



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

*J.H.H. Weiler
European Union Jean Monnet Chair*

in cooperation with the



THE NEW PUBLIC LAW IN A GLOBAL (DIS)ORDER A PERSPECTIVE FROM ITALY

Jean Monnet Working Paper 15/10

Federico Fabbrini

**The European Multilevel System for the Protection of Fundamental Rights:
A 'Neo-Federalist' Perspective**

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ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
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New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

The New Public Law in a Global (Dis)Order – A Perspective from Italy

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of “Administrative Law,” “Constitutional Law,” or “International Law,” but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper. The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler, *Director, Jean Monnet Center for International and Regional Economic Law & Justice*

Sabino Cassese, *Judge of the Italian Constitutional Court*

Prologue: The New Italian Public Law Scholarship

Since the second half of the 20th Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20th century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals (“*Rivista trimestrale di diritto pubblico*” and “*Giornale di diritto amministrativo*”). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled “The New Public Law in a Global (Dis)Order – A Perspective from Italy” – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law[♦].

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*

Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*

Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

[♦] Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D’Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo; Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at <http://www.irpa.eu/index.asp?idA=302>.

**THE EUROPEAN MULTILEVEL SYSTEM FOR THE PROTECTION OF FUNDAMENTAL RIGHTS:
A ‘NEO-FEDERALIST’ PERSPECTIVE**

By Federico Fabbrini*

Abstract

The paper advances a ‘neo-federalist’ perspective to analyze the European multilevel system for the protection of fundamental rights. This perspective fits within the theoretical prism of constitutional pluralism but rejects the allure of a *sui generis* approach in favour of the analytical and heuristic virtues of the comparative methodology. By rediscovering the pluralist tradition of federalism of the United States of America and Switzerland, the paper claims that the European human rights architecture can be compared with the arrangements for the protection of fundamental rights in force in those two constitutional systems, and that, when put in comparative context, it can be better understood. In this light, the paper argues that two major challenges can be currently identified in the European system – ineffectiveness and inconsistency, provides several empirical examples to highlight them, and examines how the legal transformations taking place in Europe or other proposals for policy reforms might address them.

* PhD candidate, Law Department, European University Institute. B.A. *summa cum laude* University of Trento School of Law (2006); J.D. *summa cum laude* University of Bologna School of Law (2008); LL.M. Law Department, European University Institute (2009). An earlier draft of this paper was presented at the Seminar “The New Public Law in a Global (Dis-)Order. A Perspective from Italy” jointly organized by the Institute for Research on Public Administration (IRPA) and the New York University Jean Monnet Center and held in New York, on September 19/20, 2010. My gratitude goes to the participants, and especially to the chair and discussants of the II panel “Democracy and Human Rights Beyond the State” - professor Matthias Kumm, professor Pasquale Pasquino and professor Joseph H.H. Weiler - for their insightful comments. All responsibility for the contents of the paper, of course, remains my own. Further comments are welcome. E-mail address: Federico.Fabbrini@eui.eu.

TABLE OF CONTENTS

Introduction.....	7
1. The European multilevel system for the protection of fundamental rights.....	8
1.1. The context.....	9
1.2. The historical rationale.....	15
2. Theoretical and methodological approaches.....	16
2.1. Sovereignism vs. pluralism.....	18
2.2. <i>Sui generis</i> vs. comparativism.....	23
3. A 'neo-federalist' perspective.....	27
3.1. Rediscovering federalism.....	28
3.2. Putting the European system in comparative context.....	33
4. The challenges of the European multilevel human rights system in a comparative perspective.....	40
4.1. Ineffectiveness.....	42
4.2. Inconsistency.....	46
5. The transformations of the European multilevel human rights system in a comparative perspective.....	51
5.1. Legal changes.....	52
5.2. Policy through comparative law.....	57
Conclusion.....	59

Introduction

The European continent is endowed with one of the most sophisticated systems for the protection of fundamental rights worldwide. Over the same geographical space three diverse sets of normative orders – a national, a supranational and an international, each with its own laws and institutions for the protection of fundamental rights, overlap and intertwine to ensure a heightened and advanced degree of protection of individual liberties. Yet, to a large extent, the European multilevel human rights architecture remains a puzzling object, as constitutional scholars have had a hard time in providing a comprehensive and persuasive account for making sense of its complex implications.

This paper attempts to contribute to this burgeoning constitutional debate about the European multilevel human rights architecture by developing a ‘neo-federalist’ perspective. This perspective fits within the conceptual paradigm of the theory of constitutional pluralism. However, it resorts to a methodology which trades the allure of *sui generis* in favour of the analytical virtues of the comparative method. In particular, ‘neo-federalism’ claims that the European multilevel system can be understood through the lenses of federalism – conceived *de novo* as a principle governing non-statist, pluralist constitutional arrangements, and therefore meaningfully compared with other federal systems for the protection of fundamental rights.

In light of this ‘neo-federalist’ perspective, then, the paper addresses some of the critical dynamics at play in the European fundamental rights architecture and argues, on the basis of several empirical examples, that two major challenges can be identified currently. In particular, the paper explains that a challenge of ineffectiveness emerges when the substantive overlap of norms and the functional interlink of institutions creates lacunae in the protection of fundamental rights; and that a challenge of inconsistency, instead, arises when the same overlap and interlink generates antinomies in the protection of fundamental rights.

In addition, by putting the European multilevel architecture into a comparative context, the paper demonstrates that analogous challenges characterize the historical and constitutional experiences of other federal systems for the protection of fundamental rights and argues that,

because of the evolving nature of such arrangements, such challenges can be addressed internally. To this end, therefore, the paper examines the most recent European legal transformations and assess the impact of these developments on the functioning of the European human rights architecture. Moreover, it draws on the lessons of comparative constitutional law to advance – albeit with relevant caveats – proposals for policy reforms *de jure condendo*.

As such, the paper is structured as follows: Section 1 describes the main features of the European multilevel system for the protection of fundamental rights. Section 2 reviews the alternative theoretical and methodological positions of the academic literature on the topic and highlights its main weaknesses. Section 3 develops the contours of a ‘neo-federalist’ perspective and explains its major advantages in making sense of the European human rights architecture. Section 4 addresses, in a ‘neo-federalist’ perspective, some critical implications of the European structure by defining the challenges of ineffectiveness and inconsistency. Section 5, finally, evaluates the impact of the ongoing legal transformations and discusses the potentials of policy-making through comparative law. A few final remarks conclude the paper.

1. The European multilevel system for the protection of fundamental rights

In this section I describe the main empirical features of the contemporary European multilevel system of human rights protection:¹ in the first subsection I draw a picture of the most relevant norms and institutions for the protection of fundamental rights existing in the several layers of the European architecture; in the second subsection, I explain the historical reasons and the political rationales that account for these unprecedented developments in the European human rights practice after the II World War (WWII).

¹ While being aware of the lively debate taking place in legal scholarship as to the precise definition of typologies of rights, for the purpose of this paper the words ‘fundamental’ and ‘human’ rights will be used interchangeably.

1.1. *The context*

The European system for the protection of fundamental rights is characterized by a three-layered structure.² Human rights in Europe are protected by national, supranational (European Union – EU) and international (European Convention on Human Rights – ECHR) norms and institutions.³ Each layer of the multilevel architecture is endowed with a substantive catalogue of fundamental rights. In addition, institutional remedies – most notably through the instrument of judicial review exercised by courts, are duly established at every level of the European human rights architecture to ensure the protection of these constitutionally entrenched liberties.

At the *national* level, the protection of fundamental rights has been a defining feature of all the Constitutions adopted in post-WWII Europe.⁴ In the subsequent waves of constitutionalization which have taken place in Europe in the last 50 years – in the late 1940s in Italy and Germany,⁵ in the late 1970s in Spain, Portugal and Greece,⁶ and in the early 1990s with the transition to democracy of the post-Soviet countries of Central and Eastern Europe,⁷ an event of paramount importance has been the adoption of a binding catalogue of fundamental rights

² The idea of the European system as a multilevel constitutional structure has been developed in the work of I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam”, 36 *Common Market Law Review* (1999), p. 703; “Multilevel Constitutionalism in the European Union”, 27 *European Law Review* (2002), p. 511; and lastly “The Treaty of Lisbon. Multilevel Constitutionalism in Action”, 15 *Columbia Journal of European Law* (2009), p. 349.

³ On the European multilevel system for the protection of fundamental rights *cf.* especially M. Cartabia, “L’ora dei diritti fondamentali nell’Unione Europea”, in M. Cartabia (ed.), *I diritti in azione* (Il Mulino, Bologna, 2007), p. 13 and A. Torres Pérez, *Conflicts of Rights in the European Union: A theory of Supranational Adjudication* (OUP, Oxford, 2009), ch. 2.

⁴ A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford, 2000); M. Shapiro, “Rights in the European Union: Convergent with the USA?”, in N. Jabko et al. (eds.), *The State of the EU (Volume 7): With US or Against US? European Trends in American Perspective* (OUP, Oxford, 2005), p. 378.

⁵ *Cf.* in general M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (Giuffrè, Milan, 1972). *See* then specifically also H.G. Rupp, “Judicial Review in the Federal Republic of Germany”, 9 *American Journal of Comparative Law* (1960), p. 29 (on Germany) and A. Pizzorusso, “Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies”, 38 *American Journal of Comparative Law* (1990), p. 373 (on Italy).

⁶ *Cf.* M. Rosenfeld, “Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Examples Inspired by the Spanish Example”, 19 *Cardozo Law Review* (1998), p. 1891 (on Spain); P. Schmitter, *Portugal: Do autoritarismo à democracia* (Imprensa de Ciências Sociais, Lisboa, 1999) (on Portugal).

⁷ *Cf.* W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Springer, Wien, 2005).

enshrined in the supreme law of the land and safeguarded by the creation of specialized Constitutional Courts based on the Kelsenian model.⁸

An early example of this European constitutionalist trend is, for instance, Italy. Here, fundamental rights are extensively proclaimed in the first part of the 1948 Constitution,⁹ a higher law which can only be modified through a complex process of constitutional revision. Besides the ordinary judicial system, charged to review the action of the executive branch,¹⁰ then, a centralized Constitutional Court, the *Corte Costituzionale*, has been set up to review the compatibility of ordinary statutes with the Constitution¹¹ and its fundamental rights.¹²

Otherwise, also in those countries of Northern¹³ and Western Europe in which no such constitutional transformation took place after WWII, fundamental rights have gained a new momentum. In France, i.e., the *Conseil Constitutionnel* discovered a binding Bill of Rights in the Preamble to the 1958 Constitution already in 1971¹⁴ and, recently, a constitutional reform has introduced a path-breaking system of *a posteriori* judicial review of legislation which allows all

⁸ Cf. G. de Vergottini, *Le transizioni costituzionali* (Il Mulino, Bologna, 1998). On the introduction of constitutional review of legislation in Europe compared with the US experience cf. M. Rosenfeld, "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts", 2:4 *International Journal of Constitutional Law* (2004), p. 633 and W. Hoffmann-Riem, "Two Hundred Years of *Marbury v. Madison*: The Struggle of Judicial Review of Constitutional Questions in the United States and Europe", 5:6 *German Law Journal* (2004), p. 685.

⁹ Cf. for a general and philosophical overview V. Onida, *La Costituzione* (Il Mulino, Bologna, 2004) and G. Zagrebelsky, *La legge e la sua giustizia* (Il Mulino, Bologna, 2008).

¹⁰ Cf. A. Sandulli, "La giustizia", in S. Cassese (ed.), *Istituzioni di diritto amministrativo* (Giuffrè, Milan, 2004), p. 381.

¹¹ On the role of the Constitutional Court cf. E. Cheli, *Il giudice delle leggi* (Il Mulino, Bologna 1996) and for a recent account T. Groppi, "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review", 3:2 *Journal of Comparative Law* (2008) p. 101.

¹² On the protection of fundamental rights in the Italian legal system cf. A. Barbera et al., "Le situazioni soggettive. Le libertà dei singoli e delle formazioni sociali. Il principio di uguaglianza", in G. Amato and A. Barbera (eds.), *Manuale di diritto pubblico* (Il Mulino, Bologna, 1991), p. 117 and A. Barbera and A. Morrone (eds.), *I diritti fondamentali* (Cedam, Padua, 2011 forthcoming).

¹³ On the rise of human rights-based judicial review in the Scandinavian countries cf. J. Nergelius, "Judicial Review in Swedish Law. A Critical Analysis", 78:2 *Nordic Journal of Human Rights* (2009), p. 142 (on Sweden); T. Ojanen, "From Constitutional Periphery Toward the Center: Transformations of Judicial Review in Finland", 78:2 *Nordic Journal of Human Rights* (2009), p. 194 (on Finland).

¹⁴ Décision 71-44 DC of 16 July 1971. Cf. A. Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (OUP, Oxford, 1992); L. Favoreu and L. Philip, *Les grandes décisions du Conseil Constitutionnel* (Daloz, Paris, 2005), p. 177.

individuals affected by an act of Parliament to contest the legality of the measure when it infringes the rights and liberties that the Constitution provides.¹⁵

Equally, in the United Kingdom – where arguably fundamental rights received their first historical recognition in a written document, the Magna Carta of 1215,¹⁶ the question of the protection of fundamental rights re-emerged when in 1998 the Parliament decided to incorporate the ECHR in domestic law through the Human Rights Act,¹⁷ empowering ordinary courts to adjudicate fundamental rights cases and to declare the incompatibility (without affecting the validity, however) of an act of Parliament with the ECHR when it infringes upon the rights and liberties codified therein.¹⁸

At the *supranational* level, the introduction of a system of fundamental rights has been one of the greatest achievements of the European Court of Justice (ECJ).¹⁹ Since the 1957 European Economic Community (EEC) Treaty eluded the issue of human rights, it was the ECJ that, through a praetorian jurisprudence, recognized step-by-step fundamental rights as general principles of EEC law.²⁰ Some scholars have argued that the move of the ECJ was a response to

¹⁵ For an early assessment of the reform introduced by the *Loi constitutionnelle* n° 2008-724 compare F. Fabbrini, “Kelsen in Paris: France’s Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation”, 9:10 *German Law Journal* (2008), p. 1297 with F.X. Millet, “L’exception d’inconstitutionnalité en France ou l’impossibilité du souhaitable”, *Revue du Droit Public* (2008), p. 1445.

¹⁶ Cf. the masterpiece study of C.H. McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, New York, 1947).

¹⁷ On the UK Human Rights Act 1998, 46 *Eliz. 2*, c. 42 (Eng.) cf. D. Vick, “The Human Rights Act and the British Constitution”, 37 *Texas International Law Journal* (2002), p. 329. As explained by P. Leyland, “*Human Rights Act 1998: Riportare i diritti a casa?*”, *Quaderni Costituzionali* (2000), p. 83 the decision to incorporate the ECHR in domestic law was inspired by the will to ‘bring fundamental rights home.’

¹⁸ For a more detailed explanation of the effect of the so called ‘declaration of incompatibility’ cf. A. Clapham, “The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights”, in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights* (OUP, Oxford, 1999), p. 233; R. Gordon and T. Ward, *Judicial Review and the Human Rights Act* (Routledge, London, 2001).

¹⁹ B. de Witte, “The Past and the Future Role of the European Court of Justice in the Protection of Human Rights”, in P. Alston et al. (eds.), *The EU and Human Rights* (OUP, Oxford, 1999), p. 859.

²⁰ Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491. Cf. J.N. Cunha Rodriguez, “The Incorporation of Fundamental Rights in the Community Legal Order”, in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, Oxford, 2010), p. 89. Cf. also T. Tridimas, *The General Principles of EU Law* (OUP, Oxford, 2007), p. 298.

the jurisprudence of the Italian and German Constitutional Court on ‘counter-limits’,²¹ and therefore an attempt to foster the doctrines of supremacy and direct effect of EEC law within the national legal systems.²²

However – as Brun-Otto Bryde has powerfully demonstrated – despite the willingness of the ECJ to thwart potential threats coming from the national courts, the case law of the ECJ was, rather than a purely defensive move, “an impressive step in the development of a human rights culture in Europe.”²³ Indeed, when the ECJ identified an unwritten catalogue of fundamental rights in the general principles of EEC law, the protection of human rights was still much underdeveloped in the legal systems of the member states. At the same time, the rise of a fundamental rights jurisprudence at the EU level predates the *Solange* decisions of the national Constitutional Courts – whose concern for fundamental rights has therefore been described by some as “a disguise for the opposition to supranational power as such.”²⁴

Be that as it may, the results of the ECJ’s jurisprudence were later codified in art. F of the EU Treaty signed in Maastricht (afterward renumbered as art. 6 EU Treaty by the Amsterdam Treaty), which recognized that the EU respects fundamental rights as they result from the constitutional traditions common to the member states and the ECHR.²⁵ The ECJ, through direct recourse or preliminary reference procedure, currently verifies that fundamental rights are complied with by EU institutions as well as by member states when they implement EU rules or when they restrict the exercise of a common market freedom.²⁶

²¹ C. Cost s. 183/1973 *Frontini*; BVerfG 37, 271 (1974) *Solange I*.

²² J. Kühling, “Fundamental Rights”, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart, Oxford, 2006), p. 501; F. Schimmelfennig, “Competition and Community: Constitutional Courts, Rhetorical Action and the Institutionalization of Human Rights in the European Union”, in B. Rittberger and F. Schimmelfennig (eds.), *The Constitutionalization of the European Union* (Routledge, London, 2007), p. 100.

²³ B.O. Bryde, “The ECJ’s Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism”, in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, Oxford, 2010), p. 119, 122.

²⁴ *Ibid.*, p. 121 quoting H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr, Tübingen, 1972), p. 716.

²⁵ A. von Bogdandy, “The European Union as a Human Rights Organization? Human Rights at the Core of the European Union”, 37 *Common Market Law Review* (2000), p. 1307.

²⁶ Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925. Cf. Z. Kühn, “*Wachauf* and *ERT*: On the Road from the Centralized to the Decentralized System of Judicial Review”, in M.P. Maduro and L. Azoulai

In 2000, then, a Bill of Rights for the EU²⁷ – the Charter of Fundamental Rights (CFR) – was solemnly proclaimed by the EU institutions.²⁸ Conceived as a restatement of the general principles of EU fundamental rights law but *de facto* quite innovative in many respects, the CFR was soon – despite its non-binding status – employed by the EU (and national) judiciaries as an advanced instrument for the protection of fundamental rights.²⁹ Furthermore, since the entry into force of the Lisbon Treaty in December 2009, the CFR has acquired the same legal value of the EU treaties and binds the EU institutions and the member states when they fall under the scope of application of EU law.³⁰

At the *international* level, finally, the ECHR has established a common framework for the protection of basic civil and political rights throughout the European continent.³¹ The ECHR was adopted in Rome in 1950 by the state parties of the Council of Europe (CoE) and later integrated by several additional protocols. As the membership to the ECHR steadily expanded to the countries of Central and Eastern Europe in the late 1990s, moreover, the institutional devices for

(eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, Oxford, 2010), p. 151.

²⁷ K. Lenaerts and E. de Smijter, “A “Bill of Rights” for the European Union”, 38 *Common Market Law Review* (2001), p. 273.

²⁸ On the CFR *cf.* L.S. Rossi, “La Carta dei Diritti Fondamentali come strumento di costituzionalizzazione dell’ordinamento dell’UE”, *Quaderni Costituzionali* (2002), p. 565 and G. de Burca and J.B. Aschenbrenner, “European Constitutionalism and the Charter”, in Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Hart, Oxford, 2004), p. 4.

²⁹ K. Lenaerts and E. de Smijter, “The Charter and the Role of the European Courts”, 8:1 *Maastricht Journal of European and Comparative Law* (2001), p. 90; P. Eeckhout, “The EU Charter of Fundamental Rights and the Federal Question”, 39 *Common Market Law Review* (2002), p. 945.

³⁰ On the impact of the Lisbon Treaty on the protection of fundamental rights in the EU system *cf.* M. Cartabia, “I diritti fondamentali e la cittadinanza dell’Unione”, in F. Bassanini and G. Tiberi (eds.), *Le nuove istituzioni europee: Commento al Trattato di Lisbona* (Il Mulino, Bologna, 2008), p. 81; M. Dougan, “The Treaty of Lisbon 2007: Winning Minds, Not Hearts”, 45 *Common Market Law Review* (2008), p. 617.

³¹ As argued by A. Stone Sweet, “Sur la constitutionnalisation de la Convention européenne des droits de l’homme”, 80 *Revue trimestrielle des droits de l’homme* (2009), p. 923 the ECHR, despite its Treaty-like nature, has undergone tremendous transformations in recent years and may be today accounted as a trans-European Constitution. In particular, the existence of a strong court such as the ECtHR, able to condemn contracting parties for their human rights violation and having (since the enactment of Protocol 11) compulsory jurisdiction over the claims raised by private individuals, has had a major role in enhancing the ECHR. This distinguishes the ECHR from other international human rights regimes (established by treaties adopted in the framework of the Council of Europe or the United Nations) who, despite their normative relevance (e.g. also in the field of social and cultural rights), still lack strong adjudicatory and enforcement mechanisms and thus have a more limited capacity to influence the legal systems of its member (and non-member) states.

the protection of fundamental rights was refined and the role of the European Court of Human Rights (ECtHR) was strongly enhanced.³²

In particular, since the enactment of the 11th additional Protocol to the ECHR in 1998, the *ressortissants* of the signatory states may commence legal proceedings in front of the ECtHR when they believe that an individual right proclaimed in the ECHR has been unlawfully abridged by their state, and they have unsuccessfully exhausted all national remedies; moreover, they can receive damages if the state is found guilty.³³ The ECtHR therefore exercises an external and subsidiary review on the national systems of fundamental rights protection by remedying potential malfunctions at the state level.³⁴

The constitutional role of the ECtHR,³⁵ however, creates an incentive for national courts to take into account the ECHR in domestic adjudication,³⁶ even in those member states in which the ECHR is not incorporated into the national legal order with the status of a constitutional text.³⁷ As such, *de facto* in several European countries, the ECHR has become the common instrument through which ordinary courts exercise judicial review of national legislation: indeed, when a

³² R. Harmsen, “The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges Facing the European Court of Human Rights”, in G. Martinico and O. Pollicino (eds.) *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Europa Law Publishing, Groningen, 2010), p. 27.

³³ Cf. A. Bultrini, “Il meccanismo di protezione dei diritti fondamentali istituito dalla Convenzione europea dei diritti dell’uomo. Cenni introduttivi”, in B. Nascimbene (ed.), *La Convenzione europea dei diritti dell’uomo. Profili ed effetti nell’ordinamento italiano* (Giuffrè, Milan, 2002), p. 20.

³⁴ P. Tanzarella, “Il margine di apprezzamento”, in M. Cartabia (ed.), *I diritti in azione* (Il Mulino, Bologna, 2007), p. 145, 150; E.U. Petersmann, “Human Rights, International Economic Law and ‘Constitutional Justice’”, 19:4 *European Journal of International Law* (2008), p. 769, 777.

³⁵ Compare J.F. Flauss, “La Cour européenne des droit de l’homme est-elle une Cour constitutionnelle?”, *Revue Française Droit Constitutionnel* (1998), p. 711 with L. Wildhaber, “A Constitutional Future for the European Court of Human Rights?”, 23 *Human Rights Law Review* (2002), p. 161.

³⁶ Cf. A. Stone Sweet and H. Keller, “The Reception of the ECHR in National Legal Orders”, in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights* (OUP, Oxford, 2008), p. 3; G.F. Ferrari, “National Judges and Supranational Laws. On the Effective Application of EU Law and ECHR”, in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Europa Law Publishing, Groningen, 2010), p. 21.

³⁷ A paradigmatic example of what is argued here is represented by Italy, where, thanks to the jurisprudence of the *Corte Costituzionale* – C. Cost s. 348/2007 & s. 349/2007 – the ECHR (despite having an infra-constitutional status within the Italian legal system) is nowadays utilized as a source integrating the Constitution, i.e. as one of the parameter on the basis of which national legislation is reviewed. Cf. D. Tega, “Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte ‘sub-costituzionale’ del diritto”, *Quaderni Costituzionali* (2008), p. 133 and M. Savino, “Il cammino internazionale della Corte Costituzionale dopo le sentenze n. 348 e 349 del 2007”, *Rivista Italiana Diritto Pubblico Comunitario* (2008), p. 747 and the literature quoted in note 195 *infra*.

national statute is found to be contrasting with the rights established in the ECHR, ordinary courts disapply, in the case at hand, the national act – even where the Constitution prohibits courts from reviewing the constitutionality of acts of Parliament.³⁸

1.2. *The historical rationale*

As this brief description outlines, fundamental rights in Europe are proclaimed in national Constitutions and in the ECHR and are recalled in the EU Treaty (which identifies the constitutional traditions common to the member states and the ECHR as general principles of EU law). Moreover, since the entry into force of the Lisbon Treaty, they are codified in a CFR which has the same legal value as the EU treaties. National courts (ordinary judges and Constitutional Courts), the ECJ, which includes the Court of First Instance (CFI), and the ECtHR then provide judicial remedies against rights' infringements.

The protection of fundamental rights in Europe is hence ensured through a multilevel structure in which different overlapping normative orders intertwine.³⁹ This pluralist structure is actually no coincidence. Rather, it is born out of history and necessity.⁴⁰ Indeed, in the immediate aftermath of WWII it became crystal clear to the political elites that the protection of fundamental rights could not be confined solely to the states and that additional norms and institutions *beyond the states* were necessary to ensure liberty and peace on the European continent.⁴¹

³⁸ Cf. O. Duteillet de Lamothe, “Contrôle de constitutionnalité et contrôle de conventionalité”, in *Mélanges Labetoulle* (Dalloz, Paris, 2007) (on France) and G. van der Schyff, “Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?”, 11:2 *German Law Journal* (2010), p. 275 (on the Netherlands).

³⁹ Cf. I. Pernice and R. Kanitz, “Fundamental Rights and Multilevel Constitutionalism in Europe”, Walter Hallstein-Institute Paper 7 (2004) now reprinted in D. Curtin et al. (eds.), *The Emerging Constitution of the European Union*, (OUP, Oxford, 2004); G. Guzzetta, “Garanzia multilivello dei diritti e dialogo tra le Corti nella prospettiva di un *Bill of Rights* europeo”, in A. d’Atena et al. (eds.), *Tutela dei diritti fondamentali e costituzionalismo multilivello. Tra Europa e Stati nazionali* (Giuffrè, Milan, 2004), p. 155.

⁴⁰ B. Ackerman, “Prologue: Hope and Fear in Constitutional Law”, in E.O. Eriksen et al. (eds.), *Developing a Constitution for Europe* (Routledge, London, 2004), p. xii speaks of a “constitutionalism based on fear.”

⁴¹ A. Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe”, 54 *International Organization* (2000), p. 217; S. Gardbaum, “Human Rights and International Constitutionalism”, in J. Dunoff and J. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law and Global Governance*

This is for sure the story of the ECHR, already enacted in 1950. However, the same logic also explains the creation of the EEC and its subsequent development in the EU.⁴² Originally conceived as a political plan – only later to be recycled as an economic venture,⁴³ the project of European integration pursued the goal of strengthening the relationship between the member states by overcoming the deadly features of Westphalian politics that twice in less than thirty years had bloodied Europe.⁴⁴ Fundamental rights, as checks against the abuse of public authorities, were certainly part of this enterprise and the jurisprudence of the ECJ, dating as early as to the 1960s, shows this clearly.⁴⁵

In the end, as this section illustrates, the reality of fundamental rights protection in Europe can be described as a system of constitutional pluralism. Indeed, the existence of a plurality of constitutional sources enshrining fundamental rights and of a plurality of constitutional actors endowed with the power to protect them, is a hardly contestable fact. Constitutional scholars have however developed competing normative visions of the European human rights architecture, which will now be investigated.

2. Theoretical and methodological approaches

In this section I briefly summarize the main theoretical and methodological approaches that have been debated within the European constitutional scholarship in order to make sense of the European multilevel human rights architecture. Although the existence of a pluralist system for

(CUP, Cambridge, 2009), p. 233. Cf. then the collection of essays: J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (CUP, Cambridge, 2004).

⁴² Cf. A. Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino, Bologna, 2002), p. 173 who affirms that “the two political projects that lead, respectively, to the creation of the EC and to the activity of the ECHR both represented important initiatives to contrast a re-emergence of the difficulties that had led to the enormous tragedies tearing Europe in the first half of the XX century.” (my translation) Cf. also T. Joris and J. Vandenberghe, “The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?”, 15 *Columbia Journal of European Law* (2009), p. 1.

⁴³ As recalled by A. Grilli, *Le origini del diritto dell’Unione Europea* (Il Mulino, Bologna, 2009), the EEC Treaty was adopted by the founding Member States after the failure of the European Defence Community in 1954. Nevertheless, at that time, the creation of an integrated economic system was clearly intended to be a first step in the construction of an integrated political system in which presumably fundamental rights would have some role.

⁴⁴ This argument has been developed remarkably by J. Habermas, “Why Europe Needs a Constitution?”, 11 *New Left Review* (2001) September – October, p. 5.

⁴⁵ Bryde, *supra* note 23, p. 126; Pizzorusso, *supra* note 42, p. 18.

the protection of fundamental rights is now rooted in the fabric of European constitutional law, for a long time legal doctrine found it hard to conceptualize this new reality. Professor Armin von Bogdandy has remarkably emphasized the role that the *Rechtswissenschaft* has traditionally played, and still plays, in European legal culture.⁴⁶ It is well known, at the same time, how the doctrinal foundation of strong conceptual constructs can create path dependency and chill intellectual creativity.⁴⁷

In the first subsection I underline how, in the conventional perspective which European public lawyers inherited from XIX century dogmatic, the idea of fundamental rights was inherently connected with the categories of sovereignty and the state. The increasing difficulties with which such a traditional ‘sovereignist’ theory of fundamental rights was faced due to the unprecedented transformations reshaping the European human rights architecture, however, eventually prompted the formulation of an alternative theory, under the idea of ‘constitutional pluralism’. This theory, by regarding the European architecture as a post-statist framework in which a plurality of authorities interact and dialogue together while leaving the fundamental question of sovereignty undecided, offers a more convincing conceptualization of the European system and of its human rights structure than classical ‘sovereignist’ thinking.

At the same time, as I emphasize in subsection 2, a relevant but largely unexplored contraposition among constitutional pluralists emerges on the methodological questions. Whereas most scholars embrace a *sui generis* perspective – that is, they regard the European constitutional system as a *sui generis*, special case, other authors have challenged this ideographic approach and argued in favour of a comparative approach – claiming that Europe is comparable, with all due methodological caveats, to other constitutional systems. The

⁴⁶ A. von Bogdandy, “The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship”, 7:3 *International Journal of Constitutional Law* (2009), p. 364.

⁴⁷ Cf. also M. Kumm, “On the Past and Future of European Constitutional Scholarship”, 7:3 *International Journal of Constitutional Law* (2009), p. 401 and G. Napolitano, “Sul futuro delle scienze del diritto pubblico”, *Rivista Trimestrale Diritto Pubblico* (2010), p. 1. For an explanation of the concept of path-dependency in legal theory cf. then A. Stone Sweet, “Path Dependence, Precedent and Judicial Power”, in Michel Troper et al. (eds.), *Théorie des contraintes juridiques* (LGDJ, Paris, 2005).

persuasiveness of these alternative methodological arguments therefore also needs to be assessed.

2.1. *Sovereignism vs. pluralism*

The new reality of the European multilevel system of fundamental rights protection represents a significant challenge to the doctrinal understanding of the protection of fundamental rights which traditionally dominated European constitutional scholarship in the last centuries.⁴⁸ At least since the XIX century, indeed, public lawyers in Europe commonly conceptualized the protection of fundamental rights as the mirror image of the sovereignty of the state: in this ‘sovereignist’ view, individual rights were regarded as created and secured because of the existence of the state as the personified sovereign and therefore their protection could make sense only within the close and self-contained framework of the state’s legal authority.⁴⁹

In one of the most influential ‘sovereignist’ theories – the late XIX century *theorie die subjektive öffentliche Rechte* of George Jellinek, fundamental rights were regarded as the product of an act of self-limitation of the state, which placed boundaries on itself in order to ensure a space for freedom to the citizenry.⁵⁰ According to Jellinek, “the State recognizes individual liberties, as they have historically developed, through its act of self-limitation, that is through a ‘sovereign’ decision.”⁵¹ Of course, Jellinek’s theories have been partially superseded by the enactment of the post-WWII Constitutions described in section 1, inspired by the idea of fundamental rights as pre-political individual entitlements which operate as the outer boundaries

⁴⁸ A. Barbera, “Prefazione”, in M. Cartabia (ed.), *I diritti in azione* (Il Mulino, Bologna, 2007), p. 5.

⁴⁹ For an historical and philosophical overview compare P. Costa, “Diritti”, in M. Fioravanti (ed.), *Lo Stato moderno in Europa: Istituzioni e diritto* (Laterza, Roma, 2002), p. 37 with L. Ferrajoli, “I diritti fondamentali”, in E. Vitale (ed.), *Diritti fondamentali: Un dibattito teorico* (Laterza, Roma, 2008), p. 5.

⁵⁰ Cf. G. Jellinek, *Das System der subjektiven öffentlichen Rechte* (1892). But cf. also C. von Gerber, *Ueber öffentliche Rechte* (1852), P. Laband, *Das Staatsrecht des Deutschen Reiches* (1876) and V.E. Orlando, *Diritto pubblico generale* (1940).

⁵¹ G. Bongiovanni, “Introduzione”, in G. Bongiovanni (ed.), *George Jellinek, La Dichiarazione dei diritti dell’uomo e del cittadino* (Laterza, Roma, 2002), p. xxxiv.

of state action.⁵² Nevertheless, the intellectual categories elaborated by the sovereigntist thinkers seem to have outlived their own creators.

In particular, the conviction that rights should be essentially confined within the sovereign state has heavily, enduringly and often unconsciously shaped the contemporary European discourse about fundamental rights – and is today echoed in academic writings,⁵³ in the case law of several national courts⁵⁴ and even in the measures adopted by national governments and legislatures.⁵⁵ The ability of this ‘sovereigntist’ doctrine to make sense of the post-WWII legal reality in Europe, however, has come under increased pressure.⁵⁶ As explained in the previous

⁵² Cf. G. Bongiovanni, “Diritti inviolabili e libertà”, in A. Barbera (ed.), *Le basi filosofiche del costituzionalismo* (Laterza, Roma, 1997), p. 63, 83; D. Kelly, “Revisiting the Rights of Men: Georg Jellinek on Rights and the State”, 22:3 *Law and History Review* (2004), p. 493. For a broader philosophical perspective on the *Staatsrechtslehre* and its conception of fundamental rights cf. then N. Bobbio, *L’età dei diritti* (Einaudi, Torino, 1990) and R. Alexy, *A Theory of Constitutional Rights* (OUP, Oxford, 2002).

⁵³ Cf. e.g. L. Favoreu, “L’euroscetticismo du droit constitutionnel”, in H. Gaudin (ed.), *Droit constitutionnel. Droit communautaire. Vers un respect réciproque mutuel?* (Économica, Paris, 2001), p. 379; D. Grimm, “Il significato della stesura di un catalogo europeo dei diritti fondamentali nell’ottica della critica dell’ipotesi di una Costituzione europea”, in G. Zagrebelsky (ed.), *Diritti e Costituzione nell’Unione Europea* (Laterza, Roma, 2003), p. 5, 15.

⁵⁴ Cf. e.g. the Italian *Consiglio di Stato*, sez. V, n. 4207/2005, *Federfarma*, p. 30-31 stating that “it is possible to conceive the preservation of a State’s legal space wholly subtracted from the influence of Community law and in which the State continues to be fully sovereign, that is independent, and therefore free to adopt the laws that it pleases. This is the area of fundamental rights” (my translation). For a critical remark of this position see G. Itzcovich, “I diritti fondamentali come ‘libertà dello Stato’. Sovranità dello Stato e sovranità dei diritti nel caso *Federfarma*”, *Diritti umani e diritto internazionale* (2008), p. 267. A similar sovereigntist view has been recently advanced by the German *Bundesverfassungsgericht*, II Senat, 2 BvE 2/08, *Lissabon Urteil*, 30 June 2009 § 334 who has remarked among others the following: “from the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the States remain the masters of the Treaties, it follows - at any rate until the formal foundation of a European federal State and the change of the subject of democratic legitimisation which must be explicitly performed with it - that the Member States may not be deprived of the right to review adherence to the integration programme” (official translation). Cf. critically, C. Schönberger, “Lisbon in Karlsruhe: Maastricht’s Epigones at Sea”, 10:8 *German Law Journal* (2009), p. 1201.

⁵⁵ Cf. e.g. the 30th Additional Protocol to the Lisbon Treaty on the application of the EU CFR to Poland and the UK, OJ 306/156, in which the British and Polish government affirmed that “the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms”; and that “to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.” Whether these provisions have any meaning at all, however, has been contested: cf. J. Ziller, *Il nuovo Trattato europeo* (Il Mulino, Bologna, 2007), p. 178 who affirms that “from the legal point of view the protocol is totally useless” (my translation).

⁵⁶ Whether the concept of ‘sovereignty’ continues to be meaningful in the new global legal reality has in itself been the object of major debate. Compare S. Cassese, “L’erosione dello Stato: una vicenda irreversibile?”, in S. Cassese

section, after WWII, fundamental rights were simultaneously entrenched within the state and beyond the state on the assumption that only multiple checks on the exercise of public authority would ensure that the tragedies of totalitarianism would *never happen again*.⁵⁷

In this new context, traditional sovereigntist claims that fundamental rights draw their legitimacy from the state and ought to be secured exclusively within the state, appear as the outdated expression of a ‘statist paradigm’ of thought which fails to appreciate the transformations of constitutionalism that have occurred in the last 60 years.⁵⁸ It is not surprising, therefore, that an alternative normative account of the European multilevel system of fundamental rights protection has been recently brought forward. Such a theory is offered by a cohort of scholars who define themselves as ‘constitutional pluralists.’⁵⁹ Constitutional pluralists not only accept the reality of a multilevel constitutional architecture, and by analogy of a multilevel system of fundamental rights protection, but regard this state of affairs as a normatively agreeable situation. In the words of one of its earliest proponents, professor Neil Walker, constitutional pluralism has, besides an explanatory claim, a normative and epistemic function.⁶⁰

In the ‘pluralist’ view, fundamental rights no longer appear as directly and univocally related to the sovereign state. Rather, rights are conceived as autonomously and simultaneously entrenched in a plurality of legal sources in a multiplicity of legal frameworks which intertwine

(ed.), *La crisi dello Stato* (Laterza, Roma, 2002), p. 44 and M. Troper, “The Survival of Sovereignty”, in H. Kalmo and Q. Skinner (eds.), *Sovereignty in Fragments – The past, Present and Future of a Contested Concept* (CUP, Cambridge, 2010), p. 132.

⁵⁷ Cf. M.P. Maduro, “Las formas del poder constitucional de la Union Europea”, 119 *Revista de Estudio Politicos* (2003); M. Fioravanti, “Il costituzionalismo nella dimensione sovranazionale”, in M. Fioravanti (ed.), *Costituzionalismo. Percorsi della storia e tendenze attuali* (Laterza, Roma, 2009), p. 158.

⁵⁸ For a critique of the ‘statist’ paradigm and for a call in favour of a ‘cosmopolitan turn in constitutionalism’ cf. M. Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State”, in J. Dunoff and J. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP, Cambridge, 2009), p. 258, 263.

⁵⁹ J. Baquero Cruz, “The Legacy of the *Maastricht-Urteil* and the Pluralist Movement”, 14 *European Law Journal* (2008), p. 389. Cf. also M.P. Maduro, “The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism”, 3 *International Journal of Constitutional Law* (2005), p. 332, 347.

⁶⁰ N. Walker, “The Idea of Constitutional Pluralism”, 65:3 *Modern Law Review* (2002), p. 317, 337.

and overlap.⁶¹ The state is but one of the authorities endowed with the power to acknowledge and secure fundamental rights and cannot advance any *a priori* greater claim of legitimacy in this enterprise *vis-à-vis* the other public authorities protecting human rights beyond the state.⁶² As such, constitutional pluralism rejects the idea of a systemic, abstract superiority of the state in the protection of fundamental rights, in favour of an open-ended, heterarchical approach – to use the words of professor Daniel Halberstam – which emphasizes the relative capacities of the various institutions involved in rights-protecting activities.⁶³

According to the theory of constitutional pluralism, therefore, the existence of a plurality of constitutional sites and authorities for the protection of fundamental rights should in general be defended as a valuable post-Westphalian setting⁶⁴ in which different institutions cooperate, as in a musical counterpoint,⁶⁵ to achieve a greater protection of fundamental rights while simultaneously respecting the legitimate claims of authority made by each of the participants. In addition, as is emphasized, pluralism is the constitutional arrangement in which the needs for

⁶¹ Cf. L. Besselink, “Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union”, 35 *Common Market Law Review* (1998), p. 629 and N. Krisch, “The Open Architecture of European Human Rights Law”, 71:2 *Modern Law Review* (2008), p. 183.

⁶² Cf. J.H.H. Weiler and N. Lockhart, ““Taking Rights Seriously” Seriously: The European Court of Justice and Its Fundamental Rights Jurisprudence – Part I”, 32 *Common Market Law Review* (1995), p. 51, 81 who actually even “confess to a bias, rebuttable to be sure, in favour of human rights judicial review by courts not directly part of the polity the measure of which comes under review”. *Contra* however see M. Luciani, “Costituzionalismo irenico e costituzionalismo polemico”, Paper dell’Associazione Italiana dei Costituzionalisti (2006), §5 who argues that: “It is particularly troublesome that multilevel constitutionalism not only uncritically supports the role of courts but also reserves the worst treatment to the constitutional judges of the Member States, who are closer to the reality of civil society and derive their legitimacy from the sovereign constitutive decision of the people, allowing instead international and supranational courts, who have no similar legitimacy, to impose their discretionary appreciation” (my translation).

⁶³ D. Halberstam, “Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States”, in J. Dunoff and J. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP, Cambridge, 2009), p. 326, 337 who argues that in pluralist settings a number of factors influence the capacity to act of the several players, notably voice, expertise and rights.

⁶⁴ Cf. N. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (OUP, Oxford, 1999); N. Walker, “Late Sovereignty in the European Union”, in N. Walker (ed.), *Sovereignty in Transition* (Hart, Oxford, 2003), p. 3.

⁶⁵ M.P. Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, in N. Walker (ed.), *Sovereignty in Transition* (Hart, Oxford, 2003), p. 501.

uniformity and diversity in the protection of fundamental rights can be best accommodated and reconciled and, as a consequence, Europe should strive to preserve it *de jure condendo*.⁶⁶

If the theory of constitutional pluralism appears powerful in its capacity to offer a conceptual framework for addressing the issue of the protection of fundamental rights in the European multilevel architecture one needs to be aware, however, that there exists a plurality of approaches among the pluralists' movement.⁶⁷ Many authors regard the current arrangement for the protection of fundamental rights as being in the abstract the one that best fits Europe.⁶⁸ Others, instead, have developed a non-idealized view of the European system, seeing it as a living laboratory in which the existing limitations can also be openly addressed and tackled, while the principles of constitutional pluralism are preserved.⁶⁹

What seems to be the most profound cleavage in this lively debate among brands of constitutional pluralism, however, is the methodological dimension. A large share of the literature focusing on the European multilayered architecture has not paid much attention to the methodological issues that are inevitably involved in the interpretive operations of theory-building. Methodological weaknesses, however, are a significant hurdle on the doctrinal construction of a theoretical model which purports to both replace consolidated concepts such as 'sovereignism' and have a meaningful heuristic power. The methodological warnings that have been brought forward by some constitutional pluralists need, therefore, to be fully considered.

⁶⁶ M. Cartabia, "Unita nella diversità. Il rapporto tra la Costituzione europea e le Costituzioni nazionali", *Diritto dell'Unione Europea* (2005), p. 590; X. Groussot, "'European Rights' and Dialogues in the Context of Constitutional Pluralism", in M. Avbelj and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2011 forthcoming).

⁶⁷ On the various brands of constitutional pluralism cf. M. Avbelj and J. Komarek, "Four Visions of Constitutional Pluralism", *EUI Working Paper Law 21* (2008) and J. Komarek, "Institutional Dimension of Constitutional Pluralism", in M. Avbelj and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2011 forthcoming). In general compare also the approaches of M. Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty", *11:3 European Law Journal* (2005), p. 262, 286 with M.P. Maduro, "Europe and the Constitution: What if This is as Good as it Gets?", in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (CUP, Cambridge, 2004), p. 74.

⁶⁸ Cf. Krisch, *supra* note 61, p. 209. Cf. also A. Young, "The Charter, Constitution and Human Rights: Is this the Beginning or the End for Human Rights Protection by Community Law?", *11 European Public Law* (2005), p. 219.

⁶⁹ Cf. Besselink, *supra* note 61, p. 679. Cf. also I. Canor, "Primus Inter Pares. Who Is the Ultimate Guardian of Fundamental Rights in Europe?", *25 European Law Review* (2000), p. 3.

2.2. *Sui generis* vs. comparativism

To a large extent, the academic research done on the European pluralist constitutional system for the protection of fundamental rights has, either explicitly or (more often) implicitly, adopted a *sui generis* approach. While methodological choices have only seldom been openly discussed, in the ordinary *vorverständnis* of most legal scholars engaged in the field, the European multilevel architecture has been conceived as a special, unique, or exceptional system with no equivalents in history in the world. This, frequently hidden, pre-conception of the European system as a *sui generis* case, has largely shaped analytical and theoretical interpretations of the system, fostering the idea that only *ad hoc* tailored theoretical clothes can fit the European body.

In an explicit analysis of the methodological issues at stake here, Matej Avbelj, for example, offers a thought-provoking argument in favour of an autonomous, special narrative about European constitutionalism, criticizing both the intellectual trap of a statist paradigm of thought as well as the pitfalls of comparative methodology.⁷⁰ In his view, indeed, comparative constitutionalism can have only an epistemologically negative effect on the discourse about European integration (creating distorted presumptions and fostering negative self-fulfilling prophecies). Hence, it would instead be “desirable to develop a constitutional narrative that would be freed of the inherent statist underpinnings to make it fit the *special*, we would claim, pluralist nature of European integration”⁷¹ and methodologically autonomous from the deceptive examples of other constitutional systems on which a comparative method could draw.

In the general constitutional law literature, however, ideographic methodological approaches such as *sui generis* have come under increased fire from students of comparative law. Indeed, (just as has happened in other sectors of legal science) a widespread awareness seems to have recently emerged among constitutional lawyers about the manifold advantages of

⁷⁰ M. Avbelj, “The Pitfalls of (Comparative) Constitutionalism for European Integration”, Eric Stein Working Paper 1 (2008).

⁷¹ *Ibid.*, p. 22 (emphasis added).

the comparative method.⁷² As has been highlighted, the comparative method, on the one hand, is the most effective cognitive instrument to understand, by underscoring the commonalities and diversities between cases, the structures and functions of juridical systems.⁷³ On the other hand, it is an extremely powerful method to explicate the dynamics and processes that characterize a specific system and to illuminate those structural regularities that would otherwise pass unnoticed.⁷⁴

The comparative method has also been identified as a valuable tool to supply models in the perspective of legal reforms and to understand transformations in the law.⁷⁵ Needless to say, however, comparison as a method is *prima facie* indifferent to the outcome of its analysis. The purpose of the comparative method is not to prove convergence or similarities between the cases studied: instead, it may well reach the conclusion that the systems compared are different and divergent, and that solutions prevailing in one jurisdiction cannot or should not be exported into others. Hence, although the circulation of constitutional ideas is certainly an important task of the comparative method,⁷⁶ its primary purpose is descriptive rather than prescriptive and as such it aims at enhancing scientific knowledge rather than advising legal reforms.

Constitutional scholarship, otherwise, has defined with growing precision the principles which should guide case-selection in comparative law.⁷⁷ In this regard, it has been underlined

⁷² Cf. G. Samuel, "Taking Method Seriously", 2 *Journal of Comparative Law* (2007), p. 94; L. Zucca, "Montesquieu, Methodological Pluralism and Comparative Constitutional Law", 5 *European Constitutional Law Review* (2009), p. 481.

⁷³ Cf. R. David and C. Jauffret-Spinozi, *Les grands systèmes de droit contemporains* (Dalloz, Paris, 2002, 11th ed.); L. Pegoraro, "Introduzione al diritto pubblico comparato", in L. Pegoraro et al. (eds.), *Diritto Pubblico Comparato* (Giappichelli, Torino, 2004), p. 1.

⁷⁴ Cf. R. Sacco, *Introduzione al diritto comparato* (Utet, Torino, 2001, 5th ed.), p. 12; Id., "Legal Formants: a Dynamic Approach to Comparative Law – Part I", 39 *American Journal of Comparative Law* (1991), p. 1 and "– Part II", 39 *American Journal of Comparative Law* (1991), p. 343.

⁷⁵ Cf. A. Watson, "Comparative Law and Legal Change", 37 *Cambridge Law Journal* (1978), p. 313; A. Pizzorusso, *Corso di Diritto Comparato* (Giuffrè, Milan, 1983).

⁷⁶ Cf. S. Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law", in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (CUP, Cambridge, 2006), p. 1; V. Jackson, *Constitutional Engagements in a Transnational Era* (OUP, Oxford, 2010), ch. 9.

⁷⁷ Cf. R. Hirshl, "The Question of Case Selection in Comparative Constitutional Law", 53 *American Journal of Comparative Law* (2005), p. 125 who distinguishes between the 'most similar cases' logic of comparison, the 'most different cases' logic of comparison, the 'prototypical case' logic of comparison and the 'most difficult case' logic

how the value of the comparative assessment and its practical significance in shaping policy reforms increases with the increase of the structural similarities between the considered variables.⁷⁸ At the same time, however, for a comparative assessment to take place, there is no need for a perfect identity between the systems to be examined.⁷⁹ Indeed, while the existence of structural similarities between the legal systems to be compared might be a helpful condition to draw practical conclusions from the comparison, by no means a comparison requires an absolute parallelism between the cases to be compared.⁸⁰

Aware of the virtues of the comparative method, several European constitutional lawyers have maintained that any research that focuses on the European multilevel system should resort to a comparative methodology and also benefit, if possible, from the lessons that can be learnt from other legal systems.⁸¹ According to this ‘comparativist’ view, in fact, the European system is not a unique case, and there is more to gain than to lose from comparing it with other polities sharing its pluralist constitutional features.⁸²

Interestingly, the legal comparative approach in the study of European constitutionalism was quite widespread till the 1980s, but it later “fell into a medieval slumber”,⁸³ to be replaced

of comparison. See also M. Tushnet, “Some Reflections on Method in Comparative Constitutional Law”, in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (CUP, Cambridge, 2006), p. 67.

⁷⁸ This is what Hirshl, *supra* note 77, p. 133 in his systemic categorization of the typologies of comparison calls the ‘most similar cases’ logic of comparison.

⁷⁹ Halberstam, *supra* note 63, p. 336.

⁸⁰ Cf. e.g. C. Schönberger, “European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism”, 19:1 *European Review of Public Law* (2007), p. 61, 65 who highlights how “a comparison does not have to be based on the assumption of a complete identity of development. Its task is not to predict the future but to enlighten the present.”

⁸¹ Cf. e.g. S. Boom, “The European Union After the *Maastricht* Decision: Will Germany Be the “Virginia of Europe”?”, 43 *American Journal of Comparative Law* (1995), p. 177; J. Cohen, “The European Preliminary Reference and US Supreme Court Review of State Courts Judgments: A Study in Comparative Judicial Federalism”, 44 *American Journal of Comparative Law* (1996), p. 421.

⁸² Cf. A. Sbragia, “Thinking about the European Future: The Use of Comparison”, in A. Sbragia (ed.), *Euro-Politics. Institutions and Policymaking in the “New” European Community* (Brookings Institution, Washington DC, 1992), p. 257; M. Tushnet, “Conclusion”, in M. Tushnet (ed.), *Comparative Constitutional Federalism. Europe and America* (Greenwood Press, New York, 1990), p. 139. On the caveats that needs to be considered when comparing the EU cf. also R. Dehousse, “Comparing National and EC Law: the Problem of the Level of Analysis”, 42 *American Journal of Comparative Law* (1994), p. 761.

⁸³ R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (OUP, Oxford, 2009), p. 3 nt. 12.

by a *sui generis* narrative.⁸⁴ Recently, however, comparative lawyers have gained a new interest in European studies and have powerfully challenged the weak methodological assumptions of the *sui generis* scholarship.⁸⁵ As Robert Schütze has convincingly argued, indeed, “there are serious problems with the *sui generis* argument.”⁸⁶ Firstly, such an approach lacks explanatory value. In addition, it is only able to describe the European system in negative terms and, by being unable to provide any external standard, it fails to offer an adequate benchmark to appreciate the transformations of the European human rights architecture.

More importantly, however, comparative lawyers have persuasively claimed that the *sui generis* argument is historically unfounded, since the European architecture as a compound system characterized by the existence of overlapping sites of authorities – each also endowed with institutions and practices for the protection of human rights, is in no way unique, special or exceptional and, rather, appears comparable with the constitutional structures of other polities, namely those governed by the principle of federalism.⁸⁷ As several scholars have highlighted, Europe is under many dimensions (a foundational, an institutional and a functional one) a federal-like arrangement and can be usefully compared with other federal constitutional systems.⁸⁸ This methodological debate represents a fertile intellectual humus from which to

⁸⁴ A prominent example of this has been professor J.H.H. Weiler who, despite being one of the front runner of a comparative approach to the study of Europe – cfr. his contribution to M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds.) *Integration Through Law: Europe and the American Federal Experience, Volume 1, Book 1* (de Gruyter, Berlin, 1986), p. 3 – in recent times has become a strong supporter of the *sui generis* argument. Cf. J.H.H. Weiler, “Federalism Without Constitutionalism: Europe’s *Sonderweg*”, in K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, Oxford, 2001), p. 54.

⁸⁵ Cf. e.g. L.C. Backer, “The Extra-National State: American Confederate Federalism and the European Union”, 7 *Columbia Journal of European Law* (2001), p. 173; E. Young, “Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism”, 77 *New York University Law Review* (2002), p. 1612.

⁸⁶ Schütze, *supra* note 83, p. 59.

⁸⁷ Cf. Halberstam, *supra* note 63, p. 348; Torres Pérez, *supra* note 3, p. 72 and in much detail section 3 *infra*. But cf. also D. Halberstam, “Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights”, 5:1 *International Journal of Constitutional Law* (2007), p. 166.

⁸⁸ Cf. Schütze, *supra* note 83, p. 47 *et seq.* Cf. also L. Friedman Goldstein, *Constituting Federal Sovereignty. The European Union in Comparative Context* (Johns Hopkins University Press, Baltimore, 2001) and M. Rosenfeld, “The European Treaty-Constitution and Constitutional Identity: A View from America”, 3:2&3 *International Journal of Constitutional Law* (2005), p. 316.

depart to fulfil Daniel Elazar's plea for a creative reconsideration of contemporary (European) legal reality.⁸⁹

3. A 'neo-federalist' perspective

In this section I attempt to build on the theoretical and methodological insights presented in the previous section and to advance a perspective on the European multilevel system of fundamental rights which – for labelling purposes – I will call 'neo-federalist'. This perspective fits within a pluralist understanding of the European architecture, as theorized by constitutional pluralism. However, it rejects the diffused and often unconscious presumptions of *sui generis* in favour of a different methodological approach: by recurring to the comparative method, I argue that the European multilevel human rights system is not a unique and unprecedented arrangement. On the contrary, Europe reflects the main features of other federal systems for the protection of fundamental rights and can be meaningfully compared with these constitutional structures.

To this end, in the first subsection I explain why the use of the concept of 'federalism' in the legal discourse about fundamental rights in Europe has been traditionally regarded as problematic in theory and unworkable in practice and I suggest that, instead, the idea of 'neo-federalism' can prove far reaching. Whereas the classical European concept of 'federalism' is imbued with statist ambiguities, 'neo-federalism' offers an alternative understanding of this idea – largely based on a rediscovery of the constitutional tradition of the United States of America (US), and construes federalism as the organizing principle of pluralist, heterarchical constitutional arrangements. In this light, the theories of federalism as developed in the US and of constitutional pluralism as developed in Europe appear similar, since *inter alia* they both address the puzzle of protecting rights in divided power systems.

But if this is so, what is the added value of embracing a 'neo-federalist' perspective? Why is constitutional pluralism not sufficient in itself as a theory fitting for the European constitutional system? Is not the idea of 'neo-federalism' simply cosmetic, nominal change? In

⁸⁹ D. Elazar, "The State System + Globalization (Economic Plus Human Rights) = Federalism (State Federations Plus Regional Confederations)", 40 *South Texas Law Review* (1999), p. 555, 563.

subsection 2 I highlight what I consider as the major advantage of a ‘neo-federalist’ perspective on the European human rights architecture: namely, comparative methodology. Whereas, in fact, most versions of the theory of constitutional pluralism are methodologically *sui generis*, ‘neo-federalism’ exploits to its full potential the analytical and heuristic virtues of the comparative method and builds on a strong and consolidated theory of fundamental rights. As I argue, the European multilevel architecture can be compared with other federal systems for the protection of fundamental rights, and when placed in a comparative context, it can also be better understood.

3.1. *Rediscovering federalism*

European legal and political discourse has traditionally been frightened by the use of the “F” word. The word ‘federalism’ had been carefully avoided in the language of EU primary law and, albeit with remarkable exceptions, scholars addressing the EU constitutional structure have only reluctantly referred to it in their research.⁹⁰ But what is the trouble with the concept of ‘federalism’ in Europe and why is there so much fuss about it? As argued by Tim Koopmans some twenty years ago, a good deal of the answer lies in the confusion which hopelessly characterizes the debate about federalism in contemporary Europe.⁹¹

The concept of federalism has significantly evolved over time, acquiring different meanings, from its appearance in the vocabulary of political philosophy in XVI century Europe, through its re-invention in XVIII century America, up to its revival in the modern and

⁹⁰ This is true especially for European academics: on the contrary, American scholars (for the reasons that will be explicated below), have traditionally been comfortable in resorting to ‘federalist’ ideas to make sense of the European constitutional system. Cf. e.g., G. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States”, 94 *Columbia Law Review* (1994), p. 332; D. Elazar, “The United States and the European Union: Models for Their Epochs”, in R. Howse and K. Nicolaidis (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, Oxford, 2001), p. 31. For examples of other comparative approaches to the EU system cf. instead S. Shastri, “Lessons for the European Community from the Indian Experience with Federalism”, 17 *Hastings International and Comparative Law Review* (1994), p. 633 (comparing Europe and India).

⁹¹ T. Koopmans, “Federalism: The Wrong Debate”, 29 *Common Market Law Review* (1992), p. 1047.

contemporary world.⁹² Nevertheless, since the XIX century, European public lawyers (with the exception of the Swiss⁹³) have considered ‘federalism’ simply as a theory for the political organization of the *state* and as the technical device to decentralize competences within a single, hierarchical constitutional system.⁹⁴ ‘Classical’ European federalist thought, in other words, has traditionally suffered from a sovereigntist, statist bias, since federalism has conventionally been equated to a purely national phenomenon.⁹⁵

This frame of mind has largely influenced those scholars who have pioneered a federalist vision of Europe – what I like to call the ‘classical federalists’.⁹⁶ In the last 50 years, indeed, the acolytes of the ‘classical federalism’ school have argued that Europe should strive to overcome the differences between the member states and become a true federal *state*.⁹⁷ This view, however, is naive and has been criticized in both sovereigntist and pluralist terms. Hence, several authors have questioned the possibility of thinking of a EU federal state – let alone of realizing it,⁹⁸ while others have advanced an even more compelling argument: By being state-biased, indeed, classical federalist thinking falls into the same theoretical trap in which ‘sovereigntist’

⁹² Cf. D. Elazar, *Exploring Federalism* (University of Alabama Press, Tuscaloosa, 1987); K. Lenaerts, “Constitutionalism and the Many Faces of Federalism”, 38 *American Journal of Comparative Law* (1990), p. 205; R. Watts, *Comparing Federal Systems in the 1990s* (Queen’s University, Kingston, 1996); V. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation Press, New York, 1999), p. 789; O. Beaud, *Théorie de la fédération* (PUF, Paris, 2007).

⁹³ See *infra* text accompanying notes 100 & 137.

⁹⁴ Schütze, *supra* note 83, p. 31.

⁹⁵ Cf. R. Howse and K. Nicolaidis, “Introduction: The Federal Vision, Levels of Governance, and Legitimacy”, in R. Howse and K. Nicolaidis (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, Oxford, 2001), p. 1 and C. Pinelli, *Il momento della scrittura* (Il Mulino, Bologna, 2002), p. 30.

⁹⁶ Cf. e.g. A. Spinelli, *Il modello costituzionale Americano e i tentativi di unità europea* (1957). A. Glencross, “Altiero Spinelli and the Idea of the US Constitution as a Model for Europe; the Promises and Pitfalls of an Analogy”, 47 *Journal of Common Market Studies* (2009), p. 287 has emphasized how the ‘Statist’ conception of the European ‘classical federalists’ was fostered by a wrong understanding of the American federal tradition, on which see *infra* the text accompanying notes 105 & 106.

⁹⁷ For a classical view cf. G.F. Mancini, “Europe: The Case for Statehood”, 4:1 *European Law Journal* (1998), p. 29 and, more recently, U. Morelli, “La Costituzione europea: il modello federalista”, in G. Zagrebelsky (ed.), *Diritti e Costituzione nell’Unione Europea* (Laterza, Roma, 2003), p. 69.

⁹⁸ Cf. e.g. D. Grimm, “Treaty or Constitution? The legal basis of the European Union after Maastricht”, in Erik O. Eriksen et al. (eds.), *Developing a Constitution for Europe* (Routledge, London, 2004), p. 69 advancing ideas already formulated in Id., “Does Europe Need a Constitution?”, 1 *European Law Journal* (1995), p. 282.

thought is caught, because it is unable to understand and appreciate the advantages of a pluralist setting in which the statist features of sovereignty have been overcome.⁹⁹

If these statist ambiguities imbued in the European tradition of ‘federalism’ can explain the scepticism (or fear) with which the concept has been rejected at the analytical and normative level in Europe, one needs to be aware that this view is not unrivalled. In the constitutional experiences of other systems – namely the US and Switzerland, federalism has traditionally represented something quite different, being originally conceived as a theory of governance for a *union of states*.¹⁰⁰ In the view of the American founders in particular,¹⁰¹ federalism was conceived as the technical device for the creation of an institutional structure lying somewhere in between a purely national and international phenomenon.¹⁰² Needless to say, through a number of constitutional moments,¹⁰³ the US (like Switzerland) has over time developed into a state-like structure. Despite the significant centralizing trend, however, the federalist idea has survived in the US for the ensuing two centuries, and is still today reflected *inter alia* in the compound architecture for the protection of fundamental rights.¹⁰⁴

In the US tradition, thus, federalism is regarded as a normative theory and as an institutional device rejecting a hierarchical and monist constitutional arrangement and dividing and distributing sovereignty between competing levels of authority and institutions in it.¹⁰⁵ Seen from this perspective, therefore, federalism must be regarded a *species* of the *genus*

⁹⁹ Cf. J.H.H. Weiler, “Europe: The Case Against the Case for Statehood”, 4:1 *European Law Journal* (1998), p. 43 and R. Toniatti, “Forma di Stato comunitario, sovranità e principio di sopranazionalità: una difficile sintesi”, *Diritto Pubblico Comparato Europeo* (2003), p. 1552.

¹⁰⁰ Friedman Goldstein, *supra* note 88, p. 10; Young, *supra* note 85, p. 1612. *But see* also A.R. Amar, “Of Sovereignty and Federalism”, 96 *Yale Law Journal* (1987), p. 1425.

¹⁰¹ Cf., of course, J. Madison, A. Hamilton and J. Jay, *The Federalist Papers* (1788).

¹⁰² Elazar, *supra* note 90; Schütze, *supra* note 83, p. 4. Cf. also B. Ackerman, “The Rise of World Constitutionalism”, 83 *Virginia Law Review* (1997), p. 771, 776 who affirms that federalism, that is “the (uncertain) transformation of a treaty into a constitution, is at the center of the European Union today; it was at the center of the American experience between the Revolution and the Civil War.”

¹⁰³ Cf. B. Ackerman, *We the People (Volume 2): Transformations* (Harvard University Press, Cambridge, 2000).

¹⁰⁴ Cf. H. Scheiber, “Redesigning the Architecture of Federalism – An American Tradition”, 14 *Yale Law & Policy Review* (1996), p. 227 and R. Schapiro, *Polyphonic Federalism. Toward the Protection of Fundamental Rights* (University of Chicago Press, Chicago, 2009).

¹⁰⁵ Cf. J. Goldsworthy, “The Debate About Sovereignty in the United States: a Historical and Comparative Perspective”, in N. Walker (ed.), *Sovereignty in Transition* (Hart, Oxford, 2003), p. 423.

constitutional pluralism,¹⁰⁶ that is, as a “theory on levels of government activity generally ... dissociated from the notion of the State.”¹⁰⁷ As has been convincingly demonstrated, indeed, “legal pluralism provides the conceptual background to all modern federal thought”¹⁰⁸ and “federalism emphasizes constitutionalized pluralism and power sharing as the basis of a truly democratic government.”¹⁰⁹ From this point of view, the theories of federalism and constitutional pluralism appears as significantly akin.¹¹⁰

In this vein, it is apparent how the ‘neo-federalist’ perspective embraced in this essay differs from the ‘classical federalism’ that has conventionally dominated European public discourse, by refusing the idea that the European system should evolve into a federal *state*.¹¹¹ On the basis of a fuller awareness of the US federal experience, and by ideally linking itself to *that* tradition of federalism, instead, ‘neo-federalism’ supports the vision of a pluralist European constitutional architecture.¹¹² In other words, by proposing a ‘neo-federalist’ approach, this paper

¹⁰⁶ R. Schütze, “Federalism as Constitutional Pluralism. ‘Letter from America’”, in M. Avbelj and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2011 forthcoming). Cf. also Halberstam, *supra* note 63, p. 327 who, as already noticed, speaks of ‘constitutional heterarchy’ to conceptualize the federalist and pluralist constitutional experiences.

¹⁰⁷ Koopmans, *supra* note 91, p. 1050.

¹⁰⁸ Schütze, *supra* note 83, p. 15.

¹⁰⁹ D. Elazar, “Federalism, Diversity and Rights”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 1, 2.

¹¹⁰ Cf. also E. Stein, “Uniformity and Diversity in a Divided-Power System: the United States’ Experience”, 61 *Washington Law Review* (1986), p. 1081 now reprinted in *Thoughts from a Bridge. A Retrospective of Writings on New Europe and American Federalism* (University of Michigan Press, Ann Arbor, 2000) p. 309. Most European scholars however seem to have missed the nature of American federal thought. Cf. e.g. Avbelj, *supra* note 70, p. 23: where he affirms that “the present EU constitutional narrative is epistemologically rooted in the American federal constitutional experience and it therefore promotes a monist, hierarchical, functionally state-like vision of integration” – failing to understand that federalism in the US constitutional experience is something quite different from a ‘state-like’ constitutional experiment: this is rather what European classical doctrine thinks about federalism.

¹¹¹ Cf. K. Nicolaidis, “Conclusion: the Federal Vision Beyond the Federal State”, in K. Nicolaidis and R. Howse (eds.), *The Federal Vision. Legitimacy and Level of Governance in the United States and the European Union* (OUP, Oxford, 2001), p. 439.

¹¹² Cf. Maduro, *supra* note 65, p. 522 who argues that “in a multi-level or federal system it is the vertical or federal conception of constitutionalism (as a form of limited government at the State and federal level) that requires the issue of ‘who decides who decides’ to be left unresolved.”

aims at rediscovering federalism in Europe and at making it a powerful prism through which to assess the European multilevel system of human rights protection.¹¹³

Given the similarities between the US tradition of federalism and the European theory of constitutional pluralism, however, one may ask what the added value of a ‘neo-federalist’ perspective on the European multilevel system of fundamental rights protection is? The answer – I argue – is largely methodological. While ‘neo-federalism’ fits within the constitutional pluralism paradigm, it builds on the much consolidated theory of federalism by fully exploiting the virtues of a comparative methodology. As has been stated, “it is the comparative method which – with all due caution – [allows] not only to study the contested nature of the European Union but also to go well beyond the historical and legal studies by identifying some of the *limits* of pluralism, ambiguity and contestedness.”¹¹⁴

Contrary to a widespread assumption, Europe is not the only system which has “had to combine a respect for rights with the requirements of effective government and to apportion responsibility for defining and protecting rights between general and constituent governments.”¹¹⁵ Rather, Europe, as a pluralist system, is facing the same challenges as other federal systems and, “to a considerable extent, the problems these federal nations face in reconciling federalism and rights.”¹¹⁶ The complexities of a pluralist constitutional system of human rights protection are quite new in Europe:¹¹⁷ on the contrary, they have been dealt with for a much longer time (and still continue to be dealt with) by other federal polities. From this

¹¹³ On the possibilities and limitations of comparative federalism in general cf. V. Jackson, “Comparative Constitutional Federalism and Transnational Judicial Discourse”, 2:1 *International Journal of Constitutional Law* (2004), p. 91 and C. Saunders, “Constitutional Arrangements of Federal Systems”, 25:2 *Publius* (1995), p. 61.

¹¹⁴ D.J. Mann, “*We, the People*” versus “*We, the Peoples*” – *Nature of the Union Debates Compared*, PhD thesis, Department of Social and Political Sciences, European University Institute, p. 38 (of the draft paper, on file with the author). Cf. also Id., “Ein Gebilde *sui generis*? Die Debatte um das Wesen der EU im Spiegel der „Nature of the Union“-Kontroverse in den USA”, in F. Decker and M. Höreth (eds.), *Die Verfassung Europas. Perspektiven des Integrationsprojekts* (VS-Verlag, Wiesbaden, 2009), p. 319.

¹¹⁵ E. Katz and A. Tarr, “Introduction”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. xv.

¹¹⁶ *Ibid.*

¹¹⁷ Cf. K. Lenaerts, “Federalism and Rights in the European Community”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 139; D. Howard, “Protecting Human Rights in a Federal System”, in M. Tushnet (ed.), *Comparative Constitutional Federalism. Europe and America* (Greenwood Press, New York, 1990), p. 115.

point of view, comparative “federalism provides one of the few theories which makes the actual developments understandable”¹¹⁸ and it is therefore worthwhile exploring it.

3.2. *Putting the European system in comparative context*

In light of the theoretical underpinnings sketched in the previous section, and by following a ‘most similar cases’ logic of comparison, it may be particularly appropriate to compare the European multilevel human rights architecture with the federal systems for the protection of fundamental rights existing in the US and Switzerland.¹¹⁹ Otherwise, it shall be remarked that such comparison is appropriate, regardless of the state-like nature that the constitutional systems of the US and Switzerland have over time increasingly acquired. From the point of view which is of interest for the comparison, in fact, both systems are still empirically characterized by the existence of a federal, multilevel architecture for the protection of human rights, analogous to the European one.

A *first* example of a federal system for the protection of fundamental rights is that of the *United States of America* (US).¹²⁰ After the faulty and unsuccessful experience of the Articles of Confederations, the 1787 US Constitution established for the thirteen independent American

¹¹⁸ Koopmans, *supra* note 91, p. 1051.

¹¹⁹ On the ‘most similar cases’ logic of comparison *cf.* Hirshl, *supra* note 77, p. 133. Of course, the cases to be selected for a comparative assessment could be different, instead, if the purpose of the research work was not to analyze the protection of fundamental rights but, say, the structure of the public administration and the exercise of public powers. For a thorough comparison of the European administrative system with the experiences of modern multinational empires *cf.* S. Cassese, “Che tipo di potere pubblico è l’Unione Europea?”, *Quaderni fiorentini per la storia del pensiero giuridico* (2002), p. 109.

¹²⁰ Torres Pérez, *supra* note 3, p. 72; Halberstam, *supra* note 63, p. 348. For an early comparison of the European and US systems of human rights protection *cf.* J. Frowein, S. Schulhofer and M. Shapiro, “The Protection of Fundamental Rights as a Vehicle of Integration”, in M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience, Volume 1, Book 3* (de Guyter, Berlin, 1986), p. 231. When L. Favoreu, “I garanti dei diritti fondamentali europei”, in G. Zagrebelsky (ed.), *Diritti e Costituzione nell’Unione Europea* (Laterza, Roma, 2003), p. 247, 255 criticizes the existence of multiple layers of fundamental rights protection in Europe by saying that “although the protection of fundamental rights in the US is not perfect, it cannot be denied that in that legal system a high standard of protection is achieved only by mean of one national catalogue of rights” (my translation) he obviously demonstrates his poor knowledge of the US federal constitutional system of fundamental rights protection. *See also infra* text accompanying notes 132 & 147.

states a constitutional system in which power was institutionally divided both vertically¹²¹ – between several states and a federal authority, and horizontally¹²² – among the various branches of the federal government (following a model that reproduced what was in force at that time in each of the several founding states and that would later be reproduced also in each of the new states).

In its original structure,¹²³ the US system was endowed with two strictly separate mechanisms for the protection of fundamental rights.¹²⁴ Each state of the federation had its own constitutional text codifying fundamental rights and entrusting the state’s judiciary to enforce it. A federal Bill of Rights – drafted in 1791 and attached as the first ten amendments to the 1787 Constitution (which itself included only few minor human rights provision) – then bound the action of the federal government in its spheres of competence. The federal Bill of Rights was however irrelevant and inapplicable in the states¹²⁵ – some of which still, in fact, even allowed slavery.¹²⁶

After the Civil War, a major constitutional transformation occurred in the US with the adoption in 1868 of a new amendment to the federal Constitution.¹²⁷ The XIV amendment – by stating that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

¹²¹ On the vertical separations of powers in the US constitutional architecture *cf.* G. Gunther and K. Sullivan, *Constitutional Law* (Foundation Press, New York, 1997, 13th ed.), p. 87; R. Sadler, “The Constitution and the American Federal System”, 55 *Wayne Law Review* (2009), p. 1486.

¹²² On the horizontal separations of powers in the US constitutional architecture *cf.* L. Tribe, *American Constitutional Law* (Foundation Press, New York, 2000, 3rd ed.), p. 118; B. Clark, “Separation of Powers as a Safeguard of Federalism”, 79 *Texas Law Review* (2001), p. 1321.

¹²³ Compare the historical accounts of B. Ackerman, *We the People (Volume 1): Foundations* (Harvard University Press, Cambridge, 1991) with A.R. Amar, *America’s Constitution: A Biography* (Random House, New York, 2005).

¹²⁴ J. Yarbrough, “Federalism and Rights in the American Founding”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 57.

¹²⁵ *Cf.* the decision of the US Supreme Court in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) and A.R. Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press, New Haven, 2000).

¹²⁶ On the problem of slavery and for an account of the infamous decision of the US Supreme Court in *Dred Scott v. Sandford*, 19 US (How.) 393 (1857) *cf.* P. Finkelman, *Dred Scott v. Sandford. A Brief History with Documents* (Bedford/St.Martin’s, Boston, 1997).

¹²⁷ *Cf.* W. Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Harvard University Press, Cambridge, 1988).

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” – extended the application of the federal Bill of Rights to the states, empowering the three branches of the federal government to ascertain and remedy possible violations by the states of the fundamental rights recognized in the federal Constitution.¹²⁸

The so-called ‘incorporation’ of the federal standards of fundamental rights protection within the legal orders of the states was a gradual and contested process¹²⁹ that took more than a century and was mainly achieved, after WWII, through the jurisprudence of the US Supreme Court.¹³⁰ Nonetheless, despite the increasing harmonization of the protection of fundamental rights in the US under the aegis of the federal government, the several states of the US maintained their own systems for the protection of fundamental rights.¹³¹ In addition, given the ample range of competences that were – and are – entrusted to the states, these remained – and still are largely today – relevant loci in which the protection of fundamental rights takes place.¹³²

¹²⁸ Cf. J.P. Stevens, “The Bill of Rights: A Century of Progress”, in G. Stone et al. (eds.), *The Bill of Rights in the Modern State* (University of Chicago Press, Chicago, 1992), p. 13 and M. Zuckert, “Toward a Corrective Federalism: the United States Constitution, Federalism and Rights”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 75. For a detailed analysis of the due process clause of the XIV amendment cf. instead J. Orth, *Due Process of Law. A Brief History* (University of Kansas Press, Lawrence, 2003).

¹²⁹ Two major doctrines of incorporation faced each other in the last century. A first one – the so called doctrine of selective incorporation (mainly advocated by US Supreme Court Justice Brennan) – favoured the incorporation in the law of the States (only) of specific rights contained in the federal Bill of Rights. A second one – the so called doctrine of total incorporation (mainly advocated by US Supreme Court Justice Black) – supported the incorporation of all the federal Bill of Rights in the law of the States. A third doctrine (advocate by US Supreme Court Justice Frankfurter), finally, was essentially against the incorporation of the federal Bill of Rights, except in extraordinary circumstances for reasons of fundamental fairness. On this debate cf. Amar, *supra* note 125, p. 218 *et seq.*

¹³⁰ Cf. R. Cortner, *The Supreme Court and the Second Bill of Rights. The Fourteenth Amendment and the Incorporation of Civil Liberties* (University of Wisconsin Press, Madison, 1981). On the role of the other branches of the federal government in ensuring the application of the federal Bill of Rights in the law of the states cf. however Halberstam, *supra* note 63, p. 349.

¹³¹ Cf. W. Brennan, “State Constitutions and the Protection of Individual Rights”, 90 *Harvard Law Review* (1977), p. 489; S. Pollock, “State Constitutions as Separate Sources of Fundamental Rights”, 35 *Rutgers Law Review* (1983), p. 707.

¹³² Cf. A. Tarr, “State Supreme Courts in American Federalism”, in B. Caravita di Toritto et al. (eds.), *Judge Made Federalism? The Role of Courts in Federal Systems* (Nomos, Baden-Baden, 2009), p. 192 (analyzing the jurisprudence of the Massachusetts Supreme Judicial Court in introducing a right to marriage for gay couples in the state of Massachusetts).

After WWII, the US was also closely involved in the process of constitutionalization of human rights at both the regional and the international level,¹³³ although it then refused to bind itself to such agreements.¹³⁴ Hence, at the regional level, the US has signed but not ratified the American Human Rights Convention, with the consequence that the Inter-American Human Rights Court has no jurisdiction over claims against the US. The US has signed the American Declaration of the Rights of Men (ADRM) and – being a member of the Organization of the American States, can be sued before the Inter-American Commission on Human Rights (IACommHR).¹³⁵ The ADRM-based review of the IACommHR is quite limited however, as it can only adopt non-binding recommendations which it is then left to the state whether to enforce.¹³⁶

A *second* example of federal system for the protection of fundamental rights is that of *Switzerland*. The Swiss constitutional structure developed from the Middle Ages through a series of covenantal networks among sovereign and independent cantons.¹³⁷ During the XIX century, a more stable framework of cooperation was established with the adoption of the 1848 and 1874 Constitutions. This latter text, however, did not contain a Bill of Rights, but only a number of scattered human rights provisions.¹³⁸ Fundamental rights, therefore, were essentially protected on the basis of cantonal law and “the function of the federal government as guarantor of individual

¹³³ On the leading role of the US in establishing international human rights institutions *cf.* L. Henkin, *The Rights of Men Today* (Westview, Boulder, 1978) and M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, New York, 2001).

¹³⁴ On the position of the US *vis-à-vis* international human rights institutions *compare* P. Sands, *Lawless World. America and the Making and Breaking of Global Rule* (Viking, London, 2005) *with* J. Rubinfeld, “The Two World Orders”, in G. Nolte (ed.), *European and US Constitutionalism* (CUP, Cambridge, 2005), p. 280.

¹³⁵ On the IACommHR *cf.* R. Goldman, “History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights”, 31 *Human Rights Quarterly* (2009), p. 856.

¹³⁶ *Cf.* critically H. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law Politics Morals* (OUP, Oxford, 2007, 3rd ed.), p. 1029 *et seq.*

¹³⁷ D. Elazar, “Communal Democracy and Liberal Democracy: An Outside Friend’s Look at the Swiss Political Tradition”, 23 *Publius* (1993), p. 3.

¹³⁸ J. Müller, “Allgemeine Bemerkungen zu den Grundrechten”, in D. Thürer et al. (eds.), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess, Zürich, 2001), p. 621, 623.

liberty was also subjected to the doctrine of ‘subsidiarity’: it was to be exercised as a last resort only and thus with caution.”¹³⁹

During the XX century, the Swiss system for the protection of fundamental rights underwent several significant transformations.¹⁴⁰ On the one hand, “the fundamental rights catalogue of the Swiss Federal Constitution was supplemented step by step by the case law of the Federal Supreme Court concerning the unwritten fundamental rights and the voluminous case law concerning the equal protection clause,”¹⁴¹ which anticipated the introduction of a detailed Bill of Rights in the new Swiss Constitution of 1999. On the other hand, “Switzerland c[ould] not escape the influence of the international legal revolution.”¹⁴² Indeed, in 1974 Switzerland became a party to the ECHR, and because of the openness of its legal system *vis-à-vis* international human rights law, the ECHR has ever since been considered as directly binding in the federal and cantonal domains.¹⁴³

The Federal Supreme Court, in particular, established the predominance of the ECHR over national law, by equalizing the former to the Constitution and by taking into account the conventional guarantees for the concretization of constitutional rights. Hence, the ECHR has become “an essential element of the Swiss legal order.”¹⁴⁴ Moreover, the predominance of the ECHR within the Swiss legal order has allowed the Federal Supreme Court to circumvent the limitations that the Constitution placed on its power of judicial review of federal legislation: As a consequence, nowadays, the Federal Supreme Court is *de facto* empowered to declare the incompatibility of a federal statute with constitutional and international law, forcing the legislature to bring Swiss law in conformity with them.¹⁴⁵

¹³⁹ M. Frenkel, “The Communal Basis of Swiss Liberty”, 23 *Publius* (1993), p. 61, 68.

¹⁴⁰ Cf. T. Fleiner, “Recent Developments of Swiss Federalism”, 32 *Publius* (2002), p. 97.

¹⁴¹ D. Thurnherr, “The Reception Process in Austria and in Switzerland”, in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights* (OUP, Oxford, 2008), p. 311, 367.

¹⁴² Frenkel, *supra* note 139, p. 69.

¹⁴³ Cf. N. Michel, “L’imprégnation du droit étatique par l’ordre juridique international”, in D. Thürer et al. (eds.), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess, Zürich, 2001), p. 63.

¹⁴⁴ Thurnherr, *supra* note 141, p. 368.

¹⁴⁵ Cf. W. Kälin, “Verfassungsgerichtbarkeit”, in D. Thürer et al. (eds.), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess, Zürich, 2001), p. 1167.

This short description shows how both the US and the Swiss federal fundamental rights architectures – like the European one, are multilevel systems based on the existence of overlapping and intertwining layers of human rights norms and institutions.¹⁴⁶ In the US, a “dual system of constitutional protections”¹⁴⁷ is in force, with both states and federal Constitutions and with states as well as federal Bills of Rights. The US, otherwise, while systematically refusing to subject itself to the external scrutiny of a human rights institution as pervasive as the ECHR, is still bound by the (albeit weak) ADRM. In Switzerland, instead, “three levels of written fundamental rights”¹⁴⁸ are at play, comprising cantonal laws, the Federal Constitution and the ECHR.

At the same time, the US and Swiss historical and constitutional examples prove how – to quote Aida Torres Pérez – “the tension between uniformity and diversity is endemic to any divided power system” of fundamental rights protection.¹⁴⁹ Scholars of federalism have outlined the competing interests at stake in federal human rights systems.¹⁵⁰ On the one hand, federalism is functional to the values of self-government, increases the restraints on the concentration and abuse of powers, fosters civic education and participation, making government more accountable. In addition, it favours local solutions to local problems, allows constituent units to work as laboratories, and creates the conditions for a continuous referendum on fundamental principles. On the other hand, federalism is also essential to overcome local tyrannies and injustices, to guarantee equal justice under the law and to build a sense of nationhood and identity.

¹⁴⁶ Torres Pérez, *supra* note 3, p. 73.

¹⁴⁷ D. Toth Beasley, “Federalism and the Protection of Individual Rights: the American State Constitutional Perspective”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 101, 102.

¹⁴⁸ Thurnherr, *supra* note 141, p. 366.

¹⁴⁹ Torres Pérez, *supra* note 3, p. 70.

¹⁵⁰ Cf. D. Howard, “Does Federalism Secures or Undermines Rights?”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 11; M. Tushnet, “Federalism and Liberalism”, 4 *Cardozo Journal of International & Comparative Law* (1996), p. 329. Federalism instead, appears to be a rather neutral ideological concept: that is, federalism can be combined with both a politically ‘conservative’ and a politically ‘liberal’ view. Cf. E. Young, “Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror”, 69 *Brooklyn Law Review* (2004), p. 1277 and Id., “The Conservative Case for Federalism”, 74 *George Washington Law Review* (2006), p. 874.

Both the US and Switzerland have blended in historically different and evolving forms the above-mentioned values of diversity and uniformity: indeed, “the model of rights protection in federal compounds is always debated.”¹⁵¹ It seems therefore possible to classify federal systems for the protection of fundamental rights into a *continuum* from extremely decentralized structures, in which the function of rights’ protection at the central level is almost non-existent (as in the US prior to the enactment of the XIV amendment, or even more, prior to the enactment of the Bill of Rights; or in Switzerland under the aegis of the 1874 Constitution) to rather centralized structures. In these, despite the continuous importance of sub-national institutions for the protection of fundamental rights, an extremely important role is played by federal or even international norms and institutions (as, but with an important caveat, in both the contemporary US and Switzerland).¹⁵²

Comparing the historical and constitutional experiences of federal structures for the protection of fundamental rights such as the US and Switzerland can therefore prove extremely useful to understand the reality of the European multilevel system. It is only when placed in a comparative context that the European human rights architecture can be comprehensively and systematically understood. A comparative analysis, indeed, sheds light on the unexplored dynamics of the European system and offers a conceptual framework through which the legal developments taking place in Europe can be appreciated.

In conclusion, the ‘neo-federalist’ perspective propounded in this essay avoids the methodological weaknesses of the *sui generis* literature by offering a different, comparative-based, understanding of the European multilevel constitutional system for the protection of fundamental rights. By rediscovering a pluralist discourse of federalism and making a conscious

¹⁵¹ Torres Pérez, *supra* note 3, p. 71.

¹⁵² Cf. C. Fercot, “Diversity of Constitutional Rights in Federal Systems”, 4 *European Constitutional Law Review* (2008), p. 302. The caveat is that, contrary to a widespread presumption, sub-national constitutional norms and institutions still play a relevant role in the protection of fundamental rights both in the US and Switzerland cf. T. d’Alemberte, “Rights and Federalism: an Agenda to Advance the Vision of Justice Brennan”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 123 and R. Kägi-Diener, “Grundrechtsschutz durch die Kantone”, in D. Thürer et al. (eds.), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess, Zürich, 2001), p. 837.

and deliberate use of the comparative method, ‘neo-federalism’ embodies a valuable perspective to appreciate the relevant implications of the European fundamental rights architecture, identify the challenges it currently faces, and envision its possible future developments. The following two sections will be dedicated to this task.

4. The challenges of the European multilevel human rights system in a comparative perspective

The multilevel system for the protection of fundamental rights that has developed in the last 60 years in Europe is an extraordinary enterprise which has ensured the maintenance of peace and the blessing of liberty over the European continent for the longest time ever in history. As such, the rise in Europe of the impressive human rights architecture I described in section 1, well confirms the comparative lawyers’ claim that “federal systems have a better overall record of protecting rights than unitary systems have.”¹⁵³ Through the lenses of ‘neo-federalism’, however, it is possible to address some of the main challenges that derive from the European pluralist human rights system.

A pluralist architecture for the protection of fundamental rights generates constitutional dynamics that are largely unknown in traditional statist settings. Rather, the dynamics produced by the overlap and interplay between different sets of norms and institutions in Europe are akin to those at play in other federal human rights systems and can be better appreciated by employing a comparative approach, that is, by comparing the European architecture with the constitutional and historical experiences of other federal systems for the protection of fundamental rights.¹⁵⁴

¹⁵³ Katz and Tarr, *supra* note 115, p. xii. *Cf.* also J. Gardner, “In Search of Sub-National Constitutionalism”, 4 *European Constitutional Law Review* (2008), p. 325, 341.

¹⁵⁴ Several scholars have developed a comparative framework of analysis of the European fundamental rights system for *prescriptive purposes*, i.e. to advance a normative theory of adjudication: *cf.* Torres Pérez, *supra* note 3, p. 97 *et seq.* *Cf.* also M.P. Maduro, “Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism”, in J. Dunoff and J. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP, Cambridge, 2009), p. 356. This paper, instead develops a comparative framework of analysis essentially for *explanatory purposes*, i.e. to explicate what are the implications of a pluralist human rights architecture.

What are indeed the implications of a multilevel human rights architecture? In this section I claim that two major challenges emerge from the overlap and interplay between different layers of norms and institutions and I consider a couple of empirical examples to illustrate them. For labelling purposes I will define these dynamics as the challenge of ineffectiveness and the challenge of inconsistency.

As I claim in the first subsection – where I address the case of due process rights for individual and entities suspected of financing terrorism, a challenge of ineffectiveness arises whenever the overlap between national, supranational and international norms and the interplay between their respective institutions, generates dynamics of tension creating gaps and deficiencies in the protection of several fundamental rights.

As I maintain in the second subsection, instead – where I describe the case of voting rights for non-citizens, a challenge of inconsistency arises whenever the overlap between national, supranational and international norms and the interplay between their respective institutions generates dynamics of tension creating asymmetries and incoherencies in the protection of several fundamental rights.

Needless to say, this section does not argue that ineffectiveness and inconsistency should be regarded as the only implications of a multilevel system of human rights protection – much less does the section imply that, because of them, the European architecture should be regarded in negative terms. Quite the contrary: I have already emphasized how the European pluralist structure should, overall, be highly valued.

The analysis, however, focuses on these dynamics because it regards ineffectiveness and inconsistency as two of the major challenges to the successful operation of the European human rights system. Addressing them is therefore instrumental to the purpose of enhancing the European architecture. Comparative methodology, otherwise, highlights that analogous challenges have emerged in other federal systems for the protection of rights and that pluralist systems are endowed with the internal mechanisms to successfully face these challenges.

4.1. *Ineffectiveness*

An issue that has drawn much attention among European lawyers in recent times has been the question of due process rights for individuals and entities suspected of financing terrorism and arbitrarily subjected to a freeze of all their properties in application of global counter-terrorism measures. As is well known, in the wake of the terrorist attacks of 11 September 2001, the United Nations (UN) Security Council drafted several resolutions creating a black-list of natural and legal persons suspected of being involved in the financing of terrorism and compelling all states, including the EU member states, to freeze their financial assets.

In the European legal space, these individual and entities were left, for a long time, without judicial protection of their due process rights, despite the fact that due process rights are *de jure* recognized and enshrined in each layer of the European fundamental rights architecture. The UN counter-terrorism measures were implemented in Europe first through acts adopted by the member states in the framework of the EU Common Foreign and Security Policy (CFSP) and later via EC regulations. These regulations were then enforced in the national legal systems of the EU member states through legislative or administrative acts.

In the first cases raised against these EU counter-terrorism measures, the CFI refused to review the contested acts, arguing that their lawfulness was secured by the existence of a UN resolution.¹⁵⁶ These decisions, however, created a major lacuna in the protection of fundamental rights in the European architecture. While no remedy appeared available at the EU level, in fact, neither the national courts nor the ECtHR could step in and ensure the respect of the individual rights of the suspected terrorism financiers at least at the national or at the international level.

On the one hand, the institutional relationship between member states' courts and EU courts – with the well-consolidated principle that only EU courts can quash EU acts infringing EU fundamental rights,¹⁵⁷ prevented states' courts from reviewing the contested EC counter-terrorism measures. On the other, the lack of any formalized link between the EU and the ECHR

¹⁵⁶ Case T-306/01, *Yusuf & Al Barakaat International Foundation v. EU Council and Commission*, [2005] ECR II-3533. Cf. also Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649.

¹⁵⁷ Case 314/85 *Foto-Frost*, [1987] ECR 4199.

– coupled with the doctrine of judicial comity developed by the ECtHR in its *Bosphorus* ruling,¹⁵⁸ excluded the possibility of the ECtHR exercising any external review on the decisions of the EU courts.

Eventually, it was the intervention of the ECJ in the celebrated *Kadi* case¹⁵⁹ that re-established at the EU level an appropriate mechanism of redress for the individuals concerned. By overruling the decision of the CFI and subjecting the contested EC measure to strict scrutiny (despite the fact that the regulation was based on a UN resolution) for violation of due process rights of the suspected terrorists' financiers, the ECJ ensured the effectiveness of the protection of fundamental rights in the European multilevel architecture and partially anticipated, as I will underline below,¹⁶⁰ the innovations contained in the Lisbon Reform Treaty as well as the effects that are likely to derive from the accession of the EU to the ECHR.¹⁶¹

Analyzing this example in depth elsewhere,¹⁶² I have argued that the case of due process rights for suspected terrorists highlighted a challenge of ineffectiveness. This phenomenon is an unexpected consequence of the European multilevel constitutional architecture. Indeed, in Europe, as in other federal systems for the protection of fundamental rights, the existence of a plurality of human rights norms and institutions usually works to enhance the protection of fundamental liberties, since individuals whose rights have been violated can claim protection in multiple constitutional loci and resort to different mechanisms of redress.

As a matter of fact, nonetheless, there may be circumstances in which the existence of a multilevel system may generate critical dynamics: the practical interaction among the different

¹⁵⁸ *Bosphorus Hava Yollari Turizm v. Ireland*, ECHR (Grand Chamber) [2005], Application No. 45036/98.

¹⁵⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351.

¹⁶⁰ See *infra* section 5.1.

¹⁶¹ The question whether this result was achieved at the price of increasing the fragmentation of the international legal order is beyond the purpose of my work. On this issue compare G. de Burca, "The European Court of Justice and the International Legal Order After *Kadi*", Jean Monnet Working Paper 1 (2009) with S. Besson, "European Legal Pluralism After *Kadi*", 5:2 *European Constitutional Law Review* (2009), p. 237.

¹⁶² F. Fabbrini, "Judicial Review of United Nations Counter-Terrorism Sanctions in the European Multilevel System of Human Rights Protection. A Case Study in Ineffectiveness", in G. Martinico et al. (eds.), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Europa Law Publishing, Groningen, 2010), p. 147 *et seq.*

layers of the European architecture may create pressures and frictions which compress and neutralize human rights standards rather than enhance them. These dynamics occur, in particular, in those circumstances in which the overlapping of the several layers of norms and institutions ensuring respect for fundamental rights opens up, and leaves unaddressed, gaps in the protection of human rights.

In the example at hand, the gap in the protection of fundamental rights was generated by the initial unwillingness of the EU courts to provide a judicial remedy to the individuals and entities suspected of financing terrorism, coupled with the inability of courts at both the national and ECHR level to intervene due to the institutional constraints and the mutual deference regulating their inter-level cooperation. Other reasons, however, may also explain the emergence of similar shortcomings.

I call this situation the challenge of ineffectiveness, whereas by ineffectiveness I define the phenomenon that emerges when the substantive overlapping of norms or the functional interlinking of institutions operating at different layers of the European multilevel system of fundamental rights protection creates lacunae in the protection of human rights, that is produces tensions and deficiencies in the European human rights architecture which reduce or *tout court* hamper the protection of individual or social entitlements.

From this tentative definition of ineffectiveness at least two clarifying comments follow. First, not all gaps in the protection of fundamental rights arising in the European system generate an ineffectiveness. In a multilevel system, gaps in one level are usually filled in other levels. Ineffectiveness is a challenge emerging from the deficiencies of the European multilevel structure as a whole. Ineffectiveness only arises when one layer of the European human rights architecture is unwilling or unable to effectively ensure protection of a given right *just as the others are*.¹⁶³

¹⁶³ A number of authors have critically remarked the existence of gaps in the protection of fundamental rights within each level of the European multilayered system. Cf. G. Gaja, "New Instruments and Institutions for Enhancing the Protection of Fundamental Rights in Europe?", in P. Alston et al. (eds.), *The EU and Human Rights* (OUP, Oxford, 1999), p. 781, 787; F. Butler (ed.), *Human Rights Protection: Methods and Effectiveness* (Kluwer, The Hague, 2001); G. Silvestri, *L'effettività e la tutela dei diritti fondamentali nella giustizia costituzionale* (Editoriale

Secondly, the challenge of ineffectiveness should not be simply regarded as a failure to protect a given right in all the three different constitutional sites that make up the European multilevel human rights architecture. Rather, the challenge emerges because the failure to protect the subjective rights at hand in each layer of the European human rights architecture is *precisely* generated by the existence of constraints deriving from the two other levels of norms and institutions. It is the overlap of multiple normative orders and the interplay between different institutions that creates the lacuna.

The case study of due process rights for suspected terrorists offers a paradigmatic illustration of the ineffectiveness that may sometimes trouble the smooth operation of the European multilevel human rights architecture: however, other examples can also be brought forward in this regards. Comparative scholars have emphasized that federal systems for the protection of rights have historically had their “dark chapters”¹⁶⁴ and sometimes operated to the detriment of an effective protection of rights. In a comparative perspective, in addition, it is possible to emphasize how the critical implications of the European human rights system reflect (and often overlap with) the same challenges faced by other federal systems.

Interestingly, in fact, the same challenge of ineffectiveness in the protection of due process rights of suspected terrorist financiers has also emerged in another federal system for the protection of fundamental rights: Switzerland. Largely following the CFI example, the Swiss Federal Court refused to ensure any meaningful review of Swiss federal legislation implementing UN resolutions listing individuals and entities as suspected terrorist financiers in violation of their due process rights.¹⁶⁵ However, because of the structure of Swiss federalism – with the impossibility of reviewing federal legislation at the cantonal level, no human rights remedy could be ensured in this area by cantons either.

Scientifica, Naples, 2009). This paper however considers ineffectiveness as a problem of the European multilevel system *as a whole*.

¹⁶⁴ Howard, *supra* note 150, p. 25.

¹⁶⁵ *Youssef Nada v. SECO* 1A.45/2007 / daa judgment of 14 November 2007. Cf. also *A v. Département fédéral de l'économie* 2A.783/2008 /svc judgment of 23 January 2008.

This situation generated a major deficiency in the protection of due process rights in the Swiss system. Otherwise, although the Swiss Federal Court (unlike the ECJ) has not yet overruled this position, a legal appeal has promptly been raised against Switzerland at the ECHR level. The ECtHR has hence now been called to intervene and – since the *Bosphorus* presumption is not applicable *vis-à-vis* Switzerland, its judgment is eagerly awaited to restore an effective protection of individual rights.

To summarize: in certain circumstances the overlap and interplay between norms and institutions operating at different layers of the European multilevel system may produce dynamics of tension which hamper or reduce the protection of several fundamental rights. I call this the challenge of ineffectiveness. Comparative law shows that ineffectiveness is not a special or unique feature of the European system. Rather, it is a challenge that arises also in other federal systems for the protection of rights. It should therefore be addressed with the purpose of improving the European architecture.

4.2. *Inconsistency*

A case study that highlights the other challenge at play in a multilevel system of human rights protection and its comparability with the experience of other federal systems is that of voting rights for non-citizens. In Europe, electoral rights are today regulated in all layers of the multilevel system. Traditionally, the domestic legal systems were the only loci in which electoral rights were recognized and enforced, and the differences between states were common and widely accepted. With the enactment of the ECHR and of other specific treaties adopted in the framework of the CoE, and especially with the rise of the competences of the EU, however, voting rights have also been shifted to the supranational and international levels.

As a result, the decision about who can vote where, no longer belongs exclusively to the member states. Whereas the possession of national citizenship was historically considered in most countries as a necessary condition to vote in member state elections, EU law has empowered citizens of each EU member state who reside in a EU country of which they are not

nationals to participate actively and passively in local and EU Parliament elections in their state of residency, despite the lack of formal citizenship.

Nevertheless, the overlapping of the several rules regulating electoral rights, generates new tensions.¹⁶⁶ On the one hand, EU law expands the boundaries of the franchise by establishing electoral rights for EU citizens. On the other, member states often take rather contradictory positions in this regard. To begin with, in some member states, EU citizens are ineligible to vote in elections for local units which are domestically regarded as regional governments. In addition, more than a few states disenfranchise from national elections their citizens who move to another member states. Furthermore many member states still *tout court* exclude electoral rights, even at the local level, for permanent-resident third-country-nationals.

Quite a few substantive antinomies hence shape the picture of voting rights for non-citizens. By introducing voting rights in local and EU Parliament elections for individuals who do not hold the nationality of the member state in which they reside, the EU legal order has promoted a vision of electoral rights as open and accessible entitlements which contrasts with a number of restrictive national practices and rules on voting rights. In other words, there is a tension between an expansive conception of electoral rights as recognized at the supranational level and an opposite, restrictive pull emerging from the national level of the European human rights architecture.

Analyzing more at length this case elsewhere,¹⁶⁷ I have argued that the example of electoral rights for non-citizens highlights a challenge of inconsistency. As others have claimed, inconsistency is a “spectre”¹⁶⁸ always haunting the operations of pluralist architectures for the protection of fundamental rights. As already emphasized a number of times, in Europe

¹⁶⁶ Cf. Ruth Rubio Marin, *Immigration as a Democratic Challenge* (CUP, Cambridge, 2000); A. Lansbergen and J. Shaw, “National Membership Models in a Multilevel Europe”, 8:1 *International Journal of Constitutional Law* (2010), p. 50.

¹⁶⁷ F. Fabbrini, “The Right to Vote for Non-Citizens in the European Multilevel System of Fundamental Rights Protection. A Case Study in Inconsistency?”, Eric Stein Working Paper 4 (2010).

¹⁶⁸ L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the United States* (OUP, Oxford, 2007), p. 52 who defines “a normative inconsistency [as] aris[ing] when two norms are jointly incompatible ... since they contradict one another.”

fundamental rights are recognized and protected in diverse legal orders and by institutions operating in separate albeit interrelating layers of protection.

In the European pluralist human rights architecture, as in the other federal systems for the protection of fundamental rights, therefore, differences between legal systems and judicial practices can always occur. In itself, this is what ‘federalism’ is all about: contrary to uniform systems, pluralist constitutional architectures ensure meaningful uniformity between constituent units without giving up local diversity. The history of the last 60 years in Europe proves that liberty blossoms from pluralism and that the existence of alternative human rights institutions is healthy for the protection of individual rights.

Nevertheless, there may be cases in which the overlapping of three layers of norms and institutions for the protection of fundamental rights produces differences that conflict with “the idea of justice [as] consistency in the law, [with] the notion that citizens should enjoy the same rights.”¹⁶⁹ Hence, there is certainly an inconsistency if one legal system grants electoral rights to aliens and another *tout court* disenfranchises them. In the above-mentioned example, the divergences between some national electoral legislations and the EU franchise policies look problematic in light of the idea of voting rights conceived as the instrument by which individuals can have an equal and fair stake in government.

I call this situation the challenge of inconsistency, whereas by inconsistency I define the phenomenon that emerges when the substantive overlapping of norms or the functional interlinking of institutions operating at different layers of the European multilevel system of fundamental rights protection creates antinomies in the protection of human rights, that is generates tensions and asymmetries in the European human rights architecture which put under strain or *tout court* jeopardize the coherent protection of individual or social entitlements.

¹⁶⁹ Howard, *supra* note 150, p. 22. Cfr. also Maduro, *supra* note 65, p. 527 who summarized these concerns in his paragraph “Consistency and Vertical and Horizontal Coherence” in the following: “how do we guarantee that Europe’s constitutional pluralism will not erode the uniform and coherent application of EU law? A pluralist conception may be very attractive as an abstract form of legitimacy for EU law but many fear its application will be impossible and ultimately destroy the European legal order.”

From this tentative definition, at least two remarks follow. To begin with, it is clear that not all divergences that exist between norms and institutions operating in different sites of the European multilevel human rights system are serious enough to trigger the existence of an inconsistency. Since the European architecture is inherently pluralist, only those differences that exceed an acceptable degree of divergence between the human rights standards applying in different normative settings fall under the critical definition of inconsistency provided above.¹⁷⁰

Secondly, the factor that triggers the existence of an inconsistency is linked to the inner substance of the fundamental rights at hand. As it has been argued, “the critical factor here is the conception of rights implicit in [the] constitutional vision, one that requires consistency in the application of standards of right conduct.”¹⁷¹ Indeed, an inconsistency comes about if the vision of a specific right in one layer of the European architecture is in tension and substantially contrasts with the vision of the same right as embraced in another layer.

At the same time, comparative law suggests that in all federal systems for the protection of fundamental rights, the definition of what amounts to an acceptable divergence in the standard of fundamental rights protection among constituent federal units and what shall instead be regarded as an unacceptable inconsistency is always a highly contested and debated exercise. A comparative perspective, however, can raise our attention to the existence of similar patterns in other federal system and illuminate those challenges at stake in the European architecture that would otherwise pass unnoticed.

¹⁷⁰ A number of authors have critically remarked the existence of problematic divergences in the protection of fundamental rights within the European multilevel system. Particular attention in scholarly discussions has received the divergences between the fundamental rights jurisprudence of the ECJ, the ECtHR and the highest national courts. Cf. D. Spielmann, “Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities”, in P. Alston et al. (eds.), *The EU and Human Rights* (OUP, Oxford, 1999), p. 757; L. Garlicki, “Cooperation of Courts: The Role of Supranational Jurisdictions in Europe”, 6:3&4 *International Journal of Constitutional Law* (2008), p. 509. For an administrative law perspective see L. Torchia, *Il governo delle differenze* (Il Mulino, Bologna, 2006). Cf. then M. Rosenfeld, “Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism”, 6:3&4 *International Journal of Constitutional Law* (2008), p. 415.

¹⁷¹ G.J. Jacobsohn, “Contemporary Constitutional Theory, Federalism and the Protection of Rights”, in E. Katz and A. Tarr (eds.), *Federalism and Rights* (Rowman & Littlefield, Lanham, 1996), p. 29, 32 who recalls R. Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977).

Tellingly, indeed, the same tensions which are currently emerging in the field of electoral rights in Europe have for many years characterized another federal system for the protection of fundamental rights, the US. In the US, differences in voting rights for non-citizens have long existed, since the federal government originally had a limited competence in the area of electoral law and the states had extremely diverging laws and policies, often very restrictive of the franchise of aliens (both non-US citizens and citizens of other US states). Over time, however, a growing awareness emerged at the political level that this situation was inconsistent, since it conflicted with an idea of equal justice in the exercise of the vote and had to be tackled appropriately.¹⁷²

With a series of constitutional and legislative measures, therefore, the federal government was granted new competences over electoral rights to ensure equality in the right to vote through-out the US. I will return to this point later, evaluating whether and how the American story can offer a valuable model *de jure condendo* for Europe.¹⁷³ Here it suffices to remark that federal systems face comparable challenges and that comparative law helps to highlight issues that would be harder to understand from a purely internal perspective.

To summarize: in several circumstances the overlap and interplay between norms and institutions operating at different layers of the European multilevel system may produce dynamics of tensions which put under strain or jeopardize the harmonious protection of several fundamental rights. I call this the challenge of inconsistency. Just like ineffectiveness, also inconsistency is a phenomenon emerging from a multilevel constitutional architecture. Solutions should therefore be advanced in order to address this challenge while, simultaneously, preserving the normative added values of a pluralist European human rights system.

¹⁷² Cf. J. Raskin, “Legal Aliens, Local Citizens: the Historical, Constitutional and Theoretical Meanings of Alien Suffrage”, 141 *University of Pennsylvania Law Review* (1993), p. 1391 and G. Neuman, ““We Are the People”: Alien Suffrage in German and American Perspective”, 13 *Michigan Journal of International Law* (1992), p. 259.

¹⁷³ See *infra* section 5.2.

5. **The transformations of the European multilevel human rights system in a comparative perspective**

Whereas the previous section has focused on some major challenges that arise from the European multilevel system of fundamental rights protection, this section attempts to look ahead, by taking into account the transformations at play and soon forthcoming in the European legal space and assessing whether and how they may shape the European multilevel human rights architecture. As I explain in the first subsection, the European human rights architecture, much like the other federal systems for the protection of rights, is a dynamic constitutional arrangement in which developments are constantly taking place both in the law in the books and the law in action.

From this point of view, it appears how a ‘neo-federalist’ perspective is not just instrumental in shedding light on some critical implications emerging from the European pluralist human rights architecture. Rather, the same approach also explains how legal changes affect the functioning of the system and emphasizes how these developments can create – so to speak – positive internal dynamics of checks and balances, functional to a more effective and consistent protection of fundamental rights. In other words, the assumption that drives a ‘neo-federalist’ assessment of the European human rights architecture is that, while the system faces several challenges, it also can provide the solutions to address them.

As I argue in the second subsection, the comparative method commended by a ‘neo-federalist’ perspective in the assessment of the European human rights system can also prove useful to advance further proposals for policy reforms. Albeit with a number of important caveats, scholars might in fact draw lessons from the historical and constitutional stories of other federal systems which have experienced for longer a multilevel system for the protection of fundamental rights and might advise reforms *de jure condendo* for the purpose of increasing the effectiveness and consistency of the European human rights architecture, especially in those fields in which the current transformations do not yet seem to be plainly satisfactory.

5.1. *Legal changes*

The European system for the protection of fundamental rights is a living legal structure, subject to constant changes and redefinitions.¹⁷⁴ The three national, supranational and international overlapping layers of norms and institutions are interlinked and interlaced together and the transformations taking place on one level inevitably produce a spill-over to the other layers.¹⁷⁵ Two kinds of ongoing development can especially be detected.

A *formal* transformation derives from the changes in the law in the books at the various levels of the European human rights architecture. Ordinary law-making and constitutional reforms at the national level,¹⁷⁶ just like the semi-permanent Treaty revision process at the EU level¹⁷⁷ or the frequent amendments of the ECHR¹⁷⁸ have ensured in the last few years a recurrent redefinition of the fundamental rights norms and of the mechanisms set up to protect them, on all layers of the European multilevel system.

Transformations in the law in the books are especially relevant at the supranational level. The Lisbon Treaty is clearly of paramount importance here.¹⁷⁹ After a lengthy ratification period the reform pact eventually entered into force on 1 December 2009, significantly reshaping the

¹⁷⁴ On the dynamic and evolving nature of the European multilevel constitutional system in general *cf.* F. Snyder, “The Unfinished Constitution of the European Union: Principles, Processes and Cultures”, in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (CUP, Cambridge, 2004), p. 55; S. Cassese, “L’Unione Europea come organizzazione pubblica composita”, in S. Cassese (ed.), *La crisi dello Stato* (Laterza, Roma, 2002), p. 67. For an assessment of Constitutions as living documents in the US context then *cf.* B. Ackerman, “The Living Constitution”, 120 *Harvard Law Review* (2007), p. 1738.

¹⁷⁵ *Cf.* K. Lenaerts, “Interlocking Legal Orders in the European Union and Comparative Law”, 52 *International and Comparative Law Quarterly* (2003), p. 873; S. Douglas-Scott, “A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*”, 43 *Common Market Law Review* (2006), p. 629.

¹⁷⁶ *Cf.* e.g. A. Stone Sweet, “Le Conseil Constitutionnel et la transformation de la République”, *Cahiers du Conseil Constitutionnel* (2008) (on France); Enzo Cheli, *La riforma mancata: tradizione e innovazione nella Costituzione italiana* (Il Mulino, Bologna, 2000) (on Italy).

¹⁷⁷ *Cf.* B. de Witte, “The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process”, in N. Walker et al. (eds.), *Convergence and Divergence in European Public Law* (Hart, Oxford, 2002), p. 39.

¹⁷⁸ *Cf.* L. Caflish, “The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond”, 6:2 *Human Rights Law Review* (2006), p. 403.

¹⁷⁹ *Cf.* Ziller, *supra* note 55; Dougan, *supra* note 30.

EU human rights profile.¹⁸⁰ As mentioned, the CFR has now acquired binding legal value.¹⁸¹ Moreover, because of the abolition of the pillar structure, the jurisdiction of the ECJ has been expanded to all areas of EU law (except with regard to CFSP)¹⁸² and the conditions for individual direct recourse to the ECJ have been relaxed.¹⁸³

Furthermore, the Treaty now mandates the accession of the EU to the ECHR:¹⁸⁴ although the precise effects of accession are still uncertain, it is likely that once the EU joins the ECHR, EU citizens will be able to resort to the ECtHR whenever they claim that EU institutions have violated their fundamental rights and after the prior exhaustion of all remedies at the EU level.¹⁸⁵ To this end, the ECHR has also recently been updated through the adoption of a new additional Protocol. The 14th Protocol has entered into force, on 1 June 2010, to allow the EU accession and negotiations between the two European institutions are currently under way¹⁸⁶ to ensure that the EU will soon be integrated within the pan-European human rights system.¹⁸⁷

¹⁸⁰ Cf. E. Bribosia, “L’avenir de la protection de droits fondamentaux dans l’Union européenne”, in G. Amato et al. (eds.), *Genesis and Destiny of the European Constitution* (Bruylant, Bruxelles, 2007), p. 995; L. Daniele, “La protezione dei diritti fondamentali nell’Unione Europea dopo il Trattato di Lisbona: un quadro d’insieme”, *Diritto dell’Unione Europea* (2009), p. 645.

¹⁸¹ See *supra* note 30.

¹⁸² Cf. R. Passos, “Le système juridictionnel de l’Union”, in G. Amato et al. (eds.), *Genesis and Destiny of the European Constitution* (Bruylant, Bruxelles, 2007), p. 565, 571. The ECJ, however will acquire jurisdiction to review measures restrictively affecting individuals even if adopted under the heading of the CFSP. Cf. M. Cremona, “The Union External Action: Constitutional Perspectives”, in G. Amato et al. (eds.), *Genesis and Destiny of the European Constitution* (Bruylant, Bruxelles, 2007), p. 1173, 1198.

¹⁸³ On the issue of standing compare C. Harlow, “Access to Justice as a Human Rights: the European Convention and the European Union”, in P. Alston et al. (eds.), *The EU and Human Rights* (OUP, Oxford, 1999), p. 187 and X. Lewis, “Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: if the System is Broken, Where Should it Be Fixed?”, 30 *Fordham International Law Journal* (2007), p. 1469.

¹⁸⁴ A. Giannelli, “L’adesione dell’Unione Europea alla CEDU secondo il Trattato di Lisbona”, *Diritto dell’Unione Europea* (2009), p. 684.

¹⁸⁵ On the most likely effects of the accession of the EU to the ECHR compare A. Ciampi, “L’Union européenne et le respect des droits de l’homme dans la mise en oeuvre des sanctions devant la Cour européenne des droits de l’homme”, *Revue Générale de Droit Internationale Public* (2006), p. 85 and F. Jacobs, “The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice”, in I. Pernice et al. (eds.), *The Future of the European Judicial System in Comparative Perspective* (Nomos, Baden-Baden, 2006), p. 291.

¹⁸⁶ Cf. Council of the European Union, Doc. 6855/10, 25 and 26 February 2010, p. 13; Council of the European Union, Doc 10630/10, 3 and 4 June 2010; European Commission, IP/10/906, 7 July 2010.

¹⁸⁷ H.C. Krüger and J. Polakiewicz, “Proposals for a Coherent Human Rights Protection System in Europe”, 22 *Human Rights Law Journal* (2001), p. 1.

At the same time, the ECHR internal structure has also undergone significant modifications. The 14th additional Protocol has attempted to increase the capacity of the ECtHR to cope with its soaring case law.¹⁸⁸ Still, to enhance the constitutional role of the ECtHR in the European space, an International Conference calling for a new amendment to the ECHR has recently been held in Interlaeken and reforms of the ECHR are expected to follow.¹⁸⁹

A *substantive* transformation is also currently underway in the law in action, as a result of the constant activities of judicial institutions at all layers of the European architecture. As professor Marta Cartabia has extensively argued,¹⁹⁰ national courts, the ECJ and the ECtHR are in constant dialogue¹⁹¹ with each other and their dynamic relationship and mutual engagement is favouring the creation of a European common law of fundamental rights.¹⁹²

Indeed, albeit with some exceptions,¹⁹³ the involvement of national Constitutional Courts in the European judicial conversation has recently been remarkable – most notably through the use of the preliminary reference procedure.¹⁹⁴ The ECJ, has played a major role in recent years –

¹⁸⁸ P. Tanzarella, “Il Protocollo XIV, un tentativo per alleggerire la Corte di Strasburgo”, *Quaderni Costituzionali* (2005), p. 891.

¹⁸⁹ Cf. Parliamentary Assembly – Committee on Legal Affairs and Human Rights, AS/Jur (2010) 06. Cf. also A. Mowbray, “The Interlaeken Declaration – The Beginning of a New Era for the European Court of Human Rights?”, 10 *Human Rights Law Review* (2010), p. 519.

¹⁹⁰ M. Cartabia, “Europe and Rights: Taking Dialogue Seriously”, 5 *European Constitutional Law Review* (2009), p. 5. *But cf.* also A. Vosskuhle, “Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsbund*”, 6 *European Constitutional Law Review* (2010), p. 175.

¹⁹¹ The literature on judicial dialogue is burgeoning. Cf. among the most relevant works A.M. Slaughter, “A Global Community of Courts”, 44 *Harvard International Law Journal* (2003), p. 191; S. Cassese, *I Tribunali di Babele* (Donzelli, Roma, 2009). On dialogue in the European multilevel system in particular cf. F. Jacobs, “Judicial Dialogues and the Cross-Fertilization of the Legal Systems: The European Court of Justice”, 38 *Texas International Law Journal* (2003), p. 547 and F. Fontanelli and G. Martinico, “Alla ricerca della coerenza: le tecniche del ‘dialogo nascosto’ fra i giudici nell’ordinamento costituzionale multi-livello”, *Rivista Trimestrale di Diritto Pubblico* (2008), p. 374. A critique of the idea of judicial dialogue among courts has been recently raised however by G. de Vergottini, *Oltre il dialogo tra le Corti: giudici, diritto straniero, comparazione* (Il Mulino, Bologna, 2010).

¹⁹² C. McCrudden, “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights”, 20:4 *Oxford Journal of Legal Studies* (2000), p. 499; G. Silvestri, “Verso uno *ius commune* europeo dei diritti fondamentali”, *Quaderni Costituzionali* (2006), p. 7; G. Zagrebelsky, “Corti Costituzionali e diritti universali”, *Rivista Trimestrale di Diritto Pubblico* (2006), p. 297.

¹⁹³ Cf. M. Wind et al., “The Uneven Legal Push for Europe. Questioning Variations When National Courts go to Europe”, 10:1 *European Union Politics* (2009), p. 63.

¹⁹⁴ Cf. e.g. C. Cost s. 102/2008 raising the first preliminary reference of the Italian *Corte Costituzionale* to the ECJ. For a comment of the decision see M.E. Gennusa, “Il primo rinvio pregiudiziale da Palazzo della Consulta: la Corte Costituzionale come ‘giudice europeo’”, *Quaderni Costituzionali* (2008), p. 612 and F. Fontanelli and G. Martinico,

chiefly under the auspices of the CFR, in expanding the protection of fundamental rights at the EU level, even in fields in which its jurisdiction was weak or almost non-existent.¹⁹⁵ Finally, the ECtHR is exercising with confidence its constitutional role and its jurisprudence is now relied upon by courts both at the national¹⁹⁶ and EU level¹⁹⁷ as a benchmark for fundamental rights protection in the European legal space. The burgeoning case load of the ECtHR nevertheless represents a significant challenge, with which state parties to the ECHR are trying to deal.

What is the impact of these ongoing developments on the functioning of the European human rights architecture? Can these transformations play a role in addressing the challenges that were identified in the previous section? With all due caution it seems that the legal changes at play both at the formal and at the substantive level are likely to increase the effectiveness and the consistency in the European system of fundamental rights protection. In rather speculative terms, one may argue that a binding EU CFR, coupled with the prospects of accession of the EU to the ECHR and a growing cooperative engagements between national, supranational and international courts, have the potential to fill some of the lacunae and overcome some of the antinomies existing in the European fundamental rights system, along the lines experienced by other federal systems such as the US and Switzerland.¹⁹⁸

“Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice”, 16:3 *European Law Journal* (2010), p. 345.

¹⁹⁵ For an assessment of the increasing protection of fundamental rights in the area of freedom, security and justice cf. S. Peers, “Salvation Outside the Church: Judicial Protection in the Third Pillar After the *Pupino* and *Segi* Judgments”, 44 *Common Market Law Review* (2007), p. 883.

¹⁹⁶ Cf. J. Andriantsimbazovina, “La prise en compte de la Convention européenne des droits de l’homme par le Conseil Constitutionnel”, 18 *Cahier du Conseil Constitutionnel* (2004) (on France); A. Rodríguez, “Los efectos internos de las resoluciones del Tribunal europeo de derechos humanos y la vinculacion del juez español a su jurisprudencia”, 8-9 *Teoria y realidad constitucional* (2001-2002), p. 201 (on Spain); O. Pollicino, “Constitutional Court at the Crossroads Between Constitutional Parochialism and Co-operative Constitutionalism”, 4 *European Constitutional Law Review* (2008), p. 363 (on Italy).

¹⁹⁷ On the evolution of the relationship between the ECJ and the ECtHR cf. M.E. Gennusa, “La CEDU e l’Unione Europea”, in M. Cartabia (ed.), *I diritti in azione* (Il Mulino, Bologna, 2007), p. 94; G. Harpaz, “The European Court of Justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy”, 46 *Common Market Law Review* (2009), p. 105.

¹⁹⁸ See *supra* text accompanying note 151.

The specific example of due process rights for suspected terrorists that I mentioned above shows the capacities of the ongoing developments to address cases of ineffectiveness.¹⁹⁹ Whereas initially the individuals concerned by the contested EC counter-terrorism measures did not enjoy any judicial protection, the lacuna that emerged was subsequently solved, first via the substantive intervention of the ECJ and later through a formal amendment of EU primary law. In the celebrated *Kadi* ruling, indeed, the ECJ established a judicial remedy against due process violations at the EU level, by making it clear that, despite the existence of a UN resolution, EU institutions had to comply with the right to due process when freezing the assets of individuals or entities suspected of financing terrorism.

In addition, the ECJ has anticipated some of the reforms brought forward in the Lisbon Treaty, which, among others, now prescribes a mechanism of judicial review of EU counter-terrorism measures affecting the due process rights of natural or legal persons. In addition, by mandating the accession of the EU to the ECHR, the Lisbon Treaty will likely open the door to greater scrutiny of EU acts by the ECtHR, beyond the limited review provided by the *Bosphorus* doctrine. As mentioned, the most likely effects of the accession of the EU to the ECHR will be to ensure a complete review of EU measures before the ECtHR – as is already the case for the individual EU member states and the other non-EU countries (e.g. Switzerland) which are parties to the ECHR.

However, these developments do not seem to be able to provide a satisfactory answer to *all* the challenges that the European architecture is currently experiencing. The example of electoral rights for non-citizens provides some evidence in this regard. Indeed, despite some courageous decisions by the ECJ and the ECtHR and the amendment of the EU Treaty, the inconsistencies that currently affect the picture of voting rights for non-citizens in Europe have remained largely unaddressed by the most recent transformations in the law in the books and the law in action. This is why the analysis should move from the descriptive level to the normative level in order to advance proposals for some possible reforms *de lege ferenda*.

¹⁹⁹ See Fabbrini, *supra* note 161, 173 *et seq* also for further references to the relevant literature.

5.2. Policy through comparative law

As highlighted in the previous subsection, the ongoing transformations taking place in the European fundamental rights architecture do not address all the challenges of the European system. With the aim of overcoming these unresolved shortcomings, however, scholars may perhaps draw ideas and proposals from the examples of other federal systems for the protection of fundamental rights which largely share the features of the European architecture, such as the cases of the US and Switzerland examined in section 3. As already emphasized in section 2, among the virtues of the comparative method is the capacity to supply models for legal reforms, i.e. to recommend policy changes through law.²⁰⁰

Before undertaking any such task, nevertheless, a number of remarks are compelling. To begin with, one needs to be aware that the *primary* purpose of comparative methodology is explanatory, not normative. Comparison aims at creating scientific knowledge, whereas the formulation of proposals for legal transplants from one system to the other is only a *residuary*, possible, function of this methodology. Otherwise, proposals for policy reforms based on samples taken from comparative law are often controversial, and reasonable people might reasonably disagree as to whether the suggested reforms are either advisable or feasible.

In other words, when lawyers enter the prescriptive field of policy through comparative law they lose objectivity. This is why any attempt to use comparison to advance legal reforms should be kept clearly separate from the primary function of the comparative method, which aspires to be a neutral tool to foster scientific (i.e. falsifiable) knowledge. Indeed, although academics, politicians and practitioners may have different ideas about the prognosis of a legal system, they can still agree on the diagnosis. The comparative method, in fact, can be an objective tool to understand the critical aspects of a legal system and still be a controversial source of proposals for possible cures. While the former does not imply the latter, the latter does not deny the former.

²⁰⁰ Cf. Sacco, *supra* note 74, p. 19; Pegoraro, *supra* note 73, p. 5. Cf. also M. Tushnet, “The Possibilities of Comparative Constitutional Law”, 108 *Yale Law Journal* (1999), p. 1225; M. Scheinin et al. (eds.), *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Åbo Akademi, Turku, 2000).

It is with these precautionary observations in mind, that it is possible to move toward the formulation of some proposals for legal reforms to address the current limitations of the European multilevel fundamental rights architecture, in light of the constitutional and historical experiences of other federal systems of human rights protection. Just as an example, I will here limit myself to picking the above-mentioned case of electoral rights for non-citizens by taking into account the US historical and constitutional model. As recalled in section 4, the inconsistencies currently characterizing the European multilevel system of voting rights have been present for long time in the US as well, although there they have also been largely overcome.

After a series of legal transformations, US citizens can now move from one state to the other of the federation and participate in all (state and federal) elections held in their state of residency under conditions of equality. At the same time, whereas the states remain sovereign in extending electoral rights to aliens, the issue of voting rights for non-US citizens has been mainly dealt with indirectly, through the adoption by the US Congress of uniform naturalization rules that facilitate the acquisition of US citizenship and, with it, of electoral rights.

Dwelling on the issue elsewhere, I have therefore maintained that the European system should be reformed along analogous lines.²⁰¹ Firstly, residence should become the basis for the exercise of electoral rights at the national level: a citizen of one EU member state who resides in another EU member state should have the right to vote (also) for national elections in her member state of residence. Secondly, national laws on local elections should be harmonized to enfranchise long-term resident third-country-nationals; or, as an alternative, the power to make laws on naturalization should be shifted to the EU, so that third-country-nationals can acquire EU citizenship and its electoral privileges through a uniform EU-governed process.

Once again, observers may both reasonably disagree on the benefits of these suggested changes and be sufficiently sceptical about their practicability. Academic proposals for legal reforms are always controversial and in any case they cannot be implemented absent a consensus

²⁰¹ See Fabbrini, *supra* note 166, p. 30 *et seq.* also for further references to the relevant literature.

among policy-makers. Nevertheless, here emerges a final, albeit residual, virtue of the comparative methodology proper of a ‘neo-federalist’ perspective on the European multilevel fundamental rights architecture: scholars may anticipate questions that are not yet ready for political discussion, by learning cautionary tales from comparative constitutional law.

Conclusion

The European multilevel fundamental rights architecture is based on a plurality of overlapping and intertwining norms and institutions. Since the aftermath of WWII, fundamental rights have been entrenched at the national, supranational and international level in Europe and this pluralist constitutional architecture has ensured a long-lasting period of peace and liberty in the Old Continent. How, however, can we make sense of this complex system? Constitutional scholars have advanced several approaches, which raise a number of theoretical and methodological queries.

This paper has suggested adopting a new perspective – ‘neo-federalism’ – and has attempted to explain its contours. By rediscovering federalism as the organizing principle of pluralist, heterarchical constitutional arrangements and by putting the European human rights architecture in a comparative perspective with other federal systems for the protection of fundamental rights (notably, the US and Switzerland), I have argued that it is possible to gain a better understanding of the functioning of the European multilevel system and of its critical implications.

In particular, on the basis of some (first) empirical examples (the cases of due process rights for suspected terrorists; and of electoral rights for non-citizens), I have argued that two major challenges emerge from the European multilevel system. Ineffectiveness arises when the substantive overlapping of norms and the functional interlinking of institutions creates lacunae in the protection of fundamental rights; inconsistency, instead, emerges when the same overlapping and interlinking generates antinomies in the protection of fundamental rights.

While the comparative analysis has shown that analogous challenges have also characterized the internal dynamics of other federal systems for the protection of fundamental

rights, an assessment of the ongoing formal and substantive transformations taking place in the European system has shown that legal changes have, at least in some cases, the potential to solve the existing shortcomings. Comparative law, then, may prove useful to advance proposals for policy reforms and address those challenges that have been left unanswered by the most recent developments.

In conclusion, the studies on the European multilevel system of fundamental rights protection and its evolution have often in the past been petrified by a statist or a *sui generis* bias. This paper has tried to advance a different approach. By drawing on the theoretical framework of pluralism and taking advantage of the comparative methodology, I argue that ‘neo-federalism’ can offer a better account of the reality of fundamental rights protection in Europe, of the challenges that currently affect it, and of its future prospects.