2016

Book Review

Douglass Cassell
University of Notre Dame, doug.cassel@nd.edu

is fit for purpose, we might first question whether the world we have fashioned is fit for humans.

Margot E. Salomon
Law Department and Centre for the Study of Human Rights
London School of Economics and Political Science
doi:10.1093/hrlr/ngw005
Advance Access Publication Date: 11 April 2016

Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (Oxford University Press, 2014, xx + 319pp, £63.00) ISBN 978 0 19 870204 7 (hb)

Fundamental Rights in Europe takes on large questions. What has been the impact of regional norms and institutions on protection of human rights in European states? What ought it to be? What is it likely to be in the future? What factors explain and condition the impact? Where is the right balance between regional norms and state sovereignty? How does the relationship of regional courts to European states compare with that of the federal Supreme Court to states in the USA?

Comprehensive answers would challenge the most experienced scholars. Few possess the breadth and depth of knowledge to assess such themes on even a single continent, let alone two. Many disciplines—political science, international relations, sociology and history, among others—might be brought to bear.

Federico Fabbrini, an Assistant Professor at Tilburg Law School, approaches these broad questions through the lens of a narrow but nonetheless revealing methodology: a comparison of the evolution over time of four fundamental rights in Europe and the USA. He selects one right from each of four different 'generations' of rights. Civil rights are illustrated by due process for suspected terrorists; political rights by rights of non-citizens to vote; economic rights by the right to strike; and personal or 'new generation' rights (p 49) by the right to choose an abortion.

While these studies yield useful insights, Fabbrini wisely refrains from attempting to draw from them a 'full-blown effort of theory-building'. Still, they lead him to infer the 'key dilemmas'—'identity, equality, and supremacy'—which he believes must be addressed by a new theory for the protection of fundamental rights in a 'multi-layered' Europe (p 249).

1. STATE SOVEREIGNTY AND EUROPEAN PLURALISM

Fabbrini begins by partially rejecting two prevalent schools of thought: 'sovereigntism' and 'pluralism'. Sovereigntism is correct, he admits, to recognize that difficulties arise in imposing regional standards on states of varying cultures and values. However, he dissents from the proposed solution of sovereigntists—'making the states the ultimate decision-makers on matters of rights' (p 248).

He sees the competing pluralist school as correct in emphasizing 'the added value of multiple layers of human rights norms in Europe' (p 248). Indeed, he 'largely

endorse[s]' pluralism (p 267). Yet, he believes advocates of pluralism are 'wrong in either perceiving this reality as problem-free, or arguing that judicial dialogue is the solution to all the difficulties that arise in a multi-layered regime' (pp 248–9). Their 'idyllic vision' of a 'happy coexistence' of a plurality of human rights norms and institutions overlooks the reality that at times the interaction between multiple human rights standards 'may be bad rather than good, and demand reform rather than preservation' (p 267).

Accommodation is needed, argues Fabbrini, between regional norms and state particularities. Analogizing from federalism as a theory of federal states in the USA and elsewhere, he calls for a 'neo-federal' vision of rights protection in Europe (p 249). But what does a 'neo-federal' vision mean? After all, one could characterize the current relationship between the European Court of Human Rights (ECtHR) and states as 'neo-federal'. ECtHR doctrine flexibly allocates decision-making powers between states, which are granted a variable 'margin of appreciation' in resolving rights dilemmas, and the European Court, which retains a variable degree of 'European supervision' in its role as 'subsidiary' guardian of rights.[1]

Fabbrini's neo-federal vision, however, is broader. It embraces not merely European Court review of state actions, or even 'judicial dialogue' among regional and state courts, but also the full range of interactions among treaty-making, constitutional, legislative, executive and judicial approaches to human rights, at both regional and state levels, in constantly evolving processes over time (pp 43, 267).

The substantive content of a neo-federal vision, Fabbrini argues, must contend with at least three 'dilemmas': identity, equality and supremacy (p 268). By 'identity' he means the different understandings of the scope of rights based on a state's 'particular historical and cultural experiences—in most cases entrenched in their constitutional texts or practices' (p 268). 'Equality' means that 'human rights ought to be secured as much as possible to all individuals living in the same territory without discrimination' (p 268). And 'supremacy' means that there must be a 'mechanism for the authoritative resolution' of conflicts between human rights, whether at the state or supranational level (pp 268–9).

2. COMPLICATED SETS OF RELATIONSHIPS

A simplistic conception might view sovereigntists as preserving state prerogatives to limit human rights protection in defence of other state interests. Pluralists might then be seen as allowing divergent state protections of rights to coexist, within limits, with beneficent European standards. Few scholars would defend this stark dichotomy. Sovereigntists and pluralists alike probably acknowledge that states do sometimes assert sovereignty to defend human rights, while regional institutions do not always enhance human rights.

In this context, Fabbrini offers two important insights. First, he develops a schematic of how regional norms relate to state practices. Secondly, he argues that the varying regional–state relationships are critical for understanding and protecting rights in Europe. His schematic takes into account both regional and state norms of

1 For example, *Lautsi and Others v Italy* Application No 30814/06, Merits and Just Satisfaction, 18 March 2011 at paras 68–70.

fundamental rights. Does a European regional norm set a 'floor' of minimum required protection of rights? Or does it instead impose a 'ceiling' of maximum protection of rights (in the interest of protecting competing rights or other public interests)? In either case, how does the European floor or ceiling compare to existing levels of rights protection by states?

These questions lead Fabbrini to define four basic categories of regional–state relationships in regard to fundamental rights (pp 45–46). One is when European norms establish a floor higher than existing levels of state protections of rights. A second is when European norms set a floor lower than existing state protections. A third is when European norms establish a ceiling higher than existing levels of state protections of rights. And a fourth is when the European ceiling is lower than existing state protections.

These categories, in turn, lead to different sorts of problems in rights protection. When European floors are set higher than existing state protections, problems of compliance by states may result, which Fabbrini calls 'challenges of ineffectiveness' (pp 48, 263). When European floors are lower than existing state practice, problems of inconsistent standards among states may arise, which he terms 'challenges of inconsistency' (pp 48, 263).

The problems are the reverse in the case of European ceilings. When European ceilings are higher than existing state practice, inconsistency in rights protection among states may continue. When European ceilings are lower than existing state norms, states may resist any effort to lower their standards, and problems of state compliance with European norms may result.

As Fabbrini recognizes, the reality is even more complex. First, claims of fundamental rights are often in tension and sometimes in conflict. One right's floor may be another right's ceiling. An example is given in his case study on the right to abortion (pp 198–9). Although neither right is clearly established in the case law of the European Court of Human Rights, a 'ceiling' on any right of a woman to an abortion is also a 'floor' on any right of the unborn to life. Therefore, Fabbrini's four categories of combinations of floors and ceilings must be supplemented by their opposite images for competing rights.

Secondly, at any given time, some states may have standards lower than European norms, while others may have standards higher than European norms. As a result, applied across all states, European standards may simultaneously face both 'challenges of ineffectiveness' and 'challenges of inconsistency'.

So far, this is only a static view, a snapshot of a moment in time; but, in fact, both European and state norms evolve. Their relationships to each other may then change. Today's challenge of ineffectiveness may become tomorrow's challenge of inconsistency. And while that may be the direction of change in state A, the reverse may be true in state B, where a current challenge of inconsistency may morph into a future challenge of ineffectiveness.

In both their static and dynamic dimensions, then, Fabbrini's categories of 'floor' and 'ceiling' relationships are both descriptive and prescriptive. They may help not only to understand the realities of rights protection in the multi-level European system, but also to discern the most effective strategies for strengthening protection of a given right at a given stage of development.

3. TESTING THE THEORY IN PRACTICE

Fabbrini devotes most of his book to testing the theory in practice, by comparing the development of four fundamental rights over decades (and in some cases centuries) in both Europe and the USA.

A. Methodology

His 'core methodological claim' is that a comparative approach provides the 'most suitable laboratory' for explaining the constitutional dynamics of the multi-level European human rights architecture (p 1). This modest formulation, although debatable, seems unobjectionable. Unfortunately, Fabbrini overreaches in further asserting that 'only' a comparative approach can provide a convincing explanation (p 25).

Once wed to a comparative methodology, Fabbrini selects the USA as the most sensible comparator. After reviewing federal systems in various countries, he explains that the US federal system is the 'most similar (or least different)' case for comparison with the European 'multilevel architecture' (p 29).

His reasons make sense. As in Europe, the USA has 'Bills of Rights' at both federal and state levels; as well as a plurality of enforcement institutions, including independent judiciaries at both federal and state levels, which operate as 'integrated yet separate jurisdictions'; and, furthermore, a variety of constitutional views on rights (pp 29–30). In addition, like Europe, the USA came into being through a constitutional process of 'coming together' of pre-existing states, 'each endowed with its own mechanisms for the protection of fundamental rights' (pp 32–33).

As Fabbrini acknowledges, however, there are also relevant differences. Europe boasts three levels of rights protection: national, supranational by the European Union and international by the Council of Europe (pp 6–12). In contrast, the USA has essentially two levels of protection (state and federal), with only a 'razor thin' third level provided by the few international treaties and mechanisms the USA accepts (p 34). Also, whereas the USA is a 'solid political community' in a single state, Europe is 'at best, a polity in the making' (p 34).

These important differences have significant impacts on the dynamics of rights protection. Still, Fabbrini concludes, the US system is the 'least different' from Europe (p 34). True enough. But the differences might suggest greater circumspection before placing all one's methodological eggs in the comparative basket.

B. Case Studies

Fabbrini compares the development of four rights in Europe and the USA: due process for suspected terrorists, rights to vote of non-citizens, the right to strike and the right to abortion. He finds that two rights (due process for suspected terrorists and the right to strike) show challenges of ineffectiveness, whereas two others (right of non-citizens to vote and the right to abortion) evidence challenges of inconsistency (p 49). Space here does not allow for evaluation of each case study, but only general comments.

Fabbrini has researched each of his studies to an impressive, nearly exhaustive degree. His ambitious standard format begins by considering 'horizontal' differences

among EU Member States. He then considers, sequentially, the 'vertical' impact of supranational or international law in Europe and resulting challenges of ineffectiveness or inconsistency; analogous dynamics in the US federal system over time; recent transformations in Europe; and, finally, future prospects in Europe 'in light of the US experience' (p 50).

Much of his analysis, then, draws on European experience independent of the US comparison. Most pointedly, whether a given right in Europe fits in one or the other of his four categories of floor-and-ceiling relationships can be ascertained without regard to the USA.

On a comparative basis, the studies reveal that trends in the development of the four rights over time in the USA and Europe are in many ways broadly similar. However, the trajectories in the two continents are also different enough that some alleged similarities seem more forced than real.

For example, the US component of the right of non-citizens to vote is less a study of the right to vote—which non-citizens are generally denied in the USA—than of the right of immigrants to enter the USA and gain citizenship, so that they can then vote. This right of naturalization in the USA compares rather uneasily with the right of non-citizens to vote in Europe.

Another example is Fabbrini's analysis of the US component of the rights of suspected terrorists to due process. He contends that federal norms after the 11 September 2001 terrorist attacks placed a ceiling on the ability of states to protect rights of suspected terrorists. But he cites only one such case (p 70, n 124). This paucity is not surprising. In the USA, counterterrorism measures lie far more within the province of the federal government than of states. The top-heavy US allocation of responsibility contrasts with Europe, where counterterrorism measures by states are far more extensive, both in absolute terms and relative to regional measures. In Europe, the ceiling issue is therefore significant, as illustrated by cases like *Kadi and Al Barakaat Int'l Foundation v EU Council and Commission*.[2] In the USA, by contrast, the federal role is less a ceiling than a near monopoly.

Such imperfections matter because the comparison to the USA does heavy lifting in two aspects of Fabbrini's analysis. First, the US experience is a key input into his predictions of future prospects in Europe. He accords it substantial if not uncritical weight. Misunderstanding the US past thus risks misunderstanding Europe's future.

More generally, the vibrancy of the federal structure of US rights-protecting institutions leads Fabbrini to a possibly misplaced confidence about Europe. He 'underline[s] how the example of the US proves that multi-layered systems are endowed with internal mechanisms to face these challenges [of ineffectiveness and inconsistency] successfully and to enhance the protection of fundamental rights over time' (p 50).

Any claim that the US example 'proves' this optimistic conclusion—or indeed much about Europe at all—must give one pause. In view of the not insignificant

2 C-402/05 and C-415/05 *Kadi v Council and Commission* [2008] ECR I-6213 (discussed by Fabbrini at 79–83).

differences between the two regions, as well as recent retrogressions in rights protection in the USA in several areas,[3] one might nominate 'suggests' or 'gives reason to hope' as more prudent word choices.

Of late, Europe too may be facing retrogressions with a possibly lasting impact on rights protection. Will the Syrian refugee crisis lead to permanent restrictions on freedom of movement? Will recent terrorist attacks lead to curtailments of rights to liberty and due process? Will the proposal by the current UK government to assert an entitlement to disregard judgments of the European Court of Human Rights weaken rights protection?[4] Will the combined negative impact of such factors add up to more than the sum of the parts?

In fairness, most of these warning signs post-date the publication of Fabbrini's book in 2014. Yet they call into question both the optimism generated by his invocation of the US experience and the soundness of any comparative methodology that relies so heavily on a single, imperfect comparison.

Elsewhere in the text, to be sure, Fabbrini hedges his bets, both on the predictive value of the US experience and on future prospects for Europe. The theory of federalism in the USA, he cautions, 'is inextricably linked with the contingent historical experience of *that* system, and cannot as such serve as a template to be followed in Europe' (p 271). Hence he proposes, not a federal, but a 'neo-federal' system for Europe.

Likewise in Europe, he observes, 'the finality of the process of integration is yet to be decided' (p 262). He adds that

> many of the challenges triggered by the overlap and interaction between multiple layers of human rights standards are still open. In the end, whether and how these challenges will ever be addressed depends on the future political transformations of the European multilevel human rights architecture.

The future of human rights in Europe, then, depends more on Europe's future than on the US past. Surely Fabbrini is right about this. Comparative analysis, while informative, should not be asked to bear too much weight.

4. CONCLUSION

Fabbrini's study sheds valuable light on the dynamics that shape the interactions among multiple levels of human rights protection in Europe, and on the consequences for rights protection that tend to ensue. Less successful is his outsized confidence in a comparative approach, especially as applied to political and juridical communities as distinct as the USA and Europe. While the imperfect comparisons yield useful insights, Fabbrini at times overstates their import.

3 See, for example, United Nations Human Rights Committee, Concluding observations on the Fourth Periodic Report of the United States of America, CCPR/C/USA/CO/4, 23 April 2014.

4 For example, Watt and Mason, 'Cameron "committed to breaking link with European Court of Human Rights" ', *The Guardian*, 1 June 2015.

His most important contribution is the analysis of the varying impacts of European 'floors' and 'ceilings' on rights protection. This is a valuable addition to the literature. It significantly improves on the less nuanced approaches of both 'sovereigntists' and 'pluralists'. Fabbrini's four-part categorization of floors and ceilings deserves to become a standard lens through which to view developments in fundamental rights in Europe.

Douglass Cassel
Professor and Notre Dame Presidential Fellow
Notre Dame Law School, United States
doi:10.1093/hrlr/ngw008
Advance Access Publication Date: 28 April 2016

Nicola Perugini and Neve Gordon, *The Human Right to Dominate* (Oxford University Press, 2015, x + 200pp, £16.99 (pb) £64 (hb)) ISBN 978-0-19-936-500-5 (pb), ISBN 978-0-19-936-501-2 (hb)

This book's intriguing title sums up a critical, compelling and innovative analysis of human rights. Starting from a detailed analysis of human rights in the Israeli–Palestinian conflict, it formulates general theoretical claims about the way human rights work. The insights which anthropologist Nicola Perugini and political scientist Neve Gordon have to offer are important and fundamental, but would benefit from being elaborated upon and refined within the legal discipline.

The book starts out with the observation that, around the turn of the millennium, conservatives in the USA and elsewhere changed their attitude towards human rights. Whereas before conservatives tended to reject the expanding human rights culture, they now began to embrace it. They began adopting not only the language and the institutions of liberal human rights organizations, but also their methodologies and strategies. This led to a convergence between liberals and conservatives on three points. First, they agreed on the primacy of law and the judiciary in upholding it. Secondly, they agreed on how to gather valid data and what constitutes evidence. Thirdly, they agreed that human rights discourse can be used to allocate guilt and innocence. This process, which Perugini and Gordon call 'mirroring', is now used for opposing ends by liberals and conservatives in the USA and elsewhere. Liberal organizations defend gay rights and religious freedom, conservative organizations invoke family rights and criticize Lesbian, Gay, Bisexual and Transgender (LGBT) and women's rights. Conservatives such as Marine Le Pen and Geert Wilders invoke women's and LGBT rights to legitimize xenophobia. Amnesty International opposed NATO's withdrawal from Afghanistan by invoking women's rights. Human rights discourse is used for different political purposes, a phenomenon which the authors call 'inversion'.

Perugini and Gordon reject the idea that conservatives use human rights as a pretext and distort the original liberal meaning of human rights. Instead, they argue that