Conclusion

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This book critically examined the EU's remedies system from a fundamental rights perspective, focusing on the EU's activities outside the realm of law-making. How can private parties vindicate their fundamental rights against the EU? Is there untapped potential within the remedies system to accommodate fundamental rights complaints? Does the EU remedies system live up to the promises of effectiveness and completeness?

The chapters show a complex and nuanced picture. This conclusion draws together some of the recurring strands of argumentation presented in this book. In broad strokes, it discusses, first, the limits of the EU remedies system and, second, its potential, closing with an overall reflection.

C.1 THE LIMITS OF THE EU REMEDIES SYSTEM

C.1.1 *Judicial Remedies and the Outdated Vision of the EU as a Lawmaker*

In line with the traditional distribution of tasks between the Union and its Member States, challenging EU conduct often means challenging EU laws. The centrepiece of the remedies system, the action for annulment, allows individuals to challenge EU laws. But it is well known just how restrictive access to this procedure is (Chapter 1 – Gentile), which can be explained to some extent by a presumption of lawfulness – the EU legislator 'can do no wrong' (Chapter 3 – Grozdanovski). Even once that hurdle is cleared, fundamental rights challenges to EU laws predominantly concern procedure, with substantive contestation remaining the exception (Chapter 1 – Gentile).

The bigger challenge is conduct that does not neatly fall within the category of 'law', strictly speaking. As we learn from Chapter 14 (Chamon), judicial mechanisms in the EU Treaties are premised on the idea that government acts through binding measures. Even though this principle has been somewhat

relaxed in the context of the preliminary reference procedure, ultimately there is no watertight system of remedies for harm done through soft law. Chapter 12 (Coman-Kund) comes to a similar conclusion, arguing that in relation to factual conduct, the judicial remedies available are neither complete nor effective. These conclusions are echoed in Chapters 11 (Bovend'Eerdt, Karagianni, Scholten) and 15 (Demková) regarding law enforcement and the use of artificial intelligence, respectively. In short, the EU's remedies system has not been designed with these types of conduct in mind and struggles to accommodate them.

Part IV of this volume (Bovend'Eerdt, Karagianni, Scholten; Coman-Kund; Eliantonio; Chamon; Demková) highlights two points. First, many of the EU's 'non-legal' activities have always been part of the EU's toolbox. However, as the scale on which the EU exercises these types of powers increases, so too does the gap in the remedies system. With this in mind, it is important that future conferrals of 'executive' powers go hand in hand with the setting up of remedial procedures, at least until broader reform can be achieved. Second, many of the activities the EU remedies system fails to capture are inherently fundamental rights sensitive. This is especially true of law enforcement (Chapter 11 – Bovend'Eerdt, Karagianni, Scholten), factual conduct (Chapter 12 – Coman-Kund), and the use of Artificial Intelligence (Chapter 15 – Demková). This makes the need for establishing remedies outside the possibilities of challenging 'legal acts' even greater.

C.1.2 *The Reluctance to Engage in Fundamental Rights Reasoning*

One of the 'great benefits' of the incorporation of the Charter of Fundamental Rights of the EU (CFR, 'the Charter') into EU primary law is that the EU's remedies system can be relied upon to vindicate Charter rights.[1] For the Working Group that advised the drafters of the (failed) Constitutional Treaty, this seems to have been one of the reasons why they did not find the inclusion of a fundamental rights complaints procedure into EU law necessary.[2] However, the chapters in this book found that the adoption of the Charter seems to have provided little momentum to the further development of the remedies system from a fundamental rights perspective.

[1] Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (CFR); The European Convention, Final Report of Working Group II, 22 October 2002, CONV 354/02, 15.

[2] The European Convention, Final Report of Working Group II, 22 October 2002, CONV 354/02, 15.

First, while Article 47 CFR has been relied on to make some improvements to the remedies system, for instance, in relation to the Common Foreign and Security Policy, it has overall been of limited relevance in shaping the mechanisms available to individuals to enforce their rights against the EU. This is, according to the Court of Justice of the EU (CJEU, the Court), because 'Article 47 of the Charter ... is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union'.[3] Chapters 1 (Gentile) and 3 (Grozdanovski) illustrate how this line of reasoning seems to apply not only to the restrictions set out in the Treaties but also to the interpretation of its components, especially the notions of 'direct and individual concern' and 'legal act', in the Court's own case law. Also, in relation to the action for damages, Article 47 CFR has not been significantly relied upon by the Court to shape the strict conditions under which liability arises (Chapter 2 – Fink, Rauchegger, De Coninck). Given the flexibility the Treaties provide (see Section C.2), this restrictive stance seems unnecessary. It also stands in stark contrast to the impact Article 47 CFR has had on the Member States' remedies systems, creating – as Chapter 3 (Grozdanovski) points out – a 'two-speed effective judicial protection'.

Second, the Court does not engage in any fundamental rights reasoning to justify its restrictive stance on the need and possibilities for modifying the remedies system. Specifically, the argument that the remedies system is 'complete' is never substantiated by reference to Article 47 CFR. There is no in-depth discussion of what Article 47 CFR requires from the EU and how the remedies system complies with that. Rather than a persuasive argument, the 'completeness' of the remedies system is a claim or – more generously – a promise. Ultimately, this approach by the Court is facilitated by the lack of any external control of the CJEU itself and once more underlines the need for accession of the EU to the European Convention on Human Rights (ECHR) (Chapter 7 – Krommendijk).

C.1.3 *The Over-reliance on National Courts*

The argument surrounding the 'completeness' of the EU's remedies system builds on the idea that the CJEU and national courts share the responsibility

[3] Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625, para 97.

to provide remedies (Chapter 3 – Grozdanovski; Chapter 4 – López Zurita). The CJEU has repeatedly held that the restrictions for private parties to bring actions for annulment do not create a lacuna in judicial protection because private parties are still able to file actions before national courts, which in turn refer questions regarding the validity of EU acts to the CJEU under the preliminary reference procedure.[4] This possibility, the Court has stressed, 'constitutes the very essence of the Community system of judicial protection'.[5] If a gap does arise, 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'.[6]

Where national implementation measures have been taken, individuals can indeed use the preliminary reference procedure to challenge the validity of EU acts and – as Chapter 4 (López Zurita) argues – fundamental rights have for a long time been 'a favourite ground' to do so. Chapter 6 (Hofmann) shows that national courts may also play a role outside the narrow context of the preliminary reference procedure, even though their function in this respect is understudied and needs more empirical attention as well as a more nuanced normative debate.

One of the limits of this approach is the dependency it creates on national law. Chapters 4 (López Zurita), 6 (Hofmann), 8 (van der Pas), 11 (Bovend'Eerdt, Karagianni, Scholten), and 14 (Chamon) illustrate that relying on national courts carries the risk that the effectiveness and fairness of the EU's remedies system is dependent on national rules of procedure and national (litigation) culture. In addition, national courts are not suitable to resolve the challenges that the EU's shared administration poses. Chapter 13 (Eliantonio) shows how the strict division of responsibilities between the EU and Member State courts cannot do justice to the administrative reality in the EU, in which the activities of the EU and its Member States are closely intertwined. The nature of fundamental rights commitments often requires a joint effort. Yet joint fundamental rights responsibility is difficult to implement under the current judicial framework (Chapter 13 – Eliantonio; Chapter 2 – Fink, Rauchegger, De Coninck). An additionally complicating factor is that in its cooperation with the Member States, the EU often takes on a preparatory, supportive, or assisting function. Leaving ultimate responsibility

[4] Ibid para 92; very clearly also Opinion of AG Bobek in Case C-911/19 *FBF* [2021] ECLI:EU:C:2021:294, para 138.

[5] Case C-300/99 P *Area Cova and Others v Council* [2001] ECLI:EU:C:2001:71, para 54.

[6] Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECLI:EU:C:2002:462, para 41.

for wrongdoing in this context with the Member States might be pragmatic, but it also reduces the EU's own responsibility to a minimum that is not reconcilable with the rule of law (Chapter 2 – Fink, Rauchegger, De Coninck). These challenges cannot be resolved by national courts, not only for lack of competence but also due to the need for uniformity. They require a stronger role by the CJEU.

C.2 THE POTENTIAL OF THE EU REMEDIES SYSTEM

C.2.1 *Looking beyond the Action for Annulment*

One of the most significant strengths of the remedies system is that many of the limitations exposed in this book are only sketched out in very general terms in the Treaties and ultimately stem from the strict interpretation thereof by the CJEU. This opens up space to better accommodate fundamental rights complaints without a risk that this would require changes in the system of judicial review laid down by the Treaties.

While the Charter cannot displace the Treaties, it can guide their interpretation. As Chapters 1 (Gentile), 3 (Grozdanovski), and 12 (Coman-Kund) show, the admissibility of actions for annulment could very well be interpreted less restrictively, possibly using Article 47 CFR. But other actions might harbour even greater untapped potential. As Chapters 2 (Fink, Rauchegger, De Coninck) and 12 (Coman-Kund) concluded, the action for damages is flexible enough to allow the Court to rely on Article 47 CFR for a less restrictive stance on the conditions under which compensation is awarded in the fundamental rights context.

C.2.2 *Looking beyond the CJEU*

Staying within the framework provided for by the Treaties also means there is an outer limit to reforming judicial remedies. But there is plenty of room to develop mechanisms outside the court system. This volume shows just how varied the non-judicial mechanisms are that have been set up under the Treaties or EU secondary law to provide ex ante control or deal with complaints against EU bodies by private parties. Beyond the well-known European Ombudsman, there are review bodies that deal with specific rights (such as the European Data Protection Supervisor) or specific EU bodies (Boards of Appeal, Fundamental Rights Officers). These lack the type of authority we usually associate with the effective vindication of rights and the guarantees of independence we know from courts. But Chapters 5 (Schramm), 11

(Bovend'Eerdt, Karagianni, Scholten), 12 (Coman-Kund), 14 (Chamon), and 15 (Demková) all show how these mechanisms have considerable potential to improve access to justice in the EU, especially due to their expertise and capacity to address structural root causes of fundamental rights violations.

Chapter 5 (Schramm) presents a compelling argument that review bodies should 'team up' with courts so that their respective strengths can be combined. With the judicial authority of the courts and the capacity of review bodies to address structural root causes of fundamental rights violations, they could together deliver more comprehensive protection than each of them alone. Chapters 11 (Bovend'Eerdt, Karagianni, Scholten), 12 (Coman-Kund), 14 (Chamon), and 15 (Demková) echo the argument that such review mechanisms are a way forward, especially when the EU does not act through traditional 'legal acts'. This requires reform. But as Chapter 5 (Schramm) argues, the burden to place themselves more firmly on the 'remedies map' is also on the review bodies themselves, who may want to increase their impact through more direct and powerful public messaging.

What seems important is a thorough discussion on how best to integrate review bodies into the remedies system in practice. Establishing review bodies without fully equipping them with the necessary powers and funds might do more harm than good because they may then, as Chapter 5 (Schramm) argues, risk becoming 'ceremonial legitimation of otherwise structurally flawed practices'. Especially the early versions of the Fundamental Rights Complaints Procedure established for the EU agency Frontex is a cautionary tale in that respect.

C.2.3 *Looking beyond EU Law*

While the EU may be unique, this is not necessarily the case for all the questions concerning the design of its remedies system. Part of the problem lies in the fact that the EU has developed a range of 'state-like' functions and powers that were not foreseen when it was set up. The necessary 'updates' to the remedies system can be inspired by national regimes, which have to provide for remedies against similar types of powers.

However, the EU is not a state. Crucially, its legal system consists of multiple levels that complement and depend on each other but also retain their independent functions. The EU fulfils its tasks within a shared administration where EU bodies and Member State authorities cooperate and interact. As Chapter 13 (Eliantonio) shows, this legal reality forms a particular challenge to the creation of an effective remedies system. Since no state has to deal with a multi-level system of this nature, it might be worth looking at

international law, especially the law of international responsibility, for inspiration on how to address some of these challenges.

As noted above, the Court has not yet developed a clear line of fundamental rights reasoning either to remove or to justify the limits in the remedies system. In this respect, the Court might draw on the case law of the European Court of Human Rights (ECtHR). As Chapter 7 (Krommendijk) argues, it is hard to anticipate whether, in the event of accession, the ECtHR would consider the remedies system, especially the standing requirements under the action for annulment, compliant with the ECHR, but greater coherence between the ECHR and the CFR is in any case beneficial for legal certainty.

Less obvious possibilities for inspiration lie in international arbitration. As Chapter 9 (Yefremova) argues, arbitration as a fundamental rights enforcement mechanism might be incorporated at EU level to a greater degree, at least as a 'gap-filler' where no other remedies exist. While this would require caution, so as not to undermine the uniform interpretation of EU law, it is worth exploring where this could be useful, especially in light of the expertise, flexibility, and authority arbitration could bring to the table.

C.2.4 *Technology as Opportunity*

New technologies pose significant risks to fundamental rights. Chapter 15 (Demková) shows how diverse these risks are, both substantively but also procedurally. The challenges to the requirements of transparency and good administration posed by decision-making informed by artificial intelligence have direct implications for individuals' access to effective remedies.

At the same time, Chapter 10 (Schmidt-Kessen) illustrates the potential new technologies hold to strengthen access to remedial mechanisms. Online Dispute Resolution is increasingly used in the context of fundamental rights disputes by private actors, such as online platforms, and has spread into the public realm in a number of national jurisdictions. While we lack a clear legal basis to incorporate a fundamental rights–specific Online Dispute Resolution mechanism in the context of which individuals could hold EU bodies to account, it might be implemented under the umbrella of existing administrative mechanisms, such as the EU Ombudsman's office.

C.2.5 *Applicants with Agency*

Many suggestions advanced in this book require some form of intervention by the EU legislator or courts. At the same time, the book carries a more empowering message. The empirical study in Chapter 4 (López Zurita)

found some indications that framing a complaint more clearly in fundamental rights terms might increase its chances of success. While not systematically studied, Chapter 2 (Fink, Rauchegger, De Coninck) found that of all the successful damages cases since 2015, 80% included references to the Charter in the grounds of judgment. Similarly striking, Chapter 1 (Gentile) found that at first instance 64% of successful actions for annulment involved fundamental rights. These findings suggest that the applicants themselves might have more power than it may seem at first sight to push the boundaries of the remedies system, simply by relying more strongly on their Charter rights.

Chapter 8 (van der Pas) provides a look at how that could be done. Access to 'Euro-expertise', that is, a high level of EU legal expertise, is crucial and can be provided by specialised NGOs, coalitions, networks, and also individual experts. While the formal judicial proceedings route may not always be feasible, petitions and complaints to other (administrative) bodies or even informal involvement may equally allow litigants to open up avenues to be heard and shape EU law in an otherwise rather closed system of remedies.

C.3 FINAL REMARKS

Clearly, and understandably, the drafters of the EU's remedies system could not anticipate how EU power would evolve and what this would require in terms of remedies. As a consequence, today, more than six decades later, the remedies system is simply outdated.

What this means for the protection of fundamental rights and the possibilities for victims of violations thereof to seek justice came to the fore in *WS and Others v Frontex*, decided by the General Court in September 2023.[7] The applicants in the case were a Syrian family escaping Aleppo at the height of the war in 2016 to seek international protection in the EU, in the course of which they suffered what they argued were gross violations of their fundamental rights. They turned to the EU courts to hold the EU agency Frontex accountable for its role therein. The action was unsuccessful. More worrying than the outcome as such is the lack of any engagement whatsoever by the General Court with the fundamental rights dimension of the case. The Court not only failed to provide effective judicial protection to the applicants but also ignored the broader rule of law implications of allowing EU public power to escape accountability.

[7] Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492.

The 'complete system of remedies' is not a claim, it is a promise. But it is not a promise that the EU currently lives up to. Without any external source of authority that could sound the alarm, it falls on the CJEU to take a stronger role as a fundamental rights court and on the EU legislator to develop additional judicial and non-judicial mechanisms that can fill the gaps. For 'without mechanisms for their effective vindication', 'the possession of rights is meaningless'.[8]

[8] Mauro Cappelletti and Bryant Garth, *Access to Justice: Vol. I A World Survey* (Book I, Sijthoff; Giuffrè 1978) 8.