional courts and the ECJ in general, and in particular between the German Constitutional Court and the ECJ, are examples of its contested authority. The second form of dispersal is described as the “EU capacity to govern”. Although the EU has a significant steering power, it has to rely on domestic courts and administrative bodies to implement EU policies. In other words its capacity to enforce its policy hierarchically is limited.

The above-mentioned forms of dispersal characterize the EU governance and specifically its relationship with fundamental rights. The concepts of governance and fundamental rights do not appear *prima facie* compatible or associable. Governance is a political concept, which refers to the exercise of political powers, whilst fundamental rights are understood as an instrument of legal constraint of limiting power (pp. 4–5). The former term relates to the allocation of rules amongst different institutions at several levels and the latter carries a universal element, a common and mutually accessible core of protection to be enforced by authoritative central institutions. Moreover, governance is a fluid and changing concept which sits in tension with the hierarchical and static rule implied by the “rule of law”, whilst fundamental rights exist in a state of relative stability to be meaningful.

Dawson adopts a variety of methods to examine the interrelation between these two concepts. A critical approach to the theory of governance of EU fundamental rights is contextualized in the first chapter. A dichotomy between EU Human Rights Scepticism strand and a procedural approach to transnational human rights protection is proposed.

The first strand, the Human Rights Scepticism doctrine, is elaborated through three different theories and criticisms. The first is counter-majoritarian theory, which considers the challenges posed by divergences over the scope of human rights across EU Member States and the difficulties in reconciling the political will with the judicial enforcement of those rights. The

second theory is the communitarian critique, which relates to the individualist approach of the EU citizenship in protecting individuals by undermining the bonds of collective solidarity. The third is an empirical critique that questions the added value of EU human rights protection for minorities and individuals. This is based on the assumption that often the national judiciary have a more effective role in protecting individual and minority rights than legislatures, as they do not have to respond to the electorate. At EU level, the absence of an explicit “margin of appreciation” mechanism, characteristic of the ECtHR approach, limits the ECJ’s capacity to determine sensitive issues such as cultural or religious questions.

The second strand, which concerns the procedural understanding of transnational rights, substantially explores the features of judicial review if an individual’s fundamental rights have been infringed. The theoretical underpinnings of this approach are expressed through an analysis of Hart Ely and Habermas’ theories. Based on the main American school of constitutional interpretation, Ely’s account adopts a process-oriented judicial review, arguing that in interpreting human rights rather than limiting political choices judges open up channels of political communications. Thus, intervention to protect human rights is conducted via different human rights charters and broader principles of constitutionalism. Although based on a different disciplinary and political tradition, Habermas’ theory is consistent with Ely’s account, in that he considers human rights are not grounded in external morality alone but also in democratic authorship, i.e. political process and not in pre-political values (pp. 28–30)

Dawson has also developed a further account of human rights scepticism, which is empirical in nature and questions the effectiveness of the governance of fundamental rights. This approach requires more than judicial supervision; it suggests that proactive institutions are able to promote and fulfil human rights guarantees across the EU (Williams, 2015). Such an argument is brilliantly reviewed in Chapter 2. Dawson provides a doctrinal analysis of relevant ECJ case law to assess whether the EU courts engage in a form of “margin of appreciation” which is designed to respect the “legitimate diversity” between Member States in two ways. The first standpoint, which is defined as the vertical deference, examines the extent to which EU courts have developed the margin of appreciation in their interaction with national courts. The second perspective, which is defined as the horizontal deference, involves a direct dialogue between the EU courts and the EU legislature; the latter is a set of different EU institutions that issue legislative acts. The concluding reflection provided in this chapter is strictly related to the

following chapter and focuses on the EU's political institutions.

The main line of reasoning reflects on the difficulty of the EU courts to protect fundamental rights adequately. The solution can be found in asserting that EU fundamental rights protection is a shared responsibility between the EU judiciary, the EU legislature and national courts. The question is: how much responsibility should be expected of each of the above bodies, bearing in mind that the legal basis for this policy is fragmented between different areas. To answer this question effectively, the author believes a mapping exercise should be conducted at two levels. The first level considers the formal division of competences between the EU institutions which carry and share their mandate. The three main political institutions are the Commission, the Council and the Parliament and the watchdog institutions, i.e. those which monitor the work of the EU institutions themselves: the ECJ and the Ombudsman. The second level analyses the implementing bodies which are subordinated to assist other institutions to fulfil their duties. An external evaluation of the EU FRA and Frontex was provided to unpack the principal procedures used by the EU to monitor fundamental rights and assess their effectiveness. The analysis is based on two arguments. The first argues that the EU institutions cannot be understood independently from their strategic objectives and their role in the EU's larger institutional framework. The second suggests that despite some failures in the system, the EU governance of fundamental rights has demonstrated an ability to correct itself, as omissions committed by an institution are then rectified by others. Thus, the cumulative effect is an "institutional architecture of greater sophistication and with a higher capacity to rectify fundamental rights violations, than at any point in the EU's past history". (p. 142).

The subsequent analysis proceeds with an evaluation of the work of the EU institutions in relation to a set of concrete rights. Two case studies containing doctrinal and empirical findings are developed. The first one focuses on justice and the rule of law within the context of the recent crises in Poland and Romania (Ch. 4). The second case study explored the issue of social rights protection under the EU Charter during the economic crisis focusing on Greece, Portugal and Ireland (Ch. 5). These two case studies have shown that the challenge is not whether the EU institutional framework for the governance of fundamental rights is adequate. Instead, the real issue is that fundamental rights are bypassed either by programmes which threaten substantive rights per se or by measures that remove the possibility of their legal or political contestation. For example, in the case of social rights, intergovernmental actions have rendered the legal and

political accountability developed under the Treaties inapplicable, and in relation to the rule of law, Member States have threatened their national courts making national judicial review and/or reference to transnational courts impossible.

Thus, Dawson acknowledges the benefits of the EU governance of fundamental rights.

However, he is concerned that its effectiveness might be limited by distort mechanisms adopted by the EU and its Member States.

In short, this book has explored this complex topic through an elaborate theoretical and empirical discussion at different levels using impressive methodological tools. Although highly recommended as essential reading in this field of research, this monograph struggles to offer a practical and feasible proposal to overcome the distortions between the theory and practice of the EU governance of fundamental rights.

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