The European Multilevel System of Fundamental Rights Protection: A ‘Neo-Federalist’ Perspective

Federico Fabbrini*

ABSTRACT

The paper advances a ‘neo-federalist’ perspective to analyze the European multilevel system of fundamental rights protection. 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 critical implications 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 Conference “The New Public Law in a Global (Dis)Order – A Perspective from Italy” held at the New York University School of Law on 19 and 20 September 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 Mattias 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. Mailing address: Federico Fabbrini, Law Department, European University Institute, Villa Schifanoia, Via Boccaccio 121, 50133 Firenze, Italy.
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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 generism* 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 implications of 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 case 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 case 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, the critical implications of the European structure and defines the problems 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).

1.1. 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.

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.
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 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

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momentum. In France, i.e., the Conseil Constitutionnel discovered a binding Bill of Rights in the Preamble to the 1958 Constitution already in 1971 and, recently, a constitutional reform has introduced a path-breaking system of *a posteriori* judicial review of legislation which allows all 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.

Equally, in the United Kingdom – where arguably fundamental rights received their first historical recognition in a written document, the Magna Carta of 1215, 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, 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.

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). 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. Some scholars have argued that the move of the ECJ was a response to the jurisprudence of

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

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.” 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.”

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. 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.

In 2000, then, a Bill of Rights for the EU – the Charter of Fundamental Rights (CFR) – was solemnly proclaimed by the EU institutions. 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

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advanced instrument for the protection of fundamental rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 the protection of fundamental rights was refined and the role of the European Court of Human Rights (ECtHR) was strongly enhanced.\textsuperscript{32}

In particular, since the enactment of the 11\textsuperscript{th} 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.\textsuperscript{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.\textsuperscript{34}


\textsuperscript{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 ECtHR. 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 constitutional role of the ECtHR, however, creates an incentive for national courts to take into account the ECHR in domestic adjudication, even in those member states in which the ECHR is not incorporated into the national legal order with the status of a constitutional text. 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 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.  

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. This pluralist structure is


actually no coincidence. Rather, it is born out of history and necessity. 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.

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. Originally conceived as a political plan – only later to be recycled as an economic venture, 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. Fundamental rights, as checks against the abuse of public authorities, were certainly part of this enterprise and the jurisprudence of the ECJ, dating already to the 1960s, shows this clearly.

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.

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.
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 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 know, 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, given 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 means by which to conceptualize the European system and 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 persuasiveness of these alternative methodological arguments therefore also needs to be assessed.


2.1. Sovereigntism 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. At least since the late 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 ‘sovereigntist’ 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.

In one of the most influential ‘sovereigntist’ 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. 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.” 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 of state action. 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, in the case law of several

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national courts\textsuperscript{54} and even in the measures adopted by national governments and legislatures.\textsuperscript{55} The ability of this ‘sovereigntist’ doctrine to make sense of the post-WWII legal reality in Europe, however, has come under increased pressure.\textsuperscript{56} As explained in the previous 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.\textsuperscript{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.\textsuperscript{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.’\textsuperscript{59} Constitutional pluralists not only accept the reality of a

\textsuperscript{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.

\textsuperscript{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).\textsuperscript{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 (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.


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.\textsuperscript{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 created by a plurality of legal sources in a multiplicity of legal frameworks which intertwine and overlap.\textsuperscript{61} The state is but one of the authorities endowed with the power to acknowledge and secure fundamental rights and cannot advance any \textit{a priori} greater claim of legitimacy in this enterprise \textit{vis-à-vis} the other public authorities operating in the field of human rights protection beyond the state.\textsuperscript{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 authorities involved in rights-protecting activities.\textsuperscript{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 setting\textsuperscript{64} in which different institutions cooperate, as in a musical counterpunct,\textsuperscript{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 uniformity and


\textsuperscript{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”. \textit{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).


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.\textsuperscript{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.\textsuperscript{67} Many authors regard the current arrangement for the protection of fundamental rights as being in the abstract the one that best fits Europe.\textsuperscript{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.\textsuperscript{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 ‘sovereignty’ and have a meaningful heuristic power. The methodological warnings that have been brought forward by some constitutional pluralists need, therefore, to be fully considered.

2.2. Sui generism 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 generist 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 generism* 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 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 rules 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, 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. In this regard, it has been underlined 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. 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. 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.

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. 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.

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

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.

As Robert Schütze has convincingly argued, indeed, “there are serious problems with the *sui generis* argument.”

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.

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.

This methodological debate represents a fertile intellectual humus from which to depart to fulfil Daniel Elazar’s plea for a creative reconsideration of contemporary (European) legal reality.
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 recurering 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 isn’t constitutional pluralism sufficient in itself as a theory fitting for the European constitutional system? Isn’t the idea of ‘neo-federalism’ simply cosmetic, nominal change? In 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. 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.

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 contemporary world. Nevertheless, since the XIX century, European public lawyers (with the exception of the Swiss) 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. ‘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.

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’. In the last 50 years, indeed, the

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93 See infra text accompanying notes 100 & 137.

94 Schütze, supra note 83, p. 31.


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’ 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 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.\(^104\)

`classical federalists’ was fostered by a wrong understanding of the American federal tradition, on which see infra the text accompanying notes 105 & 106.


\(^{102}\) 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).

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.\textsuperscript{105} Seen from this perspective, therefore, federalism must be regarded a species of the genus constitutional pluralism,\textsuperscript{106} that is, as a “theory on levels of government activity generally … dissociated from the notion of the State.”\textsuperscript{107} As has been convincingly demonstrated, indeed, “legal pluralism provides the conceptual background to all modern federal thought”\textsuperscript{108} and “federalism emphasizes constitutionalized pluralism and power sharing as the basis of a truly democratic government.”\textsuperscript{109} From this point of view, the theories of federalism and constitutional pluralism appears as significantly akin.\textsuperscript{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.\textsuperscript{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.\textsuperscript{112} In other words, by proposing a ‘neo-federalist’ approach, this paper 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.\textsuperscript{113}


\textsuperscript{107} Koopmans, supra note 91, p. 1050.

\textsuperscript{108} Schütze, supra note 83, p. 15.


\textsuperscript{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 Arbour, 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.


\textsuperscript{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.”

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.”

Contrary to a widespread assumption among constitutional pluralists, 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.” 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.”

The complexities of a pluralist constitutional system of human rights protection are quite new in Europe: 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 point of view, comparative “federalism provides one of the few theories which makes the actual developments understandable” 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

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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.
116 Ibid.
118 Koopmans, supra note 91, p. 1051.

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rights operating in the US and Switzerland. \(^\text{119}\) 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). \(^\text{120}\) After the faulty and unsuccessful experience of the Articles of Confederations, the 1787 US Constitution established for the thirteen independent American states a constitutional system in which power was institutionally divided both vertically \(^\text{121}\) – between several states and a federal authority, and horizontally \(^\text{122}\) – 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, \(^\text{123}\) the US system was endowed with two strictly separate mechanisms for the protection of fundamental rights. \(^\text{124}\) 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

\(^{119}\) 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.


of the federal government in its spheres of competence. The federal Bill of Rights was however irrelevant and inapplicable in the states\textsuperscript{125} – some of which still, in fact, even allowed slavery.\textsuperscript{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.\textsuperscript{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, 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.\textsuperscript{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 process\textsuperscript{129} that took more than a century and was mainly achieved, after WWII, through the jurisprudence of the US Supreme Court.\textsuperscript{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 human rights.\textsuperscript{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.\textsuperscript{132}


\textsuperscript{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, \textit{supra} note 125, p. 218 et seq.

\textsuperscript{130} Cf. R. Cortner, \textit{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, \textit{supra} note 63, p. 349.


After WWII, the US was also closely involved in the process of constitutionalization of human rights at both the regional and the international level, although it then refused to bind itself to such agreements. 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). 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.

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. 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. Fundamental rights, therefore, were essentially protected on the basis of cantonal law and “the function of the federal government as guarantor of individual liberty was also subjected to the doctrine of ‘subsidiarity’: it was to be exercised as a last resort only and thus with caution.”

During the XX century, the Swiss system for the protection of fundamental rights underwent several significant transformations. 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

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On the leading role of the US in establishing international human rights institutions \cite{134} and \cite{135}. 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). 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.

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During the XX century, the Swiss system for the protection of fundamental rights underwent several significant transformations. 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
equal protection clause," 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.” Indeed, in 1974 Switzerland become 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.

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.” 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.

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. In the US, a “dual system of constitutional protections” is in force, with both states and federal Constitutions and with state 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” 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. Scholars of federalism have outlined the

142 Frenkel, supra note 139, p. 69.
144 Thurnherr, supra note 141, p. 368.
146 Torres Pérez, supra note 3, p. 73.
148 Thurnherr, supra note 141, p. 366.
149 Torres Pérez, supra note 3, p. 70.
competing interests at stake in federal human rights systems.\textsuperscript{150} One 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.

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.”\textsuperscript{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).\textsuperscript{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 understanding, 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.


\textsuperscript{151} Torres Pérez, \textit{supra} note 3, p. 71.

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 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 perspectives. The following two sections will be dedicated to this task.

4. The implications 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 and tensions that derive from the European pluralist human rights system.

What are indeed the implications of the European pluralist architecture? In this section, in particular, I will venture to examine several problematic consequences of a multilevel structure of fundamental rights protection and try to openly address them.154 To do this, I will consider a couple of empirical examples which are – I think – emblematic of the types of challenges that emerge from a multilevel human rights system and which can be better appreciated by employing a comparative approach, that is, by comparing the European situation with the constitutional and historical experiences of other federal systems for the protection of fundamental rights. In my view these case studies highlight the existence of two major critical implications that I conceptualize with the ideas of ineffectiveness and 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 problem of ineffectiveness arises whenever the overlap of national, supranational and international norms, or the concrete relationship between the jurisprudences of their respective judicial institutions, opens up gaps in the protection of fundamental rights, leaving the individual without redress. As I maintain in the second subsection, instead – where I describe the case of voting rights for non-citizens, a problem of inconsistency arises whenever legal provisions or judicial rulings at different levels of the human rights architecture are in tension or conflict with each other, undermining the coherence in the protection of 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 critical implications 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 legal challenges 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.\footnote{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.} 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,\footnote{Case 314/85 Foto-Frost, [1987] ECR 4199.} prevented the domestic judicial institutions from reviewing the contested EC counter-terrorism measures. On the other, the lack of any formalized link between the EU and the ECHR – coupled with the doctrine of judicial comity developed by the ECtHR in its \textit{Bosphorus} ruling\footnote{Bosphorus Hava Yollari Turizm v. Ireland, ECHR (Grand Chamber) [2005], Application No. 45036/98.} (and before), 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 \textit{Kadi} case\footnote{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.} that re-established at the EU level an appropriate mechanism of redress for the individuals concerned. By overruling 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,\footnote{See infra section 5.1.} 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.\footnote{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 \textit{Kadi}”, Jean Monnet Working Paper 1 (2009) with S. Besson, “European Legal Pluralism After \textit{Kadi}”, 5:2 European Constitutional Law Review (2009), p. 237.}

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 who lament violations of their rights 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 have unpredictable, unwanted and undesirable effects: hence, the European architecture may strain fundamental rights standards and compress individual entitlements rather than enhance them. This occurs, 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 supranational level to intervene due to the institutional constraints and the mutual deference regulating their inter-level cooperation. Other reasons, including the normative incompleteness of a specific layer of human rights protection unbalanced by the other layers, may however also explain the emergence of gaps.

If, for whatever cause, the interplay of the three overlapping human rights layers trumps the protection of individual rights, a lacuna emerges in the fabric of the European multilevel human rights architecture. I call this situation the problem of ineffectiveness, whereas by ineffectiveness I define the implication of the European pluralist constitutional architecture 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, leaving the individuals concerned powerless in case of violation or abridgment of their basic rights.

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 problem. In a multilevel system, gaps in one level are usually filled in other levels. Ineffectiveness is a problem emerging from the deficiencies of the European multilevel structure as a whole. The problem of 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.\(^{162}\)

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\(^{162}\) 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,
Secondly, the problem 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 problem 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 overlapping of the three normative orders and the institutional arrangements existing among their 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”\(^ {163}\) 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 situation 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.\(^ {164}\) However, because of the structure of Swiss federalism – with the impossibility of challenging federal legislation at the cantonal level, no human rights remedy could be ensured in this area by cantons either.

This situation generated a major gap 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 at the international level. The ECtHR has hence now been called to intervene and – since the Bosphorus presumption is not applicable \emph{vis-à-vis} Switzerland, its judgment is eagerly awaited to restore an effective protection of individual rights.

To summarize: in certain circumstances the substantive overlapping of norms or the functional interlinking of institutions operating at different layers of the European multilevel system

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\(^{163}\) Howard, \textit{supra} note 150, p. 25.

can hamper the protection of fundamental rights. I call this the problem of ineffectiveness. If my argument is accurate, ineffectiveness represents an unexpected challenge of the existence of a multilevel constitutional architecture. Comparative law shows that ineffectiveness is not a special or unique feature of the European system. Rather, it is a challenge that can arise in federal systems for the protection of rights. And 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 ECHR and of other specific treaties adopted in the framework of the CoE, and especially with the rise 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 other EU member states to participate actively and passively in local and EU Parliament elections, even in those countries where they do not have formal citizenship, under the simple condition of being permanent residents there.

Nevertheless, the overlapping of the several rules regulating electoral rights, generates tensions. 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 general elections their citizens who move to another member states (and have EU voting rights upon residence there). Furthermore many member states still tout court exclude electoral rights, even at the local level, for permanent-resident third-country-nationals.

This state of affairs, however, generates quite a few substantive antinomies. 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,\(^{166}\) I have argued that the example of electoral rights for non-citizens highlights a case of inconsistency. As others have claimed, inconsistency is a “spectre”\(^ {167}\) always haunting the operations of all pluralist architectures for the protection of fundamental rights. True enough, as already emphasized a number of times, in Europe 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. Often, otherwise, differences can be non-problematic. (Clearly, e.g. there would be no inconsistency if one system granted electoral rights to resident aliens after five years and another, say, only after eight years).

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.”\(^ {168}\) 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 among the national electoral legislations and **vis-à-vis** the EU franchise policies look

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\(^{167}\) 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.”

\(^{168}\) 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.”
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 problem of inconsistency, whereas by inconsistency I define the implication that emerges from the European pluralist constitutional architecture 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, which challenge the coherence of the protection of fundamental rights by putting under strain the normative content of the human rights standards of the various layers of the multilevel system.

From this tentative definition, at least two remarks follow. To begin with, it is clear that not all divergences and tensions 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.  

Secondly, the factor that triggers the existence of an inconsistency is linked to the inner substance of the fundamental rights at hand, and to its inherent call for a minimization of differences. That is, “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.” In several substantive areas of fundamental rights, indeed, it seems far harder to justify divergences between national, supranational and international standards than in other areas of the law and this is precisely where a situation of inconsistency in human rights standards comes about.

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. Hence, even in the preceding example, commentators might question whether the tensions between electoral laws

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at different layers of the European architecture should be regarded as problematic at all. A comparative perspective, however, can raise our attention to the existence of similar patterns in other federal system and illuminate the challenges at stake in the European architecture.

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 non-US citizens (as well as of US citizens). 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.\textsuperscript{171}

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 throughout the US. I will return to this point later, evaluating whether and how the American story can offer a valuable model \textit{de jure condendo} for Europe.\textsuperscript{172} 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 differences emerging from the overlapping of legal norms and institutional practices of the multiple layers of fundamental rights protection may produce tensions that are hardly bearable and justifiable, as they jeopardize the coherent enjoyment of fundamental rights. I call this the problem of inconsistency. Just like ineffectiveness, also inconsistency is a consequence of 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.


\textsuperscript{172} 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 operating 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 its own problems.

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. 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. 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, just like the semi-permanent Treaty revision process at the EU level or the frequent amendments of the ECHR 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. After a lengthy ratification period the reform pact eventually entered into force on 1 December 2009, significantly reshaping the EU human rights profile. As mentioned, the CFR has now acquired binding legal value. Moreover, because of the abolition of the pillar structure, the jurisdiction of the ECJ has been expanded to all

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178 Cf. Ziller, supra note 55; Dougan, supra note 30.


180 See supra note 30.
areas of EU law (except with regard to CFSP) and the conditions for individual direct recourse to the ECJ have been relaxed.\textsuperscript{182}

Furthermore, the Treaty now mandates the accession of the EU to the ECHR,\textsuperscript{183} 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.\textsuperscript{184} To this end, the ECHR has also recently been updated through the adoption of a new additional Protocol. The 14\textsuperscript{th} Protocol has just entered into force, on 1 June 2010, to allow the EU accession and negotiations between the two European institutions are currently under way\textsuperscript{185} to ensure that the EU will soon be integrated within the pan-European human rights system.\textsuperscript{186}

At the same time, the ECHR internal structure has also undergone significant modifications. The 14\textsuperscript{th} additional Protocol has attempted to increase the capacity of the ECtHR to cope with its soaring case law.\textsuperscript{187} 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 Interlaken and reforms of the ECHR are expected to follow.\textsuperscript{188}

A substantive transformation is also currently underway in the law in action, as a result of the constant activities of judicial institutions on all layers of the European architecture. As professor Marta Cartabia has extensively argued,\textsuperscript{189} national courts, the ECJ and the ECtHR are in constant


dialogue\textsuperscript{190} with each other and their dynamic relationship and mutual engagement is favouring the creation of a European common law of fundamental rights.\textsuperscript{191}

Indeed, albeit with some exceptions,\textsuperscript{192} 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.\textsuperscript{193} The ECJ, has played a major role in recent years – 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.\textsuperscript{194} Finally, the ECtHR is exercising with confidence its constitutional role and its jurisprudence is now relied upon by courts both at the national\textsuperscript{195} and EU level\textsuperscript{196} 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 the lacunae and overcome the antinomies existing in the European fundamental rights system, along the lines experienced by other federal systems such as the US and Switzerland.\textsuperscript{197}

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.\textsuperscript{198} 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 \textit{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 principles of 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 \textit{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 \textit{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 \textit{de lege ferenda}.

\textsuperscript{197} \textit{See supra} text accompanying note 151.
\textsuperscript{198} \textit{See} Fabbrini, \textit{supra} note 161, 173 \textit{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.\(^{199}\)

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 being 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.

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.\textsuperscript{200} 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 general 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 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 complex constitutional architecture has ensured a long-lasting period of peace and liberty in the Old Continent. How, however, can we make sense of this system? Constitutional scholars have advanced several approaches, which raise a number of theoretical and methodological queries.

\textsuperscript{200} See Fabbrini, supra note 166, p. 30 \textit{et seq.} also for further references to the relevant literature.
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 perspectives.