Nihil novi sub sole?

The not so special protection of fundamental rights in Europe

Koen Lemmens*

Federico Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective* (Oxford University Press 2014) 319 p.

When I was a student, years ago, I remember being easily irritated whenever a professor teaching the ins and outs of Belgian constitutional law referred to the country's complex constitutional system as something sui generis. Qualifying something 'sui generis' is, in the legal debate, too often a rhetoric trick that excludes any form of critique. If something is of its own kind, it cannot (easily) be compared to something else. No matter what is called sui generis, it is – by this mere qualification – immunised against criticism.

I suppose Federico Fabbrini, a brilliant Italian scholar, must have had a similar feeling when he started his PhD research in the European University Institute on the protection of fundamental rights in Europe, seen through the prism of multi-level governance. Nowadays, fundamental or human rights are, in Europe, entrenched in national constitutions, sometimes even in subnational constitutions, in the European Convention on Human Rights, and the legal system of the EU. This multi-layered system has created a specific dynamic and it does give rise to many questions concerning the interplay of the different systems. Compared to the situation some decades ago, this new human rights design is typically much more complex, since both national and supranational actors interact with each other, challenging thereby the classic Kelsian idea of hierarchy of norms. Moreover, as Fabbrini observes,[1] the European model is in many ways pluralistic. Not only because of the great diversity of national constitutions, but also because of the great variety of actors (constitutional courts, supreme courts, lower courts, the European Court of Justice, European Court of Human Rights, national parliaments). Finally,

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[1] At p. 14.

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there is of course an important difference in conceptions of and views on fundamental rights in Europe. At this point, we can refer to the renewed interest in 'the margin of appreciation' in the Strasbourg case law and the fact that Protocol No. 15 explicitly has the ambition to insert this margin of appreciation in the Preamble of the European Convention on Human Rights. The revival of this concept, and the deferential judicial decision-making that goes along with it, illustrate at least the need of diversity in European human rights protection.

The question then is whether this complex and fairly new architecture can meaningfully be compared with other systems or whether it is a 'sui generis' system. Fabbrini argues that comparison is possible and he dismisses thereby the sui generis claim. To understand the challenging and transforming dynamics of the European multi-layered model, Fabbrini proposes to adopt a comparative approach. The author makes a strong claim about this, when he writes[2]: '*The central methodological claim of my work is, in other words, that only a comparative approach can yield a convincing explanation for the constitutional implications of a multi-layered human rights regime such as the European one*'. Admittedly, it can be debated whether the use of the word 'only' is appropriate, but the author makes at least a clear point. This preference for comparative law does not come as a surprise: anyone who is familiar with the established academic traditions in the European University Institute, knows how important the great comparatist Mauro Cappelletti's intellectual heritage is in the Florentine surroundings.[3]

Fabbrini proposes to compare the European model to the American legal order. To be clear, the author knows that there are relevant differences between the European and the US legal orders and he does not minimise them. Yet, in the author's view, both systems have sufficient commonalities to be meaningfully compared. Moreover, the author believes that no other system comes as close to the European multi-layered system as the US model. In short: the US and Europe can be compared and it is even the most appropriate comparison possible. I suppose this starting point is open to debate. The strength of this thesis is that the author overtly endorses a methodological approach. Of course, and this could be seen as a weakness, he offers his adversaries an easy way to call into question the further developments of his research. Casting doubts on the relevance of the comparison will definitely call into question the rest of the work. I fear, however, that this might be a dialogue of the deaf between those who will agree with Fabbrini, stressing the commonalities, and those who will emphasise the differences between the two models, leading therefore to challenging the idea of an adequate comparison between both.

[2] At p. 25.

[3] <www.eui.eu/DepartmentsAndCentres/Law/HeritageofMauroCappelletti/MauroCappelletti.aspx>, visited 4 October 2016.

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What then are the dynamics the author underscores in the multi-layered model of fundamental rights protection? Fabbrini discerns two clusters of important frictions, which he calls 'synchronic challenges' and 'diachronic transformations'. The former concern the relation between the transnational and the national level: sometimes, international law will set a ceiling of fundamental rights protection, and sometimes it will only set a floor. In case of a ceiling, there is pressure on more protecting states to move in the direction of the lower international norm. In the words of Fabbrini, the 'effectiveness of the vanguard States" protection is challenged. In case of a floor, on the contrary, the author instead remarks that 'the consistency of the laggard states' standard' is defied. The latter pertains to the transformative consequences of the interplay between transnational and national standards. It is obvious that, over time, the perennial dialogue between the national and the transnational levels will alter the conception of human rights in each of the systems. There is, in other words, an impact that permanently transforms the concrete understanding of human rights in the respective legal orders. The author examines these challenges and transformation through the analysis of four fundamental rights: the right to strike; the right to vote; the right to abortion; and fair trial rights for terrorists.

Fabbrini argues that the mutual relation between the transnational and the national level cannot be conceived in terms of either sovereignty or legal pluralism. He agrees with sovereigntists that the multi-layered model poses serious questions about, amongst others, the normative hierarchy between the various legal orders. Yet, the author dismisses the claim that therefore the only way to deal with these complex hierarchical relationship is to refocus on national states, considering this the only appropriate context in which fundamental decisions can be taken. Yet, he is not satisfied either with the legal pluralist approach: although Fabbrini values the added value of multi-level human rights protection, he criticises the vagueness of the concept of 'constitutional dialogue'. As far as I am concerned, I could not agree more. Questions about normative hierarchy should be addressed, not circumvented. The concept of 'judicial or constitutional' dialogue is not very helpful in answering clear question about hierarchy and priority. Dialogue may be most appropriate to avoid conflicts, but as such it provides no normative answer to the question which norm should prevail (or which court should have the last say when the dialogue does not succeed in finding a compromise). To stick to the metaphor: dialogues also respect rules, and therefore the question will be who decides the rules of the dialogue? We can avoid the question of hierarchy, but not escape it.

Fabbrini argues that a 'neo-federal theory' should be developed: it combines the insights of pluralists with the considerations of sovereigntists. In the words of the author, 'the verticality of sovereignty' should be combined with the horizontality of pluralism.

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The author has written an impressive book: even critics who may not agree with his findings, will have to acknowledge that Federico Fabbrini proves to be a skilled legal scholar. I am impressed by the comparative endeavor and ambition of the book. There are indeed three comparative layers. The first one concerns, obviously, the comparison between the European and the US model. Now, apart from the conceptual questions we can have regarding the methodological appropriateness of this comparison, the fact remains that the author had to familiarise himself with the two legal orders. As far I can see, he does this brilliantly. Second, as if the first type of comparison was not already burdensome enough, he had to integrate an intra-European comparison. As such, it is a pleasure to see how skillfully Fabbrini integrates major European legal systems in his research. Finally, what I admire most, is the scope of his case studies. For fundamental rights cover many topics and it would already be quite an impressive achievement if an author proves to be an expert on one fundamental right in so many different legal orders. Yet, Fabbrini does not shy away from a very ambitious exercise, since he analysed no less than four different fundamental rights. The analysed cases relate to political and socio-economic rights, they include technical and classic issues as well as more ethical and recent issues. Many researchers would stick to the fields they are most acquainted with, but Fabbrini covers them all.

Related to the previous point, I cannot resist the temptation to pay tribute to the rich Italian tradition that flavoured Fabbrini's work. Needless to point out that there is quite an impressive and long-standing tradition of Italian comparatists, both in private and public law. The author has proven that this tradition is still very much alive. What certainly contributes to the success of Italian comparative scholarship is the ability of Italian scholars to at least read a handful of languages. In other words, they have access to many sources, not only the usual ones in the English language. Browsing through Fabbrini's bibliography illustrates the point: he used works in English, French, German, Italian and Spanish. The richness of his work is certainly due to, amongst others, the fact that the author has skillfully brought together sources of various legal traditions, in the original languages. This leads to a so much richer understanding of national legal systems than the usual publications in our daily Euro-English.

My appraisal of Fabbrini's work does not mean that I have no minor questions about the methodology and the findings. I will confine myself to three points only.

In the first place, I regret that the author did stick to his mere analytical approach. As indicated, this was already an impressive amount of work, so I fully understand why he did not go further. Fabbrini clearly states at the beginning of his book, that he did not have normative ambitions. Yet, he repeatedly indicates that an in-depth understanding of the complex multi-layered human rights structure presupposes a neo-federal theory. Although he gives some indications as to the elements that should be part of such a theory (identity, equality and supremacy),

he does not undertake any considerable effort to develop it. Once again, given the richness of his analytical research, this is understandable, but I hope that in his further research, Fabbrini will endeavor to build this new theory. It would complete his fascinating research.

A second point of criticism pertains to the structure of the book. At first sight, there is little to criticise here. The author has opted for a clear and convincing structure: he describes a problem, illustrates it by analysing four cases and wraps it all up in a concluding chapter. Nevertheless, the reader may get the impression that there is a strong circular dynamic in the argument. The problem description is based on the case studies, but the cases are then presented to illustrate the theory. So in the end, one may wonder to what extent the author is proving his own starting point.

Finally, the author pays all in all little attention to the diversity debate regarding the European Court of Human Rights. It is true that in Europe, the tension between national and transnational levels is mainly expressed in the ambit of the EU-Member States relationship. However, there are growing tensions between the Strasbourg Court and national supreme and constitutional courts. The judicial divergence and tensions between the Luxembourg and the national courts have, indeed, a more modest counterpart in the relation between the Strasbourg Court and the national courts. These tensions are less present in the research. I would not say that this is a shortcoming in the sense that a more comprehensive analysis of these dynamics and counter-dynamics would have altered Fabbrini's findings, nevertheless it might have enriched the present book.

Still, I would think that these comments are some suggestions, and they have no impact on my high esteem of this book and this author. Auguri, Federico Fabbrini.

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