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Introduction to Special Issue "Understanding Resistance to the EU Fundamental Rights Policy"

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Recent Landmarks in the Development of the EU Fundamental Rights Policy

The past few years have constituted landmarks for the development of the European Union fundamental rights policy (EUFRP). Not only did the European Union (EU)[1] attempt to flesh out its fundamental rights policy by adopting a New Strategic Framework on Human Rights and Democracy, consisting of 36 key objectives and the nomination of a special EU Envoy for Human Rights, on the models of the US State Department Envoy on Democracy and Human Rights and of the United Nations High Commissioner for Human Rights. It also witnessed two crucial developments made possible by the entering into force of the Lisbon Treaty on 1 December 2009. First of all, the Charter of Fundamental Rights of the European Union, which is legally binding since then, has clearly become a reference point for national courts and for the Court of Justice of the European Union (CJEU).[2] Second, the European Commission tabled landmark legislative proposals (e.g. on defendants' rights, data protection and so on) aiming at promoting those fundamental rights entailed in the Charter. Third, the EU has been pursuing, together with the 47 member countries of the Council of Europe, negotiations in order to allow its accession to the European Convention on Human Rights (ECHR)—an accession which had been regularly debated at least since the 1970s.[3]

[1]Although the EU legally exists since the entering into force of the Maastricht Treaty (in 1993), when it replaced the existing European Communities (EC), we will use hereafter the denomination EU for practical purposes.

[2]The Charter upholds a number of rights which EU institutions have to abide by when they draft and adopt legislation; it is also binding on Member States when they implement the law of the Union.

[3]As a consequence of this accession, EU law will be by submitted to independent external control and EU citizens will enjoy the same protection vis-à-vis acts of the EU as they presently enjoy from Member States. This would be the last step in the consolidation of a comprehensive human rights regime in EU-Europe. At the time of writing, the draft accession agreement has been finalized; negotiators are waiting for the opinion of the CJEU on this agreement.

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Certainly, despite these recent developments, the EUFRP is often submitted to harsh criticism, as observers denounce a lack of coherence between its internal and external dimensions, a certain leniency on the part of the EU towards powerful dictatorships, recurrent divisions between Member States on how to react to human rights violations by third countries and so on—to the point where some have been questioning the mere existence of such a policy. However, one should beware of evaluating the EU performance too severely in comparison to states (even democratic ones), whose internal and external fundamental rights records are all but entirely satisfying. Moreover, this relatively new development in the history of European integration was not granted in the case of an organization (the European Economic Community, created in 1957), which was initially mainly economic in nature. Today, even if its legal competences in the field of fundamental rights are incomplete and patchy, "Europe" has developed a remarkably advanced human rights regime and policy if compared to other regional organizations worldwide.[4] Despite the weaknesses of its own human rights policy, the EU, especially, is a leading power on the world stage when it comes to influencing the agenda of international organizations on fundamental rights.

Outlining the Logics of the Special Issue

As this special issue illustrates, this is precisely the unique, supranational nature of the EU regime of fundamental rights, in association with that of the Council of Europe, which explains why the EUFRP gives rise to strong controversies and resistances at domestic level. With a view to better understand this uniqueness, contributions in this issue first address the complex workings of this policy, as well as the distribution of powers between key actors. They also emphasize the rationale underlying the development of this policy, indirectly addressing the reasons why member states accepted this in the first place. As the historically ambiguous attitude of national constitutional courts and domestic governments towards the EU indicates, one might wonder whether unintended consequences were not at play here. While constitutional courts offered the CJEU, an unintended window of opportunity by expressing their concerns over the perceived lack of FR protection at EU level (thus allowing the CJEU to carve a role for itself as a guarantor of these rights under EU law), reluctant governments, like British ones, promoted the Council of Europe as a possibly weaker, more intergovernmental organization, which has now become a key ally of the CJEU in its fight for supranational FR protection. Nothing illustrates these unintended consequences better than initial, narrowly defined provisions in the Rome Treaty on equal pay for men and women, which laid down the basis for a much more far-reaching, EU anti-discrimination law, under the impulse of a vast coalition of non-state actors. This is why contributions in this special issue also focus on the strategies of the "natural" allies of the EUFRP against reluctant governments: most notably, NGOs fighting for the rights of diverse minorities, as well as Members of the European Parliament (MEPs), although some among the latter also claim to defend national sovereignty against a pervasive EU. In that respect, the issue also addresses resistances against the EUFRP in a broader political context, where scepticism about the EU and concerns over the limits of the integration process become more vocal.

[4] "Europe" refers here to both the EU and the Council of Europe as the two pillars of this supranational human rights regime.

What Do We Understand with "EUFRP"?

First of all, a short definition of the two key terms "policy" and "fundamental rights" seems appropriate, before specifying these notions in the EU context. If the existence of a public policy requires an explicit decision by public authorities to develop such a policy, some degree of coherence or interconnectedness between several public measures and/or programmes and a discourse linking this policy to the to the end values of the polity, then there exists an "official" EUFRP at least since the promotion of fundamental rights worldwide has been defined by the EU, in the Maastricht Treaty, as one of the core goals of its foreign policy.[5] As for fundamental rights, they generally refer to a core of rights (e.g. the right to life, human dignity, freedom of opinion, etc.) that is being recognized and given legally binding effect by instruments of a constitutional nature. That EU Treaties, under the impulse of the CJEU, have acquired a quasi-constitutional status, has been argued by lawyers at least since the late 1990s.[6]

The EUFRP, however, is by no means limited to EU primary law. Indeed, the existence of such a policy expresses itself in a multiplicity of fundamental rights discourses articulated by various (EU) institutions and actors, pursuing different agendas and trying to put forward their own definitions of fundamental rights in the EU context.[7]

In the case law of the CJEU, for instance, fundamental rights initially referred, primarily, to the various economic freedoms derived from Internal Market legislation (e.g. the free circulation of persons and services, the right to work in other member country and so on). In the discourse of the European Parliament (EP), which started articulating a human rights discourse from the second half of the 1980s onwards, fundamental rights rather refer to the usual definition given above. These "fundamental rights languages" were underpinned by different institutional agendas. As is explained further below, the CJEU started articulating a fundamental rights discourse from the late 1960s onwards, as a defensive reaction against distrustful national constitutional courts. The latter were worried that EU law, in the absence of any reference to the protection of fundamental rights in the founding treaties, might violate these very rights they (the courts) were mandated to protect. As for the EP, its discourses and actions in the field of fundamental rights often developed as informal practices, without a legal base in EU primary law, as MEPs tried to carve out a role for themselves in the EU external relations, from which they were initially almost entirely excluded. Moreover, EP calls for the development of a more robust EUFRP can also be analyzed as being part of wider attempts, by the EP (at least since 1984), to put forward the idea of a constitution for the EU, entailing a supranational bill of rights.[8]

In today's EU, thus, the various "languages of fundamental rights" are anchored in different institutional logics: those, most notably, of the CJEU (increasingly in close

[5] Signed on 2 February 1992, the Maastricht Treaty entered into force on 3 November 1993.

[6] See for instance Renaud Dehousse (2001) "Naissance d'un constitutionalisme transnational", *Pouvoirs. Numéro special*: "*Les cours européennes*, *Luxembourg et Strasbourg*, no 96, pp. 19–30.

[7] We borrow this frame of analysis from Gráine de Búrca (1996), "The language of rights and European integration", in J. Shaw (eds) *New Legal Dynamics of European Union* (Oxford: Oxford University Press).

[8] A Treaty Establishing a Constitution for Europe, entailing such a bill (the future Charter for Fundamental Rights) was finally drafted and signed by Member States governments in 2004; however, the ratification process of the treaty was derailed by referenda in France and the Netherlands. The Constitutional treaty was replaced by the Lisbon Treaty (signed in 2007), which took over most of the content of the former Constitutional Treaty, albeit with various changes.

cooperation with the European Court of Human Rights[9]), of the EP (and its Subcommittee on Human Rights), of the European External Action Service (EEAS),[10] of the Foreign Affairs Council[11] and of the European Commission.[12] Consequently, the EUFRP as we understand it in this special issue encompasses different elements: the law of the Union (deriving from primary law, from the case law of the CJEU, and from legislative texts adopted by the Council of ministers and by the EP), action programmes and measures (e.g. sanctions) adopted by the Council and the EEAS, as well as informal practices developed by the EP outside of the treaties' legal framework. (Indeed, the EP has carved out a role for itself in the EUFRP by awarding each year the Sakharov Prize for the freedom of expression to activists all over the world, by organizing hearings on human rights issues, by publishing reports on human rights violations in and outside the EU and so on).

The Development of the EUFRP Across Time

Certainly, as was already mentioned, the development of such a multi-faceted EUFRP was not granted at the beginning of European integration in the early 1950s. Not only was the protection of fundamental rights the task of the Council of Europe, whose European Court of Human Rights had to monitor the implementation of the ECHR by member countries, while the European Economic Community (EEC) was essentially dedicated to economic integration. The founding European Community (EC) treaties were also totally silent on human rights and membership in the EC was not, officially, conditioned by the respect for fundamental rights.[13] This non-normative nature of the EC started to evolve in the 1970s, under the impulse of international and European developments.

Among international developments, the 1970s witnessed an increasing presence of fundamental rights on the agenda of international organizations and arenas, as the Helsinki agreements (in 1975) and the entering into force of the two international human rights covenants (in 1976) attested. While human rights became more frequently inserted in the diplomacy of some key states (e.g. the USA under the presidency of Jimmy Carter, the Netherlands and the Nordic countries in Western Europe), the push for human rights was also boosted by the creation of INGOs working on human rights issues (as the 1977 Nobel Peace Prize awarding to Amnesty International epitomized).

As for European developments, the EC started to play a role in the promotion of fundamental rights on the global stage in the context of the emerging European Political

[9] The CJEU is located in Luxemburg, while the European Court of Human Rights, which is part of the Council of Europe, is located in Strasburg.

[10] Set up by the Lisbon Treaty as an embryo of European State Department, the EEAS is in charge of elaborating the foreign policy of the EU.

[11] Gathering the foreign ministers of the 28 Member States of the EU, this body is the only one who can, for instance, take diplomatic sanctions in case of fundamental rights violations.

[12] Now that most of the EU external relations fall within the remit of the EEAS, the European Commission remains mostly responsible for fundamental rights (as defined in EU law) within the Union (for instance, by tabling legislative proposals via its Directorate General "Justice", which is also responsible for monitoring the implementation of the Charter of Fundamental Rights) and in candidate countries applying for EU membership (via its Directorate General "Enlargement").

[13] Even though, *de facto*, countries in Southern Europe could not apply to membership as long as they were governed by dictatorial regimes (Greece from 1967 to 1974, Portugal from 1933 to 1974 and Spain, where democratic transition was definitively completed in 1981).

Cooperation (an embryo of concerted foreign policy), which included the drafting of a common position (on human rights) of the nine EC countries at the Helsinki conference, common trade sanctions against the South African apartheid regime and so on. Parallel to these diplomatic efforts, the 1970s were for the EC the landmark decade of "integration by law", with the Court of Justice as a driving engine for legal integration; in 1969 and 1970, it issued its first rulings relating to the protection of fundamental rights under EC law.

From then on, the development of the EUFRP fulfilled two different but interlinked functions: an identity-building function and a legitimising function.

First of all, the promotion of fundamental rights worldwide helped the EC define a distinctive international identity, as it started to develop its diplomatic action. It first did so in the 1973 Declaration on European identity, which defined human rights as "key elements of European identity" and in the 1977 Joint Declaration by EC institutions on human rights. Moreover, framing the respect for fundamental rights as one of the distinctive elements of its identity allowed the EC to deal with controversial applications from non-democratic, South European countries.[14] Later, following the second boost[15] to human rights worldwide in the aftermath of the Cold War, the EU confirmed this trend by defining (in the Maastricht Treaty) the promotion of human rights as one of the five key goals of its newly born, common foreign policy. It also started to apply systematically, from the early 1990s on, a principle of conditionality to its development aid policy, while explicitly linking EU membership to the respect for fundamental rights.[16]

Second, next to its identity-building function, the development of the EUFRP also fulfilled a legitimising function—for the EU in general and for the CJEU especially. That state institutions incorporate human rights in some of their policies—notably in their foreign policy—with the aim of enhancing the latter's legitimacy is a well-known fact. In the case of the EU and of its institutions, which do not enjoy the same level of legitimacy and acceptance as states, this instrumental function of fundamental rights is all the more significant. In fact, the initial development of the EUFRP—most notably the emergence of a fundamental rights language in EC law—can be seen as a way, on the part of EC institutions (and above all on the part of the CJEU) to counter domestic resistances against supranational integration. Indeed, by ensuring concerned constitutional courts that EC law would comply with fundamental rights despite the silence of founding treaties on this issue,[17] the CJEU tried to enhance its legitimacy vis-à-vis those courts who had used the language of rights in order to limit the scope of the primacy principle.[18] Indeed, powerful constitutional courts, like the German and Italian ones (respectively in 1973 and 1974) had challenged the principle of primacy (of EC law over domestic, constitutional law) on the grounds that, in the absence of an EC Bill on human rights, EC law might violate those fundamental rights that the courts aimed

[14] Greece and Spain applied to EC membership respectively in 1975 and 1977, as they were still experiencing democratic transition processes. They had to wait until these processes were completed in order to join the EC, in 1981 and 1986, respectively.

[15] The first one was in the immediate aftermath of World War II.

[16] The so-called Copenhagen criteria, adopted in 1993 with an eye to future membership EC applications from Eastern European countries, state that respect for fundamental rights is a precondition for EU membership.

[17] It first did so in the Stauder (1969) and Internationale Handelsgesellschaft (1970) rulings.

[18] According to this principle, which is not mentioned in the founding treaties but has been derived from the latter by the CJEU, EU law takes precedence over national law—even over constitutional provisions—whenever the two are incompatible. These national constitutional courts were contesting the application of the primacy principle to constitutional provisions.

to protect at domestic level. It is indeed no coincidence that constitutional courts used the language of rights—and reference to their role as gatekeepers of these rights—after the landmark rulings delivered by the CJEU in the 1960s, which asserted the primacy principle.[19]

Moreover, the EUFRP also aimed at enhancing the legitimacy of EU institutions vis-à-vis EU citizens, as it was assumed that the promotion of rights by these institutions on behalf of EU citizens might boost the popularity—if not the allegiance—of the latter at the benefit of the Union. Such was the aim, for instance, of EU citizenship (introduced by the Maastricht treaty), which, by granting rights to EU citizens, could theoretically have created new loyalties on behalf of the EU, on the part of rights-bearing EU citizens.

As these examples illustrate, the development of the EUFRP cannot be dissociated from wider attempts, by EU advocates, to promote the process of European unification. In this context, the language of human rights could be seen either as part of a narrative promoting the normative integration of EU-Europe or as a safeguard against criticism emanating from domestic institutions. Indeed, as is explained below, most of domestic resistances against the EUFRP is not rooted in hostility against the philosophy of fundamental rights itself but in concerns over an ever-expanding scope of power on behalf of EU institutions. In this respect, contestation of CJEU jurisprudence by national constitutional courts is a good case in point, as the CJEU has traditionally be considered as one of the driving engines of supranational integration, if not as a "crypto-federalist activist" altogether.

National Resistances Against the EUFRP: Past and Present

Certainly, not all domestic institutions resent the development of the EUFRP. Not only was the development of the EUFRP made possible by domestic governments (who are in charge of treaty reforms); it was also supported by coalitions of civil society organizations (churches, women rights' organizations, anti-racist and civic organizations, etc.) who saw the EU level as a window of opportunity in order to promote their cause. Nonetheless, national governments especially have displayed an ambiguous attitude in that respect—an ambiguity which, if already present in the early days of European integration, has become stronger in the recent period.

Resistances on the part of domestic governments towards the development of a fundamental rights dimension in European integration are not new.

Even before the creation of the EEC (in 1957), the failure of the European Political Community project, which foresaw the creation of a European federation adopting the rights provisions contained in the ECHR, showed that segments among national political elites had little appetite for a deeply integrated and normative community.[20] What more, as mentioned, the founding treaties of the European Communities were initially completely silent on fundamental rights. Even those provisions which had to do with human rights, like the principle of equal pay for men and women, were not

[19] One of the first of this kind was the so-called Costa v ENEL ruling (1964).

[20] This project foresaw a far more integrated, federalist type of organization, with fully integrated foreign and defence policies. It was defeated in 1954.

justified in ethical terms but were seen as an economic imperative, in order to preserve the core EC principle of free and fair competition between workers. Even today, the promotion of fundamental rights is not mentioned as one of the core objectives of the EU; it is only mentioned as a key objective of the EU foreign policy. In the same vein, Member States have historically been clearly reluctant to follow up on bold, fundamental rights initiatives launched by EC supranational institutions. For instance, the European Commission's successive calls in favour of EC accession to the ECHR, which date back to 1979, have long been ignored by national governments. Similarly, EP resolutions, since 1989, in favour of a European Charter of fundamental rights have only found an echo 10 years later.[21] Beyond reluctance towards a deeply integrated EC as such, some Member States have also been historically reluctant towards the ECHR, for fear of being condemned by the European Courts of Human Rights. France, for instance, only ratified the ECHR in 1974. These resistances against the setting up of a supranational regime of human rights—especially under the aegis of the EU—have been growing since the late 1990s for several reasons.

First of all, human rights requirements within the EU, which were initially meant for outside partner countries or candidate countries, have also come to apply, increasingly, to the Member States themselves. As mentioned, the initial development of a human rights discourse on the part of Member States institutions was meant to check the powers of supranational institutions, notably the European Commission and the CJEU, by making sure that EC law and CJEU case law abode by fundamental rights. However, since the Amsterdam Treaty (1996), which mentioned fundamental rights as a value common to all member countries and introduced a procedure allowing peer governments to sanction a national government convicted of violating the common values of the EU, the role of the EU as a gatekeeper of fundamental rights in the Member States themselves cannot be ignored anymore.[22] The most illuminating illustration of this is the current investigation launched by the European Commission against laws introduced by the Hungarian government, on the ground that they might be violating EU legal provisions on human rights.

The second reason why resistances against the EUFRP have been growing in the recent period is that the legal body of provisions (the *acquis* in the EU jargon) relating to fundamental rights has grown far beyond core fundamental rights, to include, for instance, anti-discrimination law, the fight against racism and xenophobia, social legislation (although still limited) and so on. Moreover, rights-bearer under EU law are not limited to EU citizens anymore; they increasingly include third-country residents, who benefit from the mainstreaming of human rights in internal policies of the EU, such as immigration and asylum. This had led to clashes between EU supranational institutions and the Member States, for instance on issues such as family reunification, when Member States tried to toughen domestic policies at the expense of the rights of third-country citizens.

The third reason underlying the growing resistance against the EUFRP has to do with the difficult balance to be found between economic liberties—which, as

[21] Drafted in 2000, the Charter was solemnly proclaimed by the European Commission, the European Parliament and the Council in December 2000; as mentioned, it only acquired legally binding status in 2009.
[22] The EP also played a role in this evolution: while it has been publishing yearly reports on fundamental rights violations in the world since 1983, it has started doing the same thing for human rights violations by EU member states in 1993.

mentioned, are considered as fundamental rights by the CJEU—and domestic social legislation. Since the social dimension of the EU remains limited, many citizens and civil society organizations (mainly trade unions) are concerned that EU legislation might come to clash with domestic social provisions. This indeed happened in a number of rulings delivered by the CJEU in 2005–2006, where the latter was perceived by trade unions to prioritize economic liberties (e.g. the free circulation of services within the Union) at the expense of other fundamental rights protected at the national level, such as the rights to strike or to organize industrial action. The imbalance between deep economic integration and weak social harmonization in the EU lead many citizens to think that their rights as employees or workers are insufficiently protected—if not tramped altogether—by the EU.

Finally, the fourth reason explaining why resistances against the EUFRP are becoming more vocal (at least in some Member States) relates to the increased cooperation between the EU and the Council of Europe. Indeed, many critics of the EUFRP, especially in the UK, mention controversial rulings of the European Court of Human Rights (of the Council of Europe) in order to disparage EU actions in the field of fundamental rights. Both organizations become increasingly conflated in Eurosceptic discourses—a fact which is being favoured by increased cooperation between the two courts (they have been holding regular meetings since 1998) and by the tacit alliance they have built in order to cope with defiant domestic constitutional courts and/or governments. In the UK especially, criticism against the EUFRP is all the stronger in the context of EU accession to the ECHR—an accession which, according to British Eurosceptics, might transform the CJEU into a kind of federal Supreme Court—an idea echoing concerns over an alleged state-like evolution of the EU.

How Do Member States Resist the Further Development of the EUFRP?

Consequently, national governments have tried, in various ways, to resist the perceived increase in EU powers deriving from the development of its fundamental rights policy.

First of all, the Lisbon Treaty contains numerous provisions aiming at limiting the scope of EU powers in this field. Not only was the text of the Charter for Fundamental Rights taken out of final version of the Treaty by negotiators.[23] Article 51, §2 of the Charter clarifies that the Charter "does not create any new competence for the EU". Moreover, the article of the Lisbon Treaty providing for EU accession to the ECHR specifies that this accession "does not modify the current distribution of powers between Member States and the EU". By the same token, some Member States (the UK and the Czech Republic) have negotiated derogatory statutes in relation to the Charter. Finally, the powers of the recently reformed EU Agency for Fundamental Rights have been kept to a minimum; it only advises Member States and EU institutions as to how best incorporate fundamental rights in legislation and policies.

Second, a number of Member States regularly opposes any further extension of EU legislation on fundamental rights, notably in the field of anti-discrimination. For instance, a Framework directive proposal initially tabled by the Commission in 2008,

[23] The Treaty of Lisbon simply refers to the Charter but does not entail the text itself.

which aims at filling gaps in existing EU anti-discrimination legislation, is being blocked since years by a coalition of distrustful states.

Third, in recent years, various Member States governments have contested the authority of supranational institutions on fundamental rights issues when they have come to clash with the latter on some aspects of their public policies. For instance, the Danish government contested aspects of EU law relating to the right to family reunification (in 2008) and the French government contested the authority of the European Commission during a clash over the expulsion, by the former, of Roma, EU citizens (in 2010).

Why Does it Matter to Analyze Resistances Against the EUFRP?

In this context, analyzing resistances against the EUFRP matters for a number of reasons. First of all, it matters for EU citizens and third-country residents, when their rights under EU law are violated by reluctant governments, who do not always comply with EU legislation touching upon fundamental rights—for instance, on the right to free circulation for persons, free movement of services and so on. Moreover, in the post-9/11 period, criticism of the EUFRP is part of a broader context where some governments try to weaken the ECHR (as the UK case makes clear), while implementing discretionary law-and-order policies at the expense of civil liberties—this in a context characterised by the increasing influence of radical, right-wing populist parties across Europe.

Second, it matters for the rest of the world. Presently, the European human rights protection system is a particularly comprehensive regional human rights regime in the world. It is an implicit model for other, weaker regional human rights regimes (such as the one of the African Union or the Inter-American system of human rights). In this context, weakening the European regime of fundamental rights protection—as some Member States of the EU want to do—is a bad signal sent to other regional organizations which might wish to enhance their own system. Moreover, weakening the European human rights regime might undermine global attempts by the EU to push the case for human rights in international organizations; it can also weaken the position of fundamental rights advocates and activists in countries where the EU tries to promote a human rights agenda, like, for instance, Turkey.

The Structure of the Special Issue: Choice of Approach and Individual Contributions

There certainly exists no straightforward conceptual framework to guide us through the understanding of resistances to the emergence of a supranational fundamental rights policy. Yet, in this special issue, we have opted for a multi-disciplinary and multi-layered enquiry into the different facets of the phenomenon. In line with the general approach of the Human Rights Review, this issue thus brings together lawyers, political scientists, sociologists; academics as well as practitioners. Resistances to the EUFRP may indeed only be grasped if approached from a variety of disciplines reflecting on the diversity of the EU political and legal order.

Furthermore, this collection of essays is structured by reference to a multi-layered set of research questions according to a top-down approach. As European integration is characterised by a process of 'integration through law', we start from the legal constitutional perspective. What are the ambiguities in the legal/constitutional framework of the EU on matters of fundamental rights protection that could explain resistances? How do national constitutional courts, traditionally vested with the mandate of protecting fundamental rights in their own legal order, react to the development of a EUFRP?

Yet, in the past few years, EU discourse on fundamental rights has been increasingly politicized. EU political institutions have indeed gained more explicit competences to set fundamental rights standards (e.g. anti-discrimination, data protection, rights of migrants and suspected persons in criminal proceedings) and also availed themselves of possibilities to discuss FR matters (e.g. resolutions issued by the EP). Fundamental rights have thus gained more importance in EU political sphere and debates to which specific attention ought to be devoted. How do EU political institutions address this challenge in the diverse ideological landscape of the EU? What dilemmas does civil society face when seeking to contribute to the EUFRP? How does public opinion react to these developments?

Finally, at the junction between domestic public opinion and the EU political sphere, how do domestic political discourses shape the debate on supranational intervention on matters of fundamental rights? What emerges from the contributions to this special issue is a set of observations on the constitutional dimension of resistances to the EUFRP as well as on their origins in the EU and domestic political spheres.

First of all, Elise Muir recalls that resistances against the EUFRP are to a large extent inherent in the constitutional design of both the process of European integration and the establishment of a structure for the protection of fundamental rights. European integration implies supranational control over domestic policies—this does not always pleases everyone—and the fundamental right discourse is inherently designed to act as a check on political institutions—although this may have legitimising effects this also naturally triggers resistances. Yet, she shows that the inability of traditional constitutional law principles (especially the principle of attributed competences) to provide a clear conceptual framework explaining the intervention of the EU in issues of fundamental rights may feed particularly strong constitutional resistances.

De Visser further adds that, as the ultimate guardians of fundamental rights in the European Union, the European Court of Justice and domestic constitutional courts ought to maintain cautious interactions on fundamental rights issues, constantly seeking to balance concerns for uniformity with respect for diversity. For this ongoing dialogue to constitute 'constructive judicial engagement', de Visser points at the need for the CJEU to show awareness of the sensitivities of certain fundamental rights issues depending on the domestic context of a case. Meanwhile, she also calls for caution when domestic courts may be tempted to use European FR instruments such as the Charter for internal purposes—i.e. to bypass the domestic catalogue of rights and the constitutional court.

Bridging the gap between constitutional disputes, the role of the judiciary and the EU political landscape, François Foret in turn stresses that although MEPs clearly concur on asserting the importance of a European fundamental right discourse, they may—and do—also frame claims to diversity in terms of fundamental right to free choice and to freedom of expression. On the basis of a survey on 'Religion at the

European Parliament' (2010–2013), the author forcefully stresses—thereby reinforcing the warnings raised by de Visser—that the legalisation of value-driven choices through a fundamental rights policy does not deprive such choices of their political and controversial nature. The political dimension of the fundamental rights discourse and its interactions with the domestic political sphere may thus not be ignored.

Acknowledging the importance of the political embedding of fundamental rights, Carlo Ruzza enquires the extent to which civil society organisations may act as intermediaries between the domestic and the European spheres in the process of shaping and implementing the EUFRP. While stressing that civil society organisations can benefit from the conceptual and legal support provided by EU norms to defend the interests of individuals and groups at domestic level, his analysis also illustrates that civil society organisations will thereby make use of a EU law and policy to counter practices or rules that are deeply anchored in local or domestic systems. The top-down use of EU fundamental rights mechanisms by civil society actors thus simultaneously empowers these actors and exposes them as well as the EUFRP to accusations of unwanted interventionism in internal matters.

One step further down this top-down approach, Cécile Leconte investigates the dynamics of Euroscepticism triggered by or related to the EUFRP. Indeed, she investigates the widespread perception that the EU, via its fundamental rights policy, unduly interferes in matters where value systems are at stake. She also analyzes how the EU is being resented, by some segments of political elites, for allegedly empowering diverse groups (such as ethnic minorities, immigrants and anti-racist associations) at the expense of an exclusive understanding of national identity. Moreover, she shows that such resentment is exacerbated in a context where national governments are increasingly submitted to the critical assessment of EU-level actors (e.g. the European Parliament or the European Commission) in terms of democratic credentials.

Owing to a refreshing historical overview of the position of the UK in both the EU and the ECHR fundamental rights protection systems, Nuala Mole finally points at the sharp contrast between domestic discourses and legal reality on matters of European FR policies. Besides being critical of the manipulative use of a very limited number of high-profile and controversial cases by media and politicians alike to feed anti-European discourses, Nuala Mole's paper is a forceful reminder of the lack of clarity of European infrastructures for the protection of fundamental rights. The coexistence of the European Convention and Court for Human Rights with the Charter of Fundamental Rights and the Court of Justice of the European Union indeed creates confusion in people's mind and provides a fertile ground for manipulative discourses.

Does the intended complexity of this unique European regime of human rights mean that cynical governments are winning the battle of public opinion, as far as support for a robust, supranational fundamental rights regime is concerned? As shown in this special issue, resistances against the EUFRP are by far not limited to the "usual suspects", who deny the universality of fundamental rights as such. Moreover, those "natural allies" of the EUFRP often find it hard to enlarge their support beyond transnational advocacy coalitions lobbying the "Brussels bubble". However, by trying to impede the further developments of a policy they have themselves initiated, domestic political elites may also come to feel backlash reactions. Nothing illustrates this better than dramatic events currently unfolding on the Southern shores of Europe, where the deaths of hundreds of immigrants trying to cross the Mediterranean indirectly results from the lack of a

collective, comprehensive immigration policy at EU level. Public criticism and outrage against domestic and EU decision-makers on this issue suggests that governments cannot simply evoke the EU as a "community of values" when they find it convenient, while refusing to integrate those policy areas where common values are a stake.