



Department of Law

FUNDAMENTAL RIGHTS IN EUROPE
Challenges and Transformations of a Multilevel
System in Comparative Perspective

Federico Fabbrini

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, June 2012

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Summary

This PhD thesis deals with the protection of fundamental rights in Europe. Today, in Europe, fundamental rights are simultaneously protected at the levels of the states, of the European Union and of the European Convention on Human Rights. The purpose of this thesis is to analyze the implications of this multilevel architecture and to examine the dynamics that spring from the interaction between different human rights standards in Europe. To achieve this task, the thesis develops a “neo-federalist” narrative based on an empirical and conceptual comparison with the federal arrangement for the protection of rights of the United States of America. Rejecting both a “sovereignist” and “*sui generis*” approach to the study of fundamental rights in Europe, the thesis argues that only a comparative approach can shed light on the comprehensive set of dynamics which are at play in the European multilevel architecture. The thesis identifies two recurrent challenges in the interplay between different state and transnational human rights standards – a challenge of ineffectiveness and a challenge of inconsistency. It explains that these challenges arise when transnational law operates either as a floor or as a ceiling of protection for a specific human right. In addition, the thesis maps the most important transformations taking place in the European system and assesses their impact on these challenges. To provide empirical evidence for its arguments, the thesis then considers four case studies. First, the right to due process for suspected terrorists. Second, the right to vote for non-citizens. Third, the right to strike. Fourth, the right to abortion. Since these case studies cover all the four “generations” of rights traditionally identified in constitutional scholarship (civil, political, social and “new generation” rights), the thesis aims to offer a complete analytical framework which can also be useful for future research on the protection of other fundamental rights in Europe.

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Introduction

This doctoral thesis deals with the protection of fundamental rights in Europe. Its purpose is to analyze the implications that emerge from a multilevel human rights system. In the last two decades, the protection of fundamental rights in Europe has experienced an unprecedented expansion. Human rights are nowadays simultaneously entrenched in the constitutional systems of the states, in the legal order of the European Union (EU) as well as in the framework of the European Convention on Human Rights (ECHR). A charter of rights has been adopted in each layer of the European architecture and a plurality of institutions – notably courts – ensure an active protection of fundamental rights both at the state and at the transnational level in Europe. Yet, what are the consequences of this complex constitutional architecture? What dynamics spring from the interaction between state and transnational human rights laws in Europe?

To answer this question, the thesis develops a new narrative, called “neo-federalist”. This narrative claims that it is methodologically necessary to compare the European multilevel human rights architecture with the models for the protection of fundamental rights of other federal systems and that, by reconceptualising the European system as a “neo-federal” arrangement, it is possible to gain essential insights to understand the complex dynamics at play in it. Since the prevailing narratives on fundamental rights in Europe are based on weak theoretical or methodological assumptions, their capacity to explain the phenomena that take place in a multilevel human rights system is limited. On the contrary, by comparing the European architecture with other federal systems – notably the United States of America (USA) – and by taking advantage of the rich theoretical discussion on federalism and rights that has taken place there, “neo-federalism” provides a comprehensive account of the implications of a multilevel human rights system.

The thesis argues that the overlap and interplay between state and transnational human rights standards generates several recurrent synchronic and diachronic dynamics. In a synchronic

perspective, the European multilevel architecture creates several *challenges*. Indeed, relevant differences often exist in the degree of protection which is accorded to each given human right both at the horizontal level (i.e. among the EU member states – with some states providing vanguard forms of protection for the specific right, and others providing laggard forms of protection) and at the vertical level (i.e. between the state law and supranational law). Because of these differences, the interaction of human rights standards in the European multilevel system produces tensions. The nature of these tensions, however, changes depending whether the standard of protection of human rights provided at the transnational level operates as a ceiling (i.e. as a maximum standard of protection that cannot be superseded by state law) or as a floor (i.e. as a minimum standard of protection that can well be integrated and enriched by state law).

As I endeavour to explain, two challenges can therefore be identified in the functioning of the European human rights architecture. A challenge of ineffectiveness emerges when a transnational law setting a ceiling of protection for a specific human right interacts with state laws which ensure a more advanced standard of protection for that right. In this situation, transnational law challenges the effectiveness of the vanguard states' standard and pressures it toward the less protective maximum set up at the transnational level, while leaving the standard in force in the laggard states unaffected. Vice versa, a challenge of inconsistency arises when a transnational law setting a floor of protection for a specific human right interacts with state laws which ensure a less advanced standard of protection for that right. In this situation, transnational law challenges the consistency of the laggard states' standard and pressures it toward the more protective minimum set up at the transnational level, while leaving the standard in force in the vanguard states unaffected.

The European architecture presents, however, also important diachronic dynamics. The system is subject to constant *transformations* because of changes and reciprocal influences between human rights norms and institutions. These transformations may over time provide satisfactory answers to the challenges that emerge from the interaction between state and transnational laws. To this end, I map the most relevant judicial and institutional transformations currently taking place in the European system and evaluate their impact on the existing challenges of ineffectiveness and inconsistency. In addition, I suggest that scholars may take into account the historical experience of other federal systems to envision additional proposals for reforms of the European architecture. With all due caveats, in particular, a comparative-based assessment of the US constitutional experience may offer useful models and anti-models for reforming *de jure condendo* the European multilevel architecture, especially in those areas of the law where challenges of ineffectiveness or inconsistency appear to be left unanswered by the ongoing transformations.

To provide an empirical backing for these arguments, the thesis takes into account four case studies. The case studies are: the right to due process for suspected terrorists, the right to vote for non-citizens, the right to strike and the right to abortion. The case studies cover all the four “generations” of rights traditionally identified in constitutional scholarship. The first case study deals with a civil right; the second deals with a political right; the third with a social right; and the fourth with a so-called “new generation right”. The first and third case studies provide evidence of the challenge of ineffectiveness while the second and the fourth exemplify the challenge of inconsistency. The case studies address issues that are often controversial. However, by selecting topics such as counter-terrorism law, migration and voting rights, strike law and abortion law, the thesis considers a number of recent milestone rulings of the European courts which have been the object of attentive legal and political debate in Europe.

All the empirical chapters of the thesis follow a common structure. Firstly, I outline how the standard of protection of each specific right significantly varies among the EU member states. Secondly, I examine the growing impact of EU and ECHR law in the field and explain how the interaction between state and transnational law revealed a challenge of either ineffectiveness or inconsistency in Europe. Thirdly, by adopting a comparative perspective, I highlight how analogous dynamics have emerged in the federal system for the protection of fundamental rights of the US and underline how the US example proves that pluralist systems are endowed with the internal mechanisms to successfully face these challenges, and to enhance over time the protection of fundamental rights. In light of this, I explore the more recent jurisprudential and institutional transformations taking place in Europe and, finally, I discuss what the future prospects for the protection of each of these specific rights in Europe could or should be.

Overall, the content of this thesis is analytical rather than normative. The thesis is, in fact, a study in *comparative constitutional law* and not in legal or political theory. By bridging the gap between EU constitutional law and comparative constitutional law, this work aims to enhance the scientific understanding of the European multilevel system for the protection of fundamental rights. As such, Chapter 1 introduces the analytical framework for the examination of the challenges and transformations at play in the European human rights architecture. Here I design the contours of my “neo-federalist” narrative, emphasize its advantages *vis-à-vis* the other existing narratives, and present the core arguments of my work. The subsequent chapters analyze each of the four case studies. Chapter 2 considers the right to due process for suspected terrorists. Chapter 3, the right to vote for non-citizen. Chapter 4, the right to strike. Chapter 5, the right to abortion. It is my hope that the analytical framework of this thesis will invite further research to assess whether and to what extent the conclusions I reach here can be generalized to other areas of European human rights law.

Chapter 1

Of Floors, Ceilings & Human Rights: The European Fundamental Rights Architecture Compared

Introduction

The European continent is endowed with one of the most sophisticated systems for the protection of fundamental rights world-wide. At the height of two decades of unprecedented transformations, the European human rights architecture is today characterized by the existence of three layers of norms and institutions which overlap and intertwine together to ensure an advanced degree of protection of fundamental rights and liberties. Human rights are proclaimed in the constitutions of the states, in the law of the European Union (EU) and in the European Convention on Human Rights (ECHR). At the same time, institutions charged to protect and vindicate human rights – notably courts empowered to exercise judicial review – are set up at each layer of this multilevel system. What are the consequences of this complex human rights architecture? The research question that this thesis attempts to address is that of examining what constitutional dynamics arise in the protection of specific fundamental rights from the interaction between different layers of human rights norms and institutions in Europe.

The constitutional transformations that the European human rights architecture has recently undergone – and particularly the expansion of the machinery for the protection of human rights at the transnational level – have challenged conventional approaches to the study of fundamental rights in Europe and underlined their inadequacies in explaining the dynamics at play in a multilevel constitutional system. Indeed, to a large extent, the European human rights architecture remains today a puzzling object, as the prevailing scholarly narratives have been unable to provide a

comprehensive and persuasive account to explain its complex implications. In the legal literature, two leading narratives have emerged. A first narrative, which I call “sovereigntist”, has mainly stressed the problematic features of a multilevel human rights architecture. A second narrative, which is generally referred as “pluralist”, has instead assessed the operation of the European system optimistically. Both these narratives, however, present a major methodological weakness: by failing to use the comparative method, they offer only a partial view of the dynamics at play in the European multilevel human right architecture.

This chapter advances therefore a new narrative – which I will call “neo-federalist”. The “neo-federalist” narrative claims that it is methodologically necessary to compare the European multilevel human rights architecture with the models for the protection of fundamental rights of other federal systems and that, by reconceptualising the European system as a “neo-federal” arrangement, it is possible to gain insights that are essential to understand the complex dynamics at play within it. Recourse to the comparative method for the purpose of studying the European multilevel human rights architecture may appear innovative but, in fact, is an inevitable choice. As the late EUI professor Mauro Cappelletti used to remind us, comparative law is the only laboratory which lawyers have to verify or falsify the appropriateness of their theories.¹ The comparative method is therefore the only instrument capable of yielding convincing analytical results in an attempt to answer the research question concerning the constitutional dynamics at play in the European human rights architecture.

As the “neo-federalist” approach underlines, the European human rights architecture is not a unique, *sui generis* arrangement. Rather, the European multilevel system shows several empirical and conceptual points of analogy with other federal human rights systems. In particular, I argue, the European system can be meaningfully compared with the United States of America (US). The US system presents several empirical features which makes it structurally the most similar case for comparison with the European multilevel architecture. First, in the US, as in Europe, fundamental rights are codified in a multiplicity of binding Bills of Rights, enshrined in both state and the federal constitutions. Second, in the US, as in Europe, a plurality of institutions is in place for the protection of rights – especially because of the existence of several separate orders of jurisdictions, both at the state and federal levels, that are empowered to exercise judicial review.

In addition, the US tradition of combining federalism and the protection of fundamental rights offers a rich conceptual and normative background to explore the European human rights system. In the US experience, the concept of “federalism” conveys ideas that are particularly

¹ See Mauro Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (Giuffrè 1972). As it will emerge throughout this and the next chapters, the comparative work of Professor Mauro Cappelletti has been an evergreen intellectual guidance for my research

valuable in making sense of a multilevel constitutional system. Whereas in Europe, federalism has traditionally been equated with the notion of the sovereign state, in the US, federalism has been regarded as the constitutional tool and theory *par excellence* to split the atom of sovereignty. As will become clear, therefore, by drawing conceptually on the US experience, I endeavour to recast federalism *de novo* as a principle governing non-statist, polyarchic constitutional arrangements and to use it as a powerful framework to analyze the implications of the European multilevel human rights system. In order to avoid conceptual confusion with the European brand of “federalism”, however, I will phrase my narrative in “neo-federalist” terms, building a bridge between the tradition of US federal thought and the contemporary debates about human rights in Europe.

By comparing the European multilevel human rights architecture with the US federal experience, I aim to design an analytical framework to examine the constitutional dynamics that arise in the European system and to explain the implications of a multilevel arrangement in the protection of a selected number of fundamental rights. As I will argue, a “neo-federalist” narrative illustrates the existence in Europe of a complex set of *synchronic* and *diachronic* dynamics which the traditional “sovereignist” and “pluralist” narratives are unable to capture. In particular, in order to answer my research question, I will explain that the interaction between different state and transnational human rights standards generates in the European architecture a series of constitutional phenomena which can be described through the notions of federal “*floors*” and “*ceilings*” of human rights protection.

The functioning of the European pluralist system reveals, in fact, several recurrent synchronic dynamics. Since the human rights standards in force at the state and transnational levels often differ, the interaction between state and transnational laws generates possible tensions. The nature of these tensions, however, depends on: a) whether transnational law provides more or less protection than state law to the specific fundamental right *de quo*; and b) whether transnational law operates as a ceiling (i.e. as a maximum standard of protection that cannot be superseded by state law) or rather as a floor (i.e. as a minimum standard of protection that can be well integrated and enriched by state law). In the abstract, this generates multiple hypotheses of interaction between state and transnational law. However, taking into account that relevant horizontal differences exist between the human rights standards of the states – with some states providing a vanguard degree of protection and other states providing a laggard degree of protection for any given right – I argue that the impact of transnational law on state law simultaneously triggers different dynamics in different states and I therefore distinguish between what I define as: a *challenge of ineffectiveness* and a *challenge of inconsistency*.

A *challenge of ineffectiveness* emerges when a transnational law setting a ceiling of protection for a specific human right interacts with state laws which ensure a more advanced standard of protection for that right, challenging the effectiveness of the vanguard states' standard and pressuring it toward the less protective maximum set up at the transnational level (while leaving the standard in force in the laggard states unaffected). A *challenge of inconsistency* emerges instead when a transnational law setting a floor of protection for a specific human right interacts with state laws which ensure a less advanced standard of protection for that right, challenging the consistency of the laggard states' standard and pressuring it toward the more protective minimum set up at the transnational level (while leaving the standard in force in the vanguard states unaffected).

The European human rights architecture also presents, however, important diachronic dynamics. The European multilevel system, like the US federal system, is constantly evolving because of changes and reciprocal influences between human rights norms and institutions and, as I argue, these transformations may, over time, provide satisfactory answers to the challenges that emerge from the interaction between state and transnational laws. To this end, I map the most relevant *judicial* and *institutional transformations* currently taking place in Europe and evaluate their impact on the existing challenges of ineffectiveness and inconsistency. In addition, I suggest that scholars may take into account the historical experience of the US federal system to envision further proposals for reforms of the European architecture. With all due caveats, in fact, a comparative-based assessment of the experience of the US may offer useful models and anti-models for reforming the European multilevel human rights system *de jure condendo*, especially in those areas of the law where challenges of ineffectiveness or inconsistency appear to be left unanswered by the ongoing transformations.

Making use of this general analytical framework I select four case studies (which will be the object of detailed analysis in the following four chapters of the thesis) and briefly describe how, in each of these cases, it is possible to identify either a challenge of ineffectiveness or a challenge of inconsistency because of the interaction between state and transnational human rights standards in Europe. In addition, I emphasize how analogous dynamics have also been at play in the US federal system, and I explore the ways in which the current or prospective transformations taking place in Europe may improve the status quo. The case studies concern different human rights: a civil right (the right of due process for suspected terrorists), a political right (the right to vote for non-citizens), a social right (the right to strike) and a so-called "new generation" right (the right to abortion). Each of these cases addresses different situations but all the examples reveal recurrent patterns. By identifying the existence of the same dynamics in the four different examples, I expect to provide stronger empirical backing for the conceptual arguments I advance in this chapter. In addition, I

hope that the analytical conclusions of this work will invite further research to assess whether and to what extent the patterns I identify can be generalized also to other areas of European human rights law.

The chapter is structured as follows. In Section 1, I outline the main features of the European multilevel human rights architecture and underline the most important constitutional transformations that have taken place in the protection of fundamental rights over the last two decades. In Section 2, I review the narratives that have prevailed in the legal literature and assess why both the “sovereigntist” and the “pluralist” approaches appear insufficient in making sense of the complexities of the European human rights system. In Section 3, I outline the contours of a “neo-federalist” narrative, explaining how the European architecture can be compared with the US federal system and how conceptualizing the European system in “neo-federal” terms can yield essential analytical insights. In this Section, I also explain why I prefer to speak of “neo-federalism” rather than “federalism”, distinguishing between a statist idea of federalism that has traditionally dominated the European public discourse and a pluralist idea that is instead proper to US constitutional thought and which – I argue – should be rediscovered in Europe. Having clarified my narrative, in Section 4 I attempt to design a comprehensive analytical framework for the study of fundamental rights in Europe. Here, I map the synchronic and diachronic dynamics at play in the European system, I define the challenges of ineffectiveness and inconsistency emerging from the interaction between state and transnational law, and I explore the transformations at play in the European system. In light of this framework, finally, in Section 5 I briefly synthesize how these dynamics operate empirically in the selected case studies which form the object of the next four chapters.

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

In the last two decades, the protection of fundamental rights has seen a remarkable expansion in Europe.² Fundamental rights have risen in importance in each layer of what is conventionally called the European *multilevel* architecture.³ In fact, nowadays, fundamental rights are simultaneously

² In this work, I will often refer to Europe, rather than simply to the EU, in order to include in the analysis also the ECHR as a third constitutional layer for the protection of fundamental rights. On the multilevel nature of the European constitutional system, comprising the member states, the EU and the ECHR see the works of Ingolf Pernice: ‘Multilevel Constitutionalism in the European Union’ (2002) 27 *European Law Review* 511 and ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’ (2009) 15 *Columbia Journal of European Law* 349

³ On the European multilevel system for the protection of fundamental rights see especially Maria Cartabia, ‘L’ora dei diritti fondamentali nell’Unione Europea’ in Maria Cartabia (ed), *I diritti in azione* (Il Mulino 2007) 13 and Aida Torres Pérez, *Conflicts of Rights in the European Union: A theory of Supranational Adjudication* (OUP 2009) chap 2

protected by national (state), supranational (EU), and international (ECHR) norms and institutions. 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 to ensure the protection of these constitutionally entrenched liberties.

At the *state* level, the protection of fundamental rights has been a defining feature of all the Constitutions adopted after World War II (WWII) by European countries that had experienced an authoritarian regime.⁴ In the subsequent waves of constitutionalization which have taken place in Europe in the past 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-Communist countries of Central and Eastern Europe⁷ – 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 that can be amended only 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 An analogous arrangement

⁴ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000); Martin Shapiro, 'Rights in the European Union: Convergent with the USA?' in Nicolas Jabko and Craig Parsons (eds), *The State of the EU (Volume 7): With US or Against US? European Trends in American Perspective* (OUP 2005) 378

⁵ See Hans Rupp, 'Judicial Review in the Federal Republic of Germany' (1960) 9 *American Journal of Comparative Law* 29 (on Germany) and Alessandro Pizzorusso, 'Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies' (1990) 38 *American Journal of Comparative Law* 373 (on Italy)

⁶ See Michel Rosenfeld, 'Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Examples Inspired by the Spanish Example' (1998) 19 *Cardozo Law Review* 1891 (on Spain); Philippe Schmitter, *Portugal: Do autoritarismo à democracia* (Imprensa de Ciências Sociais 1999) (on Portugal)

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

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

⁹ See for a general and philosophical overview Valerio Onida, *La Costituzione* (Il Mulino 2004) and Gustavo Zagrebelsky, *La legge e la sua giustizia* (Il Mulino 2008)

¹⁰ See Aldo Sandulli, 'La giustizia' in Sabino Cassese (ed), *Istituzioni di diritto amministrativo* (Giuffrè 2004) 381

¹¹ On the role of the Constitutional Court see Enzo Cheli, *Il giudice delle leggi* (Il Mulino 1996) and for a recent account Tania Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review' (2008) 3:2 *Journal of Comparative Law* 101

¹² On the protection of fundamental rights in the Italian legal system see Augusto Barbera et al, 'Le situazioni soggettive. Le libertà dei singoli e delle formazioni sociali. Il principio di uguaglianza' in Giuliano Amato and Augusto

exists in Germany, where a core list of un-amendable fundamental rights is codified in the 1949 Basic Law and enforced against the unlawful action of the executive, the legislative and the judicial branch (both in the *Bund* and the *Länder*) by a powerful *Bundesverfassungsgericht*.¹³

At the same time, in the last few years, fundamental rights have also gained a new momentum in those countries of Western and Northern Europe in which no such constitutional transformation took place after WWII. Hence, in France, in 2008 a constitutional reform has introduced a path-breaking system of *a posteriori* constitutional review of legislation,¹⁴ 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.¹⁵ In the Netherlands, where courts already exercise an ECHR-based *contrôle de conventionnalité*, a debate about the appropriacy of introducing a form of constitutional review of legislation has gained ground in the last few years.¹⁶

Equally, in the United Kingdom (UK) – where arguably fundamental rights received their first historical recognition in a written document, the Magna Charta of 1215¹⁷ – the question of the protection of fundamental rights re-emerged when, in 1998, the Parliament decided to incorporate the ECHR into domestic law through the Human Rights Act (HRA).¹⁸ The HRA empowered 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.¹⁹ Even in the Nordic countries, finally, human-rights-based judicial review has emerged as a prominent feature of contemporary constitutionalism.²⁰

Barbera (eds), *Manuale di diritto pubblico* (Il Mulino, 1991) 117 and Augusto Barbera and Andrea Morrone (eds), *I diritti fondamentali* (Cedam 2012)

¹³ On the protection of fundamental rights in the German constitutional system see Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 1997)

¹⁴ For an assessment of the reform introduced by the Loi constitutionnelle n° 2008-724 J.O.R.F., 24 juillet 2008, p. 11890 (Fr.) compare Federico Fabbrini, 'Kelsen in Paris: France's Constitutional Reform and the Introduction of A *Posteriori* Constitutional Review of Legislation' (2008) 9:10 German Law Journal 1297 with François-Xavier Millet, 'L'exception d'inconstitutionnalité en France ou l'impossibilité du souhaitable' [2008] *Revue du droit public* 1445

¹⁵ The discovery of a binding Bill of Rights in the Preamble to the 1958 Constitution had been accomplished by the *Conseil Constitutionnel* already in its *Décision* 71-44 DC. See Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (OUP 1992); Louis Favoreu and Louis Philip, *Les grandes décisions du Conseil Constitutionnel* (Dalloz 2005) 177

¹⁶ See Gerhard van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?' (2010) 11:2 German Law Journal 275

¹⁷ See the masterpiece study of Charles McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1947)

¹⁸ On the UK Human Rights Act 1998, 46 Eliz. 2, c. 42 (Eng.) see Douglas Vick, 'The Human Rights Act and the British Constitution' (2002) 37 Texas International Law Journal 329. See also Peter Leyland, 'Human Rights Act 1998: Ripartire i diritti a casa?' [2000] *Quaderni Costituzionali* 83 (explaining that the decision to incorporate the ECHR in domestic law was inspired by the will to "bring fundamental rights home.")

¹⁹ For a more detailed explanation of the effect of the so-called "declaration of incompatibility" see Andrew Clapham, 'The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights* (OUP 1999) 233; Richard Gordon and Tim Ward, *Judicial Review and the Human Rights Act* (Routledge 2001)

²⁰ On the rise of human rights-based judicial review in the Scandinavian countries see Joakim Nergelius, 'Judicial Review in Swedish Law. A Critical Analysis' (2009) 78:2 Nordic Journal of Human Rights 142 (on Sweden); Tuomas

At the *supranational* level, fundamental rights have also recently gained in importance and visibility. From the historical point of view, the introduction of a system of fundamental rights at the supranational level has been one of the greatest achievements of the European Court of Justice (ECJ).²¹ Since the 1957 European Economic Community (EEC) Treaty eluded the issue of human rights,²² it was the ECJ that, through a praetorian jurisprudence, recognized step-by-step fundamental rights as general principles of EEC law.²³ Some scholars have argued that the case law of the ECJ was a response to the jurisprudence of the Italian and German Constitutional Court on “counter-limits”,²⁴ and that it was therefore an attempt to foster the doctrines of supremacy and direct effect of EEC law within the national legal systems.²⁵

However – as Brun-Otto Bryde has powerfully demonstrated – the case law of the ECJ was not a purely defensive move: despite the willingness of the ECJ to thwart potential threats coming from the national courts, the jurisprudence of the ECJ represented instead “an impressive step in the development of a human rights culture in Europe.”²⁶ Indeed, when the ECJ first 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. In addition, 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.”²⁷

Be that as it may, the results of the ECJ’s jurisprudence were later codified in Article F of the EU Treaty signed in Maastricht (afterward renumbered as Article 6 EU Treaty by the

Ojanen, ‘From Constitutional Periphery Toward the Centre: Transformations of Judicial Review in Finland’ (2009) 78:2 Nordic Journal of Human Rights 194 (on Finland)

²¹ Bruno de Witte, ‘The Past and the Future Role of the European Court of Justice in the Protection of Human Rights’ in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 859

²² As Gráinne de Búrca, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’ (2011) 105 American Journal of International Law 649 has recently explained, human rights represented a fundamental pillar of the project for the establishment of a European Political Community discussed during 1952-1953. However, after the rejection of the European Defence Community Treaty by France in 1954, the founding member states decided to pursue a path toward integration focused on economic issues, in which human rights were not specifically considered

²³ Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491. See José N. Cunha Rodriguez, ‘The Incorporation of Fundamental Rights in the Community Legal Order’ in Miguel Poiares Maduro and Loïc Azoulay (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 89. See also Takis Tridimas, *The General Principles of EU Law* (OUP 2007) 298

²⁴ C. Cost sent. 183/1973 *Frontini*; BVerfGE 37, 271 (1974) *Solange I* (holding that the supremacy of EU law can not extend to the point of undermining the protection of state constitutional rights)

²⁵ Jurgen Kühling, ‘Fundamental Rights’ in Armin von Bogdandy and Jurgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2006) 501; Frank Schimmelfennig, ‘Competition and Community: Constitutional Courts, Rhetorical Action and the Institutionalization of Human Rights in the European Union’ in Berthold Rittberger and Frank Schimmelfennig (eds), *The Constitutionalization of the European Union* (Routledge 2007) 100

²⁶ Brun Otto Bryde, ‘The ECJ’s Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism’ in Miguel Poiares Maduro and Loïc Azoulay (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 119, 122

²⁷ *Ibid* 121, quoting Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr 1972) 716

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.²⁸ The ECJ, through direct recourse or preliminary references, 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.²⁹ The Amsterdam Treaty, otherwise, also set up in Article 7 EU Treaty a political mechanism (later refined by the Nice Treaty) to ensure member states' compliance with EU fundamental rights.³⁰

In 2000, then, a Bill of Rights for the EU³¹ – the Charter of Fundamental Rights (CFR) – was drafted and solemnly proclaimed by the EU institutions.³² 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 – actively employed by the EU (and national) judiciaries as an advanced instrument for the protection of fundamental rights.³³ Furthermore, since the entry into force of the Lisbon Treaty in December 2009, the CFR has acquired the same legal value as the EU treaties and binds the EU institutions and the member states when their action falls under the scope of application of EU law.³⁴

At the *international* level, finally, the ECHR has acquired a key importance as a constitutional source for the protection of basic civil and political rights throughout the European continent.³⁵ The ECHR was adopted in Rome in 1950 by the state parties of the Council of Europe

²⁸ Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights at the Core of the European Union' (2000) 37 *Common Market Law Review* 1307

²⁹ Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925. See Zdenek Kühn, 'Wachauf and ERT: On the Road from the Centralized to the Decentralized System of Judicial Review' in Miguel Poiaras Maduro and Loïc Azoulay (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 151

³⁰ See Wojciech Sadurski, 'Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law* 385

³¹ Koen Lenaerts and Eddy de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *Common Market Law Review* 273

³² On the CFR see Lucia Serena Rossi, 'La Carta dei Diritti Fondamentali come strumento di costituzionalizzazione dell'ordinamento dell'UE' [2002] *Quaderni Costituzionali* 565 and Gráinne de Búrca and Jo Beatrix Aschenbrenner, 'European Constitutionalism and the Charter' in Steve Peers and Angela Ward (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Hart Publishing 2004) 4

³³ Koen Lenaerts and Eddy de Smijter, 'The Charter and the Role of the European Courts' (2001) 8:1 *Maastricht Journal of European and Comparative Law* 90; Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945

³⁴ On the impact of the Lisbon Treaty on the protection of fundamental rights in the EU system see Marta Cartabia, 'I diritti fondamentali e la cittadinanza dell'Unione' in Franco Bassanini and Giulia Tiberi (eds), *Le nuove istituzioni europee: Commento al Trattato di Lisbona* (Il Mulino 2008) 81; Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *Common Market Law Review* 617

³⁵ As argued by Alec Stone Sweet, 'Sur la constitutionnalisation de la Convention européenne des droits de l'homme' (2009) 80 *Revue trimestrielle des droits de l'homme* 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 1998) compulsory jurisdiction over the claims raised by private individuals, has had a major role in enhancing the ECHR. This distinguishes the ECHR from other international human rights regimes (established by treaties adopted in the framework of the Council of Europe or the United Nations) which, despite their normative

and was later integrated by several additional protocols. As 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 were refined and the role of the European Court of Human Rights (ECtHR) was strongly enhanced.³⁶

In particular, since the enactment of the 11th additional Protocol to the ECHR in 1998, the *ressortissants* of the signatory states may commence legal proceedings in front of the ECtHR when they believe that an individual right proclaimed in the ECHR has been unlawfully abridged by their state, and they have unsuccessfully exhausted all national remedies. In addition, they can receive damages if the state is found guilty.³⁷ 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.³⁸ The success of the ECHR review machinery, however, is such that the ECtHR has been literally flooded by individual applications in the last decade. Because of this, additional reforms to the ECHR were introduced in 2010 with the enactment of Protocol 14th aimed at enhancing the capacity of the ECtHR to cope with its soaring case law.³⁹

The constitutional role of the ECtHR⁴⁰ creates an incentive for national courts to take the ECHR into account in domestic adjudication,⁴¹ even in those member states where the ECHR is not incorporated into the national legal order with the status of a constitutional text.⁴² Moreover, in

relevance, 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

³⁶ Robert Harmsen, 'The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges Facing the European Court of Human Rights' in Giuseppe Martinico and Oreste Pollicino (eds) *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 27

³⁷ See Articles 34 and 41 ECHR (right to individual application and just satisfaction to the injured party). See also Antonio Bultrini, 'Il meccanismo di protezione dei diritti fondamentali istituito dalla Convenzione europea dei diritti dell'uomo. Cenni introduttivi' in Bruno Nascimbene (ed), *La Convenzione europea dei diritti dell'uomo. Profili ed effetti nell'ordinamento italiano* (Giuffrè 2002) 20

³⁸ Palmira Tanzarella, 'Il margine di apprezzamento' in Maria Cartabia (ed), *I diritti in azione* (Il Mulino 2007) 145, 150; Ernst-Ulrich Petersmann, 'Human Rights, International Economic Law and "Constitutional Justice"' (2008) 19:4 *European Journal of International Law* 769, 777

³⁹ See Lucius Caflish, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6:2 *Human Rights Law Review* 403. The need of new reforms in the machinery of the ECHR has recently been voiced also in the 'Final Declaration' of the High Level Conference on the Future of the ECtHR, Brighton (UK) 20 April 2012.

⁴⁰ Compare Jean Francois Flauss, 'La Cour européenne des droit de l'homme est-elle une Cour constitutionnelle?' [1998] *Revue française de droit constitutionnel* 711 with Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Review* 161

⁴¹ See Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (OUP 2008) 3; Giuseppe Franco Ferrari, 'National Judges and Supranational Laws. On the Effective Application of EU Law and ECHR' in Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 21

⁴² A paradigmatic example of what is argued here is represented by Italy, where, thanks to the jurisprudence of the *Corte Costituzionale* – C. Cost sent. 348/2007 and sent. 349/2007 – the ECHR (despite having an infra-constitutional status within the Italian legal system) is nowadays utilized as a source integrating the Constitution, i.e. as one of the parameter on the basis of which national legislation is reviewed. See Diletta Tega, 'Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte 'sub-costituzionale' del diritto' [2008] *Quaderni Costituzionali* 133 and Mario Savino, 'Il cammino internazionale della Corte Costituzionale dopo le sentenze n. 348 e 349 del 2007' [2008] *Rivista Italiana Diritto Pubblico Comunitario* 747. See also Joel Andriantsimbazovina,

several European countries, the ECHR has *de facto* become the common instrument through which ordinary courts exercise judicial review of national legislation: indeed, in many European jurisdictions, 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.⁴³

As this brief description outlines, in the last two decades the protection of fundamental rights has blossomed in Europe. Fundamental rights are nowadays proclaimed in national Constitutions, in the ECHR, as well as in the EU Treaty (which defines 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), EU courts (the ECJ and the Court of First Instance (CFI), now renamed the General Court), as well as the ECtHR provide judicial remedies against the infringements of rights.

The protection of fundamental rights in Europe is hence ensured today through a multilevel structure in which different overlapping normative orders intertwine.⁴⁴ The emergence of this pluralist structure represents a significant departure from the constitutional tradition of the European states where rights used to be protected by a single institution (either the Parliament or the Supreme Court). Yet, this system is the result of well-known historical necessities.⁴⁵ The memory of the tragedies of the 20th century had made crystal clear to Europe's 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.⁴⁶

'La prise en compte de la Convention européenne des droits de l'homme par le Conseil Constitutionnel' (2004) 18 Cahier du Conseil Constitutionnel (on France); Angel Rodríguez, 'Los efectos internos de las resoluciones del Tribunal europeo de derechos humanos y la vinculacion del juez español a su jurisprudencia' (2001-2002) 8-9 Teoria y realidad constitucional 201 (on Spain)

⁴³ See Olivier Dutheillet de Lamothe, 'Contrôle de constitutionnalité et contrôle de conventionnalité' in *Mélanges Labetoulle* (Daloz 2007) (on France) and Elaine Mak, 'Report on the Netherlands and Luxemburg' in Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 301 (on the Netherlands and Luxemburg)

⁴⁴ See Ingolf Pernice and Ralf Kanitz, 'Fundamental Rights and Multilevel Constitutionalism in Europe' (2004) Walter Hallstein-Institute Paper 7 now reprinted in Deirdre Curtin et al (eds), *The Emerging Constitution of the European Union* (OUP 2004); Giovanni Guzzetta, 'Garanzia multilivello dei diritti e dialogo tra le Corti nella prospettiva di un Bill of Rights europeo' in Antonio d'Atena et al (eds), *Tutela dei diritti fondamentali e costituzionalismo multilivello. Tra Europa e Stati nazionali* (Giuffrè 2004) 155

⁴⁵ Bruce Ackerman, 'Prologue: Hope and Fear in Constitutional Law' in Erik O. Eriksen et al (eds), *Developing a Constitution for Europe* (Routledge 2004) 12 (speaking of a "constitutionalism based on fear.")

⁴⁶ See Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217; Stephen Gardbaum, 'Human Rights and International Constitutionalism' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance*

This is for sure the historical explanation of the ECHR – enacted in the aftermath of WWII and significantly strengthened after the fall of the Berlin Wall.⁴⁷ However, the same logic also explains the creation of the EEC and its subsequent development into the EU.⁴⁸ Originally conceived as a political plan, only later to be recycled as an economic venture,⁴⁹ 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 had twice, in less than thirty years, bloodied Europe.⁵⁰ Fundamental rights, as checks against the abuse of public authorities, were certainly part of this enterprise – as evidenced by the jurisprudence of the ECJ, dating back as early as the 1960s, and by the subsequent codification of human rights in the EU in the late 1990s.⁵¹

The growth of a fundamental rights culture in Europe in the last few decades, otherwise, has been supported by a continuous dynamic of mutual reinforcement. Indeed, whenever fundamental rights have been strengthened at one of the levels of the European multilevel system, this has created the incentive for an expansion of the norms and institutions for the protection of fundamental rights in the other layers of the European system too. While state pressures arguably pushed the ECJ to begin protecting fundamental rights at the EU level,⁵² the development of fundamental rights in the framework of the EU and the ECHR have recently triggered major constitutional reforms in countries like France and the UK, bringing the protection of fundamental rights to the center of their constitutional systems.⁵³ In addition, the mutual influences and virtuous competition between the ECJ and the ECtHR have greatly contributed to the enhancement of, and convergence between, human rights standards at the transnational level in Europe.⁵⁴

(CUP 2009) 233. See then the collection of essays Joseph H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2004)

⁴⁷ See Oreste Pollicino, *L'allargamento ad est dell'Europa e rapporti tra Corti costituzionali e Corti europee* (Giuffrè 2010)

⁴⁸ See Alessandro Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino, 2002) 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 apart Europe in the first half of the XX century” (my translation). See also Tony Joris and Jan Vandenberghe, ‘The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?’ (2009) 15 *Columbia Journal of European Law* 1

⁴⁹ As recalled by Antonio Grilli, *Le origini del diritto dell'Unione Europea* (Il Mulino 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 functional step in the construction of an integrated political system in which presumably fundamental rights would have some role

⁵⁰ This argument has been developed remarkably by Jürgen Habermas, ‘Why Europe Needs a Constitution?’ (2011) 11 *New Left Review* 5

⁵¹ See B.O. Bryde (n 26) 126; A. Pizzorusso (n 47) 18; Sadurski (n 30) 385

⁵² See J. Kühling (n 25) 501; F. Schimmelfennig (n 25) 100

⁵³ See eg Alec Stone Sweet, ‘Le Conseil Constitutionnel et la transformation de la République’ [2008] *Cahiers du Conseil Constitutionnel* (on France); Cian Murphy, ‘Report on the UK and Ireland’ in Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 481 (on the UK)

⁵⁴ See Sionaidh Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’ (2006) 43 *Common Market Law Review* 629; Federico Fabbrini, ‘Il giudizio della Corte Europea dei

The above-mentioned processes, however, have not produced a uniform conception of fundamental rights across Europe. As will be emphasized later in this chapter, significant differences remain in the understanding and scope of fundamental rights. Variations in the standards of protection regarding specific rights exist both at the horizontal level (between the member states) and at the vertical level (between state law, EU law and ECHR law). As such, the European system for the protection of fundamental rights can be described as a pluralist constitutional arrangement. The existence of 1) a *plurality of constitutional sources* enshrining fundamental rights, 2) a *plurality of constitutional actors* endowed with the power to protect them and thus 3) a *plurality of constitutional views* on human rights is hardly a contestable fact. But what are the consequences of this complex constitutional arrangement? What are the dynamics at play in the European multilevel human rights system? Scholars have advanced very different approaches to make sense of this new constitutional reality, and the persuasiveness of these narratives needs now to be investigated.

2. Two narratives and their limits: “sovereignism” vs. “pluralism”

The extraordinary expansion of fundamental rights that has occurred over the last two decades in Europe represents a major challenge to the study of this field of law.⁵⁵ The development of an advanced system for the protection of fundamental rights at the transnational level, in particular, has called into question traditional theories about the protection of fundamental rights and has generated opposing academic reactions. In the European literature it is possible to identify two prevailing narratives that examine the implications of a multilevel architecture for the protection of fundamental rights.⁵⁶ According to several scholars, the emergence of layers of human rights beyond the state represents a negative challenge, threatening the sovereignty of the state. According to other scholars, instead, the events which have recently reshaped the European human rights arrangement must be assessed as a positive development, enhancing the overall European human rights record.

Diritti dell'Uomo sugli atti di Comunità ed Unione Europea' in Luca Mezzetti and Andrea Morrone (eds), *Lo strumento costituzionale dell'ordine pubblico europeo* (Giappichelli 2011) 519

⁵⁵ See Augusto Barbera, 'Prefazione' in Marta Cartabia (ed), *I diritti in azione* (Il Mulino 2007) 7. On the conceptual challenges that the constitutional transformations taking place in Europe produce on the traditional constitutional law and international law scholarship see also Giuliano Amato, 'Conclusion – Future Prospects for a European Constitution' in Giuliano Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 1271, 1276-1277

⁵⁶ On the concept of narratives see Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4

These two narratives depart from different theoretical premises and offer diverging understandings of the current European reality.⁵⁷ The first narrative – which I call the “sovereigntist” approach, since it is doctrinally grounded on the theory of the sovereign state as the primary locus for the protection of fundamental rights – mainly stresses the negative outcomes of the European multilevel system. The second narrative – which can be defined as the “pluralist” approach, since it departs from the theory of constitutional pluralism – provides instead a more optimistic assessment of the functioning of the European multilevel architecture, which praises the emergence of a common culture of fundamental rights in Europe. Yet, in their polarization, these two narratives offer only a partial view of the dynamics at play in Europe. For the methodological reasons that I will clarify below, both narratives present serious limitations in their capacity to explain comprehensively the implications of a multilevel architecture for the protection of fundamental rights.

A negative reading of the transformations that have recently occurred in the European multilevel human rights architecture can be detected in the work of a number of scholars from various EU member states. The emergence of sources and mechanisms of fundamental rights protection in the framework of the EU and the ECHR and the impact of these developments within the state legal system have been criticized in several areas of the law, as a challenge to the domestic standards of human rights protection.⁵⁸ Although often formulated in different tones, these negative conceptions of the transformations taking place in the European human rights system are driven by an underlying common “sovereigntist” narrative, with strong roots in the UK⁵⁹ but recently revitalized also in continental Europe.⁶⁰ According to this narrative, the protection of fundamental

⁵⁷ To some extent, these two narratives correspond to what, according to Miguel Maduro, are the two main threads within modern constitutional thought. See Miguel Poyares Maduro, ‘Three Claims of Constitutional Pluralism’ (2012, forthcoming) (paper on file with the author) 21-22 (identifying “two opposing pulls of modern constitutionalism. One, towards pluralism, linked to the values of freedom and private autonomy. The other, towards unity of hierarchy, linked with the ideals of equality, the rule of law and universality.”)

⁵⁸ See eg Diarmuid Rossa Phelan, ‘Right to Life of the Unborn v Promotion of Trade in Services: the European Court of Justice and the Normative Shaping of the European Union’ (1992) 55 *Modern Law Review* 670, 686 (criticizing the “intrusive structure and techniques of EC law [...] *vis-à-vis* a Member States’s constitutional law” in the area of abortion); Alain Supiot, ‘Conclusion: Europe’s Awakening’ in Marie-Ange Moreau (ed), *Before and After the Economic Crisis: What Implications for the ‘European Social Model* (Edward Elgar 2011) 292, 296 (criticizing the case law of the ECJ in the field of social right for “deconstructing national social rights” and advocating a form of judicial resistance to the decision of the ECJ by the state supreme and constitutional courts)

⁵⁹ For a recent restatement of the traditional British sovereigntist stand see the European Union Act 2011, 59 Eliz. 2 c. 12 (Eng.) whose Section 18 (the so-called “sovereignty clause”) states that “directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in Section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the UK only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.” For a critical assessment of this piece of legislation see Paul Craig, ‘The European Union Act 2011. Locks, Limits and Legality’ (2011) 48 *Common Market Law Review* 1915

⁶⁰ The contours of a (neo-)sovereigntist narrative have been recently, forcefully framed by the German *Bundesverfassungsgericht*. See BVerfGE 123, 267 (2009) (*Lissabon Urteil*) par 334 which 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

rights should be a primary function of the state, which exercises it, within the framework of the Constitution, through the action of its democratically-elected Parliament or through the activities of its courts.⁶¹ Hence, the development of human rights at the transnational level is seen as jeopardizing domestic standards and conceptions of rights and limiting the capacity of the state to decide about the scope of protection that should be granted to certain rights or liberties.⁶²

The dogmatic underpinnings of the “sovereigntist” approach find their historical roots, in the British case, in the centennial tradition of the “Sovereignty of Parliament”,⁶³ and, in continental Europe, in the doctrinal thought of the late 19th-century *Staatsrechtslehre*.⁶⁴ In his celebrated theory, Dicey conceptualized the practice of Parliamentary sovereignty as consisting in the power of the Queen-in-Parliament to make or unmake any law whatsoever. Furthermore, according to Dicey, no other authority has the right to over-ride or set aside legislation in the UK.⁶⁵ In his influential *System der subjektive öffentliche Rechte*, instead, Jellinek constructed fundamental rights 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.⁶⁶ 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.”⁶⁷ 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.⁶⁸

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). See critically, Cristoph Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones at Sea’ (2009) 10:8 German Law Journal 1201

⁶¹ See Massimo Luciani, ‘Costituzionalismo irenico e costituzionalismo polemico’ [2006] *Giurisprudenza Costituzionale*. But see also L. Favoreu, ‘L’eurosepticisme du droit constitutionnel’ in Hélène Gaudin (ed), *Droit constitutionnel. Droit communautaire. Vers un respect réciproque mutuel?* (Économica 2001) 379; Dieter Grimm, *Die Verfassung und die Politik. Einsprüche in Störfällen* (Beck 2001)

⁶² See eg the recent British parliamentary debate about the introduction of voting rights for convicted felons, required by the decision of the ECtHR in *Hirsh v. UK*, ECHR [2005] Application No. 74025/01 (GC) (UK found to be in violation of Article 3 of the 1st additional Protocol to the ECHR for depriving felons of voting rights). House of Commons 10 Feb 2011: Column 493 (Mr. Davis MP asking: “is the requirement to give prisoners the vote sensible, just, right and proper? Secondly, who should decide? Should it be the [ECtHR], or this House on behalf of the British people?”)

⁶³ Alison Young, ‘Sovereignty: Demise, Afterlife or Partial Resurrection?’ (2011) 9:1 *International Journal of Constitutional Law* 163

⁶⁴ On the enduring influence that legal tradition plays in European legal culture cf. Bruno de Witte, ‘Sovereignty and Legal Integration: The Weight of Legal Tradition’ in Anne Marie Slaughter et al (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart Publishing 1998)

⁶⁵ Albert V. Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed Liberty Classics 1915)

⁶⁶ See Georg Jellinek, *Das System der subjektiven öffentlichen Rechte* (Mohr 1892). But see also Carl von Gerber, *Ueber öffentliche Rechte* (H. Laupp 1852), Paul Laband, *Das Staatsrecht des Deutschen Reiches* (Mohr 1895) and Vittorio Emanuele Orlando, *Diritto pubblico generale* (Giuffrè 1940)

⁶⁷ Giorgio Bongiovanni, ‘Introduzione’ in Giorgio Bongiovanni (ed), *Georg Jellinek, La Dichiarazione dei diritti dell’uomo e del cittadino* (Laterza 2002) xxxiv

⁶⁸ For an historical and philosophical overview compare Pietro Costa, ‘Diritti’ in Maurizio Fioravanti (ed), *Lo Stato moderno in Europa: Istituzioni e diritto* (Laterza 2002), 37 with Luigi Ferrajoli, ‘I diritti fondamentali’ in Ermanno Vitale (ed), *Diritti fondamentali: Un dibattito teorico* (Laterza 2008) 5

For understandable reasons, the tradition of Parliamentary sovereignty has been much more resilient in the UK, while Jellinek's theories have been partially superseded in continental Europe. Since the UK has never experienced a totalitarian regime, the idea of Parliamentary sovereignty could legitimately survive in Britain even after WWII.⁶⁹ In continental Europe, instead, the enactment of the post-WWII Constitutions described in Section 1, was driven by the desire to recognize fundamental rights as pre-political individual entitlements and to institutionalize them as the outer boundaries of state action.⁷⁰ Nevertheless, the influence of "sovereignist" thinking seems to have survived also on the European continent. In fact, the conviction that rights should be essentially confined within the sovereign state has heavily and enduringly shaped the contemporary European discourse about fundamental rights – and is today echoed in public conversation,⁷¹ in the case law of several national courts,⁷² and even in the measures adopted by national governments and legislatures.⁷³

A positive reading of the transformations taking place in the field of fundamental rights protection in Europe is instead offered by another group of scholars. These scholars praise in general terms the emergence of a *jus commune* of fundamental rights in Europe, applying to the field of human rights some of the most important conceptual accomplishments of the theory of constitutional pluralism.⁷⁴ The theory of constitutional pluralism, which has been developed to

⁶⁹ Whether however the principle of the "sovereignty of Parliament" continues to be viable also in the UK after the accession to the EU and the enactment of the HRA has been called into question. See Nick Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9:1 International Journal of Constitutional Law 144

⁷⁰ See Giorgio Bongiovanni, 'Diritti inviolabili e libertà' in Augusto Barbera (ed), *Le basi filosofiche del costituzionalismo* (Laterza 1997) 63, 83; Duncan Kelly, 'Revisiting the Rights of Man: Georg Jellinek on Rights and the State' (2004) 22:3 Law and History Review 493. For a broader philosophical perspective see then Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002)

⁷¹ See eg Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice' CES report originally published in German in the *Frankfurter Allgemeine Zeitung* (Frankfurt, 8th September 2008). For a discussion whether the concept of sovereignty continues to be viable today in continental Europe compare Sabino Cassese, 'L'erosione dello Stato: una vicenda irreversibile?' in Sabino Cassese (ed), *La crisi dello Stato* (Laterza 2002) 44 and Michel Troper, 'The Survival of Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments – The past, Present and Future of a Contested Concept* (CUP 2010) 132

⁷² Cf. eg the Italian *Consiglio di Stato*, sez. V, n. 4207/2005, *Federfarma*, par 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 Giulio Itzcovich, 'I diritti fondamentali come 'libertà dello Stato'. Sovranità dello Stato e sovranità dei diritti nel caso *Federfarma*' [2008] *Diritti umani e diritto internazionale* 267

⁷³ Cf. eg Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ 2010 C 83/313, in which the British and Polish government affirmed that "the Charter does not extend the ability of the [ECJ], 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: see Jacques Ziller, *Il nuovo Trattato europeo* (Il Mulino 2007) 178 (affirming that "from the legal point of view the protocol is totally useless." (my translation))

⁷⁴ See Gaetano Silvestri, 'Verso uno *jus commune* europeo dei diritti fondamentali' [2006] *Quaderni Costituzionali* 7. See also Alison Young, 'The Charter, Constitution and Human Rights; Is This the Beginning or the End for Human

rationalize the current legal reality of competing constitutional claims of final authority and of judicial attempts at accommodating them, advances an optimistic vision of the European multilevel arrangement.⁷⁵ Constitutional pluralists, in fact, not only accept the reality of a multiplicity of constitutional loci in Europe but actually regard this state of affairs as a normatively valuable situation. In the words of one of the earliest proponents of this theory, Professor Neil Walker, constitutional pluralism has, besides an explanatory claim, a normative and epistemic function.⁷⁶

In this “pluralist” narrative, fundamental rights no longer appear as directly and univocally related to the sovereign state. Rather, they are conceived as autonomously and simultaneously entrenched in a plurality of legal sources and a multiplicity of legal frameworks which intertwine and overlap.⁷⁷ The state is but one of the authorities endowed with the power to acknowledge and secure fundamental rights and cannot advance any *a priori* greater claim of legitimacy *vis-à-vis* the other public authorities operating in the field of human rights protection beyond the state.⁷⁸ As such, constitutional pluralism rejects the idea of a systemic, abstract superiority of the state in the protection of fundamental rights, in favour of an open-ended, heterarchical approach – to use the words of Professor Daniel Halberstam – which emphasizes the relative capacities of the various institutions involved in rights-protecting activities.⁷⁹

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 setting⁸⁰ in which different institutions cooperate, as in a musical counterpunct,⁸¹ to achieve a greater protection of fundamental rights while simultaneously

Rights Protections by Community Law?’ (2005) 11 European Public Law 219; Peter Häberle, *La garantía del contenido esencial de los derechos fundamentales* (Dykinson 2003)

⁷⁵ Julio Baquero Cruz, ‘The Legacy of the *Maastricht-Urteil* and the Pluralist Movement’ (2008) 14 European Law Journal 389. See also Miguel Poiars Maduro, ‘The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism’ (2005) 3 International Journal of Constitutional Law 332, 347; Mattias Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty’ (2005) 11:3 European Law Journal 262

⁷⁶ Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65:3 Modern Law Review 317, 337

⁷⁷ See Nico Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71:2 Modern Law Review (2008) 183

⁷⁸ See Joseph H.H. Weiler and Nicholas Lockhart, “‘Taking Rights Seriously’ Seriously: The European Court of Justice and Its Fundamental Rights Jurisprudence – Part I’ (1995) 32 Common Market Law Review 51, 81 (who 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.”) and ‘ – Part II’ (1995) 32 Common Market Law Review 579

⁷⁹ Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 326, 337 (arguing that in pluralist settings a number of factors influence the capacity to act of the several players, notably voice, expertise and rights)

⁸⁰ See Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (OUP 1999); Neil Walker, ‘Late Sovereignty in the European Union’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 3

⁸¹ Miguel Poiars Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 501

respecting the legitimate claims of authority made by each of the participants.⁸² In addition, as is emphasized, pluralism is the constitutional arrangement in which the needs for uniformity and diversity in the protection of fundamental rights can be best accommodated and reconciled and, as a consequence, Europe should strive to preserve it *de jure condendo*.⁸³

Despite their different theoretical premises, both the “sovereignist” and the “pluralist” narratives present common methodological limits that seriously weaken their capacity to systematize the implications of a multilevel human rights system.⁸⁴ Both narratives capture some of the truth in the constitutional dynamics at play in the European architecture. The “sovereignist” narrative correctly points out that the rise of transnational standards for the protection of fundamental rights has in some cases produced challenges in the domestic systems, threatening the state standards of protection of several rights. The “pluralist” narrative, at the same time, rightly emphasizes how the existence of a multilevel architecture has often enhanced the degree of protection of fundamental rights in the last decades in Europe. Nevertheless, because of a common methodological mistake, both narratives miss the general picture of fundamental rights in Europe and are therefore unable to convincingly explain the complex dynamics of such a multilevel architecture.⁸⁵

Indeed, both the “sovereignist” and the “pluralist” narratives lack a comparative perspective, and approach the protection of fundamental rights in Europe from only a partial viewpoint.⁸⁶ The “sovereignists” consider a specific EU member state as their exclusive frame of reference and fail to undertake any *internal comparison* among EU member states. Hence, in

⁸² See also for a description of various brands of constitutional pluralism Matej Avbelj and Jan Komarek, ‘Four Visions of Constitutional Pluralism’ (EUI Working Paper Law No. 21, 2008)

⁸³ Marta Cartabia, ‘Unita nella diversità. Il rapporto tra la Costituzione europea e le Costituzioni nazionali’ [2005] *Diritto dell’Unione Europea* 590; Xavier Groussot, ‘European Rights’ and Dialogues in the Context of Constitutional Pluralism’ in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2011)

⁸⁴ I will focus here only on the methodological limits of both the “sovereignist” and the “pluralist” narratives. It has to be mentioned, however, that the “sovereignist” narrative raises also serious theoretical concerns. Indeed, “sovereignist” claims that fundamental rights draw their legitimacy from the state and ought to be secured exclusively within the state legal framework 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 and their rationale. For a critique of the “statist” paradigm and for a call in favour of a “cosmopolitan turn in constitutionalism” see Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 258, 263. See also Miguel Poiares Maduro, ‘Las formas del poder constitucional de la Union Europea’ (2003) 119 *Revista de Estudio Políticos* 11

⁸⁵ For an interesting critical assessment of the “sovereignist” and “pluralist” claims in the context of the US debate about human rights see also Margaret McGuinness, ‘Federalism and Horizontality in International Human Rights’ (2008) *Missouri Law Review* 1265

⁸⁶ On the opportunity to use the comparative method when studying the EU and on the caveats concerning the levels of analysis that needs to be considered when comparing the EU see Renaud Dehousse, ‘Comparing National and EC Law: the Problem of the Level of Analysis’ (1994) 42 *American Journal of Comparative Law* 761

examining the implications of the interaction between state and transnational laws in Europe, the “sovereigntist” narrative neither appreciates the differences between EU member states nor explores how the impact of transnational human rights standards varies across the EU member states. The “pluralists”, on the other hand, focus solely on the European multilevel architecture, failing to undertake any *external comparison* between Europe and other multilevel systems for the protection of rights. Hence, in studying the dynamics at play in Europe, the “pluralist” narrative develops a *sui generis* vision, conceiving the European system as a unique, exceptional arrangement with no equivalents worldwide.

As such, the analysis of both the “sovereigntists” and the “pluralists” appears to be based on an ideographic methodology. The “sovereigntists” see only what the interaction between state and transnational law produces in their country, without considering what – from an internal (European) comparative perspective – the consequences of this interaction are for other EU member states. The micro focus of the analysis and the lack of any *cross-units* comparison (i.e. comparison with other units of the European architecture) has however a serious drawback: the “sovereigntist” narrative results in a ideological preconception against transnational human rights law which misses the manifold and variable consequences of the interaction between state and supranational laws in the European multilevel architecture. The “pluralists”, instead, idealize the interplay between multiple sources of law in the European architecture as a *sui generis* phenomenon, without attempting to explore – from an external comparative perspectives – what dynamics arise in other multilevel human rights architectures. The macro focus of the analysis and the lack of any *cross-systems* comparison (i.e. comparison with other multilevel human rights systems) is therefore also problematic: the “pluralist” narrative crystallizes European reality and is unable to provide the benchmarks and guidelines needed to examine the evolving operation of the European system.

In the general constitutional law literature, however, this kind of ideographic methodological approach has been the object of recurrent criticism from students of comparative law. Indeed, comparative lawyers have quite convincingly clarified the manifold advantages of the comparative method.⁸⁷ The comparative method, on the one hand, is the most effective cognitive instrument to understand the structures and functions of juridical systems by underscoring the commonalities and diversities between cases.⁸⁸ On the other hand, it is an extremely powerful method to explicate the dynamics and processes that characterize the functioning of a specific system and to illuminate

⁸⁷ See Geoffrey Samuel, ‘Taking Method Seriously’ (2004) 2 *Journal of Comparative Law* 94; Lorenzo Zucca, ‘Montesquieu, Methodological Pluralism and Comparative Constitutional Law’ (2009) 5 *European Constitutional Law Review* 481. See also recently Maurice Adams and Jacco Bomhoff, ‘Comparing Law: Practice and Theory’ in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012) 1

⁸⁸ See René David and Camille Jauffret-Spinozi, *Les grands systèmes de droit contemporains* (11th ed Dalloz 2002); Lucio Pegoraro, ‘Introduzione al diritto pubblico comparato’ in Lucio Pegoraro et al (eds), *Diritto Pubblico Comparato* (Giappichelli 2004) 1

those structural regularities that would otherwise pass unnoticed.⁸⁹ These advantages have been defined by Vicki Jackson as the “mirror function” of comparative law, i.e. the attitude of looking at the others to better understand oneself.⁹⁰

The comparative method has also been identified as a valuable tool to supply models in the perspective of legal reforms and to advance transformations and unifications in the law.⁹¹ Needless to say, however, comparison as a method is *prima facie* indifferent to the outcome of its analysis. The primary purpose of the comparative method is to explain phenomena rather than to prove convergences or similarities between the cases studied: a comparative analysis, in fact, 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 component of the comparative method,⁹² its main purpose is descriptive rather than prescriptive and as such it aims at enhancing scientific knowledge rather than advising legal reforms.

Constitutional scholarship has, at the same time, defined with growing precision and attention the principles that should guide case-selection in comparative law.⁹³ Ran Hirschl has thoroughly identified four different models of comparative analysis,⁹⁴ and has underlined how the value of the comparative assessment and its practical significance in shaping policy reforms is greatest under the so-called “most similar cases logic of comparison”, i.e. when the systems to be compared present structural similarities under most considered variables.⁹⁵ Aware of the virtues of the comparative method, several students of European law have maintained that any research that focuses on the European system should resort to a comparative methodology and thus benefit, if possible, from the lessons that can be learnt from other legal systems.⁹⁶ According to these scholars,

⁸⁹ This point has been stressed notably in the works of Rodolfo Sacco: *Introduzione al diritto comparato* (5th ed Utet 2001) 12; ‘Legal Formants : a Dynamic Approach to Comparative Law – Part I’ (1991) 39 *American Journal of Comparative Law* 1 and “– Part II” (1991) 39 *American Journal of Comparative Law* 343

⁹⁰ See Vicki Jackson, *Constitutional Engagements in a Transnational Era* (OUP 2010) chap 9. See also Victor Ferreres Comella, ‘Comparative Modesty (book review of Vicki Jackson, *Constitutional Engagements in a Transnational Era*)’ (2011) 7:3 *European Constitutional Law Review* 517, 520 (arguing that “transnational law is a sort of mirror that helps a national community define itself in a self-critical way.”)

⁹¹ See Alan Watson, ‘Comparative Law and Legal Change’ (1978) 37 *Cambridge Law Journal* 313; Alessandro Pizzorusso, *Corso di Diritto Comparato* (Giuffrè 1983)

⁹² See Sujit Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 1

⁹³ See Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *American Journal of Comparative Law* 125. See also Mark Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 67

⁹⁴ R. Hirschl (n 93) (distinguishing between the “most similar cases logic of comparison”, the “most different cases logic of comparison”, the “prototypical case logic of comparison” and the “most difficult case logic of comparison”)

⁹⁵ *Ibid* 133

⁹⁶ See eg Steve Boom, ‘The European Union After the *Maastricht* Decision: Will Germany Be the “Virginia of Europe”?’ (1995) 43 *American Journal of Comparative Law* 177; Jeffrey Cohen, ‘The European Preliminary Reference and US Supreme Court Review of State Courts Judgments: A Study in Comparative Judicial Federalism’ (1996) 44 *American Journal of Comparative Law* 421

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 polycentric constitutional features.⁹⁷

Interestingly, the legal comparative approach in the study of European constitutionalism was quite widespread till the 1980s,⁹⁸ but it later “fell into a medieval slumber”,⁹⁹ to be replaced by a *sui generis* narrative.¹⁰⁰ Recently, however, comparative lawyers have shown a new interest in European studies and have powerfully challenged the weak methodological assumptions of the *sui generis* scholarship.¹⁰¹ As Robert Schütze has convincingly argued, “there are serious problems with the *sui generis* argument.”¹⁰² Firstly, such an approach lacks explanatory value. Secondly, it is able to describe the European system only in negative terms. Thirdly, 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. From the empirical point of view, furthermore, comparative lawyers have persuasively explained that the *sui generis* argument is analytically unfounded, since the European architecture as a pluralist system characterized by the existence of overlapping sites of authorities – each 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 principles of federalism.¹⁰³ Drawing on these important insights, I will now endeavour to advance a comparative-based analysis of the European multilevel human rights system.

⁹⁷ See Alberta Sbragia, ‘Thinking about the European Future: The Use of Comparison’ in Alberta Sbragia (ed), *Euro-Politics. Institutions and Policymaking in the “New” European Community* (Brookings Institution 1992) 257; Mark Tushnet, ‘Conclusion’ in Mark Tushnet (ed), *Comparative Constitutional Federalism. Europe and America* (Greenwood Press 1990) 139

⁹⁸ The history of comparative studies on Europe reflect to a large extent the broader experience of the rise and fall of comparative studies in general in the last fifty years. See David Fontana, ‘The Rise and Fall of Comparative Constitutional Law in the Postwar Era’ (2011) 31 *Yale Journal of International Law* 1

⁹⁹ Robert Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (OUP 2009) 3 n 12

¹⁰⁰ A prominent example of this has been Professor Joseph H.H. Weiler who, despite being one of the front runners of a comparative approach to the study of Europe – cfr. his contribution to Mauro Cappelletti et al (eds), *Integration Through Law: Europe and the American Federal Experience. Volume 1, Book 1* (de Gruyter 1986) – in recent times has become a strong supporter of the *sui generis* argument. See Joseph H.H. Weiler, ‘Federalism Without Constitutionalism: Europe’s *Sonderweg*’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 54

¹⁰¹ See eg Larry Catà Backer, ‘The Extra-National State: American Confederate Federalism and the European Union’ (2001) 7 *Columbia Journal of European Law* 173; Ernest Young, ‘Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism’ (2002) 77 *NYU Law Review* 1612

¹⁰² R. Schütze (n 99) 59

¹⁰³ See D. Halberstam (n 79) 348; A. Torres Pérez (n 3) 72 and in much detail see *infra* Section 3. But see also Daniel Halberstam, ‘Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights’ (2007) 5:1 *International Journal of Constitutional Law* 166

3. The European multilevel system in comparative perspective: a “neo-federalist” narrative

The idea that the constitutional architecture of Europe can be analyzed in a comparative perspective has a noble historical pedigree.¹⁰⁴ It suffices to recall here the pioneering research coordinated by Mauro Cappelletti at the EUI in the early 1980s to appreciate how *federal systems* – and notably, the federal experience of the US – have traditionally been regarded as the most illuminating comparative examples for the study of Europe.¹⁰⁵ As has been highlighted, the EU is a federal-like arrangement under many dimensions (a foundational, an institutional and a functional one) and can be usefully compared with other federal constitutional systems.¹⁰⁶ By building on the illuminating contributions of these scholars, in this Section I will attempt to develop a comparison between the European multilevel human rights system and other federal arrangements for the protection of fundamental rights.¹⁰⁷

In light of this comparative exercise, I will later frame the contours of a new narrative for the study of fundamental rights in Europe, which I call “neo-federalist”. The core claim of this narrative is that the European multilevel human rights architecture reflects the main features of other federal systems for the protection of fundamental rights and should be conceptualized as a “federal” model in order to be better analyzed. As I explain, however, the “federal” idea in Europe has traditionally been regarded as problematic in theory and unworkable in practice because of the statist ambiguities with which the European brand of “federalism” is fraught. In order to avoid this deadlock, I will therefore advance a “neo-federalist” vocabulary which, by rediscovering the US constitutional tradition, construes federalism as the organizing principle of pluralist, heterarchical constitutional arrangements. With these conceptual clarifications, “neo-federalism” will emerge as a powerful narrative to analyze the multilevel European human rights architecture.

In my comparative analysis I follow the “most similar cases logic of comparison”,¹⁰⁸ and therefore select as comparator the federal constitutional system that shares more similarities with

¹⁰⁴ See Eric Stein, ‘Uniformity and Diversity in a Divided-Power System: the United States’ Experience’ (1986) 61 *Washington Law Review* 1081 now reprinted in *Thoughts from a Bridge. A Retrospective of Writings on New Europe and American Federalism* (University of Michigan Press 2000) 309; Terrance Sandalow and Eric Stein, ‘On the Two Systems: An Overview’, in Terrance Sandalow and Eric Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe* (OUP 1982); Koen Lenaerts, *Two Hundred Years of U.S. Constitution and Thirty Years of EEC Treaty. Outlook for a Comparison* (Kluwer 1988)

¹⁰⁵ M. Cappelletti et al (n 100)

¹⁰⁶ See R. Schütze (n 99) 47 ff

¹⁰⁷ Since the purpose of my research is to study the protection of fundamental rights I only consider as comparative examples for my analysis contemporary federal democracies. Of course, the cases to be selected for a comparative assessment could be different, however, if the purpose of the research work was, for instance, to study 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 see Sabino Cassese, ‘Che tipo di potere pubblico è l’Unione Europea? [2002] *Quaderni fiorentini per la storia del pensiero giuridico* 109

¹⁰⁸ See R. Hirschl (n 93) 133

the European multilevel architecture.¹⁰⁹ In this regard, I argue that the most appropriate comparative example for the European multilevel architecture is precisely the federal system for the protection of fundamental rights of the US. As mentioned above, two structural features characterize the European multilevel system: 1) the plurality of constitutional sources, i.e. charters of rights at the state, EU and ECHR levels; and 2) the plurality of constitutional actors, i.e. institutions for the protection of rights. In Europe, this is ensured notably through several separate orders of jurisdictions (state courts, EU courts and the ECtHR), which are able to develop an autonomous conception of fundamental rights (since none of them is subject to appellate review by other courts on matters exclusively pertaining to its domestic jurisdiction) and which are mostly empowered to exercise judicial review.

As a matter of fact, these pluralist features are lacking in the federal systems which originated in the framework of the British Commonwealth. In Australia, for instance, the federation (and many of the states) are not endowed with a Bill of Rights and although the federal judiciary has gradually developed a praetorian human rights jurisprudence, a single judicial system is in place in which the federal High Court acts simultaneously as the last instance court for both federal and state law.¹¹⁰ An analogous situation also exists in Canada: here, both the provinces and the federal government have Charters of Rights;¹¹¹ however, the judicial system is largely centralized since the Federal Supreme Court operates as a last instance court also for provincial law (hence fully reviewing the decisions of provincial courts). In India, on the other hand, there are neither state constitutions nor state courts which have developed a local-based conception of rights.¹¹²

A pluralist architecture for the protection of human rights exists instead in Switzerland, as the result of a series of historical developments that present many points of analogy with the European experience. The Swiss constitutional structure developed from the Middle Ages through a

¹⁰⁹ On the possibilities, but also on the caveats, that need to be taken into account when comparing federal systems see Vicki Jackson, 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2:1 *International Journal of Constitutional Law* 91, 95 (explaining how federal systems are complex "package deals" resulting from historically contingent compromises). See also Cheryl Saunders, 'Constitutional Arrangements of Federal Systems' (1995) 25 *Publius* 61

¹¹⁰ On the lack of a federal Charter of Rights see George Williams, *A Charter of Rights for Australia* (UNSW Press 2007). On the complex constitutional interaction between federal and state law in Australia see however, Simon Evans and Cheryl Saunders, 'Overlap, Inconsistency, Conflict and Choice. Reconciling Multiple Norms in the Australian Federation' in Hans Peter Schneider et al (eds), *Judge Made Federalism? The Role of Courts in Federal Systems* (Nomos 2009) 131

¹¹¹ See Kent Roach, *Constitutional Remedies in Canada* (Canada Law Book 1997). On the Can. Charter of Rights and Freedoms [Schedule B to the Canada Act 1982, 30 Eliz 2, c. 11 (UK)] and the weak system of judicial review that it creates see also Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008) 18

¹¹² For a comparative assessment of federalism in India and the EU see however Shivadev Shastri, 'Lessons for the European Community from the Indian Experience with Federalism' (1994) 17 *Hastings International and Comparative Law Review* 633

series of covenantal networks among sovereign and independent cantons.¹¹³ During the 19th 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.¹¹⁴ 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.”¹¹⁵

During the 20th century, the Swiss system for the protection of fundamental rights underwent several significant transformations.¹¹⁶ First, “the fundamental rights catalogue of the Swiss Federal Constitution was supplemented step by step by the case law of the Federal Supreme Court concerning the unwritten fundamental rights and the voluminous case law concerning the equal protection clause,”¹¹⁷ which anticipated the introduction of a detailed Bill of Rights in the new Swiss Constitution of 1999. Secondly, “Switzerland c[ould] not escape the influence of the international legal revolution.”¹¹⁸ Thus, in 1974, Switzerland became a party to the ECHR and, given the openness of its legal system *vis-à-vis* international human rights law,¹¹⁹ the ECHR has ever since been considered as directly binding in the federal and cantonal domains.¹²⁰ As such, in Switzerland there are today “three levels of written fundamental rights”¹²¹, comprising cantonal laws, the Federal Constitution and the ECHR.¹²²

Nevertheless, mostly because of its civil law tradition,¹²³ Switzerland is endowed with a unified judicial system, since cantonal courts are charged to enforce federal laws and the Federal Tribunal is empowered to hear appeals against decisions of the last instance courts of the Cantons¹²⁴

¹¹³ Daniel Elazar, ‘Communal Democracy and Liberal Democracy: An Outside Friend’s Look at the Swiss Political Tradition’ (1993) 23 *Publius* 3

¹¹⁴ Jörg Müller, ‘Allgemeine Bemerkungen zu den Grundrechten’ in Daniel Thürer et al (eds), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess 2001) 621, 623

¹¹⁵ Max Frenkel, ‘The Communal Basis of Swiss Liberty’ (1993) 23 *Publius* 61, 68

¹¹⁶ See Thomas Fleiner, ‘Recent Developments of Swiss Federalism’ (2002) 32 *Publius* 97

¹¹⁷ Daniela Thurnherr, ‘The Reception Process in Austria and in Switzerland’ in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (OUP 2008) 311, 367

¹¹⁸ M. Frenkel (n 115) 69

¹¹⁹ See Anne Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’ (2009) 3 *International Constitutional Law Journal* 170

¹²⁰ See Nicolas Michel, ‘L’imprégnation du droit étatique par l’ordre juridique international’ in Daniel Thürer et al (eds), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess 2001) 63

¹²¹ D. Thurnherr (n 117) 366

¹²² On the role of cantonal constitutional laws in the protection of fundamental rights see Regula Kägi-Diener, ‘Grundrechtsschutz durch die Kantone’ in Daniel Thürer et al (eds), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess 2001) 837

¹²³ Thomas Fleiner, ‘Different “Federalism” According to the Different Legal Systems: Common Law and Continental Law’ paper presented at the Conference in Honour of Ronald Watts “The Federal Idea”, in Kingston (Ontario, Canada) on October 18-20, 2007 (paper on file with the author)

¹²⁴ See Article 86, *Loi Fédérale sur le Tribunal Fédéral* du 17 Juin 2005, RO 2005 p. 3829 (Switz.) (appeals to the Federal Tribunal against decisions of the last instance courts of the Cantons)

for any issue concerning federal law, international law, or the constitutional law of the Cantons,¹²⁵ as well as appeals against any decision of cantonal authorities on any matter of federal constitutional law (so-called “subsidiary recourse”).¹²⁶ In addition, because of its strong tradition of local participatory democracy,¹²⁷ Switzerland has historically opposed the introduction of judicial review of legislation:¹²⁸ even today, the Federal Tribunal can review cantonal laws but cannot set aside federal norms.¹²⁹ As a consequence, it appears that Switzerland presents several relevant institutional differences from the pluralist judicial system existing in the European architecture which makes it a less apt example for comparison.

From this point of view, the US emerges as the most similar case to be compared with the European multilevel architecture. In the US, as in Europe, the system for the protection of fundamental rights is characterized by a multiplicity of Bills of Rights (since the US states are endowed with their own human rights texts, just like the federal government)¹³⁰ and by a plurality of jurisdictions (since the US states, like the federal government, are endowed with independent judicial institutions which can review legislation and whose decisions can only be appealed to the federal Supreme Court for compatibility with the federal Constitution).¹³¹ In the subsequent chapter of this thesis, therefore, I will use the US case as the comparative model for the study of Europe. Such a comparison is appropriate, otherwise, regardless of the state-like nature of the US constitutional system. From the point of view which is of interest for the comparison, in fact, the US is still empirically characterized by the existence of a federal, multilevel architecture for the protection of human rights, analogous to the European one.

Also in the US, the emergence of a pluralist architecture for the protection of fundamental rights has been the result of a long historical evolution. The 1787 US Constitution, drafted after the unsuccessful experience of the 1781 Articles of Confederation, established for the thirteen independent American states a constitutional system in which power was institutionally divided both vertically¹³² – between several states and a federal authority – and horizontally¹³³ – among the

¹²⁵ See Ibid Article 95 (reasons of appeals to the Federal Tribunal)

¹²⁶ See Ibid Article 113 (subsidiary recourse in constitutional matters to the Federal Tribunal)

¹²⁷ This is perhaps the strongest source of pluralism in Switzerland, as acknowledged by D. Elazar (n 113)

¹²⁸ See Walter Kälin, ‘Verfassungsgerichtbarkeit’ in Daniel Thürer et al (eds), *Verfassungsrecht der Schweiz - Droit constitutionnel suisse* (Schulthess 2001) 1167

¹²⁹ The Federal Tribunal, cannot even set aside a federal statute when it is incompatible with the ECHR. See D. Thurnherr (n 117) 332-333 (explaining that “the Federal Supreme Court can state that the statute is incompatible with international law and that it is the legislator’s responsibility to bring the Swiss law into conformity with it.”)

¹³⁰ On the codification of rights both in the federal Bill of Rights and in states constitutions see Stewart Pollock, ‘State Constitutions as Separate Sources of Fundamental Rights’ (1983) 35 Rutgers Law Review 707

¹³¹ On the judicial architecture of the US see Vicki Jackson and Judith Resnik (eds), *Federal Courts* (Foundation Press 2010)

¹³² On the vertical separations of powers in the US constitutional architecture see Gerald Gunther and Kathleen Sullivan, *Constitutional Law* (13th ed Foundation Press 1997) 87; Robert Sadler, ‘The Constitution and the American Federal System’ (2009) 55 Wayne Law Review 1

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 which would also later be reproduced in each of the new states).

In its original structure,¹³⁴ the US system was endowed with two strictly separate mechanisms for the protection of fundamental rights.¹³⁵ Every state in 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 provisions) – then bound the action of the federal government in its spheres of competence. The federal Bill of Rights was, however, inapplicable in the states¹³⁶ – some of which, in fact, even allowed slavery.¹³⁷

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.¹³⁸ The Fourteenth 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.¹³⁹

The so-called “incorporation” of the federal standards of fundamental rights protection within the legal orders of the states was a gradual and contested process¹⁴⁰ that took more than a

¹³³ On the horizontal separations of powers in the US constitutional architecture see Laurence Tribe, *American Constitutional Law* (3rd ed, Foundation Press 2000) 118; Bradford Clark, ‘Separation of Powers as a Safeguard of Federalism’ (2001) 79 *Texas Law Review*

¹³⁴ Compare the historical accounts of Bruce Ackerman, *We the People. Volume 1: Foundations* (Harvard University Press 1991) with Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2005)

¹³⁵ Jean Yarbrough, ‘Federalism and Rights in the American Founding’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 57

¹³⁶ See the decision of the US Supreme Court in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) and Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 2000)

¹³⁷ On the problem of slavery and for an account of the infamous decision of the US Supreme Court in *Dred Scott v. Sandford*, 19 U.S. (How.) 393 (1857) see Paul Finkelman, *Dred Scott v. Sandford. A Brief History with Documents* (Bedford/St.Martin's 1997)

¹³⁸ See William Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Harvard University Press 1988)

¹³⁹ See John Paul Stevens, ‘The Bill of Rights: A Century of Progress’ in Geoffrey Stone et al (eds), *The Bill of Rights in the Modern State* (University of Chicago Press 1992) 13. For a detailed analysis of the Due Process Clause of the Fourteenth Am. see instead John Orth, *Due Process of Law. A Brief History* (University of Kansas Press 2003)

¹⁴⁰ Three 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. A.R. Amar (n 136) 218 ff

century and was mainly achieved, after WWII, through the jurisprudence of the US Supreme Court.¹⁴¹ Nonetheless, despite the increasing harmonization of the protection of fundamental rights in the US under the aegis of the federal government, the states maintained their own systems for the protection of fundamental rights.¹⁴² 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.¹⁴³

After WWII, the US was also closely involved in the process of constitutionalization of human rights at both the regional and the international level,¹⁴⁴ although it then refused to bind itself to such agreements.¹⁴⁵ 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 (IACtHR) 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 (IACCommHR).¹⁴⁶ The ADRM-based review of the IACCommHR is quite limited however, as it can only adopt non-binding recommendations which it is left to the state whether to enforce or not.¹⁴⁷

This short description shows how the US federal architecture for the protection of fundamental rights presents many structural similarities with the European multilevel system. Also the US system, in fact, is based on overlapping and intertwining layers of human rights norms and institutions.¹⁴⁸ Having said this, of course, one should not ignore a relevant difference between the European and the US human rights systems. In the US, a “dual system of constitutional protections”¹⁴⁹ is in force, with both states and federal courts and with state as well as federal bills

¹⁴¹ See Richard Cortner, *The Supreme Court and the Second Bill of Rights. The Fourteenth Amendment and the Incorporation of Civil Liberties* (Wisconsin University Press 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 see D. Halberstam (n 79) 349

¹⁴² See William Brennan, ‘State Constitutions and the Protection of Individual Rights’ (1977) 90 *Harvard Law Review* 489

¹⁴³ See Alan Tarr, ‘State Supreme Courts in American Federalism’ in Hans Peter Schneider et al (eds), *Judge Made Federalism? The Role of Courts in Federal Systems* (Nomos 2009) 192 (analyzing the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Dep’t of Public Health*, 440 Mass. 309 (2003) (introducing a right to marriage for gay couples in the state of Massachusetts))

¹⁴⁴ On the leading role of the US in establishing international human rights institutions compare Louis Henkin, *The Rights of Men Today* (Westview 1978) with Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001)

¹⁴⁵ On the position of the US *vis-à-vis* international human rights institutions compare Philippe Sands, *Lawless World. America and the Making and Breaking of Global Rule* (Viking 2005) with Jed Rubenfeld, ‘The Two World Orders’ in Georg Nolte (ed), *European and US Constitutionalism* (CUP 2005) 280

¹⁴⁶ On the IACCommHR see Robert Goldman, ‘History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights’ (2009) 31 *Human Rights Quarterly* 856

¹⁴⁷ See critically Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law Politics Morals* (3rd ed OUP 2007) 1029 ff

¹⁴⁸ A. Torres Pérez (n 3) 73

¹⁴⁹ Doroty Toth Beasley, ‘Federalism and the Protection of Individual Rights: the American State Constitutional Perspective’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 101, 102

of rights. The US, instead, is not subject to a third layer of human rights protection comparable to the ECHR: while, in fact, the US is still bound by the weak ADRM, it has systematically refused to subject itself to the more pervasive external scrutiny of the IACtHR. Yet, the existence of this difference should not be taken as an insurmountable obstacle: Comparative analysis, indeed, does not require a total equivalence between the systems to be compared, and, as was explained above, the US system indeed appears as the most similar to the European one.¹⁵⁰

At the same time, there are also historical and normative reasons that render the US case enlightening to study the dynamics at play in Europe. From the historical point of view, the US federal system, like the European multilevel architecture, came into being through a constitutional process of “coming together” of pre-existing states, each endowed with its own mechanisms for the protection of fundamental rights. This explains why fundamental rights were largely absent in the original constitutional setting and emerged only subsequently, through a series of key constitutional transformations.

Moreover, the US federal system and the European multilevel architecture appear to share a common normative identity characterized by “the [endemic] tension between uniformity and diversity”¹⁵¹ in the protection of fundamental rights. Kim Lane Scheppele has emphasized how the US federal arrangement “embodies a commitment to moral pluralism within a larger national arena, which must, as a result promote tolerance of such diversity for the nation to survive”¹⁵² and US scholars have attentively outlined how the US federal system combines competing centripetal and centrifugal forces in the field of fundamental rights.¹⁵³ Indeed, each generation in the US has faced the question of where to draw the federal line between the search for uniformity and the need of diversity and how to combine self-rule and shared-rule.¹⁵⁴

¹⁵⁰ See Cristoph Schönberger, ‘European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism’ (2007) 19:1 *European Review of Public Law* 61, 65 (arguing that “comparative analysis does not pretend to deny the uniqueness of the European experience. But the [EU] is uniquely European in the same sense that other federalisms are uniquely American, German or Swiss. [...] To compare two experiences does not mean to identify them, but to study their difference and similarities.”). See also Paul Schiff Berman, ‘Federalism and International Law Through the Lens of Legal Pluralism’ (2008) 73 *Missouri Law Review* 1149, 1152 (suggesting the comparability of the US federal system with other pluralist and transnational arrangements characterized by jurisdictional redundancies)

¹⁵¹ A. Torres Pérez (n 3) 70

¹⁵² Kim Lane Scheppele, ‘The Ethics of Federalism’, in Harry Scheiber and Malcom Feeley (eds), *Power Divided: Essays on the Theory and Practice of Federalism* (IGS Press, 1989) 51, 52

¹⁵³ See Dick Howard, ‘Does Federalism Secure or Undermine Rights?’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 11 (arguing that, on the one hand, federalism is functional to the values of self-government, increases the restraints on the concentration and abuse of powers, fosters civic education and participation, making government more accountable. In addition, it favours local solutions to local problems, allows constituent units to work as laboratories, and creates the conditions for a continuous referendum on fundamental principles. On the other hand, federalism is also essential to overcome local tyrannies and injustices, to guarantee equal justice under the law and to build a sense of nationhood and identity)

¹⁵⁴ Harry Scheiber, ‘Constitutional Structure and the Protection of Rights: Federalism and Separation of Powers’, in Harry Scheiber and Malcom Feeley (eds), *Power Divided: Essays on the Theory and Practice of Federalism* (IGS Press, 1989) 17, 29

The same process, and the same challenges in striking the balance between centralization and decentralization, stand at the core of the European normative space.¹⁵⁵ For the reasons that will be explained below, the tension between uniformity and diversity in the field of fundamental rights has not been historically conceptualized in Europe through the language of federalism. Yet, the European experience of combining homogeneity and heterogeneity is federalism in all but name.¹⁵⁶ As argued by Judge Pierre Pescatore, in fact, “federalism is a political and legal philosophy which adapts itself to all political contexts on both the municipal and the international level, wherever and whenever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interests of the participant entities.”¹⁵⁷

From the normative point of view, therefore, the US federal experience represents a particularly appropriate model to discuss the developments taking place in the European multilevel constitutional system. As it has been stated, “American federalism is a system of law and a structure of power”¹⁵⁸ which, in the field of fundamental rights, is designed to promote diversity while safeguarding a degree of uniformity.¹⁵⁹ Since the values of uniformity and diversity are also at the normative heart of the European multilevel human rights architecture, the US experience offers a paradigmatic example to appreciate how federal systems can blend in historically different forms the centripetal and centrifugal forces at play in the polity and how the never-ending tension between homogeneity and heterogeneity constitutes the essence of the federal method.¹⁶⁰

A comparison with other federal systems hence reveals that the European architecture is not a *sui generis* arrangement. Rather, the European multilevel human rights system shares many structural and normative similarities with the federal arrangement of the US. In light of this relevant methodological achievement, I claim that it is possible to develop a new narrative on the European system for the protection of fundamental rights, which – for labelling purposes – I will call “neo-

¹⁵⁵ A. Torres Pérez (n 3) 77 (outlining, on the one hand, the interests pursued by supranational uniformity in the field of human rights – namely: unity and identity, efficacy of EU law, equal protection, legitimating the EU legal order – and, on the other hand, those connected to state diversity – namely: democratic self-government of political communities, local identity, dual protection, exit and experimentation leading to innovation)

¹⁵⁶ On the appropriateness of conceptualizing the EU system of governance through the notion of federalism see Daniel Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (Rowman and Littlefield 1998) 12 (noticing ironically that if something “looks like a duck, walks like a duck, and quacks like a duck, it is highly likely to be a duck.”)

¹⁵⁷ Pierre Pescatore, ‘Forward’ in Terrance Sandalow and Eric Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe* (OUP 1982) x

¹⁵⁸ Samuel Beer, *To Make a Nation: The Rediscovery of American Federalism* (Harvard University Press 1993) 23

¹⁵⁹ See Gary Jacobsohn, ‘Contemporary Constitutional Theory, Federalism and the Protection of Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 29

¹⁶⁰ Mark Tushnet, ‘Federalism and Liberalism’ (1996) 4 *Cardozo Journal of International and Comparative Law* 329. As it has been underlined federalism, instead, appears to be a rather neutral ideological concept: that is, federalism can be combined with both a politically “conservative” and a politically “liberal” view. See Ernest Young, ‘Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror’ (2004) 69 *Brooklyn Law Review* 1277 and Ernest Young, ‘The Conservative Case for Federalism’ (2006) 74 *George Washington Law Review* 874

federalist”. According to this narrative, the European human rights architecture can be conceptualized as a “federal” constitutional structure and compared with the US in order to be comprehensively and systematically analyzed.

Why do I call my narrative “neo-federalist” rather than simply “federalist”? The notion of federalism deserves here some attention. European legal and political discourse has traditionally been alarmed by the use of the “F” word. The word “federalism” has been carefully avoided in the language of EU primary law and, with some remarkable exceptions, scholars addressing the EU constitutional structure have only reluctantly referred to it in their research.¹⁶¹ But what is the trouble with the concept of “federalism” in Europe and why is the debate around it so heated? As argued by Tim Koopmans some twenty years ago, much of the answer lies in the confusion that characterizes the debate about federalism in contemporary Europe.¹⁶²

The concept of federalism has evolved significantly over time, acquiring different meanings, from its appearance in the vocabulary of political philosophy in 16th-century Europe, through its re-invention in 18th-century America, up to its revival in the modern and contemporary world.¹⁶³ Nevertheless, since the 19th century, European public lawyers (with the above-mentioned exception of the Swiss¹⁶⁴) have considered “federalism” simply as a theory for the political organization of the sovereign *state* and as the technical device to decentralize competences within a single, hierarchical constitutional system.¹⁶⁵ European federalist thought, in other words, has traditionally suffered from a “sovereignist”, statist bias, since federalism has conventionally been equated with a purely national phenomenon.¹⁶⁶

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.”¹⁶⁷ In the last 50 years, indeed, the acolytes of the “classical federalism” school have argued that Europe should strive to overcome the

¹⁶¹ This is true especially for European academics. On the contrary, American scholars (for the reasons that will be explicated below), have traditionally been comfortable in resorting to “federalist” ideas to make sense of the European constitutional system. See eg George Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94 *Columbia Law Review* 332; Daniel Elazar, ‘The United States and the European Union: Models for Their Epochs’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 31

¹⁶² Tim Koopmans, ‘Federalism: The Wrong Debate’ (1992) 29 *Common Market Law Review* 1047

¹⁶³ See Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987); Ronald Watts, *Comparing Federal Systems in the 1990s* (Queen’s University 1996); Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (West Group 1999)

¹⁶⁴ See *supra* text accompanying n 113

¹⁶⁵ R. Schütze (n 99) 31

¹⁶⁶ See Robert Howse and Kalypso Nicolaidis, ‘Introduction: The Federal Vision, Levels of Governance, and Legitimacy’ in Robert Howse and Kalypso Nicolaidis (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 1 and Cesare Pinelli, *Il momento della scrittura* (Il Mulino 2002) 30

¹⁶⁷ See eg Altiero Spinelli, *Il modello costituzionale Americano e i tentativi di unità europea* (Il Mulino 1957). As has been recently argued by Andrew Glencross, ‘Altiero Spinelli and the Idea of the US Constitution as a Model for Europe; the Promises and Pitfalls of an Analogy’ (2009) 47 *Journal of Common Market Studies* 287 the “statist” conception of the European “classical federalists” was fostered by a wrong understanding of the US federal tradition

differences between the member states and become a true federal *state*.¹⁶⁸ This view, however, has been criticized in both “sovereigntist” and “pluralist” terms. Hence, several authors have questioned the wisdom of conceptualizing an EU federal state – let alone of realizing it;¹⁶⁹ while others have advanced an even more compelling argument for rejecting the notion: because of its bias toward the state, classical federalist thinking falls into the same theoretical trap in which “sovereigntist” thought is caught, namely it is unable to understand or appreciate the advantages of a pluralist setting in which the statist features of sovereignty have been overcome.¹⁷⁰

The 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. However, one needs to be aware that this notion of “federalism” is not the only one. In the constitutional experiences of other systems – notably the US and Switzerland – federalism has traditionally represented something quite different, originally being conceived as a theory of governance for a *union of states*.¹⁷¹ In the view of the American founders in particular,¹⁷² federalism was conceived both as a tool and a theory for the creation of an institutional structure lying somewhere in between a purely national and international phenomenon.¹⁷³ Needless to say, through a number of constitutional moments, the US (like Switzerland) has over time developed into a state-like structure.¹⁷⁴ Despite the significant centralizing trends, however, the federalist idea has survived in the US for the last two centuries¹⁷⁵ and is still today reflected *inter alia* in the compound architecture for the protection of fundamental rights.¹⁷⁶

¹⁶⁸ For a classical view see Federico Mancini, ‘Europe: The Case for Statehood’ (1998) 4 *European Law Journal* 29 and, more recently, Umberto Morelli, ‘La Costituzione europea: il modello federalista’ in Gustavo Zagrebelsky (ed), *Diritti e Costituzione nell’Unione Europea* (Laterza 2003) 69

¹⁶⁹ See eg Dieter Grimm, ‘Treaty or Constitution? The legal basis of the European Union after Maastricht’ in Erik O. Eriksen et al (eds), *Developing a Constitution for Europe* (Routledge 2004) 69 advancing ideas already formulated in Dieter Grimm, ‘Does Europe Need a Constitution?’ (1995) 1 *European Law Journal* 282

¹⁷⁰ See Joseph H.H. Weiler, ‘Europe: The Case Against the Case for Statehood’ (1998) 4 *European Law Journal* 43 and Roberto Toniatti, ‘Forma di Stato comunitario, sovranità e principio di sopranazionalità: una difficile sintesi’ [2003] *Diritto Pubblico Comparato Europeo* 1552

¹⁷¹ See Leslie Friedman Goldstein, *Constituting Federal Sovereignty. The European Union in Comparative Context* (Johns Hopkins University Press 2001) 10. On the concept of union of states, as the process of federation by aggregation of independent states through a federal pact, see Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester University Press 1981)

¹⁷² See, of course, James Madison et al, *The Federalist Papers* (1st published 1788, Penguin 1987)

¹⁷³ D. Elazar (n 163); R. Schütze (n 99) 4. See also Bruce Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 *Virginia Law Review* (1997) 771, 776 (stating that federalism, that is “the (uncertain) transformation of a treaty into a constitution, is at the center of the [EU] today; it was at the center of the American experience between the Revolution and the Civil War.”) But see also Akhil Reed Amar, ‘Of Sovereignty and Federalism’ (1987) 96 *Yale Law Journal* 1425

¹⁷⁴ See Bruce Ackerman, *We the People. Volume 2: Transformations* (Harvard University Press 2000)

¹⁷⁵ See Harry Scheiber, ‘Redesigning the Architecture of Federalism – An American Tradition’ (1996) 14 *Yale Law and Policy Review* 227. But see Edward L. Rubin and Malcolm Feeley, ‘Federalism: Some Notes on a National Neurosis’ (1994) 41 *UCLA Law Review* 903

¹⁷⁶ See Robert Schapiro, *Polyphonic Federalism. Toward the Protection of Fundamental Rights* (University of Chicago Press 2009)

In the US tradition, therefore, federalism has been regarded as a normative theory and as an institutional device that rejects a hierarchical and monist constitutional arrangement and divides and distributes sovereignty between competing levels of authority and institutions within it.¹⁷⁷ Seen from this perspective, federalism embodies the constitutional values of freedom, pluralism and self-governance¹⁷⁸ and must be regarded as a “theory on levels of government activity generally [...] dissociated from the notion of the State.”¹⁷⁹ As has been convincingly demonstrated, indeed, “legal pluralism provides the conceptual background to all modern federal thought”¹⁸⁰ and “federalism emphasizes constitutionalized pluralism and power sharing as the basis of a truly democratic government.”¹⁸¹ In light of the above, the US theory of federalism results as significantly akin to the European theory of constitutional pluralism.¹⁸²

It is thus apparent how the “neo-federalist” perspective embraced in this essay differs from the “classical federalism” that has conventionally dominated the European public discourse, since it rejects an automatic equation between federalism and the *federal state*.¹⁸³ On the basis of a fuller awareness of the US federal experience,¹⁸⁴ and by ideally linking this work to *that* tradition of federalism, I instead regard “neo-federalism” as a valuable conceptual framework to explain the

¹⁷⁷ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy J. concurring, defining US federalism as the attempt “to split the atom of sovereignty”). See also Jeffrey Goldsworthy, ‘The Debate About Sovereignty in the United States: a Historical and Comparative Perspective’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 423

¹⁷⁸ James Gibson, ‘Freedom, Pluralism and Federalism: An Enigmatic Trio?’, in Sarah Baumgartner Thurow (ed), *E Pluribus Unum. Volume 2: Constitutional Principles and the Institutions of Government* (University Press of America 1988) 222. See also, from a social science perspective, Vincent Ostrom, *The Meaning of American Federalism: Constituting a Self-Governing Society* (ICS Press 1991)

¹⁷⁹ T. Koopmans (n 162) 1050

¹⁸⁰ R. Schütze (n 99) 15

¹⁸¹ Daniel Elazar, ‘Federalism, Diversity and Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 1, 2

¹⁸² Indeed, as correctly pointed out by Robert Schütze, ‘Federalism as Constitutional Pluralism. “Letter from America”’ in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2011), the theory of constitutional pluralism is a theory of federalism since the normative claims it advances correspond to those that are achieved also under the theory of federalism. The overlap between the two theories of (US) federalism and (European) constitutional pluralism is seldom acknowledged, perhaps because of the under-evaluation of the US constitutional experience in European scholarship. See however the speech by Miguel Maduro at the Conference “The EU as a Federal Order of Competences” at the EUJ on January 20, 2012 (in which he openly acknowledged that constitutional pluralists are “federalists in disguise”, and explained that recourse to the idea of constitutional pluralism is only instrumental to avoid the sovereigntist ambiguities with which the notion of federalism is imbued in Europe). See also Cormac Mac Amhlaigh, ‘Concepts of Law in Integration Through Law’ in Daniel Augenstein (ed), *Integration Through Law Revisited: The Making of the European Polity* (Ashgate 2012) 69, 71 (arguing that “constitutional pluralism in EU legal studies [...] militates in favour of the federal principle.”)

¹⁸³ Cf. Kalypso Nicolaidis, ‘Conclusion: the Federal Vision Beyond the Federal State’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision. Legitimacy and Level of Governance in the United States and the European Union* (OUP 2001) 439

¹⁸⁴ The pluralist nature of the US federal thought is often under-estimated. Cf. eg Matej Avbelj, ‘The Pitfalls of (Comparative) Constitutionalism for European Integration’ (Eric Stein Working Paper No. 1, 2008) 23 (who affirms that “the present EU constitutional narrative is epistemologically rooted in the [US] federal constitutional experience and it therefore promotes a monist, hierarchical, functionally state-like vision of integration”. The author of this statement does not seem to recognize 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)

dynamics at play in the pluralist European constitutional architecture.¹⁸⁵ In other words, by proposing a “neo-federalist” approach, this chapter aims to revive a neglected brand of federalism in Europe and to make it a powerful prism through which to assess the European multilevel system of human rights protection.¹⁸⁶

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 in the capacity of the “neo-federalist” approach to better *explain* the constitutional dynamics at play in the European human rights architecture through the use of comparative law. Contrary to a widespread assumption, the European multilevel architecture 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.”¹⁸⁷ 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.”¹⁸⁸ The complexities of a pluralist constitutional system of human rights protection are quite new in Europe:¹⁸⁹ by contrast, other federal polities have dealt with these complexities for a much longer time, and still continue to deal with them today. From this point of view, comparative “federalism provides one of the few theories which makes the actual developments understandable”¹⁹⁰ and it is therefore worthwhile exploring it.

In conclusion, the “neo-federalist” narrative propounded in this thesis dialogues with the theoretical paradigm of constitutional pluralism but avoids the methodological weaknesses of a *sui generis* vision 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 new perspective to appreciate the relevant implications of the European fundamental rights architecture, identify the challenges it currently faces, and envision its possible future developments. The following Section will be dedicated to this task.

¹⁸⁵ See M.P. Maduro (n 81) 522 (arguing 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.”)

¹⁸⁶ See also A. Torres Pérez (n 3) 70 and R. Schütze (n 99) 15

¹⁸⁷ Ellis Katz and Alan Tarr, ‘Introduction’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) xv

¹⁸⁸ *Ibid*

¹⁸⁹ See Koen Lenaerts, ‘Federalism and Rights in the European Community’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 139; Dick Howard, ‘Protecting Human Rights in a Federal System’ in Mark Tushnet (ed), *Comparative Constitutional Federalism. Europe and America* (Greenwood Press 1990) 115

¹⁹⁰ T. Koopmans (n 162) 1051

4. The dynamics of the European multilevel architecture recast

What are the consequences of the European system for the protection of fundamental rights? What dynamics are at play in a multilevel human rights arrangement such as the one described in Section 1? In Section 2, I examined the “sovereigntist” narrative and questioned its theoretical capacity to provide a rationalization of the constitutional dynamics that spring from a multilevel human rights architecture. At the same time, I also underlined how the “pluralist” narrative lacks explanatory power, since in its *sui generis* mood, it does not offer any benchmark and framework of reference to analyze the phenomena at play in Europe. For this reason in Section 3 – after demonstrating that the European multilevel human rights architecture can be compared with the federal system of the US – I advanced a “neo-federalist” narrative, arguing that conceptualizing the European system as a federal arrangement can yield a more persuasive answer to the research question of this work.

A multilevel architecture for the protection of fundamental rights generates dynamics that are unknown in traditional European statist, hierarchical settings in which the task of protecting rights is clearly assigned to a single institution (be it the Parliament or a Supreme Court) and where a uniform, clear standard for the protection of fundamental rights is therefore in place. Rather, the dynamics produced by the overlap and interplay between different sets of norms and institutions in Europe are akin to those at play in other federal human right arrangements and can be better appreciated by employing a comparative approach, that is by analyzing the European architecture in light of the constitutional and historical experiences of the federal system for the protection of fundamental rights of the US.¹⁹¹

A “neo-federalist” perspective allows us to analyze the dynamics of the European multilevel human rights system under two dimensions: a synchronic and a diachronic one. According to the first dimension, it is possible to identify the *challenges* that arise in specific human rights sectors from the interaction between different state laws and transnational law (a term by which I generally refer to EU and ECHR law in Europe, and federal law in the US).¹⁹² According to the second dimension, it is possible to evaluate the *transformations* taking place in the European multilevel system and the capacity of these ongoing (and prospective) legal and judicial developments to

¹⁹¹ Several scholars have developed a comparative framework of analysis of the European fundamental rights system for *prescriptive purposes*, ie to advance a normative theory of adjudication: see A. Torres Pérez (n 3) 97 ff. See also Miguel Poiars Maduro, ‘Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 356. My work, instead develops a comparative framework for *analytical purposes*, ie to explicate what are the implications of a pluralist human rights architecture

¹⁹² To simplify the analysis, in the forthcoming discussion I will jointly consider EU law and ECHR law as a “transnational law” which interacts with state law. It goes without saying, however, that there are differences in the standards of protection of specific rights existing at the EU and ECHR level which I shall take into account later. See Dean Spielmann, ‘Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities’ in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 757

address the critical dynamics that can be identified in the functioning of the European human rights arrangement.

In a multilevel human rights system, the protection of fundamental rights is *synchronically* ensured by a multiplicity of human rights charters and by a plurality of human rights institutions. The scope given to specific rights either in the several human rights charters or in the case law of the institutions adjudicating in the various layers of the multilevel architecture is often variable. Certainly, there are cases in which the standard for the protection of a specific right is exactly the same in each layer of the multilevel architecture. In Europe, for instance, the law of all the member states, the EUCFR and the ECHR converge in interpreting the protection of the right to life as implying a prohibition of the death penalty.¹⁹³ The same example of the death penalty in the US, however, makes it clear that in federal human rights arrangements relevant differences can often exist both horizontally and vertically in the standard of protection given to a specific right.¹⁹⁴

At the horizontal level, states vary in the scope of protection they afford to specific rights. As Ann Althouse has clearly explained with reference to the US, in federal systems for the protection of fundamental rights, states are generally able to experiment and provide different degrees of protection to a given right.¹⁹⁵ As such, for any specific fundamental rights issue, it is possible to classify states along a spectrum of positions and to identify *vanguard states* (i.e. states which ensure the most advanced degree of protection of the right at issue) and *laggard states* (i.e. states which lag behind, by protecting – if at all – the right de quo in only a very restrictive way). Needless to say, since rights do not exist in a vacuum but are rather the result of complex balancing between competing interests,¹⁹⁶ “attempts to sort the states into these two categories will (and should) produce great disputes.”¹⁹⁷ Nevertheless, classifying the states’ standards of protection along the continuum vanguard-laggard offers a very promising point of departure to explore the consequences of the interaction between state and transnational standards.

¹⁹³ See Article 2 ECHR (right to life) and Article 1, 13th additional Protocol to the ECHR (total abolition of the death penalty); Article 2 EU CFR (right to life and prohibition of the death penalty) as well as Andrea Pugiotto, ‘L’abolizione costituzionale della pena di morte e le sue conseguenze ordinamentali’ [2011] Quaderni Costituzionali 573

¹⁹⁴ On the death penalty in the US see David Garland, *Peculiar Institution: America’s Death Penalty in the Age of Abolition* (Harvard University Press 2010) (explaining how, in the US, 34 states out of 50 and the federal government retain the death penalty)

¹⁹⁵ Ann Althouse, ‘Vanguard States and Laggard States: Federalism and Constitutional Rights’ (2004) 152 *University of Pennsylvania Law Review* 1745. See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting, defining as “one of the happy incidents of the federal system [the fact] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

¹⁹⁶ On the balancing of fundamental rights see Andrea Morrone, ‘Bilanciamento (Giustizia costituzionale)’ in *Enciclopedia del diritto* (Giuffrè 2009) ad vocem (explaining how the expansion of the content of one right implies the restriction of the content of another right)

¹⁹⁷ A. Althouse (n 195) 1746

In federal, multilevel human rights architectures variations also occur at the vertical level since the standards for the protection of a given right often differ in state law and transnational law.¹⁹⁸ Just as in the horizontal dimension, in fact, states and transnational laws may reflect different understandings of human rights and strike alternative balances between conflicting rights and public interests.¹⁹⁹ As outlined in Section 1 with regard to the European system and in Section 3 with reference to the US, the emergence of a transnational standard for the protection of fundamental rights in federal human rights systems came at a more recent historical stage of evolution of the constitutional system. As such, when a transnational human rights standard comes into being, it starts interacting with pre-existing state standards, bringing to light possible areas of divergence with the domestic standards already in force.

The coexistence of a multiplicity of standards in multilevel human rights architectures such as the European one is at the origin of complex constitutional dynamics. When the state and transnational standards for the protection of a specific right differ, the interaction between state and transnational law generates possible tensions. Yet the nature of the constitutional dynamics that arise from the overlap and interplay between different human rights standards depends on two specific factors. First it depends on whether the transnational standard provides (i) *more* protection to a specific right than the relevant state standard or (ii) *less* protection than the relevant state standard. Second, it depends on whether the transnational standard for the protection of a given right operates (a) as a *ceiling* (i.e. as a maximum standard of protection that cannot be superseded by state law) or (b) as a *floor* (i.e. as a minimum standard of protection, that can well be integrated and enriched by state law).

In a formalistic way, therefore, it would be possible to distinguish four different hypothetical dynamics. 1) If transnational law sets a floor of protection, which corresponds to the minimum existing state standard, no major complication seems to arise, since the existence of a transnational minimum leaves the states free to provide a more advanced degree of protection. 2) If transnational law, however, sets a floor of protection, which is higher than that provided by state law, this generates a more complicated dynamic. In this situation, in fact, transnational law puts pressure on the states to enhance their standard of protection at least up to the minimum degree provided at the transnational level. 3) If, instead, transnational law sets a ceiling of protection, which corresponds to the maximum existing state standard, no major complication emerges either since, in this situation, transnational law sets a maximum standard which is in any case as protective, or more protective,

¹⁹⁸ See Miriam Aziz, *The Impact of European Rights on National Legal Cultures* (Hart Publishing 2004)

¹⁹⁹ See also Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the United States* (OUP 2007) x (explaining how conflicts of rights are unavoidable and “adjudication in these matters necessarily imposes sacrifices and losses on the part of one or both right-holders, or the state as the party to the conflict.”)

than the existing state standard. 4) If transnational law, however, sets a ceiling of protection, which is lower than that provided by state law, this generates another critical situation. Here, in fact, transnational law puts pressure on the states, challenging their more advanced human rights standards.

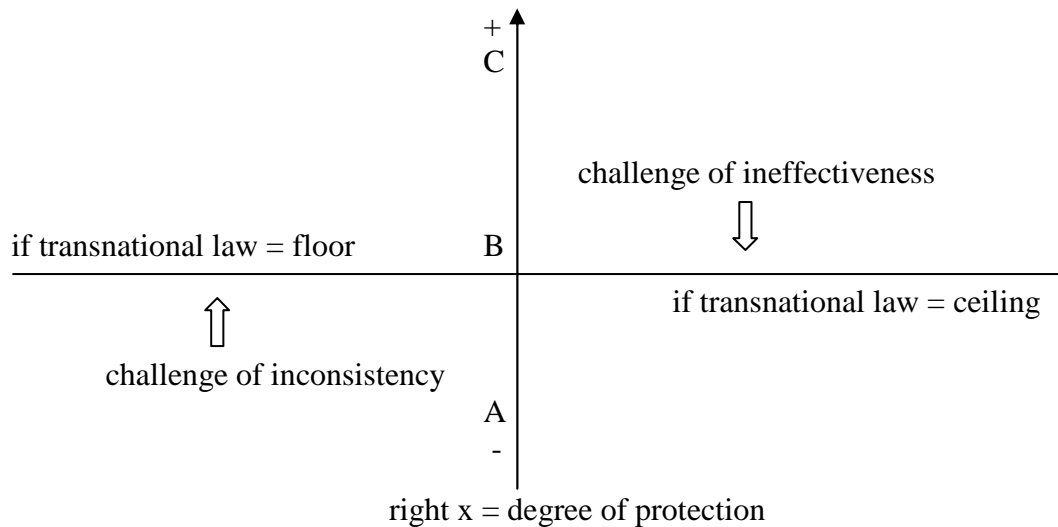
As a matter of fact, however, this classification does not entirely capture the reality of the European multilevel human rights system. Because of the already mentioned horizontal differences that exist between the states (with states providing vanguard and laggard protection for any given human right), in reality, the interaction between state and transnational law always *simultaneously* triggers more than one of the above-mentioned dynamics. When transnational law sets a floor for the protection of a given right, this standard may be lower than the standard provided by some vanguard countries but still exceed the standards existing in some other laggard states. And equally, when transnational law sets a ceiling for the protection of another right, this standard may be higher than the standard provided by some laggard countries but still be lower (and thus undermining) the standards in force in other vanguard states. As such, it seems possible to identify two major constitutional dynamics at play in the European multilevel system, which, for analytical purposes, I will label the *challenge of inconsistency* and the *challenge of ineffectiveness*.

A *challenge of inconsistency* emerges in the case of interaction between different state laws and transnational law, when the latter operates as a floor of protection. By setting up a minimum standard for the protection of a specific human right, transnational law challenges the less protective standards existing in some laggard states and pressures them to enhance their levels of protection at least up to the degree provided by transnational law. At the same time, by drawing only a minimum standard of protection, transnational law leaves free other vanguard states to go above the transnational floor by providing more advanced protection to the right *de quo*.

A *challenge of ineffectiveness* emerges instead in the case of interaction between different state laws and transnational law, when the latter operates as a ceiling of protection. By setting up a maximum standard for the protection of a specific human right, transnational law challenges the effectiveness of the more protective standards existing in the vanguard states, pressuring them towards the bottom-level protection provided by transnational law. At the same time, as long as it defines a maximum standard of protection, transnational law leaves unaffected the other pre-existing state standards that do not exceed the transnational ceiling.

The graph below attempts to offer a visual description of the challenges of ineffectiveness and inconsistency described above. The vertical axis classifies along a maximum-minimum continuum the protection ensured to a given right (x) by three hypothetical states – state A, providing a laggard degree of protection, state C, providing a vanguard degree of protection and

state B, providing a median protection to right x. The horizontal axis, instead, sets the degree of protection that is ensured to right x by transnational law, at a level hypothetically equivalent to that provided by state B. On the left hand side of the graph, transnational law operates as a floor of protection for right x, thus creating a challenge of inconsistency for state A; on the right hand side of the graph, on the contrary, transnational law operates as a ceiling of protection for right x, thus creating a challenge of ineffectiveness for state C.



The question whether the transnational standard for the protection of a given right operates as a floor rather than as a ceiling is difficult to answer in the abstract.²⁰⁰ The nature of a transnational standard seems to be the result of both the broader legal framework and of the specific human rights issue at hand. In Europe, generally, the ECHR functions as a floor of protection:²⁰¹ according to the principle of subsidiarity, which characterizes international human rights treaties, in fact, the ECHR only sets up a minimum standards of protection, above which states are totally free to go.²⁰² EU law, on the contrary, reveals a more intricate picture. The EUCFR claims to function as a floor of protection, which leaves the more advanced standard existing at the international or state level unaffected.²⁰³ Yet, in the policy fields falling under the regulation of the EU, member states

²⁰⁰ On the difficulty of detecting federal floors and federal ceilings in US law see William Buzbee, 'Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction' (2007) 82 NYU Law Review 1547

²⁰¹ See Article 53 ECHR (safeguard of existing human rights)

²⁰² See Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 American Journal of International Law 38. But see from a critical perspective Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standard' (1999) 31 NYU Journal of International Law and Politics 843

²⁰³ See Article 53 EUCFR (level of protection)

are prevented from enforcing human rights standards which are higher than the EU standards and which possibly interfere with EU law.²⁰⁴

While a synchronic assessment of the functioning of the European multilevel human rights architecture reveals the existence of several challenges due to the interplay between transnational law and different state laws, a “neo-federalist” assessment of the European system also sheds light on the *diachronic* transformations that are at play. 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. Contrary to hierarchical human rights architectures – which tend to be quite static because changes can only be triggered by the single institution in charge of defining the relevant human rights standard – pluralist human rights systems are subject to continuous readjustments, because of the mutual influences and spill-overs between state and transnational laws and actors.

The dynamism of federal systems has been clearly emphasized in the literature.²⁰⁵ With specific regard to human rights, then, Aida Torres Pérez has explained that “the model of rights protection in federal compounds is always debated.”²⁰⁶ As outlined in the previous Section, in the US the protection of fundamental rights has been historically subject to continuous jurisprudential and institutional changes, often driven by the desire to enhance rights protection and address perceived shortcomings in the overall constitutional system.²⁰⁷ The US experience hence invites us, first, to consider whether analogous transformations are taking place in Europe; and, second, to think comparatively about what possible additional reforms may be advisable in the future to improve the protection of fundamental rights in Europe.

Among the transformations currently taking place in the European multilevel architecture, two are especially worth our attention. A first transformation is taking place at the *jurisprudential* stage. As Marta Cartabia has extensively argued,²⁰⁸ state courts, the ECJ and the ECtHR are in

²⁰⁴ When state measures for the protection of fundamental rights interfere, for instance, with the operation of the common market, it is up to the EU (mainly through its judicial branch) to decide on the degree of protection that member states can afford to the right *de quo* in a way that is compatible with EU law. In this situation, in fact, EU law sets a ceiling of protection above which member states cannot go, since this would jeopardize the achievement of other goals or policies of the EU. On the potential conflict between state constitutional principles and EU free movement rules see eg Case C-36/02, *Omega* [2003] ECR I-9609, Case C-112/00, *Schmidberger* (2003) ECR I-5659.

²⁰⁵ See in general terms Koen Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *American Journal of Comparative Law* 205; Bruce Ackerman, ‘The Living Constitution’ (2007) 120 *Harvard Law Review* 1738

²⁰⁶ A. Torres Pérez (n 3) 71

²⁰⁷ See Michael Zuckert, ‘Toward a Corrective Federalism: the United States Constitution, Federalism and Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 75

²⁰⁸ Marta Cartabia, ‘Europe and Rights: Taking Dialogue Seriously’ (2009) 5 *European Constitutional Law Review* 5. But see also Andreas Voßkuhle, ‘Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*’ (2010) 6 *European Constitutional Law Review* 175

constant dialogue²⁰⁹ with each other and their mutual engagements are profoundly reshaping the contours of the protection of fundamental rights in Europe.²¹⁰ In addition, a number of courts – notably the ECtHR – have developed an evolutive interpretation of the human rights texts upon which they base their rulings, constantly updating their meaning and scope of protection.²¹¹ The transformations in the case law of the European courts need to be closely monitored in their capacity to fill some of the gaps in the protection of rights at the EU level but also for the positive influences that they may have on the advancement of human rights in those member states which still lag behind in the protection of specific rights or liberties.

A second transformation, however, is occurring at the *institutional* stage. A major force of change in the European context is, in fact, represented also by the political branches, both at the state and transnational level.²¹² In this regard, several key innovations are contained in the Lisbon Treaty.²¹³ The Treaty, which itself is part of an almost fifteen-year long “semi-permanent Treaty revision process”²¹⁴ at the EU level, now *inter alia* mandates the accession of the EU to the ECHR²¹⁵ and, although the precise effects of accession are still uncertain,²¹⁶ it is likely that once the EU joins the ECHR, this will have profound implications for the strengthening of the protection of

²⁰⁹ The literature on judicial dialogue is burgeoning. See among the most relevant works Anne Marie Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191; Sabino Cassese, *I Tribunali di Babele* (Donzelli 2009). On dialogue in the European multilevel system in particular see Francis Jacobs, ‘Judicial Dialogues and the Cross-Fertilization of the Legal Systems: The European Court of Justice’ (2003) 38 *Texas International Law Journal* 547 and Filippo Fontanelli and Giuseppe Martinico, ‘Alla ricerca della coerenza: le tecniche del ‘dialogo nascosto’ fra i giudici nell’ordinamento costituzionale multi-livello’ [2008] *Rivista Trimestrale di Diritto Pubblico* 374

²¹⁰ See eg Guy Harpaz, ‘The European Court of Justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy’ (2009) 46 *Common Market Law Review* 105. But see Giuseppe de Vergottini, *Oltre il dialogo tra le corti. Giudici, diritto straniero, comparazione* (Il Mulino 2010)

²¹¹ On the evolutive interpretation of the ECHR see *Tyrer v. United Kingdom*, ECHR [1978], Application No. 5856/72 par 31 (arguing that the ECHR is to be interpreted as a “living instrument”). See also Kanstantsin Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’ (2011) 12:10 *German Law Journal* 1730

²¹² See also Jan Komarek, ‘Institutional Dimension of Constitutional Pluralism’ in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2011) (warning against adopting a “single-institutional perspective”, which puts too much attention on courts in the EU system of governance)

²¹³ On the Lisbon Treaty and its implications for the protection of fundamental rights in Europe see Luigi Daniele, ‘La protezione dei diritti fondamentali nell’Unione Europea dopo il Trattato di Lisbona: un quadro d’insieme’ [2009] *Diritto dell’Unione Europea* 645. On the important effect of the Lisbon Treaty in expanding the jurisdiction of the ECJ to review measures restrictively affecting individuals even if adopted under the heading of the Common Foreign and Security Policy see then Marise Cremona, ‘The Union External Action: Constitutional Perspectives’ in Giuliano Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 1173, 1198

²¹⁴ See Bruno de Witte, ‘The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process’ in Neil Walker et al (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002) 39

²¹⁵ Alessandra Giannelli, ‘L’adesione dell’Unione Europea alla CEDU secondo il Trattato di Lisbona’ [2009] *Diritto dell’Unione Europea* 684; Sionaidh Douglas-Scott, ‘The European Union and Human Rights After the Treaty of Lisbon’ (2011) 11 *Human Rights Law Review* 645

²¹⁶ On the most likely effects of the accession of the EU to the ECHR compare Annalisa Ciampi, ‘L’Union européenne et le respect des droits de l’homme dans la mise en oeuvre des sanctions devant la Cour européenne des droits de l’homme’ [2006] *Revue générale de droit international public* 85 and Francis Jacobs, ‘The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice’ in Ingolf Pernice et al (eds), *The Future of the European Judicial System in Comparative Perspective* (Nomos 2006) 291

fundamental rights within the EU legal order.²¹⁷ The possibility of bringing a case against the EU before the ECtHR should, in fact, provide incentives to the ECJ and the other EU institutions to raise the EU human rights standards where they lag behind the ECHR minima, enhancing the convergence between the two European transnational standards.

Additional reforms may, however, be needed in the European system in the future. In this regard, the comparative method commended by the ‘neo-federalist’ perspective can again prove useful.²¹⁸ 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 a longer experience of a multilevel system for the protection of fundamental rights in order to advance proposals for (legal and policy) reforms *de jure condendo* aimed at 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 yield plainly satisfactory results.

Moreover, as previously explained, the US federal system and the European multilevel architecture share a common normative identity since they strive to combine in the field of fundamental rights the need for unity with an accommodation for diversity. The solutions adopted in one system can therefore be taken into consideration to address comparable challenges in the other. When considering the experience of the US federal human rights system to inform our discussion about possible future reforms of the European human rights architecture, however, an important caveat is required. In the US, the architecture for the protection of fundamental rights has undergone a gradual evolution from an extremely decentralized compound, in which the function of rights protection at the central level was almost non-existent (as prior to the enactment of the Fourteenth Amendment, or even more clearly, prior to the enactment of the Bill of Rights) to a fairly centralized structure.²¹⁹ Nevertheless, it is important to notice that this evolution was neither unavoidable nor irreversible. In the US, in fact, trends toward centralization and uniformity have historically been sided by trends toward decentralization and differentiation.²²⁰

²¹⁷ The negotiating process for the accession of the EU to the ECHR is currently at an advanced stage. A first Draft International Agreement on the Accession of the EU to the ECHR has been published on July 19, 2011, CDDH-UE(2011)16 and, after a series of amendments, re-published on October 14, 2011 CDDH-UE(2011)009. For an updated analysis of the draft see Xavier Groussot et al, ‘Adhésion de l’Union européenne à la Convention européenne des droits de l’homme: analyse juridique du projet d’accord d’adhésion du 14 octobre 2011’ (Fondation Schuman Paper 2011)

²¹⁸ On the ability of the comparative method to supply models for legal reforms, ie to recommend policy changes through law, see R. Sacco (n 89) 19; L. Pegoraro (n 88) 5. See also Martin Scheinin et al (eds), *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Åbo Akademi 2000)

²¹⁹ On the continuous importance that sub-national constitutional norms and institutions still play in the protection of fundamental rights in the US see however Talbot d’Alemberte, ‘Rights and Federalism: an Agenda to Advance the Vision of Justice Brennan’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 123

²²⁰ See Céline Fercot, ‘Diversity of Constitutional Rights in Federal Systems’ (2008) 4 *European Constitutional Law Review* 302

In other words, there is no inevitable teleology in federal human rights arrangements shaping the evolution of these systems toward centralization and homogenization. The already-mentioned example of the death penalty in the US demonstrates how federalism can accommodate both increases and decreases of federal interventions in the field of human rights. The decision whether to ban the death penalty was traditionally a matter for the states.²²¹ In 1972, the US Supreme Court held capital punishment was unconstitutional, arguing that the imposition of the death penalty violated the prohibition on “cruel and unusual punishment” of the federal Bill of Rights and it imposed a moratorium on state capital punishments.²²² In 1976, however, the power to set the relevant “right to life” standard was handed back to the states, most of which have now reinstated the death sentence.²²³

As a consequence, taking the US federal experience into account when discussing possible future prospects for the enhancement of the European multilevel fundamental rights system does not imply claiming that Europe should, or will, necessarily follow the US path toward a federal state. Rather, the point being made here is that the US offers a wide spectrum of models and anti-models, which the European human rights system can consider in discussing how to address *specific* challenges. Looking at the lessons of other federal, multilevel human rights systems can therefore both raise the attention regarding the existence of adequate mechanisms for reform within the European multilevel architecture and suggest ways in which Europe may tackle (e.g., through treaty, legislative or judicial changes) the challenges of ineffectiveness and inconsistency left unaddressed by the current transformations.

From this point of view, in conclusion, it appears that a “neo-federalist” perspective is not simply instrumental in shedding light on some of the critical implications emerging from the European pluralist human rights architecture. The same approach also explains how legal changes affect the functioning of the system and emphasizes how these transformations 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, at the same time as the system faces several challenges, it also can provide the solutions to address these.

²²¹ See D. Garland (n 194)

²²² *Furman v. Georgia*, 408 U.S. 238 (1972)

²²³ *Gregg v. Georgia*, 428 U.S. 153 (1976)

5. Four case studies

In the next chapters of this thesis I will consider four case studies to assess the extent to which the complex constitutional dynamics outlined above can be detected in practice in the European multilevel architecture. To prove the validity of my argument I select four different types of fundamental rights, each belonging to what scholars define as the several “generations” of rights:²²⁴ a civil right (the right to due process for suspected terrorists), a political right (the right to vote for non-citizens), a social right (the right to strike) and a “new generation right”²²⁵ (the right to abortion). Two of these cases (the right to due process and the right to strike) exemplify the challenge of ineffectiveness; the other two (the right to vote for non-citizens and the right to abortion) instead provide evidence of the challenge of inconsistency.

In each of these cases, I explain how the interaction between state and transnational law has revealed a challenge of either ineffectiveness or inconsistency in Europe. By adopting a comparative perspective I also highlight how analogous dynamics have emerged in the federal system for the protection of fundamental rights of the US. The challenges of ineffectiveness and inconsistency are, in fact, typical features of multilevel human rights arrangements characterized by horizontal and vertical differences in standards of protection. At the same time, I also underline how the example of the US proves that pluralist systems are endowed with the internal mechanisms to successfully face these challenges, and to enhance over time the protection of fundamental rights. In light of this, I explore the more recent jurisprudential and institutional transformations taking place in Europe and discuss what the future prospects for the protection of each of these specific rights could or should be in Europe.

In selecting the case studies, I have attempted to choose four examples which address topics of particular relevance and which have, consequently, received special attention in contemporary legal debates. Moreover, selecting issues such as counter-terrorism law, migration and voting rights, strike law and abortion law has allowed me to consider a number of recent milestone rulings of the ECJ and the ECtHR such as, to name only a few, *Kadi*,²²⁶ *Aruba*,²²⁷ *Viking*,²²⁸ *Laval*,²²⁹

²²⁴ For a classical distinction between three generations of rights, see Thomas Marshall, *Citizenship and Social Class* (CUP 1950) (distinguishing between a first generation of civil rights – acquired during the liberal revolutions of the 18th century – a second generation of political rights – obtained in the course of the 19th century – and a third generation of social rights – born out of the experience of the 20th century)

²²⁵ I draw the expression “new generation rights” from Augusto Barbera, ‘I nuovi diritti: attenzione ai confine’ in Licia Califano (ed), *Corte costituzionale e diritti fondamentali* (Giappichelli 2004) 19 (who speaks about “new generation rights” to define several rights who have emerged in the social understanding in the last 50 years, relating to ethical issues such as the beginning or the end of life)

²²⁶ 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 (on due process in the field of counter-terrorism)

²²⁷ Case C-300/04 *Eman & Sevinger (Aruba)* [2006] ECR I-8055 (on voting rights)

²²⁸ Case C-438/05 *Viking* [2007] ECR I-10779 (on the right to strike)

Bosphorus,²³⁰ *Demir & Baykara*²³¹ and *A., B. & C.*²³² (not to mention, of course, important decisions taken by the national courts). At the same time, these topics have also given me the chance to take into account in comparative perspective key constitutional moments of US history, such as the Reconstruction, the New Deal, the Civil Rights Era as well as the most recent War on Terror.²³³ By selecting very different cases, I hope to provide the broadest empirical support for the arguments advanced in the thesis. Anticipating what will be the core of the next analytical chapters, I offer here a brief sketch of each of these four case studies.

The *right of due process for suspected terrorists* offers a first example of the challenge of ineffectiveness. In the aftermath of 9/11 counter-terrorism measures with serious consequences on the due process rights of the targeted individuals were adopted both by the EU member states and by the EU, under the aegis of the United Nations (UN) Security Council. The degree of due process ensured to suspected terrorists varied greatly, however, among the EU states, with countries like Germany providing a generally wide protection for due process rights,²³⁴ and countries like France and the UK striking a much more “security-sensitive” approach.²³⁵ In this context, the original decision of the CFI in the *Kadi* case²³⁶ to refuse to review the legality of the EU counter-terrorism measures for compatibility with EU due process rights, generated a major challenge of ineffectiveness: by setting a low-level due process standard (akin to that of the laggard member states), the EU opened a lacuna of protection in the EU constitutional system and at the same time prevented the member states which were willing to do so, from providing at the state level a more extensive review of the UN-based EU counter-terrorism measures.

This state of affairs parallels to some extent the situation that occurred in the US, where the post-9/11 federal counter-terrorism policies significantly lowered the due process standards that were traditionally in force in many state jurisdictions. Since under the “anti-commandeering”

²²⁹ Case C-341/05 *Laval* [2007] ECR I-11767 (on the right to collective action)

²³⁰ *Bosphorus Hava Yollari Turizm v. Ireland*, ECHR [2005], Application No. 45036/98 (GC) (on due process)

²³¹ *Demir & Baykara*, ECHR [2008], Application No. 34503/97 (GC) (on social rights)

²³² *A., B. & C. v. Ireland* [2010], Application No. 25579/05 (GC) (on abortion)

²³³ On the Reconstruction, the New Deal and the Civil Rights Era as constitutional moments of US history see B. Ackerman (n 174). On the War on Terror (and for a convincing criticism of the term) see instead David Cole and James Dempsey, *Terrorism and the Constitution* (The New Press 2002)

²³⁴ See eg BGHSt 49, 112 (2004) (German Supreme Court annulling a lower court decision convicting a suspected terrorist, holding that the impossibility for the accused to challenge the evidence against him - because the evidence where withheld by the German secret services - represented a violation of the right to fair trial)

²³⁵ See eg C.E. No. 262626, *Association Secours Mondial de France*, judgment 3 November 2004 (French Council of State reviewing the ministerial decision to blacklist an individual suspected of financing terrorism only under the lowest-intensity standard of review); *R (on the Application of Al-Jedda) v. Secretary of State* [2007] UKHL 58 (UK House of Lords holding that an act authorized by the UN Security Council escapes review for compatibility with the ECHR)

²³⁶ Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649

doctrine state officials cannot be compelled to execute federal mandates,²³⁷ a number of state governments refused to cooperate in the Bush Administration War on Terror. Yet, by pre-empting the field of national security, the federal government was able to set aside the state standards and to replace them with a weaker federal standard. This challenge of ineffectiveness was slowly addressed by the US federal judiciary through a series of decisions that, step-by-step, enhanced the federal due process standard for suspected terrorists.²³⁸ Equally, in Europe, it was the ECJ's decision in *Kadi* to overrule the CFI and to review the legality of the EU counter-terrorism measures that filled the gap in the protection of due process rights at the EU level.²³⁹ The decision, which anticipated some positive innovations delivered in the Lisbon Treaty, also triggered an increase in the standard of protection at the state level.²⁴⁰

The case of *voting rights for non-citizens* offers an interesting example of the challenge of inconsistency. Traditionally in Europe, the definition of the boundaries of the electorate was a prerogative of the member states, which were endowed with very diverse regulations – with some states (notably the UK and Ireland)²⁴¹ expanding the franchise for selected classes of aliens even in national elections, and other states (e.g. Germany and Austria)²⁴² following a very restrictive nation-based conception of the polity. The establishing, with the EU Maastricht Treaty of 1992, of a right to vote at the local and supranational level for EU citizens residing in a EU member state of which they are not nationals (so-called “second-country nationals”), generated a major change in Europe:²⁴³ by requiring member states to open their polling stations to several groups of non-

²³⁷ See *US v. Printz*, 521 U.S. 898 (1997) (declaring unconstitutional a federal statute commandeering state police officers to execute a federal mandate)

²³⁸ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding the procedural rules in front of military commissions to be in violation of due process standards); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding the jurisdiction-stripping provision of the Military Commission Act unconstitutional)

²³⁹ 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

²⁴⁰ See eg *R. v. Jabar Ahmed* [2010] UKSC 2 (UK Supreme Court striking down the Orders in Council which formed the entirety of the UK anti-terrorism financing regime for violation of human rights standards). See also *Al-Jedda v. UK* ECHR [2011], Application No. 27021/08 (GC) (ECtHR holding the UK responsible under the ECHR for its conduct of policing and detention during the Iraq war and finding a violation of Article 5, ECHR)

²⁴¹ See eg Section 2(1)(c), Representation of the People Act (RPA) 1983, 31 Eliz. 2 c. 2 (consolidated version) (Eng.) (extending the right to vote for the Westminster Parliament to anybody who “is either a Commonwealth citizen or a citizen of the Republic of Ireland” and permanently resides in the UK); Ninth Am., Ir. Const., codified as Article 16(1)(2) (stating that “(i) All citizens, and (ii) such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of the House of Representatives, shall have the right to vote at an election for members of the House of Representatives.”)

²⁴² See eg BVerfGE 63, 37 (1990) (German Constitutional Court declaring a *Land* statute which extended voting rights to non-citizens incompatible with the constitutional requirement that the right to vote be restricted to the German “Volk”); VfSlg 17.264/2004 [2004] (Austrian Constitutional Court holding a *Land* bill allowing third-country national to participate in local elections unconstitutional for violation of the principle of homogeneity of the electoral body)

²⁴³ See Article 19 TEC (voting rights for EU citizens residing in another member state); Directive 93/109/EC OJ 1993 L 329/34 (exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a member state of which they are not nationals); and Directive 94/80/EC OJ 1994 L 368/38 (exercise

citizens, EU law placed the restrictive conceptions of voting rights that existed in some member states under pressure, while leaving other member states free to provide an even more advanced standard of protection in the field of electoral rights than that required by the minimum standard set in EU law.

The dynamics taking place in Europe closely reflect the experience of the US. In the original US constitutional system, the regulation of voting rights was exclusively in the hands of the states, which had very different regulations – with some states extending the franchise even to non-US citizens and other states depriving of the vote US citizens coming from other US states. Over time, however, this state of affairs proved to be unworkable since it produced serious discriminations throughout the US. Hence, with a series of constitutional amendments, legislative enactments and judicial rulings the federal government slowly set up a consistent standard for the regulation of voting rights, ensuring that US citizens moving from one US state to another could enjoy full voting rights both at the state and the federal level.²⁴⁴ In light of the US development, it is doubtful whether the recent decisions of the ECJ on the meaning of European citizenship can lead to an enhancement for the voting rights of second-country nationals.²⁴⁵ From this point of view, additional reforms in EU primary law would arguably be needed to allow EU citizens who reside in another EU member state to enjoy full voting rights there.

The case of the *right to strike* provides another example of the challenge of ineffectiveness. The right to collective action enjoys diverse degrees of protection in Europe. Some member states (e.g. Italy, France)²⁴⁶ recognize the strike as a constitutional right and other countries (e.g. Sweden, Finland)²⁴⁷ also widely protect collective labour rights. Nevertheless, in other member states (e.g. Germany, Poland)²⁴⁸ several limitations apply to the exercise of industrial action, through a requirement of *ultima ratio* – and in the UK the strike is not even regarded as a right but simply as a statutory immunity from common law rules.²⁴⁹ In *Viking*²⁵⁰ and *Laval*,²⁵¹ the ECJ recognized the right to strike as an EU fundamental right. However, it also held that strikes can be exercised only

of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a member state of which they are not nationals)

²⁴⁴ See eg Fifteenth Am. to the US Const. (right of US citizens to vote shall not be abridged by the US or by the states on account of race, color or previous condition of servitude); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (declaring a state residency requirement to vote to be incompatible with the right to inter-state travel); Voting Rights Act, Pub. L. 89-100 (1965), codified as amended in 42 U.S.C. par 1973 (enforcing federal voting rights in the states)

²⁴⁵ See eg Case C-300/04 *Eman & Sevinger (Aruba)* [2006] ECR I-8055 (holding a Dutch law which unreasonably disenfranchised Dutch citizens residing in the Dutch overseas territory of Aruba to be incompatible with EU law)

²⁴⁶ See eg Article 40, Const. It. (recognizing a constitutional right to strike), Preamble, Const. Fr. (same)

²⁴⁷ See eg Article 17, Const. Swed. (right to strike); Article 13, Const. Fin. (right to collective bargaining)

²⁴⁸ See eg *Ustawa z dnia 23 maja 1991 r. o rozwiązywaniu sporów zbiorowych* (Dz. U. z dnia 26 czerwca 1991 r.) (Pl.) (right to strike to be exercised only as a last resort measure)

²⁴⁹ See Trade Unions and Labour Relations (Consolidation) Act of 1992, 40 Eliz. 2 c. 52 (Eng.) (strict procedures to be followed to enjoy statutory immunity from common law rules in case of strike)

²⁵⁰ Case C-438/05 *Viking* [2007] ECR I-10779

²⁵¹ Case C-341/05 *Laval* [2007] ECR I-11767

when industrial action is necessary and strictly proportional to the achievement of the desired end. This produced a great deal of tension in the European system. By setting a standard that is lower than that existing in many EU states (although equivalent to, or possibly even higher than, that provided in other EU countries), EU law challenged the effectiveness of the right to strike standard of vanguard states. Moreover, by setting a ceiling of protection, *Viking* and *Laval* prevented member states from going above this maximum whenever industrial action interferes with EU free movement rules.

A striking analogy with the current European situation derives from an analysis of US history. In the US too, the regulation of industrial action originally fell within the purview of the states, which had very different standards of protection for labour rights. In the early 20th century, however, action by trade unions increasingly came under the scrutiny of the federal courts because of interference with free market rules. While the US Supreme Court recognized a federal constitutional right to strike, it subjected it to significant limitations by embracing a *laissez-faire* doctrine which was instrumental to inter-state commerce.²⁵² Nevertheless, during the New Deal, the federal government addressed the challenge of ensuring an effective protection of industrial action at the federal level through the enactment of an important piece of legislation (the Wagner Act),²⁵³ which replaced the weak judge-made standard with a vanguard mechanism for the defence of labour rights. In light of the US experience, it is worth examining whether the EU might also enhance its standard, either under the external influence of the recent *Demir & Baykara*²⁵⁴ jurisprudence of the ECtHR or through an internal reform such as the enactment of an EU Wagner Act.

Another example of the challenge of inconsistency, finally, is provided by *abortion rights*. On the very sensitive issue of when a woman can autonomously choose to end her pregnancy, EU member states have developed different models of regulation over the last decades. Some member states (notably UK and France)²⁵⁵ are endowed with very “liberal” regimes, which leave women a broad freedom to choose. Other countries (e.g. Italy, Germany)²⁵⁶ instead adopt a more intermediate

²⁵² See *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923) (stating that the Fourteenth Am. to the US Constitution recognizes the right to strike); *Dorchy v. Kansas*, 272 U.S. 306 (1926) (holding that right to strike is not absolute and can be limited to ensure freedom of contract principles)

²⁵³ National Labor Relations Act (Wagner Act), 49 Stat. 452 (1937), codified as amended at 29 U.S.C. paras 151-169

²⁵⁴ *Demir & Baykara*, ECHR [2008], Application No. 34503/97 (GC) (ECHR protects right to collective bargaining). See also *Enerji v. Turkey*, ECHR [2009], Application No. 68959/01 (ECHR protects right to strike)

²⁵⁵ See eg Section 1(1)(a) Abortion Act 1967, 15 Eliz. 2 c. 87 (as amended) (Eng.) (allowing termination of pregnancy up to the 24th week if “the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.”); Article 1, Loi n° 2001-588 du 4 juillet 2001, J.O.R.F., 7 juillet 2001, p. 10823 (allowing termination of pregnancy up to the 12th week for any situation of stress)(Fr.)

²⁵⁶ See eg Article 4, Legge 22 maggio 1978, n. 194 (G.U. 22 maggio 1978, n. 140) (It.) (allowing termination of pregnancy within 90 days after a non-directive counselling process); Article 8, Schwangeren-und Familienhilfeänderungsgesetz von 21 August 1995, BGBl I 1050 (Ger.) (declaring unlawful but not punishable an abortion performed within the first 12 weeks of pregnancy after a pro-life consultation procedure)

stand, while a few (Poland, Ireland)²⁵⁷ have an almost absolute abortion ban, which allows women to terminate pregnancy only when this is necessary to save their lives. In the last two decades, however, a substantive body of law regulating abortion has emerged at the EU and ECHR level. In the *Grogan* case,²⁵⁸ the ECJ recognized that abortion is a service under the scope of EU law, and, in a series of cases ending with *A., B. & C.*,²⁵⁹ the ECtHR stated that the ECHR requires member states to make access to abortion services effective whenever national law recognizes a woman's right to terminate her pregnancy in the books. As a result, the developments taking place at the transnational level in Europe have slowly increased the floor of protection for women's right in the abortion field, placing the most restrictive state legislations under pressure to reform and recognize the woman's right to chose.

Dynamics analogous to those at play in Europe have also characterized the US federal system. Until the early 1970s, the regulation of abortion was entirely in the hands of the states, which had very diverging regulations, with some states allowing abortion up to the sixth month and others prohibiting it *tout court*. In the well-known case of *Roe v. Wade*,²⁶⁰ however, the US Supreme Court recognized that a fundamental right to abortion was protected by the US Constitution and struck down state laws that were falling behind this federal minimum. The definition of a federal standard for the protection of the right to abortion did not prevent states from ensuring more advanced forms of protection and let states free to adopt regulations within the parameters set by *Roe* and its progeny.²⁶¹ Needless to say, the issue of abortion still remains extremely controversial in the US today and a number of states continue to challenge the central premise of *Roe*. Yet, the experience of the US demonstrates that a plurality of regulatory frameworks can coexist with a transnational minimum, which ensures at least a core abortion right for women wanting to terminate their pregnancies. Given the US example, it would seem that additional protection of the right to abortion, mostly through the case law of the ECJ and the ECtHR, would be welcome in Europe in order to avoid any discriminatory effect.

²⁵⁷ See Article 4(a), Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży (Dz.U. 1993 nr 17 poz. 78)(Pl.) (permitting abortion only if the pregnancy is endangering the mother's life or health, or up to viability if the foetus is seriously impaired or up to the 12th week if pregnancy resulted from rape); Eight Am., Const. Ir. codified as Article 40.3.3 (stating that the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right)

²⁵⁸ Case C-159/90, *Society for the Protection of the Unborn (SPUC) v. Grogan* [1991] ECR I-4685

²⁵⁹ *A., B. & C. v. Ireland*, ECHR [2010], Application No. 25579/05 (GC). See also *Open Door Counselling v. Ireland* ECHR [1992] Applications Nos. 14234/88 & 14235/88 (Plenary) (Irish prohibition to circulate information about abortion providers in other EU countries to be in violation of ECHR); *Tysiąc v. Poland*, ECHR [2007], Application No. 5410/03 (Poland to be in violation of Article 8 ECHR for not having provided an effective legal framework by which a woman suffering from a serious health disease could obtain an abortion as provided by the Polish legislation)

²⁶⁰ *Roe v. Wade*, 410 U.S. 113 (1973)

²⁶¹ See eg *Planned Parenthood of South-eastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (upholding *Roe*'s central premise but allowing state regulation of abortion unless this creates an "undue burden" over women)

The short summary provided above had only the intent to briefly introduce the case studies, outlining the challenges that emerge in the protection of several fundamental rights in Europe, their causes and their future prospects. More detailed explanations for each case study are provided in the subsequent chapters where readers will be able to examine from a closer and more complete perspective the practical consequences that spring from the European multilevel human rights architecture in these four examples. At this point, however, it seems possible to draw several conclusions from the previous analysis and to identify a number of recurrent patterns in the functioning of the European human rights system.

A first pattern is what I term “variability”. From the analysis undertaken, it emerges that the ranking of EU member states in the protection of fundamental rights varies in different areas of the law. State laws may be at the vanguard or at the rearguard in different fields of fundamental rights. Hence, for instance, the UK has an advanced system for the protection of electoral rights and one of the most liberal abortion rights regimes Europe-wide. Yet, the UK performs pretty badly in the area of strike law and due process rights for suspected terrorists. Equally, Germany may be a model in national security law, but it does not shine in abortion law or collective labour rights and is a laggard in the area of voting rights. The same considerations can be made for each EU member state. There is no European state that is permanently lagging behind in the field of fundamental rights.²⁶² At the same time, no state can claim to be the best in all fields of human rights.

The existence of significant variations in the human rights standards of the EU member states warns against over-evaluating the concept of “common constitutional traditions”.²⁶³ In the literature, it is often claimed that the development of human rights in the framework of the EU and the ECHR should be driven by respect for the “common constitutional traditions” of the member states: indeed, both the ECJ and the ECtHR are criticized when they do not do so.²⁶⁴ Nevertheless, although it is certainly true that, in general terms, a common culture of fundamental rights has been

²⁶² An exception to this general rule may nowadays be Hungary. Although I will not develop this claim further here, it seems clear to me that the recent constitutional changes that have been introduced by the new Hungarian nationalist government beg the question whether Hungary still complies with the general human rights standards required by Article 6 and 7 TEU to remain a member of the EU. On the issue see Kriszta Kovacs and Gabor Attila Toth, ‘Hungary’s Constitutional Transformations’ (2011) 7 *European Constitutional Law Review* 183

²⁶³ As is well-known the concept of “common constitutional tradition” was originally created by the ECJ and later codified in the TEU. See ECJ, Case 4/73, *Nold* [1974] par 13 (stating that in securing fundamental rights the ECJ “is bound to draw inspiration from constitutional traditions common to the member states”); Article 6 TEU (fundamental rights as recognized in the ECHR and in the “common constitutional traditions” are general principles of EU law)

²⁶⁴ See eg Eva Kocher, ‘Fundamental Social Rights in Community Law and in the German Constitution – Equivalent Rights?’ (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 385 395 (criticizing the case law of the ECJ in the field of labour law for not having drawn inspiration from the constitutional traditions of the member states and arguing that “only in these traditions we can find experiences and specific solutions for typical conflicts between social rights and entrepreneurial freedoms.”). In light of the diversity of regulation of strike law in Europe explained above, it is difficult to see however how the ECJ could follow all traditions in its cases

gradually emerging in Europe,²⁶⁵ this should not obliterate the existence of important differences between the states on specific human rights issues. As such, when assessed from a “neo-federalist” perspective, the frequent pleas for the ECJ and the ECtHR to take the “common constitutional traditions” more seriously in their case law appear ingenuous.²⁶⁶ Given that traditions and human rights standards vary among the states, it is impossible for the transnational European courts to draw clear inspiration from them: in this context, a home-grown conception of rights at the EU and the ECHR level is often the most practical and unavoidable option for both the ECJ and the ECtHR.

A second pattern is that of “relativity”. The examples above reveal that the impact of transnational law on state law is relative, since the effects of EU and ECHR law changes on the basis of the underlying state law. In other words, transnational law may be good, bad or neutral for the protection of a specific fundamental right depending on the previous conditions of state law. Thus, the emergence of a transnational minimum standard for the protection of abortion rights may significantly challenge the legal systems of Ireland and Poland (because both are laggards in the field) but it leaves the regimes of, say, France or the UK largely unaffected. Similarly, the definition of a judge-made standard for the protection of strike action at the EU level may challenge the high-level degree of protection of Italy and Finland, perhaps enhance the low-level standard of the UK and still be irrelevant for Germany and Poland (since both have standards based on proportionality analysis which are largely corresponding to those created by *Viking* and *Laval*).

In the awareness of the relative effects that transnational law may have on state human rights standards we can assess with some scepticism the scholarly calls for a “race to the top” in the protection of human rights in Europe. In the literature, indeed, it has been sometimes claimed that goal of the European transnational courts should be the pursuit of the maximum human right standard (since a race to the top is the only way to avoid conflicts between state and transnational law).²⁶⁷ While the pursuit of a high level standard of human rights protection can be shared from a normative point of view,²⁶⁸ some caution is needed when addressing the issue from an analytical stand-point. As the “neo-federalist” perspective makes clear, a high standard at the transnational level can generate serious challenges in some states, and the higher the standard the greater these challenges. Bearing in mind the totality of dynamics at play in a multilevel system, it is realistic to

²⁶⁵ See also G. Silvestri (n 74) 7; P. Häberle (n 74)

²⁶⁶ If not a cynical instrument to advocate, under the patina of a common constitutional culture, the adoption by the ECJ or the ECtHR of one specific standard – the standard prevalent in the writer’s own country!

²⁶⁷ Leonard Besselink, ‘Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union’ (1998) 35 *Common Market Law Review* 629, 679 (claiming that the ECJ should embrace a “universalized maximum standard approach” in the protection of fundamental rights, adopting as EU law standard the most advanced standard among the relevant international and national standards)

²⁶⁸ See also Norberto Bobbio, *L’età dei diritti* (Einaudi 1990); Klaus Günther, ‘The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture’ in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 117

doubt whether systematically pursuing the maximum standard in the protection of human rights at the transnational level is the best way to avoid conflicts between state and transnational law.²⁶⁹ Because the nature of the interaction between state and transnational law is relative, caution and modesty are required when designing guidelines for judicial action.

A third pattern, finally, can be labelled “reformability” or “dynamism”. The challenges that take place in the European multilevel architecture are different in nature and scope and, as the examples demonstrate, often require different solutions. A challenge of ineffectiveness such as the one created in the field of due process rights by the CFI in *Kadi* could well be addressed by the judicial *revirement* of the ECJ. A challenge of inconsistency such as that arising in the field of abortion rights may be handled by future judicial action. A challenge of ineffectiveness such as that produced by *Viking* and *Laval* instead requires legislative reforms at the EU level to enhance the standard of protection of the right to strike. A challenge of inconsistency like the one triggered by the enactment of the Maastricht Treaty in the field of electoral rights, finally, most likely requires a more substantive revision of the EU Treaty to ensure broader protection of voting rights for migrant EU citizens. Yet, the responses to these challenges always take place within the “federalist” framework. In other words, the functioning of the European multilevel human rights system can be reformed *from within*.

Understanding the dynamism of the European multilevel human rights system – i.e. its capacity to change and be reformed when this is necessary to address specific human rights challenges – reveals that the European system is neither a “crystallized” arrangement (as the “pluralist” narrative on fundamental rights would suggest) nor an “un-reformable” machinery (as the “sovereignist” narrative would have it). Rather, the European system *can* be reformed and in some cases *must* be reformed. For better or for worse, there is nothing fixed in the current arrangement for the protection of fundamental rights. This means that, on the one hand, the unpleasant aspects of the systems can be revised for the better. On the other hand, it also implies that advanced human rights standards may tomorrow be changed for the worse. As Antonio Cassese, Andrew Clapham and Joseph H.H. Weiler remind us: “human rights protection is a question of constant vigilance.”²⁷⁰ And constant vigilance is certainly also needed in Europe to ensure that its human rights system continues to live up to its challenges.

²⁶⁹ See Koen Lenaerts, ‘Interlocking Legal Orders in the European Union and Comparative Law’ (2003) 52 *International and Comparative Law Quarterly* 873, 906 (explaining how the ECJ, through the use of comparative law, often arrives at a “solution in the ‘middle-line’” which can be acceptable for many different legal systems)

²⁷⁰ Antonio Cassese et al ‘1992 – What are our rights? Agenda for a Human Rights Action Plan’, in Antonio Cassese et al (eds), *European union - The Human Rights Challenge: Volume II. Human Rights and the European Community: Methods of Protection* (Nomos 1991) 1, 75

Conclusion

The European architecture for the protection of fundamental rights has in the last two decades undergone a series of remarkable constitutional developments. Human rights have gained in importance and status at each level of what is now conventionally called the European multilevel system. Fundamental rights are now enshrined in states' constitutional provisions, in a binding EUCFR, and in the ECHR. Moreover, they are secured by the overlapping activity of a plurality of institutions. In particular, state courts, the ECJ and the ECtHR provide a network of judicial fora in which human rights issues can be claimed and vindicated. As such, the European architecture has emerged as one of the most advanced systems for the protection of fundamental rights worldwide. Historical reasons, related to the tragic experiences of the European continent during the 20th century, explain the rationale for the appearance of a multilevel human rights system in Europe. Yet, the full implications of the European system do not appear to have been clearly understood in the legal literature so far. To a large extent, the European human rights architecture remains a puzzling object for scholars and practitioners.

In the literature, two main narratives have to date been advanced to explain the consequences deriving from the European multilevel human rights system. According to a first, "sovereigntist" narrative, the rise of mechanisms for the protection of fundamental rights beyond the state has produced mainly negative effects, challenging the ability of the state (or its Parliament) to decide autonomously about the scope of the protection of fundamental rights. According to a second, "pluralist" narrative, the strengthening of human rights beyond the states and the creation of a common culture of fundamental rights can instead be praised as positive features of a new European pluralist constitutional arrangement. As I have attempted to explain, both the "sovereigntist" and the "pluralist" narratives capture some useful facets of the way in which the European architecture functions. Nevertheless, because of their methodological weaknesses, they offer only a partial view of the European reality. The "sovereigntist" narrative fails to undertake an internal comparison (assessing the diverse impact of transnational human rights law in the various EU member states), while the "pluralist" narrative fails to undertake an external comparison (between Europe and other federal systems). As a result, neither narrative is able to provide a convincing account of the complex set of dynamics that come into play in the European multilevel system.

The purpose of this chapter has been to advance a different, "neo-federalist" narrative. This narrative rejects the idea that the European multilevel system is a *sui generis* arrangement and claims that it is methodologically necessary to compare the European system with other federal

human rights systems in order to better explain it. To this end, I have undertaken a comparative analysis of other federal systems and underlined how, under a “most similar cases logic of comparison”, the European architecture presents several structural and normative analogies with the US federal system, which is also endowed with a multiplicity of constitutional sources and a plurality of constitutional actors for the protection of fundamental rights. In light of this comparison, I have argued that it is possible to reconceptualise the European system as a “neo-federal” system and that this approach may yield essential analytical insights when exploring the dynamics at work in it. At the same time, to avoid conceptual ambiguities, I have explained how the notion of (neo-)federalism that I embrace is not the statist, hierarchical vision which has traditionally prevailed in European legal thought but rather the pluralist, heterarchical vision which is at the core of the US constitutional experience and I have maintained that this tradition should be rediscovered in contemporary Europe.

Through the lenses of a “neo-federalist” approach, I have then attempted to design an analytical framework to examine the complex constitutional phenomena at play in the European multilevel human rights system and identified several recurrent synchronic and diachronic dynamics. As I have explained, in a multi-layered human rights architecture such as the European one, the standards of protection of specific fundamental rights often differ at the horizontal level (between the EU member states) and at the vertical level (between the states, the EU and the ECHR). As such, the interaction between different state and transnational human rights standards creates several challenges. The nature of these challenges changes, however, depending on whether transnational law provides more or less protection than state law and whether transnational law operates as a ceiling (maximum) rather than as a floor (minimum) of protection. Taking into account the vertical and horizontal dimensions of the interplay between human rights standards, I have therefore recast the architectural dynamics at play in the European system, distinguishing between a challenge of ineffectiveness and a challenge of inconsistency.

As I argued, a challenge of ineffectiveness emerges when a transnational law setting a ceiling of protection for a specific human right interacts with state laws which ensure a more advanced standard of protection for that right, challenging the effectiveness of the vanguard states’ standard and pressuring it towards the less protective maximum set up at the transnational level (while leaving the standard in force in the laggard states unaffected). A challenge of inconsistency emerges instead when a transnational law setting a floor of protection for a specific human right interacts with state laws which ensure a less advanced standard of protection for that right, challenging the consistency of the laggard states’ standard and pressuring it toward the more

protective minimum set up at the transnational level (while leaving the standard in force in the vanguard states unaffected).

At the same time, I have explained how the European human rights architecture, like other federal systems, is subject to a permanent dynamic of diachronic transformations. Changes at the jurisprudential and institutional level are constantly in action and must be taken into account: these transformations, in fact, may provide responses to the challenges of ineffectiveness and inconsistency emerging from the interaction between state and transnational laws. Where this is not the case, however, additional reforms of the European systems should be advanced *de jure condendo* and, as I have underlined, here again a comparative approach can prove useful: with all due caveats, scholars may draw lessons from the historical experience of other federal systems for the protection of fundamental rights on how specific challenges in the protection of human rights can be addressed in Europe. An assessment of the temporal dimension of the dynamics at play in Europe, indeed, reveals that the challenges emerging in the European system are relative and can, over time, be reformed through the internal mechanisms of checks and balances with which the European pluralist architecture is endowed.

Finally, the chapter has briefly examined four case studies to highlight how the previously developed general conceptual framework could well be employed to analyze the empirical implications emerging from the European multilevel architecture in the field of due process rights for suspected terrorists, voting rights for non-citizens, the right to strike, and the right to abortion. Despite the relevant differences between the four examples, a summary overview has revealed that in all cases the interaction between different state laws and transnational law generated a challenge of either ineffectiveness or inconsistency. A comparative assessment, however, has shown that analogous dynamics were also at play historically in the US federal system, and a discussion of the most recent (or future) transformations taking place in Europe has shed light on the prospective improvements of the status quo. The four case studies were only sketched in this chapter since greater attention for each of them will be devoted in the next four chapters. Yet, the brief analysis exposed the existence of recurrent patterns in diverse sectors of human rights in Europe: my hope is, therefore, that the analytical framework developed in this study will encourage further research on the empirical implications that arise from a multilevel architecture in other fields of European human rights law.

Chapter 2

The Right to Due Process for Suspected Terrorists

Introduction

The right to due process – widely formulated as the right of an individual, whose liberty or property has been subjected to restrictive measures by a governmental authority, to: i) receive information on the reasons justifying the restrictive measures taken against him or her; ii) access an independent institution to obtain redress; and iii) be given a fair and just proceedings by which his or her claims can be impartially heard and adjudicated – is a defining feature of the tradition of liberal constitutionalism, rooted in the thought of John Locke¹ and based on the idea that fundamental rights are natural and inalienable endowments of every individual that must be protected against the encroachment of the political power.²

It is well known, however, that the terrorist attacks of September 11, 2001 (9/11) and the reaction to it, have put under severe pressure the protection of due process rights in many countries world-wide. National governments as well as international institutions such as the United Nations (UN) have responded to 9/11 by adopting several restrictive counter-terrorism measures, ranging from assets freezing to preventive detention or even preventive strikes.³ These measures, however, have often significantly hampered the protection of fundamental rights – and primarily of due

¹ See John Locke, *Second Treatise of Government* (1st published 1690, Crawford Macpherson 1980)

² See *inter alia* Augusto Barbera, *Le basi filosofiche del costituzionalismo* (Laterza 1996); Andras Sajó, *Limiting Government: An Introduction to Constitutionalism* (CEU Press 1999); Stephen Breyer, *Active Liberty* (Knopf 2005)

³ For an assessment of the post-9/11 counter-terrorism policies see David Cole and James Dempsey, *Terrorism and the Constitution* (The New Press 2002) (on the US); Kim Lane Scheppele, 'The Migration of the Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 347 (on the UN)

process rights – and raised the question whether the judiciary should have the authority to step in the thorny field of national security to ensure an effective protection of human rights.⁴

The purpose of this chapter is to analyze the protection of due process rights for suspected terrorists after 9/11 in Europe. To this end, the chapter examines the stand adopted by several member states in the fight against terrorism and the increasing involvement of the European Union (EU) – formerly the European Community (EC) – in the field of national security during the last decade. The chapter argues that the implementation at the EU level of a restrictive anti-terrorism financing regime, originally designed by the UN, has initially created a major challenge to the effectiveness of due process guarantees in Europe. By setting a low-level ceiling for the protection of the due process rights of suspected terrorists, the EU institutions have precluded individuals and entities affected by UN counter-terrorism measures from obtaining justice in the EU judicial system and simultaneously prevented EU member states from enforcing vanguard standards of due process protection in their domestic legal systems.

Nevertheless, as the chapter claims, a similar dynamic has taken place in the United States of America (US). After 9/11 the federal government pre-empted the field of national security displacing the state standards for the protection of due process rights and replacing them with a low-intensity federal standard. In this context, it has been up to the US federal judiciary to gradually enhance the federal standard of due process accorded to suspected terrorists. A comparable development, has arguably also occurred in Europe, where the EU courts have gradually improved the degree of protection of the right of due process and curbed the action of the political branches of government. In particular, with the milestone *Kadi* decision,⁵ the European Court of Justice (ECJ) has eventually restored a vanguard standard of due process protection in the EU, paving the way for the resolution of the challenge of ineffectiveness and anticipating several positive innovations linked to the entry into force of the EU Lisbon Treaty.

The chapter is structured as follows. Section 1 maps the position of the EU member states after 9/11, outlining how in some countries courts have resisted pressures from political institutions and upheld vanguard human rights standards while in other EU states due process guarantees have been restricted in the name of national security. Section 2 examines the impact of EU counter-terrorism law on EU member states and the dreadful implications of the decisions of the EU courts to withhold scrutiny on EU counter-terrorism measures implementing UN sanctions. Section 3 introduces a comparative assessment and explains that also in the US the fight against terrorism has

⁴ See the report of the UN *Special Rapporteur* Martin Scheinin on ‘The protection of human rights and fundamental freedoms while countering terrorism’, A/61/267 (2006), the conclusions of the UN High Commissioner for Human Rights on ‘The protection of human rights and fundamental freedoms while countering terrorism’, A/HRC/8/13 (2008)

⁵ Joined Cases C-402/05 P and C-415/05 P *Yassin A. Kadi and Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351

produced a challenge of ineffectiveness and assesses how this challenge has been addressed by the US federal judiciary. Section 4, then, analyzes the most recent judicial developments in the EU system and their positive impact on the protection of due process rights. Section 5, finally, discusses the advantages of the entry into force of the EU Lisbon Treaty in preventing future weakening of the EU due process standards for suspected terrorists.

1. Context: the protection of due process rights in the EU member states after 9/11

De jure, the right to due process and to an effective judicial remedy are protected in each layer of the European multilevel architecture.⁶ The Constitutions of many EU countries enshrine a fundamental right to due process and access to courts.⁷ In the civil law countries, which recognize the principle *ubi ius ibi remedium*, access to justice has progressively emerged as an autonomous procedural rights whose purpose is to make all the other substantive rights effective.⁸ In the common law countries, because of the tradition of the forms of action, the existence of an effective remedy precedes the attribution of an individual right as only *ibi ius ubi remedium*.⁹ Both constitutional models acknowledge that human rights shall be effectively protected, be it through a general right of access to court or a specific remedy in front of an independent tribunal. In addition, with the constitutionalization of the European legal space, such principles have moved to the international and supranational systems, increasing the convergence between the two models.¹⁰

At the international level, Article 6 of the European Convention on Human Rights (ECHR) codifies a right to fair trial and Article 13 states that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority

⁶ See Sabino Cassese, ‘Il diritto amministrativo e i suoi principi’ in Sabino Cassese (ed), *Istituzioni di diritto amministrativo* (Giuffrè 2006); Takis Tridimas, *The General Principles of EU Law* (2nd ed OUP 2006) 370 ff. See also, in a global perspective Sabino Cassese, ‘A Global Due Process of Law?’ in Gordon Anthony et al (eds), *Values in Global Administrative Law* (Hart Publishing 2011) 17

⁷ See Nicolò Trocker, “‘Civil Law’ e ‘Common Law’ nella formazione del diritto processuale europeo’ [2007] *Rivista Italiana di diritto pubblico comunitario* 421, 435

⁸ See, eg Article 24(1) Const. It. stating that “tutti possono agire in giudizio per la tutela dei propri diritti ed interessi legittimi”; Article 101.I Const. Ger. enshrining the “Recht auf den gesetzlichen Richter”. For a comparative overview of the concept Europe-wide see Eva Storskrubb and Jacques Ziller, ‘Access to Justice in European Comparative Law’ in Francesco Francioni (ed), *Access to Justice as a Human Rights* (OUP 2007) 177

⁹ See Ugo Mattei, *Il modello di Common Law* (Giappichelli 1996) 7 (recalling the celebrated statement of Friedrich Maitland, *The Forms of Action at Common Law* (1st published 1909, CUP 1948) 2 according to whom “the forms of action are a part of the structure upon which rests the whole common law of England and, though we may have buried them, they still rule us from their graves.”)

¹⁰ See N. Trocker (n 7) 435; E. Storskrubb and J. Ziller (n 8) 184

notwithstanding that the violation has been committed by persons acting in an official capacity.”¹¹ In *Golder*,¹² the European Court of Human Rights (ECtHR), drawing from the concept of the “rule of law” in the preamble of the ECHR, interpreted Article 6 as not being “limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, [but also as] secur[ing] a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined.”¹³ On the other hand, it is a fairly established statement of the ECtHR, that the ECHR “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”¹⁴

At the supranational level, also the ECJ has recognized in its landmark *Johnston* decision¹⁵ that “the requirement of judicial control [...] reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in Articles 6 and 13 of the ECHR [...] and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in EC Law.”¹⁶ By virtue of this judgment, therefore, “all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to” their fundamental rights.¹⁷ By enshrining in Article 6 of the EU Treaty (TEU) the principle that the EU “is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” the EU member states have furthermore reasserted the need for effective judicial review.¹⁸

In addition, Article 47 of the EU Charter of Fundamental Rights (CFR) clearly recognizes that “everyone whose rights and freedom guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.” Article 41 CFR then recognizes a right to “good administration” defined as the “right of every person to be heard, before any individual measure which could affect him or her adversely is taken.”¹⁹ Since the entry into force of the Lisbon Treaty on 1st December 2009, the EU CFR (which had only been proclaimed in Nice in 2000 by the EU Parliament, Council and Commission) has

¹¹ According to Luzius Wildhaber, ‘The European Court of Human Rights in Action’ (2004) 21 *Ritsumeikan Law Review* 83 “the principal and overriding aim of the system set up by the ECHR is to bring about a situation in which in every Contracting State the rights and freedoms are effectively protected”

¹² *Golder v. United Kingdom*, ECHR [1975], Application No. 4451/70

¹³ *Ibid* at par 25 see Carol Harlow, ‘Access to Justice as a Human Right: the European Convention and the European Union’ in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 203

¹⁴ *Airey v. Ireland*, ECHR [1979], Application No. 6289/73, at par 24. See also *Artico v Italy*, ECHR [1980], Application No. 6694/74, at par 33; *Goodwin v. United Kingdom*, ECHR [2002], Application No. 28957/95, at par 74

¹⁵ Case 222/84, *Johnston v. Chief Constable of the Royal Ulster* [1986] ECR 1651

¹⁶ *Ibid* par 18

¹⁷ *Ibid* par 19

¹⁸ See Giorgio Gaja, ‘New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe’ in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 780, 794; Dinah Shelton, ‘Remedies and the Charter of Fundamental Rights of the European Union’ in Steve Peers and Angela Wards (eds), *The European Charter of Fundamental Rights: Politics, Law and Policy* (Hart Publishing 2004) 349

¹⁹ See also Martin Shapiro, ‘The Giving Reasons Requirement’ [1992] *University of Chicago Legal Forum* 179

acquired legally binding value and constrains the EU institutions and the member states when they act within the scope of application of EU law.²⁰

De facto, however, in the aftermath of the terrorist attacks of 9/11, the due process guarantees existing in many European Constitutions, as well as at the transnational level in Europe, have come under pressure. The need to tackle the threat of insecurity produced by international terrorism pushed the political branches to enact sweeping counter-terrorism measures. These measures, whether adopted under a purely national agenda or under the aegis of international institutions such as the UN Security Council (SC), threatened the protection of core due process guarantees in the name of national security.²¹ Nevertheless, judicial reactions to the “war on terror” have been uneven in Europe, and it seems possible to contrast several vanguard states, in which courts have ensured a heightened standard of protection to due process rights of suspected terrorists, with a number of laggard states, in which reasons of security have often outweighed the duty to respect due process rights.²²

Although it is not my intention to offer here a complete outline of the role of state courts in the field of national security after 9/11,²³ it may be noticed that, for instance, in Germany, courts played a remarkably effective task in controlling the counter-terrorism policies of the political branches, mandating strict compliance with the high due process standards of the German Basic Law.²⁴ Not only did the *Bundesverfassungsgericht* strike down prominent pieces of counter-terrorism legislation of the German government for violation of human rights,²⁵ but also the *Bundesgerichtshof* ensured to individuals indicted on terrorism charges a heightened standard of due process protection: in 2004, in the *El Mottasadeq* case,²⁶ for example, the *Bundesgerichtshof*

²⁰ See Angela Ward, ‘Access to Justice’ in Steve Peers and Angela Wards (eds), *The European Charter of Fundamental Rights: Politics, Law and Policy* (Hart Publishing 2004) 123

²¹ On the challenges to due process rights after-9/11 see Adam Tomkins, ‘National Security and Due Process of Law’ [2011] Current Legal Problems 1; Enzo Cannizzaro, ‘The Machiavellian Moment? The UN Security Council and the Rule of Law’ (2006) 13 International Organizations Law Review 195

²² I draw the expression “vanguard” and “laggard” states from Ann Althouse, ‘Vanguard States, Laggard States: Federalism and Constitutional Rights’ (2003-2004) 152 University of Pennsylvania Law Review 1745 (speaking about the “vanguard” and the “laggard” states to distinguish between the most-protective and the least-protective regimes for the protection of fundamental rights at the state level in the US federal system of government)

²³ For a more thorough overview, notably of state courts’ review of counter-terrorism sanctions mandated by the UN see John Dugard, ‘Judicial Review of Sanctions’ in Vera Gowlland-Debbas et al (eds), *United Nations Sanctions and International Law* (Kluwer 2005) 83 and Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights* (European Center for Constitutional and Human Rights 2011)

²⁴ On the role of courts in the field of counter-terrorism in Germany James Beckman, *Comparative Legal Approaches to Homeland Security and Anti-Terrorism* (Ashgate 2007) 107

²⁵ See eg BVerfGE 59 NJW 751 (2006) (German Constitutional Court striking down the 2005 federal Air-Transport Security Act which empowered the federal Ministry of Defence to order the shooting down of an aircraft suspected of being hijacked by terrorists holding that the act was incompatible with the constitutional protection of fundamental rights, notably the right to life and to human dignity). For a comment of the decision see Oliver Lepsius, ‘Human Dignity and the Downing of Aircraft: the German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-transport Security Act’ (2007) 7 German Law Journal 761

²⁶ See BGHSt 49, 112 (2004)

annulled a lower court decision convicting a suspected terrorist, arguing that the impossibility for the accused to challenge the evidence against him (because it had been withheld by the German secret services) represented a violation of the right to fair trial.²⁷

A “human rights sensitive” position seems to have been adopted also by Belgian courts. In the well-known 2005 case of *Sayadi & Vinck*, two Belgian nationals who, under suspicion of terrorism financing, had been inserted in a UN “black-list” without any due process of law challenged the Belgian administrative measure which froze their assets in implementation of the UN order. The *Burgerlijke Rechtbank van Eerste Aanleg* of Brussel ruled in favour of the applicants and ordered the Belgian state, under the penalty of a daily *astreinte*, to ensure their de-listing before the competent UN organs.²⁸ Since the decision was not appealed, it became final. Nevertheless the Belgian court proved unable to ensure an effective remedy to the applicants: despite the court’s ruling, the two applicant did not re-obtain their financial assets (until the UNSC approved their de-listing in 2009) and for this reason in 2008 Belgium was eventually found to be in violation of the International Covenant of Civil and Political Rights.²⁹

A mixed picture emerges, then, when assessing the role of courts in the United Kingdom (UK) after 9/11.³⁰ Although the House of Lords (HL) delivered several outstanding decisions in the field of national security,³¹ courts initially demonstrated some reluctance in scrutinizing the action of the political branches, especially if mandated by the UNSC. In *Al-Jedda*,³² for instance, the UKHL affirmed that an act authorized by a UNSC resolution would escape judicial review of its conformity with the human rights principles recognized by the ECHR.³³ Here the case concerned the legality of the detention of a British citizen by the UK military during the Iraq war. The detention, however, was allegedly authorized by a UNSC resolution³⁴. The UKHL thus rejected the applicant’s claim, ruling that the UN Charter (and the resolutions adopted by the UNSC) enjoyed

²⁷ For a comment on the decision see Max Putzer, ‘Terrorism and Access to Justice: A Comparative Approach in the Field of Security versus Liberty’ (Sant’Anna Legal Studies Working Paper No. 2, 2012)

²⁸ See Civ. (4^eme Ch.), 11 February 2005, *Sayadi and Vinck c. Etat belge*, not published. On the UN system of listing individuals suspected of financing terrorism see *infra* text accompanying n 44-48

²⁹ See Human Rights Committee, CCPR/C/94/D/1472/2006, Decision in case *Sayadi and Vinck v. Belgium*, 22 October 2008 (finding a violations of Article 12 and 17 ICCPR)

³⁰ On the role of courts in the field of counter-terrorism in the UK see Adam Tomkins, ‘National Security and the Role of the Court: a Changed Landscape?’ (2010) 126 Law Quarterly Review 543

³¹ See eg the *Belmarsh* case: *A and others v. Secretary of State for the Home Dept.* [2004] UKHL 56 (House of Lords holding that a provision of the Anti-Terrorism Crime and Security Act 2001, 49 Eliz. 2, c. 24 which allowed the indefinite detention of non-nationals without trial was incompatible with the ECHR)

³² *R (on the Application of Al-Jedda) v. Secretary of State* [2007] UKHL 58

³³ For a comment to the decision see Francesco Messineo, ‘The House of Lords in *Al Jedda* and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights’ (2009) 56 Netherlands International Law Review 35

³⁴ S/RES/1546 (2004). See also S/RES/1637 (2005); S/RES/1723 (2006)

supremacy even over the ECHR, since this was “necessary for imperative reasons of security”³⁵ and entirely displacing the protection of human rights in the case.

Also in France, ordinary courts manifested a “security-sensitive” approach in reviewing counter-terrorism measures.³⁶ For example, the French *Conseil d’Etat* in its judgment in the *Association Secours Mondial* case³⁷ found itself competent to review an administrative act freezing the funds of an entity allegedly involved in the financing of terrorism.³⁸ In exercising its review, however, the *Conseil d’Etat* employed as a standard the manifest error of appreciation scrutiny³⁹ and concluded as follows: “considering [...] that [...] some days after the publication on the official Journal of the French Republic of the decree which is now challenged, the applicant entity was inserted on the list drafted and periodically revised by the Committee created by resolution 1267 of the [UNSC] and that with regulation EC n° 1893/2002 of October 23, 2002, the Commission of the [EC] had equally listed the [entity] on the list of natural and legal persons against whom the [EU] Council has adopted financially restrictive measures, it does not emerge from the facts of the case that the Minister has, in these circumstances, made any error of appreciation.”⁴⁰

Hence, as this short overview highlights, although the protection of due process rights is clearly part of the constitutional traditions of the member states (and now also of the EU and of the ECHR), the post-9/11 “war on terror” has produced a significant threat to the protection of due process rights in many European jurisdictions. Although several domestic courts have exercised a closed human rights scrutiny of restrictive counter-terrorism measures enacted by the political

³⁵ *Al-Jedda* (Bingham of Cornhill L.J. par 39)

³⁶ On the role of courts in the field of counter-terrorism in France see Carolina Cerda-Guzman, ‘La Constitution : un arme efficace dans le cadre de la lutte contre le terrorisme ?’ [2008] *Revue française de droit constitutionnel* 73

³⁷ C.E. No. 262626, *Association Secours Mondial de France*, judgment 3 November 2004

³⁸ See Stanislas Adam, ‘Overcoming Dissonance to Reshape Coherence: The European Court of Justice, Terrorist Lists and the Rule of Law’ in Giuseppe Martinico et al (eds), *Shaping Rule of Law Through Dialogue* (Europa Law Publishing 2009) 193, 197

³⁹ According to Wojciech Sadurski, “Reasonableness” and Value Pluralism in Law and Politics’ (EUI Working Paper Law No. 13, 2008) 4 the “manifest error of appreciation” represents a weak test for judicial review and “only extremely irrational, arbitrary, unwise legal rules will fall victim of such test of reasonableness.” As a matter of fact, however, since the ruling in the case C.E. *Ministre de l’Equipment et du Logement c. Fédération des Défenses des Personnes Concernées par le Projet Ville Nouvelle Est de Lille*, judgment 28 May 1971, it is customary for the *Conseil d’Etat* to employ a stronger test to review the legality of the administrative acts, which resembles proportionality analysis. On the test of judicial review utilized in French constitutional law see Federico Fabbrini, “Reasonableness” as a Test of Judicial Review of Legislation in the French Constitutional Council’ (2009) 4 *Journal of Comparative Law* 39. The decision to recur to the ‘manifest error of appreciation’ review highlights, from this point of view, the willingness of the *Conseil d’Etat* to adopt a deferential scrutiny of the governmental order

⁴⁰ *Association Secours Mondial*, 7ième considérant (my translation: “considérant [...] que [...] quelques jours après la parution au JORF du décret attaqué, l’association requérante a été inscrite sur la liste élaborée et mise à jour périodiquement par le comité du Conseil de sécurité créé par la résolution 1267 du Conseil de sécurité des Nations-Unies et que par le règlement CE n° 1893/2002 du 23 octobre 2002, la Commission [...] a également inscrit [l’association] sur la liste des personnes et entités pour lesquelles le Conseil de l’Union européenne a institué des mesures financières restrictives, il ne ressort pas des pièces du dossier que le ministre [...] a, dans ces circonstances, commis une erreur d’appréciation.”)

branches, courts in other countries have come very close to the adoption of the “political question” or “*act de gouvernement*” doctrine,⁴¹ showing their incapacity to ensure an effective protection to the fundamental rights of persons targeted by restrictive anti-terrorism measures enacted by national governments or UN institutions. The protection of due process rights of suspected terrorists, however, has been increasingly affected also by the action of the EU.

2. Challenge: the impact of EU counter-terrorism law on due process rights

In the aftermath of 9/11, the EU has significantly increased its involvement in the field of counter-terrorism.⁴² In particular, the EU has assumed a leading role in implementing the “smart sanctions” established by resolutions of the UNSC.⁴³ Since the late 1990s, in fact, the UNSC, considering that terrorist financing represented a threat to the stability of the international community, began to enact economic sanctions targeting specific individuals or entities suspected of being involved in the financing of terrorism.⁴⁴ To this end, the UNSC established an auxiliary Committee (where all the members of the UNSC are represented) and endowed it of the power to draw a “black-list” of natural and legal persons suspected of being involved in terrorist activities.⁴⁵ In the auxiliary committee, the diplomatic representatives of the members of UNSC directly identify the persons

⁴¹ See Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 177

⁴² For an overview of the role of the EU in the field of counter-terrorism cf. Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP 2009); Cian Murphy, *EU Counter-Terrorism Law: Pre-emption and the Rule of Law* (OUP 2012, forthcoming)

⁴³ See Annalisa Ciampi, *Sanzioni del Consiglio di Sicurezza e diritti umani* (Giuffrè 2007); Daniel Halberstam and Eric Stein, ‘The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order’ (2009) 46 *Common Market Law Review* 13. On the UN sanction regime more generally see Georges Abi-Saab, ‘The Concept of Sanction in International Law’ in Vera Gowlland-Debbas et al (eds), *United Nations Sanctions and International Law* (Kluwer 2005) 29; Jeremy Farrall, *The United Nations Sanctions and the Rule of Law* (CUP 2007)

⁴⁴ The employment of counter-terrorism sanctions at the UN level began prior to 9/11/2001: see, eg S/RES/1267 (1999), S/RES/1333 (2000), S/RES/1363 (2001). However, the employment of counter-terrorism sanctions steadily grew after the terrorist attacks in the US: see, eg S/RES/1373 (2001), S/RES/1452 (2002), S/RES/1455 (2003), S/RES/1526 (2004), S/RES/1535 (2004), S/RES/1566 (2004), S/RES/1617 (2005), S/RES/1730 (2006), S/RES/1735 (2006), S/RES/1822 (2008), S/RES/1904 (2009), S/RES/1989 (2011). See Luigi Condorelli, ‘Les attentats du 11 septembre et leur suites: où va le droit international?’ [2001] *Revue générale de droit international public* 829; Peter Fitzgerald, ‘Responding to Rogue Regimes: from Smart Bombs to Smart Sanctions. Managing ‘Smart Sanctions’ Against Terrorism Wisely’ (2002) 36 *New England Law Review* 957

⁴⁵ The Committee was established by S/RES/1267 (1999). Its powers and rules of procedure were then modified by successive resolutions. See, eg S/RES/1333 (2000), S/RES/1363 (2001), S/RES/1390 (2002), S/RES/1452 (2002), S/RES/1455 (2003), S/RES/1526 (2004), S/RES/1566 (2004), S/RES/1617 (2005), S/RES/1730 (2006), S/RES/1735 (2006), S/RES/1822 (2008); S/RES/1904 (2009). See Eric Rosand, ‘The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions’ (2004) 98 *American Journal of International Law* 745; Jochen Frowein, ‘The Anti-Terrorism Administration and the Rule of Law’ in Pierre-Marie Dupuy et al (eds), *Common Values in International Law Festschrift Tomuschat* (Engel Verlag 2006) 785. Recently, resolutions S/RES/1988 (2011) and S/RES/1989 (2011) have introduced relevant changes to the Committee’s sanction system by creating a distinction between two “black-lists” (a country-specific for the Taliban and a general one for the individuals and entities associated with Al-Qaida)

who are to be targeted by the smart sanctions. The listing procedure is essentially informal, governed by consensus and based on the often limited and confidential information gathered by the security services of the member states of the UNSC.⁴⁶

Once an individual or an entity is inserted in the UN “black-list”, all UN member states are then required to give effect to the determinations of the auxiliary committee in their domestic legal system, materially freezing the assets of the individuals and entities identified by the UN. Indeed, since the counter-terrorism framework established by the UNSC is based on Chapter VII of the UN Charter, which grants the UNSC the power to take all measures necessary for the maintenance of international peace and security,⁴⁷ its resolutions are binding on all the UN member states and shall be faithfully executed in their domestic legal systems.⁴⁸ Because of the economic implications of the UN sanctions, however, EU member states decided to implement UN sanctions through legislative measures adopted in the EU framework.⁴⁹

Prior to the entry into force of the Lisbon Treaty, the legal regime for the implementation of UN sanctions was as follows. To begin with, a common position listing the individual and entities targeted by the counter-terrorism measures was adopted by the EU member states in the so-called II pillar of the EU – the Common Foreign and Security Policy (CFSP).⁵⁰ Subsequently, a regulation was enacted under the so-called I pillar of the EU – the EC – on the joint basis of Articles 60, 301 and 308 of the EC Treaty (TEC).⁵¹ The regulation ordered the freezing of the assets of all natural

⁴⁶ For an overview of the administrative procedure that governs the functioning of the Sanction Committee see Clemens Feinaugle, ‘The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of the Individuals?’ (2008) 9 *German Law Journal* 11 1513. Recently, however, the resolutions S/RES/1988 (2011) and S/RES/1989 (2011) have introduced significant innovations in the administrative functioning of the Sanction Committee. In particular, an independent Ombudsperson can now hear individual requests for delisting and take a decision which becomes final unless within 60 days the Sanction Committee decides by consensus to retain the suspected individual and entity on the “black-list”

⁴⁷ For an introduction to the dispositions of Chapter VII of the UN Charter and a comment article by article see Jochen Frowein and Nico Krisch, ‘Chapter VII: Action with Respect to Threats to Peace, Breaches of Peace and Acts of Aggression’ in Bruno Simma et al (eds), *The Charter of the United Nations. A Commentary. Volume 1* (2nd ed OUP 2002) 701; See also Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004). On the expansion of the powers of the UN Security Council in the last decade, see Michael Matheson, *Council Unbound: The Growth of Un Decision Making on Conflict and Post-conflict Issues After the Cold War* (United States Institute of Peace Press 2006)

⁴⁸ Article 25 of the UN Charter states in fact that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” See Jost Delbrück, ‘Article 25’ in Bruno Simma et al (eds), *The Charter of the United Nations. A Commentary. Volume 1* (2nd ed OUP 2002) 452

⁴⁹ See Martin Nettesheim, ‘UN Sanctions Against Individuals: a Challenge to the Architecture of the EU Governance’ (2007) 44 *Common Market Law Review* 567, 571. For a general overview of the constitutional foundations of the external relations of the EU see Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP 2004)

⁵⁰ See, eg, Council Common Position 1999/727/CFSP OJ 1999 L 294/01; Council Common Position 2001/154/CFSP OJ 2001 L 57/01; Council Common Position 2002/402/CFSP OJ 2002 L 139/04

⁵¹ For a discussion concerning the existence of a EC competence to adopt and implement economic sanctions targeting individuals and entities, see Amandine Garde, ‘Is it really for the European Community to Implement Anti-Terrorism UN Security Council Resolutions?’ (2006) 65 *Cambridge Law Journal* 284. Article 60, 301 and 308 TEC have been considered as a sufficient legal basis for the adoption of target sanctions by the EC both by the CFI in Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC*, [2005] ECR II-3649 and by the ECJ in Joined Cases C-

and legal persons reported in the Annex to the regulation, and empowered the EC Commission to update the Annex.⁵² Finally, the EU member states gave effect to the regulation at the national level, with administrative acts that materially froze the financial assets of the blacklisted individuals and entities.⁵³

After the entry into force of the Lisbon Treaty this legal framework has largely remained unchanged, although new legal basis have been inserted in EU primary law to sustain the action of the EU institutions. Article 215 of the (renamed) Treaty on the Functioning of the EU (TFEU) provides that the Council, acting by a qualified majority on a joint proposal of the EU High Representative for Foreign Affairs and the Commission can adopt – in the context of the CFSP – restrictive measures “against natural or legal persons and groups or non-State entities.”⁵⁴ Article 75 TFEU then provides that the EU Parliament and Council may enact, following the ordinary legislative procedure, a regulation providing for the “freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.”⁵⁵ Regulations are then applied in all member states. Therefore, even in the post-Lisbon regime, a series of legal measures of identical content (CFSP acts, regulations and national administrative measures) continue to be utilized to give effect in Europe to the UN counter-terrorism sanctions.

402/05 P and C-415/05 P *Yassin A. Kadi and Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351, albeit with different arguments

⁵² See, eg, Council Regulation 337/2000/EC OJ 2000 L 43/01; Council Regulation 881/2002/EC OJ 2002 L 139/09; Council Regulation 561/2003/EC OJ 2003 L 082/01

⁵³ According to Article 249(2) TEC “a regulation shall be binding in its entirety and directly applicable” in all EU member states. The intervention of national administrative agency (eg, banking authorities, police forces etc.) is however necessary to give full effect to the regulation. See on the state disciplines of assets freezing, eg Mario Savino, ‘La disciplina italiana della lotta al finanziamento del terrorismo’ [2008] *Giornale di Diritto Amministrativo* 497 (on Italy); Torbjörn Andersson et al, ‘EU Blacklisting: The Reinassence of Imperial Power, but on a Global Scale’ (2003) 14 *European Business Law Review* 111 (on Sweden)

⁵⁴ The Lisbon Treaty abolished the pillar structure of the EU but left a set of *ad hoc* rules in the area of CFSP. See Marise Cremona, ‘The Union External Action: Constitutional Perspectives’ in Giuliano Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 1194. Article 215 TFEU make now explicit the power for the EU to enact restrictive measures to implement foreign and security strategies: “1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the [TEU] so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.” Article 43(1) TEU otherwise now makes clear that action in the field of CFSP “may contribute to the fight against terrorism”

⁵⁵ Article 75(1) TFEU, therefore, makes now explicit the legal basis of the EU in the field by stating that: “Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.” See Marise Cremona, ‘EC Competences, ‘Smart Sanctions’ and the *Kadi* Case’ (2009) 28 *Yearbook of European Law* 559

Smart sanctions have a significant impact on the fundamental due process rights of targeted individuals and entities.⁵⁶ As highlighted in the previous Section, a right to due process is well acknowledged in each layer of the European multilevel architecture and would require, at the minimum, that before the adoption of the sanctions or in its immediate aftermath, interested persons be informed of the reasons that justify the restrictive measure taken against them and have the right to defend their position by accessing a neutral and independent decision-maker. Wide consensus exists nonetheless among scholars about the deficiencies of the procedure by which the auxiliary Committee of the UNSC identifies the persons whose funds ought to be frozen: because of the political and diplomatic mechanism by which the listing takes place, significant violations of fundamental rights have been claimed.⁵⁷

In light of the serious consequences produced by the economic sanctions, black-listed individuals and entities soon began to challenge the lawfulness of these UN counter-terrorism measures. As a matter of fact, however, no court was initially available to review the compatibility of targeted sanctions with fundamental rights.⁵⁸ As it is well-known, no judicial institutions has ever been established at the UN level before which individuals can activate legal proceedings.⁵⁹ Even supposing that the International Court of Justice (ICJ) could have been competent to review the acts of the UNSC – a possibility, nonetheless, which is far from being certain⁶⁰ – the individuals and entities targeted by the UNSC counter-terrorism sanctions “lacked *locus standi* before the ICJ, traditionally conceived as a judge between states.”⁶¹

Also in the EU legal framework, however, it was initially impossible for blacklisted individuals and entities to obtain redress.⁶² Before the entry into force of the Lisbon Treaty,⁶³ the

⁵⁶ See Bardo Fassbender, ‘Targeted Sanctions Imposed by the UN Security Council and Due Process Rights’ (2006) 13 *International Organizations Law Review* 437; Erika de Wet, ‘The Role of Human Rights in Limiting the Enforcement Power of the UN Security Council: a Principled View’ in Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 7

⁵⁷ See August Reinish, ‘Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions’ (2001) 95 *American Journal of International Law* 851; Frederic Mégret and Florian Hoffman, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 *Human Rights Quarterly* 314

⁵⁸ See Jessica Almqvist, ‘A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions’ (2008) 57 *International Comparative Law Quarterly* 303; Takis Tridimas and Jose Gutierrez-Fons, ‘EU Law, International Law and Economic Sanctions against Terrorism: the Judiciary in Distress?’ (2008) 32 *Fordham International Law Journal* 660

⁵⁹ See M. Nettesheim (n 49) 568. See also Dapo Akande, ‘The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?’ (1997) 46 *International and Comparative Law Quarterly* 341

⁶⁰ The ICJ has not excluded this possibility in its judgment *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 but so far it has not accepted the authority to judge the validity of acts of the UNSC

⁶¹ Giacinto Della Cananea, ‘Global Security and Procedural Due Process of Law Between the United Nations and the European Union: *Kadi v. Council*’ (2009) 15 *Columbia Journal of European Law* 519, 523

⁶² Nikolas Lavranos, ‘Judicial Review of UN Sanctions by the CFI’ (2006) 11 *European Foreign Affairs Review* 471; Piet Eeckhout, ‘Community Terrorism Listing, Fundamental Rights and UN Security Council Resolution: In Search of the Right Fit’ (2007) 3 *European Constitutional Law Review* 183

TEU excluded the jurisdiction of the ECJ over acts adopted by the EU Council in the framework of CFSP. According to former Article 46(1)(d) TEU the jurisdiction of the ECJ in the intergovernmental pillars was limited to what was specified by former Article 35, which acknowledged a limited role for the ECJ only in the area of Justice and Home Affairs (JHA). A preliminary reference could be submitted (by the judiciaries of the EU member states that had accepted the jurisdiction of the ECJ)⁶⁴ on the validity and interpretations of decisions and framework decisions and on the interpretation of conventions. Actions for annulment of decisions and framework decisions could then be brought by the member states or the Commission.⁶⁵ Common positions instead were not contemplated among the acts that could be subjected to review before the ECJ.⁶⁶

The jurisdiction of the ECJ over the measures adopted in the EC pillar, was formally recognized in the TEC. The validity of EC acts could be challenged ex Article 230 – the action for annulment⁶⁷ – and ex Article 234 – the preliminary reference procedure.⁶⁸ In the *Yusuf*⁶⁹ and *Kadi*⁷⁰

⁶³ On the impact of the Lisbon Treaty on the jurisdiction of the ECJ see *infra* text accompanying n 241

⁶⁴ According to former Article 35(2) TEU, “by a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.” Former Article 35(3) then stated that “a Member State making a declaration pursuant to paragraph 2 shall specify that either: a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the [ECJ] to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or b) any court or tribunal of that State may request the [ECJ] to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.” See also Anthony Arnall, ‘Les incidences du traité d’Amsterdam sur la Cour de Justice des CE’ [2002] *Revue des affaires européennes* 227

⁶⁵ According to former Article 35(1) TEU, the ECJ “shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them”. According to (former) Article 35(6) then “the [ECJ] shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers”. See also Eleanor Spaventa, ‘Fundamental What? The Difficult Relationship Between Foreign Policy and Fundamental Rights’ in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008)

⁶⁶ See Steve Peers, ‘Salvation Outside the Church: Judicial Protection in the Third Pillar After the *Pupino* and *Segi* Judgments’ (2007) 44 *Common Market Law Review* 883, 886. The CFI in Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v. Council of the EU*, [2006] ECR II-4665 confirmed the inadmissibility of an action of annulment against a common position

⁶⁷ According to former Article 230(4) TEC (current Article 263 TFUE) “any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. For a critical assessment of the debate concerning the restrictive interpretation of the *locus standi* provision of Article 230(4) TEC see Xavier Lewis, ‘Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures’ (2003) 30 *Fordham International Law Journal* 1469

⁶⁸ According to former Article 234(1) TEC (current Article 267 TFUE) the ECJ “shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community” upon referral by a national court. See Adelina Adinolfi, *L’accertamento in via pregiudiziale della validità degli atti comunitari* (Giuffrè 1997)

⁶⁹ Case T-306/01, *Ahmed A. Yusuf and Al Barakaat International Foundation v. EU Council and Commission* [2005] ECR II-3533

decisions of 2005, however, the CFI denied *moto proprio* the power to review the compatibility with human rights principles of an EC regulation implementing in the EU legal space the counter-terrorism sanctions established by the UNSC. The *Kadi* case originated from an individual action for annulment. The applicant, a Saudi national with substantial funds in the EU who had been black-listed by the UNSC Sanction Committee, alleged that the EC regulation⁷¹ implementing the UNSC resolution⁷² violated his EU constitutional rights – in particular, the right of due process – and asked the CFI to strike down the act insofar as it applied to him.

In order to answer the question raised by the petitioner, the CFI found it appropriate “to consider, in the first place, the relationship between the international legal order under the UN and the domestic or Community legal order.”⁷³ In the CFI’s view, the Charter of the UN enjoyed supremacy “over every other obligation of domestic law and international treaty law,”⁷⁴ including the TEC and the same primacy extended to the resolutions adopted by the UNSC.⁷⁵ Furthermore, the EC should “be considered to be bound by the obligations under the UN Charter in the same way as its Member States”⁷⁶ by virtue of the assumption of powers “previously exercised by Member States in the area governed by the UN Charter.”⁷⁷ The CFI concluded that the UN Charter (and the acts adopted under it) prevailed even over EC constitutional rules.⁷⁸

The CFI therefore took the view that “a limitation of [its] jurisdiction [wa]s necessary”⁷⁹ here, since “any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of EC law relating to the protection of fundamental

⁷⁰ Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649

⁷¹ Council Regulation 881/2002 OJ 2002 L 139/9

⁷² S/RES/1390 (2002)

⁷³ *Kadi* at par 178

⁷⁴ *Ibid* par 181

⁷⁵ The judgment therefore confirms great respect for international law, and is consistent with a constitutional reading of Article 103 of the UN Charter. See Bardo Fassbender, ‘The UN Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529. As such, the internationalism of the CFI decision has been praised by some: see eg Petros Stangos and Georgios Gryllos, ‘Le droit communautaire à l’épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme international’ [2006] *Cahiers de Droit Européen* 466. Nonetheless a series of questions have been raised about the relationship between the legal orders of the UN, the Community and the EU member states. For an assessment of the debate in light of the subsequent ECJ judgment, distinguishing in particular between constitutionalist versus pluralist approaches to international law see in particular D. Halberstam and E. Stein (n 43) 43 ff and Gráinne de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51 *Harvard Journal of International Law* (2010) 1, 37 ff. as well as the literature cited *infra* in n 206

⁷⁶ *Kadi* par 193. According to M. Nettesheim (n 49) 574, this argument is “somewhat surprising”

⁷⁷ *Kadi* par 203. For a description of the theory of succession, according to which the EC has assumed all the responsibilities the member states in the field now covered by EC law (a theory first developed with relation to the GATT: Joined Cases C-21/72 and C-24/72 *International Fruit Company* [1972] ECR 1219) and its defence in the present case see Christian Tomuschat, ‘Case Note: *Kadi v. EU Council and Commission*’ (2006) 43 *Common Market Law Review* 537, 542-543

⁷⁸ This position seems to contradict the normal understanding of the hierarchy of norms within the EC legal order: see Allan Rosas, ‘The European Court of Justice and Public International Law’ in Jan Wouters et al (eds), *The Europeanisation of International Law* (CUP 2008) 71, 78

⁷⁹ *Kadi* par 218

rights, would [...] imply that the court is to consider, indirectly, the lawfulness of⁸⁰ a superior UNSC resolution. However, to avoid a full “judicial abdication”⁸¹ which would have produced a complete “deficiency in the protection of fundamental rights”⁸² the CFI found itself “empowered to check, indirectly, the lawfulness of the resolution of the SC in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the UN, and from which no derogation is possible.”⁸³

Nonetheless, the review on the basis of *jus cogens* of the alleged violations of the fundamental rights of the petitioner, turned out to be extremely limited.⁸⁴ The CFI excluded that it had the power to “verify that there has been no error of assessment of the facts and evidence relied on by the SC in support of the measure it had taken.”⁸⁵ It instead affirmed, leaving a wide margin of appreciation to the UNSC, that “the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted *vis à vis* the person concerned in order to frustrate the threats, entails a political assessment and value judgment which in principle falls within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of peace and security.”⁸⁶

In sum, the CFI decided that none of the applicant’s arguments alleging breach of fundamental due process right was well founded and it upheld the EC regulation, an instrument necessary “as the world now stands”⁸⁷ to fight international terrorism. By limiting the scope of its judicial review,⁸⁸ the first decision of the CFI dealing with the legality of EU counter-terrorism measures, however, “raised several perplexities, since it ended sacrificing entirely the needs of the protection of fundamental rights,”⁸⁹ giving “a *carte blanche* to the member states”⁹⁰ to disregard the rule of law in implementing resolutions of the UNSC. The EU constitutional principles were in fact

⁸⁰ Ibid par 215

⁸¹ P. Eeckhout (n 62) 205

⁸² M. Nettesheim (n 49) 574

⁸³ *Kadi* par 227 For a critique of this reasoning see Benedetto Conforti, ‘Decisioni del Consiglio di Sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale di Primo Grado’ [2006] *Diritto dell’Unione Europea* 333

⁸⁴ See N. Lavranos (n 62) 475. *Contra* C. Tomuschat (n 77) 551, who claims that “the judgment show that the CFI did not confine its assessment to *jus cogens* proper, but resorted to applying to their full extent the standards evolved in the practice of the EC judicial bodies”

⁸⁵ *Kadi* par 284

⁸⁶ Ibid

⁸⁷ Ibid par 133

⁸⁸ See Christina Eckes, *Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the CFI* (2008) 14 *European Law Journal* 74, 82. See also Stanislas Adam, ‘Les résolutions du Conseil de sécurité de l’Onu à l’épreuve des juridictions communautaires: Variations autour de la justiciabilité’ in Francis Snyders (ed), *The Evolution of the European Courts* (Bruylant 2009) 10 (arguing that the CFI has essentially adopted here the theory of the *actes de gouvernement* or political question)

⁸⁹ Marta Cartabia, ‘L’ora dei diritti fondamentali nell’Unione Europea’ in Marta Cartabia (ed), *I diritti in azione* (II Mulino 2007) 13, 49 (my translation)

⁹⁰ T. Tridimas and J. Gutierrez-Fons (n 58) 682

“outweigh[ed by] the essential public interest in the maintenance of international peace and security”⁹¹ pursued by the political branches of the EU.

The rulings of the CFI in *Yusuf* and *Kadi* created a major gap in the protection of due process rights for suspected terrorists at the EU level.⁹² By refusing to review the compatibility with EU fundamental rights of the EU counter-terrorism measures implementing the UNSC resolutions, the CFI deprived individuals and entities suspected of financing terrorism of any meaningful opportunity to invoke their due process rights at EU level.⁹³ At the same time, however, by clarifying that due process standards could not hamper the implementation of an act mandated by the UN, the CFI also introduced an EU-wide ceiling for the protection of the right to due process with detrimental effects for judicial review at the state level. As has already been mentioned, the EU counter-terrorism sanctions are materially enforced by state administrations.⁹⁴ As Daniel Halberstam has attentively explained, in fact, a major feature of the EU system of governance is that, generally speaking, the policies of the EU are indirectly implemented by the member states.⁹⁵ In the absence of a powerful centralized administration, the EU relies on state officials in carrying out its policies including in the field of counter-terrorism.

Under the law of all EU member states, actions of administrative officials can be challenged before state courts for compatibility with fundamental rights. State officials implementing an EU counter-terrorism sanction could therefore be sued before state courts if their action was in violation of due process rights. Yet, state courts cannot review state administrative measures mandated by EU legislation under a more restrictive standard than the one established by EU courts.⁹⁶ As state

⁹¹ *Kadi* par 289

⁹² See P. Eeckhout (n 62) 205-206; J. Almqvist (n 58) 303. A defensive view of the ruling of the CFI is however taken by Rory Stephen Brown, ‘*Kadi v. Council: Executive Power and Judicial Supervision at the European Level*’ (2006) 4 European Human Rights Law Review 456, 468 who argues that the CFI “has a responsibility not to hinder the effective implementation of peaceable measures adopted to combat terrorism. [Freezing of funds] broadly speaking, therefore, should receive judicial backing”

⁹³ The “security-sensitive” position initially showed by EU courts in reviewing counter-terrorism measures was reiterated also in other decisions. See eg Case C-355/04 *Segi and others v. EU Council* [2007] ECR I-1657 (rejecting an appeal for damages raised by a Basque organization which had been listed as a terrorist entity in a EU counter-terrorism measure adopted in the II pillar of the EU); Case T-253/02 *Chakif Ayadi v. EU Council* [2006] ECR II-2139 (confirming the *ratio decidendi* of *Kadi* but introducing a cause of action at the state level against any refusal by national authorities to activate a de-listing request before the UNSC)

⁹⁴ See *supra* text accompanying n 53

⁹⁵ Daniel Halberstam, ‘Comparative Federalism and the Issue of Commandeering’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 213

⁹⁶ This statement should be taken with a caveat. A number of state courts have accepted to faithfully execute EU law with the reservations of some “counter-checks” to ensure that EU law does not lower domestic human rights standards. See eg the well-known decisions of Italian *Corte Costituzionale* and the German *Bundesverfassungsgericht*: C. Cost s. 183/1973 *Frontini*; BVerfGE 37, 271 (1974) (*Solange I*). However, over-time state courts clearly affirmed that they will not resort to their “safety jurisdiction” as long as the EU system ensures a protection of fundamental rights generally equivalent to the national one. See eg BVerfGE 73, 339 (1986) (*Solange II*). As a matter of fact, there has not been any single case in which a state court has resorted to its “safety jurisdiction” to set aside an EU act allegedly incompatible

officials have a duty to loyally execute EU law, state courts can not prevent them from doing so if their action is regarded as legitimate by EU courts. According to the *Foto-Frost* doctrine⁹⁷ national courts do not have the power to invalidate an EC act on their own but must refer the matter to the ECJ.⁹⁸ By setting an extremely low due process standard for the review of EU counter-terrorism measures – a standard of protection to some extent akin to that adopted by courts in the laggard member states – the CFI prevented those member states courts which might have been willing to provide more extensive protection of due process rights, to suspected terrorists from doing so.

This state of affairs can be described as a challenge of ineffectiveness. As I explained in the first chapter of this thesis, a case of ineffectiveness emerges when supranational law establishes a ceiling for the protection of a given right, thus preventing more extensive protection at the state level for the right de quo. This supranational ceiling puts pressure on those vanguard states which are endowed with higher levels of protection and threatens their more advanced human rights standards (while leaving unchallenged, the standards in force in the laggard states). In the case at hand, the *Yusuf* and *Kadi* decisions of the CFI produced a challenge of ineffectiveness: not only they deprived Mr. Kadi of the chance to obtain a remedy before an EU court, but they also made impossible for him to seek more protection against the EU counter-terrorism measure before domestic courts. As was mentioned, after 9/11 most state courts were anything but willing to secure a robust protection of due process rights. But some other state courts had proven much more resilient in protecting rights even in times of emergency. Yet, no state court could have provided Mr. Kadi with more due process rights than those provided by the CFI (unless willing to violate core structural tenets of the EU constitutional architecture).⁹⁹

with domestic human rights law. See generally Monica Claes, *The National Court's Mandate in the European Constitution* (Hart Publishing 2006)

⁹⁷ Case 314/85 *Foto-Frost* [1987] ECR 4199

⁹⁸ See Giuseppe Tesaurò, *Diritto comunitario* (Cedam 2005) 299; Jean-Claude Gautron, *Droit européen* (Daloz 2006) 199

⁹⁹ AG Mengozzi recognized in another EU counter-terrorism case, Case C-355/04 *Segi and others v. EU Council* [2007] ECR I-1657 the possibility that state courts may violate their duty to apply EU law (i.e. resort to their “safety jurisdiction”) in case EU courts had continued to enforce a low-intensity standard of protection of fundamental rights. In his Opinion, he stated that were the ECJ to exclude any power to hear an action brought against a common position adopted in the III pillar, hence “endorses[ing] the recognition of such a gap in the protection of fundamental rights in the field of police and judicial cooperation in criminal matters, the national courts of various Member States would feel entitled, if actions were brought before them, to verify whether the acts adopted by the Council on the basis of Article 34 TEU were compatible with the fundamental rights *guaranteed by their respective national legal systems, but not necessarily in an identical manner.*” *Segi*, Opinion of AG Mengozzi, par 90 (emphasis in the original)

3. Comparative assessment: due process and counter-terrorism in the US constitutional experience

The previous Section has highlighted the existence of complex dynamics in the protection of due process rights in the EU. The purpose of this Section is to explore to what extent comparable dynamics can be found also in other federal systems. In this regard, the US represent a natural comparative example. To begin with, the US has been at the forefront of the fight against terrorism. As it is well known, in reaction to the terrorist attacks of 9/11 the US Administration began what it called – inappropriately – a “war on terror.”¹⁰⁰ The federal government authorized a series of sweeping counter-terrorism measures,¹⁰¹ and important anti-terrorism tools were enacted also by most of the US states (which, in the US federal system of government, exercise a primary role in the areas of police and security).¹⁰² These far-reaching counter-terrorism policies, however, put under challenge the protection of core constitutional liberties enshrined both at the federal and the state level in the US, revealing the existence of tensions between the states and the federal government.¹⁰³

In the US, like in the EU, moreover, a matter of particular judicial concern has been the protection of the right to due process for suspected terrorists. Whereas, as explained above, courts in the EU have mainly dealt with the legality of the *economic sanctions* imposed without due process over suspected terrorists listed by the UN,¹⁰⁴ the issue of assets freezing has not played such a prominent role in the US.¹⁰⁵ Most of the activity of US courts has focused on the legality of the

¹⁰⁰ The literature on the so-called “war on terror” is huge. See among many, Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006) 169 ff; Louis Fisher, *The Constitution and 9/11* (Kansas University Press 2008)

¹⁰¹ For an overview of the most relevant anti-terrorism measures of the Bush Administration see Scott Matheson, *Presidential Constitutionalism in Perilous Times* (Harvard University Press 2008). For an assessment of the evolving role of the executive and legislative branches of the US government in the fight against terrorism see instead Federico Fabbrini, ‘Lotta al terrorismo: Da Bush a Obama passando per la Corte Suprema’ [2011] *Quaderni Costituzionali* 89

¹⁰² On the activity of state legislatures after 9/11 see Donna Lyons, ‘States Enact New Terrorism Crimes and Penalties’ National Congress of State Legislatures –State Legislative Report Vol. 27 No. 19 (2002) available at <http://www.ncsl.org/Portals/1/documents/cj/terrorismcrimes.pdf>

¹⁰³ See on the implications of 9/11 on the US federal system of criminal law enforcement William J. Stuntz, ‘Terrorism, Federalism and Police Misconducts’ (2001-2002) 25 *Harvard Journal of Law and Public Policy* 665

¹⁰⁴ These differences in the dockets of the two courts reflect the underlying counter-terrorism policies chosen by the US and the EU. While the US have adopted a reactive policy aiming at detecting and imprisoning individuals suspected of materially engaging in terrorist activities, the EU (which, anyway, has so far limited power in the field of criminal law) has tackled the problem of the financing of terrorism, with the purpose of depriving at the roots terrorist organizations of the economic resources necessary to bring about terrorist acts. See Marise Cremona, ‘The Union as a Global Actor: Roles, Models and Identity’ (2004) 41 *Common Market Law Review* 553

¹⁰⁵ A number of judgments of lower federal courts, but no rulings of the US Supreme Court, are available on the legality of financial sanctions. The Court of Appeal for the D.C. Circuit held that freezing the assets of an entity designated by the Secretary of State as a terrorist group without prior hearing infringed the constitutional rights of the petitioner. See *People Mojahedin Organization of Iran v. Dept. of State*, 182 F.3d 17 (D.C. Cir. 1999) and *National Council of Resistance of Iran v. Dept. of State*, 251 F.3d 192 (D.C. Cir. 2001). See also Fletcher Baldwin, ‘The Rule of Law,

detention without due process of individuals suspected of being involved in terrorist activities. Nevertheless, the decisions of the US courts on the legality of detention without trial and those of the EU courts on the legality of the freezing of financial assets show a common ground which well supports their comparability. They both deal with the limitation of fundamental individual rights, without *due process of law*: a limitation of liberty without due process in the first case; a limitation (mainly) of property without due process in the latter.¹⁰⁶

A comparison between the US and the EU, otherwise, seems possible despite the existence of an important structural difference between the two systems of governance. As mentioned in the previous Section, the EU carries out most its policies through the member states and EU counter-terrorism sanctions are materially executed by state officials.¹⁰⁷ In the US, on the contrary, the federal government does not resort to the states' authorities to execute its policies. In fact, under the *Printz* doctrine¹⁰⁸ of the US Supreme Court, the federal government is constitutionally prohibited from "commandeering" state officials, i.e. compelling them to carry out federal mandates.¹⁰⁹ As Ann Althouse has thoroughly explained, the anti-commandeering doctrine has played a vigorous role in the US after 9/11.¹¹⁰ On the awareness that the counter-terrorism policies adopted by the federal government could undermine the effectiveness of the protection of core civil liberties at the local level, a number "of municipalities, as well as a few states, have passed resolutions directing their officials to refuse to participate in the anti-terrorism efforts of the federal government."¹¹¹ Although standards of procedural justice greatly vary among the US states, under the shield of the anti-commandeering doctrine, the states and local governments endowed with vanguard forms of due process protection "declin[e] to provide any aid to federal authorities in investigations and enforcement actions that might jeopardize civil liberties."¹¹²

Despite the operation of the anti-commandeering doctrine, however, the action of the federal government in the field of national security still challenged the operation of states' vanguard due

Terrorism and Countermeasures including the USA Patriot Act of 2001' (2004) 16 Florida Journal of International Law 43, 58

¹⁰⁶ Janny Martinez, 'Process and Substance in the 'War on Terror'' (2008) 108 Columbia Law Review 1013. On the due process principles of the Fifth and Fourteenth Amendments to the US Const. see generally also See John Orth, *Due Process of Law* (University Press of Kansas 2003)

¹⁰⁷ See D. Halberstam (n 95) 213

¹⁰⁸ See *US v. Printz*, 521 U.S. 898 (1997) (declaring unconstitutional a federal statute commandeering state police officers to execute a federal mandate)

¹⁰⁹ On *Printz* see Vicki Jackson, 'Federalism and the Uses and Limits of Law: *Printz* and Principle' (1998) 111 Harvard Law Review 2180. On the historical roots of the "anti-commandeering" doctrine in US constitutional law see then, Paul Finkelman, 'The Roots of *Printz*' (2004) 69 Brooklyn Law Review 1399

¹¹⁰ Ann Althouse, 'The Vigor of the Anti-Commandeering Doctrine in Times of Terror' (2004) 69 Brooklyn Law Review 1231

¹¹¹ *Ibid* 1233

¹¹² Vikram Amar, 'Converse § 1983 Suits in Which States Police Federal Agents' (2004) 69 Brooklyn Law Review 1639 (who discusses further the possibility of bringing a cause of action in state courts against federal officials)

process standards.¹¹³ Indeed, whereas the federal government cannot commandeer state officials, it can directly carry out its policies through federal officials and if the federal government occupies a given field, state action may be *tout court* excluded under the doctrine of pre-emption.¹¹⁴ After 9/11 the field of national security was regarded as being pre-empted by federal law, with the consequence that state standards for the protection constitutional rights were entirely displaced.¹¹⁵ The federal pre-emption of the field of national security deprived the states of the power to enforce their (possibly more advanced) due process standards in the fight against terrorism, and replaced the state standards with a very weak federal standard. As a result, a challenge of ineffectiveness comparable to that experienced in the EU materialized also in the US, with the federal government enforcing a ceiling of protection for the right of due process for suspected terrorist, undermining the standards in force in many vanguard US states.

In this context, it was up to the federal judiciary, to respond to the due process challenge posed by the action of the federal government and to raise the standard for the protection of fundamental rights in the field of counter terrorism. Yet, the reaction of the US Supreme Court was gradual and, as I have explained elsewhere, three distinct phases can be distinguished.¹¹⁶ In an initial phase, the Supreme Court exercised a deferential approach, with a minimal review of the acts of the political branches of government. In a second intermediate phase, the Supreme Court started limiting the effects of its precedents and acknowledged for itself the power to scrutinize more extensively the policies of the other branches. In a last phase, the Supreme Court reaffirmed its institutional position in the balances of governance and strongly enhanced the protection of due process standards for suspected terrorists.

In the first case dealing with the legality of counter-terrorism measures, the Supreme Court adopted a deferential approach toward the determination of the political branches of government,

¹¹³ Ernest Young, 'Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror' (2004) 69 Brooklyn Law Review 1277

¹¹⁴ On the pre-emption doctrine see *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 98 (1992) (holding that federal law may pre-empt state action in a given field either expressly or impliedly when "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States" (so-called field pre-emption) or "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (so-called conflict pre-emption)). See also Stephen Gardbaum, 'The Nature of Preemption' (1994) 79 Cornell Law Review 776

¹¹⁵ For a critical view of the application of the principle of federal pre-emption in the field of national security law see Erwin Chemerinsky, 'Empowering States When It Matters: A Different Approach to Preemption' (2004) 69 Brooklyn Law Review 1313 which reports the decision of the New Jersey Court of Appeal in *ACLU of New Jersey v. County of Hudson* 799 A.2d 629 (2002) (holding that federal national security regulations pre-empted New Jersey laws requiring prisons to make public the information on detainees). For a more supportive view of pre-emption in the field of national security see instead Laura Donohue and Juliette Kayyem, 'Federalism and the Battle over Counter-Terrorism Law: State Sovereignty, Criminal Law Enforcement, and National Security' (2002) 25 Studies in Conflict and Terrorism 1

¹¹⁶ See Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2009) 28 Yearbook of European Law 664

limiting to a minimum or excluding *tout court* judicial review over the policies adopted to fight terrorism. In *Hamdi*,¹¹⁷ the Supreme Court was called to review for the first time the detention policy adopted by the US Administration in the immediate aftermath of the terrorist attacks of 9/11. Hamdi, a US citizen, had been captured by the US military forces in the course of the hostilities in Afghanistan in 2001, classified as an “enemy combatant”¹¹⁸ by an order of the US President and since then detained on US soil, without the guarantees of due process. Through an action for *habeas corpus*,¹¹⁹ he challenged the lawfulness of his indefinite detention without trial, essentially asking the Court to answer the following legal questions: 1) does the executive power have the authority to detain a US citizen, captured on the battlefield, as “enemy combatant”, without trial, for the indefinite duration of the conflict? 2) What process is due to a US citizen who disputes his enemy combatant status?

In its first serious confrontation with a question raising such severe constitutional concerns, especially with regard to due process, the Supreme Court “responded with a cacophony of opinions,”¹²⁰ leaving to Justice O’Connor the task to write the controlling opinion only for a four-judge plurality. On the first question, the Court was clever in avoiding to address the argument of the Administration, which maintained that “no explicit congressional authorization [was] required, because the executive possess[ed] plenary authorization to detain pursuant to Article II of the Constitution.”¹²¹ The Court, however, held that “the detention of individuals [...] for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”¹²²

¹¹⁷ *Yaser E. Hamdi and others v. Donald H. Rumsfeld et al*, 542 U.S. 507 (2004)

¹¹⁸ The term “enemy combatant” is not known in the language of international humanitarian law, but has been employed in US law by the US Supreme Court since *Ex parte Quirin*, 317 U.S. 1 (1942) as a synonym of “unlawful combatant”. In the wake of 9/11 the US authorities have redefined the category to encompass “any individual who was part of or supporting Taliban or Al Qaida forces, or associated forces that are engaged in hostilities against the US or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces” - Order of the Deputy Secretary of Defense Establishing Combatant Status Review Tribunal, 7 July 2004, § a - and have deprived those falling under that heading of the privilege enjoyed by the “lawful combatants” under the law of war. On this see: David Cole, ‘Enemy Aliens’ (2002) 54 *Stanford Law Review* 953; George Harris, ‘Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant’ (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 31

¹¹⁹ The petitioner was challenging his detention on the basis of the *habeas corpus* statute, 28 U.S.C. par 2241(c)(3), according to which the Supreme Court or any other justice may grant *certiorari* to a prisoner held “in custody in violation of the Constitution or laws or treaties of the US”

¹²⁰ B. Ackerman (n 100) 27 (noting that the controlling opinion of the judgment was written by O’Connor J. only for herself and three colleagues, because there was no majority of five judges who could agree on a specific ruling)

¹²¹ *Hamdi* (Opinion of O’Connor J.), at 516. Note that Article II, §.2, cl.1 US Const. states that “the President shall be the Commander in Chief”

¹²² *Hamdi* (Opinion of O’Connor J.), at 518. The Court read the Authorization for the Use of Military Forces (AUMF), Pub. L. 107-40 (2001) – the congressional resolution granting the President the power “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001” – as the statutory authorization for the detention of US citizens without trial. According to B. Ackerman (n 100) 30 this reasoning suggests “disturbing judicial uncertainty”. In

Subsequently, the plurality moved on to answer the second question, about the process due to a citizen who disputes his enemy combatant status, emphasizing “the tension that exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right.”¹²³ *Prima facie*, the Supreme Court decided to balance “the most elemental of liberty interests – the interest in being free from physical detention by one’s own government,”¹²⁴ with, on the other hand, the “sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the US,”¹²⁵ rejecting both the “unilateralism”¹²⁶ of the Administration as well as the “civil libertarian maximalism”¹²⁷ of the petitioner.

In the practical weighing of competing interests, however, the Supreme Court adopted a “minimalist approach.”¹²⁸ Thus, even if the plurality affirmed quite emphatically that “it is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad,”¹²⁹ the result of the “calculus”¹³⁰ was an indulgent yielding to the executive.¹³¹ The Court simply concluded that a citizen “seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”¹³²

In addition, the Court acknowledged that “enemy combatants’ proceedings may be tailored to alleviate their uncommon potential to burden the Executive”¹³³ in times of emergency, and, in the end, even acknowledged that “the standards [...] articulated could be met by an appropriately authorized and properly constituted military tribunal.”¹³⁴ Hence, “although the popular press has hailed *Hamdi* for reining in presidential power, [...] a much dimmer view”¹³⁵ seems necessary. “When one considers where the balance was struck, the departure from [executive] unilateralism

their joint dissent, in fact, Scalia J. and Stevens J. insisted that according to the US constitutional tradition, in the absence of a formal suspension of the writ of *habeas corpus*, “the Executive assertion of military exigency has not been thought sufficient to permit detention without trial” (Scalia J. dissenting, at 554). For a defence of the plurality opinion see, however: Curtis Bradley and Jack Goldsmith, ‘Congressional Authorization and the War on Terrorism’ (2005) 118 *Harvard Law Review* 2047 and Richard Fallon and Daniel Meltzer, ‘Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror’ (2007) 120 *Harvard Law Review* 8 2032, 2071

¹²³ *Hamdi* (Opinion of O’Connor J.), at 528

¹²⁴ *Ibid* at 529

¹²⁵ *Ibid* at 531

¹²⁶ Michel Rosenfeld, ‘Judicial Balancing in Times of Stress: Comparing the American, British and Israeli Approaches to the War on Terror’ (2006) 27 *Cardozo Law Review* 2079, 2082

¹²⁷ *Ibid*

¹²⁸ Cass Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America* (Basic Books 2005) 175

¹²⁹ *Hamdi* (Opinion of O’Connor J.), at 532

¹³⁰ *Ibid*

¹³¹ Ronald Dworkin, ‘What the Court Really Said’ (2004) 51 *New York Review of Books* (12th August 2004) 26

¹³² *Hamdi* (Opinion of O’Connor J.), at 533

¹³³ *Ibid*

¹³⁴ *Ibid* at 538

¹³⁵ B. Ackerman (n 100) 29

was limited. From the standpoint of judicial balancing itself, the plurality accorded too little weight to the serious deprivation of liberty associated with the designation as an enemy combatant and too much weights on security concerns relating to the war on terrorism.”¹³⁶

In a second decision of 2006, however, the Supreme Court began to abandon its previous self-restraint and, through a strict interpretation of the relevant legislative provisions, made the first step in the direction of restoring the rule of law and granting adequate protection of fundamental rights. In *Hamdan*,¹³⁷ the Supreme Court dealt with the case of a Yemeni national held as an enemy combatant in the US prison of Guantanamo, on suspicion of being the former driver of the AlQaida-leader, Bin Laden. After his capture in Afghanistan in 2001, Hamdan had been detained without trial for four years. The US President, however, in 2004 charged him with the crime of conspiracy to commit terrorism and found him eligible for trial before a war crime military commission, established *ad hoc* by executive order.¹³⁸ Through *habeas corpus* proceedings Hamdan asked the Court to assert: 1) whether the US President had the authority to establish military commissions to try enemy aliens for war crimes; and 2) whether the procedure governing trials before the military commissions complied with the basic tenets of military and international law.

While the case was pending before the Supreme Court, a legislative provision was enacted depriving US federal courts of jurisdiction to hear application for *habeas corpus* filed by aliens detained in Guantanamo.¹³⁹ In the view of the political branches of government a new administrative procedure had to be established to review the legality of the detention, without all the burdensome safeguards of a trial before the federal courts.¹⁴⁰ The Administration therefore urged the Court to decide the case on procedural grounds, dismissing the suit for lack of jurisdictional competence. A five-justice majority (led by Justice Stevens), however, construed the statute narrowly, and stated that “ordinary principles of statutory construction suffice to rebut the

¹³⁶ M. Rosenfeld (n 126) 2114-2115

¹³⁷ *Salim A. Hamdan v. Donald H. Rumsfeld et al*, 548 U.S. 557 (2006)

¹³⁸ The decision to establish *ad hoc* military commissions to try enemy combatants for alleged violations of the law of war was taken by Order of the President of the United States, November 13, 2001, “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism”, 66 Fed. Reg. 57,833 par 4. See Daryl Mundis, ‘The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts’ (2002) 96 American Journal of International Law 320; Neal Katyal and Laurence Tribe, ‘Waging War, Deciding Guilt: Trying the Military Tribunals’ (2002) 111 Yale Law Journal 1259

¹³⁹ Indeed, par 1005(e)(1) of the Detainee Treatment Act, Pub. L. 109-148 (2005), amended the *habeas corpus* statute (see *supra* n 119) providing that “no court, justice, or judge shall have jurisdiction to hear or consider – an application for writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo.”

¹⁴⁰ Indeed, following the *ratio decidendi* of the Supreme Court in *Hamdi*, the executive created with the previously mentioned Order of the Deputy Secretary of Defense Establishing Combatant Status Review Tribunal, 7 July 2004 - the Combatant Status Review Tribunal (CSRT), an administrative body composed of three officers of the US Armed Forces charged of the duty to review through an inquisitorial procedure whether the condition for classifying as “enemy combatants” the detainees held in Guantanamo still held. See Anthea Roberts, ‘Righting Wrongs or Wronging Rights? The United States and Human Rights Post September 11’ (2004) 15 European Journal of International Law 721, 730

Government's theory"¹⁴¹ since both the language and the history of the statute excluded its retroactive application to pending cases.

Moreover, rejecting its previous deferential approach toward the arguments of the executive branch,¹⁴² the Court underlined that "the Government has identified no other 'important countervailing interest' that would permit federal courts to depart from their general 'duty to exercise the jurisdiction that is conferred on them by Congress'"¹⁴³ and addressed the claims of the petitioner on the merit. With regard to the first claim, concerning the authority of the President to try enemy combatants for crimes against the law of war by military tribunals instituted with executive order, the Court ruled that no act of Congress "expand[ed] the President's authority to convene military commissions"¹⁴⁴ and that the statutory requirement of an express congressional authorization for the establishment of *ad hoc* tribunals had been violated.¹⁴⁵

With regard to the second claim, concerning the legality of the procedures governing the trial by military commission, the Supreme Court highlighted that, according to the rules set forth by the executive, the accused was "precluded from ever learning what evidence was presented"¹⁴⁶ against him and that "striking[ly] any evidence [...including] testimonial hearsay and evidence obtained through coercion"¹⁴⁷ was admitted in front of the decision-makers. The majority decided that these procedures violated the standard of US military justice as well as the provision of the Geneva Convention granting minimal due process rights¹⁴⁸ to the aliens detained in the course of a "conflict not of an international character:"¹⁴⁹ indeed, those "requirements are general ones, crafted to accommodate a wide variety of [situations]. But requirements they are nonetheless."¹⁵⁰

¹⁴¹ *Hamdan*, at 575

¹⁴² Chiara Bologna, 'Hamdan v. Rumsfeld: Quando la tutela dei diritti è effetto della separazione dei poteri' [2006] Quaderni Costituzionali 813, 817. For a critical appraisal of "Hamdan's refusal to give deference to the executive branch" see, however, Julian Ku and John Yoo, 'Hamdan v. Rumsfeld: the Functional Case for Foreign Affairs Deference to the Executive Branch' (2006) 23 Constitutional Commentary 179, 180

¹⁴³ *Hamdan*, at 589

¹⁴⁴ *Ibid* at 593-594. Marking the diversity of its new approach from the one followed in *Hamdi* – where the AUMF was considered as a sufficient authorization for the President to detain citizens as enemy combatants (see *supra* n 122) – the Court this time affirmed that the AUMF could not be invoked as the legal basis for President's authority to convene military commissions

¹⁴⁵ According to 10 U.S.C. par 821, indeed, military tribunals for the trial of offences against the law of war may be established only "by statute or by the law of war". A plurality of four judges also affirmed that, beside the absence of a specific congressional authorization, "none of the acts that Hamdan is alleged to have committed violates the law of war" (Opinion of Stevens J., at 600)

¹⁴⁶ *Hamdan*, at 614

¹⁴⁷ *Ibid* (italics in the original text)

¹⁴⁸ Fiona de Londras, 'The Right to Challenge the Lawfulness of Detention: an International Perspective on US Detention of Suspected Terrorists' (2007) 12 Journal of Conflict and Security Law 223, 234

¹⁴⁹ *Hamdan*, at 629. Common Article 3(1)(d) of the Four Geneva Convention of 1949 affirms that "In the case of armed conflict not of an international character [...] the following acts are and shall remain prohibited: [...] the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

¹⁵⁰ *Hamdan*, at 635

The Supreme Court in *Hamdan* took the first steps to assure adequate protection of fundamental right in the fight against terrorism by making it clear that “the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”¹⁵¹ The Court departed from its previous deferential position,¹⁵² favouring an intermediate, “process-based institutional approach”¹⁵³ that relies on a form of checks and balances between the legislative and executive branches. At the same time, however, the Court did not engage directly with the relevant constitutional arguments at stake, and “the true novelty of the Supreme Court decision, in fact, is not a new interference in the activities of the war-making branches of government, but rather the acknowledgment of a relevant role for the Congress in times of emergency.”¹⁵⁴

In a third milestone decision, finally, the Supreme Court adopted a bold stand *vis à vis* the political branches of government, showing greater confidence about its indispensable constitutional role in a contemporary liberal democracy. By submitting to a full and strict review the US counter-terrorism measures, the Court assured an effective protection of the procedural guarantees enshrined in the US Constitution. In *Boumediene*¹⁵⁵ the Supreme Court was presented with a “question not resolved by [its] earlier cases relating to the detention of aliens [i.e.] whether they have the constitutional privilege of *habeas corpus*.”¹⁵⁶ In response to *Hamdan*, Congress enacted a new provision stripping US federal courts of the jurisdiction to hear claims by enemy combatants held in US custody in Guantanamo explicitly extending its application to the pending cases.¹⁵⁷ The Court was thus forced to acknowledge that Congress had “deprive[d] the federal courts of jurisdiction to entertain the *habeas corpus* actions.”¹⁵⁸ This, nonetheless, allowed it to address the “constitutional issue”¹⁵⁹ of whether also the enemy aliens in Guantanamo were entitled to a constitutional right to contest the legality of their detention before an independent and regularly constituted tribunal.¹⁶⁰

¹⁵¹ *Ibid*

¹⁵² Cass Sunstein, ‘Clear Statement Principles and National Security: *Hamdan* and Beyond’ [2006] Supreme Court Review 1, 29

¹⁵³ M. Rosenfeld (n 126) 2082

¹⁵⁴ Chiara Bologna, ‘Tutela dei diritti ed emergenza nell’esperienza statunitense: una *political question*?’ (Forum Costituzionale Paper 2007) 13, 14 (my translation)

¹⁵⁵ *Lakhdar Boumediene and others v. George W. Bush et al*, 553 U.S. 723 (2008)

¹⁵⁶ *Boumediene*, at 732. Article I, §9, cl.2 US Const. (the so-called “Suspension Clause”) states that “the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it”

¹⁵⁷ Indeed par 7(a) of the Military Commission Act, Pub. L. 109-366 (2006), stated that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States” and par 7(b) made clear that “the amendment made by par 7(a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act”

¹⁵⁸ *Boumediene*, at 739

¹⁵⁹ *Ibid* at 734

¹⁶⁰ Note that whereas *Hamdi* concerned the applicability of constitutional rights to a US citizen held as enemy combatant, *Hamdan* had left unanswered the question whether also *foreign nationals* held as enemy combatants were entitled to constitutional privileges. On the double standard approach (that sets different legal treatments for citizens and non-citizens) employed by the US in the wake of 9/11 see the attentive and detailed analysis of D. Cole (n 118). For

With its pleas, *Boumediene*, an Algerian national detained since 2001 in the prison of Guantanamo, asked the Court to decide: 1) whether “the constitutional privilege of *habeas corpus*, a privilege not to be withdrawn except in conformance with the Suspension Clause, Article I, §9, cl.2”¹⁶¹ applied abroad in Guantanamo; and, as a consequence, 2) whether the statutory provision depriving federal courts to hear *habeas corpus* claims was constitutional. Writing for a five-judge majority, Justice Kennedy began the opinion of the Court restating that the purpose of the constitutional privilege of *habeas corpus* in the common law tradition had always been to ensure “that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”¹⁶²

On the extraterritorial application of the constitutional *habeas* provision, Justice Kennedy rejected the formalistic arguments of the Government and adopted a “functional approach,”¹⁶³ based on “objective factors and practical concerns.”¹⁶⁴ Since “the US have maintained complete and uninterrupted control of [Guantanamo] for over 100 years,”¹⁶⁵ the Supreme Court argued that excluding the application of the privilege of *habeas corpus* there would mean granting “the political branches [...] the power to switch the Constitution on or off at will,”¹⁶⁶ “permit[ting] a striking anomaly in [the US] tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is’.”¹⁶⁷ Hence, answering the first question, the Court ruled “that Article I, par 9, cl.2 of the Constitution has full effect at Guantanamo.”¹⁶⁸

“In the light of this holding, the question [turned on] whether the statute stripping jurisdiction to issue the writ [was constitutional] because Congress ha[d] provided for adequate substitute procedure for *habeas corpus*.”¹⁶⁹ According to the Court, the “easily identified attributes

different perspectives on the issue (one favourable to extending constitutional due process rights to aliens and the other supporting a differentiated response) see also: Jesse Choper and John Yoo, ‘Wartime Process: A Dialogue on Congressional Power to Remove Issues from Federal Courts’ (2007) 95 California Law Review 1243

¹⁶¹ *Boumediene*, at 732

¹⁶² *Ibid* at 745

¹⁶³ *Ibid* at 764. Gerald Neuman, ‘The extraterritorial Constitution after *Boumediene v. Bush*’ (2009) 82 Southern California Law Review 259, 261

¹⁶⁴ *Boumediene*, at 764. According to David Cole, ‘Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay’ [2008] Cato Supreme Court Review 47, 51 this holding “pierce the veil of sovereignty, reject formalist fictions of territoriality where the state exercises authority beyond its borders, and insist on the need for judicial review to safeguard the human rights of citizens and noncitizens alike”. According to Eric Posner, ‘*Boumediene* and the Uncertain March of Judicial Cosmopolitanism’ [2008] Cato Supreme Court Review 23, 43, on the contrary, the judgment suggest “a sneaking cosmopolitanism in the Supreme Court jurisprudence”

¹⁶⁵ *Boumediene*, at 764

¹⁶⁶ *Ibid* at 765

¹⁶⁷ *Ibid* quoting the seminal decision of *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing judicial review in the US)

¹⁶⁸ *Boumediene*, at 771. Note however the position of Fiona de Londras, ‘What Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Law Approach in *Boumediene and Al Odah*’ (2008) 41 Israel Law Review 562, 564 who regrets that the Court missed “the opportunity to consider the relationship between constitutional and international rights protecting norms in times of conflict”

¹⁶⁹ *Boumediene*, at 771

of any constitutionally adequate”¹⁷⁰ substitute for *habeas corpus* proceedings included giving the prisoner a meaningful opportunity to rebut the reasons that legitimize his detention and the power of the court to order the release of an individual unlawfully detained. Since these minimal requisites were lacking in the alternative procedure set up by the legislature (granting the power to try the enemy aliens held in Guantanamo to *ad hoc* combatant status review tribunals), the Court concluded that the contested statute “effect[ed] an unconstitutional suspension of the writ.”¹⁷¹

Boumediene hence reasserted the prominent constitutional role of the US judiciary in the balance of governance and in the protection of fundamental rights in times of emergency.¹⁷² Contrary to the minimalist or moderate stand adopted in its previous rulings concerning the legality of US counter-terrorism measures, the Supreme Court here showed great confidence, exercised a full review and “for the first time in history found it necessary to strike down a statute as violating the Suspension Clause, rather than construe it to avoid invalidity.”¹⁷³ Striking a more appropriate balance between competing interests, the Court clearly stated that “security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary detention and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.”¹⁷⁴

To summarize: a comparative assessment of the protection of due process rights in the US after 9/11 reveals the existence of a challenge analogous to the one that can be found in the EU. The US example is illuminating not only because the US has been at the forefront of the fight against terrorism, but also because the US is a federal system in which police powers are prevalently exercised by the states. Although the US government cannot commandeer state officials, after 9/11 the Bush Administration pre-empted the field of national security, displacing state due process guarantees and replacing them with an extremely low-intensity standard of protection for suspected terrorists. In this situation, it was up to the US Supreme Court to address the challenge of ineffectiveness created by restrictive federal anti-terrorism policies. Through decisions like *Hamdi*, *Hamdan* and *Boumediene* the US Supreme Court gradually enhanced the human rights guarantees applied in the field of anti-terrorism, leading to a greater protection of due process rights.¹⁷⁵

¹⁷⁰ *Ibid* at 779

¹⁷¹ *Boumediene*, at 792. The dissent of the Chief Justice well enlightened how the Court abandoned its original jurisprudence: Roberts C.J., while recognizing that the Suspension Clause applied in Guantanamo, defended the substitute procedure for *habeas corpus* set up by the political branches of government as meeting “the minimal due process requirements outlined in *Hamdi*” (Roberts C.J., dissenting at 804), and urged the Court to show precisely the self-restraint initially adopted in terrorist-related cases, from which the majority, on the contrary, here eventually departed.

¹⁷² Martin Katz, ‘Guantanamo, *Boumediene* and the Jurisdiction-Stripping: The Imperial President Meets the Imperial Courts’ (2009) 25 *Constitutional Commentary* 377

¹⁷³ G. Neuman (n 163) 260-261

¹⁷⁴ *Boumediene*, at 797

¹⁷⁵ Needless to say, however, the case law of the US Supreme Court on due process rights in counter-terrorism has not been always satisfactory. In particular, the Supreme Court has refused to review the practice of extraordinary renditions leaving a major gap in the protection of due process rights of individuals who were unlawfully transferred to other

4. Recent developments: the case law of the European Court of Justice

As the previous Section makes clear, the challenge of ineffectiveness generated by the enforcement of a low-level federal ceiling of protection for the due process rights of suspected terrorists, was slowly addressed in the US by the US Supreme Court. Recent developments in the EU judicial system highlight an analogous pattern. After the 2005 *Kadi* decision, EU courts have gradually abandoned their self-restraint and, step by step, they have strengthened the degree of due process protection ensured to “black listed” individuals and entities at EU level. In the *OMPI* decision of 2006,¹⁷⁶ the CFI, moved to limit the effects of its previous ruling and, by distinguishing the case from *Kadi*, it ensured greater protection of due process rights. It has been however the ECJ, in reviewing on appeal the *Kadi* case in 2008,¹⁷⁷ that has taken the most important step toward the resolution of the challenge of ineffectiveness in the field of due process rights for suspected terrorists in Europe, opening the way for important developments in the national security case law of both EU lower courts and state supreme courts.

The issue before the CFI in *OMPI* was the same as that already at stake in *Kadi*. With an action for annulment, the applicant, an Iranian organization based in Britain challenged the legality of an EC regulation¹⁷⁸ listing it among the entities suspected of financing terrorism and freezing its assets without due process of law. Whereas the defendant urged the CFI to comply with its precedents denying the power of the EU judiciary to review a contested EC measure implementing a UNSC resolution in the light of the fundamental principles of EU law, the CFI found it appropriate to “distinguish the present case.”¹⁷⁹ Contrary to *Kadi*, the challenged EC regulation, this time, implemented a UNSC resolution¹⁸⁰ that did “not specify individually the persons, groups and entities who [we]re to be the subjects of”¹⁸¹ the financial freezing measures.

countries and subject to inhumane treatments there. See in particular *El-Masri v. US*, 479 F.3d 296 (4th Cir. 2007) *cert. denied El-Masri v. US*, 552 U.S. 947 (2007) (holding that the State secret privilege barred review in torts claim).

Having exhausted his avenues of recourse at the domestic level, the petitioner brought proceedings in front of the Inter-American Commission on Human Rights (IACommHR). The IACommHR has declared the case admissible but still has to decide on the merit. See *El-Masri v. US*, IACommHR, Petition No. 419-08, admissibility decision 27 August 2009. It is well-known however that powers of the IACommHR are limited as it can only adopt non-binding recommendations which it is left to the state whether to enforce. On this issue see further Federico Fabbrini, ‘Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared’ [2012] Italian Journal of Public Law 255

¹⁷⁶ Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v. Council of the EU* [2006] ECR II-4665

¹⁷⁷ Joined Cases C-402/05 P and C-415/05 P *Yassin A. Kadi and Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351

¹⁷⁸ Council Regulation 2580/2001/EC OJ 2001 L 344/70

¹⁷⁹ *OMPI* par 99

¹⁸⁰ S/RES/1373 (2001)

¹⁸¹ *OMPI* par 101

The identification of the exact “persons, groups and entities whose funds [we]re to be frozen pursuant to the [UN] resolution”¹⁸² had occurred first within the framework of the II pillar of the EU,¹⁸³ and later transposed into the EC regulation. Therefore, “the adoption of those acts [by the EU Council] f[ell...] within the ambit of the exercise of [a] broad discretion.”¹⁸⁴ As a consequence, the CFI recognized that “the EC institutions concerned, in this case the Council, are in principle bound to observe [the fundamental rights protected by the EU legal order] when they act with a view to giving effect to [a UNSC] resolution.”¹⁸⁵ According to the CFI, there was no jurisdictional immunity¹⁸⁶ that could shield the challenged EC regulation and “the present dispute c[ould] be resolved solely on the basis of a judicial review of the lawfulness of the contested decision.”¹⁸⁷

The CFI engaged in an effective review¹⁸⁸ of the measure adopted by the EU political institutions with regard to the right of due process of the petitioner,¹⁸⁹ taking care to ensure “that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights.”¹⁹⁰ On the merits, the CFI found that all the claims of the petitioner concerning violations of the right to a fair hearing, of the obligation to state reasons and of the right to effective judicial protection, were well founded.¹⁹¹ The CFI ruled that “the contested decision d[id] not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicants rights to a fair hearing was not observed [and that] furthermore the CFI was not [itself...] in a position to review the lawfulness of the decision.”¹⁹²

The CFI annulled the EC regulation insofar as it concerned the plaintiff, reaching the result that was rejected in *Kadi*.¹⁹³ *Per contra*, the CFI made it clear that the review it was exercising was a form of “manifest error scrutiny,”¹⁹⁴ a review “restricted to checking that the rules governing procedure and the statements of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment of the facts or misuse of

¹⁸² Ibid par 102

¹⁸³ Council Common Position 2001/931/CFSP OJ 2001 L 344/93

¹⁸⁴ *OMPI* par 103 For a critical appraisal of this reasoning see however Elspeth Guild, ‘The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the ‘Terrorist Lists’ (2008) 46 *Journal of Common Market Studies* 173, 185 (arguing that defining this argumentation “opaque, is, perhaps, un understatement”)

¹⁸⁵ *OMPI* par 107

¹⁸⁶ P. Eeckhout (n 62) 184-185

¹⁸⁷ *OMPI* par 113

¹⁸⁸ According T. Tridimas and J. Gutierrez-Fons (n 58) 709, the review of the CFI is so detailed “that it makes *OMPI* one of the most important judgments delivered by the Community courts on the rights to a hearing”

¹⁸⁹ Laura Cappuccio, ‘E’ illegittima la decisione delle istituzioni comunitarie che non rispetta il diritto di difesa?’ [2007] *Quaderni Costituzionali* 416, 417

¹⁹⁰ *OMPI* par 155

¹⁹¹ Takis Tridimas, ‘Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order’ (2009) 34 *European Law Review* 103, 119 ff

¹⁹² *OMPI* par 173

¹⁹³ According to P. Eeckhout (n 62) 190 from this point of view *OMPI* “represents the better approach.” See however also S. Adam (n 88) 21 (stressing how the different treatment accorded by the CFI to *Kadi* and *OMPI* knocks against “the *transversalité* of human rights in the EU”)

¹⁹⁴ S. Adam (n 88) 10. On the nature of the manifest error scrutiny see W. Sadurski (n 39) 3-4

powers.”¹⁹⁵ Hence, while reaffirming the “imperative”¹⁹⁶ nature of its review, the EU judiciary carved for itself a “limited,”¹⁹⁷ intermediate space, acknowledging that “that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions.”¹⁹⁸

The *OMPI* case represented a step ahead from the first decisions on the legality of the EU counter-terrorism policies since it “br[ought] a measure of rule of law into a field which seems to have been tarnished by the arbitrary.”¹⁹⁹ As it has been argued, “the EU judiciary experimented here its capacity of being rigorous in the protection of rights in one of the most thorny fields, given the fact that the seriousness of the international situation tends to attenuate the sensitiveness toward the rights of the suspected terrorist and produces a stronger propensity toward the demand for security rather than towards that for liberty and justice.”²⁰⁰ At the same time, the CFI took the explicit position of adopting a middle review scrutiny, falling short of affirming an extended constitutional power to ensure the primacy of EU fundamental principles.²⁰¹

A full-blown holding that EU fundamental due process rights cannot be sacrificed in the name of national security came however from the ECJ in the *Kadi* decision of 2008. The *Kadi* decision of the CFI was in fact later appealed and the ECJ was called to decide in last instance about the legality of an EC regulation implementing a UNSC resolution listing individuals and entities suspected of being terrorists and freezing their assets without due process of law. In contrast to the CFI,²⁰² the Grand Chamber of the ECJ began its reasoning by emphasizing that “the EC is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid conformity of their acts with the basic constitutional charter, the EC Treaty.”²⁰³ According to the ECJ, it followed from “those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all EC acts must respect fundamental rights.”²⁰⁴

On this premise, the ECJ left aside the argument of the CFI concerning the relationship between the UN and EU legal orders, and, while not denying the binding nature of the UNSC

¹⁹⁵ *OMPI* par 159

¹⁹⁶ *Ibid* par 155

¹⁹⁷ *Ibid* par 159. See also E. Guild (n 184) 188 (underlining the step forward taken by the CFI in *OMPI* with respect to *Kadi* but stressing that “the scope of the CFI review, however, is limited”)

¹⁹⁸ *OMPI* par 159. See also T. Tridimas (n 191) 122

¹⁹⁹ E. Guild (n 184) 181

²⁰⁰ M. Cartabia (n 89) 51 (my translation)

²⁰¹ According to T. Tridimas and J. Gutierrez-Fons (n 58) 730 the decision of the CFI in *OMPI* “confirms that any concept of emergency constitution is internalized, i.e. remains subject to the prerequisites for human rights protection provided for by the Community legal order. On the other hand it recognizes that exceptions may be required [...]”

²⁰² D. Halberstam and E. Stein (n 43) 43; G. de Búrca (n 75) 43

²⁰³ *Kadi* par 281 quoting Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339 (affirming for the first time that the EC Treaty is the Constitutional Charter of the EC)

²⁰⁴ *Kadi* par 285

resolutions and their “supremacy in [...] international law”²⁰⁵ (stemming from the UN Charter), reaffirmed within the EU legal system²⁰⁶ the supremacy of primary EU constitutional law, “in particular the general principles of which fundamental rights form part.”²⁰⁷ As a consequence, the ECJ excluded that a EC regulation implementing a UN resolution could be immune from judicial review, arguing instead that “the review of the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.”²⁰⁸

The ECJ clearly ruled that “the EC judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all EC acts in the light of the fundamental rights forming an integral part of the general principles of EC law, including review of EC measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the SC.”²⁰⁹ Hence, it engaged directly in a strict and attentive scrutiny of the contested regulation,²¹⁰ following the influential advice of Advocate General (AG) Maduro, according to which “in situations where the Community’s fundamental value are in the balance, the Court may be required to reassess and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the SC.”²¹¹

²⁰⁵ Ibid par 288

²⁰⁶ The ECJ therefore adopts an internal, constitutional approach to the relationship between the UN and EU legal order. This position is defended by community lawyers such as Nikolaos Lavranos, ‘Case Note: *Kadi v. Council*’ [2009] Legal Issues of Economic Integration 157, 174 who argues that with the *Kadi* ruling “the normally applicable hierarchy of norms within the Community legal order remains intact also *vis-à-vis* the UN Charter.” Also according to Maria Tzanou, ‘Case Note *Kadi v. Council*’ (2008) 10:2 German Law Journal 123, 142, “there are two reasons that advocate in favour of the ECJ’s self-oriented approach: first, [...] the serious deficit of the UN system as regard the observance of fundamental rights [...]. Secondly, the ECJ does not seek to establish itself as the guardian of the global legal order, since it does not review the UNSC resolution but the EC implementing measure”. For an international law critique, however, see G. de Búrca (n 75) 2 according to which “the judgment is a significant departure from the conventional presentation and widespread understanding of the EU as an actor which maintains a distinctive commitments to international law and institutions”. According then to Andrea Gattini, ‘Case Note *Kadi v. Council*’ (2009) 46 Common Market Law Review 213, 224 from this point of view the judgment of the ECJ “gives rise to mixed feelings. On the one hand one can not but welcome the unbending commitment of the ECJ to the respect of human rights, but on the other hand the relatively high price, in terms of coherence and unity of the international legal system [...] is worrying”. For an assessment of the various approaches to the relationship between international and EU law – “thin internationalism” and “constitutional resistance” and the identification of a possible third way, “a *Solange* type dialogue” (a position already defended by P. Eeckhout (n 62) 205) – see however D. Halberstam and E. Stein (n 43) 49 ff. See also Nikolaos Lavranos, ‘Toward a *Solange*-Method between International Courts and Tribunals’ in Yuval Shany et al (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing 2008) 217

²⁰⁷ *Kadi* par 308

²⁰⁸ Ibid par 316. There is much convergence among scholars as to the fact that the ECJ approach is preferable to that of the CFI as far as the protection of fundamental rights is concerned. See T. Tridimas (n 191) 126 (arguing that “on the issue of fundamental rights protection, the ECJ’s commitment is to be applauded”)

²⁰⁹ *Kadi* par 326

²¹⁰ Laura Cappuccio, ‘Il controllo della Corte di Giustizia sugli atti comunitari tra tutela giurisdizionale dei diritti e lotta al terrorismo internazionale’ [2008] Quaderni Costituzionali 903, 904

²¹¹ *Kadi*, Opinion of AG Maduro, par 43

On the merit of the fundamental rights' claim raised by the appellant, the ECJ displayed "distrust toward any invasion of due process"²¹² and held that "in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures [...] the right of defence, in particular the right to be heard, and the right to effective judicial review were patently not respected."²¹³ In addition, according to the ECJ, also the freezing of assets deriving from inclusion on the list "constituted an unjustified restriction of [the] right to propriety."²¹⁴ As a result, confirming that "in the EU's flawed system of governance, democracy finds solace in judicial review,"²¹⁵ the ECJ declared the appeal to be well founded and annulled the contested EC regulation in so far as it concerned the applicants.²¹⁶

In *Kadi*, the ECJ rejected the deferential stand of the CFI and followed the suggestions of AG Maduro to take seriously its role as the "constitutional court of the municipal order that is the EC"²¹⁷ and its duty to preserve the rule of law. The ECJ reasserted also the role of the judiciary in times of emergency by simply excluding that a "regulation [could] escape all review by the EC judicature once it ha[d] been claimed that the act [...] concern[ed] national security and terrorism."²¹⁸ As indeed the AG had again correctly pointed out, "especially in matters of public security, the political process is liable to become overly responsive to immediate popular concern, leading the authorities to allay the anxiety of the many at the expenses of the rights of the few. This is precisely when courts ought to get involved,"²¹⁹ with "constitutional confidence."²²⁰

In sum, the recent jurisprudence of the ECJ has ensured an effective review of UN counter-terrorism sanctions against individuals and entities, thus strengthening the protection of due process rights in the EU system. The enforcement of an advanced standard of protection at the EU level also reduced the tensions with states endowed with vanguard due process guarantees, as reflected in the *E & F* case.²²¹ *Kadi*, otherwise, has had relevant implications at the state level, pushing many state

²¹² T. Tridimas and J. Gutierrez-Fons (n 58) 698

²¹³ *Kadi* par 334

²¹⁴ *Ibid* par 370

²¹⁵ T. Tridimas (n 191) 103

²¹⁶ The ECJ, however, maintained on the basis of former Article 231 TEC (current Article 264 TFEU) the effects of the regulation for a period of no more than three months running from the date of delivery of the judgment in order to allow the Council to remedy the infringements found and to avoid "seriously and irreversibly prejudicing the effectiveness of the restrictive measures" (*Kadi* par 373). See M. Tzanou (n 206) 152

²¹⁷ *Kadi*, Opinion of AG Maduro, par 37. According to A. Gattini (n 206) 234, 235 "the ECJ in its own understanding is not an international supervisory body but a juridical body analogous to a domestic court". See also Pierre d'Argent, 'L'arret *Kadi*: le droit communautaire comme droit interne' [2008] *Journal de droit européen* 265

²¹⁸ *Kadi* par 343 According to T. Tridimas and J. Gutierrez-Fons (n 58) 701 "a distinct feature of the ECJ's reasoning, which differentiates its approach from that of the CFI, is [precisely] that it conceded little ground to the source of the security concerns"

²¹⁹ *Kadi*, Opinion of AG Maduro, par 45

²²⁰ T. Tridimas (n 191) 114

²²¹ Case C-550/09 *Criminal Proceedings Against E and F* [2010] ECR I-6213. The case had originated from a preliminary reference by a German court, the *Oberlandesgericht* in Düsseldorf, which was adjudicating in a criminal trial against two Turkish nationals, residing in Germany, who had been listed in the EU counter-terrorism regulation as

courts to improve their human rights standards, as evidenced by the decision of the UK Supreme Court in *Jabar Ahmed*.²²² As the follow up to the *Kadi* case demonstrates, however, the struggle for the definition of the appropriate standards of treatment for individuals suspected of being involved in terrorism financing is far from being over.²²³ As requested by the ECJ, in fact, *Kadi* was provided by the EU institutions with a short statement of reasons justifying his black-listing and, on the basis of these few information, he was re-inserted in the EU assets freezing regime.²²⁴ *Kadi*, however, claimed that the process followed by the EU institutions to re-list him was still incompatible with the EU due process standards and challenged the new regulation before the CFI (which, in the meanwhile, had been renamed General Court (GC) by the Lisbon Treaty).

In September 2010, the GC delivered its *Kadi II* judgment,²²⁵ holding that also the new regulation was in violation of EU fundamental rights. The GC surprisingly affirmed that it was “not bound under Article 61 of the Statute of the Court of Justice by the points of law decided by the [ECJ] in its judgment in *Kadi*.”²²⁶ In addition, with an unprecedented step for a lower court, the GC remarked that “certain doubts may have been voiced in legal circles as to whether the judgment of the [ECJ] in *Kadi* is wholly consistent with, on the one hand, international law and, more particularly, Articles 25 and 103 of the Charter of the [UN] and, on the other hand, the EC and EU Treaties”²²⁷ and, indicating rulings of UK²²⁸ and Swiss²²⁹ courts in support, stated “that those criticisms are not entirely without foundation.”²³⁰ However, the GC recognized that “the appellate principle itself and the hierarchical judicial structure which is its corollary generally advise[d]

suspected terrorist financiers. The German court asked the ECJ to assess whether the listing of the two individuals by the EU was compatible with fundamental due process rights and whether, therefore, the EU regulation could be used as the basis for the prosecution of the two individuals at the state level. The ECJ found the relevant EU measure to be invalid and therefore directed the German court to refrain from applying the EU regulation in prosecuting the two individuals. For a comment of the case see Cian Murphy, ‘Case Note: *Criminal Proceedings Against E and F*’ (2011) 48 Common Market Law Review 243

²²² *R. v. Jabar Ahmed* [2010] UKSC 2 (UK Supreme Court striking down the Orders in Council which formed the entirety of the UK anti-terrorism financing regime for violation of human rights standards). For a review of how British courts have, under the influence of EU and ECHR law, overtime increased their standards of review in counter-terrorism cases see Aileen Kavanagh, ‘Constitutionalism, Counterterrorism and the Courts: Changes in the British Constitutional Landscape’ (2011) 9 International Journal of Constitutional Law 172

²²³ See also Joris Larik, ‘Two ships in the night or in the same boat together: How the ECJ squared the circle and foreshadowed Lisbon in its *Kadi* judgement’ (2010) 13 Yearbook of Polish European Studies 149

²²⁴ Commission Regulation 1190/2008/EC OJ 2008 L 322

²²⁵ Case T-85/09, *Kadi v. Commission (Kadi II)*, judgment of 30 September 2010 nyr

²²⁶ *Ibid* par 112

²²⁷ *Ibid* par 115

²²⁸ See *Al-Jedda supra* n 32

²²⁹ See *Youssef Nada v. SECO* 1A.45/2007 / daa judgment of 14 November 2007 (Swiss *Tribunal Fédéral* denying the power to review a national measure implementing a UNSC resolution listing suspected terrorist and freezing their assets, but for its conformity with *jus cogens*). The same reasoning was later employed by the *Tribunal Fédéral* also in *A v. Département fédéral de l'économie* 2A.783/2008 /svc judgment of 23 January 2008. For an overview of the financial measures adopted by Switzerland to fight international terrorism see Bruce Zagaris, ‘Merging of the Counter-Terrorism and Anti-Money Laundering Regimes’ (2003) 34 Law and Policy in International Business 45, 94

²³⁰ *Kadi II* par 121

against the [GC] revisiting points of law which have been decided by the [ECJ]”²³¹ and set out to apply a “strict review”²³² of the contested regulation.

On the merit, the GC underlined how the EU counter-terrorism sanctions were “particularly draconian for those who are subject to them. All the applicant’s funds and other assets have been indefinitely frozen for nearly 10 years now and he cannot gain access to them without first obtaining an exemption from the [UN] Sanctions Committee.”²³³ On the procedure that had been followed to re-list Kadi, otherwise, the GC remarked how “the applicant’s rights of defence ha[d] been ‘observed’ only in the most formal and superficial sense.”²³⁴ As the GC made clear, in fact, “the procedure followed by the Commission, in response to the applicant’s request, did not grant him even the most minimal access to the evidence against him. In actual fact, [...] no balance was struck between his interests, on the one hand, and the need to protect the confidential nature of the information in question, on the other.”²³⁵ As a consequence, the GC itself was “not able to undertake a review of the lawfulness of the contested regulation”²³⁶ as would have been required by the applicant’s fundamental right to effective judicial review.

The GC, in addition, held that “the imposition on the applicant of the restrictive measures [...] constitute[d] an unjustified restriction of [the applicant’s] right to property”²³⁷ and entailed also a violation of the principle of proportionality. The GC, thus, annulled the regulation in so far as it concerned the applicant. Nevertheless, the decision of the GC was appealed before the ECJ²³⁸ and, as Armin Cuyvers has stated, the judgment of the GC now “puts the [ECJ] in a predicament, with very few easy or cost-free exits.”²³⁹ On the one hand, it would not be easy for the ECJ to give up the powerful “human-rights friendly” stand it embraced in *Kadi*. On the other hand, the ECJ is certainly aware of the political implications of its future ruling, both on the capacity of the EU institutions to cope with the threat of international terrorism and on the need for the EU member state to comply with their UN obligations. In this light it will be interesting to follow closely the future case law of the ECJ to see whether new challenges of ineffectiveness might emerge in the fabric of the EU

²³¹ Ibid par 121

²³² Armin Cuyvers, ‘The *Kadi II* Judgment of the General Court: the ECJ’s Predicament and the Consequences for the Member States’ (2011) 7 European Constitutional Law Review 494

²³³ *Kadi II* par 149

²³⁴ Ibid par 171

²³⁵ Ibid par 174. As remarked by Lisa Ginsborg and Martin Scheinin, ‘You Can’t Always Get What you Want. The *Kadi II* Conundrum and the Security Council 1267 Terrorist Sanctions Regime’ [2011] Essex Human Rights Review 7, the EU institutions were *de facto* unable to provide Mr. Kadi with the evidence justifying his listing for the simple reasons that they *do not* have evidence against him. Evidence (if any) for the listing of individual and entities are possessed only by few countries (essentially the US) within the UN 1267 Committee and not shared with other states.

²³⁶ *Kadi II* par 183

²³⁷ Ibid par 193

²³⁸ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and UK v. Kadi* pending

²³⁹ A. Cuyvers (n 232) 496

constitutional architecture as well as to think about what other legal checks may be put in place to prevent a new gap in the protection of due process rights in Europe.

5. Future prospects: beyond the Lisbon Treaty

As explained in the previous Section, gradual developments in the case law of the EU court, culminating in the milestone ruling of the ECJ in *Kadi*, have contributed to enhance the standard of due process protection in the EU. As such, the challenge of ineffectiveness triggered by the CFI's decision in *Kadi* seems to have been largely overcome. Nevertheless, the follow up of the *Kadi II* case, has raised several worries about the possibility to maintain a vanguard model of protection for suspected terrorists in the EU. It is therefore worth exploring to what extent other institutional transformations taking place in the EU system may provide safeguards against a possible future weakening of the EU due process standard. In this regard, a development of major significance is the entry into force of the Lisbon Treaty on 1st December 2009. By bringing about a significant overhaul of the EU constitutional architecture, the Lisbon Treaty has expanded the substantive and institutional tools for the protection of fundamental rights, including due process rights for individuals and entities subjected to counter-terrorism sanctions.

To begin with, at a very general level, the Lisbon Treaty reasserts the importance of the protection of fundamental rights in the EU by granting *valeur juridique* to the EU CFR.²⁴⁰ The Lisbon Treaty, in addition, abolishes the pillar structure of the EU extending the *méthode communautaire* (including the full jurisdiction of the ECJ) also to the area of JHA.²⁴¹ The CFSP indeed maintains several *ad hoc* rules,²⁴² but according to the new Article 275 TFEU, “the ECJ shall have jurisdiction to [...] rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU [ex Article 230 TEC], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of [the CFSP]”. Combined with the recent *Kadi* doctrine, this new clause effectively

²⁴⁰ On the impact of the Lisbon Treaty on fundamental rights see Marta Cartabia, ‘I diritti fondamentali e la cittadinanza dell’Unione’ in Franco Bassanini and Giulia Tiberi (eds), *Le Nuove Istituzioni Europee: Commento al Trattato di Lisbona* (Il Mulino 2008) 81 as well as the literature quoted *supra* at n 20

²⁴¹ See Jacques Ziller, *Il nuovo Trattato europeo* (Il Mulino 2007) 70

²⁴² See *supra* n 54

allows the ECJ to review even a common position listing persons suspected of financing terrorism, as well as, of course, its implementing regulation.²⁴³

More importantly, the Lisbon Treaty now mandates the formal accession of the EU to the ECHR.²⁴⁴ Although the issue of the accession of the EU (or the EC) to the ECHR had been on the political agenda of the EU for the last twenty years, no step had been taken so far in this regard.²⁴⁵ Pursuant to the new Article 6(2) TEU (as well as to the new Article 59(2) ECHR, as recently modified by the 14th Additional Protocol to the ECHR, which entered into force in June 2010), the negotiating process for the accession of the EU to the ECHR is currently underway and may soon conclude with a formal accession document.²⁴⁶ The precise effects of the accession of the EU to the ECHR are difficult to predict. Yet it seems likely that the core achievement of the accession will be to subject the action of the EU institutions to judicial review before the ECtHR.²⁴⁷

Since so far neither the EC nor the EU was a party to the ECHR, the ECtHR has declared inadmissible all challenges against the EC or the EU.²⁴⁸ The ECtHR can review the compatibility with the ECHR of measures adopted by the Contracting Parties after the exhaustion of all the available domestic remedies. In *Matthews v. UK*²⁴⁹ the ECtHR also acknowledged its power to review acts of the EU member states amending EU primary law. In that case (which will be further analyzed in the next chapter of this thesis) the ECtHR restated that “EC as such cannot be challenged before the Court because the EC is not a Contracting Party”²⁵⁰ but retained jurisdiction. The decision to review the application, however, was largely due to the fact that the contested UK act could “not be challenged before the [ECJ] for the very reason that it [was] not a ‘normal’ act of

²⁴³ See Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds not Hearts’ (2008) 45 *Common Market Law Review* 617, 674-675

²⁴⁴ See Emanuelle Bribosia, ‘L’avenir de la protection des droits fondamentaux dans l’Union Européenne’ in Giuliano Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 995

²⁴⁵ In *Opinion 2/94 In re Accession by the EC to the ECHR* [1996] ECR I-1759 the ECJ furthermore excluded that the EC could accede to the ECHR without a modification of the TEC. From a practical point of view, however, the EC and the ECHR have come closer in the recent years, especially thanks to the jurisprudence of the ECJ and the ECtHR: see Maria Elena Gennusa, ‘La Cedu e l’Unione Europea’ in Marta Cartabia (ed), *I diritti in Azione* (Il Mulino 2007) 91

²⁴⁶ A first Draft International Agreement on the Accession of the EU to the ECHR has been published on July 19, 2011, CDDH-UE(2011)16 and, after a series of amendment, re-published on October 14, 2011 CDDH-UE(2011)009. For an updated analysis of the draft cf. X. Groussot et al, ‘Adhésion de l’Union européenne à la Convention européenne des droits de l’homme: analyse juridique du projet d’accord d’adhésion du 14 octobre 2011’ (Fondation Robert Schuman Policy Paper 2011)

²⁴⁷ See Jean-Paul Jacqué, ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’ (2011) 48 *Common Market Law Rev* 995; Tobias Lock, ‘The ECJ and the ECtHR: The Future Relationship Between the Two European Courts’ (2009) 8 *The Law and Practice of International Courts and Tribunals* 375

²⁴⁸ See *Confédération Française Démocratique du Travail v. EEC (CFDT)*, ECHR [1978] Application No. 8030/77. See also Evert Alkema, ‘The EC and the European Convention on Human Rights: Immunity and Impunity for the Community?’ (1979) 16 *Common Market Law Review* 508

²⁴⁹ *Matthews v. United Kingdom*, ECHR [1999] Application No. 24833/94 (GC)

²⁵⁰ *Ibid* par 32

the Community, but [it was] a treaty within the Community legal order”²⁵¹ and that therefore the UK held responsibility *ratione materiae* for the consequences of that Treaty.²⁵²

On the other hand, instead, the ECtHR has repeatedly held that it will not review state acts which implement secondary law of the EC/EU, since in these case a general presumption of legality applies.²⁵³ The contours of this jurisprudence have been spelled out by the ECtHR in a case which presents many analogies with the *Kadi-saga*: the *Bosphorus* case.²⁵⁴ Bosphorus, a Turkish air carrier had leased an aircraft from the Yugoslavian national airline, just before the beginning of the Yugoslav civil war. While present in Ireland, the aircraft was impounded by the Irish authorities on the basis of an EC regulation²⁵⁵ implementing a UNSC resolution²⁵⁶ imposing sanctions on Yugoslavia. After the exhaustion of the national remedies and a preliminary ruling of the ECJ on the interpretation of the relevant EC regulation,²⁵⁷ Bosphorus started proceedings in front of the ECtHR claiming a violation of its right to property.

The ECtHR found itself competent to review the decision of the Irish authorities even if they were simply giving effect to an EC regulation. The ECtHR acknowledged that Ireland was complying “with its obligation flowing from EC law.”²⁵⁸ On the other hand, it reasserted that “a Contracting Party is responsible under Article 1 ECHR for all acts or omissions of its organs.”²⁵⁹ After balancing the EU member states’ obligations to comply with EC law with their duty to ensure the effectiveness of the ECHR, however, the ECtHR affirmed that it would not undertake any review of a national measure implementing a EC/EU act as long as the EC/EU ensures a level of human rights protection, “as regards both the substantive guarantees offered and the mechanism controlling their observance, in a manner which can be considered at least equivalent to”²⁶⁰ the one guaranteed by the ECHR.

²⁵¹ Ibid par 33

²⁵² See Toby King, ‘Ensuring Human Rights Review of Intergovernmental Acts in Europe’ (2000) 25 European Law Review 86. For a broader reading of the ruling of the ECtHR, later disavowed by the ECtHR itself, see also Danny Nicol, ‘Lessons from Luxembourg: Federalization and the European Court of Human Rights’ (2001) 26 European Law Review 18

²⁵³ See *M and co. V. Germany*, ECHR [1990] Application No. 13258/87

²⁵⁴ *Bosphours Hava Yollari Turizm v. Ireland*, ECHR [2005] Application No. 45036/98 (GC)

²⁵⁵ Council Regulation 990/93/EEC OJ 1993 L 102/14

²⁵⁶ S/RES/820 (1993)

²⁵⁷ Case C-84/95, *Bosphorus v. Minister of Transports* [1996] ECR I-3953. For a criticism of the judgment see Iris Canor, “‘Can Two Walk Together Except They Be Agreed’? The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into European Community Law through the Perspective of the European Court of Justice’ (1998) 35 Common Market Law Review 137

²⁵⁸ *Bosphorus* par 148

²⁵⁹ Ibid par 153

²⁶⁰ Ibid par 155

The decision of the ECtHR has been compared to the *Solange* doctrine of the German *Bundesverfassungsgericht*.²⁶¹ according to the ECtHR, in fact, review of EC measures through the national implementing acts is to be undertaken as an *extrema ratio*, only if the overall EC/EU system of human rights protection suddenly falls below the ECHR standard²⁶² and if “in the circumstances of a particular case, it is considered that the protection of ECHR rights was [at the EU level] manifestly deficient.”²⁶³ Under this test, Annalisa Ciampi has plausibly argued that cases like *Kadi* (as decided by the CFI) would not obtain a remedy before the ECtHR.²⁶⁴ After the accession of the EU to the ECHR, however, there would be no reason for the ECtHR to preserve this minimalist approach. Rather, it seems likely that the ECtHR will adopt *vis-à-vis* the EU the same full standard of review it employs *vis-à-vis* the other Contracting Parties to the ECHR. As a consequence, a possible lowering of the standard of protection in the EU legal order (like in *Kadi*) may come under the scrutiny of the ECtHR.

A cursory review of the case law of the ECtHR in the field of national security also reveals that the ECtHR has increasingly become a bulwark for the protection of fundamental rights in times of emergency, regardless of the requirement of complying with UN obligations. In some early decisions, indeed, the ECtHR had come close to non-justiciability arguments. For instance, in the *Behrami and Saramati* judgment,²⁶⁵ the ECtHR refused to review the conduct of military operations by several EU countries during the Kosovo War, since their action had been authorized by the UNSC.²⁶⁶ More recently, however, the ECtHR clearly proved to be able to face the challenge of protecting rights in times of emergency.²⁶⁷ Hence, for example, in the *Al-Jedda* case²⁶⁸ (on appeal

²⁶¹ See Jean-Paul Jacqué, ‘Droit communautaire et Convention européenne des droits de l’homme: L’arrêt *Bosphorus*, une jurisprudence “*Solange II*” de la Cour européenne des droits de l’homme?’ (2005) 41 *Revue trimestrielle de droit européen* 756; Giorgio Gaja, ‘The Review by the European Court of Human Rights of Member States’ Acts Implementing European Union Law: “Solange” Yet Again?’ in Pierre-Marie Dupuy et al (eds), *Common Values in International Law Festschrift Tomuschat* (Engel Verlag 2006). The *Solange* jurisprudence of the German *Bundesverfassungsgericht* is reported *supra* at n 96

²⁶² According to Steve Peers, ‘Limited Responsibility of European Union Member States for Action within the Scope of Community Law. Case Note to *Bosphorus Airways v. Ireland*’ (2006) 2 *European Constitutional Law Review* 443, 452 “the concept of conditional review as developed by the [ECtHR] is fraught with ambiguities and uncertainties and runs the risk that human rights will not be sufficiently guaranteed in certain cases”. See also Cathryn Costello, ‘The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 *Human Rights Law Review* 87

²⁶³ *Bosphorus* par 156

²⁶⁴ Annalisa Ciampi, ‘L’Union Européenne et le respect des droits de l’homme dans la mise en œuvre des sanctions devant la Cour Européenne des droits de l’homme’ [2006] *Revue générale de droit international public* 85. But see also Iain Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’ (2003) 72 *Nordic Journal of International Law* 159

²⁶⁵ *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, ECHR [2007] Application No.71412/01 and 78166/01 (GC)

²⁶⁶ For a comment on the judgments see Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: the *Behrami* and *Saramati* Cases’ (2008) 8 *Human Rights Law Review* 151

²⁶⁷ See Richard Smith, ‘The Margin of Appreciation and Human Rights Protection in the “War on Terror”’: Have the Rules Changed Before the European Court of Human Rights?’ [2011] *Essex Human Rights Law Review* 124

²⁶⁸ *Al-Jedda v. UK*, ECHR [2011] Application No. 27021/08 (GC)

from the UKHL), the ECtHR hold that the action of the British military in Iraq, fall under the scope of application of the ECHR, irrespective of a UN mandate, and found that the UK had violated the ECHR.²⁶⁹

From this point of view, in conclusion, the accession of the EU to the ECHR may represent an important development for the protection of due process rights in the EU. Whereas, so far, no external scrutiny of EU standards of protection was in place, once the accession will be accomplished, EU institutions, including its courts, will be required to comply with the floor of protection set by the ECtHR. The gap of protection generated in the EU by the low-level standard of protection crafted by the CFI in *Kadi* would most likely not be tolerated by the ECtHR. As such, the accession of the EU to the ECHR can be a powerful incentive for the ECJ, in reviewing on appeal the *Kadi II* decision of the GC, not to bow toward a “security-sensitive” position. In a way, the existence of a prospective control by the ECtHR on the action of the EU institutions should persuade the ECJ to maintain the high due process standard it framed in its *Kadi* ruling, preventing any re-emergence of challenges of ineffectiveness in the EU constitutional system.

Conclusion

This chapter has analyzed the protection of due process rights for suspected terrorists after 9/11 in Europe. Its goal has been to explore the complex dynamics that have emerged due to the interaction between state and EU law and to argue that a major challenge to the effectiveness of the protection of due process rights for suspected terrorist has occurred because of the enforcement of a restrictive ceiling of protection at the EU level. The right to due process is well-established in the European multilevel constitutional system. The events of 9/11, however, have triggered the enactment of sweeping counter-terrorism measures significantly threatening due process rights, both at the state and at the transnational level in Europe. A brief review of the jurisprudence of national courts revealed that relevant horizontal differences arose in the capacity of state courts to uphold fundamental rights in times of emergency: whereas some jurisdictions have ensured vanguard due process standards even after 9/11, others have adopted a much more “security-sensitive” approach, which sacrificed core due process guarantees in the name of national security.

As international terrorism was perceived as a threat requiring transnational solutions, however, the EU has progressively stepped in the field of national security. In particular, the EU

²⁶⁹ For a comment on the judgment see Marko Milanovic, ‘*Al-Skeini and Al-Jedda in Strasbourg*’ (2012) 23 *European Journal of International Law*

assumed a leading role in implementing the UN legal framework for the fight against terrorism financing. The due process deficiencies of this sanctions regime – coupled with the initial unwillingness of EU lower courts to ensure judicial review of counter-terrorism measures – created however a major challenge of ineffectiveness. In *Kadi* and *Yusuf*, with the intent to ensure the full application of UN resolutions in the EU, the CFI designed a low-intensity standard for the review of due process rights of blacklisted individuals and entities, thus depriving them of the possibility to invoke their due process rights at the EU level. Simultaneously, the CFI set up a ceiling of due process protection to be accorded to suspected terrorists, thus depriving state courts, especially those with vanguard standards of due process, of the possibility to go above this maximum and ensure more protection to blacklisted persons.

Yet, as the chapter has endeavoured to explain, the dynamics that took place in the European system are not *sui generis*. A comparative assessment of the experience of the US reveals comparable patterns. The US case is not only interesting because the US has been at the forefront of the fight against terrorism. The US is a federal system in which police enforcement is mainly ensured by the states, each of which is endowed with its own standards of procedural justice. After 9/11, however, the federal government entirely pre-empted the field of national security, and, by enforcing a weak due process standard in the field of counter-terrorism, displaced the more advanced state standards. In this context, it was up to the US Supreme Court to address the challenge of ineffective protection of due process rights by heightening the relevant federal standard. Hence, through a gradual, three-step, jurisprudence, the Supreme Court has limited the room for manoeuvre of political branches in the field of national security and ensured a more effective protection of the procedural rights of suspected terrorists in the US.

The transformations that have taken place in the US system, otherwise, mirror those which later occurred in Europe. After their initial debacle, in fact, EU courts engaged in a serious effort to improve the due process guarantees accorded to suspected terrorists. In the *Kadi* case, in particular, the ECJ powerfully claimed that the protection of core constitutional guarantees cannot be suspended for reasons of national security and struck down a EU counter-terrorism measures (implementing a UN resolution) freezing the assets of blacklisted persons for violation of EU due process rights. The decision of the ECJ had a remarkable impact both at the EU and at the state level. *Kadi* neutralized possible tensions with state courts endowed with vanguard due process standards and also invited state courts with laggard procedural guarantees to raise their levels of human rights protection. In the follow up of the case, in *Kadi II*, the GC obeyed the ECJ and again found the EU anti-terrorism sanctions to be unlawful.

The decision of the GC in *Kadi II*, however, has now been appealed to the ECJ. Whereas it is difficult to predict the stand that the ECJ will adopt in this new case, several other institutional transformations taking place in the EU system could prove important in persuading the ECJ to maintain a high standard of due process protection for suspected terrorists. After the entry into force of the Lisbon Treaty, the EU is required to accede the ECHR. The most likely consequence of the accession will be the possibility to challenge the actions of EU institutions before the ECtHR. As the ECtHR has increasingly flexed its muscles in protecting rights in times of emergency, it seems clear that any new judicial decision akin to the CFI's ruling in *Kadi*, would not pass muster before the ECtHR. In light of its precedent and of the prospective accession of the EU to the ECHR, one may only hope that the ECJ will avoid a new challenge of ineffectiveness and continue to ensure that "in countries where liberty is most esteemed, there [be no] laws by which a single person is deprived of it, in order to preserve it for the whole community."²⁷⁰

²⁷⁰ See Charles-Louis Montesquieu, *The Spirit of the Laws* (1st published 1748, Encyclopedia Britannica 1990) Book 12 chap 19

Chapter 3

The Right to Vote for Non-Citizens

Introduction

The right to vote and to participate in political life is an essential component of any democracy.¹ As Thomas Jefferson famously wrote in the 1776 Declaration of Independence, “governments are instituted among men deriving their just powers from the consent of the governed.”² Who ought to be considered as “the governed”, has nonetheless remained a largely unsettled question in legal practice and political theory ever since.³ Historically, the boundaries of the franchise have been the object of contestation in almost any constitutional system and it is only through slow and uneven developments that disenfranchised groups such as poor, women, minorities and the young have obtained the right to participate in the body politic.⁴

This chapter analyzes the regulation of voting rights for non-citizens in the European multilevel constitutional system. The pluralist arrangement that exists in Europe due to the overlap of the legal orders of the member states, of the European Union (EU) and of the European

¹ Robert Dahl, *On Democracy* (Yale University Press 1998) 33 (defining democracy as an association of people characterized by five standards: “1. effective participation 2. equality in voting 3. gaining enlightened understanding 4. exercising final control over the agenda 5. inclusion of adults”)

² For an historical account of the philosophical underpinnings of the Declaration of Independence cf. Gordon Wood, *The Creation of the American Republic* (Norton 1993) 181

³ See Cristina Rodriguez, ‘Noncitizen Voting and the Extraconstitutional Construction of the Polity’ (2010) 8 *International Journal of Constitutional Law* 30; Rainer Bauböck, ‘Global Justice, Freedom of Movement and Democratic Citizenship’ [2009] *European Journal of Sociology* 1

⁴ As Michel Troper, ‘The Concept of Citizenship in the Period of the French Revolution’ in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 27 has rightly emphasised, since the French Revolution a distinction was drawn between “citizenship” and “nationality” precisely for the purpose of defining that privileged class of individuals who, amidst the nationals of a state, enjoyed full political rights (i.e. the citizens). See also Benoît Guiget, ‘Citizenship and Nationality: Tracing the French Roots of the Distinction’ in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 95

Convention on Human Rights (ECHR) is increasingly described by scholars as a “multilevel constitutional architecture.”⁵ A widespread assumption among constitutional lawyers is that the European system is a *sui generis* arrangement. Nevertheless, as I have explained in the first chapter of this thesis, the European multilevel architecture can be meaningfully compared with other federal systems and that, if compared, it can also be better understood.

The purpose of this chapter is therefore to study the European electoral rights regime for non-citizens and the implications emerging from a multilevel constitutional architecture, in a comparative perspective with the federal experience of the United States of America (US). To clarify the terminology, with the term “non-citizens” (or “aliens” or “foreigners”) I refer here both to citizens of a member state of the EU or the US who reside in another member state of the EU or the US (i.e. – according to the European legal jargon – “second-country nationals”) and to citizens of a non-member country who permanently reside within a member state of the EU or the US (i.e. “third-country nationals”).

The chapter argues that the complex interplay among national and transnational law in the European multilevel architecture has created new challenges and tensions in the field of electoral rights for non-citizens. A challenge of inconsistency, in particular, seems to emerge from the interaction between states’ electoral laws and the voting rights regime developing at the EU level setting a minimum floor of protection for electoral rights Europe-wide. At the same time, however, the chapter claims that the dynamics at play in Europe are not unique. Rather, the experience of the US in the field of alien suffrage and citizenship underlines how the interplay between state and federal law have historically produced phenomena in the US that are akin to the ones existing in Europe.

To this end, the chapter is structured as follows. Section 1 begins by examining the legislation regulating electoral rights for non-citizens in the EU member states and explores the increasing impact that supranational law exercises within domestic legal systems. Section 2 then analyzes the tensions and challenges that this overlap generates. Section 3 introduces a comparative assessment to argue that analogous dynamics have characterized the constitutional experience of the US. Finally Section 4 evaluates the most recent transformations brought about by the case law of the European courts and EU Lisbon Treaty and Section 5 discusses whether, and what kind of further reforms would be advisable to address some of the remaining inconsistencies in the European electoral rights regime.

⁵ See Ingolf Pernice, ‘Multilevel Constitutionalism in the European Union’ (2002) 27 *European Law Review* 511; Miguel Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 501

1. Context: Electoral rights for non-citizens in Europe

Since the end of World War II Europe has experienced a progressive expansion of political rights.⁶ A fundamental right to vote for citizens, regardless of sex, wealth and social conditions, has been enshrined in the fundamental laws of most member states and recognized under the ECHR. Developments at the level of the EU, otherwise, have further increased the mechanisms of democratic representation.⁷ Despite this trend toward the extension of the franchise, however, significant variations exist on how the question of voting rights for non-citizens is dealt with in each layer of the European multilevel system.⁸ The enfranchisement of aliens is indeed a reflection of traditions of political and social inclusion,⁹ and relevant differences exist in the vision of the polity embedded in national, EU and ECHR law.

At the state level a plurality of statutory frameworks can be detected. By resorting to the analytical distinction formulated by Ann Althouse between vanguard and laggard states,¹⁰ it seems possible to classify the positions of the EU member states on the issue of voting rights for non-citizens in four regulatory models. These models can be ideally placed in a continuum ranging from legal systems which are rather open toward the extension of the franchise, even in national elections, to the benefit of qualified non-citizens to legal systems which are, instead, extremely restrictive in limiting the right to democratic participation only to nationals, in the name of an ethnic, identity-based, conception of the people.¹¹

At one extreme of the spectrum lie the United Kingdom (UK) and Ireland which grant voting rights to selected classes of resident aliens not only at the local level but also in national elections.¹² In the UK – pursuing to a tradition dating to the time of the British Empire and codified

⁶ In his celebrated sociological theory of citizenship Thomas Marshall, *Citizenship and Social Class* (CUP 1950) argued that political rights (i.e. voting rights) were the second wave of entitlements that the people obtained *vis-à-vis* the state in the course of the 19th century, after the acquisition of civil rights in the 18th century liberal revolutions and before the conquest of social rights during the 20th century

⁷ See Editorial, 'Thinking About Elections and About Democratic Representation' (2011) 7 *European Constitutional Law Review* 1

⁸ See Virginie Giraudon, 'Citizenship Rights for Non-Citizens' in Christian Joppke (ed), *Challenge to the Nation-State* (OUP 1998) 272 and Christian Joppke, 'The Evolution of Alien Rights in the United States, Germany and the European Union' in Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) 36

⁹ See Ulrich Preuß et al, 'Traditions of Citizenship in the European Union' (2003) 7 *Citizenship Studies* 3, 8 and Linda Bosniak, 'Constitutional Citizenship Through the Prism of Alienage' (2002) 63 *Ohio State Law Journal* 1285

¹⁰ See Ann Althouse, 'Vanguard States, Laggard States: Federalism and Constitutional Rights' (2003-2004) 152 *University of Pennsylvania Law Review* 1745 (speaking about "vanguard" and "laggard" states to distinguish between the most-protective and the least-protective regimes for the protection of fundamental rights at the state level in the US federal system of government)

¹¹ For an assessment of the legislation of the member states on alien suffrage in the broader context of the process of European integration see Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of the Political Space* (CUP 2007) 76 ff

¹² See Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17 *Oxford Journal of Legal Studies* 75, 77-78

in the Representation of the People Act¹³ – participation in national parliamentary elections is ensured to anybody who “is either a Commonwealth citizen or a citizen of the Republic of Ireland” and permanently resides in the UK.¹⁴ To reciprocate, Ireland enacted in 1984 a constitutional amendment¹⁵ which, by overruling a contrary opinion of the Supreme Court,¹⁶ allowed UK citizens residing in Ireland to cast their votes for the Irish legislative assembly.¹⁷

A growing number of other EU member states, instead have adopted since the 1970s laws enabling foreigners to participate in the democratic process but have restricted the franchise for permanent resident aliens at the local level.¹⁸ Hence, the Netherlands introduced in 1985 the right to vote in municipal councils for foreigners who “have been resident in the Netherlands for an uninterrupted period of at least five years immediately prior to nomination day and have residence rights”¹⁹ and a similar piece of legislation was enacted in 2004, after a lengthy parliamentary debate, by Belgium.²⁰ Since 1991, then, two years of permanent residency suffice to aliens for obtaining voting rights at the local level in Finland and this right has now been enshrined even in the text of the Constitution of 2000.²¹

On the other hand, a third group of EU states currently do not extend voting rights to non-citizens at the local level but nothing would prevent them from doing so by enacting appropriate legislation. This seems to be, for example, the case of Italy.²² In a series of rulings, in fact, the *Corte Costituzionale*²³ declared as purely programmatic (i.e. deprived of any legally binding force) the statutes of several regions extending voting rights at the local level to non-citizens arguing that the

¹³ Representation of the People Act (RPA) 1983, 31 Eliz. 2, c. 2 (consolidated version) (Eng.)

¹⁴ RPA Section 2(1)(c) (UK)

¹⁵ Ninth Am., Ir. Const., codified as Article 16(1)(2) stating that “(i) All citizens, and (ii) such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of the House of Representatives, shall have the right to vote at an election for members of the House of Representatives” (Ir.). The constitutional provision was implemented through the adoption of Electoral (Amendment) Act 1985 (Act No. 13/1985) (Ir.) whose Section 2 expressly extended voting rights for Parliamentary elections to “British citizen[s].”

¹⁶ *In the Matter of Article 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill 1983* [1984] 1 I.R. 268 (Irish Supreme Court declaring unconstitutional a legislative bill extending voting rights to non-citizens)

¹⁷ See Ko-Chih Tung, ‘Voting Rights for Alien Residents: Who Wants it?’ (1985) 19 *International Migration Review* 451

¹⁸ Currently, among the 27 member states of the EU 15 extend the franchise at the local level to (at least some classes of) non-EU citizens: Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom. For a detailed examination of the issue cf. Giovanna Zincone and Simona Ardovino, ‘I diritti elettorali dei migranti nello spazio politico e giuridico europeo’ [2004] *Le Istituzioni del Federalismo* 741

¹⁹ Article B 3(2) Kieswet, 28.09.1989 (Ne.)(consolidated version of the electoral Act)

²⁰ Loi du 19 mars 2004 visant à octroyer le droit de vote aux élections communales à des étrangers, F. 2004-1386 (Be.)

²¹ Article 14(2) Const. Fin.. See also Article 26, Kuntalaki, 17.3.1995/365 (Fin.)(consolidated version of the electoral Act)

²² The issue, however, is contested. Compare Paolo Bonetti, ‘Ammissione all’elettorato e acquisto della cittadinanza: due vie dell’integrazione politica degli stranieri’ [2003] *Federalismi.it* 11 (arguing that “nothing prohibits the extension by ordinary law to non-citizens of the subjective rights granted by the Constitution to citizens”) with Tommaso Giupponi, ‘Stranieri extracomunitari e diritti politici. Problemi costituzionali dell’estensione del diritto di voto in ambito locale’ (Forum Costituzionale Paper, 2006) 6

²³ C.Cost sent. 372/2004 (statute of region Tuscany); C.Cost sent. 379/2004 (statute of region Emilia-Romagna)

Constitution expressly reserves the exclusive competence in the field of electoral law to the national legislature. The clause of the Constitution which recognizes that all citizens have the right to vote,²⁴ however, has not been interpreted by the *Corte Costituzionale* as prohibiting the national Parliament from enacting a bill enfranchising third-country nationals at the local level.

In a last group of member states, on the contrary, voting rights are constitutionally restricted to nationals and any expansion of the franchise to non-citizens requires the burdensome process of constitutional amendment. In Germany, for instance, the attempt of two *Länder* to extend voting rights to foreign residents in local (and *Land*) elections was declared unconstitutional by the *Bundesverfassungsgericht* which, in two joint 1990 decisions,²⁵ affirmed that the constitutional concept of the “*Volk*” ought to be interpreted as restricting electoral rights only to German nationals and made clear that any expansion of the franchise to non-citizens required a constitutional change.²⁶ A similar stand was recently adopted also by the Austrian *Verfassungsgerichtshof*, which in 2004 declared a *Land* bill allowing third-country nationals to participate in local elections unconstitutional for violation of the principle of homogeneity of the electoral body.²⁷

The issue of electoral rights for non-citizens is instead addressed in an open-ended way in the framework of the ECHR. Given its importance for the establishment of a well functioning democracy, Article 3 of the 1st additional Protocol to the ECHR codifies a fundamental right to vote²⁸ stating that the Contracting Parties shall organize free elections “at reasonable intervals, by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” The provision, otherwise, talks about the right to vote of “the people” without explicitly imposing any limitation of the franchise to “the citizens.” Nevertheless, Article 16 of the ECHR expressly allows for the restriction of the political activities of aliens²⁹ and traditionally a wide margin of appreciation has been acknowledged by the European Court of Human Rights (ECtHR) to the Contracting Parties on voting rights issues.³⁰

²⁴ Article 48, par 1, Const. It.

²⁵ BVerfGE 63, 37 (1990) (statute of *Land* Schleswig-Holstein); BVerfGE 63,60 (1990) (statute of *Land* Hamburg)

²⁶ See Gerald Neuman, “‘We Are the People’: Alien Suffrage in German and American Perspective” (1992) 13 Michigan Journal of International Law 259 and Ruth Rubio Marin, ‘Equal Citizenship and the Difference that Residence Makes’ in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 201, 210 ff

²⁷ VfSlg 17.264/2004 [2004]

²⁸ Cf. Susan Marks, ‘The European Convention on Human Rights and its “Democratic Society”’ [1995] British Yearbook of International Law 209 and Hans-Martien ten Napel, ‘The European Court of Human Rights and Political Rights: the Need for More Guidance’ (2009) 5 European Constitutional Law Review 464

²⁹ Cf. Federico Casolari, ‘La partecipazione dello straniero alla vita pubblica locale’ in Marcello Di Filippo et al (eds), *Diritto europeo dell’immigrazione* (Cedam 2010) 2

³⁰ See *Mathieu-Mohin and Clerfayt v. Belgium*, ECHR [1987], Application No. 9267/81 (GC); *Sante Santoro v. Italy*, ECHR [2004], Application No. 36681/97; *Py v. France*, ECHR [2005], Application 66289/01. For a structural analysis of the case law of the ECtHR on Article 3, 1st additional Protocol see M. Napel (n 28) 468

In 1992, however, a separate Convention was negotiated within the Council of Europe with the aim of improving the integration of foreign residents into the local community “by enhancing the possibilities for them to participate in local public affairs.”³¹ Article 6 of the Convention on the Participation of Foreigners in Public Life at the Local Level (CPFPL) requires Contracting Parties to grant aliens who have been resident in a state for 5 years the right to vote and to stand in local government elections.³² Although the CPFPL “contains the first unambiguous statement in international law upholding the rights of non-nationals residents to vote in local elections,”³³ however, only a few EU countries have ratified the treaty so far and some have even adopted reservations and derogations on Article 6, hence depriving the CPFPL of its most significant clause.³⁴

Voting rights for non-citizens have been recognized at the EU level as well.³⁵ Whereas the citizens of the EU member states have *de facto* been endowed with new rights of political representation since the introduction of direct elections by universal suffrage to the EU Parliament in 1979,³⁶ it is only with the enactment of the Maastricht Treaty in 1993 that electoral rights for non-citizens have experienced a novel expansion under the concept of EU citizenship.³⁷ Article 17 of the European Community Treaty (TEC) affirmed that “every person holding the nationality of a Member State [should] be a citizen of the Union. Citizenship of the Union [should] complement and not replace national citizenship.” And today, with a similar but somewhat innovative language,³⁸ Article 9 EU Treaty (TEU) – inserted by the Lisbon Treaty – states that “every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.”

Among the privileges attached to the possession of EU citizenship electoral rights feature prominently, together with the right of free movement.³⁹ Citizens of EU member states, in

³¹ Preamble (Recital 6), CPFPL

³² See F. Casolari (n 29) 5

³³ J. Shaw (n 11) 66

³⁴ Currently only 8 States have duly ratified the CPFPL (5 of which are member states of the EU): Albania, Denmark, Finland, Iceland, Italy, the Netherlands, Norway and Sweden. See G. Zincone and S. Ardovino (n 18) 743

³⁵ See H. Lardy, ‘The Political Rights of Union Citizenship’ (1996) 2 *European Public Law Review* 611; Maria Fraile Ortiz, ‘Citizenship in Europe – Consequences of Citizenship’ (2007) 19 *European Review of Public Law* 125

³⁶ Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/EEC, OJ 1976 L 278/5. The Decision did not introduce voting rights for the EU Parliament elections for citizens of a EU member state residing in another member state. Some EU countries (such as Italy), however, autonomously extended to all residents holding the nationality of another EU member state the right to stand in elections for the EU Parliament. See Legge 18 gennaio 1989 n. 9 (G.U. 23 gennaio 1989, n. 18)(It.)

³⁷ See Flora Goudappel, ‘From National Citizenship to European Union Citizenship: the Re-Invention of Citizenship?’ (2007) 19 *European Review Public Law* 21; Dora Kostakopoulou, ‘European Union Citizenship: Writing the Future’ (2007) 13 *European Law Journal* 623

³⁸ See *infra* n 204

³⁹ See George Bermann, ‘European Citizenship at Center-Stage: Introduction’ (2009) 15 *Columbia Journal of European Law* 165; Siofra O’Leary, ‘The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law’ (1995) 32 *Common Market Law Review* 519. The literature on free movement rights of EU

particular, have the right to vote and stand as candidates at both municipal elections and EU Parliament elections in their member state of residence, when this differs from their member state of nationality.⁴⁰ According to Article 22(1) of the Treaty on the Functioning of the EU (TFEU) (ex Article 19(1) TEC) “every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.” Article 22(2) TFEU (ex Article 19(2) TEC) then restates the very same rule with regard to EU Parliament elections.

The detailed arrangements and derogations for the exercise of the right to vote and to stand as a candidate in EU Parliament and local elections for EU citizens residing in a member state of which they are not nationals are contained in Directives 93/109⁴¹ and 94/80⁴² adopted unanimously by the Council after consulting the EU Parliament, as specified by Article 19 TEC (now Article 22 TFEU). As the recitals of the two directives acknowledge, electoral rights are part of the EU’s task to “organize, in a manner demonstrating consistency and solidarity, relations between the peoples of the Member States”⁴³ and are “a corollary of the right to move and reside freely enshrined in [the TEC].”⁴⁴ The aim of these provisions “is essentially to abolish the nationality requirement to which most Member States currently make the exercise of the right to vote and to stand as a candidate subject.”⁴⁵ Their operation, however, is without prejudice “for the right to vote and to stand as a candidate in the Member State of which the citizen is a national.”⁴⁶

On technical grounds,⁴⁷ the two directives specify that EU citizens can exercise the right to vote in the member state of residence if they have expressed the wish to do so simply by producing a formal declaration. Appropriate measures can be adopted by the member states to prevent the individual concerned from voting twice and to ensure that he has not been deprived of the right to vote in his home state. Applications to stand as a candidate, then, are subject to the same conditions applying to nationals candidates. To address the specific concerns of some EU countries,

citizens is very broad. See among many Norbert Reich, ‘The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union’ (2005) 11 *European Law Journal* 675; Siofra O’Leary, ‘Developing an Ever Closer Union Between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship’ (2008) 27 *Yearbook of European Law* 167

⁴⁰ See Dimitry Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights’ (2009) 15 *Columbia Journal of European Law* 169, 197 ff

⁴¹ Council Directive 93/109/EC OJ 1993 L 329/34

⁴² Council Directive 94/80/EC OJ 1994 L 368/38

⁴³ Recital 1, Directive 93/109; Recital 1, Directive 94/80

⁴⁴ Recital 3, Directive 93/109; Recital 3, Directive 94/80

⁴⁵ Recital 4, Directive 94/80. See also with a similar language recital 4, Directive 93/109

⁴⁶ Recital 7, Directive 93/109; Recital 6, Directive 94/80

⁴⁷ For a detailed analysis and critical assessment of the content of the two directives cf. Marta Cartabia, ‘Cittadinanza europea’ in *Enciclopedia Giuridica* (Treccani 1995) vol. 6 ad vocem 8 ff and Epaminondas Marias, ‘European Citizenship in Action: From Maastricht to the Intergovernmental Conference’ in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 293

nonetheless, the directives recognize that the right to stand for the head of the local government unit can be restricted to nationals only.⁴⁸ Voting rights both in local and EU elections may be subject, moreover, to specific residency requirements in those states in which the proportion of non-national citizens of the EU of voting age exceeds 1/5 of the electoral population.⁴⁹

Therefore, as EU primary and secondary legislation makes clear, the progressive steps taken to enhance European political integration have had relevant consequences on the issue of voting rights for non-citizens.⁵⁰ By being awarded the *status* of EU citizens, the nationals of the EU member states have acquired a supplementary voice in the electoral process. Although the EU provisions dealing with voting rights in municipal and EU Parliament elections are technically framed as non-discrimination clauses, their effect is to endow second-country nationals with the right to vote and to stand for elections at the local as well as supranational level in their country of residence.⁵¹ Moreover, unlike the provisions of the CPFPL, these rights are directly effective in all member states (subject to the arrangements and the derogations set out in the directives mentioned above) and prevail over contrasting national law, including constitutional law.

In the end, as this short outline illustrates, the picture of voting rights for non-citizens in the European multilevel architecture is quite intricate. The legislation of EU countries differs greatly on the matter and whereas some vanguard states enfranchise aliens even for national elections, other laggard states deem any extension of the suffrage beyond the citizenry unconstitutional. The international human rights norms provide only limited guidance on this issue: on the one hand, the exclusion of foreigners from the political process is regarded as acceptable by the ECHR; on the other, the CPFPL “offers a template of incremental steps towards enhancing the political participation rights of non-nationals.”⁵² The EU, however, adds a new layer of complexity⁵³ to the picture by recognizing that citizens of each of the EU member states may vote and stand for local and EU Parliament elections in their country of residence (even) when this is not their country of

⁴⁸ See Article 5, Directive 94/80. This provision was specifically adopted to address the concerns of France. Cf. Bertrand Mathieu and Michel Verpeaux, *Droit constitutionnel* (PUF 2004) 460 and further *infra* n 88. According to Marias (n 47) 300, however, such derogation is “contrary to the case law of the ECJ [...] which prohibits any discrimination based on nationality” (quoting Case C-92/92 *Collins* [1993] ECR I-5145)

⁴⁹ See Article 14, Directive 93/109 (and, with a similar language, Article 12, Directive 94/80). These provisions were specifically adopted to address the concerns of Luxembourg. Cf. however the critical comments of D. Kochenov (n 40) 204

⁵⁰ See M. Cartabia (n 47) 7; H. Lardy (n 35) 612; J. Shaw (n 11) 25 ff

⁵¹ See D. Kochenov (n 40) 203; J. Shaw (n 11) 172. This interpretation has been confirmed by Advocate General Tizzano in his joint Opinion in Case C-145/04 *Spain v. UK* and Case C-300/04 *Eman and Sevinger* [2006] ECR I-7920 par 67-68

⁵² J. Shaw (n 11) 65

⁵³ See Edoardo Chiti, ‘Consequences of Citizenship in Europe: Are New Layers of Complexities Emerging?’ (2007) 19 *European Review of Public Law* 99

nationality. What are the consequences of these complex interactions among domestic and supranational law?

2. Challenges: the impact of supranational law on states' electoral laws

The incremental expansion of the regulation of electoral rights at the supranational level has produced major consequences. In particular, the development in the EU framework of a substantive body of law enfranchising EU citizens who reside in a EU member state of which they are not nationals has significantly increased the protection of the right to vote for non-citizens (second-country nationals) in the European legal space. A new Europe-wide minimum floor for the protection of electoral rights for non-citizens is now in place thanks to EU law. At the same time, by recognizing that each EU member state must open its electoral process to individuals who do not hold its nationality, EU law “has given rise to some inconsistencies and disruptions in national franchise systems.”⁵⁴ The open conception of the franchise premised in the grant of electoral rights at the EU level, challenges and puts under pressure restrictive national laws and practices in the field of electoral rights.

The new tensions generated by the rising impact of supranational law on the states' electoral regimes emerge chiefly in two areas. On the one hand, EU law calls into question the domestic arrangements that either produce asymmetries in the electoral entitlements of second-country national or place constraints on the freedom of EU citizens to take full advantage of the voting rights benefits stemming from EU law. On the other hand, EU law calls into question the domestic arrangements that either fragment the treatment of third-country nationals permanently residing in the EU or persistently exclude them from the franchise, even at the local level. To describe these dynamics I will hereafter resort to the idea of “inconsistency” I introduced in the first chapter of this thesis. The interaction between different legal standards in the European multilevel constitutional architecture has in fact created pressures in several states to enhance their level of protection of voting rights, and this dynamic can well be conceptualized as a challenge of inconsistency.

The interplay between supranational and domestic law generates several inconsistencies with regard to the electoral rights of second-country nationals.⁵⁵ As was mentioned in the previous Section, EU citizens who reside in a EU state of which they are not nationals are granted in the

⁵⁴ Anja Lansbergen and Jo Shaw, ‘National Membership Models in a Multilevel Europe’ (2010) 8 *International Journal of Constitutional Law* 50, 62

⁵⁵ See Dimitry Kochenov, ‘Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: an Ignored Link?’ (2009) 16 *Maastricht Journal of European and Comparative Law* 197

member state of residence “the right to participate in politics by way of elections (both actively and passively) at two of at least three vital levels of political representation.”⁵⁶ By putting flesh on the bones of EU citizenship⁵⁷ and creating a common core of fundamental privileges for the nationals of the EU member states everywhere they reside within the EU,⁵⁸ EU law has empowered second-country nationals to vote in municipal and supranational elections – but not national elections – in their member state of residence, regardless of nationality.⁵⁹

A first complication arises however because, “in the absence of a universal Community law definition of ‘municipal’, the practical application of Article 19(1) TEC [now Article 22(1) TFEU] *de facto* results in numerous inconsistencies, since what some Member States view as ‘municipal’ can easily fall within the meaning of ‘national’ in others.”⁶⁰ Whereas the UK allows citizens from other EU states to cast a ballot even for the devolved legislatures of Scotland, Wales and Northern Ireland⁶¹ Germany and Austria restrict the right to vote in *Länder* elections to nationals, thus depriving EU citizens of electoral rights in their municipalities which are also *Länder*.⁶² It has been affirmed that these differences between national rules result “in notable discrepancies between the rights enjoyed by European citizens in different Member States, harming the idea of equality among citizens.”⁶³ Indeed, it seems that the *status* of EU citizen does not carry equal electoral rights in every member state: rather, its content varies depending from the national law in force.⁶⁴

⁵⁶ Ibid 207

⁵⁷ Following the well-known expression of Siofra O’Leary, ‘Putting Flesh on the Bones of EU Citizenship’ (1999) 24 European Law Review 68 (who however was stressing the fundamental role of the ECJ in making the concept of EU citizenship meaningful). See also Chris Hilson, ‘What’s In a Right? The Relationship Between Community, Fundamental and Citizenship Rights in EU Law’ (2004) 29 European Law Review 636, 649

⁵⁸ As famously affirmed by Advocate General Jacobs in his Opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, par 47 stating that “a Community national [is...] entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the ECHR. In other words, he is entitled to say ‘*civis europeus sum*’ and to invoke that *status* in order to oppose any violation of his fundamental rights.”

⁵⁹ See H. Lardy (n 35) 626; F. Ortiz (n 35) 128; J. Shaw (n 11) 195

⁶⁰ D. Kochenov (n 55) 209. Note that Recital 7, Directive 94/80 acknowledges that “the term “municipal election” does not mean the same thing in every Member State” and Annex I to the Directive contains a list of the local government units which according to the electoral laws of the member states fall within the scope of application of Article 22(1) TFEU [ex Article 19(1) TEC]

⁶¹ See Scotland Act 1998, 46 Eliz. 2, c. 46, Section 11(1)(a); Government of Wales Act 1998, 46 Eliz. 2, c. 38, Schedule 1, Section 10(1); Northern Ireland (Election) Act 1998, 46 Eliz. 2, c. 12, Section 2(2) (UK)

⁶² See VfGH B3113/96, B3760/97 [1997] (Austrian *Verfassungsgerichtshof* holding that the disenfranchisement in the election for the municipality of Vienna of non-Austrian EU citizens residing in Vienna is admissible because the right to vote for local elections in the country of residence granted by EU law does not include the right to vote for a municipality which is also a *Land* in a federal system of government)

⁶³ D. Kochenov (n 55) 209

⁶⁴ It is true that even if EU law had provided a uniform definition of the concept of “municipal elections” to be applied in all member states, it still would have been possible for EU countries to go beyond the minimum provided by EU law and to recognize broader electoral rights to EU citizens resident. Yet, it appears undeniable that the asymmetries that this situation generates challenge the equality in the right to democratic participation of EU citizens throughout the EU. For an assessment of the problematic recognition of the principle of equality in EU law see Dimitry Kochenov, ‘Citizenship Without Respect: The EU’s Troubled Equality Ideal’ (Jean Monnet Working Paper No. 8, 2010)

A second major difficulty, then, is produced by the absence of an EU right to vote in general elections in the member state of residence when coupled with national provisions denying expatriate voting. As indicated, the national level of political representation in the member state of residence is currently left uncovered by EU law.⁶⁵ At the same time, it was already highlighted that the ECHR leaves to the states the discretion whether to extend political rights to non-citizens.⁶⁶ Hence, while some European countries (notably, the UK and Ireland) have decided autonomously to go beyond the transnational minimum and enfranchise some classes of foreigners even for parliamentary elections, the vast majority of EU states restrict voting rights for aliens at the local level or exclude them *tout court*.⁶⁷

As long as EU member states allow for expatriate voting, the lack of EU provisions establishing a right to vote in national elections in the member state of residency for the individuals who reside abroad is compensated by the possibility for them to take part in the choice of the legislature in their member state of nationality.⁶⁸ With the aim of emphasizing the link which should exist between an individual and the community mainly affecting his interests, it has been persuasively claimed that “the country of residence [should be] primarily responsible for the inclusion of its resident population [and that] the country of origin should arguably not bear the obligation to make up for it by allowing emigrants [...] to decide the political future of those who stayed behind.”⁶⁹ As unsatisfactory as it may be, nonetheless, the possibility to cast an absentee vote allows the persons concerned to express a voice at least in the election of one national legislature.⁷⁰

A problem arises, on the contrary, for those EU member states which disenfranchise voters who no longer reside in the state or who have ceased to be a resident for a number of consecutive years.⁷¹ Certainly, the decision of states to withhold the right to vote from their citizens who live abroad is closely linked to the history and the political culture of the given state.⁷² Countries which have traditionally been a place of emigration, or with large minority groups dislocated outside the national borders, tend to be more favourable to preserving ties with the overseas communities than states of immigration.⁷³ Hence, for instance, although Italy does not recognize voting rights for

⁶⁵ See D. Kochenov (n 40) 199

⁶⁶ See *supra* text accompanying n 30

⁶⁷ See *supra* n 12

⁶⁸ See J. Shaw (n 11) 197

⁶⁹ Ruth Rubio Marin, ‘Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Immigrants’ (2006) 81 NYU Law Review 117, 130-131

⁷⁰ See J. Shaw (n 11) 197

⁷¹ According to D. Kochenov (n 55) 201 currently 7 EU countries deny expatriate voting (some, after a number of years abroad): Cyprus, Greece, Ireland, Hungary, Malta, Slovakia and the United Kingdom

⁷² See R. Rubio Marin (n 69) 122

⁷³ This may not always be the case though, and different reasons may explain why several member states restrict expatriate voting while other support it. See Institute for Democracy and Electoral Assistance (IDEA), ‘Voting from Abroad: Handbook on External Voting’ (2007) available at http://www.idea.int/publications/voting_from_abroad/

foreign residents even at the local level, the Constitution has recently been amended to ensure greater representation in both chambers of Parliament of the “*Italians leaving abroad*.”⁷⁴ The opposite rule exists instead in the UK where citizens lose their voting rights after 15 years of continuous residence outside British territory.⁷⁵

The legal or factual impossibility of casting an absentee vote in several EU member states, however, generates an unsatisfactory situation: EU citizens who move to reside in a host member state, while gaining the right to vote at the municipal and supranational level in that state, are disenfranchised for national elections.⁷⁶ This situation seems inconsistent under a plurality of approaches. From an internal market perspective, individuals should not be forced to trade away their right to political representation at the state level in order to exercise free movement rights and participate, their alienage notwithstanding, in the local political life of another member state. Indeed, as it has been written, “instead of benefiting from both free-movement and national political representation rights, [EU citizens] are facing an impossible choice.”⁷⁷

Also from a constitutionalist perspective, however, this state of affairs is problematic as the national disenfranchisement of EU citizens expatriated in another EU member state is in tension with the new supranational normative arrangement and “the creation of a new form of citizenship under the auspices of the [EU].”⁷⁸ Since the purpose of EU electoral rights is to allow EU citizens to participate in political life and express their voice in elections even when they reside outside their country of nationality in Europe, the impossibility to cast a vote in general elections “highlights the [...] tension between national constitutional models and the models of democratic inclusion required by the goal of European citizenship.”⁷⁹

The interaction between supranational and domestic law, furthermore, generates a number of inconsistencies also with regard to the electoral rights of third-country nationals permanently residing within the EU. It was highlighted in the previous Section that while some EU countries have adopted legislations or ratified international agreements (such as the CPFPL) that enfranchise non-citizens in local elections, many EU member states still restrict suffrage to citizens.⁸⁰ The arguments advanced in these countries to disenfranchise aliens – either based on an ethnic concept

⁷⁴ See Article 1 and 2 Const. It. Rev. Bill 1/2001 modifying Article 56 and 57 Const. It. to ensure that 12 deputies and 6 senators be elected by the Italians leaving abroad (my translation: “italiani all’estero.”) See Valerio Onida, ‘Relazione Introduttiva’ in *Atti del Convegno Annuale dell’Associazione Italiana dei Costituzionalisti: “Lo statuto costituzionale del non cittadino”* (Jovene 2010) 3, 6

⁷⁵ See D. Kochenov (n 55) 213

⁷⁶ See H. Lardy (n 35) 622; D. Kochenov (n 55)

⁷⁷ D. Kochenov (n 55) 223

⁷⁸ Sujit Choudhry and Cheryl Saunders, ‘Symposium of Citizenship: Foreword’ (2010) 8 *International Journal of Constitutional Law* 6

⁷⁹ A. Lansbergen and J. Shaw (n 54) 62

⁸⁰ See *supra* text accompanying n 11

of “people”⁸¹ or on a republican ideal of citizenship⁸² – nevertheless, lose much of their strength and become difficult to justify in light of the impact of EU law.⁸³ Indeed, “once a Member State has opened its polling stations to Union citizens who lack its legal citizenship, what principled ground can it advance for refusing to consider the claims of other non-[]citizens to be admitted?”⁸⁴

It is true that the provisions granting voting rights to EU citizens in their country of residence introduced by the Maastricht Treaty were of such significance that constitutional amendments were required in a number of member states to ratify the pact.⁸⁵ Hence, for example, Germany expressly introduced a clause allowing EU citizens to vote in local elections in its Basic Law⁸⁶ and France did the same in Article 88-3 of its Constitution (where specific arrangements were also made to ensure that foreigners would neither be allowed to “exercise the role of major or deputy nor to participate in the designation of the senatorial electors or to the election of senators”).⁸⁷ Still, logically speaking, by extending the franchise to certain non-citizens (second-country nationals), these countries have compromised the claims in favour of the purity of the electoral body and opened the door for the extension of the suffrage to other classes of non-citizens.⁸⁸

In addition, on the basis of the provisions of former Title V TEC, Directive 2003/109 on the *status* of third-country nationals who are long-term residents was adopted in 2003.⁸⁹ This framework legislation extends to third-country nationals many of the rights enjoyed by EU citizens (although with some exceptions, including voting rights),⁹⁰ on the assumptions that “both experience similar forms of dislocation when they reside in a State where they lack the nationality.”⁹¹ Even though the directive sets only a minimum standard that can be overcome by more favourable national provisions, “the principle underpinning this [act] is that domicile generates entitlements both in the forms of equalization of the treatment of third country nationals

⁸¹ See Enik Horvath and Ruth Rubio Marin, “‘Alles oder Nichts’?” The Outer Boundaries of the German Citizenship Debate’ (2010) 8 International Journal of Constitutional Law 72, 87

⁸² See Edwige Lefebvre, ‘Republicanism and Universalism: Factors of Inclusion or Exclusion in the French Concept of Citizenship’ (2003) 7 Citizenship Studies 15

⁸³ See H. Lardy (n 35) 627

⁸⁴ H. Lardy (n 12) 99

⁸⁵ See M. Cartabia (n 47) 9; M. Fraile Ortiz (n 35) 128

⁸⁶ See Article 28 Const. Ger.

⁸⁷ Article 88-3 Const. Fr. (my translation: “exercer les fonctions de maire ou d’adjoint ni participer à la désignation des électeurs sénatoriaux et à l’élection des sénateurs”). The constitutional revision was required by the *Conseil Constitutionnel* Décision 92-308 DC, par 26-27 (holding that the ratification of the TEU required a constitutional amendment). See also the Décision 92-312 DC (French *Conseil Constitutionnel* upholds law authorizing the ratification of the TEU). In the literature see B. Mathieu and M. Verpeaux (n 48) 318

⁸⁸ See D. Kochenov (n 40) 227; E. Horvath and R. Rubio Marin (n 81) 87

⁸⁹ Council Directive 2003/109/EC OJ 2004 L 16/44. In the literature see Dora Kostakopoulou, “‘Integrating’ Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms’ (2002) 8 Columbia Journal European Law 181

⁹⁰ See Samantha Besson and André Utzinger, ‘Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora’s Box’ (2007) 13 European Law Journal 573, 580; F. Goudappel (n 37) 41

⁹¹ J. Shaw (n 11) 236

with nationals of the host Member State in socio-economic life and enhanced protection against expulsion as well as rights of mobility within the EU.”⁹²

In light of these developments at EU level, therefore, the disenfranchisements of permanent resident third-country nationals in some EU member states generates asymmetries across Europe:⁹³ Citizens of non-EU countries who reside for 5 years in a EU member state are automatically entitled to obtain long-term residence *status*; they enjoy a common core of rights; but, they can vote in local elections only if they happen to reside in a EU state which accords such a right.⁹⁴ Although certainly EU law only sets a minimum standard for the treatment of aliens, it appears that greater coordination among member states would diminish the constitutional tensions that emerge from this account.⁹⁵ As of today, however, it has to be regretted “that there is no common approach in all EU Member States to this issue.”⁹⁶

Otherwise, with the purpose of emphasizing the link between citizenship and voting rights, several authors have argued that instead of stressing the need for alien suffrage, citizenship should be made more easily available to third-country nationals permanently residing within the EU.⁹⁷ However, the EU currently has no power to directly grant EU citizenship to third-country nationals,⁹⁸ and, since “each State’s law is simultaneously based on juridical traditions, nation-State building, international influences and the role played by migration”⁹⁹ EU countries differ significantly in the specification of the criteria necessary to acquire national citizenship (and, *iure tracto*, EU citizenship).¹⁰⁰ A tenet of international law is, after all, that the states are the sole authorities allowed to decide on what basis to grant their nationality.¹⁰¹ EU law, then, is mute on the matter and the ECJ has confirmed that the member states enjoy wide autonomy in the field.¹⁰²

⁹² D. Kostakopoulou (n 89) 198

⁹³ See H. Lardy (n 35) 627; D. Kochenov (n 40) 228

⁹⁴ See S. Besson and A. Utzinger (n 90) 580; D. Kostakopoulou (n 37) 643 ff

⁹⁵ See J. Shaw (n 11) 232

⁹⁶ D. Kochenov (n 40) 229

⁹⁷ See H. Lardy (n 35) 628; S. Besson and A. Utzinger (n 90) 581; D. Kostakopoulou (n 37) 644

⁹⁸ See Álvaro Castro Oliveira, ‘The Position of Resident Third-Country Nationals: Is it too Early to Grant Them Union Citizenship?’ in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 185

⁹⁹ See Patrick Weil, ‘Access to Citizenship: a Comparison of Twenty-Five Nationality Laws’ in Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) 17, 18

¹⁰⁰ See Stefania Bariatti, ‘Cittadinanza (diritto comparato e straniero)’ in *Enciclopedia Giuridica* (Treccani 1988) vol. 6 ad vocem, 1 and Bruno Nascimbene, ‘Toward a European Law on Citizenship and Nationality’ in Siofra O’Leary and Teija Tiilikainen (eds), *Citizenship and Nationality Status in the New Europe* (Sweet and Maxwell 1998) 63, 73

¹⁰¹ See International Court of Justice, *Nottebohm (Lichtenstein v. Guatemala)*, I.C.J. Reports 1955, p. 4. In the literature see Rainer Hofmann, ‘Overview of Nationality and Citizenship in International Law’ in Siofra O’Leary and Teija Tiilikainen (eds), *Citizenship and Nationality Status in the New Europe* (Sweet and Maxwell 1998) 5, 7 ff

¹⁰² See Case C-369/90 *Micheletti v. Delegacion del Gobierno en Cantabria* [1992] ECR I-4258. For a thorough analysis of the impact of EU law on domestic nationality laws see however Gerard René de Groot, ‘Towards a European Nationality Law’ (2004) 8 *Electronic Journal of Comparative Law* 3

Generally, “citizenship can be acquired in any one of four ways: by descent (*jus sanguinis*), by birthplace (*jus soli*), by naturalisation or by registration.”¹⁰³ A detailed analysis of the legislation of the EU member states is clearly beyond the scope of this chapter:¹⁰⁴ it may however be stressed that while the *jus soli* principle is predominant in the UK¹⁰⁵ and Ireland and operates, in certain cases, in France¹⁰⁶ and Germany,¹⁰⁷ the *jus sanguinis* rule still prevails in continental Europe and Scandinavia.¹⁰⁸ Naturalization is available in all member states but the number of years of residence required and the additional conditions (e.g. knowledge of history or language, loyalty oath, good character and renunciation of prior nationality) vary considerably between the EU countries.¹⁰⁹ As a consequence, for third-country nationals, the acquisition of citizenship can turn out to be extremely difficult in several EU member states while being more straightforward in others.

The variations among the laws of member states, however, is not without effects. On the contrary, it may generate unexpected externalities:¹¹⁰ once, in fact, a third-country national is able to acquire (relatively more easily) the citizenship of one of the EU member states (which, e.g. automatically grants citizenship to legal residents after a fixed and limited number of years, or on the basis of birth,¹¹¹ or through the amnesty of illegal immigrants) he obtains the rights attached to EU citizenship, including the rights to free movement and to some political participation also in other EU member states.¹¹² “Granting national citizenship no longer concerns only one country, but also affects other members of the [EU].”¹¹³ Because of the interdependence of the states in the EU

¹⁰³ Atsushi Kondo, ‘Comparative Citizenship and Aliens’ Rights’ in Atsushi Kondo (ed), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Palgrave 2001) 225, 227

¹⁰⁴ For a comparative assessment of nationality laws see P. Weil (n 99) and A. Kondo (n 103) as well as the detailed database of the European Union Observatory on Democracy of the European University Institute on ‘National Citizenship Laws’ available at <http://eudo-citizenship.eu/databases/national-citizenship-laws>

¹⁰⁵ See Zig Layton-Henry, ‘Patterns of Privilege: Citizenship Rights in Britain’ in Atsushi Kondo (ed), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Palgrave 2001) 116, 117

¹⁰⁶ See Benoit Guiget, ‘Citizenship Rights for Aliens in France’ in Atsushi Kondo (ed), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Palgrave 2001) 71, 73

¹⁰⁷ See Kai Hailbronner, ‘Citizenship Rights for Aliens in Germany’ in Atsushi Kondo (ed), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Palgrave 2001) 100, 111. The *jus soli* principle was introduced in German nationality law only in 1999. Before this reform, Germany was considered as one of the country with the strictest legislation world-wide in the attribution of citizenship to aliens

¹⁰⁸ See Elena Dingu-Kyrklund, ‘Citizenship Rights for Aliens in Sweden’ in Atsushi Kondo (ed), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Palgrave 2001) 47, 48

¹⁰⁹ See P. Weil (n 99) 22-23

¹¹⁰ See Karolina Rostek and Gareth Davies, ‘The Impact of Union Citizenship on National Citizenship Policies’ (2007) 22 *Tulane European and Civil Law Forum* 89, 115. Cf. also Marie-José Garot, ‘A New Basis for European Citizenship: Residence?’ in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 229, 232 (emphasizing “the risk of a certain amount of inequality where the access to Union citizenship derives from a naturalization process according to the law of one or another Member State”)

¹¹¹ The Irish nationality law is a case in point: the existence (prior to 2004) of an unconditional *jus soli* rule for the acquisition of nationality generated significant complications as the alien parents of children born in Ireland (and thus: Irish and EU citizens) were able to exercise free movements as bearers of their children to other member states and this right was protected by the ECJ, see Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925

¹¹² See G.R. de Groot (n 102) 24

¹¹³ K. Rostek and G. Davies (n 110) 119

legal framework, either some steps are taken to manage complex phenomena such as citizenship and voting rights or this incongruence will remain.¹¹⁴

To sum up, a number of tensions and challenges have emerged in the field of electoral rights for non-citizens in Europe because of the overlap and interplay between national and supranational law.¹¹⁵ Whereas, historically, the European states were sovereign in deciding the boundaries of their electorates, the development at the supranational level of a substantive body of laws extending voting rights to EU citizens residing outside their country of nationality has placed new limits on the autonomy of the member states.¹¹⁶ The establishment of a floor of protection of voting rights for non-citizens at the transnational level in Europe, has put under pressures those national laws and practices which constrain the electoral entitlements of second-country nationals and *tout court* exclude from the franchise third-country nationals, generating what I call a challenge of inconsistency. Are the dynamics arising in the European multilevel system from the interaction between state and transnational laws regulating electoral rights for non-citizens a *sui generis* phenomenon?

3. Comparative assessment: electoral rights for non-citizens in the US federal system

The complex dynamics that have emerged in Europe because of the overlap and interplay between different states and transnational norms on citizenship and voting rights, while certainly peculiar in some respect, are not unique.¹¹⁷ Rather, comparable features seem to characterize the “federal experiences of countries [...] founded in their respective beginnings on a voluntary association of their Member States.”¹¹⁸ In a comparative perspective, it is possible to argue, albeit with several caveats, that the tensions and challenges arising in the field of electoral rights for non-citizens in the European multilevel architecture are analogous to the dynamics at play in those federal systems in

¹¹⁴ See B. Nascimbene (n 100) 79; G.R. de Groot (n 102)

¹¹⁵ See A. Lansbergen and J. Shaw (n 54) 62

¹¹⁶ See also Miriam Aziz, *The Impact of European Rights on National Legal Cultures* (Hart Publishing 2004) 67

¹¹⁷ On the methodological advantages of rejecting a *sui generis* approach to the study of Europe in favour of a comparative approach (especially with the US federal architecture) cf. in general Mario Cappelletti et al, ‘General Introduction’ in M. Cappelletti et al (eds), *Integration Through Law: Europe and the American Federal Experience. Volume 1, Book 1* (de Gruyter 1986) 3 and Robert Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (OUP 2009)

¹¹⁸ Christoph Schönberger, ‘European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism’ (2001) 19 *European Review of Public Law* 61, 64

which the competence over electoral rights and the power to define the boundaries of the polity have been the object of continuous contestation between the federation and its constituent states.¹¹⁹

This appears to be especially the case of the US.¹²⁰ In the US federal experience, in fact, the scope of electoral rights for non-citizens has been historically conditioned by the interplay between state and federal rules and by the competition between a local and a transnational vision of citizenship and the polity. Whereas in the early phase of the federation, the constituent states were largely independent in defining who their peoples were and in regulating access to the franchise (both for state and federal elections), over time the federal government was granted increasing powers in the field of electoral rights to remedy perceived shortcomings in the regulation of the right to vote and to ensure greater consistency, especially in the electoral entitlements for citizens of the US moving from one state to the other of the federation.

From the methodological point of view,¹²¹ therefore, a comparison of the constitutional experience of the US federal system may be particularly useful in order to understand the dynamics and the developments at play in the field of citizenship and voting rights in Europe.¹²² Before undertaking this assessment, however, it is worth clarifying as a caveat that a comparison of the regulation of electoral rights for non-citizens in the European multilevel and the US federal systems neither implies that the two systems are identical nor suggests that they will inevitably evolve in the same way.¹²³ As scholars of comparative federalism have correctly pointed out, “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.”¹²⁴

At the same time the US federal system and the European multilevel architecture share an important structural analogy: as I clarified in the opening chapter of this thesis, both systems feature a pluralist, heterarchical constitutional arrangement for the protection of fundamental rights, with

¹¹⁹ See Vincenzo Lippolis, *La cittadinanza europea* (Il Mulino 1994) 75 and Christoph Schönberger, *Unionsbürger, Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck 2005). See also Jeremy Bierbach, ‘Who’s Afraid of Union Citizenship? (book review of Christoph Schönberger, *Unionsbürger, Europas föderales Bürgerrecht in vergleichender Sicht*)’ (2009) 5 *European Constitutional Law Review* 517

¹²⁰ See Vicki Jackson, ‘Citizenship and Federalism’ in Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) 127

¹²¹ For an overview of the rules governing case selections and their justification in the field of comparative constitutional law see the systematic work of Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *American Journal Comparative Law* 125

¹²² For a comparison of citizenship, free movements and social rights in the US and Europe cf. instead Anna Van der Mei, ‘Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law’ (2002) 19 *Arizona Journal of International and Comparative Law* 803; Francesca Strumia, ‘Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity’ (2006) 12 *Columbia Journal of European Law* 713

¹²³ On the caveats that are necessary when undertaking a comparison of the EU with the US see Daniel Elazar, ‘The United States and the European Union: Models for Their Epochs’ in Robert Howse and Kalypso Nicolaïdis (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 31 and George Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94 *Columbia Law Review* 332

¹²⁴ C. Schönberger (n 118) 65

rights being simultaneously recognized at the state and federal or supranational levels and adjudicated by a plurality of institutions operating in these multiple layers.¹²⁵ Hence, assessing in a comparative perspective how the issue of voting rights for non-citizens has historically been dealt with in the US constitutional system raises useful insights to understand the current European challenges and provides some cautionary tales to appreciate the possible scenarios that might open up in the future in the European multilevel human rights system.¹²⁶

The US Constitution of 1787 “originally left voting rights, even in federal elections, in the hands of the states.”¹²⁷ Consistent with the idea of a republican compound of states and peoples,¹²⁸ the Philadelphia Constitutional Convention rejected the hypothesis of establishing uniform electoral rules at the federal level,¹²⁹ specifying instead in Article I, §2, cl.1 of the US Constitution that the members of the House of Representatives would be chosen by the “people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.” Since the Senate, until the adoption of the Seventeenth Amendment in 1913, was also elected directly by the state legislatures, for all purposes this arrangement meant that it was for the states to decide who should be enfranchised, and that those eligible to vote at the state level were also able to cast ballots for the federal government.¹³⁰

Furthermore – whereas the Constitution made possession of US citizenship a condition to hold office in Congress and as US President¹³¹ and Article I, §8, cl 2 empowered Congress to make “a uniform rule of naturalization” – the original pact “contained no definition of national citizenship.”¹³² In this context, it was up to each of the constituent states to define the boundaries of its citizenry (and, by implication, of the federal polity) and to accord to its members a series of local entitlements, such as political rights. Article IV, §2, cl.1, however – rescuing a provision formerly

¹²⁵ See also Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 70; Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 348.

¹²⁶ See Ernest Young, ‘Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism’ (2002) 77 NYU Law Review 1612

¹²⁷ Gerald Neuman, *Strangers to the Constitution. Immigrants, Borders and Fundamental Law* (Princeton University Press 1996) 63

¹²⁸ See Leslie Friedman Goldstein, *Constituting Federal Sovereignty. The European Union in Comparative Context* (Johns Hopkins University Press 2001) and Jeffrey Goldsworthy, ‘The Debate About Sovereignty in the United States: a Historical and Comparative Perspective’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 423

¹²⁹ See G. Neuman (n 127) 63

¹³⁰ See Virginia Harper-Ho, ‘Noncitizen Voting Rights: The History, the Law and Current Prospects for Change’ (2000) 18 Law and Inequality 271, 287; Elise Brozovich, ‘Prospects for Democratic Change: Non Citizen Suffrage in America’ (2002) 23 Hamline Journal of Public Law and Policy 403, 411

¹³¹ See Earl Maltz, ‘Citizenship And The Constitution: A History Of The Supreme Court’s Alienage Jurisprudence’ (1996) 28 Arizona State Law Journal 1135

¹³² Alexander Bickel, ‘Citizenship in the American Constitution’ (1973) 15 Arizona Law Review 369. Bear in mind that in the US with the term “national” reference is made to the federal level of government

codified in the Articles of Confederation¹³³ – affirmed that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,” with the purpose of ensuring that “the citizens of the states ceased to be foreigners for the other states of the new Union without becoming their citizens.”¹³⁴

The fact that for almost three-quarters of a century since the foundation of the US federation the states had almost total control on the rights of political participation, meant that the enfranchisement of non-citizens varied significantly across the US.¹³⁵ On the one hand, several states introduced strict residency requirements aiming at preventing citizens of other US states (analogous to those called “second-country nationals” in EU parlance) who had recently moved in the state from participating in elections there.¹³⁶ On the other hand, in other states voting rights were even extended to resident aliens (“third-country nationals”),¹³⁷ including through judicial means.¹³⁸ As Jamin Raskin argued, “as a chapter in the history of American federalism, the period of alien suffrage reflected a conception of states as sovereign political entities. The states with alien suffrage allowed non-US citizens to participate in voting at all levels of American government, thereby turning them, explicitly, into ‘citizens’ of the state itself.”¹³⁹

The original US constitutional arrangement, began to reveal its limitations by the half of the 19th century in connection with the thorny question of slavery. Since the 1770s a number of Northern states had granted state citizenship and voting rights to freed slaves,¹⁴⁰ and it had remained largely unsettled whether the slave-states could challenge the “privileges and immunities” granted to freed slaves by free-states.¹⁴¹ In its infamous *Dred Scott* decision,¹⁴² however, the US Supreme Court destroyed this fragile compromise by stating that “negro[es] of African descent, [...] who were brought into this country and sold as slaves”¹⁴³ could never be part of the US polity. The decision of the Court contributed to the explosion of the Civil War, which eventually – after the victory of the Union – led to the abolition of slavery and to the adoption of two constitutional

¹³³ See V. Lippolis (n 119) 76

¹³⁴ See Schönberger (n 118) 68

¹³⁵ See Jamin Raskin, ‘Legal Aliens, Local Citizens: the Historical, Constitutional and Theoretical Meanings of Alien Suffrage’ (1993) 141 *University of Pennsylvania Law Review* 1391, 1395

¹³⁶ See David Cocanower and David Rich, ‘Residency Requirement for Voting’ (1970) 12 *Arizona Law Review* 477, 484

¹³⁷ See V. Harper-Ho (n 130) 273; E. Brozovich (n 130) 408

¹³⁸ See e.g. *Stewart v. Foster*, 2 Binn. 110 (Pa. 1809) 25 (Pennsylvania Supreme Court holding that resident aliens are entitled to vote as a matter of state law); *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 408 (1840) (Illinois Supreme Court affirming that state constitution extended “the right of suffrage to those who, having by habitation and residence, identified their interests and feelings with the citizenry [...] although they may be neither native nor adopted citizens”)

¹³⁹ J. Raskin (n 135) 1397

¹⁴⁰ See Pamela Karlan, ‘Ballots and Bullets: The Exceptional History of the Right to Vote’ (2003) 71 *University of Cincinnati Law Review* 1343, 1348

¹⁴¹ See V. Lippolis (n 119) 80

¹⁴² *Dred Scott v. Sandford*, 19 U.S. (How.) 393 (1857). For a detailed analysis of the facts preceding the case, the ruling, and its effects see Paul Finkelman, *Dred Scott v. Sandford. A Brief History with Documents* (Bedford 1997)

¹⁴³ *Dred Scott*, at 404

amendments that profoundly reshaped the relationship between the states and the federal government in the field of citizenship and electoral rights.¹⁴⁴

The Fourteenth Amendment – by establishing that “all persons born or naturalized in the US [...] are citizens of the US and of the state wherein they reside” and by prohibiting the states from abridging the privilege and immunities of the citizens of the US or depriving them from the due process and the equal protection of the laws – “made state citizenship a matter of federal constitutional law, defining it simply as residence in a state”¹⁴⁵ and simultaneously mandated the application of a federal standard of fundamental rights protection throughout the US.¹⁴⁶ The Fifteenth Amendment – by barring the States from denying or abridging the right to vote of US citizens on “account of race, colour, or previous condition of servitude” and by granting to Congress the power to enforce the provision by appropriate legislation – “marked the first time since the constitutional Convention in Philadelphia that the national government of the US grappled directly and extensively with the issues of voting rights.”¹⁴⁷

Yet, if the Reconstruction amendments sanctioned the involvement of the federal government in the field of electoral rights, they did not effectively prevent many states from continuing to disenfranchise large parts of their population throughout the Jim Crow era.¹⁴⁸ At the same time, in the 1904 case *Pope v. Williams*¹⁴⁹, the US Supreme Court confirmed that the states still enjoyed autonomy in regulating the suffrage of “second-country nationals”, since “the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.”¹⁵⁰ States, moreover, also retained the power to enfranchise non-US citizens for local purposes and the Supreme Court upheld this practice in *Minor v. Happerset*:¹⁵¹ by the 1920s, however, the tradition virtually disappeared.¹⁵²

¹⁴⁴ Compare Bruce Ackerman, *We the People. Volume 2: Transformations* (Harvard University Press 1998) and Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 2000)

¹⁴⁵ Peter Schuck, ‘Citizenship in Federal Systems’ (2000) 48 *American Journal of Comparative Law* 195, 223

¹⁴⁶ See William Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Harvard University Press 1988)

¹⁴⁷ Alexander Keyssar, *The Right to Vote* (Basic Books 2000) 94

¹⁴⁸ Since the purpose of this work is to examine the regulation in the US of the right to vote for non-citizens (“second-country nationals” or “third-country nationals”), I will not address here the dramatic history of domestic disenfranchisement of African-Americans and other minority groups who, despite clearly being citizens of the US and of the state in which they resided, were deprived of their electoral rights at home because of their racial origin. It has to be acknowledged, however, that the struggle to solve the problem of African-American disenfranchisement has been the driving force of electoral rights reform in the US. Cf. Lawrence Friedman, *Law in America* (Modern Library 2002) 69

¹⁴⁹ *Pope v. Williams*, 193 U.S. 621 (1904) (upholding a state law that required a US citizen who enters the state to make a declaration of his intention of becoming a citizen of the state before he can be registered as a voter)

¹⁵⁰ *Ibid* at 632

¹⁵¹ *Minor v. Happerset*, 88 U.S. 162 (1874) (affirming that citizenship has not in all cases been made a condition precedent to enjoy the right to vote)

¹⁵² See J. Raskin (n 135) 1416; Harper-Ho (n 130) 282

The tilt “toward the nationalization of the right to vote”¹⁵³ only occurred in the US during the 20th century. The Nineteenth, Twenty-fourth and Twenty-Sixth Amendments to the US Constitution successively forbade the states from denying or abridging the right to vote of US citizens by reason of sex, failure to pay poll taxes or age.¹⁵⁴ Moreover, finally relying on the enforcement powers set by the Fifteenth Amendment, in the 1950s Congress started to enact a series of Voting Rights Acts aiming at ensuring effective participation at the polls to all US citizens.¹⁵⁵ The federal judiciary then played a “central role”¹⁵⁶ in authorizing and supporting “what amounted to a federal takeover of state voting laws:”¹⁵⁷ the Supreme Court upheld the constitutionality of the Voting Rights legislation¹⁵⁸ and subjected to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment all restrictive voting qualifications set up by the states.¹⁵⁹

The assumption by the federal government of “full responsibility”¹⁶⁰ in guaranteeing voting rights had major consequences for the enfranchisement of US citizens residing in another state of US. In *Dunn v. Blumstein*¹⁶¹ the US Supreme Court struck down a Tennessee law, requiring residency in the state for one year as a prerequisite for voting, for violating the Fourteenth Amendment’s equal protection clause and the right to interstate travel.¹⁶² According to the Court, indeed, the state’s durational residency requirements “impermissibly condition[ed] and penalize[d] the right to travel by imposing their prohibitions on only those [US citizens] who have recently exercised that right [and...] forc[ing] a person who wishes to travel and change residence to choose

¹⁵³ A. Keyssar (n 147) 166

¹⁵⁴ See J. Raskin (n 135) 1425 ff

¹⁵⁵ See eg Voting Rights Act 1965, Pub. L. 89-100 (1965) codified as amended at 42 U.S.C. par 1971 ff. See also Gerald Gunther and Kathleen Sullivan, *Constitutional Law* (13th ed Foundation Press 1997) 984

¹⁵⁶ Peyton P. McCray, ‘Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990’ (2003) 5 *Pennsylvania Journal of Constitutional Law* 665, 667

¹⁵⁷ A. Keyssar (n 147) 266

¹⁵⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the Voting Rights Act 1965 as a valid mean to carry out the commands of the Fifteenth Amendment); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (upholding the provision of the Voting Rights Act 1965 prohibiting polling taxes as condition to vote); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding the provision of the Voting Rights Act prohibiting English-language literacy tests as conditions to vote). On this significant page of the US Supreme Court’s history see Alexander Bickel, ‘The Voting Rights Cases’ [1966] *Supreme Court Review* 79

¹⁵⁹ See *Baker v. Carr*, 369 U.S. 186 (1962) (reviewing apportionment of State legislative seats in Tennessee under the Equal Protection Clause of the Fourteenth Amendment); *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down the Alabama districting system for state legislature). For a more recent overview of the case law of the US Supreme Court in the field of electoral law cf. Pamela Karlan, ‘The Supreme Court’s Voting Rights Trilogy’ [1993] *Supreme Court Review* 245

¹⁶⁰ A. Keyssar (n 147) 256

¹⁶¹ *Dunn v. Blumstein*, 405 U.S. 330 (1972). See also *Carrington v. Rush*, 380 U.S. 89 (1965) (striking down a Texas law that prevented members of the military stationed in the state from establishing residence there for electoral purposes)

¹⁶² On the right of interstate travel see the decisions of the US Supreme Court in *Edwards v. California*, 314 U.S. 160 (1941) (declaring unconstitutional a California law prohibiting the bringing of non-resident indigent persons into the state) and *Shapiro v. Thompson*, 349 U.S. 618 (1969) (declaring unconstitutional a Connecticut law reserving welfare benefits only to citizens who have resided in the state for one year)

between travel and the basic right to vote.”¹⁶³ Denying that the states could have a compelling interest in preserving “the purity of the ballot box”¹⁶⁴ the Court made clear that the right of participation in the democratic process ought to be guaranteed to US citizens anywhere they moved in the US.

On the contrary, the expansion of federal competences in the field of electoral law did not directly benefit aliens (“third-country nationals”) as the power to enfranchise non-US citizens has remained within the purview of the US states.¹⁶⁵ Nevertheless, although recent trends have highlighted a renewed interest for immigrant suffrage at the local level,¹⁶⁶ the issue of voting rights for non-US citizens was mainly dealt with indirectly through the adoption by Congress of uniform federal naturalization rules that facilitate the acquisition of US citizenship – and with it of electoral rights.¹⁶⁷ Whereas citizenship has always been ensured in the US to second-generation immigrants by the application of unconditional *jus soli*,¹⁶⁸ since 1952 requirements for naturalization have been eased and made non-discriminatory for all permanent resident aliens.¹⁶⁹

In sum, a short assessment of the regulation of electoral rights for non-citizens in the US federal system reveals an evolving pattern. Whereas the US states were originally sovereign in deciding the boundaries of the suffrage, and were endowed with quite diversified laws on the matter, a series of constitutional transformations establishing the primacy of federal citizenship over state citizenship¹⁷⁰ and constraining states’ autonomy in the field of electoral rights¹⁷¹ have step by step expanded the competence of the federal government in the regulation of the franchise. As a result, some of the tensions that had characterized the US regime of electoral rights for non-citizens have been solved. Today, especially, US citizens can move from one US state to another and participate in all state and federal elections held in their state of residency under conditions of

¹⁶³ *Dunn*, at 342

¹⁶⁴ *Ibid* at 345

¹⁶⁵ See J. Raskin (n 135) 1419

¹⁶⁶ See Monica Varsanyi, ‘The Rise and Fall (and Rise?) of Non-Citizen Voting: Immigration in the Shifting Scale of Citizenship and Suffrage in the United States’ (2005) 9 *Space and Polity* 113

¹⁶⁷ See G. Neuman (n 26) 310; R. Rubio Marin (n 26) 216. See also Peter Schuck, ‘The Treatment of Aliens in the United States’ in Peter Schuck and Reiner Münz (eds), *Paths to Inclusion* (Berghahn Books 1998) 203, 237

¹⁶⁸ Even before the introduction of the Fourteenth Amendment to the US Const., which constitutionalized the principle that people born in the US are US citizens. See P. Weil (n 99) 20. The Supreme Court confirmed that all persons born in the US are US citizens in *US v. Wong Kim Ark*, 169 U.S. 649 (1898) (denying that the nationality and the racial origin of the parents may deprive a child born on US soil from US citizenship). See Thomas Heller, ‘Changes and Convergence: is American Immigration still Exceptional?’ in Atsushi Kondo (ed), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Palgrave 2001) 196

¹⁶⁹ See Immigration and Nationality Act, Pub. L. 82-414 (1952), codified as 8 U.S.C. 1427. In the literature see also Peter Schuck, ‘The Re-Evaluation of American Citizenship’ in Christian Joppke (ed), *Challenge to the Nation-State* (OUP 1998) 191

¹⁷⁰ See V. Lippolis (n 119) 83, 84

¹⁷¹ See A. Keyssar (n 147) 282

equality.¹⁷² No federal standard, instead, provides for the enfranchisement of non-US citizens, but alien residents can easily acquire US citizenship through a uniform federal procedure and thus become part of the US electorate.¹⁷³

4. Recent developments: the case law of the European Court of Justice

A comparative assessment of the US federal experience reveals several similarities in the constitutional dynamics at play in the US and Europe. Firstly, both in the US and in Europe the regulation of electoral rights for non-citizens has been characterized by tensions and challenges: in the US, the interplay between different state and federal rules historically produced contestations over the conception of the polity and the meaning of the right to vote analogous to those experienced in contemporary Europe. Secondly, both in the US and Europe, electoral right regimes appear to evolve incrementally, with inconsistencies surfacing and being addressed over a long time span and through the concerted action of a plurality of institutions. Hence, in the US, despite the enactment of the Fourteenth and Fifteenth Amendments in the 1860s, it was only in the 1960s that Congress and the federal courts took the decisive step to ensure that the right to vote for US citizens would not be jeopardized when they travelled from one state to another of the US.¹⁷⁴

At the same time, however, major differences remain. Beside the peculiar link that in the US exists between electoral reforms and the struggle for African-Americans enfranchisement,¹⁷⁵ there are structural diversities between the US and the European systems that can hardly be minimized. For instance, whereas as previously mentioned in Section 2 in Europe member states are still sovereign in defining their nationality laws, the US Constitution – as the basic text of a new-founded community made of immigrants – originally gave Congress the power to adopt a uniform naturalization rule, significantly changing the framework in which the demands for alien suffrage took place.¹⁷⁶ In addition, a series of subsequent developments have transformed the US voting

¹⁷² See Alexander Aleinikoff, 'American Citizenship: an Introduction' (2001) 5 *Citizenship Studies* 5

¹⁷³ See Gerald Neuman, 'Nationality Law in the United States and Germany: Structure and Current Problems' in Peter Schuck and Reiner Münz (eds), *Paths to Inclusion* (Berghahn Books 1998) 247, 254

¹⁷⁴ See A. Keyssar (n 147) 166. See also Frank Michelman, 'Conceptions of Democracy in American Constitutional Argument: Voting Rights' (1989) 41 *Florida Law Review* 443, 458

¹⁷⁵ On the struggle for African-American enfranchisement in the South of the US cf. Richard Valelly, *The Two Reconstructions* (University of Chicago Press 2004) and the discussion *supra* at n 148

¹⁷⁶ Cf. G. Neuman (n 26) 310 (arguing that the existence of a federal naturalization rule "available as of right [...] probably explains why so little effort has been made [...] to revive alien suffrage in the [US].") Although inferring a direct causality in the social sciences is always difficult, it seems plausible to argue that the relative ease with which foreigners can become US citizens changes the stakes of alien suffrage and dilutes some of the tensions that instead I have described as a characteristic feature of the voting rights regime for third-country nationals in Europe. See also Laurent Gilbert, 'National Identity and Immigration Policy in the US and the European Union' (2008) 14 *Columbia Journal of European Law* 99, 138

rights system in a way still unknown to Europe. Constitutional amendments, legal reforms and a stronger political awareness of the need to address the challenge of voting rights as a single national democratic problem, eventually led to the establishment of a more consistent political rights regime in the US.¹⁷⁷

It is difficult to predict whether Europe will experience a comparable development. A number of legal changes have recently taken place in Europe, mainly as a result of the jurisprudential and legal transformations occurring in the EU legal order. On the one hand, the EU Court of Justice (ECJ) and the ECtHR have expanded their case law in the field of electoral rights for non-citizens. On the other, the coming into force of the Lisbon Treaty has introduced some discrete innovations in the discipline of EU citizenship which could prospectively affect the regulation of voting rights for EU citizens. Despite their potential future relevance, nevertheless, these transformations do not yet evidence an evolutionary trend in Europe akin to that experienced in the US. From this point of view, additional transformations in EU law would appear to be required to address the main challenges and inconsistencies that afflict the regulation of voting rights for non-citizens in the European multilevel architecture.

The issue of the disenfranchisement of EU citizens was at the heart of several decisions of both the ECtHR and the ECJ.¹⁷⁸ Already in *Matthews*¹⁷⁹ the ECtHR had to decide whether the UK Act for the election of the EU Parliament, by depriving a British citizen residing in Gibraltar of the right to vote, violated Article 3 of the 1st additional Protocol of the ECHR.¹⁸⁰ The ECtHR declared the case admissible, arguing that the UK was responsible under the ECHR “for securing the rights guaranteed by Article 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European.”¹⁸¹ On the merit, it found that the EU Parliament contributed to the achievement of the principle of “effective political democracy”¹⁸² protected by the ECHR and that it was therefore for the ECtHR “to determine in the last resort whether the requirements of Protocol No. 1 ha[d] been complied with.”¹⁸³ While recognizing that “the State enjoys a wide margin of

¹⁷⁷ See A. Keyssar (n 147) 283. See also Elizabeth Meehan, ‘The Constitutions of Institutions’ in Robert Howse and Kalypso Nicolaïdis (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 403

¹⁷⁸ See J. Shaw (n 11) 168 ff. See also Jo Shaw, ‘The Political Representation of Europe’s Citizens: Developments’ (2008) 4 *European Constitutional Law Review* 162

¹⁷⁹ *Matthews v. United Kingdom*, ECHR [1999], Application No. 24833/94 (GC)

¹⁸⁰ The literature on the decision is wide and mostly focuses on the issue of the authority of the ECtHR to review a measure adopted by a Contracting Party of the ECHR in his capacity as a member state of the EU. Cf. Iris Canor, ‘*Primus Inter Pares*. Who is the Ultimate Guardian of Human Rights in Europe’ (2000) 25 *European Human Right Review* 1, 3. For an analysis of the electoral issues involved in the decision cf. Henry Schermers, ‘Case Note: *Matthews v. UK*’ (1999) 36 *Common Market Law Review* 673

¹⁸¹ *Matthews* par 35

¹⁸² *Ibid* par 42

¹⁸³ *Ibid* par 63

appreciation”¹⁸⁴ on electoral issues, then, the ECtHR ruled that “in the circumstances of the present case, the very essence of the applicant’s right to vote [...] was denied.”¹⁸⁵

Similarly, in *Aruba*,¹⁸⁶ the ECJ subjected to strict scrutiny a Dutch law disenfranchising Dutch nationals residing in the Dutch overseas territory of Aruba from the elections for the EU Parliament.¹⁸⁷ Since the petitioners could “rely on the rights conferred on citizens of the EU,”¹⁸⁸ the ECJ addressed the question whether “a citizen of the EU resident or living in an overseas territory has the right to vote and to stand as a candidate in elections to the EU Parliament,”¹⁸⁹ with the understanding that “the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State [but] in compliance with Community law.”¹⁹⁰ Given that the Dutch law unreasonably withheld voting rights for Dutch nationals residing in Aruba while allowing expatriate citizens residing in other non-member countries to vote for the EU Parliament, however, the ECJ concluded that the Netherlands had unduly violated the general “principle of equal treatment or non-discrimination.”¹⁹¹

At the same time, in *Gibraltar*¹⁹² (a case decided on the same day of *Aruba* and that had originated as a follow up to *Matthews*)¹⁹³ the ECJ upheld the decision of a member state to extend the franchise for the EU Parliament to third-country nationals.¹⁹⁴ Whereas Spain complained that the UK – in amending its electoral Act to comply with *Matthews* – had violated EU law by extending the franchise for the EU Parliament to non-EU citizens, i.e. qualified Commonwealth citizens, resident in Gibraltar, the ECJ rejected the argument that EU primary law excluded “a person who is not a citizen of the EU, such as a qualified Commonwealth citizen resident in Gibraltar, from being entitled to the right to vote and stand for election”¹⁹⁵ to the EU Parliament. The ECJ, on the contrary, affirmed that the electoral “rights recognised by the Treaty are [not necessarily] limited to citizens of the EU.”¹⁹⁶

Taken together these decisions evidence a rising role of the ECJ and the ECtHR in the field of voting rights and demonstrate how “the creation of a Europe-wide personal *status* of citizen of the EU can result in a quite substantial intrusion into the national electoral sovereignty of the

¹⁸⁴ Ibid par 64

¹⁸⁵ Ibid par 65

¹⁸⁶ Case C-300/04 *Eman and Sevinger (Aruba)* [2006] ECR I-8055

¹⁸⁷ See J. Shaw (n 11) 177 ff

¹⁸⁸ *Aruba* par 29

¹⁸⁹ Ibid par 32

¹⁹⁰ Ibid par 45

¹⁹¹ Ibid par 57

¹⁹² Case C-145/04 *Spain v. UK (Gibraltar)* [2006] ECR I-7917

¹⁹³ See Maria Elena Gennusa, ‘La Cedu e l’Unione Europea’ in Marta Cartabia (ed), *I diritti in azione* (Il Mulino 2007) 91, 126

¹⁹⁴ See Leonard Besselink, ‘Case Note: *Spain v. UK*’ (2008) 45 *Common Market Law Review* 787

¹⁹⁵ *Gibraltar* par 70

¹⁹⁶ Ibid par 74

Member States.”¹⁹⁷ While *Gibraltar* (like *Minor v. Happerset* in the US context) affirmed the autonomy of the member states in expanding the franchise to third-country nationals, *Aruba* and *Matthews* asserted the authority of the ECJ and of the ECtHR in reviewing the reasonableness of the states’ disenfranchisement of EU citizens residing abroad.¹⁹⁸ These precedents could therefore plant the seeds for future developments in judicial review of national laws and practices restricting the suffrage of EU citizens. At the same time, one needs to be aware that all cases dealt with the reach of voting rights for the EU Parliament and concerned quite specific issue (linked to the peculiar *status* of the overseas territories of Gibraltar and Aruba). It is uncertain therefore whether these decisions will produce long-term effects in the regulation of electoral rights at the EU level.

Similar cautions must surround the appreciation of the innovations introduced by the Lisbon Treaty. The entry into force of the new EU pact on 1st December 2009 has not brought about path-breaking reforms to the substance of EU citizens’ rights.¹⁹⁹ Despite bringing human rights at the core of the European integration project (by attributing binding value to the EU Charter of Fundamental Rights and requiring the accession of the EU to the ECHR),²⁰⁰ the Lisbon Treaty leaves unmodified the voting rights clauses originally codified in the TEC and does not grant additional competences to the EU in the field of electoral law.²⁰¹ Nevertheless, following the case law of the ECJ – which began around 10 years ago to state that EU citizenship “is destined to be the fundamental *status* of nationals of the Member States”²⁰² – the Lisbon Treaty has maintained an amendment to the definition of EU citizenship originally proposed during the Constitutional Convention.²⁰³

As already mentioned,²⁰⁴ Articles 9 TEU and 20 TFEU (replacing former Article 17 TEC) now state that EU citizenship “shall be additional to [...] national citizenship” – with the wording “shall be additional to” replacing “shall complement”. “This seems a very small and cosmetic amendment. It was however done for a reason and it is submitted that this modification supports a

¹⁹⁷ J. Shaw (n 11) 189

¹⁹⁸ See L. Besselink (n 194) 806

¹⁹⁹ See Annette Schrauwen, ‘European Union Citizenship in the Treaty of Lisbon: Any Change at All?’ (2008) 15 *Maastricht Journal of European and Comparative Law* 55, 63

²⁰⁰ See Maria Cartabia, ‘I diritti fondamentali e la cittadinanza dell’Unione’ in Franco Bassanini and Giulia Tiberi (eds), *Le nuove istituzioni europee: Commento al Trattato di Lisbona* (Il Mulino 2008) 81; Wolfgang Weiß, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon’ (2011) 7 *European Constitutional Law* 64

²⁰¹ See D. Kochenov (n 55) 220. See also Articles 39 and 40 CFR (restating that EU citizens have a right to vote at the local and supranational level in their state of residence, as indicated in Article 22 TFEU)

²⁰² See Case C-184/99 *Grzelczyk v Centre public d’aide sociale* [2001] ECR I-6193 par 31; Case C-224/98 *D’Hoop* [2002] ECR I-6191 par 28; Case C-148/02 *Garcia Avello* [2004] ECR I-11613 par 22. On the development of the ECJ’s case law in the field of EU citizenship see Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68:2 *Modern Law Review* 233; John Mather, ‘The Court of Justice and the Union Citizen’ (2005) 11 *European Law Journal* 722

²⁰³ See Clemens Ladenburger, ‘Fundamental Rights and Citizenship of the Union’ in G. Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 311, 318

²⁰⁴ See *supra* n 38

move towards a more independent Union citizenship.”²⁰⁵ Whereas a complementary EU citizenship cannot exist in the absence of a national citizenship,²⁰⁶ “if EU citizenship is *additional to* national citizenship, then there might one day be EU citizenship without national citizenship.”²⁰⁷ This innovation has a potential relevance on the regulation of electoral rights for EU citizens as an expanded conception of EU citizenship could be the basis for future decisions by the ECJ aimed at increasing the degree of protection of voting rights for EU citizens who reside in another member state.

A number of very recent judicial pronouncements, reveal that the ECJ appears willing to make use of the concept of EU citizenship in order to expand fundamental rights standards protected under EU law even to situations traditionally regarded as falling within the exclusive purview of the member states. The *Zambrano*²⁰⁸ case is a recent and well-known evidence in this regard.²⁰⁹ In the case, the ECJ had to confront a challenge against a Belgian order of expulsion of a non-EU national, father of a child holding Belgian nationality (and thus EU citizenship) who had never exercised his free movement rights.²¹⁰ In the case, Advocate General (AG) Sharpston provided a very detailed and sophisticated motivation to conclude that the rights connected to the EU citizenship *status* had to be recognized even to individuals who had not exercised their free movement rights.²¹¹ And the ECJ found in favour of the applicant, squarely concluding that Article 20 TFEU “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”²¹²

Emphasizing the central role of EU citizenship in an enlarged Europe, therefore, Dimitry Kochenov has argued that the ECJ should review national electoral laws denying expatriate voting: these legal measures, by disenfranchising from national elections EU citizens who have moved to another EU state, “discourage[] EU citizens from moving from their Member States of nationality to other Member States”²¹³ and unduly burden their right to free movement²¹⁴ (i.e. the EU

²⁰⁵ A. Schrauwen (n 198) 59

²⁰⁶ See Sabino Cassese, ‘La cittadinanza europea e le prospettive di sviluppo dell’Europa’ [1996] *Rivista Italiana di Diritto Pubblico Comunitario* 869, 870 and Ana Maria Guerra Martins, ‘Citizenship of the European Union: Conditions of Citizenship’ (2007) 19 *European Review of Public Law* 83, 86

²⁰⁷ A. Schrauwen (n 198) 60 (emphasis in original)

²⁰⁸ Case C-34/09 *Zambrano*, judgment of 8 March 2011 nyr (holding that EU law granted a national of a member state – and thus an EU citizen – the right of residence for himself and his third-country national parents in his member state of nationality, irrespective of the previous exercise by him of free movement in another EU state)

²⁰⁹ But see Case C-434/09 *McCarthy*, judgment of 5 May 2011 (holding that the EU citizenship provisions do not apply to a citizen who has not exercised his free movement rights and has always resided in his member state of nationality)

²¹⁰ See Anja Lansbergen and Nina Miller, ‘European Citizenship Rights in Internal Situations: An Ambiguous Revolution?’ (2011) 7 *European Constitutional Law Review* 287

²¹¹ *Zambrano*, Opinion of AG Sharpston, par 151 ff

²¹² *Zambrano* par 42

²¹³ D. Kochenov (n 40) 219

equivalent of the right to interstate travel in the US). An indirect support for this position has been provided by the First Section of the ECtHR, which, in its 2010 decision in *Sitaropoulos & Giakoumopoulos v. Greece*,²¹⁵ held that the impossibility for Greek citizens living abroad to exercise their right to vote in the Greek parliamentary elections amounted to a violation of Article 3 of the 1st additional Protocol to the ECHR. The case had been brought by Greek officials of the Council of Europe, who were complaining “that in order to exercise their right to vote, [they] would have to incur substantial travelling expenses and that considerable disruption could be caused to their family.”²¹⁶ In ruling in favour of the applicants, the ECtHR put major stress on the fact that the Greek Constitution did include a provision to extend voting rights to expatriate citizens, but that this requirement had remained, without justification, unimplemented for “approximately thirty-five years.”²¹⁷

Nevertheless, the decision of the First Section was recently overruled by the Grand Chamber of the ECtHR in a March 2012 judgment.²¹⁸ In this decision, the ECtHR remarked how “there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision.”²¹⁹ The ECtHR hence approached the question “whether Article 3 of Protocol No. 1 places States under an obligation to introduce a system enabling expatriate citizens to exercise their voting rights from abroad”²²⁰ by considering “the relevant international and comparative law [...and] the domestic law of the country concerned.”²²¹ After a deep survey of these transnational sources, however, the ECtHR affirmed that “none of the legal instruments examined [...] forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote.”²²² In addition, the ECtHR exercised a form of judicial restraint, underlying how it was not “its task to indicate to the [Greek] authorities at what time and in what manner they should give

²¹⁴ Among the ECJ’s decisions reviewing states’ measures which burden the EU citizens’ freedom of movement see Case C-192/95 *Tas-Hagen en Tas* [2006] ECR I-10451 (declaring contrary to EU free movement rights a Dutch law which granted a pension to Dutch civilian war victims only if they reside in the Netherlands); Joined Cases C-11 and C-12/06 *Morgan* [2007] ECR I-9161 (declaring contrary to EU free movement rights a German law which set as a condition for the obtainment of an educational grant for studying in another member state that the studies are continuation of the educational activity pursued for at least one year in the home member state)

²¹⁵ *Sitaropoulos & Giakoumopoulos v. Greece*, ECHR [2010], Application No. 42202/07

²¹⁶ *Ibid* par 39

²¹⁷ *Ibid* par 41

²¹⁸ *Sitaropoulos & Giakoumopoulos v. Greece (No. 2)*, ECHR [2012], Application No. 42202/07 (GC)

²¹⁹ *Ibid* par 66

²²⁰ *Ibid* par 70

²²¹ *Ibid* par 71

²²² *Ibid* par 75. The ECtHR however mentions the Council of Europe Parliamentary Assembly Resolution 1459 (2005) par 3 (encouraging states to give “due regard [...] to the voting of citizens living abroad.”)

effect to [the provision on voting rights for expatriates of the state] Constitution.”²²³ Hence, despite remarking that “the presumption that non-resident citizens are less directly or less continually concerned with the country’s day-to-day problems and have less knowledge of them [...] does not [...] apply in the instant case”²²⁴ the Grand Chamber concluded that “there ha[d] been no breach of [the ECHR].”²²⁵

Given the restraint exercised by the ECtHR, it is therefore difficult to predict whether the ECJ will be willing to swiftly expand its oversight over states franchise laws to ensure greater protection for the voting rights of EU citizens (as second-country nationals). As the example of the US cautions, the Supreme Court for almost a century refused to scrutinize states’ electoral laws, despite the fact that the Fourteenth Amendment had clearly established the supremacy of federal over states’ citizenship. As the recent *Rottmann*²²⁶ decision of the ECJ makes clear, otherwise, the EU judiciary is far from establishing in a praetorian way the primacy and autonomy of EU citizenship over national citizenship, absent an amendment to the EU treaties.²²⁷ While the petitioner in the case had challenged the compatibility of a national administrative decision depriving him of German citizenship (and thus of EU citizenship) because it has acquired it with fraud,²²⁸ the ECJ found “the legitimacy, in principle, of a decision withdrawing naturalisation on account of deception [...even] when the consequence of that withdrawal is that the person in question loses, in addition to the nationality of the Member State of naturalisation, citizenship of the Union.”²²⁹

Moreover, it can be questioned whether the action of the ECJ in reviewing state electoral laws as suggested in the literature²³⁰ might achieve truly satisfactory results: were the ECJ to review under its free movement jurisprudence the states’ laws disenfranchising EU citizens moving in another EU state, in fact, its decision could only force member states to introduce provisions for expatriate voting. Yet, this effect is the opposite of that achieved by the US Supreme Court in its *Dunn v. Blumstein* decision and seems to go against the logic – which was mentioned also by the

²²³ *Sitaropoulos (No. 2)* par 76

²²⁴ *Ibid* par 79

²²⁵ *Ibid* par 81

²²⁶ Case C-315/08 *Rottmann v. Freistaat Bayern* [2010] I-1449 (holding that the decision of the German *Land* Bayern to deprive a German citizen – and thus an EU citizen – of his nationality – and thus of EU citizenship – had to be reviewed for its compatibility with the EU principle of proportionality)

²²⁷ See for a more in depth assessment of the decision of the ECJ, Federico Fabbrini, ‘La Corte di Giustizia Europea e la cittadinanza dell’Unione’ [2010] *Giornale di Diritto Amministrativo* 702

²²⁸ Interestingly, in his theoretical assessment of the limits imposed by the general principles of EU law on the autonomy of the member states in the field of nationality laws G.R. de Groot (n 102) 17 n 80 had anticipated a *Rottmann*-like hypothesis and advanced a solution opposite to that chosen by the ECJ on the understanding that it would be “remarkable that a European citizen loses this *status* as a consequence of criminal behaviour, in spite of the fact that he continues to reside within the territory of the Union”. See also Stephen Hall, ‘Loss of Union Citizenship in Breach of Fundamental Rights’ (1996) 21 *European Law Review* 129, 143

²²⁹ *Rottmann* par 54

²³⁰ See *supra* n 213

Grand Chamber of the ECtHR in *Sitaropoulos & Giakoumopoulos v. Greece* through a reference to the writings of Jürgen Habermas – that residence on a territory should be the decisive (albeit not the only one) criterion for the attribution of voting rights.²³¹ Whereas, in fact, the Supreme Court forced the state of residence to enfranchise all resident US citizens, a review by the ECJ of state franchise laws under the freedom of movement provisions of the EU Treaty, would only compel the state of nationality to grant absentee ballots to its expatriate citizens without, however, empowering them to vote in their new EU state of residence.

As a consequence, it seems that only additional developments within the European multilevel architecture would be capable of providing a satisfactory answer to the inconsistencies emerging in the field of electoral rights for non-citizens. The transformations brought about by the recent jurisprudence of the ECJ and the ECtHR and by the entry into force of the Lisbon Treaty have opened several interesting scenarios concerning the protection of electoral rights for non-citizens. Yet these developments reveal that the European electoral rights regime is still afflicted by a number of unresolved tensions and inconsistencies. As the US experience in the field of electoral rights for non-citizens demonstrates, however, constitutional change in a complex federal system is an ever-ongoing process, subject to incremental developments rather than revolutionary breaks.²³²

5. Future prospects: beyond the Lisbon Treaty

From the investigation undertaken in the previous Section it appears that only additional transformations in EU law would be capable of providing a satisfactory answer to the challenge of inconsistency emerging in the field of electoral rights for non-citizens in Europe. *De jure condendo*, it might be advisable for the member states and the EU institutions to tackle the democratic challenge posed by the enfranchisement of non-citizens by devising further changes in the structure of European law.²³³ This Section will attempt to advance, on the basis of a comparative institutional

²³¹ *Sitaropoulos (No. 2)* par 61

²³² See also Editorial, 'The EU and Constitutional Change' (2010) 6 *European Constitutional Law Review* 335

²³³ See Ruth Rubio Marin, *Immigration as a Democratic Challenge* (CUP 2000). In support of a normative approach to the questions of European citizenship *latu sensu* cf. Massimo La Torre, 'Citizenship, Constitution and the European Union' in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 435, 437 (arguing that since the concept of EU citizenship is "not yet permanent and allows for evolution, an evolutive interpretation of it and even a *de lege ferenda* approach are legitimate.")

analysis,²³⁴ several proposals that may be appreciated as a useful step to increase the consistency of the European electoral rights regime.

In particular, the following two proposals will be advanced. First, to address the challenge generated by the overlap of the EU provisions enfranchising EU citizens (only) in local and EU elections and the national rules denying expatriate voting, it will be argued that 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 the general elections in the member state of residence.

Second, to address the challenge posed by the right to vote of third-country nationals permanently residing in the EU, it will be maintained that either a minimum harmonization of the national laws on local elections should be undertaken or the power to make laws on naturalization should be shifted to the EU: a third-country national should either benefit from voting rights (at least) at the local level in any EU member state or have the chance to acquire EU citizenship through a uniform EU-governed process.

These proposals draw cautionary tales from the US constitutional experience. Indeed, it was highlighted in Section 3 that in the US, step by step, residence has become the basis for the exercise of electoral rights for state and federal elections.²³⁵ Whereas originally state citizenship was the condition for the exercise of the franchise, the Fourteenth Amendment's citizenship clause²³⁶ and the increasing nationalization of electoral rights through the activities of the federal government²³⁷ made voting rights a pure incident of habitation, so that today any individual who holds US federal citizenship can participate in all elections in the state in which he resides. Otherwise, on the issue of alien suffrage, US history shows that while for a long time states autonomously decided whether to extend the franchise to immigrants,²³⁸ in the last century the main avenue pursued in this respect has been the attribution of national citizenship through a uniform naturalization rule set by Congress.²³⁹

The analysis of the US experience also offers some insightful indications as to which level of government, and which institutions in it, can best be trusted to realize successful reforms in the field of voting rights and citizenship. Hence, in the US, over time it became "abundantly clear to both Congress and the courts that universal suffrage would not be achieved by the decentralized actions of the fifty states, each with its own historical legacy, its own political conflicts, its own

²³⁴ See Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1994) and with specific reference to the EU Miguel Poiaras Maduro, *We the Court: the European Court of Justice and the European Economic Constitution* (Hart Publishing 1998) 117

²³⁵ See A. Aleinikoff (n 172) 5; V. Lippolis (n 119) 85

²³⁶ See C. Schönberger (n 118) 70; P. Karlan (n 140) 1349

²³⁷ See A. Keyssar (n 147) 256; P. McCray (n 156) 667

²³⁸ See J. Raskin (n 135) 1393; V. Harper-Ho (n 130) 273

²³⁹ See G. Neuman (n 173) 254; T. Heller (n 168) 200

minorities, and special issues. If the polity was going to be democratized, it would require action by the national government.”²⁴⁰ Indeed it was through the adoption of a series of revisions to the 1787 Constitution²⁴¹ and through the incremental involvement of the federal government in those domains—citizenship and electoral law—that were originally believed to be state’s prerogatives²⁴² that the problems of voting rights were historically addressed in the US.

On the other hand, within the federal government—notwithstanding the central role that courts have played, especially since the 1950s, in ensuring the effectiveness of the right to vote²⁴³—it has been the political branches of government who have led the efforts in the promotion of electoral rights.²⁴⁴ As already argued, for long periods of US history “the voteless fared much better appealing to the people and to the legislative, as opposed to the judicial, process. The Supreme Court gave us *Dred Scott* [...] but Congress and two-thirds of the states gave us the Fifteenth amendment and women’s suffrage.”²⁴⁵ Today, the responsiveness of the federal judiciary to electoral rights’ claims has increased steadily and “the Supreme Court’s view ran remarkably parallel to those of Congress.”²⁴⁶ Still, the elected branches keep the leading position in the policy areas of voting rights as well as of citizenship and migration.²⁴⁷

Correspondingly, in designing proposals for a reform of the European multilevel system, the emphasis will be placed on the potential role of the supranational institutions: the nature of the problems of inconsistency emerging in the field of electoral law for non-citizens and the fragmented answers of the member states show that coherent action can be taken only at the EU level.²⁴⁸ Otherwise, although the role of the ECJ should not be diminished, it will be claimed that the EU *pouvoir constituant* should be directly at the forefront of the reform efforts, through amendments to the EU treaties.²⁴⁹

Indeed, as it was highlighted in the previous Section, the ECJ has played in the last few years a remarkable role in enhancing the meaning and reach of EU citizenship²⁵⁰ and electoral

²⁴⁰ A. Keyssar (n 147) 283

²⁴¹ See A. Bickel (n 132) 374; G. Gunther and K. Sullivan (n 155) 917

²⁴² See A. Keyssar (n 147) 282; P. Karlan (n 140) 1354

²⁴³ See P. McCray (n 156) 667; P. Karlan (n 159) 245

²⁴⁴ See A. Keyssar (n 147) 166; G. Neuman (n 26) 334

²⁴⁵ J. Raskin (n 135) 1440

²⁴⁶ A. Keyssar (n 147) 283

²⁴⁷ See R. Schuck (n 167) 217; R. Rubio Marin (n 26) 217

²⁴⁸ See D. Kochenov (n 55) 205. But see J. Shaw (n 11) 232 (highlighting the importance of the principle of subsidiarity, and the advantages of a coordinated action at the EU level, but affirming that “the impetus for change seems more likely to come from the national level rather than the EU level.”)

²⁴⁹ See Bruno de Witte, ‘The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process’ in Neil Walker et al (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002) 39 and Paul Craig, ‘Constitution, Constitutionalism and the European Union’ (2001) 7 *European Law Journal* 125

²⁵⁰ See S. O’Leary (n 57) 68; D. Kostakopoulou (n 202) 235

rights,²⁵¹ and the possibility of further involvement of the European judiciary in the field should not be underestimated. Nevertheless, as indicated above, judicial remedies also have some important drawbacks as they seem to be capable of achieving only second-best solutions that do not solve the problems of inconsistency entirely. More fundamentally, though, it is the inherent democratic dimension of the issue of electoral rights which requires democratic institutions (before unelected courts) to take on the burden of appropriately addressing the democratic challenges that the right to vote for non-citizens poses.²⁵²

Beyond the institutional issue, it is argued that the proposals advanced here can offer a satisfactory solution to the challenge of inconsistency that were identified in Section 2. As previously highlighted, a first major tension arises in the European multilevel system because, as the law now stands, citizens of a EU member state may vote only for municipal and supranational elections when they reside in a member state of which they are not citizens. EU law, however, does not define what municipal election means. Moreover, EU law does not grant EU citizens electoral rights at the national level in their country of residence and, if their country of nationality denies expatriate voting, they inevitably become disenfranchised. A first proposal for reform, therefore, would be to amend the EU treaties in order to substantially increase the floor of protection currently ensured to non-citizens voting by EU law, extending electoral rights also for general elections to non-citizens holding the nationality of another EU member states and permanently residing in the EU country concerned.²⁵³

This proposal would address the inconsistencies that emerge in the regulation of electoral rights for second-country nationals by making residence the core condition for the exercise of voting rights.²⁵⁴ This is also the case in the US, where “the terms citizens and residents are considered essentially interchangeable”²⁵⁵ since the adoption of the Fourteenth amendment. The Supreme Court has confirmed that states have almost no discretion on this issue by striking down in *Dunn v. Blumstein* a state provision that required residency in the state for one year as a prerequisite for voting.²⁵⁶ If this proposal were enforced, the current contradictions affecting voting rights for EU citizens expatriated in another EU country would be overcome. EU citizens residing in another

²⁵¹ See L. Besselink (n 194) 788; J. Shaw (n 11) 189

²⁵² See R. Rubio Marin (n 233)

²⁵³ For support see also H. Lardy (n 35) 625; D. Kostakopoulou (n 37) 644; D. Kochenov (n 55) 221. See then J. Shaw (n 11) 198-199 (advancing as an alternative way forward also the “use of a mechanism of international law outside the formal legal framework of the EU Treaties.”)

²⁵⁴ See Garot (n 110) 235. See also Gareth Davies, “‘Any Place I Hang My Hat?’ or: Residence is the New Nationality” (2005) 11 *European Law Journal* 43, 55

²⁵⁵ V. Lippolis (n 119) 85. See also M. La Torre (n 233) 447 ff (arguing in favour of basing political rights on residence and emphasizing how already “in the American Declarations of Rights, we find that the fundamental justification of citizenship is a common concern in the commonwealth as instantiated by *permanent residence*”) (emphasis in the original)

²⁵⁶ See *supra* n 161

EU member state would not risk being deprived of the opportunity to express their voices in the choice of a national legislature where their home country denies expatriate voting: instead, they would be entitled to full political participation anywhere in the EU, no matter what their national origin is.²⁵⁷

A second tension in the European multi-tiered electoral architecture is generated because, as the law now stands, third-country nationals legally residing in the EU enjoy a set of fundamental rights that is common to all EU member states on the basis of Directive 2003/109 but their enfranchisement (even for local elections) varies depending on the legislation or the international agreements adopted by the country in which they happen to reside since no real transnational minimum standard is currently in force Europe-wide. To address this situation, two alternative proposals can be envisaged: On the one hand, the EU institutions could enact legislation to ensure voting rights at the local level for all permanent-resident third-country nationals;²⁵⁸ on the other – more structurally – the member states could empower the EU to enact a uniform naturalization law by which aliens could acquire directly EU citizenship and rights.²⁵⁹

These set of proposals would address the inconsistencies that emerge in the regulation of electoral rights for third-country nationals. The first alternative would secure alien suffrage at the local level throughout Europe,²⁶⁰ and could be reached either by expanding the scope of Directive 2003/109 or by requiring EU states to sign the CPFPL. An EU-led harmonization of member states' provisions on foreigners' suffrage would indeed repeal the unreasonable asymmetries that currently exist. The second alternative would allow third-country nationals to acquire EU citizenship following a EU-based naturalization process and, thereafter, exercise electoral rights. This solution would mirror the original US one,²⁶¹ where electoral rights are now conditioned by the possession of US citizenship, but the latter automatically stems from birth on US soil or can be acquired by

²⁵⁷ See also Augustin José Menéndez, 'The European Democratic Challenge: the Forging of a Supranational *Volonté Générale*' (2009) 15 *European Law Journal* 277

²⁵⁸ For support see also H. Lardy (n 35) 627; R. Rubio Marin (n 26) 222; S. Besson and A. Utzinger (n 90) 580; J. Shaw (n 11) 236; D. Kochenov (n 40) 228-229. See also Mark Bell, 'Civic Citizenship and Migrant Integration' (2007) 13 *European Public Law Review* 311

²⁵⁹ For support see also H. Lardy (n 35) 628; S. Besson and A. Utzinger (n 90) 581; D. Kostakopoulou (n 37) 644; D. Kochenov (n 40) 227. See also Castro Oliveira (n 98) 196 (explaining that this solution would imply separating EU citizenship from state citizenship and making the acquisition of the first the priority for long-term residents third-country nationals, just as it is in the US)

²⁶⁰ The grant of voting rights as an alternative to naturalization should be provided especially for the hypothesis in which EU citizenship could be acquired by long-term residents third-country nationals only by giving up their original citizenship. In this case, in fact, immigrants may not want to renounce their original nationality. For a human rights defence of dual citizenship and for an argument that all nationality laws of liberal democratic states should allow individuals to possess dual citizenship see however Peter Spiro, 'Dual Citizenship as Human Rights' (2010) 8 *International Journal of Constitutional Law* 111. See also Christian Joppke, 'Exclusion in the Liberal State' (2005) 8 *European Journal of Social Theory* 43

²⁶¹ See *supra* text accompanying n 176

right at the conditions set by the federal naturalization Act.²⁶² If such a proposal were enforced, the current incoherencies plaguing voting rights for third-country nationals would be resolved by indirectly integrating them in the EU electorate.²⁶³

Needless to say, these proposals are simple scholarly suggestions on possible ways to address the challenges posed by voting rights in a multilevel constitutional architecture. The issue of the expansion of voting rights for second-country and third-country nationals in the EU seems to have recently returned at the center of the attention of scholars and policy-makers, and this chapter hopes to contribute to this new debate.²⁶⁴ Nevertheless, it is submitted that a consensus among the European institutional actors would be required to translate any proposal from academic exercise to actual policy reforms and I am well aware that no agreement seems to exist on these issues at the moment.²⁶⁵ Otherwise, it is clear that any future discussion about the legal tools to overcome the tensions of the European electoral rights regime will have to address also the broader question of the nature of the European political community.²⁶⁶ Indeed, there are at least two competing visions about the purpose of the European integration project and the choice between them will determine which path the EU voting rights regime might follow.²⁶⁷

One vision considers the European project exclusively as an international arrangement of limited scope. For those who agree with this view, there are valuable arguments to sacrifice further consistency in the regulation of electoral rights for non-citizens on the shrine of national sovereignty. Another vision, on the contrary, conceives the ultimate goal of European experiment to be the creation of a borderless polity in which EU citizens can enjoy equal constitutional rights.

²⁶² See R. Schuck (n 167) 234; G. Neuman (n 173) 251

²⁶³ Cf. however Joel Fetzer, 'The Evolution of Public Attitude Toward Immigration in Europe and the United States, 2000-2010' (Robert Schuman Center for Advanced Studies – Migration Policy Institute Working Paper, 2011) (documenting trends in anti-immigration opinion in the EU and the US)

²⁶⁴ See notably the debate triggered by the European Union Observatory on Democracy of the European University Institute on 'Should EU Citizens Living in Other Member States Vote There in National Elections?' (including eleven contributions from academics and EU policy-makers) available at <http://eudo-citizenship.eu/commentaries/594-should-eu-citizens-living-in-other-members-states-vote-there-in-national-elections>

²⁶⁵ See also D. Kochenov (n 55) 202; S. Besson and A. Utzinger (n 90) 590; J. Shaw (n 11) 232. See also Jorg Monar, 'A Dual Citizenship in the Making: the Citizenship of the European Union and its Reform' in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer 1998) 167, 183 (arguing that "there is little indication so far that the Member States are willing to go significantly beyond the *status quo* in the area of democratic participation. [...] Yet some progress on the Citizenship of the Union is clearly needed.")

²⁶⁶ For a reflection on the European political identity and its legitimacy compare Miguel Poiars Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 *International Journal of Constitutional Law* 332 and Mattias Kumm, 'To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty' (2005) 11 *Columbia Journal of European Law* 481

²⁶⁷ For an discussion of the competing visions on the European integration project see Robert Howse and Kalypso Nicolaïdis, 'Introduction: The Federal Vision, Levels of Governance and Legitimacy' in Robert Howse and Kalypso Nicolaïdis (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 1. On the importance that in the US has played the emergence of the self-conception of being "one nation" (rather than simply a "states compact") in developing a political-constitutional identity see then Michel Rosenfeld, 'The European Treaty-Constitution and Constitutional Identity: A View From America' (2005) 3 *International Journal of Constitutional Law* 316

Those who support this alternative idea, hence, regard, e.g., as “arguably wholly inconsistent for the EU and the Member States to [enfranchise, EU citizens] in relation to *local* and *European* [elections] whilst ignoring the impact upon democratic participation in *national* elections.”²⁶⁸ In this view, in fact, “eligibility to vote and stand as candidates at the national elections in the Member State of residence [...] should logically be the ultimate goal of the development of European citizenship.”²⁶⁹ Since these visions are based on conflicting understandings of the finality of European integration, the remedies that they advance to address the challenges of citizenship and electoral rights shape opposite prospects for the future political identity of Europe and the legitimacy of its transnational democracy.

In conclusion, there are several possible responses to the challenge of inconsistency that affect the picture of voting rights in the European multilevel system of human rights protection. By analyzing the US experience and its developments, one may advance some proposals to reform the law. It appears that the EU is in a relatively more adequate position to manage the inconsistency appropriately. Similarly, although measures could perhaps be adopted at the jurisprudential level, it seems that the most effective transformations would take place through constitutional reforms rather than through the activity of the courts. To this end, a proposal would be to amend EU law in order to extend to national elections the right to vote of EU citizens residing in another EU member state and to enfranchise in local elections third-country nationals who have a long-term residence permit in the EU. Whether a similar agreement could be reached by the relevant institutional actor is difficult to predict. The success of any future reform of the EU electoral rights regime, however, remain inextricably linked to the future political prospects of the European polity.

Conclusion

This chapter has analyzed the regulation of electoral rights for non-citizens in the European multilevel constitutional architecture. Its purpose has been to examine the constitutional dynamics that emerge in the field of electoral rights for non-citizens from the complex interaction between national and transnational law in Europe, in a comparative perspective with the US federal experience. The chapter has argued that the overlap and the interplay between domestic and supranational law has produced new challenges and pressures in the field of electoral rights for non-citizens. In particular, it has been maintained that the development of a substantive body of laws

²⁶⁸ J. Shaw (n 11) 195 (emphasis in original)

²⁶⁹ D. Kochenov (n 40) 201

regulating voting rights beyond the states has placed under strain those domestic laws and practices constraining the electoral entitlements of second-country nationals or *tout court* disenfranchising third-country nationals.

A summary review of national legislation regulating voting rights for non-citizens has revealed the existence of significant horizontal differences among the EU member states on the issue of alien suffrage. Whereas there are countries which have adopted a broad conception of the franchise, extending voting rights to non-citizens even in national elections, in other member states an extremely restrictive approach has traditionally prevailed, preventing any extension of the suffrage to aliens. Despite these variations among the EU countries, however, since the 1990s member states have lost their full sovereignty on the issue of electoral rights for non-citizens as a consequence of the growing impact of supranational law. While the CPFPL has enhanced the right of political participation for third-country nationals at the local level, the EU Treaty has established a right for second-country nationals who permanently reside in another EU member state to cast a ballot in local and EU elections in their member state of residence.

This complex overlap of domestic and supranational laws has created new tensions and inconsistencies in the picture of electoral rights for non-citizens in Europe. EU law, in particular, has put under pressure restrictive domestic electoral laws, bringing to light cases of asymmetries and discriminations in the electoral entitlements of second and third country nationals. As I have claimed, however, this challenge of inconsistency is not *sui generis*: rather, it is reflected in the US federal experience. In the original US constitutional arrangement, competence on electoral rights for non-citizens was reserved to the states, which had widely diverging laws. Through a series of constitutional, legislative and judicial reforms, however, the federal government step by step intervened in the regulation of the electoral rights of non-citizens, especially in order to ensure that US citizens could enjoy voting rights for all elections in any state in which they resided. The power to extend voting rights to third-country nationals, instead, still today belongs the states, but the federation has been empowered since its foundation to enact a general naturalization Act that allows aliens to become US citizens, and acquire electoral rights, by following a uniform procedure.

In light of the US example, the developments triggered in Europe by the recent case law of the ECJ and the ECtHR and by the entry into force of the Lisbon Treaty seem to open possible interesting scenarios for the future but do not entirely address the existing challenges in the field of electoral rights for non-citizens. From this point of view, additional reforms of EU law might be advisable but remain inextricably linked to what vision of the European political project will prevail in the future. As an early observer of the US constitutional system noticed, “there is no more invariable rule in the history of society: the further electoral rights are extended the greater is the

need for extending them: for after each concession the strength of democracy increases and its demands increases with its strength.”²⁷⁰ Whether Europe will follow this pattern as well remains a tantalizing question that only the future can answer.

²⁷⁰ Alexis de Tocqueville, *Democracy in America* (1st published 1835, Knopf 1946) book 1 chapter 4

Chapter 4

The Right to Strike

Introduction

In a celebrated chapter of the *Integration Through Law* series, the late EUI Professor Mauro Cappelletti explained how, both in the United States (US) and in the (then) European Communities (EC) – now the European Union (EU) – the federal/supranational judiciary played a major role in the creation of a free common market.¹ In another chapter of the same volume it was also emphasized how “free trade and judicial review appear to be natural allies in federal systems of government, just as the reality of judicial review tends to be associated with federalism. Judicial review, as the American and European Founders realized, is potentially a powerful tool in the creation of any integrated economy. It seems uniquely capable of filling in the gaps of a constitution whose ostensible purpose is to break down trade barriers among states.”² For more than twenty years since these words were written, the EU Court of Justice (ECJ) has continued contributing to fostering economic integration in Europe.³ Nevertheless, increasingly in the last few years, the free market jurisprudence of the ECJ has come under scrutiny for the significant challenges that it poses to the protection of social and labour rights at the state level.⁴ Although the ECJ has committed

¹ Mauro Cappelletti and David Golay, ‘The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration’ in Mauro Cappelletti et al (eds), *Integration through Law: Europe and the American Federal Experience. Volume 1, Book 2* (de Gruyter 1986) 261

² Donald Kommers and Michael Waelbroeck, ‘Legal Integration and Free Movement of Goods: The American and European Experience’ in Mauro Cappelletti et al (eds), *Integration through Law: Europe and the American Federal Experience. Volume 1, Book 3* (de Gruyter 1986) 165, 168

³ See Miguel Poiars Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998)

⁴ See Sandra Fredman, ‘Transformations or Dilution: Fundamental Rights in the EU Social Space’ (2006) 12 *European Law Journal* 41

itself to protecting social rights,⁵ its case law has been criticized for striking an inadequate balance between economic freedoms and labour rights and for undermining the protection that workers enjoy within the EU member states.⁶

The purpose of this chapter is to analyze the complex interaction between free market principles and social rights guarantees in federalism-based constitutional systems by studying the protection of the *right to strike* in Europe in a comparative perspective with the US.⁷ In particular, the chapter explores the tensions that emerge from the overlap and interplay between state law and EU law in the regulation of the right to strike and its possible solutions.⁸ As I argue, EU member states have traditionally devised diverse regimes for the protection of the right to strike. The development of a judge-made standard for the protection of the right to strike at the EU level, however, has significantly challenged the national regulations in the field, highlighting points of friction between the conceptions of industrial action allowed at the supranational level and at the domestic level. Recently, the ECJ has acknowledged the existence of a fundamental right to strike at the EU level.⁹ The ECJ, however, has balanced the right to strike with the need to ensure a free market throughout Europe in which commerce can flow unhindered. This has led to a more restrictive standard for the protection of the right to strike at EU level than that of many EU member states. In other words, because of the growing impact of EU law in the regulation of strike law, the effectiveness of the protection of collective labour rights within a significant number of EU member states has been challenged.

As this chapter claims, the difficulties that Europe is currently experiencing in protecting collective labour rights are not *sui generis*. A comparative perspective reveals that tensions between competing fundamental rights standards are a recurrent feature of federal arrangements premised on the establishment of a free market. Hence, dynamics analogous to those at play in Europe have also historically characterized the US because of the interplay between state and federal law. In the early

⁵ See Loïc Azoulay, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45 *Common Market Law Review* 1335

⁶ See Tonia Novitz, 'The Impact of *Viking* and *Laval*. Contesting the Social Function and Legal Regulation of the Right to Strike' in Edoardo Ales and Tonia Novitz (eds), *Collective Action and Fundamental Freedoms in Europe: Striking the Balance* (Intersentia 2010)

⁷ Note that in this chapter I will use interchangeably the words "strike", "collective action" and "industrial action" to describe generally the conduct of deliberate suspension of work by a group of employees in furtherance of a dispute between labour and management. See generally Benjamin Aaron and Lord Wedderburn (eds), *Industrial Conflict: A Comparative Legal Survey* (Longman 1972)

⁸ Note that in this chapter I will focus on the "constitutional" sources of labour law emerging from state law, EU law and the ECHR and will not consider the international legal instruments set by the International Labour Organization (ILO). This is not to deny the substantive relevance of ILO provisions in the protection of the right to strike. As I will report in the chapter, indeed, both the ECJ and the ECtHR have acknowledged the importance of ILO instruments and used them as a source of inspiration in their right to strike case law. The focus in this chapter on the "constitutional" instruments for the protection of the right to strike in Europe, however, is consistent with the constitutional law approach I use in the chapter and with the goal to develop a comparison with the constitutional system of the US. On the international protection of labour rights see Philip Alston (ed), *Labour Rights as Human Rights* (OUP 2005)

⁹ See Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767

20th century, industrial action in the US was entirely regulated at the state level as the federal government lacked regulatory powers in the field of welfare. Federal courts, nevertheless, scrutinized collective action for compliance with federal principles of freedom of commerce and antitrust. Although the Supreme Court ruled that the US Constitution protected a right to strike, it placed serious restrictions on the effective exercise of this right. This state of affairs changed dramatically during the New Deal. In the effort to address an unprecedented economic crisis, the federal government embraced new powers in the field of labour legislation. A major piece in the New Deal puzzle was represented by the Wagner Act,¹⁰ a statute which overhauled the regulation of industrial relations by setting a federal standard for the protection of the right to strike. Technically drafted as an instrument to foster inter-state commerce, the Wagner Act was a successful attempt to address the tensions resulting from state labour laws and federal free market principles. Although subsequently weakened by congressional amendments and judicial constructions, the Wagner Act originally struck a revolutionary balance between social rights and the free market in the US, introducing a legislative standard for the protection of industrial action at the federal level.

In light of the comparative examination of the US experience in the field of strike law, this chapter examines whether, and how, the challenges taking place in the European multilevel system can be addressed. To this end, I consider the most recent transformations taking place in the framework of the European Convention on Human Rights (ECHR). In two milestone decisions, the European Court of Human Rights (ECtHR) has recently recognized that collective bargaining and collective action are fundamental rights protected under the ECHR.¹¹ This development in the case law of the ECtHR, coupled with the entry into force of the EU Lisbon Reform Treaty in 2009, may represent a major force for change in the protection of the right to strike at the supranational level in Europe. The Lisbon Treaty, in fact, has established an obligation for the EU to accede the ECHR and, once the accession will be completed, EU institutions will be subject to review by the ECtHR. This may incentive the ECJ to revise its right to strike jurisprudence in a way that is more protective of labour rights along the lines drawn by the ECtHR. Yet, a number of uncertainties surround the effect of the accession agreement and it is difficult to predict with certainty whether the transformations taking place in the ECHR will offer a fully satisfactory answer to the challenges of ineffectiveness that currently characterize the field of strike law. From this point of view, additional legislative developments at the EU level might be necessary, and even advisable, if Europe wants to address the federal dilemma of how to balance free market rules and social rights guarantees in a more legitimate way.

¹⁰ 49 Stat. 452 (1937), codified as amended at 29 U.S.C. paras 151-169

¹¹ See *Demir and Baykara (No. 2) v. Turkey*, ECHR [2008], Application No. 34503/97 (GC); *Enerji Yapi-Yol Sen v. Turkey*, ECHR [2009], Application No. 68959/01

The chapter is structured as follows. In Section 1, I outline the national regimes for the protection of the right to strike in Europe, identifying the main regulatory models and the relevant differences that exist between the member states in the protection of industrial action. In Section 2, I highlight the growing impact of EU law on the regulation of collective action and analyze the critical implications of the case law of the ECJ. The ECJ has recognized a fundamental right to strike at the EU level but has subjected it to significant limitations in the name of free market principles, thereby placing the protection of industrial action existing in many domestic regulatory models under strain. In Section 3, I undertake a comparative examination of the US federal experience in the field of strike law and emphasize how the US constitutional system has been historically characterized by strong frictions between state labour legislation and the federal push to ensure a free common market. At the same time, I explain how the US has addressed this state of affairs over time by shifting the protection of strike action at the federal level via the enactment of New Deal legislation. I then return to the current European situation and, in Section 4, I assess the effect of the recent transformations taking place in the framework of the ECHR. Here, I examine the recent case law of the ECtHR and discuss how it could influence the protection of the right to strike at the EU level after the entry into force of the Lisbon Treaty and the accession of the EU to the ECHR. Finally, in Section 5, I reflect on how some additional reforms may be envisaged in the constitutional system of the EU to strengthen the protection of industrial action *vis-à-vis* free market principles.

As the structure makes clear, the aim of the chapter is mainly analytical. My intention is to analyze the complex constitutional phenomena taking place in the European multilevel architecture by using the historical experience of the US as a powerful explanatory tool of contemporary European reality. By resorting to the comparative method I argue that it is possible to clarify the challenges emerging in the protection of the right to strike in Europe and to explain them in light of the recurrent tensions between social rights and free market rules which also characterized the US federal arrangement in the early 20th century. Albeit with a number of caveats, then, it seems that the US experience can also provide some useful lessons for the EU on how to address the challenge of ensuring an effective protection of the right to strike within a common transnational market. To this end, in the final Section of the chapter I will try to explore possible reforms that Europe may undertake to enhance the protection of industrial action. In this last part of the chapter, I will adopt a normative stand and, in light of the US experience, suggest that the EU should enact a legislative measure – an EU Wagner Act – setting a regulatory standard for the protection of strike action in situations which currently fall under the scope of application of EU free market rules. Needless to say, this proposal sparks controversy and readers will disagree about the legal feasibility and

political success of such a legal act. However, I will endeavour to maintain that this solution –which seems to have been recently embraced also by the EU Commission in a March 2012 proposal for a regulation on the exercise of the right to strike in the single market– may be a viable option to reduce the current tensions between social rights and the free market in the EU constitutional system.¹²

So far, the protection of social rights in Europe has been primarily conceived as a task for the individual EU member states. However, the creation of a free market of continental size has made it clear that labour protection at the domestic level cannot be properly insulated from review by the supranational judiciary. This has led to the creation of a judge-made standard for the protection of collective labour rights at the EU level which is less effective than the standards existing in many member states. *De facto*, through its freedom of movement jurisprudence, the ECJ has set up at the EU level a regulation for industrial action having a cross-border dimension that displaces states' strike laws. Yet, to reverse this trend by strengthening the sovereignty of the member states in the field of social legislation is wishful thinking. Rather, as the US experience demonstrates, the tension between the transnational free market principles and state social rights guarantees in federalism-based systems of governance can be addressed by enacting legislation protecting labour rights at the supranational level. In the US, during the New Deal, it was understood that only a major transfer of policy powers to the federal government would counter-balance the *laissez-faire* trends inherent in the inter-state common market. In this chapter, I will attempt to argue that Europe also needs to discuss whether to enact an EU regulation protecting collective labour rights in ways analogous to the US Wagner Act. The current economic crisis makes the reflection about the need for a European New Deal all the more pressing.

To anticipate possible criticisms, I should point out that this chapter adopts a *comparative constitutional law* perspective and not a comparative labour law perspective. Of course, the right to strike is a labour law right, and many of the most inspiring sources that I will be using in my analysis are the work of labour lawyers. However, my intention here is to offer a different perspective on the status of industrial relations law in Europe and in the US, one which focuses on the constitutional dynamics at play in the two systems and aims to explain the broad challenges that emerge from the interaction between state and supranational laws in multilevel constitutional arrangements. Readers will therefore forgive me if technical features of national or supranational collective labour regulations are omitted or over-generalized in my analysis. In this chapter I will

¹² On the difficulties to balance fundamental social rights and free market principles in the EU system of governance and for proposals on how to frame the debate on possible reforms in this field see also Miguel Poiares Maduro, 'Europe's Social Self: "The Sickness unto Death"' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000); Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective* (CUP 2006)

rather attempt to explain that the complex tensions that are emerging in the field of collective labour rights in Europe are part of a broader constitutional pattern. The emergence of a multilevel, heterarchical architecture for the protection of fundamental rights has generated in Europe phenomena typical of federal arrangements.¹³ As I explained in the first chapter, this has challenged the effectiveness and the consistency of fundamental rights standards in a plurality of policy areas. Labour law, and specifically the protection of the right to strike, appears to be subject to the same neo-federalist dynamics.

1. Context: the protection of the right to strike at the state level in Europe

The recognition of the right to strike in the legal systems of the EU member states is a relatively recent phenomenon. Throughout the 19th century, collective bargaining and collective action by workers was regarded as incompatible with the social and economic stability of the state, and was harshly sanctioned in all European nations.¹⁴ Attempts to recognize industrial action partially succeeded in some European countries during the 1920s, but were soon swept aside by the rise of the fascist dictatorships and the needs of World War II (WWII). “Ultimately, it was the victory of the democratic powers in western Europe at the end of [WWII] that definitely secured toleration and recognition of free collective labour relations in [W]estern Europe.”¹⁵ Starting with France in 1946 and Italy in 1948, the right to strike was enshrined in the Constitutions of a number of European states. Legislatures and courts further liberalized the right to strike in the United Kingdom (UK),¹⁶ Germany,¹⁷ and Belgium¹⁸ during the 1950s. However, it was not until their transition to democracy in the 1970s that a right to strike was recognized in Spain,¹⁹ Portugal²⁰ and Greece.²¹ In

¹³ On the pluralist European architecture for the protection of fundamental rights and its comparability with federal human rights systems see Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009); Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009)

¹⁴ Antoine Jacobs, ‘Collective Self-Regulation’ in Bob Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (Hart Publishing 1986)

¹⁵ Antoine Jacobs, ‘Collective Labour Relations’ in Bob Hepple and Bruno Veneziani (eds), *The Transformations of Labour Law in Europe: A Comparative Study of Fifteen Countries 1945-2004* (Hart Publishing 2009)

¹⁶ See *infra* text accompanying n 72-96

¹⁷ See *infra* text accompanying n 55-65

¹⁸ Karl Abelshausen et al, ‘Belgium’ in Arabella Stewart and Mark Bell (eds), *The Right to Strike: A Comparative Perspective* (The Institute of Employment Rights 2008) 9, 10

¹⁹ See Article 28(2) Const. Sp. The detailed regulation of collective action is provided by the Real Decreto-Ley 17/1977, de 4 de marzo 1977 (Sp.) which was enacted however prior to the adoption of the Constitution. The act was however later re-interpreted in an important judgment by the *Tribunal Constitucional* which made it compatible with the new Constitution. See STC Sentencia 11/1981

²⁰ See Article 57, Const. Port.

²¹ See A. Jacobs (n 15) 201

the Netherlands, the right to industrial action was formally recognized by the *Hoge Raad*, the Supreme Court, only in 1986.²² Finally, while strikes played a major role in the Polish *Solidarność* movement of the 1980s, a right to take collective action became constitutionally protected in Poland²³ and other Central and Eastern European countries only after the collapse of the Communist regime in the early 1990s.²⁴

The historical experience of each European country has largely shaped the way in which the right to strike is protected at the national level.²⁵ Hence, a broad constitutional protection of the right to strike is quite common in the new democracies of Southern and Eastern Europe – largely in reaction to the repressive practices of the fascist and communist regimes.²⁶ Northern European states, instead, often protect the right to strike exclusively through ordinary legislation and they subject it to more severe restrictions. At the same time, the nature of the social and political forces prevailing in each Western European country in the post-WWII period, explains for major regional variations. For instance, Western democracies that had powerful Communist parties (such as Italy and France) codified the right to strike in an attempt to strengthen the role of the labour movement and to enshrine new principles of social justice in the Constitution.²⁷ This need, instead, has been less compelling where the labour movement was integrated within the political process (as in the UK) or where a tradition of social partnership already existed (as in Scandinavia).

Although there are relevant differences in the degree of protection the right to strike enjoys in the legal systems of the EU member states, it may be useful, for analytical purposes, to classify the various national regimes into several regulatory models. Needless to say, many classifications of the European legislations are possible in the abstract,²⁸ but for the purpose of this work I will identify four models of protection of the right to strike that can be ideally placed along a continuum that runs from a more liberal to a more restrictive regime. To evaluate the nature of each model I consider several specific criteria. A first element is whether the right to strike is recognized as a

²² HR 30 May 1986, NJ 1986, 688. For an assessment of the Dutch regulation of strikes see also Sarah Rook et al, ‘The Netherlands’ in Arabella Stewart and Mark Bell (eds), *The Right to Strike: A Comparative Perspective* (The Institute of Employment Rights 2008) 80 (explaining that protection of the right to strike in Dutch law was based on the recognition that Article 6 of the European Social Charter, which protects a right to strike, has direct application in the Netherlands)

²³ See *infra* text accompanying n 66-71

²⁴ Fanny Jacquilot, ‘Les droits sociaux fondamentaux dans les pays d’Europe centrale et orientale’ in Laurence Gay et al (eds), *Les Droits Sociaux Fondamentaux: Entre Droits Nationaux et Droit Européen* (Bruylant 2006)

²⁵ See generally Tony Judt, *Postwar: A History of Europe since 1945* (Penguin Press 2005)

²⁶ See A. Jacobs (n 15) 202

²⁷ See Preamble Const. Fr. 1948 (stating that the Republic proclaims, “en outre, comme particulièrement nécessaires à notre temps les principes politiques, économiques et sociaux ci-après.”); Article 3(2) Const. It. (stating that it is the duty of the Republic “rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l’eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l’effettiva partecipazione di tutti i lavoratori all’organizzazione politica, economica e sociale del Paese.”)

²⁸ Arabella Stewart, ‘A Comparative Perspective on the Right to Strike’ in Arabella Stewart and Mark Bell (eds), *The Right to Strike: A Comparative Perspective* (The Institute of Employment Rights 2008) 5; Wiebke Warnke, *Strike Rules in the EU27 and beyond. A Comparative Overview* (European Trade Union Institute for Research, Education and Health and Safety 2007)

fundamental constitutional right rather than as a statutory entitlement or a simple common law liberty. A second element is whether the right to strike is an individual right or a collective right, to be exercised only by trade unions. Another element concerns the procedures that must be followed to exercise the right to strike, as well as the limitations that apply to the right to strike and the substantive conditions that justify it. A final element, then, concerns the consequences connected with the exercise of the right to strike, i.e. the implications of the strike on the individual employment contract.

France and Italy offer a first model of regulation characterized by an enhanced protection of the right to strike. The Preamble of the French Constitution of 1946 (which is recalled by the Preamble of the Constitution of 1958) recognizes “the right to strike [...] in the framework of the laws that regulate it” and, with an almost identical wording, Article 40 of the 1948 Italian Constitution affirms that “the right to strike is exercised in the framework of the laws that regulate it.” In both legal systems, the right to strike has a solid constitutional foundation and can be accounted as a fundamental right of the individual to be exercised collectively (and not as a right of the trade unions).²⁹ Moreover, both in France and in Italy, the constitutional provisions on the right to strike have not been implemented through ordinary legislation (except in the field of public services):³⁰ domestic courts have therefore assumed the task of giving direct application to these constitutional clauses and of defining the scope and the limits of the right to strike. As such, in France the *Cour de Cassation* has strictly enforced the constitutional guarantee of the right to strike, denying that it can be restricted by a collective agreement and an obligation of industrial peace.³¹ According to the case law of the French labour courts, a strike must express a professional claim (including in the form of a solidarity action) and therefore purely political strikes should be regarded as unlawful. Nevertheless, the *Cour de Cassation* has acknowledged the legitimacy of strikes which have a “macro-social goal,”³² *de facto* sanctioning the lawfulness of strikes which “aim at influencing the social and economic policy of the government which has a direct impact on working conditions.”³³

A very wide understanding of the meaning of the right to strike has also been adopted in Italy by the *Corte di Cassazione*:³⁴ the Court affirmed that the motivation for a strike is immaterial for deciding its legitimacy and recognized the admissibility of all forms of protests considered by the workers themselves as the most effective to achieve their desired goal (including the sympathy

²⁹ Marc Moreau, *La Grève* (Chêne 1998); Gino Giugni, *Diritto Sindacale* (Il Mulino 2003)

³⁰ See *infra* text accompanying n 40

³¹ Cass Soc. 7 June 1995 (RJS 8-9/95 n°933)

³² Jean-Emmanuel Ray, *Droit du Travail, Droit Vivant* (16th ed Liaisons 2007)

³³ Loredana Carta et al, ‘France’ in Arabella Stewart and Mark Bell (eds), *The Right to Strike: A Comparative Perspective* (The Institute of Employment Rights 2008) 27, 41

³⁴ Cassazione, 30 gennaio 1980, n 711 in *Giustizia Civile*, 1980, I 1088

strike, the articulate strike and the politico-economic strike).³⁵ The *Corte Costituzionale*, at the same time, has derived from Article 40 of the Italian Constitution the legitimacy of the political strike, except when finalized to the overthrowing of the constitutional order.³⁶ Being a fundamental individual right, the right to strike can be freely exercised – without any need to comply *a priori* with mediation or other procedural requirements and without any consequences *a posteriori* on the individual contract of employment. In addition, since the enactment in 1970 of the Workers' Statute³⁷ (a piece of legislation protecting employees' rights in the workplace),³⁸ the Italian law “guarantees striking workers and employees who take part in trade union activities the absence of any kind of repercussions [from the employer] other than the loss of pay.”³⁹

In light of its constitutional status, the right to strike can be restricted in Italy only to uphold equivalent constitutional values. To ensure a proper balancing of the right to strike with other essential personal rights, however, the Italian Parliament enacted in 1990 a framework statute⁴⁰ regulating the right to strike in the sector of essential public services (such as health care, education, administration of justice, police, public transportation etc.).⁴¹ The statute represents a far-reaching attempt to devise a comprehensive regulation for industrial conflicts in public services, with a view to protecting the rights of the users and to ensuring a reasonable “conciliation of the exercise of the right to strike with the enjoyment of the [other] constitutional rights of the individual.”⁴² The statute requires trade unions to give due notice of their willingness to strike and to indicate the duration of the suspension from work and its form.⁴³ During the strike, workers must in any case ensure minimal services, to be defined through collective agreements or in the self-regulatory codes of the trade unions.⁴⁴ The statute finally empowers a newly established Guarantee Committee to review the self-regulatory codes of trade unions, overview the respect of the legislative procedures, and sanction unlawful strikes.⁴⁵

A second model of state regulation of the right to strike emerges from the legal tradition of the Nordic countries. Both in Finland and in Sweden, the right to strike is solidly grounded in the

³⁵ Niccolò Delli Colli et al, ‘Italy’ in Arabella Stewart and Mark Bell (eds), *The Right to Strike: A Comparative Perspective* (The Institute of Employment Rights 2008) 65, 71

³⁶ C.Cost sent. 290/1974 and C.Cost sent. 123/1962

³⁷ Legge 20 marzo 1970, n. 300 (G.U. 27 maggio 1970, n. 131)(It.)

³⁸ For an introductory assessment to the Workers' Statute see the analysis by G. Giugni (n 30) 95

³⁹ N. Delli Colli et al (n 35) 75

⁴⁰ Legge 12 giugno 1990, n. 146 (G.U. 14 giugno 1990, n. 137)(It.)

⁴¹ See Giovanni Orlandini, *Sciopero e Servizi Pubblici Essenziali nel Processo d'Integrazione Europea* (Giappichelli 2003)

⁴² Article 1(2), Legge 146/1990 (my translation: “contemperare l'esercizio del diritto di sciopero con il godimento [di altri] diritti della persona.”)

⁴³ Ibid Article 2(1)

⁴⁴ Ibid Article 2(2)

⁴⁵ Ibid Article 12

state Constitution.⁴⁶ At the same time, both systems largely delegate the function of regulating industrial conflicts to the social partners through collective agreements, reflecting the historical ability of the main union confederations to centralize collective bargaining.⁴⁷ In the Swedish legal system, Article 17 of the Constitution affirms that “any trade union and any employer or any association of employers shall have the right to take strike or lock-out actions or any similar measures, except as otherwise provided by law or ensuing from an agreement.” The spectrum of action which is regarded as permissible is, therefore, very broad and encompasses secondary actions as well as boycotts and blockades.⁴⁸ At the same time, collective agreements usually provide for peace obligations which prevent strikes unless the objective of the industrial action falls outside the scope of the collective agreement. The right to go on strike is centralized in the trade unions. According to the 1976 Codetermination Act,⁴⁹ unions must notify their decision to stop working at least seven working days before the strike, in order to ensure the possibility of a mediation procedure.⁵⁰

Similarly, in Finland, the right for unions to strike is derived from the freedom of association and to conduct collective bargaining enshrined in Article 13 of the Constitution, and has been interpreted by courts as being “permitted for a wide range of reasons and in a wide variety of forms.”⁵¹ Under Finnish law, workers and employers are even entitled to take secondary action and political strikes. Just as in Sweden, however, collective agreements include peace obligations, which prohibit industrial action during the time-frame in which a collective contract is in force, except when the strike concerns an issue which is not regulated in the collective agreement.⁵² Also in Finland, then, the legislation and the agreements between the national trade unions and the employers’ association require “anyone intending to commence a strike [...] to give written notice – stating the reasons for the strike, its starting time and the extent of the stoppage – to the opposed party and to the Office of the National Conciliation Officers at least 14 days beforehand.”⁵³ In the Nordic countries, therefore, a solid protection of the right to strike is coupled with wide room for collective autonomy, based on the assumption that social partners are capable of adopting a responsible and cooperative stand in the resolution of industrial disputes.⁵⁴

⁴⁶ For a broader assessment to the constitutional protection of social rights in the Nordic countries focusing mostly on positive social rights see Martin Scheinin (ed), *Welfare State and Constitutionalism-Nordic Perspectives* (Nord 2001)

⁴⁷ See Torgeir Aarvag Stokke, ‘Conflict Regulation in the Nordic Countries’ (2002) 8 *European Review of Labour and Research* 670

⁴⁸ See W. Warnek (n 28) 68

⁴⁹ Lag (1976:580) om medbestämmande i arbetslivet (“Medbestämmandelagen”)(Swe.)

⁵⁰ See T.A. Stokke (n 47) 681

⁵¹ W. Warnek (n 28) 28

⁵² See generally Jari Hellsten, *From Internal Market Regulation to European Labour Law* (Helsinki University Press 2007)

⁵³ See W. Warnek (n 28) 29

⁵⁴ See generally Nikklaas Bruun and others, *The Nordic Labour Relations Model* (Dartmouth 1992)

A third model of regulation of the right to strike exists in Germany. The German system is characterized by the fact that the right to strike does not enjoy any formal constitutional protection.⁵⁵ Article 9(3) of the Basic Law recognizes the constitutional freedom of association to safeguard and improve working and economic conditions. In this context, it has been up to the highest domestic courts to derive from this provision a protection of the right to strike.⁵⁶ Already in 1955, the *Bundesarbeitsgericht* recognized a right to strike in the German legal system as an essential component of the right to collective bargaining for employers and employees.⁵⁷ Nevertheless, in Germany, the right to strike has traditionally been surrounded “with numerous limitations, such as the peace obligation during the term of a collective agreement and a prohibition on striking for conflicts of rights, as distinct from conflicts of interests.”⁵⁸ The German system, in fact, takes a strictly contractual view of industrial conflict legitimizing only those strikes which aim at enhancing the bargaining position of the employees (and prohibiting, instead, political or solidarity strikes). In addition, in Germany, the right to strike has never been interpreted as an individual right but rather as a trade unions’ right.⁵⁹ “Only those associations which are allowed to conclude collective agreements have the right to call a strike.”⁶⁰

The most characteristic feature of the German regulatory model, however, is represented by the so-called principle of *ultima ratio*. This principle represents the application in the field of labour law of the general constitutional principle of *Verhältnismäßigkeit*, or proportionality.⁶¹ According to this principle, “a strike is only legal if it is necessary and the ultimate measure to solve the industrial conflict.”⁶² As a consequence, trade unions do not enjoy an unconditional right to pursue collective action, even when, in their view, a strike would be the most effective tool to strengthen their bargaining position. “In keeping with the principle of last resort, all possibilities of a peaceful negotiation for settlement must have been exhausted” before a trade union can go on strike.⁶³ Labour courts are therefore empowered to assess the proportionality of the industrial action undertaken by the trade unions and can, if the case may be, sanction illegal strikes, condemning the trade unions to pay damages. Historically, industrial relations between employees’ unions and employers’ associations have been very cooperative in Germany and this has kept industrial action

⁵⁵ See Franziska Klaß et al, ‘Germany’ in Arabella Stewart and Mark Bell (eds), *The Right to Strike: A Comparative Perspective* (The Institute of Employment Rights 2008) 53, 54

⁵⁶ *Ibid* 55

⁵⁷ BAG, 28.01.1955 - GS 1/54. See Thomas Blank et al, *Kollektives Arbeitsrecht. Volume 2* (Reinbeck 1975)

⁵⁸ A. Jacobs (n 15) 212

⁵⁹ See Olaf Deinert, ‘Collective Action in Germany: A Union-Based System’ in Edoardo Ales and Tonia Novitz (eds), *Collective Action and Fundamental Freedoms in Europe: Striking the Balance* (Antwerp: Intersentia 2010) 53

⁶⁰ F. Klaß et al (n 55) 56

⁶¹ On the principle of proportionality in German law generally see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence* (2007) 57 *University of Toronto Law Review* 383

⁶² F. Klaß et al (n 55) 56

⁶³ W. Warnek (n 28) 33

to a minimum.⁶⁴ Yet, by permitting strikes only when they are proportionate, German law designs a rather restrictive model of regulation of the right to strike which ensures wide protection for other constitutional values (such as the right to property and freedom of commerce).⁶⁵

A regulation of strike akin to the German one also exists in Poland. In the Polish system, the right to strike is formally enshrined as a trade unions' prerogative in Article 59(3) of the Constitution, which affirms that "trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute." The detailed regulation of the permitted limits of industrial action is then provided in the 1991 Act on the settlement of collective labour disputes.⁶⁶ As in Germany, however, in Poland industrial action is only permitted for disputes over interests, rather than rights: as such "[s]trikes of political or more generally socio-economic nature are not included in th[e statutory] definition."⁶⁷ The law, in addition, sets up an obligation for trade unions to engage in negotiations and mediation procedures with employers before going on strike.⁶⁸ Finally, under Polish law, the "strike is treated by the legislator (as well as in jurisprudence [...]) as a last resort measure, only to be organized when all other possibilities to solve the conflict have failed."⁶⁹ According to the 1991 Act, indeed, the choice of trade unions to go on strike must be the *ultima ratio*.⁷⁰ Hence, the Polish legal regulation of the right to strike also appears to be based on a strict "proportionality rule: when taking the decisions to call a strike, the party representing employee interests shall ensure that demands are commensurate with the losses that the strike entails, not only in relation to the parties in dispute but also to third parties."⁷¹

The most restrictive regulation of the right to strike, however, is provided by the UK model. Traditionally, under English common law, the voluntary interruption of work by employees did not enjoy any protection and was, in fact, punished by courts as a tort and a breach of contract.⁷² In the early years of the 20th century, and, again after the end of the WWII, several statutes were enacted in the UK to allow workers to undertake industrial action:⁷³ however, "the statutory provisions which permit the organization of industrial action and participation in such action are framed in

⁶⁴ See F. Klaß et al (n 55) 54

⁶⁵ The existence of the principle of proportionality in the German system is what makes the German model more restrictive than the Nordic one. See T.A. Stokke (n 47) 683 (explaining that "principles concerning proportionality do not play any important role in the Nordic countries.")

⁶⁶ Ustawa z dnia 23 maja 1991 r. o rozwiązywaniu sporów zbiorowych (Dz. U. z dnia 26 czerwca 1991 r.)(Pl.)

⁶⁷ Joanna Unterschütz and Krzysztof Woźniewski, 'Industrial Relation within the Polish Legal System – Why the CJEU Judgments Have Little Effect on Poland' in Andreas Bückler and Wiebke Warnek (eds), *Reconciling Fundamental Social Rights and Economic Freedoms After Viking, Laval and Ruffert* (Nomos 2011) 159, 167

⁶⁸ See W. Warnek (n 28) 56

⁶⁹ J. Unterschütz and K. Woźniewski (n 67) 168

⁷⁰ Article 17(3), Ustawa

⁷¹ J. Unterschütz and K. Woźniewski (n 67) 169

⁷² See *Taff Vale Railway Co. Ltd. v. Amalgamated Society of Railway Servants* [1901] AC 426 (UK House of Lords holding trade unions liable under the common law for damage caused by industrial action).

⁷³ See A. Jacobs (n 15) 212

terms of immunities from the tortious and criminal liability that would otherwise attach.”⁷⁴ As such, it can be argued that “there is no fundamental right to strike” in the UK.⁷⁵ In the British legal system, the strike is a rather a freedom “regulated by statute and common law.”⁷⁶ The legislative framework for the exercise of the freedom to strike has been the object of several subsequent reforms, especially during the 1980s, under the pressure brought to bear by the Conservative Governments. Currently, it is synthesized in Part V of the Trade Unions and Labour Relations (Consolidation) Act of 1992 (TULRCA).⁷⁷

According to the TULRCA, an “act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only— (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance.”⁷⁸ The definition of a “trade dispute” for the purposes of TULRCA is to be found in the so-called “golden formula,” i.e. Section 244 TULRCA.⁷⁹ No industrial action is permitted if its goal is to ensure a closed-shop policy⁸⁰ or to impose union recognition.⁸¹ Furthermore, the law prohibits secondary strikes⁸² and political strikes: indeed, only “strikes which involve a trade dispute between a trade union and the relevant employer are protected and the accepted motivation tends to be restricted to economic reasons.”⁸³ The TULRCA, then, sets out a very detailed procedure which trade unions must follow before taking industrial action: unions must take a ballot to verify the support of the workers in favour of the strike,⁸⁴ notify the employer (not later than the seventh day before the opening day of the ballot) that the unions intend to hold the ballot⁸⁵ and provide the employer with a list of the categories of employees to which the ballot will be proposed.⁸⁶ As soon as is reasonably practicable after the holding of the ballot, the trade union must take such steps as are reasonably

⁷⁴ Ruth Dukes, ‘The Right to Strike Under UK Law: Not Much More than a Slogan?’ (2010) 39 *Industrial Law Journal* 82

⁷⁵ W. Warnek (n 28) 70

⁷⁶ David Barrett et al, ‘The United Kingdom’ in Arabella Stewart and Mark Bell (eds), *The Right to Strike: A Comparative Perspective* (The Institute of Employment Rights 2008) 97

⁷⁷ 40 Eliz. 2 c. 52 (Eng.)

⁷⁸ *Ibid* Section 219(1)

⁷⁹ *Ibid* Section 244 (stating that “In this Part a ‘trade dispute’ means a dispute between workers and their employer which relates wholly or mainly to one or more of the following— (a) terms and conditions of employment, or the physical conditions in which any workers are required to work; (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers; (c) allocation of work or the duties of employment between workers or groups of workers; (d) matters of discipline; (e) a worker’s membership or non-membership of a trade union; (f) facilities for officials of trade unions; and (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.”)

⁸⁰ *Ibid* Section 222

⁸¹ *Ibid* Section 225

⁸² *Ibid* Section 224(1)

⁸³ Barrett et al (n 76) 101

⁸⁴ TULRCA, Section 226

⁸⁵ *Ibid* Section 226A

⁸⁶ *Ibid*

necessary to ensure that all persons entitled to vote in the ballot and the employer are informed of the results.⁸⁷ A ballot in relation to industrial action ceases to be effective after four weeks.⁸⁸

Besides the existence of strict procedures limiting and conditioning the exercise of the right to strike, British law has traditionally also provided a very limited protection to workers engaging in industrial action.⁸⁹ Until recently, indeed the jurisprudential stand was that “[a]ny form of industrial action is a breach of contract.”⁹⁰ Only in 1999, was the TULRCA modified by the Employment Relations Act (ERA)⁹¹ to provide a remedy against unfair dismissal for employees who took protected industrial action. Accordingly, an employee must be regarded as “unfairly dismissed if— (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee took protected industrial action”⁹² and if the dismissal took place within a protected period of eight weeks (later increased to twelve weeks by the Employment Relations Act 2004).⁹³ At the same time, the guarantee against unfair dismissal does not operate in favour of workers who take unofficial action.⁹⁴ Moreover, under British law “even where employees are found to have been unfairly dismissed, they cannot be reinstated against the wishes of the employer and so the only remedy is compensation.”⁹⁵ As a consequence the UK legal system provides a rather hostile environment for workers willing to go on strike and can certainly be described as the most restrictive model of regulation of the right to strike Europe-wide.⁹⁶

In conclusion, a rapid overview of the regulation of the right to strike in the European legal systems reveals that there exist “marked differences between the specific regulations on strikes existing in the various [EU] States.”⁹⁷ Many EU member states such as France, Italy, Spain and Portugal, ensure the highest possible protection to the right to strike, enshrining it in their Constitutions. In some states, social partners have no role in the regulation of the right to strikes while in others – notably the Nordic countries – collective bargaining represents a core component of the legal framework in which industrial action can be taken. Countries such as Germany and Poland are instead endowed with a legislative framework for protecting the right to strike which empowers labour courts to exercise a pervasive proportionality analysis to verify the lawfulness of

⁸⁷ Ibid Section 231 and 231A

⁸⁸ Ibid Section 234

⁸⁹ See Barrett et al (n 76) 102

⁹⁰ *Miles v. Wakefield MDC* [1987] AC 539 (per LJ Templeman)

⁹¹ 47 Eliz. 2, c. 26 (Eng.)

⁹² TULRCA, Section 238A(1) introduced by ERA Section 16 Sch. 5

⁹³ 52 Eliz. 2, c. 24 (Eng.)

⁹⁴ TULRCA, Section 237

⁹⁵ D. Barrett et al (n 76) 104

⁹⁶ See Tonia Novitz, ‘Collective Action in the United Kingdom’ in Edoardo Ales and Tonia Novitz (eds), *Collective Action and Fundamental Freedoms in Europe* (Intersentia 2010) 173

⁹⁷ Tiziano Treu, ‘Regulations of Strikes and the European Social Model’ (2002) 8 *European Review of Labour and Research* 608

collective action. Finally, the UK has an extremely restrictive legislation, which refuses to recognize the strike as a right and treats it rather as a statutory freedom subject to strict substantive and procedural requirements. Above this pluralism of state laws operates, however, an increasingly important supranational law.

2. Challenges: The impact of the case law of European Court of Justice on the protection of the right to strike in Europe

The question whether European supranational law protects a right to strike has long beset labour lawyers⁹⁸ and constitutional scholars.⁹⁹ The project of European integration had been inspired since its foundation by the goal of enhancing the economic and social conditions of the European peoples.¹⁰⁰ Yet, a number of legal constraints and institutional weaknesses seemed to prevent a full recognition of the right to strike in the EU legal order. To begin with, the founding treaties of the EC did not include any provision regarding the right to strike.¹⁰¹ Rather, when in 1997 the Amsterdam Treaty expanded the competences of the EC in the field of social policy, a provision was inserted in the founding treaties – Article 137(5) EC Treaty (TEC), now renumbered by the Lisbon Treaty as Article 153(5) EU Functioning Treaty (TFEU) – to exclude the application of the new competences of the EC from “the right of association, the right to strike or the right to impose lock-outs.” Secondly, the EC proclaimed in 1989 a Community Charter of Fundamental Social Rights of Workers (CCFSRW), which *inter alia* protected a right to resort to collective action.¹⁰² The CCFSRW, however, was not signed by all the (then) twelve member states, since the UK abstained from any commitment to this instrument.¹⁰³ The CCFSRW, moreover, lacked any binding force, being intended as a political declaration to be implemented by the member states according to

⁹⁸ See Lammy Betten, *The Right to Strike in Community Law* (North Holland 1985); Tonia Novitz, *International and European Protection of the Right to Strike* (OUP 2003)

⁹⁹ See Antonio Baldassarre, ‘I diritti sociali’ in *Enciclopedia Giuridica* (Treccani 1989) vol 11 ad vocem

¹⁰⁰ It is well known that in the post-WWII period, the political elites of the six Founding member states of the EC were powerfully committed toward the protection of social rights, as evidenced by the strong recognition that labour rights enjoyed in the national constitutions adopted at that time. In the view of the member states, otherwise, the creation of a free common market under the aegis of the EC was conceived as an instrument for the economic and social progress of the European societies, which in the mid-long run would have benefitted workers with better wages and working conditions. See Preamble, TEC [now TFEU] (affirming “as the essential objective of [the member states’] efforts the constant improvement of the living and working conditions of their peoples”).

¹⁰¹ See Catherine Barnard, *EC Employment Law* (OUP 2006) 747

¹⁰² See Article 13, CCFSRW

¹⁰³ Cf. Stephen J. Silvia, ‘The Social Charter of the European Community: A Defeat for European Labor’ (1991) 44 *Industrial and Labour Relations Review* 626. Note that Article 151 TFEU [former Article 136 TEC], as amended by the Amsterdam Treaty, now makes an express reference to the CCFSRW as an inspiration for the EU in the exercise of its competence in the sphere of social policy

the principle of subsidiarity. Lastly, the ECJ showed great “judicial circumspection”¹⁰⁴ in protecting the right to strike. Although the ECJ acknowledged that the EC institutions’ staff enjoyed a right to form trade unions and to act for the protection of its interests,¹⁰⁵ for a long time it never officially endorsed the opinion of Advocate General (AG) Jacobs in *Albany International*¹⁰⁶ that “the right to take collective action in order to protect occupational interests [...] is also protected by [EC] law.”¹⁰⁷

At the same time, “the lack of a fundamental social right in [EC] sources [was] not totally compensated for by [the] references to the ECHR”¹⁰⁸ and the European Social Charter (ESC) contained in the EU treaties.¹⁰⁹ Indeed, major obstacles toward the protection of a right to strike also seemed to exist in the legal framework of the Council of Europe.¹¹⁰ On the one hand, the 1950 ECHR only enshrined a catalogue of civil and political liberties, with almost no attention for social and economic rights. Article 11 ECHR affirms that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” Yet the European Court of Human Rights (ECtHR) denied, until recently,¹¹¹ that Article 11 could be interpreted as protecting a right to strike.¹¹² The ECtHR instead repeatedly held that Article 11 imposed a duty on the contracting parties to set up domestic mechanisms to enable trade unions to represent their members¹¹³ but that this did not include a right to collective bargaining¹¹⁴ or collective action.¹¹⁵ On the other hand, the ESC –

¹⁰⁴ T. Novitz (n 98) 246

¹⁰⁵ See Case 175/73 *Union Syndicale, Massa and Kortner v. Commission* [1974] ECR 917 (holding that EC officials have the right to form organizations of their own choosing and that these associations are free to do anything lawful to protect the interest of their employees) and Case 18/75 *Syndicat Général du Personnel Organismes Européens v. Commission* [1974] ECR 933 (same)

¹⁰⁶ Case C-67/96, *Albany International* [1999] ECR I-5751 (holding that collective agreements fall outside the scope of application of the EC competition rules)

¹⁰⁷ *Ibid*, Opinion of AG Jacobs, par 159

¹⁰⁸ Silvana Sciarra, ‘From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy’ in Philip Alston et al (eds), *The EU and Human Rights* (OUP 2000)

¹⁰⁹ As it is well known, Article 6 TEU, as introduced by the Maastricht Treaty, included a reference to the ECHR. In addition, Article 151 TFEU [former Article 136 TEC], as amended by the Amsterdam Treaty, makes an express reference to the ESC as an inspiration for the EU social policy competences.

¹¹⁰ See Stefan Clauwaert, ‘Transnational Primary and Secondary Collective Action: An Overview of International, European and National Legislation’ (2002) 8 *European Review of Labour and Research* 624

¹¹¹ See *infra* Section 5

¹¹² Michael Forde, ‘The European Convention on Human Rights and Labor Law’ (1983) 31 *American Journal of Comparative Law* 301

¹¹³ See *National Union of Belgian Police v. Belgium*, ECHR [1976] Application No. 4464/70 (Plenary) (holding that Article 11 ECHR does attribute to trade unions a right to be heard but not a right to be consulted)

¹¹⁴ See *Swedish Engine Drivers’ Union v. Sweden*, ECHR [1979] Application No. 5614/72 (holding that Article 11 does not attribute to trade unions a right to conclude collective agreements); *Wilson and others v. UK*, ECHR [2002] Application No. 28212/95 (holding that Article 11 does not include a right to collective bargaining but that the state has a positive obligation to secure enjoyments of right under Article 11)

¹¹⁵ See *Schmidt and Dahlström v. Sweden*, ECHR [1976] Application No. 5589/72 (upholding a Swedish restriction of the right to strike on the understanding that the strike is an important means by which union members can protect their interests but that there are also other venues); *UNISON v. UK*, ECHR [2002] Application No. 53574/99 (upholding a British restriction of the right to strike as justified under Article 11)

enacted in 1961 and revised in 1996 – did include an explicit provision, Article 6(4), protecting “the right of workers and employers to collective action in case of conflicts of interest, including the right to strike.” The ESC, however, did not include any effective mechanism to enforce this right.¹¹⁶ Compliance by the signatory states is ensured through periodic reviews and only in 1995 was an optional Protocol adopted to allow trade unions and employers’ organizations to bring a complaint before the European Committee of Social Rights (ECSR).¹¹⁷ Compared to the supervision of the ECtHR, however, the review by the ECSR appears extremely weak, as it is “hampered by State control.”¹¹⁸ Hence, neither the ECHR nor the ESC worked as an effective bulwark for the protection of the right to strike at the European level from which the EU institutions could draw inspiration.

Nevertheless, in the last decade, a number of legal and jurisprudential developments have reshaped the framework for the protection of the right to strike at the supranational level, highlighting a growing influence of EU law in the regulation of industrial action. To begin with, in 2000, the EU institutions proclaimed a EU Charter of Fundamental Rights (CFR). The CFR pursued the goal to restate the case law of the ECJ in the field of fundamental rights. In fact, however, the CFR included a number of innovative provisions and quite remarkably merged in the same catalogue a set of both civil and political rights and of social and economic rights. Hence, Article 28 (which is located in the Title IV of the CFR, entitled “Solidarity”) codifies a right of collective bargaining and action and reads:¹¹⁹ “Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.” Until the entry into force of the Lisbon Treaty, the CFR was not vested with binding value.¹²⁰ Yet, drawing *inter alia* on the CFR, in two joint decisions delivered on 3 December 2007 – *International Transport Workers’ Federation v. Viking*¹²¹ and *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundets*¹²² – the Grand Chamber of the ECJ held that the right to strike is a fundamental right of the EU

¹¹⁶ Under the 1961 ESC contracting parties were required exclusively to submit reports on the extent of their compliance with the ESC to a Committee of Independent Expert nominated by the Council of Europe’s Committee of Ministers. For a description of the original supervisory system of the ESC see Alexandre Berenstein, ‘The System of Supervision of the European Social Charter’ in Lammy Betten et al (eds), *The Future of European Social Policy* (Kluwer 1989) 42

¹¹⁷ On the new supervisory mechanism see Robin Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 *European Journal of International Law* 417

¹¹⁸ T. Novitz (n 98) 241

¹¹⁹ On the CFR and the protection of labour rights see Bernard Ryan, ‘The Charter and Collective Labour Law’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights- A Legal Perspective* (Hart Publishing 2003)

¹²⁰ See *infra* Section 6

¹²¹ Case C-438/05 *Viking* [2007] ECR I-10779

¹²² Case C-341/05 *Laval* [2007] ECR I-11767

constitutional order.¹²³ In these decisions, however, the ECJ designed a standard for the protection of the right to strike which differs from that in force in a number of EU member states.¹²⁴

In *Viking*, the ECJ was confronted with a preliminary reference from the Court of Appeal for England and Wales. The case in the main proceeding concerned a Finnish company, Viking Lines which operated ferry services between Helsinki, Finland and Tallinn, Estonia. Viking was running its business at a loss and wished to relocate its place of establishment to Estonia in order to benefit from lower wages. Viking's plan to reflag its vessels was met with opposition by the Finnish Seamen's Union (FSU) and its international partner, the London-based International Transport Workers' Federation (ITWF). To prevent the relocation, FSU threatened to take industrial action against Viking and ITWF requested that its Estonian affiliates refuse to enter into negotiations with Viking. Viking brought a case before a UK tribunal to enjoin FSU and ITWF from striking. In its complaint, Viking argued that the industrial action taken by the FSU, with the support of ITWF, was preventing Viking from relocating its vessels to Estonia and was thus interfering with its freedom of movement under EU law. The Court of Appeal therefore asked the ECJ whether the collective actions by FSU and ITWF fell outside the scope of EU law or, if not, whether they were justified or rather constituted an unwarranted restriction of the free movement rules enshrined in Article 43 TEC (current Article 49 TFEU). In his opinion, AG Maduro acknowledged that the case presented the ECJ with an issue of "great socio-political sensitivity [...touching] on the relationship between social rights and the rights to freedom of movement."¹²⁵

The ECJ clearly answered the first question of the referring judge by stating that collective action by trade unions "falls, in principle, within the scope of Article 43 TEC"¹²⁶ and it consequently rejected a number of observations that had been raised by the main parties to the proceedings and by the intervening governments. Firstly, the ECJ discarded the submission of the Danish government that Article 137(5) TEC excluded the competence of the EU in this field. The ECJ argued that "the fact that Article 137 TEC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action [...] from the application of Article 43 TEC."¹²⁷ Secondly, the ECJ refused to apply by analogy the *Albany International* doctrine, underlining how *Albany* concerned the application of competition rules whereas *Viking* concerned freedom of movement. Most importantly, however, the ECJ rejected the idea that industrial action

¹²³ For a comment to the decisions see, among others, Alicia Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms' (2008) 8 Human Rights Law Review 714; Judy Fudge, 'Constitutionalizing Labour Rights in Europe' in Tom Campbell and Keith Ewing (eds), *Rescuing Human Rights* (OUP 2011)

¹²⁴ See generally Anne Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 Industrial Law Journal 126; Norbert Reich, 'Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases Before the ECJ' (2008) 9 German Law Journal 125

¹²⁵ *Viking*, Opinion of AG Maduro, par 1

¹²⁶ *Viking* par 37

¹²⁷ *Ibid* par 41

fell outside the scope of EU law because the right to strike was a fundamental right. In a remarkable paragraph, the ECJ affirmed instead that “the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the [ESC] – to which, moreover, express reference is made in Article 136 TEC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at [EC] level or in the context of the [EU], such as the [CCFSRW...] and the [CFR].”¹²⁸ The ECJ thus held that “the right to strike, must [...] be recognised as a fundamental right which forms an integral part of the general principles of [EC] law the observance of which the Court ensures.”¹²⁹

Having recognized for the first time in its jurisprudence that the right to strike is part of the constitutional principles of the EU legal order, however, the ECJ underlined how the exercise of that right may nonetheless be subject to limitations to ensure the protection of other fundamental EU freedoms. Hence, the ECJ moved to examine whether the collective action by the FSU and ITWF represented a restriction of the right of free movement and whether it could be regarded as justified. According to the ECJ it could not be disputed that “collective action such as that envisaged by FSU ha[d] the effect of making less attractive, or even pointless [...] Viking’s exercise of its right to freedom of establishment”¹³⁰ and constituted a restriction on freedom of establishment within the meaning of Article 43 TEC. To assess whether the restriction of Viking’s free movement right was justified, the ECJ engaged in a proportionality analysis of the industrial action by the FSU and ITWF. AG Maduro had emphasized how such analysis required a balancing of competing interests: “[a]lthough the Treaty establishes the common market, it does not turn a blind eye to the workers who are adversely affected by its negative traits. On the contrary, the European economic order is firmly anchored in a social contract.”¹³¹ Echoing his words, the ECJ noticed that “the activities of the [EC] are to include not only an ‘internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’, but also ‘a policy in the social sphere’”¹³². Yet, in drawing its balancing test, the ECJ affirmed that the industrial action by the FSU and ITWF would only be justified if it pursued the protection of workers and if it represented an *ultima ratio* for the trade unions.

¹²⁸ Ibid par 43

¹²⁹ Ibid par 44

¹³⁰ Ibid par 72

¹³¹ *Viking*, Opinion of AG Maduro, par 59

¹³² *Viking* par 78 (quoting Article 3(1)(c) and (j) TEC)

The ECJ, in particular, invited the state court to review¹³³ whether “the jobs or conditions of employment of the FSU’s members liable to be adversely affected by the reflagging of the [vessel] [we]re in fact jeopardised or under serious threat, [...] whether the collective action initiated by FSU [wa]s suitable for ensuring the achievement of the objective pursued and [whether it did] not go beyond what is necessary to attain that objective.”¹³⁴ Moreover, the ECJ affirmed that it was for the national court to examine “whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.”¹³⁵ Hence, the ECJ concluded that “collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of [Article 43 TEC]. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.”¹³⁶

In *Laval*, the *Arbetsdomstoled*, the Swedish Labour Court, had raised a preliminary question before the ECJ in the context of the proceedings between Laval, a company incorporated under Latvian law, and three Swedish trade unions operating in the building sector. Pursuant to the EU provisions on the freedom to provide services, Laval concluded a contract with a Swedish developer to construct a school in the city of Vaxholm, Sweden. To complete the works, Laval posted a number of Latvian workers to Sweden. These workers were members of the Latvian building sector’s trade union and Laval was bound by the conditions set in the Latvian collective agreement for the building sector. Soon after beginning work in Sweden, Laval was requested by the Swedish trade unions to conclude the Swedish collective agreement for the building sector, which required Laval to pay a higher wage to its Latvian workers. Refusal by Laval to enter into an agreement triggered industrial action by the Swedish unions, through a blockade and a sympathy strike, which *de facto* prevented Laval from continuing its construction works. Laval therefore brought a case before the Swedish labour court to obtain, first, a declaration that the collective action by the

¹³³ It may be noted that the Court of Appeal for England and Wales which had referred the preliminary question to the ECJ never decided the case because, after the decision of the ECJ, the parties decided to settle the dispute.

¹³⁴ *Viking* par 84

¹³⁵ *Ibid* par 87

¹³⁶ *Ibid* par 90

Swedish unions affecting Laval's worksite was unlawful; second, an order that such action should cease; and, third, an order that the trade unions pay compensation for the loss suffered by Laval. In its reference, the *Arbetsdomstolen* asked the ECJ whether the industrial action by the trade unions in the case at hand could be regarded as compatible with the freedom to provide services enshrined in Article 49 TEC (current Article 56 TFEU). As such, *Laval* raised a problem analogous to that of *Viking*, requiring the ECJ "to weigh the exercise by trade unions of their right to resort to collective action to defend workers' interests [...] against the exercise, by an undertaking established in the Community, of its freedom to provide services, a fundamental freedom guaranteed by the [T]EC."¹³⁷

The ECJ approached the issue of the right to strike in *Laval* just as it had done in *Viking*.¹³⁸ It rejected the argument that collective action fell outside the scope of Article 49 TEC and rather restated the fundamental nature of the right to strike in the EU legal order. The ECJ remarked however that "the exercise of that right may nonetheless be subject to certain restrictions."¹³⁹ Hence, it began its review of whether the industrial action at hand constituted a restriction on the freedom to provide services, and, if so, whether it could be justified. The ECJ held that the strike of the Swedish trade unions was "liable to make it less attractive, or more difficult, for [Laval] to carry out construction work in Sweden, and therefore constitute[d] a restriction on the freedom to provide service."¹⁴⁰ The ECJ then assessed whether the restriction was proportionate. It recognized that "in principle, [industrial] action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective" of the EU.¹⁴¹ Nevertheless, the ECJ concluded that in the present case the strike "c[ould] not be justified with regard to such an objective"¹⁴² and thus affirmed that "collective action [...] to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions"¹⁴³ was incompatible with Article 49 TEC.¹⁴⁴

¹³⁷ *Laval*, Opinion of AG Mengozzi, par 3

¹³⁸ The *Laval* case, beside addressing the issue of the protection of the right to strike in the EU legal order, also address a more technical question about the interpretation of the Posted Worker Directive: Council Directive 96/71/EC OJ 1996 L 257/26. On the issues relating to the interpretation of the Posted Workers Directive see Claire Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers' (2009) 34 European Law Review 844

¹³⁹ *Laval* par 91

¹⁴⁰ *Ibid* par 99

¹⁴¹ *Ibid* par 107

¹⁴² *Ibid* par 108

¹⁴³ *Ibid* par 111

The decisions of the ECJ in *Viking* and *Laval* represent an important step forward in the protection of the right to strike at the supranational level in Europe and underline the increasing impact that EU law exercises in the regulation of social rights. For the first time, the ECJ recognized the right to strike as a fundamental right and ruled that the right for workers to take industrial action is to be protected as a general constitutional principle of EU law. Yet, the ECJ did not hold that the right to strike is absolute. On the contrary, the ECJ affirmed that its exercise can be subject to certain restrictions and, most importantly, it held that the right to strike must be exercised in conformity with the principle of proportionality. The ECJ subjected the possibility for trade unions to go on strike to a review of the suitability, necessity and *ultima ratio* of the industrial action and empowered state courts to “verify whether the union has exhausted all other avenues under national law before the industrial action is found appropriate.”¹⁴⁵ Taking into account the limitations that surround this judicial recognition of the right to strike, many labour lawyers have criticized the decisions of the ECJ. As Tonia Novitz argued: “in neither *Viking* nor *Laval* did the [ECJ] formulate a right to collective action in a manner likely to provide effective legal protection of its exercise. Indeed it could be said that other aspects of the *Viking* and *Laval* judgments render judicial recognition of such a right negligible in terms of its practical effects.”¹⁴⁶

In light of the comparative framework developed in the previous Section, it seems possible to argue that several criticisms of the ECJ’s decisions in *Viking* and *Laval* “are to some extent overstated.”¹⁴⁷ The ECJ certainly did not embrace a position as ‘labor-friendly’ as that existing in the legal systems of the Scandinavian countries¹⁴⁸ – much less did it adopt the broad constitutional reading that countries like Italy or France accord to the right to strike.¹⁴⁹ However, the solution envisaged by the ECJ to recognize a right to strike only inasmuch as its exercise complies with the principle of proportionality is not without basis in domestic law. Indeed, this solution reflects the rule in force in the industrial relations’ systems of countries like Germany and Poland. As mentioned above, in Germany the right to strike is permitted only as an *ultima ratio* and courts

¹⁴⁴ In response to the preliminary ruling of the ECJ, the Swedish *Arbetsdomstolen* awarded *Laval* compensation for damages totalling 50,000 euros plus costs of 200,000. See Katherine Apps, ‘Damages Claims Against Trade Unions After *Viking* and *Laval*’ (2009) 34 *European Law Review* 141

¹⁴⁵ Catherine Barnard, ‘*Viking* and *Laval*: an Introduction’ (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 463, 483

¹⁴⁶ Tonia Novitz, ‘A Human Right Analysis of the *Viking* and *Laval* Judgments’ (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 541, 542

¹⁴⁷ Robert O’Donoghue and Bruce Carr, ‘Dealing with *Viking* and *Laval*: From Theory to Practice’ (2007-2008) 11 *Cambridge Yearbook of European Legal Studies* 123, 150

¹⁴⁸ See Mia Rönnmer, ‘Free Movement of Services versus National Labour Law and Nordic Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective’ (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 493

¹⁴⁹ See Edoardo Ales et al, ‘Collective Action in Italy: Conceptualizing the Right to Strike’ in Andreas Bücker and Wiebke Warnke (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Ruffert* (Nomos 2011) 119

routinely subject industrial action by the trade unions to a strict proportionality test.¹⁵⁰ From this point of view, therefore, it would appear that the ECJ introduced at the EU level a protection for the right to strike which lies somewhere in the middle between the ‘vanguard’ and ‘laggard’ models for the regulation of industrial action identified in Section 2.¹⁵¹ The standard for the protection of the right to strike developed by the ECJ in *Viking* and *Laval* is less protective than, say, the Swedish standard.¹⁵² However, it is as protective as the German standard.¹⁵³ And, perhaps, more protective than the British standard:¹⁵⁴ technically speaking, no fundamental right to strike exists under UK law, although, of course, UK courts “have never subjected industrial action to a proportionality test considering whether the harm caused to the employer is proportionate to the union’s objectives in taking industrial action.”¹⁵⁵

Whatever the appropriateness of these considerations on the compatibility between the constitutional standards of the EU and the member states,¹⁵⁶ it is nonetheless clear that *Viking* and *Laval* embody a major challenge to the domestic systems for the protection of the right to strike.¹⁵⁷ The recognition at the supranational level of a right to strike at the conditions set in *Viking* and *Laval* puts the state regulations of industrial action under pressure and creates a number of tensions between national and EU law. These tensions are particularly evident for the EU countries that ensure a heightened and advanced system for the protection of the right to strike,¹⁵⁸ although they

¹⁵⁰ See *supra* text accompanying n 61-65

¹⁵¹ I draw the expressions “vanguard” and “laggard” from Ann Althouse, ‘Vanguard States, Laggard States: Federalism and Constitutional Rights’ (2003-2004) 152 *University of Pennsylvania Law Review* 1745 (who uses it describe the “most-protective” and “least-protective” regimes for the protection of fundamental rights at the state level in the US federal system of government)

¹⁵² See Niklas Bruun et al, ‘Consequences and Policy Perspectives in the Nordic Countries as a Result of Certain Important Decisions of the Court of Justice of the EU’ in Andreas Bückler and Wiebke Warnek (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Nomos 2011) 19

¹⁵³ This of course does not mean that there is a complete and general correspondence between the German labour standards and EU law. To the contrary, see Eva Kocher, ‘Fundamental Social Rights in Community Law and in the German Constitution – Equivalent Rights?’ (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 385 (explaining that there are divergences between EU law and German constitutional law on the interpretation of the negative right of association). See also Case C-271/08 *Commission v. Germany* [2010] ECR I-7091 (holding that Germany had violated EU public procurement law because German local authorities had inter into a collective agreement with the relevant workers’ unions pursuant to the German law on industrial relations and selected pension providers for their workforce without opening the selection of the pension providers to competitive tender opened to other EU firms)

¹⁵⁴ See Rebecca Lisa Zahn, ‘I casi *Viking e Laval*: tra problemi di allargamento e soluzioni poco fortunate’ in Marta Cartabia (ed), *Dieci Casi sui diritti in Europa* (Il Mulino 2011)

¹⁵⁵ C. Barnard (n 145) 489

¹⁵⁶ On this issue see also Nicole Lindstrom, ‘Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict’ (2010) 48 *Journal of Common Market Studies* 1307 (outlining the position of the member states before the ECJ in the *Viking* and *Laval* cases and underlining the difference in approach between the more “labour-friendly” position of Western countries and the more “market-friendly” position of the new EU member states of Central and Eastern Europe)

¹⁵⁷ See Silvana Sciarra, ‘*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU’ (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 563

¹⁵⁸ See Niklaas Bruun, ‘The Challenge of Europeanisation and Globalisation in the Field of Labour Relations: the Nordic Case’ in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 103

also emerge in other member states.¹⁵⁹ The EU standard for the protection of the right to strike does not displace national standards *tout court*. Indeed, the ECJ's right to strike rules only apply in cases of transnational industrial action, i.e. cases where the conflict between unions and employers extends to more than one member state and calls into question the EU free movement rules. However as interstate commerce expands in the EU, industrial disputes with a cross-border dimension increase. In this broadening field, the interplay between EU law and domestic law threatens "to undermine the effectiveness with which labour standards, whether originating in law or in collective agreement, can be applied at the national level."¹⁶⁰

For descriptive purposes, I suggest defining the challenge that emerges from the overlap and interplay between national and supranational law in the field of industrial action through the notion of ineffectiveness I introduced in the first chapter. There, I have argued that the interactions between a plurality of fundamental rights standards generate complex constitutional dynamics in the European multilevel architecture. The same pattern emerges here. For a number of years, in the absence of binding or enforceable standards for the protection of the right to strike at the supranational level in Europe, the EU member states were free to regulate the right to strike as they thought appropriate. In the last decade, however, the autonomy of the member states has come under increased pressure due to the impact of EU law over national law.¹⁶¹ Following the enactment of the CFR, in *Viking* and *Laval* the ECJ recognized the existence of a fundamental right to strike in the EU constitutional order. Yet, by framing the exercise of the right to industrial action as a possible interference with the principles of free market, "*Laval* and *Viking* draw on a legacy of jurisprudence which views with suspicion collective action and rights, appreciating rather the exercise by employers of their economic freedoms."¹⁶² As a consequence, the ECJ's "express recognition to the right to strike as a fundamental human right d[id] not lead to enhanced protection of that right."¹⁶³ The ECJ, in fact, designed a balancing test between free movement and social rights which ensures protection of the right to strike only when industrial action is suitable, necessary and strictly proportional to the achievement of the workers' desired goal.

This jurisprudence places the regulation of the right to strike in the EU member states under pressure. As has been convincingly argued: "the ECJ's case law recognizing a new fundamental social right, may, paradoxically, lead to new restrictions on the right to strike in Member States

¹⁵⁹ See C. Barnard (n 145) 489 (arguing that "[t]he application of the proportionality test [designed by the ECJ in *Viking* and *Laval*] has the possibility of profoundly changing British strike law.")

¹⁶⁰ Simon Deakin, 'Regulatory Competition After *Laval*' (2007-2008) 10 Cambridge Yearbooks of European Legal Studies 581, 605

¹⁶¹ For an assessment of the impact of EU fundamental rights in the national legal cultures see Miriam Aziz, *The Impact of European Rights on National Legal Studies* (Hart Publishing 2004)

¹⁶² T. Novitz (n 146) 561

¹⁶³ C. Barnard, (n 145) 486

guaranteeing a high level of protection of that right. Thus the ECJ case law constitutes a challenge to national labour law systems and its outcome may well be to limit collective autonomy rather than strengthen it.”¹⁶⁴ By setting a ceiling of protection for collective labour rights in industrial disputes with a cross-border dimension, the case law of the ECJ has called into question the effectiveness of the protection of the right to strike of many EU member states. To the extent to which the tensions between state and supranational laws are a consequence of the difficult balancing between free market principles and social rights guarantees in a federalism-based system of governance, the European experience does not however seem to be unique. Indeed, exploring in a comparative perspective the federal experience of the US can provide useful points of reference to explain the dynamics currently at play in Europe and possible lessons to assess how the European legal regime may evolve in the future.

3. Comparative assessment: The right to strike in the US federal experience

The previous Section has analyzed the increasing impact that supranational law exercises over the protection of the right to strike in the EU member states and the complex constitutional challenge that this interplay generates on the effectiveness of labour rights. The goal of this Section is to introduce a comparative analysis and to explore the extent to which dynamics analogous to those currently taking place in Europe can also be detected in the federal experience of the US. As Catharine Barnard has convincingly argued, “[s]uperficially, at least, the US is a good comparator for the EU. Broadly speaking, both have similar sized economies, both are based on a federal or quasi-federal structure and both recognise that, in certain circumstances, ‘federal’ law needs to control state activity where the activity interferes with interstate commerce and thus the unity of the Union or the single market.”¹⁶⁵ Yet, as Ian Eliasoph has recently remarked with surprise, a comparative examination of the US experience “has been relatively absent from the vibrant ‘constitutional’ debates in the [EU] over issues of federalism, the balancing of social and economic right, and the proper role of the [ECJ].”¹⁶⁶

A number of conventional arguments are generally put forward against the feasibility and usefulness of a comparison between Europe and the US in the field of social rights. These

¹⁶⁴ Sophie Robin-Olivier, ‘Normative Interactions and the Development of Labour Law: A European Perspective’ (2008-2009) 11 Cambridge Yearbook of European Legal Studies 377

¹⁶⁵ Catherine Barnard, ‘Restricting Restrictions: Lessons for the EU from the US?’ (2009) 68 Cambridge Law Journal 575

¹⁶⁶ Ian H. Eliasoph, ‘A “Switch in Time” for the European Community? *Lochner* Discourse and the Recalibration of Economic and Social Rights in Europe’ (2008) 14 Columbia Journal of European Law 467

arguments commonly stress the exceptionalism of the US constitutional system for the protection of social rights and underline the existence of “a clear dividing line”¹⁶⁷ between the European social model and the limited guarantee that social and economic rights enjoy in the US. Cass Sunstein has surveyed three main explanations for these differences.¹⁶⁸ First, the US Constitution dates back to the 18th century, and therefore lacks the social and economic guarantees that were largely a creation of the 20th century. Secondly, the US has a distinctively libertarian and individualist culture that prizes the right to be free from government intrusion. Thirdly, the US Constitution is enforced by courts and there has been much reluctance in codifying a catalogue of social rights whose enforcement the courts would not be able to properly handle. According to Cass Sunstein, however, none of these justifications is entirely satisfactory. Rather, his explanation of why the US is not endowed with a strong system for the protection of social rights centers on the judicial transformations that took place in the US Supreme Court during the 1970s. Following the appointment of conservative justices by the Republican administrations the case law of the federal courts in the field of social rights was chilled and this prevented the codification of a second Bill of Rights in the US.¹⁶⁹

In this chapter, I do not intend to engage in this debate. Indeed, it is plausible to argue that significant differences exist in the constitutional protection of social rights between the US and the European *states*. What I want to suggest, however, is that these differences may be less pronounced when we compare the US with the European system *as a whole*. Most comparative constitutional and labour lawyers have explored the differences in the protection of social and labour rights that exists between the US and the individual EU member states.¹⁷⁰ The picture seems to change significantly, instead, if we consider the European multilevel constitutional architecture in its entirety as a multilevel, quasi-federal arrangement.¹⁷¹ Indeed, as it has been argued, “the legal order of the [EU] seems closer to the American archetype than to the European average.”¹⁷² The “tensions over whether the central government or the states [...] are the most suitable jurisdictions for dealing with the relationship between employers and unions” has been at play for long time in the US

¹⁶⁷ George Katrougalos, ‘European “Social States” and the USA: An Ocean Apart?’ (2008) 4 *European Constitutional Law Review* 225

¹⁶⁸ Cass Sunstein, *The Second Bill of Rights. FDR’s Unfinished Revolution and Why we need it more than ever* (Basic Books 2004)

¹⁶⁹ *Ibid* 168

¹⁷⁰ See eg Avi Ben-Bassat and Momi Dahan, ‘Social Rights in the Constitution and in Practice’ [2007] *Journal of Comparative Economics* 1

¹⁷¹ For the definition of the European system in terms of a multilevel, federal architecture see Ingolf Pernice, ‘Multilevel Constitutionalism in the European Union’ (2002) 27 *European Law Review*, 511; Robert Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (OUP 2009)

¹⁷² G. Katrougalos (n 167) 226

federal system,¹⁷³ despite being a rather new phenomenon in Europe. In fact, as one US scholar has remarked, “many of the constitutional debates in Europe have a very ‘familiar ring’ to American ears.”¹⁷⁴ There seems to be, therefore, some value in examining “possible federal dynamics within the context of the [EU] to the extent that it shows a relationship with labour law, or broader, social policy”¹⁷⁵ in a comparative perspective with the US federal experience.

In addition, there is another reason that pleads in favour of comparing the European regime for the protection of the right to strike with the US system. A major difficulty in comparing the constitutional protection of social rights in US and Europe is that the US Constitution “has one of the thinnest systems of social provision among mature and economically prosperous democracies,”¹⁷⁶ completely lacking a catalogue of *positive* social rights, i.e. legal entitlements that require positive action by the state. The right to strike is a social right: indeed, “the case usually made for the right to strike has a socio-economic character.”¹⁷⁷ Yet, the right to strike presents features which are rather typical of *negative* rights. The right to strike primarily protects workers and trade unions against unlawful restraints from the government. Needless to say, a major challenge to the effective exercise of the right to strike comes from private actors (i.e. employers) and therefore a meaningful protection of the right to strike also requires positive government action, through legislative means, to ensure that the management does not retaliate against workers when these exercise their rights. All this, however, is also true also for many other first generation negative rights. Even the right to property, which epitomizes the idea of *laissez-faire* and negative liberty, depends heavily on law and government intervention for protection against private attack.¹⁷⁸ The need for government intervention, therefore, does not contradict the fact that the right to strike should be conceptualized as a negative right. If this is so, however, it becomes possible to examine how the right to strike has been protected in the US system avoiding the difficulties posed by the lack of positive social rights provisions in the US Constitution.

In light of the above, I will now turn to an historical examination of the US experience in the protection of the right to strike and I will explore the similarities and differences that exist between the US federal system and the European multilevel architecture in this matter. This comparison does neither imply that the two systems are identical nor suggest that they will inevitably evolve in the same way. As has been correctly argued, the value of a comparative study “is to be derived not so

¹⁷³ Greg Patmore, ‘The Origins of Federal Industrial Relations Systems: Australia, Canada and the USA’ (2009) 51 *Journal of Industrial Relations* 151

¹⁷⁴ I.H. Eliasoph (n 166) 470

¹⁷⁵ Frank Hendrickx, ‘Federal Dimensions of European Labour Law’ in Othmar Vanachter and Martin Vranken (eds), *Federalism and Labour Law: Comparative Perspectives* (Intersentia 2004) 101

¹⁷⁶ Mark Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008)

¹⁷⁷ T. Novitz (n 98) 49

¹⁷⁸ See C. Sunstein (n 168) 20

much from the possibility of finding foreign laws and institutions that we can adopt; rather it is derived from the new perspectives on our own system that we can gain from such a study.”¹⁷⁹ A comparison of the US federal system can operate as a useful *mirror* to understand the tensions between the various levels of government regulation which exist today in Europe.¹⁸⁰ The evolving experience of US, however, can also offer several *models* and *anti-models* for the protection of the right to strike that Europe may want to take into account for the future.¹⁸¹ Of course, many of the events that will be recalled hereafter have occurred in the US in a remote time and this recommends caution in drawing lessons for Europe from the US experience.¹⁸² Yet, despite all the differences between the two systems in the historical, political and institutional context, the US experience in balancing federalism concerns, free market rules and social rights guarantees provides “guideposts that are perilous to ignore”¹⁸³ for Europe.

In the US, as in most European countries, early pressures in favour of the recognition of the right for workers to form trade unions and take industrial action to defend their interests emerged during the last decades of the 19th century.¹⁸⁴ At that time, the US federal government was understood as lacking substantive powers to regulate the field of industrial relations and, as such, the questions of unions’ rights were addressed exclusively by the several states in the exercise of their general welfare powers.¹⁸⁵ Under the state common law, supreme courts in many US states came to recognize a right for workers to join trade unions and legalized peaceful primary strikes for higher wages or better working conditions.¹⁸⁶ Through piecemeal adjudication, most states adopted the rule that strikes were legal unless conducted by unlawful means or for unlawful objectives, and they excluded government retaliation against workers going on strike.¹⁸⁷ Nevertheless, states were not endowed with legislation to protect striking workers from retaliation by employers: in fact, under the common law, striking workers could be fired for breach of contract and were subject to liability in tort.¹⁸⁸ Moreover, many states adopted a restrictive interpretation of what lawful strikes

¹⁷⁹ Benjamin Aaron, ‘Labor Relations Law in the United States from a Comparative Perspective’ (1982) 39 Washington and Lee Law Review 1265

¹⁸⁰ On the role that comparative constitutional law can play in facilitating the understanding of one’s *own* legal system see Vicki Jackson, ‘Narrative of Federalism: Of Continuities and Comparative Constitutional Experience’ (2001) 51 Duke Law Journal 223

¹⁸¹ On the US experience during the so-called *Lochner* era as an “anti-model” of comparative constitutional law see Sujit Choudhry, ‘The *Lochner* Era and Comparative Constitutionalism’ (2004) 2 International Journal of Constitutional Law 1, 3

¹⁸² See Ernest Young, ‘Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism’ (2002) 77 NYU Law Review 1612

¹⁸³ I.H. Eliasoph (n 166) 507

¹⁸⁴ See generally Christopher Tomlins, *The State and the Unions* (CUP 1985)

¹⁸⁵ See Gerald Gunther and Kathleen Sullivan, *Constitutional Law* (13th ed Foundation Press 1997) 159 ff

¹⁸⁶ See Ludwig Teller, *The Law Governing Labor Disputes and Collective Bargaining. Volume 1* (Baker, Voorhis and Co. 1940) 249 ff

¹⁸⁷ I am grateful to Jim Pope for making clear this point for me.

¹⁸⁸ See William Gould IV, *A Primer on American Labor Law* (4th ed MIT 2004) 9

meant and, although holdings varied widely from state to state, some state courts prohibited as unlawful all industrial action which did not lead to immediate benefits for the workers.¹⁸⁹

The protection that labour began to enjoy at the state level throughout the progressive era, however, was put under pressure by the federal courts.¹⁹⁰ To begin with, the US Supreme Court interpreted the provisions of the Federal Antitrust Act (Sherman Act)¹⁹¹ broadly as prohibiting collective action by trade unions.¹⁹² In *Loewe v. Lawlor*,¹⁹³ the US Supreme Court ruled that concerted action by unions' members in the pursuit of their interest constituted an unlawful combination in violation of the anti-trust rules and an interference with "the liberty of a trader to engage in business."¹⁹⁴ Secondly, in a series of decisions epitomized by *Lochner v. New York*,¹⁹⁵ the Supreme Court held that the US Constitution's Fourteenth Amendment guarantee that an individual not be deprived of liberty or property without "due process of law"¹⁹⁶ included a freedom to enter into private contracts without any government restriction.¹⁹⁷ Under this substantive reading of the "due process" clause, federal courts enforced a *laissez-faire* theory of economics and struck down as unconstitutional a host of state and federal legislations aiming at improving the social and working conditions of employees and the relations between labour and management.¹⁹⁸

Ironically, at the height of the *Lochner* era, the US Supreme Court held in a 1923 decision that the "due process" clause of the Fourteenth Amendment to the US Constitution protected a constitutional right to strike.¹⁹⁹ In the case of *Charles Wolff Packing Co. v. Court of Industrial Relations*,²⁰⁰ the Supreme Court invalidated a Kansas law that banned strikes in essential industries and established an industrial court to solve labour-management disputes, arguing that the state statute deprived workers and unions of "property and liberty of contract without due process of

¹⁸⁹ L. Teller (n 194) 267

¹⁹⁰ See William Graebner, 'Federalism in the Progressive Era: A Structural Interpretation of Reform' (1977) 64 Journal of American History 331

¹⁹¹ 26 Stat. 209 (1890), currently codified at 15 U.S.C. paras 1–7

¹⁹² On the relationship between anti-trust and labour law see Elinor Hoffmann, 'Labor and Antitrust Policy: Drawing a Line of Demarcation' (1983) 50 Brooklyn Law Review 1

¹⁹³ 208 U.S. 274 (1908)

¹⁹⁴ *Ibid* at 275

¹⁹⁵ 198 U.S. 45 (1905) (striking down a New York statute limiting the hours of work in bakeries). For a thorough historical examination of the *Lochner* decision see Sidney Tarrow, '*Lochner v. New York*: A Political Analysis' (1964) 5 Labor History 277

¹⁹⁶ On the Due Process Clause of the Fourteenth Amendment to the US Const. see John Orth, *Due Process of Law. A Brief History* (University Press of Kansas 2003) and William Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Harvard University Press 1988)

¹⁹⁷ On the so-called *Lochner* era of the US Supreme Court see *inter alia* Cass Sunstein, '*Lochner*'s Legacy' (1987) 87 Columbia Law Review 873

¹⁹⁸ See eg *Coppage v Kansas*, 236 U.S. 1 (1915) (striking down as a violation of freedom of contract a Kansas statute that prohibited employers from requiring employees to refrain from joining trade unions as a condition of employment); *Adair v. US*, 208 U.S. 161 (1908) (striking down as a violation of the Commerce Clause a federal statute that railway employers from discriminating employees because they joined a trade union).

¹⁹⁹ James Grey Pope, 'Contract Race and the Freedom of Labor in the Constitutional Law of "Involuntary Servitude"' (2009) 119 Yale Law Journal 1474, 1542

²⁰⁰ 262 U.S. 522 (1923)

law.”²⁰¹ In its 1926 decision in *Dorchy v. Kansas*,²⁰² however, the Supreme Court, per Justice Brandeis, affirmed that “neither the common law, nor the Fourteenth Amendment [to the US Constitution], confers the absolute right to strike”²⁰³ and affirmed the conviction inflicted by the Kansas Supreme Court against a union official who had organized a strike, holding that “[t]he right to carry on business -- be it called liberty or property -- has value [and t]o interfere with this right without just cause is unlawful.”²⁰⁴ By and large, therefore, from the late 1890s until the mid 1930s, the Supreme Court “developed and applied doctrines that insulated the market place from constraints imposed by legislatures or collective action.”²⁰⁵

By the mid 1930s, however, these doctrines were no longer tenable.²⁰⁶ Although the US Congress had already intervened during the early decades of the 20th century in the regulation of labour relations in interstate industries,²⁰⁷ the Great Depression had highlighted a need for much broader federal intervention in the economy. Pushed into power by a sweeping electoral victory, the Roosevelt Administration began a New Deal for the US, enacting major pieces of social legislation.²⁰⁸ According to the Administration, the resolution of the tensions between management and labour was a key ingredient to economic stabilization and to this end the legal rights of the unions had to be strengthened in order to ensure a workable system of collective bargaining.²⁰⁹ In 1932, Congress enacted the Norris-La Guardia Act,²¹⁰ “which eliminated federal court jurisdiction to enforce yellow dog contracts (agreement not to join a union)”²¹¹ and in 1933 Congress passed the National Industrial Recovery Act (NIRA),²¹² which protected unions’ right to conclude collective agreements. In *Schechter Poultry Corp. v. US*,²¹³ however, the US Supreme Court invalidated NIRA as an unconstitutional exercise of federal power, precipitating one of the most severe constitutional crises in US history. As is well known, President Roosevelt threatened to change the

²⁰¹ Ibid at 544. It may be worth noticing that in the case the challenge against the state statute was brought by an employer. The US Supreme Court, however, in holding the Kansas statute unconstitutional, placed weight on its restriction of labor’s ability to resort to strike or work stoppages, implying that such restrictions were incompatible with the Due Process Clause of the US Constitution

²⁰² 272 U.S. 306 (1926)

²⁰³ Ibid at 311

²⁰⁴ Ibid

²⁰⁵ L.H. Eliasoph (n 166) 471

²⁰⁶ See generally Jeff Shesol, *Supreme Power: Franklin Roosevelt vs the Supreme Court* (Norton 2010)

²⁰⁷ Clayton Act, 38 Stat. 739 (1914) currently codified at 15 U.S.C. par 17; 29 U.S.C. par 52; Railway Labor Act, 44 Stat. 577 (1926) currently codified at 29 U.S.C. paras 102, 104, 113

²⁰⁸ See C. Sunstein (n 168) 35 ff

²⁰⁹ Holly McCammon, Legal Limits on Labour Militancy: ‘US Labor Law and the Right to Strike Since the New Deal’ (1990) 37 Society for the Study of Social Problems 206, 209

²¹⁰ 47 Stat. 70 (1932) codified at 29 U.S.C. paras 101-115

²¹¹ J.G. Pope (n 199) 1552

²¹² 48 Stat. 195 (1933) formerly codified at 15 U.S.C. par 703

²¹³ 295 U.S. 495 (1935)

composition of the Supreme Court through a “Court-packing plan”²¹⁴ and Congress enacted a new statute, the National Labour Relations Act (NLRA),²¹⁵ which largely resembled the defunct NIRA. Eventually, in 1937 the Supreme Court operated a “switch in time” and upheld the constitutionality of the NLRA,²¹⁶ definitively sanctioning the constitutionality of the New Deal legislation.²¹⁷

The NLRA – also named the Wagner Act after its sponsor, Senator Robert Wagner – recognized a federal right for employees to organize trade unions and to engage in industrial action and prohibited employers from taking anti-union activities. As clarified in its opening provision, the NLRA found its legal basis in Article I, §8, cl.3 of the US Constitution – the so-called “Commerce Clause” – and was inspired by the goal to “promote[] the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.”²¹⁸ Section 7(a) of the law read: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”²¹⁹ Moreover, Section 13 affirmed that “[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike.”²²⁰ The NLRA, finally, set up a National Labor Relations Board (NLRB),²²¹ empowered to act as a mediator in industrial disputes, to investigate unfair labour practices, and to certify the representative unions for the purpose of collective bargaining in interstate industries.

As an exercise of Congress’ power to regulate inter-state commerce, the NLRA only applied to private firms operating in the nation-wide market and excluded many employers and workers from coverage, including government employers, agricultural labourers and domestic workers.²²² In the years immediately following the enactment of the NLRA, however, many states adopted state labour relations acts. State laws were often modelled after the Wagner Act and extended the protection of the rights of labour organizations to intra-state industries.²²³ Nevertheless, a number of

²¹⁴ See Richard Polenberg, *The Era of Franklin Delano Roosevelt 1933-1945: A Brief History with Documents* (Bedford Books 2000) 169

²¹⁵ 49 Stat. 452 (1937) codified as amended at 29 U.S.C. paras 151-169

²¹⁶ *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937)

²¹⁷ See also *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (upholding the constitutionality of the Norris-La Guardia Act)

²¹⁸ 29 U.S.C. par 151

²¹⁹ 29 U.S.C. par 157

²²⁰ 29 U.S.C. par 163

²²¹ 29 U.S.C. par 153

²²² 29 U.S.C. par 152

²²³ Archibald Cox, ‘Federalism in the Law of Labor Relations’ (1954) 67 *Harvard Law Review* 1297, 1307

states passed legislation which “place[d] restrictions on unions and on employees as well as on employers.”²²⁴ For almost two decades after the enactment of the NLRA, the field of industrial relations was understood as a policy area under concurrent control by the federal government and the states.²²⁵ Despite the “trend toward national integration,”²²⁶ state law coexisted with the national legislation and continued regulating important features of labour-management relations, including strikes.²²⁷ Over time, however, the application of state law different from federal law created “some kind of inconsistency”²²⁸ and in the 1959 case of *Building Trade Council v. Garmon*,²²⁹ the Supreme Court “held that Congress impliedly intended to exclusively occupy the field of collective labour relations and therefore the states [were] preempted from enacting laws attempting to regulate conduct which is ‘actually or arguably protected or prohibited’ by the NLRA.”²³⁰

The recognition of a principle of field pre-emption by federal law over state law in the area of industrial relations produced important consequences for the protection of the right to strike. The principle neatly separated the regulation of strikes for workers covered by the NLRA, falling under the exclusive purview of federal law, from the regulation of strikes for workers not covered by the NLRA, which was left to the states. In addition, it excluded that in the field of federal law, state law could go beyond the federal minimum, *de facto* transforming the NLRA into both a floor and a ceiling for the protection of the right to strike at the federal level. In the mid-long run, this arrangement did not prove positive for the protection of labour rights in the US. As has been argued, “[d]espite the crucial importance of the right to strike to the structure of the NLRA, over the sixty-plus years of the Act’s existence it has been steadily undercut by congressional amendments and judicial decisions.”²³¹ In 1947, Congress enacted the Labor-Management Relations Act (Taft-Harley Act),²³² which limited the powers of the labour unions, prohibiting secondary boycotts, and making it an unfair labour practice for unions to restrain or coerce employees in the exercise of their individual rights to self-organization.²³³ In 1959, then, Congress enacted the Labor-Management

²²⁴ Mason Doan, ‘State Labor Relations Acts’ (1942) 56 *Quarterly Journal of Economics* 507

²²⁵ See A. Cox (n 223) 1307

²²⁶ Paul Hays, ‘Federalism and Labor Relations in the United States’ (1954) 102 *University of Pennsylvania Law Review* 959

²²⁷ See Harry Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley* (University of Chicago Press 1950) 316

²²⁸ A. Cox (n 223) 1312

²²⁹ 359 U.S. 236 (1959)

²³⁰ Barbara Fick, ‘Federalism and Labour Law: The American Experience’, in Othmar Vanachter and Martin Vranken (eds), *Federalism and Labour Law: Comparative Perspectives* (Intersentia 2004) 73, 80-81

²³¹ Julius Getman and Ray Marshall, ‘The Continuing Assault on the Right to Strike’ (2001) 79 *Texas Law Review* 703, 704

²³² 61 Stat. 136 (1947) currently codified in scattered paras of 29 U.S.C.

²³³ 29 U.S.C. par 158(b)(1)(a)

Reporting & Disclosure Act (Landum-Griffin Act),²³⁴ which amended the NLRA to “further limit[] the right to strike.”²³⁵

The most significant restrictions to the protection of the right to strike, however, came from the case law of the Supreme Court. As James Gray Pope has explained, five decisions were especially fatal for the protection of the right to strike of US workers.²³⁶ Already in the 1938 case of *NLRB v. Mackay Radio & Telegraph Co.*,²³⁷ the Supreme Court ruled that employers enjoyed the right to permanently replace strikers. In *Consolidated Edison Co. v. NLRB*,²³⁸ the Court stated that the NLRB had no power to deter unfair labour practice and could only remedy harms in proceedings brought before it by private parties. In *NLRB v. Fansteel Metallurgical*,²³⁹ the Supreme Court held that workers did not have a right of self-defence against employers who committed unfair labour practice. In 1965, then, in *Textile Workers Union v. Darlington*,²⁴⁰ the Supreme Court ruled that management could lawfully close operating a factory in retaliation against workers who choose to unionize. Finally, in *Lechmere Inc. v. NLRB*,²⁴¹ the Court affirmed that employers could enforce trespass against union organizers, stopping them from accessing their property. By elevating “the state common-law rights of employers over the federal statutory rights of workers”²⁴² these decisions confirm that although “US labor law since the New Deal has undeniably empowered US workers by guaranteeing them the right to strike [...] the manner in which the law has been interpreted and applied has constrained that right and the power it implies [...] regulating workers’ collective action in ways designed to protect the continuity of production.”²⁴³

The protection of the right to strike in the state jurisdictions for the employees not covered by the federal NLRA reveals instead a more diversified picture. Because the federal courts never accepted the idea that the US Constitution included a minimum level of protection for the right to strike²⁴⁴ with which states were bound to comply in their jurisdictions,²⁴⁵ the several states have

²³⁴ 73 Stat. 519 (1959) currently codified in scattered paras of 29 U.S.C.

²³⁵ J. Getman and R. Marshall (n 239) 718

²³⁶ James Grey Pope, ‘How American Workers Lost the Right to Strike and Other Tales’ (2004-2005) 103 Michigan Law Review 518

²³⁷ 304 U.S. 333 (1938)

²³⁸ 305 U.S. 197 (1938)

²³⁹ 306 U.S. 240 (1939)

²⁴⁰ 380 U.S. 263 (1965)

²⁴¹ 502 U.S. 527 (1992)

²⁴² J.G. Pope (n 236) 519

²⁴³ H. McCammon (n 209) 223

²⁴⁴ This position has been persuasively advanced by several academics. See James Grey Pope, ‘The Right to Strike Under the United States Constitution’ (Rutgers Schools of Law Research Paper No. 66, 2007) (surveying the arguments in favour of a constitutional protection of the right to strike to be enforced against the states in the Thirteen Amendment Involuntary Servitude Clause, in the Fourteenth Amendment Due Process Clause and in the First Amendment principle on the freedom of association). See also Archibald Cox, ‘Strikes, Picketing and the Constitution’ (1950-1951) 4 Vanderbilt Law Review 574

²⁴⁵ See *U.A.W. Local 232 v. Wisconsin Labour Relations Board*, 336 U.S. 245 (1949) (holding that the Thirteen Amendment did not prohibit the state of Wisconsin from outlawing intermittent unannounced strike); *Lyng v. Auto*

remained free to enact very diverse regulations. The core focus of state legislations has been the regulation of the right to strike for public employees.²⁴⁶ A majority of states passed legislation that “forbid government employees to strike. In most states whose statutes are silent on the subject, the courts have ruled that strikes by government employees are illegal.”²⁴⁷ At the same time, some states legalized strikes for public employees. In 1985, for instance, in the case of *County Sanitation District v. Los Angeles County Employee Ass’n*,²⁴⁸ the Supreme Court of California “overturned the state’s common law ban on public employees strike”²⁴⁹ as incompatible with the state constitution. The recent events that occurred in the state of Ohio – where a contentious total strike ban on public employees was passed by the state legislature in March 2011²⁵⁰ and repealed by a popular referendum in November of the same year²⁵¹ – make it clear that major controversies still surround the regulation of the right to strike for public employees in many US states.

In conclusion, the experience of the US in the protection of the right to strike reveals an evolving pattern. The regulation of industrial action originally fell under the general welfare powers of the states. For the first three decades of the 20th century, however, the free market jurisprudence of the federal courts represented a major challenge to an effective protection of labour unions’ rights. Ironically, in *Wolff Packing* the Supreme Court quashed a strike ban as incompatible with the Fourteenth Amendment to the US Constitution and today that decision “remains available as authority for the proposition that there is a constitutional right to strike [in the US].”²⁵² The Wagner Act recognized the right to strike as fundamental to the process of collective bargaining and – with the goal to secure the “free flow of goods in [interstate] commerce”²⁵³ – introduced a heightened federal protection of industrial action. However, the protection of the right to strike at the federal level was significantly watered-down by congressional amendments and judicial rulings over time. Steadily, “[s]tate common law rights of property and contract were elevated above federal statutory rights of self-organization and collective action through *Lochner-era* notions of economic due process and interstate commerce.”²⁵⁴ At the same time, the Supreme Court interpreted federal law

Workers, 485 U.S. 360 (1988) (holding that the First Amendment did not prohibit a federal statutory provision denying food stamps to the families of workers on strike)

²⁴⁶ See Craig Olson, ‘Strikes, Strike Penalties and Arbitration in Six States’ (1986) 39 *Industrial and Labor Relations Review* 539

²⁴⁷ Benjamin Aaron, ‘Unfair Labor Practice and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model?’ (1985-86) 38 *Stanford Law Review* 1097, 1109

²⁴⁸ 38 Cal. 3d 564 (1985) cert. denied 474 U.S. 995 (1985)

²⁴⁹ J.G. Pope (n 244) 28

²⁵⁰ See 129 Senate Bill n 5 (Oh. 2011) (“An Act to make various changes to laws concerning public employees, including collective bargaining, salary schedules and compensation, playoff procedures, and leave.”)

²⁵¹ Sabrina Tavernise, ‘Ohio Turns Back a Law Limiting Unions’ Rights’ *The New York Times* (New York, 8th November 2011) A1

²⁵² J.G. Pope (n 199) 1544

²⁵³ 29 U.S.C. par 151

²⁵⁴ J.G. Pope (n 236) 551

as pre-empting the field of industrial relations and left states competent only to regulate strikes by public employees and other workers not covered by the NLRA. Thus, nowadays the right to strike enjoys a limited protection at the federal level that states can neither lower nor increase.

4. Recent developments: The case law of European Court of Human Rights

The analysis of the US federal experience has revealed a number of interesting points of analogy with the events currently taking place in Europe. The US constitutional architecture has been characterized for many decades by tensions between state and federal law in the field of social policy and although the US Supreme Court formally acknowledged the existence of a constitutional right to strike, its jurisprudence has been rather hostile to an effective protection of industrial action. This state of affairs presents “striking parallels”²⁵⁵ with the dynamics that Europe is experiencing nowadays due to the challenge posed by *Viking* and *Laval* on the effective protection of the right to strike at the state level. At the same time, it is evident that major differences still remain between the historical experience of the US and contemporary Europe. During the New Deal, the US Congress, in the exercise of its commerce powers, enacted a major piece of federal legislation – the NLRA – which designed a coherent framework for the protection of the right to strike for employers and employees operating in the national market. Over time, of course, the Wagner Act was weakened by judicial interpretations and congressional amendments. Nevertheless, at the time of its enactment, the NLRA represented an effective way to address the challenge posed by judicial review of social rights under free movement rules.²⁵⁶

In this Section I want to suggest that a number of recent developments in the legal systems of the EU and the ECHR may design a possible response to the challenge of ineffectiveness in the protection of the right to strike raised by the case law of the ECJ. However, the transformations that are taking place in Europe seem to follow a path which is different from that of the US. Rather than being based on legislative action, in fact, changes in the regulation of the right to strike in Europe may derive primarily from an innovative jurisprudence of the ECtHR. On 12 November 2008, in fact, in the case of *Demir & Baykara v. Turkey*,²⁵⁷ the Grand Chamber of the ECtHR delivered a landmark decision recognizing that Article 11 ECHR protects a right to collective bargaining. This ruling opened the way for the recognition of an ECHR right to strike in the ECtHR’s decision

²⁵⁵ Danny Nicol, ‘Europe’s *Lochner* Moment’ [2011] Public Law Review 308, 329

²⁵⁶ See also Gilles Trudeau, ‘La grève au Canada et aux Etats-Unis: d’un passé glorieux à un avenir incertain’ (2004) 38 Revue juridique Themis 1

²⁵⁷ *Demir and Baykara v. Turkey* (No. 2), ECHR [2008], Application No. 34503/97 (GC)

Enerji Yapi-Yol Sen v. Turkey of 21 April 2009.²⁵⁸ The potential influence of these two decisions is amplified by the entry into force of the EU Lisbon Treaty on 1 December 2009. Pursuant to the new Article 6 TEU, the EU shall accede to the ECHR and the negotiations to accomplish this goal are already at quite an advanced stage. Once accession is completed, the EU will be subject to a review by the ECtHR for compliance with the ECHR. It is hard to anticipate whether the ECtHR will necessarily hold decisions like *Viking* and *Laval* to be incompatible with Article 11 ECHR. Yet, it is worthwhile considering the potential impact of the new right to strike jurisprudence of the ECtHR on the constitutional dynamics at play in the EU.

The ECtHR's case of *Demir & Baykara* originated from an application against Turkey lodged by two Turkish nationals who were members of Tm Bel Sen, a trade union representing civil servants. In the early 1990s, the trade union entered into a collective agreement with a local municipality. The agreement was however challenged in court and was soon annulled and declared unenforceable by the *Yargıtay*, the Turkish Court of Cassation. According to the Court of Cassation, the ordinary statute governing collective agreements and the right to strike could not apply to relations between civil servants and a public administration. The Court of Cassation further pointed out that the legislation in force at the time when the trade union was founded did not allow civil servants to form trade unions. Having exhausted the domestic venues of redress, Mr. Demir and Mrs. Baykara brought proceedings before the ECtHR, complaining that Turkey had denied them first, the right to form trade unions and, second, the right to engage in collective bargaining and enter into collective agreements in violation of Article 11 ECHR. On 21 November 2006, the Second Section of the ECtHR unanimously held that there had been a violation of Article 11.²⁵⁹ The decision, however, was appealed by Turkey before the Grand Chamber.

The Grand Chamber began its ruling by surveying the evolving Turkish legal framework for the regulation of collective bargaining rights for trade unions in the private and public sectors and mapping the relevant international and European legal instruments protecting freedom of organization and the right to collective bargaining for civil servants. In a remarkable openness toward judicial cross-fertilization,²⁶⁰ the ECtHR then clarified that "the methodology"²⁶¹ it would adopt to examine the merits of the complaints submitted under Article 11 ECHR would be to interpret the ECHR in light of other international human rights texts and the relevant practice of the Contracting parties. The ECtHR observed that "the common international or domestic law standards of European States reflect a reality that the Court cannot disregard"²⁶² and underlined how "in

²⁵⁸ *Enerji Yapi-Yol Sen v. Turkey*, ECHR [2009], Application No. 68959/01

²⁵⁹ *Demir and Bykara v. Turkey*, ECHR [2006], Application No. 34503/97

²⁶⁰ See S. Robin-Olivier (n 164) 384

²⁶¹ *Demir (No. 2)* par 60

²⁶² *Ibid* par 76

searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.”²⁶³ The ECtHR thus synthesized its approach stating that: “in defining the meaning of terms and notions in the text of the [ECHR], [it] can and must take into account elements of international law other than the [ECHR], the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. [...] In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient [...] that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.”²⁶⁴

Having explained its methodology, the ECtHR moved to the first question, i.e. whether the Turkish prohibition for civil servants to form trade unions was compatible with Article 11 ECHR. The ECtHR noticed that Article 11(2) ECHR allowed the restriction of the right to assemble and form trade unions for “members of the armed forces, of the police or of the administration of the State” but underlined how this provision had “to be construed strictly.”²⁶⁵ The ECtHR, in particular, argued that municipal civil servants, who are not engaged in the administration of the State, should not be subjected to a limitation of their right to organise and observed how “these considerations find support in the majority of the relevant international instruments and in the practice of European States,”²⁶⁶ including Article 5 ESC, which guarantees the right of workers to form trade unions and does not allow restrictions of this right in respect of members of the administration of the State. Having acknowledged that the applicants, as civil servants, could not “be excluded from the scope of Article 11 [ECHR]”²⁶⁷ the ECtHR assessed whether the restriction imposed by Turkey on the applicants in the present case could still be justified under Article 11(2) ECHR as “[being] ‘prescribed by law’, pursu[ing] one or more legitimate aims and [being] ‘necessary in a democratic society’ for the achievement of those aims.”²⁶⁸ The ECtHR noted that the first two tiers of the proportionality analysis were satisfied. However, the ECtHR denied that the restriction could be regarded as necessary in a democratic society and – quoting the previous decision of the ECtHR Second Section – affirmed that “it ha[d] not been shown before it that the absolute prohibition on

²⁶³ Ibid par 78

²⁶⁴ Ibid par 85-86

²⁶⁵ Ibid par 97

²⁶⁶ Ibid par 98

²⁶⁷ Ibid par 107

²⁶⁸ Ibid par 117

forming trade unions imposed on civil servants [...] by Turkish law, as it applied at the material time, met a ‘pressing social need’. The mere fact that the ‘legislation did not provide for such a possibility’ is not sufficient to warrant as radical a measure as the dissolution of a trade union.”²⁶⁹ The ECtHR thus concluded that there had been “a violation of Article 11 [ECHR] on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union.”²⁷⁰

The ECtHR then moved to the second question raised by the applicants, re the compatibility with Article 11 ECHR of the decision by the Turkish Court of Cassation to annul the collective agreement signed by the Tüm Bel Sen trade union with the local municipality. The ECtHR reassessed its previous case law on the substance of the right of association protected by Article 11 ECHR. The ECtHR recalled that its jurisprudence had so far identified in Article 11 ECHR the “following essential elements [...]: the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members.”²⁷¹ In tune with a dynamic interpretation of the ECHR, however, the ECtHR affirmed that “[t]his list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the [ECHR] is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights.”²⁷² The ECtHR surveyed a number of international instruments concerning labour standards and emphasized how the right to bargain collectively had gained increasing protection under the International Labour Organization, Article 6(2) ESC as well as through the relevant EU and domestic law and practice. In light of these developments, the ECtHR considered “that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 should be reconsidered”²⁷³ and, with a milestone statement, affirmed that: “having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and to join trade unions for the protection of [one’s] interests’ set forth in Article 11 [ECHR].”²⁷⁴

In light of the foregoing path-breaking conclusion, the ECtHR moved to examine whether the interference with the applicants’ trade-union freedom resulting from the annulment of the

²⁶⁹ Ibid par 120

²⁷⁰ Ibid par 127

²⁷¹ Ibid par 145 (internal citations omitted)

²⁷² Ibid par 146

²⁷³ Ibid par 153 (internal citations omitted)

²⁷⁴ Ibid par 154

collective agreement by the Turkish Court of Cassation could be regarded as justified under Article 11(2) ECHR. The ECtHR, thus, undertook a new proportionality analysis of the action of the Turkish judicial institutions, to assess whether the restrictions they had imposed on the applicants' rights were prescribed by law, pursued a legitimate aim and were necessary in a democratic society. The ECtHR accepted that, at the material time, the interference was prescribed by law and acknowledged that it pursued the legitimate aim of the prevention of disorder.²⁷⁵ Nevertheless, the ECtHR rejected the arguments made by the Turkish government that the restriction was necessary in a democratic society. The ECtHR noted that "at the material time a number of elements showed that the refusal to accept that the applicants, as municipal civil servants, enjoyed the right to bargain collectively and thus to persuade the authority to enter into a collective agreement, did not correspond to a 'pressing social need'."²⁷⁶ Firstly, "the right for civil servants to be able, in principle, to bargain collectively, was [already] recognised by international law instruments, both universal and regional."²⁷⁷ Secondly, Turkey had already ratified "the principal instrument[s] protecting, internationally, the right for workers to bargain collectively and enter into collective agreements"²⁷⁸ and was bound to implement these agreements within its legal system. As such, the ECtHR found that "the impugned interference, namely the annulment *ex tunc* of the collective agreement entered into by the applicants' union following collective bargaining with the authority was not 'necessary in a democratic society', within the meaning of Article 11(2) [ECHR]"²⁷⁹ and concluded that there had been "a violation of Article 11 [ECHR] on this point also, in respect of both the applicants' trade union and the applicants themselves."²⁸⁰

The decision of the Grand Chamber in *Demir & Baykara* represents a major turning point in the case law of the ECtHR on the right to industrial action. Although technically the decision addresses only the extent to which Article 11 ECHR protects a right for civil servants to form trade unions and to engage in collective bargaining, the ruling anticipates the need for protection of the right to strike under the ECHR. As is self-evident for labour lawyers, indeed, the right to collective bargaining and the right to collective action constitute two faces of the same coin: trade unions are endowed with a real bargaining power only to the extent to which they can resort to industrial action to strengthen their claims. As such the protection of a right to collective bargaining by necessity implies a protection of a right to strike. Not surprisingly, therefore, just a few months after

²⁷⁵ Ibid par 160-161

²⁷⁶ Ibid par 164

²⁷⁷ Ibid par 165

²⁷⁸ Ibid par 166

²⁷⁹ Ibid par 169

²⁸⁰ Ibid par 170

the ground-breaking *Demir & Baykara* decision, the Third Section of the ECtHR ruled, in *Enerji Yapi-Yol Sen v. Turkey*, that Article 11 ECHR protected a right to strike.

The case of *Enerji* concerned a Turkish trade union representing civil servants working in the fields of land registration, energy, infrastructure services and motorway construction. In 1996, the trade union expressed its intention to go on strike. In reaction, the Turkish government enacted a circular (n° 1996/21) which, *inter alia*, prohibited public-sector employees from taking part in the strike. Ignoring the prohibition of the ministerial circular, a number of workers of the Enerji Yapi-Yol Sen union went on strike and were subjected to disciplinary sanctions. Unable to obtain redress in the domestic courts, the Enerji Yapi-Yol Sen union brought a case before the ECtHR claiming that the conduct of the Turkish authorities, and specifically the ministerial circular n° 1996/21, had breached its right to trade union freedom. The ECtHR opened its opinion by referring to the Grand Chamber's decision in *Demir and Baykara* and then addressed the question whether the action of the Turkish government amounted to an interference with the applicant's rights under Article 11 ECHR. The ECtHR recalled how the ECHR requires "legislation to allow trade unions, in a way which do not contravene Article 11 [ECHR], to fight for the protection of the interest of their members"²⁸¹ and affirmed, with another ground-breaking statement, that "[t]he strike, which allows unions to make their voice heard, constitutes an important aspect for the members of a union to protect their interests."²⁸² To support its statement, the ECtHR noticed how "the right to strike is recognized by the supervisory bodies of the International Labor Organization (ILO) as an inseparable corollary of the freedom to associate in trade unions."²⁸³ Furthermore, it "recalled that also the [ESC] protects the right to strike as a means to ensure the effective exercise of the right to collective bargaining."²⁸⁴

Having decided that the right to strike enjoyed protection under Article 11 ECHR, the ECtHR moved to review whether the interference with the applicant's right by the Turkish government could be regarded as justified under Article 11(2) ECHR. In this regard, the ECtHR acknowledged that "in the case at hand, the circular n° 1996/21 enacted in the exercise of a normative power constituted a legal basis for the interference."²⁸⁵ The ECtHR instead expressed doubts that the goal sought by the Turkish government in prohibiting the right to strike pursued a legitimate end "but it found [it] useless to address the question."²⁸⁶ The ECtHR, in fact, found that the decision of the Turkish authorities could not pass muster even under the last and stricter tier of

²⁸¹ *Enerji* par 24

²⁸² *Ibid* par 24

²⁸³ *Ibid* par 24

²⁸⁴ *Ibid* par 24

²⁸⁵ *Ibid* par 27

²⁸⁶ *Ibid* par 28

its proportionality test because the measure could not be regarded as necessary in a democratic society. The ECtHR “recognize[d] that the right to strike is not absolute. It can be subject to certain conditions and restrictions. As such the principle of trade union freedom can be compatible with a strike ban for civil servants exercising essential State function.”²⁸⁷ However, the ECtHR also affirmed that “while certain categories of civil servants can be prohibited from taking strike action, the ban cannot extend in general to all public servants, as in the present case, or to employees of State-run commercial or industrial companies.”²⁸⁸ According to the ECtHR, “a lawful restriction of the right to strike shall define as much strictly and clearly as possible the categories of workers concerned. In the view of the [ECtHR], in the case at hand, the circular had been drafted in general terms, completely depriving all public servants of the right to take strike action, without appropriately balancing the imperative needs of Article 11(2) [ECHR].”²⁸⁹ The Court thus found that “the adoption and application of the circular did not answer a ‘pressing social need’ and that there had been disproportionate interference with the applicant union’s rights enshrined in Article 11 [ECHR]”²⁹⁰ and condemned Turkey for violating the ECHR.

Demir & Baykara and *Enerji* transformed the protection of the right to strike in the ECHR system. In the former, the ECtHR ruled for the first time that Article 11 ECHR protects a right for workers to engage in collective bargaining and, in the follow-up case, it held that Article 11 ECHR also protects a right to take collective action. As has been argued, the decisions “breathe[d] life into a hitherto moribund Article 11 [ECHR]”²⁹¹ and opened a new page in the jurisprudence of the ECtHR in the field of social and economic rights.²⁹² As previously explained,²⁹³ the ECtHR had traditionally interpreted Article 11 ECHR “in a restrictive conservative manner, limiting its content and scope in the area of trade union rights.”²⁹⁴ By resorting to a dynamic interpretation of the ECHR and drawing inspiration from the legal instruments in force both in international law and EU law and from the evolving practice of the contracting parties, the ECtHR abandoned its previous case law and concluded that the rights to collective bargaining and to collective actions are now an

²⁸⁷ Ibid par 32

²⁸⁸ Ibid par 32

²⁸⁹ Ibid par 32

²⁹⁰ Ibid par 33

²⁹¹ Charles Barrow, ‘*Demir and Baykara v. Turkey*: Breathing Life into Article 11’ (2010) *European Human Rights Law Review* 419, 422

²⁹² On the recent achievements of the ECtHR in the field of social and economic rights see Ellie Palmer, ‘Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Convention on Human Rights’ (2009) 2 *Erasmus Law Review* 397

²⁹³ See *supra* text accompanying n 111

²⁹⁴ C. Barrow (n 291) 421

essential component of the right to assemble and to form trade unions enshrined in Article 11 ECHR.²⁹⁵

Furthermore, in defining the scope of protection of these rights, the ECtHR adopted a 'labor friendly' approach. In *Enerji*, in particular, the ECtHR recognized that the right to strike, albeit not absolute, may be restricted by state governments only to pursue a legitimate end and if necessary in a democratic society. In the ECtHR's view, therefore, a presumption of legality attaches to industrial action, and it is up to the government to demonstrate the proportionality of the interference with the worker's right to strike. From this point of view, it may not be exaggerated to claim that the implications of the decisions of the ECtHR could be "dramatic."²⁹⁶ On the one hand, *Demir & Baykara* and *Enerji* are likely "to have a significant effect on domestic law"²⁹⁷ especially in those countries which are currently endowed with a very restrictive regulation of the right to strike.²⁹⁸ On the other hand, the two decisions "naturally raise[] the question about the relationship between the [ECJ] and the [ECtHR] case-law concerning the right to collective action."²⁹⁹ Indeed, the ECJ and the ECtHR have reached quite different conclusions in their decisions, reflecting alternative understandings of the meaning of the right to strike, of the scope of its protection and of the limits to its exercise. However, precisely these transformations that occurred in the case law of the ECtHR may lead the ECJ to review its *Viking* and *Laval* jurisprudence on the right to strike.

The ECJ already recognizes the case law of the ECtHR as a guiding source in its human rights jurisprudence.³⁰⁰ The impact of the decisions of the ECtHR on the legal system of the EU, in addition, would increase after the entry into force of the Accession agreement of the EU to the ECHR.³⁰¹ At the moment the EU is not yet [...] a party to the ECHR and therefore [is] not answerable directly to the ECtHR."³⁰² Nevertheless, once the EU becomes a party to the ECHR, it seems likely that the ECtHR will review the action of the EU institutions, including the ECJ, for compatibility with the ECHR. By the same token, the ECtHR may regard the standard for the

²⁹⁵ See also Graziella Romeo, 'Civil Rights v. Social Rights nella giurisprudenza della Corte europea dei diritti dell'uomo: c'è un giudice a Strasburgo per i diritti sociali?' in Luca Mezzetti and Andrea Morrone (eds), *Lo Strumento Costituzionale dell'ordine Pubblico Europeo* (Giappichelli 2011) 487

²⁹⁶ Keith Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2

²⁹⁷ *Ibid* 38

²⁹⁸ The impact of the decision of the ECtHR may begin to be particularly significant in the UK. See e.g. *NURMT v SERCO, ASLEF v London and Birmingham Railway Limited* (2011) EWCA Civ. 226. For an assessment of how this recent case took into account the new case law of the ECtHR see Ruth Dukes, 'The Right to Strike under UK Law: Something More Than a Slogan?' (2011) 40 *Industrial Law Journal* 302

²⁹⁹ Jari Hellsten, 'Trade Unions Rights Under the ECHR' in Niko Johanson and Matti Mikkola (eds), *Reforms of the European Social Charter 75* (Ministry for Foreign Affairs of Finland 2011) 75, 80

³⁰⁰ See generally, Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) 43 *Common Market Law Review* 629

³⁰¹ See generally Jean-Paul Jacqu , 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *Common Market Law Review* 995

³⁰² K. Ewing and J. Hendy (n 296) 40

protection of the right to strike developed by the ECJ in *Viking* and *Laval* as falling short of the *Enerji* benchmark.³⁰³ As some have argued, therefore, control by the ECtHR may force the ECJ into “aligning itself to the [ECtHR] line.”³⁰⁴ If this were to happen, it seems clear that the transformations that have taken place in the ECHR legal order could play a fundamental role in addressing the challenge of ineffectiveness produced by the tensions between domestic laws and EU law in the field of strike law. Indeed, as Keith Ewing and John Hendy have sharply observed: *Demir & Baykara* and *Enerji* “provide the best opportunity to clean up the mess left by the ECJ in the *Viking* and *Laval* cases”³⁰⁵ by strengthening labour rights *vis-à-vis* economic rules of free market and competition.

Several *caveats* are, however, due when anticipating the potential transformative effect of the ECtHR case law on the protection of the right to strike in the EU legal order.³⁰⁶ In particular, *Enerji* held that Turkey (a non-EU member state) was in violation of the ECHR because its legislation set up a total strike ban for public employees, hence depriving the applicants *tout court* of their rights under Article 11 ECHR. Nevertheless, *Viking* and *Laval* established a much less restrictive regime for the exercise of the right to industrial action. Workers were entrusted with a fundamental right to strike but this right was subject to a proportionality analysis, with the goal of balancing its exercise together with other fundamental rights (e.g. freedom of movement). As such, it is not self-evident that the *Viking* and *Laval* standard is *necessarily* incompatible with Article 11 ECHR. At the same time, in *Enerji*, the ECtHR acknowledged that the right to strike is not absolute – not to mention the traditional margin of appreciation that the ECtHR recognizes to the contracting parties in the application of the ECHR. A final issue to consider, then, is that the ECtHR classically rules on the ‘vertical’ obligations stemming from the ECHR: in *Enerji*, the ECtHR held that a state could not disproportionately restrict the Article 11 ECHR right of a private party. It is uncertain, however, how Article 11 ECHR would operate in a ‘horizontal’ situation, where i.e. a private party claims that its labour rights have been restricted by another private party (e.g. a company) which also claims to be exercising its fundamental rights (e.g. to pursue an economic activity).

In conclusion, in *Demir & Baykara* and, later, in *Enerji*, the ECtHR has allowed the right to bargain collectively and to take industrial action to become one of the essential elements of the right to form and join a trade union for the protection of one’s interests enshrined in Article 11 ECHR. These decisions represent a landmark judicial development in the framework of the ECHR, with

³⁰³ See Phil Syrpis, ‘The Treaty of Lisbon: Much Ado...But About What’ (2008) 37 *Industrial Law Journal* 219, 233 (advancing this possibility even before the new decisions of the ECtHR on Article 11 ECHR)

³⁰⁴ J. Hellsten (n 299) 81

³⁰⁵ K. Ewing and J. Hendy (n 296) 48

³⁰⁶ See Filip Dorssemont, ‘How the European Court of Human Rights Gave us *Enerji* to Cope with *Laval* and *Viking*’ in Marie-Ange Moreau (ed), *Before and After the Economic Crisis: What Implications for the ‘European Social Model’?* (Edward Elgar Publishing 2011)

potentially far reaching consequences also for the EU. As Sophie Robin-Olivier has argued: “as a result of the continuous extension of the rights granted to unions under Article 11, in stark contrast to the [...] developments taking place in the EU, the ECtHR has appeared as the major actor in the development of European labour law, from a trade union perspective.”³⁰⁷ The jurisprudence of the ECtHR – and the accession of the EU to the ECHR – may put strong pressure on the ECJ to revisit its case law on the right to strike with beneficial effects on the challenges which currently characterize the European multilevel regime. Yet, as I have tried to emphasise, a number of caveats need to be taken into account before concluding too rapidly that the ECJ will inevitably follow (willy-nilly) the approach of the ECtHR. Indeed, it may be that the transformations taking place at the ECHR level may not suffice to address the challenge of ineffectiveness discussed in Section 2. From this point of view, perhaps, other transformations within the EU legal order are needed. The next Section will discuss one of these.

5. Future prospects: beyond the Lisbon Treaty?

The previous Section has analyzed several recent transformations taking place in the case law of the ECtHR and has emphasized their importance for the protection of the right to strike in Europe. At the same time, Section 5 has warned about the ability of these judicial developments to offer a fully satisfactory answer to the challenge of ineffectiveness that emerges from the interaction between domestic and supranational law in the field of labour rights. This Section therefore investigates what additional reforms could be undertaken in the EU legal order to ensure a long-term solution to the tensions between social rights and free market that currently characterizes the European multilevel architecture. In particular, whereas the recent case law of the ECtHR promises an uncertain *judicial* response to the critical balance between market integration and national social rights struck by the ECJ in *Viking* and *Laval*, in this Section I will explore ways in which a *legislative* response to these dynamics may prove to be more enduring and successful.³⁰⁸ In doing this, I walk a path which was traced years ago by Joseph H.H. Weiler and Sybilla Fries, albeit in a more general context.³⁰⁹ In a well-known study about the competences of the EU institutions in the field of human rights, the two authors emphasized how “it is not only the [ECJ], as one of the

³⁰⁷ S. Robin-Olivier (n 164) 394

³⁰⁸ For the discussion of a possible *constitutional* response, i.e. the modification of the EU Treaties, seen instead the proposal by the European Trade Union Council (ETUC) which advocated the enactment of a special EU Social Progress Protocol, protecting *inter alia* the right to strike in the EU, as an amendment to the EU Treaties. See *ETUC Proposal for a Social Progress Protocol*, 18 March 2009

³⁰⁹ See Joseph H.H. Weiler and Sybilla Fries, ‘A Human Rights Policy for the European Community and Union: The Question of Competences’ in Philip Alston et al (eds), *The Eu and Human Rights* (OUP 1999) 147

institutions of the [EC], that has a duty to ensure the observance of fundamental rights in the field of [EC] law, but [...] such duty rests, inherently, on all Institutions of the [EC] exercising their competences *within the field of [EC] law*.”³¹⁰

As such, I will not focus here on the role of the CFR, although, with the entry into force of the Lisbon Treaty, the CFR has acquired binding value.³¹¹ A major factor seems indeed to weaken the transformative capacity of the CFR as a legal instrument in the field of strike law. This has not so much to do with Protocol No. 30 on the application of the CFR in Poland and the UK. It is well known, in fact, that the Lisbon Treaty has introduced into EU primary law a special protocol with the goal of excluding “the ability of the [ECJ], or any court or tribunal of Poland or of the [UK], to find that the laws, regulations or administrative provisions, practices or action of Poland or of the [UK] are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.” This applies “in particular and for the avoidance of doubt” with the regard to the social rights codified in Title IV of the CFR (where Article 28 on the rights to collective bargaining and collective action is included). Scholars debate about the real meaning of this Protocol: whereas some have argued that Protocol No. 30 “is totally useless [since] it can not prohibit lawyers from requesting the application of the rights codified in the CFR,”³¹² others have emphasized that the Protocol may “contain a genuine opt-out”³¹³ in the area of social rights. Beyond the debate on the nature of the Protocol, however, there seems to be another fundamental weakness related to the CFR. The CFR was already taken into account by the ECJ, despite its lack of legal value, in *Viking* and *Laval* and it is not clear how its change of status would now compel the ECJ to reconsider its prior case law.³¹⁴

In this Section I therefore explore another path and advance the argument that the most effective way of protecting the right to strike in Europe is through the adoption of an EU regulation.³¹⁵ This regulation, to be enacted according to the ordinary EU law-making process, should clearly state that industrial action in labour-management disputes having a cross-border dimension is protected by EU law and possibly define the means of lawful collective action and the

³¹⁰ Ibid 157 (emphasis in original)

³¹¹ For an examination of the impact of the Lisbon Treaty in the field of social rights see Stefano Giubboni, ‘I diritti sociali nell’Unione europea dopo il Trattato di Lisbona. Paradossi, rischi ed opportunità’ [2011] *Persona e Mercato* 37

³¹² Jacques Ziller, *Il Nuovo Trattato Europeo* (Il Mulino 2008) 178. See also Steve Peers, ‘The “Opt-Out” that Fell to Earth: The British and the Polish Protocol Concerning the EU Charter of Fundamental Rights’ [2012] *Human Rights Law Review* 1

³¹³ Catherine Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: Eu Constitutionalism without a Constitutional Treaty?* (Springer 2010) 257

³¹⁴ See P. Syrpis (n 303) 232

³¹⁵ The argument in favour of EC intervention in the field of strike law finds some noble ancestors in writings dating to the 1970s, although at that time EU action was largely conceived as a form of harmonization between national laws. See Antoine Jacobs, ‘Toward Community Action on Strike Law?’ (1978) 15 *Common Market Law Review* 133. My proposal, instead, does not pursue the goal to harmonize the national laws but to establish a supranational standard for the protection of the right to strike to be applied in trans-national situations.

procedure to be followed by unions before going on strike. To substantiate my claim, I will draw some lessons from the experience of the US in the field of strike law. As was argued, the constitutional experience of the US during the *Lochner* era provides an anti-model for Europe.³¹⁶ However, the New Deal also offers some positive lessons.³¹⁷ In particular, I will try to explain how the adoption of an “EU Wagner Act” may be a possible solution if Europe wants to avoid a “race to the bottom” in the protection of social rights.³¹⁸ In this light, I will also analyze the recent Commission’s proposal for a regulation on the exercise of the right to strike in the context of the single market and underline both its strengths and weaknesses. Needless to say, the proposal for an “EU Wagner Act” is controversial and raises a number of questions about its legal and political feasibility. The TFEU, moreover, seemingly includes an express obstacle to the enactment of any such legal act. Otherwise, the same US example warns us from putting too much faith in the capacity of a legislative measure such as a Wagner Act to address the tensions between social rights and a free market in a federal system. Yet, despite all this, I am convinced that it is valuable to discuss the possibility of a regulation for the protection of the right to strike in the EU by taking into account the US constitutional experience.³¹⁹

The challenge that Europe is facing in the protection of the right to strike is the consequence of the increasing impact of EU free market rules over the national regulations of industrial relations. As Miguel Poiars Maduro has argued, “European economic integration [...] has generated pressures towards deregulation and challenged social standards and welfare.”³²⁰ Decisions such as *Viking* and *Laval* have been hailed from a free market perspective³²¹ but criticized from a labour law perspective for the repercussions they produce at the national level and for their interference with fundamental features of collective labour law and industrial relations *of the states*. In this context, however, it seems misplaced to complain that the EU is violating “prerogatives of Member

³¹⁶ See I.H. Eliasoph (n 166) 467; D. Nicol (n 255) 308

³¹⁷ In this chapter I am trying to explore how the US can provide useful guideposts for Europe in tackling the challenges of balancing free market and labour protection in a federalism-based system of government. It may sound obvious, but it is probably safe clarifying, that this does not imply that the US is a perfect system nor excludes that there may be ways in which the US can learn from Europe in the protection of social rights. This, in itself, could be the object of an entirely new research. See eg G. Katrougalos (n 167) 225

³¹⁸ Catherine Barnard, ‘Regulating Competitive Federalism in the European Union? The Case of EC Social Policy’ in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 49, 57

³¹⁹ In undertaking this comparative exercise I am fully aware of the warnings by Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37:1 *Modern Law Review* 1 in too easily advising the “transplant” of legal solutions from one legal system to another in the field of labour law. Yet, I am convinced (and I will try to demonstrate) that the strong institutional similarities between the European and US constitutional arrangements based on federalism, makes the use of comparative sources appropriate and reliable in advancing reforms *de jure condendo*

³²⁰ Miguel Poiars Maduro, ‘Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU’ in Philip Alston et al (eds), *The Eu and Human Rights* (OUP 1999) 449, 464

³²¹ See eg Frank Benyon, *Direct Investment, National Champions and the EU Treaty Freedoms* (Hart Publishing 2010)

States”³²² and to recall the good old days in which nation states were sovereign in regulating their industrial relations systems without any EU interference.³²³ The tensions currently occurring within the European multilevel arrangement oblige us to reconsider the strategy needed to take social rights seriously. The problem today is not the existence of a transnational common market in which goods, services and capitals are free to move unhindered. The problem is, rather, that the creation of a Europe-wide continental market “has not been compensated for by social policies arising at the level of the [EU].”³²⁴ The case of the right to strike demonstrates how national responses are no longer conceivable in a multilevel architecture in which a transnational court can umpire conflicts between federal free movement rules and state labour law guarantees.

This is where the genius of the New Deal emerges. In the US, the challenge of combining a continental market in which commerce could freely flow with the need to protect social rights (a need that the Great Depression had made ever more pressing) was ensured through a massive transfer of competences to the federal government. Bruce Ackerman has famously described the New Deal as a turning point in US constitutional history – a constitutional moment even in the absence of constitutional amendments.³²⁵ It is from the New Deal “that we date the modern interventionist national government, with its comprehensive labor and welfare policies, its extended web of national regulatory measures covering vital economic sectors formerly outside the scope of federal controls.”³²⁶ As explained in Section 4, a major piece in the New Deal puzzle was the Wagner Act. The NLRA set up a solid template for the regulation of labour-management relations, giving a legislative recognition to the right to strike for workers engaged in interstate commerce and grounding the protection of collective action directly in federal law. By setting up at the federal level a protection that was no longer possible at the state level, the Wagner Act represented the most effective response to the challenge of combining free markets and social rights in the US federal system. I have already emphasized how the NLRA was slowly weakened by judicial interpretation and legislative amendments.³²⁷ Yet this should not blind us from appreciating that, at the time of its enactment, “in some ways the Wagner Act amounted to a workers’ bill of rights.”³²⁸

³²² Stein Evju, ‘Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast’ (2009-10) 12 Cambridge Yearbook of European Legal Studies 151, 176

³²³ In the first chapter, I defined as “sovereigntist” the position of scholars who oppose the developments in the protection of fundamental rights at supranational level and claim that the member states should remain sovereign in deciding how to protect fundamental rights. In my work, I criticized the position of the sovereigntists as failing to understand the changing European reality and to appreciate the importance of a shift of paradigm in devising appropriate responses to the challenges of protecting fundamental rights in multilevel, federalism-based arrangements

³²⁴ M.P. Maduro (n 320) 464

³²⁵ See Bruce Ackerman, *We the people. Volume 2: Transformations* (Harvard University Press 1998)

³²⁶ Harry Scheiber, ‘State Law and “Industrial Policy” in American Development, 1790-1987’ (1987) 75 California Law Review 415, 433

³²⁷ One of the major contemporary weaknesses of the NLRA is due to the malfunctions of the NLRB. Because of its increased politicization, the NLRB has diminished its capacity to effectively solve labour-management disputes. In addition, because members of the NLRB are nominated by the President with the consent of the Senate, political

Although it may “seem odd to draw on the US model to save the European social model from [its current] challenges”³²⁹ I argue that the EU should endow itself with its own Wagner Act. This could be done with the enactment of a regulation which clearly establishes the *prima facie* lawfulness of industrial action taken by unions and workers to protect their economic interests. The regulation would be applicable in all cross-border situations (i.e. when industrial action takes place at the transnational level), leaving the member states free to regulate collective action in purely internal situations (i.e. when industrial action has no implication on the functioning of the internal market). To secure clarity and adequately balance free movement rules and social protections, the regulation could specify the reasons and forms which legitimize industrial action and the possible procedure to be followed by trade unions before going on strike. Although this solution may represent a step backward for countries which ensure a broad constitutional right to strike and show a tolerant attitude to conflict, the compromise may still be acceptable. Indeed, a regulation of permitted industrial action would free the right to strike from the prior judicial assessment of its proportionality and *ultima ratio* which is currently required under the *Viking* and *Laval* standard.

Additionally, as Claire Kilpatrick has explained in relations to the Posted Workers Directive, the adoption of EU legislative measures dealing with the internal market and the protection of social rights may have several advantages.³³⁰ First, legislation offers a structure. Second, it gives valuable detail and certainty about what is lawful or not. Third, it allows for adaptation. Fourth, it provides a vehicle for the consolidation and codification of the case law of the ECJ. At the same time, however, legislation also allows for reaction to the ECJ jurisprudence, providing an opportunity to “steer future interpretative developments in the area at issue by signalling to the [ECJ] the views of other institutions as expressed in legislative output [...] Or it may represent an attempt to curb or curtail aspects of [ECJ] jurisprudence considered undesirable by one or more of the other institutions.”³³¹ Last but not least, legislation has a democratic *imprimatur*. Evidence, indeed, reveals that the ECJ takes legislative output seriously³³² and that it rarely challenges a statutory intervention of the EU legislature even when the latter differs from the ECJ’s previous case law. From this point of view, an EU law regulating the exercise of the right to strike in transnational

opposition to presidential nominees has often lead the NLRB to lack the quorum needed to decided cases. See *New Process Steel v. NLRB*, 130 U.S. 2635 (2010) (holding that the NLRB needs three members out of five to be able to deliver decision in labour-management disputes). See also William Gould IV, ‘Crippling the Right to Organize’ *The New York Times* (New York, 17th December 2011) A25 (explaining how from 1 January 2012, the NLRB will only have two members on duty, being effectively incapacitated to work, unless political opposition to President Obama’s nominees stops)

³²⁸ C. Sunstein (n 168) 51

³²⁹ C. Barnard (n 165) 606

³³⁰ Claire Kilpatrick, ‘Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?’ (EUI Working Paper Law No. 4, 2011) 2

³³¹ *Ibid* 2-3

³³² *Ibid* 11

disputes in a way which is more protective for labour than the *Viking* and *Laval* standard would oblige the ECJ to reconsider its case law. Precisely this effect was produced by the NLRA: the Wagner Act – despite its merely statutory and non-constitutional nature – forced the Supreme Court to reconsider its previous jurisprudence on the extension of federal powers and economic due process, thus opening a new page in the history of US constitutional law.

All this leads us to think about the possible legal basis for this regulation. From a constitutional law point of view, it would seem that the most appropriate basis for an EU measure regulating the right to strike would be Article 28 EU CFR. The provision, in fact, recognizes a right to collective bargaining and collective action “in accordance with EU law.” This provision “*per se* may form the impetus for the introduction of new legislation,”³³³ exactly as happens in national systems where constitutional provisions recognizing a right to strike have been the basis for state legislation in labour-management relations. However, it is well known that the CFR includes a general clause, Article 51(2), which states that the CFR “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.” A similar statement is made in Article 6(1)(2) TEU which affirms that “[t]he provisions of the [CFR] shall not extend in any way the competences of the [EU] as defined in the Treaties.” Furthermore, as mentioned above,³³⁴ the UK and Poland secured during the negotiation of Lisbon Treaty the adoption of a special Protocol No. 30 which aims at excluding the application of the CFR – and notably Title IV, which includes Article 28 – in the UK and Poland. All these factors make it unlikely that the CFR can be used as a source of legislative action at the EU level.

From a labour law point of view, then, an adequate legal basis for the enactment of a EU act regulating the right to strike would be Article 151 TFEU, which details the competences of the EU in the field of social policy and the commitment of the EU to ensure “proper social protection [and] dialogue between management and labour.”³³⁵ It is well known, however, that a major textual obstacle prevents the EU institutions from resorting to the general EU competence in the field of social policy to protect a right to strike. According to the already mentioned Article 153(5) TFEU, “[t]he provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.” It is ironic that a strong lobby in favour of the codification of this provision in the EU treaties has come not only from the UK (the EU member state with the lowest standard of protection of industrial action) but also from countries such as the Nordic states, with an

³³³ Marianne Gijzen, ‘The Charter: A Milestone for Social Protection in Europe?’ (2011) 8 Maastricht Journal of European and Comparative Law 33, 42

³³⁴ See *supra* text accompanying n 311-313

³³⁵ For a commentary of the provision see Franck Lecomte, ‘Embedding Employment Rights in Europe’ (2001) 17 Columbia Journal of European Law 1

enhanced national legislation for the protection of the right to strike.³³⁶ These countries thought that, with this no-competence clause in the EU treaties, they could insulate their domestic systems from the influence of EU law. In fact, *Viking* and *Laval* swept aside this expectation denying that former Article 137(5) TEC could limit the application of the EU free movement rules when action by trade unions interfered with freedom of establishment or freedom to provide services. However, Article 153(5) remains now in the statute books – with the single effect of preventing the EU from regulating the right to strike in a more ‘labour-friendly’ way under its social policy competences.

Not all is lost, however. The US experience can once again suggest a way of finding a legal basis in the EU treaties to adopt an EU regulation on the right to strike. The Wagner Act, in fact, was enacted by the US Congress in the exercise of its commerce powers, i.e. under the general power that the federal legislature has “[t]o regulate commerce [...] among the several states.” As James Gray Pope has explained: “This was the result of a conscious choice by the bill’s creator, Senator Robert Wagner of New York. Labor leaders and others had urged the Senator to ground his bill not on Congress’s commerce power but on its human rights powers. [...] Philosophically, Senator Wagner took a similar view of his bill [...] But Senator Wagner adhered to the commerce power as a constitutional justification.”³³⁷ This was politically the wisest strategy to ensure that the statute would obtain sufficient support throughout the legislative process and later stand review before the Supreme Court (which had already struck down the NIRA as an unconstitutional exercise of congressional power).³³⁸ This choice, of course, had its drawbacks.³³⁹ However, the NLRA ensured that labour rights would be better protected than it was under the prior jurisprudence of the Supreme Court on the understanding that “[e]xperience has proved that protection by law of the right of employees to organize and bargain collectively *safeguards* commerce from injury, impairment, or interruption”³⁴⁰ rather than damages it.

The EU could follow the same path. A regulation on strike action could be based on the EU competence to regulate the internal market.³⁴¹ The general provision of Article 26 TFEU and the specific clauses on the free movement of goods, free movement of services and freedom of

³³⁶ See Ronnie Eklund, ‘Free business movement and the right to strike in the European Community: two views - A Swedish Perspective on *Laval*’ (2008) 29 *Comparative Labour Law and Policy Journal* 569; Brian Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13 *European Law Journal* 289; Umberto Carabelli, ‘Il contrasto tra le libertà economiche fondamentali e i diritti di sciopero e di contrattazione collettiva nella recente giurisprudenza della Corte di giustizia: il sostrato ideologico e le implicazioni giuridiche del principio di equivalenza gerarchica’ [2011] *Studi sull’integrazione europea* 234

³³⁷ J.G. Pope (n 236) 524

³³⁸ See R. Polenberg (n 214) 68

³³⁹ J.G. Pope (n 236) 524 (arguing that as a consequence of the legal basis of the NLRA “each exercise of the NLRB’s authority had to be justified not in terms of labor freedom, but as an effort to prevent disruptions to commerce.”)

³⁴⁰ 29 U.S.C. par 151 (emphasis added)

³⁴¹ For an argument in favour of a broad reading of the EU internal market legislative power see Bruno De Witte, ‘A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation’ in Phil Syrpis (ed), *The Judiciary, the Legislature and the Eu Internal Market* (CUP 2011)

establishment could supply a sufficient justification for the EU to legislate in this field. The example of the Posted Workers Directive shows that it is possible to resort to a legal basis in the EU treaties dealing with the internal market to also ensure the protection of labour rights:³⁴² indeed, as the Directive clarifies “promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.”³⁴³ At the same time, it is well known that the issue of strike action loomed large during the debates leading to the adoption of the Monti Regulation³⁴⁴ on the functioning of the internal market in relation to the free movement of goods among the member states.³⁴⁵ In its final version, under the pressure of the trade unions, the Monti Regulation excluded the field of industrial action from its discipline, stating that: “This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.”³⁴⁶ The regulation under discussion here should instead follow a different path and set up a framework for the protection of the right to strike.

The direction suggested in this chapter seems to have been recently followed by the EU Commission which, on 21 March 2012, brought forward a proposal for a regulation “On the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.”³⁴⁷ The Commission’s proposal – which draws from the report of 9 May 2010 by former Commissioner Mario Monti,³⁴⁸ and is thus referred in jargon as the Monti 2 Regulation³⁴⁹ – pursues the goal to “lay[] down the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services.”³⁵⁰ As the Commission stated in the explanatory memorandum accompanying its proposal, the regulation seeks to address the “tensions between the freedoms to provide services and of establishment, and the exercise of fundamental rights such as the right of collective bargaining and the right to

³⁴² See C. Kilpatrick (n 330) 4

³⁴³ Recital 5, Council Directive 96/71/EC

³⁴⁴ Council Regulation 2679/98/EC OJ 1998 L 337/8

³⁴⁵ See Clauwaert (n 110) 630

³⁴⁶ Article 2, Regulation 2679/98/EC

³⁴⁷ COM(2012) 130 final

³⁴⁸ Mario Monti, *A New Strategy for the Single Market*, 9 May 2010

³⁴⁹ On the basis of the Monti report, the Commission, in a Communication of 27 October 2010, *Towards a Single Market Act. For a Highly Competitive Social Market Economy*. COM (2010) 623 advanced a series of proposals for legislative action. See “Proposal No 30: In 2011, the Commission will adopt a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, which is likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the single market.” The Commission then held a public consultation on its proposals, collecting the opinions of the social partners

³⁵⁰ Article 1(1), proposed Mont 2 Regulation

industrial action”³⁵¹ exposed by the ECJ’s decisions in *Viking* and *Laval*. According to the Commission, in fact, a regulatory intervention at the EU level would be, among the various policy options, “the most effective and efficient solution to address the specific objective [of] reducing tensions between national industrial relation systems and the freedom to provide services.”³⁵² From this point of view, henceforth, the *ratio* of the Commission’s proposal strikingly corresponds to the arguments advanced before in favor of a Wagner Act-style legislative intervention at the EU level.

As a legal basis for its proposal, however, the Commission argued that the regulation should be based on Article 352 TFEU, which states that “[i]f action by the [EU] should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the [EU] Parliament, shall adopt the appropriate measures.” Hence, whereas I had suggested that the EU institutions could adopt the regulation on the basis of the internal market powers, which may be equated to the Commerce Clause of the US Constitution, the Commission proposed as a legal basis Article 352 TFEU, which may be seen as the EU’s equivalent to Article I, §8, cl.18 of the US Constitution, the so-called “Necessary and Proper Clause”. It is noteworthy, however, that also the Commission did not find an insurmountable obstacle in drafting its proposal in the existence of Article 153(5) TFEU. Rather, as it clarified in its explanatory memorandum: “Article 153(5) TFEU excludes the right to strike from the range of matters that can be regulated across the EU by way of minimum standards through Directives. However, the [ECJ] rulings have clearly shown that the fact that Article 153 does not apply to the right to strike does not as such exclude collective action from the scope of EU law.”³⁵³ As such, the Commission’s proposal reflects the understanding that, after *Viking* and *Laval*, the goal to shield national industrial relations systems from EU law, originally pursued by Article 153(5), has become moot and that action at the EU level is now permitted to ensure greater protection of labor rights.

Nevertheless, from the point of view of the content, the proposed regulation does not seem to enshrine any ground-braking provision. After stating in a somehow cryptic way, in Article 1(2), that the regulation shall not affect, in the purely internal situations,³⁵⁴ “the exercise of fundamental rights as recognised in the Member States, including the right or freedom to strike or to take other

³⁵¹ Commission Explanatory Memorandum, par 8

³⁵² *Ibid* par 9

³⁵³ *Ibid* par 11

³⁵⁴ Article 1(2) of the proposed Monti 2 Regulation (which largely reproduces the content of Article 2 of the Monti 1 Regulation) does not refer to the notion of purely internal (i.e. intra-state) situation. Given the general purpose of the Regulation of regulating the right to strike in inter-states labour disputes, however, it must be concluded that the provision of Article 1(2) – which proclaims the non-affectation of state right to strike regimes – can only apply to intra-state labour-management disputes in which the EU freedom of establishment and to provide services are not at play

action covered by the specific industrial relations systems in Member States in accordance with national law and practices”, the regulation reads in Article 2 that “[t]he exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.” This provision, which represents the central clause of the regulation, in fact, simply restates the general principle of proportionality, which, in line with the practice of the ECJ, is the standard tool for the reconciliation of different, conflicting constitutional interests. Nevertheless, precisely because the application of the principle of proportionality by the ECJ was at the core of the *Viking* and *Laval* rulings (and at the core of the criticism to these decisions) it is difficult to see how this provision of the proposed regulation is likely to trigger a change in the case law of the ECJ and allegedly enhance the social dimension of the EU. Article 3 of Commission’s proposal, then, contains some procedural provisions on mediation and conciliation of labour-management disputes.³⁵⁵ Yet, it is unclear to what extent these procedures will be uniformly available throughout the EU until the social partners agree on a proper contractual regime of alternative dispute resolutions in transnational labour disputes.³⁵⁶

Overall, in the end, the Commission’s proposal for a Monti 2 Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services may be regarded as consistent with the argument advanced in this chapter that action at the EU level is required to address the tensions between state social rights guarantees and EU free movement rules. The Commission’s proposal certainly raises a number of critical questions.³⁵⁷ First, is the legal basis chosen for the regulation the most appropriate one or is it likely, given the requirement of unanimous consent by the Council in Article 352 TFEU, to increase the political difficulties for its adoption? Second, is the substantive provision of the regulation, which defines the conditions under which the right to strike can be exercised in transnational labour disputes, likely to improve the existing EU standard for the protection of the

³⁵⁵ Article 3(2) of the proposed Monti 2 Regulation in particular emphasizes the proactive role of the social partners at the EU level, stating that “management and labour at European level may, acting within the scope of their rights, competences and roles established by the Treaty, conclude agreements at Union level or establish guidelines with respect to the modalities and procedures for mediation, conciliation or other mechanisms for the extrajudicial or out-of-court settlement of disputes [...] with a cross-border character.”

³⁵⁶ Article 3(1) of the proposed Monti 2 Regulation allows those member states which already have mechanisms of alternative dispute resolutions to use them where the labor-management dispute is transnational in character. The proposed Regulation does not require however those member states which do not yet have mechanisms of alternative dispute resolutions to introduce them. As a consequence, it would seem that a certain asymmetry is likely to exist between the member states until the social partner regulate the field with agreements at the EU level

³⁵⁷ For a more detailed examination of the Commission’s proposal see Federico Fabbrini, ‘Le droit de grève dans un marché commun: les défis européens à la lumière de l’expérience américaine’ [2012] *Revue française des affaires sociales*

right to strike or will it simply codify the proportionality-based case law of the ECJ in *Viking* and *Laval*? Third, are the procedural provisions of the regulation, which introduce several innovative opportunities for the use of mechanisms of alternative dispute resolutions in labor-management conflicts, likely to innovate the existing legal framework or will they be dependent on subsequent and uncertain action by the social partners? Despite these relevant concerns, nevertheless, the Commission's proposal appears to be moving in the right direction, recommending the enactment of a regulation at the EU level as the most adequate response to the challenge posed by *Viking* and *Laval*.

The decisions of the ECJ in *Viking* and *Laval* have demonstrated that insulating national systems of industrial relations from the impact of EU law is no longer an option.³⁵⁸ The interaction between domestic and supranational law is now such that any meaningful attempt to counter-balance the pressures emerging from EU free market rules must also take place at the EU level. As such, the enactment of an EU Wagner Act would acknowledge that only an EU legislative measure regulating the exercise of transnational industrial action can offer a satisfactory answer to the challenge of ineffectiveness posed by *Viking* and *Laval*. Arguments in favour of an EU social policy attempt to reintroduce political control over the economic sphere at the supranational level. Just like the US federal government during the New Deal, “[t]he [EU] would become the relevant level for the establishment and protection of social rights.”³⁵⁹ At the same time, the adoption by the EU political branches of an act regulating the right to strike in cross border situations would also cast a form of social legitimacy in an area which *de facto* is now pre-empted by EU law.³⁶⁰ It seems “uncontrovertible that the political institutions may adopt measures of human rights in all those fields which are *controlled materially* by [EC] law, either under exclusive or concurrent jurisdiction, and in which the object of the human rights legislation would be either [EC] institutions or complementary to [EC] laws and policies.”³⁶¹

Needless to say, the proposal for an EU Act on the regulation of the right to strike meets with many difficulties. The topic is extremely controversial and the social partners find it difficult, even now, to agree on a common basis for action.³⁶² The EU law-making process is burdensome and, at the moment, a consensus among the relevant institutional actors seems to be missing on the need to enact a similar directive and, even more, on its possible content.³⁶³ While the EU Parliament

³⁵⁸ See also Mia Rönnmar, *EU industrial relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Kluwer 2008)

³⁵⁹ M.P. Maduro (n 320) 467

³⁶⁰ On the question of pre-emption in the context of the *Viking* and *Laval* jurisprudence see also S. Deakin (n 160) 608

³⁶¹ J.H.H. Weiler and C. Fries (n 309) 161 (emphasis added)

³⁶² See the opposed views of the social partners in the *Report on Joint Work of the European Social Partners on the ECJ Rulings in the Viking, Laval, Rüffert and Luxembourg Cases* 19 March 2010

³⁶³ See C. Kilpatrick (n 330) 3

has traditionally played a key “pro-labour” role,³⁶⁴ strong disagreement is likely to emerge within the EU Council – where all 27 EU member states are represented – between countries which may be willing to enhance the protection of the right to strike at the supranational level and countries, such as the UK, which greatly fear any such development.³⁶⁵ If the regulation was to be adopted under Article 352 TFEU, as proposed by the Commission, this would require unanimity and each EU member state would thus be able to veto the Commission’s proposal.³⁶⁶ The possibility of resorting to qualified majority voting would be left open if instead the regulation was to be adopted under the internal market powers of the EU. Nevertheless, as long as Article 153(5) TFEU textually excludes the field of strike law from the application of the EU competences in the social sphere, it would seem that the enactment of legislation in this field, in the absence of a widespread or unanimous political consensus among the states, would be unlikely because of the following credible threat: states being outvoted in the Council could start judicial proceeding before the ECJ for *ultra vires* action by the EU institutions.³⁶⁷

In addition, one should also not forget the warnings of the US experience concerning the enactment of a federal overhaul in the field of industrial relations. The Wagner Act designed a coherent and effective framework for the regulation of the right to strike for workers engaged in

³⁶⁴ See S. Clauwaert (n 110) 632 (reporting the proposal advanced by the Rapporteur of the Social Affairs Committee of the EU Parliament, Mrs. Oomen-Ruijten on 14 January 1997 to introduce a regulation of transnational strikes at the EU level stating *inter alia* that: “The right to resort to collective action in the event of a conflict of interests shall include the right to strike at national and transnational level, in particular when transfrontier workers are affected by employment policies pursued by the undertaking where they are employed.”) The plenary of the Parliament approved on 2 July 1998 the following resolution on transnational trade union rights in the EU: “Parliament considered it necessary that the [ILO] Conventions Nos 87 and 98, and the Council of Europe’s [ESC] be applied at [EC] level; it called also for fundamental transnational trade unions rights to be enshrined in the [TEU]. Pointing out that social consensus is an essential condition for lasting social and economic development, Parliament advocated that the representative organizations be involved in establishing trade unions rights at the European level, and with the social partners enter into dialogue with a view to creating appropriate instruments to avoid collective labour disputes.” Bull. EU 7/8-1998, p. 14-15. More recently, then, the Parliament approved on 22 October 2008 another resolution on challenges to collective agreements in the EU stating at par 35 that “fundamental social rights are not subordinate to economic rights in a hierarchy of fundamental freedoms [and] therefore ask[ing] for a re-assertion in primary law of the balance between fundamental rights and economic freedoms in order to help avoid a race to lower social standards.” 2008/2085 (INI)

³⁶⁵ On the defensive attitude of the UK against social rights regulations originating in the EU see C. Barnard (n 313)

³⁶⁶ It may be noticed that on the same day in which the Commission published its proposal for a regulation on the exercise of the right to strike in the single market the French Minister of Labour published a press release in which he criticized the formulation of Article 2 of the proposed Monti 2 Regulation for being not sufficiently protective of collective labour rights and announced that it would veto the Commission’s proposal as it currently stands. See Ministère du Travail, de l’Emploi et de la Santé, Communiqué de Presse: ‘Des Propositions de la Commission européenne sur le détachement des travailleurs’ (21 March 2012) available at <http://www.travail-emploi-sante.gouv.fr/actualite-presse,42/communiqués,95/des-propositions-de-la-commission,14739.html>

³⁶⁷ The existence of Article 153(5) TFEU generates in itself a major difference between the legal situation of contemporary Europe and that of pre-1935 US. When the Wagner Act was adopted, of course, no express provision of the US Constitution excluded the competence of the federal government in the field of industrial action. Yet, the distinction between the two systems should not be overrated. When 1935 Congress enacted the Wagner Act, the authoritative interpretation of the US Constitution offered by the US Supreme Court in *Schechter Poultry Corp. v US*, 295 U.S. 495 (1935) clearly excluded that the federal government could resort to the Commerce Clause to regulate industrial action. See *Schechter Poultry Corp. v US*, 295 U.S. 495 (1935) (invalidating NIRA as an unconstitutional exercise of federal powers in the field of industrial relations)

interstate commerce, but it did not prevent the subsequent legislative and judicial developments that dealt a heavy blow to the protection of the right to collective action in the US. An EU Wagner Act would not be immune from similar dynamics. Some of these risks could perhaps be prevented by carefully drafting the EU regulation in order to ensure specific labour protections (e.g. codifying a prohibition for employers to fire or permanently replace striking workers or defining in a clear manner the room for permitted sympathy strikes etc.). However, it is widely recognized that legislation is often the result of political bargains and incompletely theorized agreements between institutional actors.³⁶⁸ As such, “the open texture of language and the obscure wording and complex architecture resulting from legislative compromises facilitates the introduction of new meaning”³⁶⁹ through judicial interpretation. Nothing, then, prevents a subsequent EU legislature to amend, or even repeal, what the previous EU legislature enacted. From this point of view, of course, the adoption of an EU Wagner Act would inevitably lay on shaky foundations, its success being tied to friendly judicial constructions and continuing political support.

Despite all this, it is time for Europe to begin seriously discussing the future of its transnational system of industrial relations and of the protection of the right to strike. The unprecedented financial crisis that the EU is currently experiencing (and that many analogize to the Great Depression in the US) is making this debate all the more momentous. This Section has argued that a possible response to the challenges currently affecting the regulation of collective action may come from an EU Wagner Act – an EU regulation setting a comprehensive legislative framework for the protection of transnational actions with a cross-border dimension. I have sketched what the possible legal basis and content of this regulation could be and then analyzed some of the strengths and weaknesses of the recent and ambitious Commission’s proposal for a regulation on the exercise of the right to strike in the context of the single market. My aim has not been to focus on the technicalities of the EU legislative intervention in this field. In my view, labour lawyers with their technical expertise can undertake this task much better. As a comparative constitutional lawyer, rather, my goal has been to demonstrate how the constitutional dynamics of tensions taking place in the European multilevel architecture are typical of federal arrangements and, in order to be addressed, require a response at the supranational level. From this point of view, the recent Commission’s proposal, despite raising several relevant questions in terms of content, appears to be moving in the right direction. Adopting an EU legislative measure on the protection of the right to strike may be a legally daunting if not politically impossible task. Nevertheless, if Europe wants to tackle the tensions between national and supranational laws in the field of industrial action, it may

³⁶⁸ I draw the expression incompletely theorized agreements from Cass Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 Harvard Law Review 1733 (who uses it however to identify a possible basis for judicial decision-making)

³⁶⁹ See C. Kilpatrick (n 330) 18

need a EU Wagner Act. If Europe wants to solve the clash between market integration and protection of social rights, it needs a New Deal.

Conclusion

The purpose of this chapter has been to analyze the protection of the right to strike in Europe in a comparative perspective with the US. The European architecture for the protection of fundamental rights is increasingly described as a multilevel system in which national and supranational laws intertwine. The existence of a plurality of sources and standards for the protection of fundamental rights generates, however, complex constitutional dynamics. As I have argued, the emergence at the EU level of a judge-made standard for the protection of the right to strike has created new challenges for those member states which ensure an enhanced protection of collective labour rights. As I explained in Section 1, the EU member states have traditionally offered different models for the regulation of industrial action: while some states have very protective labour law regimes which recognize the right to strike as a constitutional right, others subject industrial action to more limitations – either through social partners’ agreements or through a proportionality review – not to mention the UK where strike is not even regarded as a right but is simply a statutory immunity from common law principles. Beyond this fragmented picture, however, the impact of EU law in the field of strike law is becoming increasingly significant. As I detailed in Section 2, in *Viking* and *Laval*, the ECJ recognized that the right to strike is a fundamental right in the EU constitutional order. However, to uphold the continuing functioning of the EU common market, the ECJ has subjected the right to strike to severe restrictions that have challenged the protection of the right to collective action as it exists in many member states.

The interaction between national and EU law in the field of labour relations has thus exposed several tensions. Yet, this state of affairs is not a *sui generis* phenomenon. Rather, as I endeavoured to explain in Section 3, the tension between state and transnational laws is a recurrent feature of multilevel, federalism-based constitutional systems. In the US, indeed, striking a balance between state labour rights and federal free market rules has also proved problematic for long time. In the early 20th century, state social legislation was subject to judicial review by the federal judiciary and, although the Supreme Court recognized the existence of a constitutional right to strike, it deprived this right of much meaning in order to ensure that interstate commerce would not be impaired. The New Deal, however, profoundly changed the *status quo* by acknowledging that if social rights were to be taken seriously *vis-à-vis* free market rules, this had to be done at the federal

level. The Wagner Act established a comprehensive system of labour-management relations and codified a statutory right for workers to go on strike. The Wagner Act was later interpreted to preempt state legislation but in the field not covered by federal laws, states have maintained very diverse regulatory regimes for industrial action. Despite its slow weakening through legislative amendments and judicial constructions, the Wagner Act still remains today the basic framework for the regulation and the protection of the right to strike at the federal level in the US.

In light of the US experience, in Section 4, I explored the implications of the most recent transformations taking place in the case law of the ECHR. In the recent *Demir & Baykara* and *Enerji* decisions, the ECtHR has acknowledged that Article 11 ECHR protects a right to collective bargaining and collective action. These milestone decisions have opened a new perspective in the protection of strike action at the European level and could have a major influence on the ECJ. As the Lisbon Treaty has entered into force, the EU is now bound to accede the ECHR and, once this happens, the ECJ (like the other EU institutions) will be subject to review by the ECtHR for compliance with ECHR standards. As a consequence of these transformations, it could be envisaged that the ECJ will revise its *Viking* and *Laval* jurisprudence and align itself to the new labour-protective case law of the ECtHR. Yet, as I cautioned, it is difficult to predict whether this shift will necessarily occur as several factors distinguish the context and the content of the rulings of the two European supranational courts and it may be perhaps possible for them to avoid an undesirable clash. If this is the case, then other solutions to the challenge of ineffectiveness that emerge from the interaction between state and EU law will be needed. To this end, in Section 5, I discussed the possibility for the EU to enact a legislative measure that democratically regulates the contours of industrial action at the supranational level in Europe.

As things currently stand in Europe, the exercise of collective action in industrial conflicts with a cross-border dimension is *de facto* subtracted from the regulations provided by the member states and subjected to the judge-made standard developed by the ECJ in *Viking* and *Laval*. In devising a framework for the right to strike at the supranational level that complies with the EU free market principle, the ECJ has substantially pre-empted state regulations of industrial action in transnational labour disputes. Since states cannot go beyond the ceiling of protection of the right to strike provided at the EU level it appears that only a legislative reform at the supranational level would be capable of striking a new balance between free market rules and social rights guarantees which is more protective of the right to collective action. Hence, the proposal for a Wagner Act. As in the US during the New Deal, when it was understood that only a major transfer of policy powers to the federal government would counter-balance the *laissez-faire* trends inherent in the inter-state common market, Europe also needs to discuss endowing itself with an EU regulation protecting the

right to strike in ways that are analogous to those in the US Wagner Act. Of course, this proposal is controversial and difficult to realize, not least due to the hurdle of Article 153(5) TFEU. Yet, I have examined ways in which the EU might enact this bill under its internal market competences and reported how the Commission recently advanced a proposal for a regulation on the exercise of the right to strike in the single market based on Article 352 TFEU. Since the substantial regulation of transnational industrial action is now provided by the ECJ's case law on free movement, it would seem *a fortiori* that the democratic institutions which enjoy the legitimacy to adopt internal market legislation in the EU system of governance should be able to regulate the field.

Of course, an EU Wagner Act would not be a panacea. The same example of the US Wagner Act warns us from placing too much faith in the capacity of a legislative act to provide a long-lasting protection of the right to collective action. At the same time, the lessons that Europe should desperately seek to learn from the US experience is that no successful protection of labour rights can be ensured in a federalism-based constitutional arrangement as long as the tension between social rights and free market corresponds with conflicts between, on the one hand, state laws and practice and, on the other, federal rules and principles. If social rights are to be taken seriously in Europe, this requires a new foundation for the protection of social rights at the EU level along the lines drawn in the US by the New Deal. The challenge of ineffectiveness characterizing the field of strike law and emerging from the complex interaction between a plurality of fundamental rights standards in Europe can be addressed only by enhancing the mechanisms for the protection of collective labour action at the supranational level in Europe. State sovereigntism is no longer an option. To quote Mauro Cappelletti and David Golay once again it is clear that also in the field of the protection of labour rights "Europe's best future, indeed perhaps the *only* future, lies in integration."³⁷⁰

³⁷⁰ M. Cappelletti and D. Golay (n 1) 349 (emphasis in original)

Chapter 5

The Right to Abortion

Introduction

Abortion laws in Europe and the United States (US) have increasingly converged throughout the last thirty years. In the early 1980s, the refrain among many comparative lawyers was that, among Western countries, the US stood alone in recognizing a broad individual right to the voluntary interruption of pregnancy. Conversely, most European states subjected abortion to stricter regulations or prohibited it *tout court*.¹ Already during the mid-1990s, however, scholars emphasized that the US was retreating from its earlier, very liberal position, by permitting states to restrict a woman's right to an abortion.² Simultaneously, European countries were widening the conditions under which women could choose whether to terminate their pregnancies, often under the pressures of the rising supranational laws.³

An assessment of the abortion laws on each side of the Atlantic at the end of the 2010s highlights an even clearer pattern of convergence. In the US, the federal government⁴ and many state legislatures have enacted laws that further constrain women's access to abortion.⁵ These measures have gradually pushed back the time period during which a woman can obtain an

¹ See Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard University Press 1989). See also Marie-Thérèse Meulders-Klein, 'Vie privée, vie familiale et droits de l'homme' (1992) 44 *Revue internationale de droit comparé* 767

² See Laurence Tribe, *Abortion: The Clash of Absolutes* (Norton 1990) 197; Mark Tushnet, *Abortion: Constitutional Issues* (Facts on File Inc. 1995) 115

³ See David Cole, "'Going to England": Irish Abortion Law and the European Community' (1994) 17 *Hastings International and Comparative Law Review* 113; Rick Lawson, 'The Irish Abortion Cases: European Limits to National Sovereignty?' (1994) 1 *European Journal of Health Law* 167

⁴ See *infra* text accompanying n 289–94

⁵ See Eric Eckholm, 'Across Country, Lawmakers Push Abortion Curbs' *The New York Times* (New York, 22nd January 2011) A1

abortion, from the end of her second trimester to somewhere closer to the end of her first trimester.⁶ Moreover, a bill enacted in March 2011 by the state of South Dakota⁷ has introduced a system of mandatory counseling for the first time in the US, which is not dissimilar from that in effect in several European states. The bill states that women seeking abortions in South Dakota must first participate in a directed consultation at a pro-life pregnancy center.⁸

Meanwhile, a number of member states in the European Union (EU) have liberalized their abortion legislations over the last few years.⁹ In addition, the strictest abortion bans have come under the scrutiny of the European supranational courts. In a landmark ruling, *A., B. & C. v. Ireland*,¹⁰ decided in December 2010, the European Court of Human Rights (ECtHR) found that Ireland, the country in the EU with perhaps the most restrictive prohibition on abortion,¹¹ had violated the European Convention on Human Rights (ECHR) by failing to provide accessible and effective procedural mechanisms by which a woman could establish her fundamental right to a lawful abortion when her life was in peril due to her pregnancy.¹² The ruling generated widespread public reaction,¹³ and the resulting dialogue on the most appropriate way of complying with the ECtHR's decision played a major role in the ensuing Irish electoral debate.¹⁴

The purpose of this chapter is to compare the constitutional dynamics at play in the field of abortion law in the US federal and European multilevel constitutional systems. Other works already deal with the similarities and differences between the US and European approaches to the complex

⁶ See David Garrow, 'Significant Risks: *Gonzales vs Carhart* and the Future of Abortion Law' [2008] Supreme Court Review 1, 46 (arguing that in the long run "the hypothesis that federal constitutional protection [of abortion] will eventually recede toward an end-of-the-first-trimester benchmark, after which any legal abortion will require case-by-case medical review and approval, remains the historical best guess as to how the controversy will reach stasis.")

⁷ See H.B. 1217, 86th Sess. (S.D. 2011) ("An Act to establish certain legislative findings pertaining to the decision of a pregnant mother considering termination of her relationship with her child by an abortion, to establish certain procedures to better insure that such decisions are voluntary, uncoerced, and informed, and to revise certain causes of action for professional negligence relating to performance of an abortion.")

⁸ See Arthur G. Sulzberger, 'Women Seeking Abortions in South Dakota to Get Anti-Abortion Advice' *The New York Times* (New York, 23rd March 2011) A16 (arguing that the law enacted on March 22, 2011 in South Dakota "makes the state the first [in the US] to require women who are seeking abortions to first attend a consultation.")

⁹ See *infra* text accompanying n 25–39

¹⁰ *A., B. and C. v. Ireland*, ECHR [2010] Application No. 25579/05 (GC)

¹¹ See *infra* text accompanying n 102–113

¹² See Carl O'Brien and Harry McGee, 'Irish Abortion Laws Breach Human Rights, Court Rules' *Irish Times* (Dublin, 16th December 2010)

¹³ See Aoife Carr, 'Anti Abortion Group Calls for Referendum' *Irish Times* (Dublin, 17th December 2010); Kitty Holland, 'Judgment "A Landmark for Irish Women"' *Irish Times* (Dublin, 17th December 2010)

¹⁴ See Paul Cullen and Carl O'Brien, 'Abortion Becomes Election Issue After Court Ruling' *Irish Times* (Dublin, 17th December 2010). As the February 25, 2011, election date neared, the debate about the economy and the grave crisis that had hit Ireland took the front lines. The issue of abortion and how to implement the ECtHR ruling was addressed in the manifestos of all political parties and was soon tackled by the new government. On June 16, 2011, the Department of Health released an action plan for the implementation of the judgment. In this plan, the Government *inter alia* committed to establish an Expert Group by November 2011, which would be charged with making recommendations on how to properly address the matter. Dep't of Health, Press Release, 'Action Plan Regarding *A., B. and C. v. Ireland*' (16 December 2010) available at <http://www.dohc.ie/press/releases/2011/20110616.html?lang=en>

questions raised by abortion.¹⁵ These scholarly assessments, however, usually compare European countries individually with the US. When these assessments consider the jurisprudence of supranational jurisdictions (such as the ECtHR or the EU Court of Justice (ECJ)), it is mainly to better explain the internal legal framework of a specific European state.

In this chapter, I plan to take into account the European system *as a whole*. The European system, in fact, can be described as a multilevel constitutional architecture in which national, supranational (EU) and international (ECHR) laws intertwine.¹⁶ The pluralist nature of the European constitutional architecture is particularly evident in the field of fundamental rights. Each of the three layers comprising the European structure is endowed with norms and institutions for the protection of human rights that overlap and interact with one another.¹⁷ The dominant perception among European constitutional lawyers is that the European multilevel system is a *sui generis* architecture. However, as I have argued in the first chapter of this thesis, the European constitutional system for the protection of fundamental rights can be meaningfully compared with other federal arrangements and can be better understood when compared as such.

Therefore, this chapter analyzes the ways in which the complex interactions among national and transnational norms and institutions in Europe affect abortion law by comparing the European multilevel architecture to the US federal system. In particular, the chapter claims that, whereas several differences exist in the regulation of abortion among the EU member states, the growing impact of EU and ECHR law has generated new pressures and challenges in the domestic legal systems that restrict abortion. Consequently, a number of tensions and inconsistencies currently characterize the European abortion regime. As the comparative assessment of the US constitutional experience emphasizes, however, analogous constitutional dynamics have also been at play in the US system because of the interplay between state and federal rules.

Abortion regulations among the states have varied greatly in the US. Since the 1970s, the federal judiciary has recognized that the US Constitution protects a woman's right to choose whether to terminate her pregnancy. This recognition established a more consistent framework for

¹⁵ For a comparison of abortion law and politics in the US and a selected number of European countries, see Mauro Cappelletti and William Cohen, *Comparative Constitutional Law* (Bobbs-Merrill 1979); Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law I* (West Group 1999) 1, 140; Machteld Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study* (European University Institute unpublished Ph.D. thesis, 1990)

¹⁶ On the concept of multi-level constitutionalism, see the works of Ingolf Pernice: 'Multilevel Constitutionalism and the Treaty of Amsterdam' (1999) 36 *Common Market Law Review* 703; 'Multilevel Constitutionalism in the European Union' (2002) 27 *European Law Review* 511; 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 *Columbia Journal of European Law* 349

¹⁷ On the pluralist European architecture for the protection of fundamental rights, see Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 501; Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5 *European Constitutional Law Review* 5; Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009)

the protection of the right to abortion. At the same time, no uniform, federal abortion law exists in the US because the states are relatively autonomous in regulating pregnancy and other family law issues. Using the US experience as a comparative tool, this chapter examines whether a similar development is foreseeable in Europe, with the recognition of a transnational minimum standard for the protection of abortion rights, which can be integrated or superseded, but not lowered by domestic rules. Hence, the chapter considers the recent decision of the ECtHR in the case *A., B. & C. v. Ireland*, as well as the potential impact of the entry into force of the EU Lisbon Treaty and its binding Charter of Fundamental Rights.

In comparing the peculiar dynamics that characterize the regulation and protection of abortion rights in pluralist, heterarchical constitutional arrangements like the European multilevel architecture and the US federal system, this chapter's aim is primarily analytical.¹⁸ My goal is to underline, from a descriptive point of view, how comparable constitutional challenges arise from the two systems, rather than to advocate, from a prescriptive point of view, the migration of constitutional solutions from one system to the other.¹⁹ The US example is used as a *mirror* to better appreciate the complexities and tensions that are at play in the European framework of abortion laws—not as a *model* that should be imported into the European context.

The chapter proceeds as follows. Section 1 summarizes EU member states' abortion laws. Section 2 describes the growing influence that the EU and the ECHR exercise upon domestic abortion laws and highlights the challenges and tensions that emerge from this overlap. Section 3 argues that these inconsistencies are neither unique nor exceptional and explains how comparable dynamics have also been at play in the US federal system. Section 4 analyzes the recent decision of the ECtHR in *A., B. & C. v. Ireland* and evaluates its implication for the protection of abortion rights in Europe. Finally, Section 5 assesses the impact of the entry into force of the Lisbon Treaty and discusses the potential role of the EU Charter of Fundamental Rights in the review of domestic abortion laws.

Before getting started, I believe a final warning is in order: I am aware that when dealing with a controversial topic such as abortion, it is difficult for an author to resist the influence of his or her personal conceptions regarding the serious moral questions at the core of abortion issues. From this point of view, the very fact that I formulate the issue as a “woman's right to an abortion” will reveal my inclination towards a more liberal position, which supports the protection of

¹⁸ On the concept of constitutional heterarchy as the descriptive model of both the US and the EU constitutional arrangements, see Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009)

¹⁹ On the potential of comparative constitutional law in fostering the migration of constitutional models and ideas, see Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006)

abortion²⁰—a position with which pro-life advocates would certainly disagree. Having revealed my subjective viewpoint on the moral issue presented, I have sought to adopt, throughout my assessment, an analytical stance, which will use a comparative methodology to explore the complex constitutional phenomena characterizing the European abortion regime for what they are, rather than for what they should be.

In the concluding part of the chapter, however, I will abandon analytical neutrality and advance what is a normative argument in favor of greater protection for abortion rights at the supranational level in Europe. In a nutshell, I will emphasize how the existence in some EU states of strict criminal bans on abortion, coupled with the possibility for pregnant women to escape the prohibition by travelling to another EU state where abortion is permitted, has discriminatory effects upon well-off and low-income women, raising serious questions of equality. In discussing the future alternative scenarios for the European abortion regime, therefore, I will suggest that the creation of a system of soft pluralism, with stricter review of domestic abortion laws to ensure their conformity with transnational human rights standards, is an advisable option in the EU.

1. Context: States' abortion laws

Abortion law in Europe is quite diversified.²¹ A plurality of the EU member states recognizes, in a more or less liberal fashion, a right—based mostly on statutory law—for a pregnant woman to have an abortion within a certain number of weeks from the inception of pregnancy. In several states, however, abortion is not regarded as a woman's right; rather, it is only permitted under certain conditions and pursuant to specific procedures, which often include mandated medical advice and counseling sessions. In addition, some EU member states still have extremely restrictive abortion laws, which criminalize all forms of abortion, except when deemed necessary to save the life or protect the health of the pregnant woman from severe injury.

Criminal bans on abortions appeared in the statute books of European states during the 19th century, originally to protect the life of women because, because medical techniques for abortion

²⁰ For a classical liberal argument in favour of a woman's right to choose whether to seek an abortion, see generally Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (Vintage 1994)

²¹ For an overview of abortion regulation in the EU member states, see generally Caroline Forder, 'Abortion: A Constitutional Problem in European Perspective' (1994) 1 *Maastricht Journal of European and Comparative Law* 56; Albin Eser and Hans-Georg Koch, *Abortion and the Law: From International Comparison to Legal Policy* (T. M. C. Asser Press 2005). For a summary of abortion legislation in Europe in 2009, see International Planned Parenthood Federation (IPPF), 'Abortion Legislation in Europe, International Planned Parenthood Federation' (2009) available at <http://www.ippfen.org/en/Resources/Publications/Abortion+Legislation+in+Europe.htm>

were then not considered sufficiently reliable to prevent endangering the health of the women.²² Over time, however, these measures began to serve the purpose of safeguarding a traditional concept of the family and morals.²³ This view largely survived the enactment of post-World War II liberal Constitutions. Since the 1960s, however, social and political pressures to reform criminal bans on abortion began to rise in many countries of Western Europe.²⁴ Starting with the United Kingdom (UK), which legalized abortion in 1967,²⁵ measures legalizing or decriminalizing abortion were successfully enacted in a few years in Scandinavia, Austria,²⁶ France,²⁷ West Germany,²⁸ Italy,²⁹ and the Netherlands.³⁰

A second wave of reforms then took place between the late 1980s and 1990s in Belgium,³¹ and—after the transition to democracy—in Greece³² and Spain.³³ The collapse of the Soviet block, where abortion was already lawful, also prompted some of the new democracies of Central and Eastern Europe to enact legislation re-affirming the legality of abortion.³⁴ In the aftermath of unification, Germany revised its abortion legislation, harmonizing the (more restrictive) Western and (more liberal) Eastern German abortion laws.³⁵ In the last decade, liberal abortion legislation has been adopted in Portugal³⁶ and new, more permissive, abortion acts have been passed in France³⁷ and Spain.³⁸

Nevertheless, although there is a general trend toward the gradual liberalization of abortion laws in Europe, opposing pressures exist and merit attention.³⁹ In the late 1970s and early 1980s, Ireland tightened its anti-abortion regime by reinstating the strict nineteenth century criminal ban on

²² See A. Eser and H.G. Koch (n 21) 19

²³ *Ibid* 31

²⁴ See Rebecca Cook and Bernard Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 3

²⁵ See *infra* text accompanying n 45–54

²⁶ See *Bundesgesetzblatt [BGBL]*, No. 60/1974, von 23 Januar 1974 (Austria). The Act, which amended the *Strafgesetzbuch*, was upheld by the *Verfassungsgerichtshof* in its decision of 11 October 1974, VfGH 7400 - JBL 1974

²⁷ See *infra* text accompanying n 64–70

²⁸ See *infra* text accompanying n 83–85

²⁹ See *infra* text accompanying n 55–58

³⁰ Joyce Outshoorn, 'Policy-Making on Abortion: Arenas, Actors and Arguments in the Netherland' in Dorothy McBride Stetson (ed), *Abortion Politics* (Routledge 1996)

³¹ See Perrine Humblet et al, 'Developments in Abortion Policy in a Context of Illegality: The Belgian Case from 1971 until 1990' (1995) 6 *European Journal of Public Health* 288

³² See Nomos (1978: 821) (Greece)

³³ See Belén Cambronero-Saiz et al, 'Abortion in Democratic Spain' (2007) 15 *Reproductive Health Matters* 85, 86

³⁴ See Patrick Flood, 'Abortion and the Right to Life in Post-Communist Eastern European and Russia' (2002) 36 *East European Quarterly* 191

³⁵ See Eva Maleck-Lewy, 'Between Self-Determination and State Supervision: Women and the Abortion Law in Post-Unification Germany' [1995] *Social Politics* 62

³⁶ See *infra* text accompanying n 71–73

³⁷ See *infra* text accompanying n 67–70

³⁸ See *infra* text accompanying n 74–80

³⁹ See A. Eser and H. G. Koch (n 21) 18

abortion and amending the Constitution to enshrine the fundamental right to life of the unborn.⁴⁰ Equally restrictive pulls emerged in some post-Communist countries of Central and Eastern Europe. Especially in Poland where abortion on demand was widely available during the Communist regime, reforms in the 1990s resulted in backward movement, with a substantial prohibition of the voluntary termination of pregnancies.⁴¹

In light of the differences existing among the various abortion laws in Europe, it is possible to resort to the analytical distinction between vanguard and laggard states advanced by Ann Althouse⁴² and to classify the national abortion legislations in four models. Abortion is permitted in the first three legislative models, which can be placed in a continuum from a more “liberal” to a more “restrictive” one, considering criteria such as the time-limitations during which women can have an abortion and the conditions and procedures that define their right or ability to choose an abortion.⁴³ A fourth, alternative, model of legislation is represented by those EU member states that prohibit abortion *tout court*, save in limited, exceptional circumstances. In these systems, the right to life of the unborn is regarded as paramount. As a consequence, women are denied any right to choose whether to terminate their pregnancies.

The UK has a fairly liberal legislative model of abortion.⁴⁴ The Abortion Act 1967,⁴⁵ as amended by the Human Fertilisation and Embryology Act 1990,⁴⁶ states that pregnancy can be lawfully terminated up to the 24th week if “the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.”⁴⁷ In addition, abortion is always permitted if “the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman,”⁴⁸ if “the continuance of the pregnancy would involve risk to the life of the

⁴⁰ James Kingston and Anthony Whelan, *Abortion and the Law* (Round Hall Ltd 1997) 4, 5

⁴¹ See Andrzej Kulczycki, ‘Abortion Policy in Postcommunist Europe: the Conflict in Poland’ (1995) 21 *Population and Development Review* 471

⁴² See Ann Althouse, ‘Vanguard States, Laggard States: Federalism and Constitutional Rights’ (2003-2004) 152 *University of Pennsylvania Law Review* 1745 (speaking about the “vanguard” and the “laggard” states to distinguish between the most-protective and the least-protective regimes for the protection of fundamental rights at the state level in the US federal system of government)

⁴³ See A. Eser and G.H. Koch (n 21) 42 (arguing that the creation of basic regulatory models “is not dependent on one single differentiating criterion, but rather is based on a multi-factored approach.”)

⁴⁴ Note that the UK abortion legislation, however, applies in only Great Britain and not in Northern Ireland.

⁴⁵ 15 Eliz. 2, c. 87 (Eng.)

⁴⁶ 38 Eliz. 2, c. 37 (Eng.)

⁴⁷ Section 1(1)(a), Abortion Act, as amended by Section 37(1), Human Fertilisation and Embryology Act. (Prior to the enactment of the Human Fertilisation and Embryology Act 1990, Section 1(1)(a) of the Abortion Act 1967 allowed abortion, without specifying limits, whenever “the termination of pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy was terminated.” As such, the 1990 revisions have disentangled the original 1967 provision, setting a limit at the end of the second trimester for abortion on ground of physical and mental “distress” while allowing abortion with no limits in case of a serious risk to the life of or permanent injury to the health of the pregnant woman)

⁴⁸ *Ibid* Section 1(1)(b)

pregnant woman, greater than if the pregnancy were terminated,”⁴⁹ or if “there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities.”⁵⁰

The consent of two registered medical practitioners is required to perform an abortion,⁵¹ except when terminating the pregnancy is “immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.”⁵² Nevertheless, in determining whether the continuance of a pregnancy would involve a risk of injury to the health of a woman, doctors may also consider “the pregnant woman’s actual or reasonably foreseeable environment.”⁵³ As a consequence, women may obtain elective abortions for a wide variety of social reasons.⁵⁴ Otherwise, the law neither sets counseling duties nor imposes waiting periods or parental / spousal consent / notification requirements.

A different model of regulation of the right to abortion is represented by the 1978 Italian legislation,⁵⁵ shaped largely on the French *Loi relative à l’interruption volontaire de la grossesse* of 1975,⁵⁶ which was, however, recently amended.⁵⁷ Abortion is decriminalized and can lawfully be obtained in the first ninety days of pregnancy when “continuance of pregnancy, delivery or maternity would involve a serious risk for the physical and psychological health [of the woman] in light of her state of health, or her economic, social and family conditions or the circumstances in which conception occurred or in view of the anomalies and malformations of the fetus.”⁵⁸ After the first trimester, abortion is only permitted when there is a medically certified risk for the life of the pregnant woman or for her physical and psychological health.⁵⁹

⁴⁹ Ibid Section 1(1)(c)

⁵⁰ Ibid Section 1(1)(d)

⁵¹ Ibid Section 1(1)

⁵² Ibid Section 1(4)

⁵³ Ibid Section 1(2)

⁵⁴ See Christina Schlegel, ‘Landmark in German Abortion Law: The German 1995 Compromise Compared with English Law’ (1997) 11 International Journal of Law, Policy and the Family 36 (highlighting how “although according to the letter of the law and the intent of the legislator, there is no abortion on demand in England, in fact a woman seeking an abortion ‘only’ has to find two registered medical practitioners to certify the wide socio-medical grounds that justify abortion.”)

⁵⁵ Legge 22 maggio 1978, n. 194 (G.U. 22 maggio 1978, n. 140)(It.). The *Corte Costituzionale* had already declared unconstitutional the provision of the Italian Codice Penale punishing abortion to the extent to which it did not include an exception for a pregnant woman whose life was in peril. See C.Cost sent. 27/1975. For an overview of the Italian abortion law, see generally Lucio Valerio Moscarini, ‘Aborto. Profili costituzionali e disciplina legislativa’ in *Enciclopedia Giuridica* (Treccani 1988) vol 1, ad vocem

⁵⁶ Loi 75–17 du 17 janvier 1975 relative à l’interruption volontaire de la grossesse J.O.R.F., 18 janvier 1975, p. 739 (Fr.). The abortion act was challenged before the *Conseil Constitutionnel*, which declared it constitutional in its Décision 75–17 DC

⁵⁷ See *infra* text accompanying n 67–73

⁵⁸ Article 4, Legge 194/1978 (my translation: “la prosecuzione della gravidanza, il parto o la maternità comporterebbero un serio pericolo per la sua salute fisica o psichica [della donna], in relazione o al suo stato di salute, o alle sue condizioni economiche, o sociali o familiari, o alle circostanze in cui è avvenuto il concepimento, o a previsioni di anomalie o malformazioni del concepito.”)

⁵⁹ Ibid Article 6

Before obtaining an abortion in the first trimester, however, women are required to undergo compulsory non-directive counseling. Social assistants, family planning centers, or the woman's physician must discuss together with the woman any possible alternative solution to abortion and help her to overcome all the problems of a social nature that may push her to seek an abortion.⁶⁰ If at the end of the counseling process a woman still wants an abortion, she has the right to receive a document certifying her pregnancy and her desire to terminate it. After a waiting period of seven days, she can obtain an abortion in any hospital or authorized private clinic.⁶¹ Spousal notifications are suggested but not required by the law,⁶² and the requirement of parental consent for minor aged girls seeking an abortion can also be lifted through a judicial bypass.⁶³

France provided a similar regulation in 1975, allowing a woman to seek an abortion within the first ten weeks of pregnancy,⁶⁴ after mandatory counseling,⁶⁵ and a seven-day waiting period.⁶⁶ In 2001, however, a new bill⁶⁷ extended the possibility of seeking a termination of pregnancy "in a situation of stress" up to the twelfth week.⁶⁸ More importantly, the new bill abolished the mandatory counseling procedure, except for underage girls.⁶⁹ Now, counseling is only "systematically suggested, before and after the voluntary interruption of pregnancy."⁷⁰ A system akin to the Italian one, instead, has recently been adopted in Portugal.⁷¹ A right to abortion exists "by option of the woman, within the first ten weeks of pregnancy."⁷² Women who seek an abortion must undergo mandatory counseling and a three-day mandatory waiting period has also been established.⁷³

Spain too has finally recently enacted a new abortion act⁷⁴ along the above-mentioned model, with the explicit purpose of reflecting "the consensus of the international community in this

⁶⁰ Ibid Article 5(1)

⁶¹ Ibid Article 5(4)

⁶² Ibid Article 5(1) and 5(2)

⁶³ Ibid Article 12

⁶⁴ Article 161-1, Code de la Santé (Fr.), as introduced by Article 4, Loi 75-17

⁶⁵ Ibid Article 161-4

⁶⁶ Ibid Article 161-5

⁶⁷ Loi 2001-588 du 4 juillet 2001 relative à l'interruption volontaire de la grossesse et à la contraception, J.O.R.F., 7 juillet 2001, p. 10823 (Fr.). The law was challenged before the *Conseil Constitutionnel* which declared it constitutional in its *Décision* 2001-446 DC and *Décision* 2001-449 DC

⁶⁸ Article 2212-1, Code de la Santé (Fr.), as modified by Article 1, Loi 2001-588 (my translation: "dans une situation de détresse")

⁶⁹ Ibid Article 2212-4

⁷⁰ Ibid (my translation: "systématiquement proposé, avant et après l'interruption volontaire de grossesse")

⁷¹ See Lei 16/2007 de 17 de Abril 2007, Exclusão da ilicitude nos casos de interrupção voluntária da gravidez, *Diário da República* n° 75, 17.4.2007 (Port.)

⁷² Article 142(1)(e) *Código Penal* (Port.), as modified by Article 1, Law 16/2007 (my translation: "por opção da mulher, nas primeiras 10 semanas de gravidez")

⁷³ Ibid Article 142(4)(b)

⁷⁴ See Ley Organica 2/2010 de salud sexual y reproductiva y de la interrucion voluntaria del embarazo (B.O.E. 2010, 55) (Spain). The 2010 Act has been challenged before the *Tribunal Constitucional*. See Recurso 4523-10 and Recurso 4541-10 pending. See Julio Lazaro, 'El Constitucional admite el recurso del PP contra la ley del aborto' *El País* (Madrid, 30th June 2011)

field”⁷⁵ and “the legislative trend prevailing among [European] states.”⁷⁶ Contrary to the *Ley organica* 9/1985, which simply stated that abortion “will not be punishable”⁷⁷ if performed with the consent of the woman by a physician at any time for medical reasons, within twelve weeks of pregnancy in the case of rape and up to the twenty-second week in case of fetal impairment, the new *Ley organica* 2/2010 has introduced a right to abortion “at the request of the woman”⁷⁸ up to the fourteenth week of pregnancy, after a three-day waiting period and a counseling meeting in which women are informed about the means of social assistance and public support available for mothers.⁷⁹ Abortion is then permitted until the twenty-second week on medical grounds and when there are risks of fetal impairment or with no limit if a medical team certifies that the fetus has no reasonable possibility of surviving delivery.⁸⁰

In contrast, Germany has the most restrictive model of abortion regulation among the EU member states in which abortion is permitted.⁸¹ After unification, an Act was adopted in 1992,⁸² which, in order to harmonize the law in force in East Germany⁸³ (where women had a right to abortion until the twelfth week of pregnancy after mandatory counseling) and in West Germany⁸⁴ (where abortion was prohibited save on four enumerated grounds),⁸⁵ made first-trimester abortions lawful after mandatory counseling. Nevertheless, in 1993, the *Bundesverfassungsgericht*, following a 1975 precedent⁸⁶ quashing the first West German Abortion Act,⁸⁷ declared the 1992 Act unconstitutional,⁸⁸ arguing that the State had a duty to protect human life, and that, therefore, legislation ought to express a clear disapproval of abortions.⁸⁹

⁷⁵ Preamble I, *Ley Organica* 2/2010 (my translation: “[e]l consenso de la comunidad internacional en esta materia”)

⁷⁶ *Ibid* Preamble II (my translation: “la tendencia normativa imperante en los países [Europeos]”)

⁷⁷ Article 417 *Código Penal* (Spain), as modified by *Ley Organica* 9/1985 (B.O.E. 1985, 166) (Spain) (my translation: “no será punible.”) The 1985 Act was challenged before the *Tribunal Constitucional*, which declared it constitutional in STC Sentencia 53/1985

⁷⁸ Article 14, *Ley Organica* (my translation: “a petición de la mujer”)

⁷⁹ *Ibid* Article 17

⁸⁰ *Ibid* Article 15

⁸¹ See E. Maleck-Lewy (n 35) 62; see also C. Schlegel (n 54) 52

⁸² See *Schwangeren und Familienhilfegesetz*, von 27 Juli 1992, *Bundesgesetzblatt*, Teil I [BGBl I] 1398 (Ger.).

⁸³ See *Gesetz über die Unterbrechung der Schwangerschaft*, von 9 März 1972, *Gesetzblatt der Deutschen Demokratischen Republik*, Teil I [GDDR I] 89 (East Ger.)

⁸⁴ See *Fünffenzehntes Strafrechtsänderungsgesetz*, von 21 Mai 1976, *BGBl I* 1213 (Ger.)

⁸⁵ See *Ibid* Article 1(4) (declaring, on the basis of the “indication model” (*Indikationslösung*), that abortion was “*nicht strafbar*” if performed: (1) at any time, on medical grounds, (2) within the first twenty-two weeks, on embryopathic grounds, (3) within the first twelve weeks, on criminal-ethical grounds, and (4) within the first twelve weeks, on social grounds). See E. Maleck-Lewy (n 35) 67

⁸⁶ See BVerfGE 39, 1 (1975). This first decision of the *Bundesverfassungsgericht* has been the object of extensive comparative analysis with the abortion decisions of the US Supreme Court. See John Gorby and Robert Jonas, ‘West German Abortion Decision: A Contrast to *Roe v. Wade*’ (1976) 9 *John Marshall Journal of Practice and Procedure* 551

⁸⁷ See *Fünftes Gesetz zur Reform des Strafrechts*, von 18 Juni 1974, *BGBl I* 1297 (Ger.)

⁸⁸ See BVerfGE 88, 203 (1993)

⁸⁹ See Gerald Neuman, ‘*Casey* in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany’ (1995) 43 *American Journal of Comparative Law* 273 (offering a comparative analysis of abortion law in Germany and the United States)

In reaction to this decision, the German Parliament enacted a new abortion Act in 1995,⁹⁰ amending, among other things, the Criminal Code. On the basis of the new law, abortion is unlawful, but may not be punished,⁹¹ if it is performed at the request of the woman, by a medical practitioner, before the end of the twelfth week of pregnancy, after a mandatory counseling session and a three-day waiting period.⁹² In contrast, abortion is “not unlawful”⁹³ if performed, at any time, under medical indication to prevent danger to the life of or serious harm to the health of the woman or, within the first twelve weeks of pregnancy, on criminal-ethical grounds, e.g., because the pregnancy was the result of rape.⁹⁴

The mandatory counseling process is a peculiar feature of the 1995 German Abortion Act.⁹⁵ Following an explicit request by the *Bundesverfassungsgericht*, the law clarifies that the counseling must be pro-life oriented;⁹⁶ that is, it must be directed toward encouraging the woman to continue the pregnancy and to open her to the perspective of a life with the child. Social workers and family planning centers must therefore inform women that the unborn has a right to life and that abortion can only be performed under exceptional circumstances. From this point of view, the regulation of abortion via the instruments of criminal law and the imposition of a directive counseling procedure highlight the German legal system’s restrictive attitude toward the voluntary interruption of pregnancy.⁹⁷ At the same time, however, the possibility for a woman to obtain an abortion during the first trimester, if she still wishes to do so after the mandatory counseling and three-day waiting period, differentiates the German law from the legislative model of the last group of EU countries—Malta, Poland and Ireland—where abortion is generally always prohibited, with only a few, narrowly tailored exceptions.⁹⁸

⁹⁰ See Schwangeren- und Familienhilfeänderungsgesetz [SFHAndG], von 21 August 1995, BGBl I 1050 (Ger.).

⁹¹ A subtle distinction is indeed drawn in German criminal law between the abstract lawfulness of an act and the effective possibility to sanction an act. As such, an act may be lawful and therefore, not punishable, or an act may be unlawful. In the latter case, however, an act might still not be punishable when other compelling reasons push for the lifting of the criminal sanction. The 1992 Act had made first trimester abortion not unlawful, but the *Bundesverfassungsgericht* declared the measure unconstitutional to the extent to which it failed to protect the right to life of the unborn. The 1995 Act, therefore, made abortion simply “not punishable” in order to express a clear disapproval for abortion. See G. Neuman (n 89) 285

⁹² Article 218a(1), Strafgesetzbuch [StGB] (Ger.), as amended by Article 8, SFHAndG

⁹³ Ibid Article 218a(2) (my translation: “nicht Rechtswidrig”)

⁹⁴ Ibid Article 218a(3)

⁹⁵ See Nanette Funk, ‘Abortion Counselling and the 1995 German Abortion Law’ (1997) 12 Connecticut Journal of International Law 33, 51 (discussing the importance of the counseling process in the German abortion regime)

⁹⁶ See Article 219, StGB as amended by Article 8, SFHAndG

⁹⁷ See N. Funk (n 95) 57; see also V. Jackson and M. Tushnet (n 15) (describing how the German abortion law limits abortions by requiring mandatory counseling)

⁹⁸ See A. Eser and H. Koch (n 21) 46 (defining the “prohibition model” approach to abortion); C. Forder (n 21) 85-86 (explaining how the German approach to abortion is less restrictive than the Irish one)

Poland swiftly enacted legislation banning elective abortion in 1993, following the collapse of the Communist regime.⁹⁹ The new Act permits abortion only if: (1) a physician, other than the one which performs the abortion, certifies that the pregnancy is endangering the mother's life or health; (2) up to viability (i.e., up to the twenty-fourth week), if the fetus is seriously impaired; or (3) up to the twelfth week, if pregnancy resulted from rape.¹⁰⁰ Terminating pregnancy outside these cases may be punished with three years' imprisonment. A legislative attempt to reform the law and re-introduce a right to abortion in the first trimester on grounds of material or personal hardship failed in 1996. The *Trybunał Konstytucyjny* declared the bill incompatible with the Constitution, interpreting the right to life provision of the Polish Constitution as protecting the unborn.¹⁰¹

Of all European countries, Ireland has the most restrictive legislation on abortion.¹⁰² On the basis of the Offences Against the Person Act 1861,¹⁰³ the content of which was re-affirmed in the Health (Family Planning) Act 1979,¹⁰⁴ “[e]very woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent [...]. to procure the miscarriage [...] shall be liable to be kept in penal servitude for life.”¹⁰⁵ Contrary to the interpretation of the 1861 Act offered by the English courts,¹⁰⁶ Irish tribunals have traditionally

⁹⁹ See Magdalena Zolkos, ‘Human Rights and Democracy in the Polish Abortion Debate’ (2006) 3 *Essex Human Rights Review* 1, 4

¹⁰⁰ Article 4(a), Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży (Dz.U. 1993 nr 17 poz. 78)(Pl.)(an English translation of this provision of the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, Jan. 7, 1993, is available in *Tysiąc v. Poland*, ECHR [2007] Application No. 5410/03). The fact that Poland only permits abortion in these three specific cases differentiates Polish legislation and makes it more restrictive than German legislation, where abortion is not punishable (although it is not lawful) in a wider array of circumstances. See *supra* text accompanying n 91. Still, undoubtedly, the Polish abortion law is more permissive, at least on the books, than the Irish one. See *infra* text accompanying n 99–101

¹⁰¹ Trybunał Konstytucyjny, decision of 28 May 1997, K 26/96. But see the dissenting opinions of Judges Garlicki and Sokolewicz. See also Alicia Czerwinski, ‘Sex, Politics and Religion: the Clash Between Poland and the European Union over Abortion’ (2004) 32 *Denver Journal of International Law and Policy* 653, 659–60 (discussing the Polish abortion regime and its tensions with EU law)

¹⁰² See C. Forder (n 21) 57; Tushnet (n 2) 85

¹⁰³ Offences against the Person Act 1861, 24 and 25 Vict. 236, c. 100 (UK). Note that this Act was adopted by the UK and applied in Ireland because, until 1922, the UK exercised dominion over Ireland. See Gerard Hogan, ‘An Introduction to Irish Public Law’ (1995) 1 *European Public Law* 37

¹⁰⁴ Section 10, Health (Family Planning) Act 1979 (Act No. 20/1979)(Ir.)

¹⁰⁵ Section 58, Offences against the Person Act 1861. The same penalty applies to the doctor performing the abortion. According to *Ibid* Section 59 it is instead a misdemeanor to supply a woman with the poisons or instruments necessary to procure an abortion

¹⁰⁶ See *R. v. Bourne* [1939] 1 K.B. 687, 693–94 (King’s Bench, per Justice Macnaughten, affirmed that Section 58 of the Offences Against the Person Act 1861 “ought to be construed in a reasonable sense, and, if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck” abortion should be permitted on therapeutic grounds.)

adopted a narrow construction of the provision excluding the lifting of criminal sanctions, even when abortion is carried out to preserve the life or the health of the woman.¹⁰⁷

In 1983, to prevent a possible recognition of a right to abortion by judicial fiat,¹⁰⁸ an amendment to the Irish Constitution was adopted by popular referendum, which enshrined a right to life of the unborn in Irish fundamental law.¹⁰⁹ According to the Eighth Amendment, codified as Article 40.3.3 of the Irish Constitution, “the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”¹¹⁰ The amendment generated a cluster of litigation. Much of this litigation dealt with the issue of whether the state could prohibit distribution of information on abortion services provided in other EU countries. This litigation involved the ECJ and the ECtHR¹¹¹ and eventually led to the adoption of two further constitutional amendments explicitly guaranteeing a right to travel to other states in order to obtain an abortion,¹¹² as well as a right to provide information about abortion services performed overseas.¹¹³

The specific consequences of Article 40.3.3 on the prohibition of abortion were addressed in the seminal *X* case.¹¹⁴ This case involved a fourteen-year-old rape victim who became pregnant. The girl wanted an abortion and showed clear signs of suicidal tendencies if she could not obtain one. Her family agreed to bring her to England for the abortion. On the Attorney General’s application, however, the Irish High Court issued an injunction prohibiting the girl from leaving Ireland on the basis of the new constitutional provision protecting the life of the unborn. According to the Court, the “risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made.”¹¹⁵

The decision of the High Court sparked widespread controversy and was quickly overruled by a majority of the Irish Supreme Court. On appeal, Chief Justice Finlay framed a new test to

¹⁰⁷ See *Society for the Prot. of Unborn Children Ireland Ltd. v. Grogan*, [1989] I.R. 753 (Ireland Supreme Court, per Justice Keane affirmed that “the preponderance of judicial opinion in this country would suggest that the *Bourne* approach could not have been adopted . . . consistently with the Constitution prior to the Eighth Amendment.”)

¹⁰⁸ Note that in *McGee v. Attorney General*, [1974] I.R. 284, the Irish Supreme Court had recognized a fundamental right to privacy as either an unenumerated personal right or a familial right. As a result, there was widespread preoccupation that the Irish Supreme Court would follow the path of the US Supreme Court, whose decision recognizing a right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), followed from its decision recognizing a right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See M. Tushnet (n 2) 86. On the US constitutional issues of abortion law, see *infra* Section 3

¹⁰⁹ See John Quinlan, ‘The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution’ (1984) 3 Brigham Young University Law Review 371, 383-90

¹¹⁰ Article 40.3.3 Ir. Const., as amended by the Eight Am.

¹¹¹ See *infra* Section 2

¹¹² Article 40.3.3(2) Ir. Const., as amended by the Thirteenth Am.

¹¹³ Article 40.3.3(3) Ir. Const., as amended by the Fourteenth Am.

¹¹⁴ See D. Cole (n 3) 129-135; C. Forder (n 21) 57-58

¹¹⁵ *Attorney Gen. v. X* [1992] I.L.R.M. 401, 410 (H. Ct.)

review the lawfulness of an abortion in light of Article 40.3.3 of the Irish Constitution: “if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible.”¹¹⁶ The Court recognized that suicide could be considered as a real and substantial risk to the life of the woman and therefore concluded that the defendant had a right to obtain an abortion in Ireland.¹¹⁷ Attempts have been made since the *X.* case to restrict the Supreme Court’s interpretation of Article 40.3.3 by enacting new constitutional amendments directed at excluding suicide from the conditions that may justify a therapeutic abortion. All of these attempts, however, have failed in popular referenda.¹¹⁸

As a result, the current status of abortion law in Ireland appears to be that, constitutionally, termination of pregnancy is unlawful “unless it meets the conditions laid down by the Supreme Court in the *X.* case.”¹¹⁹ Women have both a constitutional right to travel to seek an abortion overseas and to obtain information about abortion services provided in other EU member states pursuant to the 1995 Information Act.¹²⁰ However, no specific regulation exists on the basis of which a woman can establish her right to obtain a lawful abortion in Ireland on grounds of a real and serious risk to her life, including a risk of suicide.¹²¹ In fact, no lawful abortion is known to have ever been carried out in Ireland,¹²² effectively making Ireland the EU country in which abortion is most severely restricted.

As the preceding survey clarifies, a variety of regulatory models exists in the EU member states in the field of abortion law. In all legal systems, however, abortion is permitted at any time, at least according to the law in the books, if necessary to save the life of the woman. Almost every

¹¹⁶ *Attorney Gen. v. X* [1992] 1 I.R. 41, 53-54 (S.C.)

¹¹⁷ *Ibid* 55. Although the opinion of the Irish Supreme Court left some doubts as to whether abortion could be obtained in Ireland in case of real and substantial risk to the woman’s life, this possibility was later confirmed by the Irish High Court in *A. and B. v. E. Health Bd.*, [1998] 1 I.L.R.M. 460, 478-79 (H. Ct.)

¹¹⁸ The proposed Twelfth Am. of the Ir. Const. would have allowed abortion only when “necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to real and substantial risk to her life, not being a risk of self-destruction.” Raymond Byrne and William Binchy, *Annual Review of Irish Law 1992* 195–97 (Sweet and Maxwell 1992). The proposal was rejected in a popular referendum in November 1992. The proposed Twenty-Fifth Am. of the Ir. Const. – Section 1(2), Protection of Human Life in Pregnancy Bill, 2001 – would have allowed abortion only when “necessary to prevent a real and substantial risk of loss of the woman’s life other than by self-destruction.” The proposal was rejected in a popular referendum in March 2002. Raymond Byrne and William Binchy, *Annual Review of Irish Law 2001* 113 (Sweet and Maxwell 2001)

¹¹⁹ Department of the Taoiseach, ‘The Green Paper on Abortion’ (1999) 3 available at http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2006/Publications_for_1999/Green_Paper_on_Abortion.html. This report was prepared at the request of the Irish government to clarify the legal framework of abortion in Irish law

¹²⁰ Section 3, Regulation of Information (Services Outside the State for Termination of Pregnancy) Act 1995 (Act No. 5/1995)(Ir.). The Act makes it legal to distribute information on abortion services abroad as long as the information does not promote abortion. The Irish Supreme Court was asked to decide on the abstract and a priori constitutionality of the Act, and it unanimously upheld it. See *In re Article 26 of the Constitution and Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill*, [1995] 1 I.R. 1 (S.C.)

¹²¹ See *infra* text accompanying n 321–337

¹²² See IPPF (n 21) 39

country recognizes the right to an abortion on medical grounds, to varying degrees. Further, a clear trend exists among a majority of states toward the legalization of elective abortion roughly within the first trimester of pregnancy, either upon the simple request of the woman, or upon the request of the woman certified (on wide social grounds) by medical doctors, or after a mandatory counseling period, be it of a neutral or life-oriented kind. Finally, all state abortion laws are subject to the increasing influence of supranational laws.

3. Challenges: the impact of supranational law on states' abortion laws

In the last two decades, the legal orders of the EU and the ECHR have steadily increased their involvement in the field of abortion law, and both the ECJ and the ECtHR have reviewed states' abortion legislations with growing frequency.¹²³ Although the authority to regulate abortion rights remains primarily in the purview of the EU member states, a series of substantive checks and procedural balances on the exercise of national sovereignty have been developed in this area. The jurisprudence of the two European supranational courts, in particular, has slowly increased the floor of protection ensured to the right of abortion Europe-wide.¹²⁴ As a consequence, as David Cole has argued, the interplay between European and domestic laws on abortion has now reached such a level of complexity that national "isolationism is impossible, even on an issue as strongly felt as abortion."¹²⁵

In the 1991 *Grogan* case,¹²⁶ the ECJ had the opportunity to rule on the abortion issue in the context of an order for a preliminary reference by the Irish High Court.¹²⁷ In this case, the Society for the Protection of the Unborn Child (SPUC) had requested an injunction prohibiting the

¹²³ See C. Forder (n 21) 56 (arguing that "recent developments have shown that abortion also has a transnational character. It is no longer possible for one country to regulate abortion without regard to what is happening elsewhere in Europe. Both the [ECJ] and the [ECtHR] have bared their teeth, and shown that there are certain minimum standards which must be met.") See also R. Lawson (n 3) 167. For an assessment of the impact of international human rights law on national abortion legislation *outside* the European context, see generally Cyra Choudhury, 'Exporting Subjects: Globalizing Family Law Progress through International Human Rights' (2011) 32 *Michigan Journal of International Law* 259

¹²⁴ Compare the open view in Bryan Mercurio, 'Abortion In Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union' (2003) 11 *Tulsa Journal of International and Comparative Law* 141 with the extremely sovereigntist view in Diarmuid Rossa Phelan, 'Right to Life of the Unborn v Promotion of Trade in Services: the European Court of Justice and the Normative Shaping of the European Union' (1992) 55 *Modern Law Review* 670

¹²⁵ D. Cole (n 3) 115

¹²⁶ Case C-159/90, *Society for the Prot. of Unborn Children Ir. Ltd.v. Grogan* [1991] ECR I-4685

¹²⁷ The preliminary reference procedure is the technical mechanism, regulated by Article 267 TFEU (former Article 234 TEC), by which a lower state court can, or a state court of last instance shall, request from the ECJ a judgment on the interpretation of or on the validity of a EU law, which is of relevance in the case pending before it. See Jeffrey Cohen, 'The European Preliminary Reference and US Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 *American Journal of Comparative Law* 421; Paul Craig, 'The Jurisdiction of the Community Courts Reconsidered' in Grainne de Búrca and Joseph H.H. Weiler (eds), *The European Court of Justice* (OUP 2001) 177

representatives of three student unions from advertising the names and contacts details of overseas abortion providers, arguing that the recently enacted Eighth Amendment to the Irish Constitution banned the publication of any such information.¹²⁸ In its preliminary reference, the High Court asked the ECJ whether abortion could be considered a service within the meaning of the European Economic Community (EEC) Treaty (EECT)¹²⁹ and, therefore, whether a national ban on information about abortion services overseas was contrary to EEC law, including the fundamental rights protected by EEC law.¹³⁰

Advocate General (AG) Van Gerven acknowledged that medical termination of pregnancy constituted a service within the meaning of the EECT. Therefore, he devoted most of his opinion to examining whether the Irish prohibition on distributing information about abortion services that are lawfully available in other EU states could be regarded as “consistent with or not incompatible with” the general principles of EU law, including respect for fundamental rights.¹³¹ However, the AG found that the Irish restriction was justified in light of the public interest pursued by the state and of the “high priority” the Irish Constitution attached to the protection of unborn life.¹³² In addition, the AG concluded that the ban on information sought by SPUC did not disproportionately infringe upon freedom of information, which is protected as a general principle of EEC law and is thus binding upon the member states “in an area covered by EEC law.”¹³³

The ECJ followed only the very first part of the opinion of the AG, stating that “medical termination of pregnancy, performed in accordance with the law of the State in which it is carried

¹²⁸ *Society for the Prot. of Unborn Children Ir. Ltd. v. Grogan* [1989] I.R. 753, 758 (H. Ct.). While the Irish High Court referred the question to the ECJ, it stayed the proceedings and did not grant the injunction requested by SPUC barring the student from publishing information about abortion providers. SPUC appealed to the Supreme Court, and the Supreme Court granted a temporary injunction but did not interfere with the High Court’s decision to raise a preliminary reference to the ECJ. Rather, the Supreme Court gave the parties leave to apply to the High Court again in order to adjust the injunction in light of the ECJ’s decision. *Society for the Prot. of Unborn Children Ir. Ltd. v. Grogan*, [1989] 4 I.R. 760, 765–66 (S.C.)

¹²⁹ See D. Cole (n 3) 126-127; B. Mercurio (n 124) 156-157

¹³⁰ See Case 29/69, *Stauder v. City of Ulm—Sozialamt* [1969] ECR 419 par 7 (affirming that fundamental rights are general principles of EU law). In the absence of a written EU catalogue of fundamental rights (which was only recently introduced with the enactment of the EU Charter of Fundamental Rights) the ECJ for long time drew inspiration for its human rights jurisprudence from the common constitutional traditions of the member states and especially from the ECHR. See Case 4/73, *Nold v. Commission* [1974] ECR 491 par 13. See also José N. Cunha Rodrigues, ‘The Incorporation of Fundamental Rights in the Community Legal Order’ in Miguel Poiares Maduro and Loïc Azulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 89, 91. The ECJ has recognized that both the EU institutions as well as the EU member states must respect fundamental rights as general principles of EU law when acting within the scope of application of EU law. See Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609 par 17; Case C-260/89, *ERT*, [1991] ECR I-2925 par 41. See also Zdenek Kühn, ‘Wachauf and ERT: On the Road from the Centralized to the Decentralized System of Judicial Review’ in Miguel Poiares Maduro and Loïc Azulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 151

¹³¹ *Grogan*, Opinion of AG Van Gerven, par 24

¹³² *Ibid* par 29

¹³³ *Ibid* par 31

out, constitutes a service within the meaning of the EECT.”¹³⁴ The ECJ rejected the contention made by SPUC that abortion could not be regarded as a service since it is immoral and stated that it would not “substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally.”¹³⁵ However, on the controversial question of the compatibility of the Irish ban on the publication of information with EEC law, the ECJ refused to take a position, arguing that the link between the Irish student unions and the UK abortion providers was “too tenuous”¹³⁶ to trigger the application of EEC law.¹³⁷

The ECJ, therefore, failed to address directly the confrontation between the Irish ban and EU fundamental rights,¹³⁸ showing a certain reluctance to deal with the “thorny issue” of abortion.¹³⁹ Nevertheless, by stating that a member state had the power to prohibit student unions from distributing information about abortion clinics that are lawfully operating in another EU state, so long as “the clinics in question have no involvement in the distribution of the said information,”¹⁴⁰ the ECJ “left open the possibility that, should a party directly connected to providing abortion become involved, the outcome could be different.”¹⁴¹ In addition, by concluding that abortion was a service within the meaning of the EECT,¹⁴² the ECJ made clear “that Ireland’s treatment of access to abortion was not simply a matter of Irish law”¹⁴³ but also a matter of concern for EU law.¹⁴⁴

Ireland understood the pressures arising from the EU legal system on domestic abortion legislation. On the eve of the approval of the Maastricht Treaty in 1992, Ireland obtained from its EU partners the enactment of an additional protocol to the EU Treaty stating that “nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.”¹⁴⁵ Nevertheless, the “special case” approach sought

¹³⁴ *Grogan* par 21

¹³⁵ *Ibid* par 20

¹³⁶ *Ibid* par 24

¹³⁷ See R. Lawson (n 3) 173; D. Cole (n 3) 128

¹³⁸ See Siofra O’Leary, ‘Freedom of Establishment and Freedom to Provide Services: The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case’ (1992) 16 *European Law Review* 138, 156

¹³⁹ Catherine Barnard, ‘An Irish Solution’ (1992) 142 *New Law Journal* 526

¹⁴⁰ *Grogan* par 32

¹⁴¹ B. Mercurio (n 124) 160

¹⁴² David O’Connor, ‘Limiting “Public Morality” Exceptions to Free Movement in Europe: Ireland’s Role in a Changing European Union’ (1997) 22 *Brooklyn Journal of International Law* 695, 702

¹⁴³ D. Cole (n 3) 129

¹⁴⁴ See Alison Young, ‘The Charter, Constitution and Human Rights: Is This the Beginning or the End for Human Rights Protections by Community Law?’ (2005) 11 *European Public Law* 219, 230 (arguing that “*Grogan* can be regarded as a triumph for the right of the woman to choose.”)

¹⁴⁵ Protocol No. 17, OJ 1992 C 224/130 – now consolidated as Protocol No. 35 OJ 2010 C 83/321

by Ireland produced domestic public outcry,¹⁴⁶ forcing Ireland to retract its position by adding a “negative declaration” to the EU Treaty, restricting the meaning of the Protocol.¹⁴⁷ Consequentially, it seems that the status of EU law *vis-à-vis* Irish abortion law has not changed very much at all.¹⁴⁸

The ECtHR has followed a more direct path toward involvement in abortion rights.¹⁴⁹ When the ECHR was adopted in 1950, abortion was of course still regarded as a criminal issue in all of the signatory parties. Therefore, it was not the intention of the drafters of the ECHR to codify a substantive limitation on the national powers to regulate abortion.¹⁵⁰ Nevertheless, the ECHR does include a number of provisions—such as the right to life,¹⁵¹ the right to respect for private and family life,¹⁵² and freedom of information¹⁵³—which, over time, became increasingly relevant in litigation challenging member states’ abortion legislations.¹⁵⁴

Until the 1990s, the ECtHR did not have the opportunity to decide cases concerning national abortion laws. Prior to the 1998 enactment of the 11th Additional Protocol to the ECHR, all individual applications lodged before the ECtHR were first addressed by the European Human Rights Commission (ECommHR).¹⁵⁵ In the few abortion cases raised before the Strasbourg

¹⁴⁶ Deirdre Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 *Common Market Law Review* 17, 48 (arguing that the negative reaction in Ireland to the additional Protocol negotiated by the Irish government was “exacerbated by the Irish Supreme Court’s [...] ruling in [the] X. [case].”)

¹⁴⁷ Declaration of the High Contracting Parties to the Treaty on European Union, May 1, 1992 (stating that “the Protocol shall not limit freedom either to travel between Member States or [...] to obtain or make available in Ireland information relating to services lawfully available in Member States.”). See Chris Hilson, ‘The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National and European Identity’ (2008) 14 *European Law Journal* 186, 191

¹⁴⁸ See C. Forder (n 21) 64 (arguing that “the Declaration [...] confirms the law as it was after *SPUC v. Grogan* and thus sets the course for a head-on collision between the Irish constitution and Community law.”)

¹⁴⁹ See Alec Stone Sweet, ‘Sur la constitutionnalisation de la Convention Européenne des droits de l’homme: cinquante ans après son installation, la Cour Européenne des droits de l’homme conçue comme une cour constitutionnelle’ (2009) 80 *Revue trimestrielle des droits de l’homme* 923 (describing the increasing importance of the ECHR as an instrument for the protection of fundamental rights in Europe and for the supervision of member states’ conduct)

¹⁵⁰ See generally Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 *International Organization* 217 (providing an historical assessment of the origins of the ECHR); see also Danny Nicol, ‘Original Intent and the European Convention on Human Rights’ [2005] *Public Law* 152

¹⁵¹ Article 2, ECHR

¹⁵² Article 8, ECHR

¹⁵³ Article 10, ECHR

¹⁵⁴ The ECHR recognizes a detailed catalogue of civil and political rights that member states can limit only according to the conditions provided by the ECHR itself and subject to the ECtHR’s proportionality-based review. See Alec Stone Sweet and Jude Matthews, ‘Proportionality, Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73

¹⁵⁵ The institutional machinery of the ECHR has been evolving. Individuals can directly lodge an application before the supervisory bodies of the ECHR, after they have exhausted the domestic avenues of recourse and if they allege to be victims of a violation of fundamental rights by a contracting party. Until the enactment of the 11th additional Protocol to the ECHR, applications were first examined by the ECommHR, which sought to achieve a friendly settlement of the dispute and decided the issue with a decision. Decisions by the ECommHR could then be appealed to the ECtHR. Since the 11th additional Protocol to the ECHR has come into force, instead, the ECommHR has been eliminated and individuals can directly lodge an application before the ECtHR under the conditions provided by Article 35 ECHR. See Antonio Bultrini, ‘Il meccanismo di protezione dei diritti fondamentali istituito dalla Convenzione Europea dei diritti dell’uomo: Cenni introduttivi’ in Bruno Nascimbene (ed), *La Convenzione Europea dei diritti dell’uomo: Profili ed*

institution, the ECommHR adopted a prudent stand:¹⁵⁶ on the one hand, it declared inadmissible the challenges, based on the right-to-life provision of the ECHR,¹⁵⁷ made against some liberal domestic abortion laws (including the 1967 UK Abortion Act).¹⁵⁸ On the other hand, it rejected on the merits a challenge against the restrictive 1975 German abortion statute, which was raised on the basis of the right-to-privacy provision of the ECHR.¹⁵⁹

The first abortion case before the ECtHR arose out of the SPUC controversy in Ireland, which had previously compelled the ECJ to intervene.¹⁶⁰ Pursuant to Article 40.3.3 of the Irish Constitution, the SPUC had obtained an injunction from the Irish High Court,¹⁶¹ later confirmed by the Supreme Court,¹⁶² which perpetually prohibited two Dublin-based family planning and counseling clinics from providing information concerning the availability of abortion services in the UK.¹⁶³ Having exhausted their domestic remedies, the two clinics lodged an appeal before the ECHR supervisory bodies, arguing that the Irish ban unduly limited their freedom of expression. The ECommHR declared the case admissible,¹⁶⁴ and in its preliminary report, found that the law violated Article 10 ECHR because the ban was not prescribed by law, since it was not reasonably foreseeable that Article 40.3.3 would have been interpreted as prohibiting the non-directive counseling conducted by the two clinics.¹⁶⁵

The decision of the ECommHR laid the foundation for the ruling of ECtHR in *Open Door*,¹⁶⁶ which also found a violation of Article 10 ECHR.¹⁶⁷ However, in *Open Door*, the ECtHR did not follow the reasoning of the ECommHR; rather, in a fifteen-to-eight majority opinion, the

effetti nell'ordinamento italiano (Giuffr  2002) (describing the institutional machinery of the ECHR and its evolution); see also Clare Ovey and Robin White, *The European Convention on Human Rights* (4th ed OUP 2006) ch. 24 (same)

¹⁵⁶ See R. Lawson (n 3) 170

¹⁵⁷ See David Harris, 'The Right to Life Under the European Convention on Human Rights' (1994) 1 Maastricht Journal of European and Comparative Law 122, 126-27

¹⁵⁸ *X. v. United Kingdom*, ECommHR [1980] Application No. 8416/79 (declaring inadmissible a challenge against the UK Abortion Act 1967 based on the claim that Article 2 ECHR protected the right to life of the fetus). See also *R.H. v. Norway*, ECommHR [1992] Application No. 17004/90 (declaring inadmissible a challenge against the Norwegian legislation on abortion based on the claim that Article 2 protected the right to life of the fetus)

¹⁵⁹ See *Bruggemann and Scheuten v. Germany*, ECommHR [1977] Application No. 5969/75 (rejecting on the merits a challenge to the German regulation of abortion established by the 1976 F nfzehntes Strafrechts nderungsgesetz based on the claim that Article 8 ECHR extended to protect the right of privacy of the woman to decide whether to terminate pregnancy)

¹⁶⁰ See B. Mercurio (n 124) 155

¹⁶¹ *SPUC v. Open Door Counselling* [1988] I.R. 593 (H. Ct.)

¹⁶² *SPUC v. Open Door Counselling* [1988] I.R. 618 (S.C.)

¹⁶³ Having succeed in obtaining a judicial injunction barring the two Dublin-based counseling clinics, *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd.*, from circulating information about abortion service providers in the UK, SPUC started a proceeding against the students associations. This proceeding then lead to the decision of the ECJ in *Grogan*

¹⁶⁴ *Open Door Counselling v. Ireland*, ECommHR [1990] Application No. 14234/88 and 14235/88 (declaring the case admissible)

¹⁶⁵ *Open Door Counselling v. Ireland*, ECommHR [1991] Application No. 14234/88 and 14235/88 (deciding the case on the merit)

¹⁶⁶ *Open Door Counselling v. Ireland*, ECtHR [1992] Application No. 14234/88 and 14235/88 (Plenary) (deciding the case on appeal from the ECommHR)

¹⁶⁷ See R. Lawson (n 3) 177

ECtHR concluded that the national measure under review could not pass judicial scrutiny, even under a more restrictive test.¹⁶⁸ According to the ECtHR, the prohibition barring the two clinics from providing information about abortion services overseas could be regarded as prescribed by law—that is, grounded in the Eighth Amendment to the Irish Constitution—and necessary to pursue the legitimate aim of the Irish State to protect the life of the unborn.¹⁶⁹ But, the “absolute nature”¹⁷⁰ of the “restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued”¹⁷¹ and was thus in violation of the right to freedom of information.¹⁷²

After declaring in *Open Door* that a state’s ban on the circulation of information about abortion was contrary to the ECHR’s clause on freedom of expression,¹⁷³ the ECtHR was asked to review a number of other national measures directly regulating abortion for their compatibility with the ECHR’s right-to-life and right-to-privacy clauses. Whereas the ECtHR has rejected all pro-life claims raised against permissive state abortion laws,¹⁷⁴ it has also “carefully avoided stating whether abortion is protected under the ECHR,”¹⁷⁵ leaving to the contracting parties a margin of appreciation to determine the availability and legal status of abortion.¹⁷⁶ Yet, the ECtHR has squarely affirmed that “legislation regulating abortion falls under the sphere of Article 8 [ECHR] and statutory abortion restrictions may constitute an interference with women’s private lives.”¹⁷⁷

In a series of cases challenging national laws on abortion on the basis of Article 2 ECHR, the ECtHR has deferred to domestic legislation,¹⁷⁸ rejecting the argument that the fetus could be

¹⁶⁸ See D. Cole (n 3) 155

¹⁶⁹ *Open Door* par 63

¹⁷⁰ *Ibid* par 73

¹⁷¹ *Ibid* par 80

¹⁷² The decision of the ECtHR reached an issue that, as mentioned *supra* in the text accompanying n 137, was not addressed by the ECJ in *Grogan*. AG Van Gerven, instead, had reached the issue in its Opinion and concluded that the Irish ban on the freedom to provide information about abortion providers overseas did not violate Article 10 ECHR.

See *supra* text accompanying n 134

¹⁷³ See D. Cole (n 3) 138

¹⁷⁴ See Christina Zampas and Jaime Gher ‘Abortion as a Human Rights – International and Regional Standards’ (2008) 8 Human Rights Law Review 249, 264

¹⁷⁵ *Ibid* 276

¹⁷⁶ On the doctrine of the ECtHR’s margin of appreciation, see generally Eva Brems, ‘The Margin of Appreciation in the Case-Law of the European Court of Human Rights’ (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240; Palmira Tanzarella, ‘Il margine di apprezzamento’ in Marta Cartabia (ed), *I diritti in Azione* (Il Mulino 2007) 145

¹⁷⁷ C. Zampas and J. Gher (n 174) 276

¹⁷⁸ Article 2(1) ECHR (“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”). See also C. Zampas and J. Gher (n 174) 264 (discussing how “each of the abortion laws at issue in these cases were fairly liberal. It is unclear whether the ECtHR would accord similar deference to Member States with more restrictive abortion laws.”)

regarded as a person within the meaning of the ECHR.¹⁷⁹ In *Boso*,¹⁸⁰ the Court upheld the Italian abortion statute, arguing that the domestic legislation struck “a fair balance between, on the one hand, the need to ensure protection of the fetus and, on the other [hand], the woman’s interests.”¹⁸¹ In addition, in *Vo*,¹⁸² the ECtHR—while expressing its awareness that it was neither desirable, nor even possible as matters stood, to answer in the abstract the question when life begins and “whether the unborn child is a person for the purposes of Article 2 of the [ECHR]”¹⁸³—concluded that the French law at issue did not violate the right-to-life clause of ECHR.¹⁸⁴

In *Tysi c*,¹⁸⁵ however, the ECtHR took the important step of finding a violation of Article 8 ECHR in the operation of the restrictive Polish abortion law.¹⁸⁶ The case involved a Polish woman suffering from a pathological optical disease. Having become pregnant, the woman was informed by several medical practitioners that pregnancy and delivery might cause a serious deterioration in her optical condition. As a consequence, she sought a medical termination of pregnancy on the basis of Polish law, which permits abortion when pregnancy seriously threatens the health of the woman.¹⁸⁷ Nevertheless, the doctors refused to grant the woman the health certificate necessary to obtain an abortion in public hospitals. The woman was forced to deliver the baby and, as expected, her conditions deteriorated badly, and she became practically blind.¹⁸⁸

The applicant raised a facial challenge against the Polish abortion law, arguing that the prohibition on a voluntary interruption of pregnancy amounted to an interference with her Article 8 ECHR right to respect for private life.¹⁸⁹ The ECtHR, instead, took the view that “the circumstances of the applicant’s case and in particular the nature of her complaint [we]re more appropriately examined from the standpoint of the respondent State’s . . . positive obligations.”¹⁹⁰ According to the ECtHR, Article 8 ECHR establishes not only a negative limit on the power of the state to interfere with the person’s physical and psychological integrity, but also “a positive obligation [for

¹⁷⁹ See Jakob Pichon, ‘Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights’ (2006) 7 German Law Journal 433; Lorenza Violini and Alessandra Osti, ‘Le linee di demarcazione della vita umana’ in Marta Cartabia (ed), *I diritti in Azione* (Il Mulino 2007) 14

¹⁸⁰ *Boso v. Italy*, ECHR [2002] Application No. 50490/99

¹⁸¹ *Ibid* par 1

¹⁸² *Vo v. France*, ECHR [2004] Application No. 53924/00 (GC)

¹⁸³ *Ibid* par 85

¹⁸⁴ See *Evans v. United Kingdom*, ECHR [2007] Application No. 6339/05 (GC) (declining to extend the protection of the right-to-life provision of Article 2 ECHR to embryos)

¹⁸⁵ *Tysi c v. Poland*, ECHR [2007] Application No. 5410/03

¹⁸⁶ See Nicolette Priaux, ‘Testing the Margin of Appreciation: Therapeutic Abortions, Reproductive “Rights” and the Intriguing Case of *Tysi c v. Poland*’ (2008) 15 European Journal of Health Law 361; Daniel Fenwick, ‘Recognition of Violation of Women’s Human Rights Under the ECHR in the Context of Restrictive Abortion Regimes’ (Durham Law School unpublished Master thesis, 2011)

¹⁸⁷ See *supra* text accompanying n 110

¹⁸⁸ *Tysi c* par 18

¹⁸⁹ See Jill Marshall, ‘A Right to Personal Autonomy at the European Court of Human Rights’ [2008] European Human Rights Law Review 337, 346

¹⁹⁰ *Tysi c* par 108

the state] to secure to its citizens their right to effective respect for this integrity.”¹⁹¹ In the case at hand, the national authorities had failed to comply with this duty.¹⁹²

As highlighted by the ECtHR, the Polish abortion act did allow for termination of pregnancy on health grounds, an exception that the applicant’s condition should certainly have triggered. Nevertheless, the Polish legislation lacked “any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in [the applicant’s] case.”¹⁹³ The absence of a clear, time-sensitive procedure for ascertaining in a fair and independent manner whether a woman had a right to interrupt her pregnancy on health grounds had a “chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case.”¹⁹⁴ In the ECtHR’s view, “once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.”¹⁹⁵

The decision of the ECtHR in *Tysic* is “significant because it confirms that women’s right to access legal abortions may not be illusory.”¹⁹⁶ At the same time, in stressing the positive duties that states have in adopting all relevant measures to make legal abortion practically available, the ECtHR focused only on the *procedural* aspects of abortion law. The ECtHR followed the same approach in the *D.* case,¹⁹⁷ where it declared the complaint of a woman who could not obtain an abortion in Ireland on grounds of fetal impairments as inadmissible since the applicant had not explored all of the domestic procedural avenues that might have been available to make her claim heard, including a constitutional challenge to the Irish Supreme Court.¹⁹⁸

From this point of view, the approach of the ECHR judicial branch seems far more prudent than that of the Parliamentary Assembly of the Council of Europe,¹⁹⁹ which has recently, albeit in a non-binding form, expressed its concern that in many of the contracting states “numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services.”²⁰⁰ The Parliamentary Assembly explicitly advocates that “abortion should not be banned within reasonable gestational limits.”²⁰¹ Rather, *Tysic* indicates “the

¹⁹¹ Ibid par 107

¹⁹² On the concepts of “negative” and “positive” obligations stemming from fundamental rights, see Neuman (n 89) 300; David Currie, ‘Positive and Negative Constitutional Rights’ (1986) 53 University of Chicago Law Review 864

¹⁹³ *Tysic* par 124

¹⁹⁴ Ibid par 116

¹⁹⁵ Ibid

¹⁹⁶ C. Zampas and J. Gher (n 174) 279

¹⁹⁷ *D. v. Ireland*, ECHR [2006] Application No. 26499/02

¹⁹⁸ Ibid par 102

¹⁹⁹ The Parliamentary Assembly is one of the statutory bodies of the Council of Europe. It is composed of representatives from each of the contracting parties who are elected or appointed by the national parliaments. It exercises advisory functions. See Tony Joris and Jan Vandenberghe, ‘The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?’ (2009) 15 Columbia Journal of European Law 1, 5

²⁰⁰ Council of Europe Parliamentary Assembly Resolution 1607 (2008) par 2

²⁰¹ Ibid par 4

ECtHR's unwillingness to address substantive violations of abortion rights, even when there is a legal basis for abortion, and propensity to rely on procedural violations to remedy the wrong."²⁰²

In conclusion, the jurisprudence of the ECJ and the ECtHR highlights the increasing impact of supranational law over states' regulations of abortion.²⁰³ On the one hand, the ECJ—while strategically avoiding a clash with the state authorities on the human rights questions raised by a ban on the circulation of information about abortion²⁰⁴—has clearly affirmed that abortion represents a service within the meaning of EU law and is thus subjected to EU supervision.²⁰⁵ On the other hand, the ECtHR—while falling short of recognizing a right to abortion in the penumbras of the ECHR²⁰⁶—has built up a solid jurisprudential framework, which prohibits states from abridging freedom of information about abortion services and requires them to ensure adequate procedural mechanisms to make the right to abortion, where it exists, effective.²⁰⁷

From this point of view, a contextual analysis of the national abortion regulations and of the law of the EU and the ECHR illuminates the complex dynamics that arise in the European multilevel constitutional architecture. Although at this point, it appears that there is no direct legal incompatibility between the national laws, especially those dictating a restrictive regulation of abortion, and the principles established by supranational jurisdictions, several tensions and challenges shape the interrelationship between some national legal systems and the normative order established by the EU treaties and the ECHR.²⁰⁸

Ireland can still prohibit abortion, as EU law does not prevent it from doing so. Nevertheless, EU law requires abortion to be treated as a service and demands that Irish people be allowed to seek all services, including abortions, overseas and be free to receive information about them. By the same token, Poland can still prohibit abortion save on health grounds, as ECHR law does not prevent it from doing so. Yet if abortion on health ground is permitted, ECHR law requires Poland to ensure that adequate and effective procedures are in place to this end. To make sense of this complex picture, I suggested in the first chapter of this thesis to employ the concept of inconsistency, as a catch-word that well describes the pressures and frictions emerging from the interplay of distinct bodies of laws pushing in opposite directions.

²⁰² C. Zampas and J. Gher (n 174) 279

²⁰³ See C. Forder (n 21) 99 (arguing that “the presence of EEC Law and the ECHR means that it is no longer possible to fossilise certain values within constitutional principles in the hope that these values will be safeguarded against development and change.”)

²⁰⁴ See D. Cole (n 3) 128; R. Lawson (n 3) 173

²⁰⁵ B. Mercurio (n 124) 179; D.R. Phelan (n 124) 686

²⁰⁶ J. Marshall (n 189); C. Zampas and J. Gher (n 174) 265

²⁰⁷ D. Cole (n 3) 128, 138; N. Priaulx (n 186) 362

²⁰⁸ A. Czerwinski (n 101) 663; B. Mercurio (n 124) 179

Until the 1990s, abortion law was exclusively in the purview of national states, with major variations in the choice of regulation pursued by the EU countries reflecting a distinction between vanguard and laggard states.²⁰⁹ However, also in this field, developments in both the framework of the EU and in the ECHR system have proven that—to quote the famous statement of Koen Lenaerts—“there is simply no nucleus of sovereignty that the Member States can invoke”²¹⁰ against the evolution of supranational law.²¹¹ The ECJ and the ECtHR have, step-by-step, developed a series of substantive checks and procedural balances that have slowly enhanced the floor of protection ensured to abortion rights Europe-wide. This has created a series of pressures in those states which are endowed with extremely restrictive abortion laws, while leaving the vanguard states free to provide even more advanced forms of protection for abortion rights. It is now necessary to investigate whether these dynamics are uniquely European and how such phenomena might prospectively develop in the future.

3. Comparative assessment: the right to abortion in the US constitutional experience

As the previous Section has highlighted, a series of pressures and complex constitutional tensions characterize the field of abortion rights in the European multilevel architecture. However, these inconsistencies are not a peculiarly European phenomenon; rather, analogous issues arise in other constitutional systems that are “premised on regulatory federalism regarding abortion policy.”²¹² From a comparative point of view, it seems possible to argue, albeit with several caveats, that the dynamics arising in the field of abortion law in Europe are not dissimilar from those at play in those federal systems in which different abortion legislations are in force in the various constituent states, and in which a federal court must review the states’ regulations on the basis of a transnational law protecting fundamental rights.²¹³

²⁰⁹ A. Althouse (n 42) 1745

²¹⁰ Koen Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *American Journal of Comparative Law* 205, 220

²¹¹ On the impact that the developments of supranational human rights law produces in the legal systems of the EU member states, see generally Miriam Aziz, *The Impact of European Rights on National Legal Cultures* (Hart Publishing 2004); Alec Stone Sweet and Helen Keller, ‘The Reception of the ECHR in National Legal Orders’ in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (OUP 2008) 3

²¹² Stephen Gardbaum, ‘State and Comparative Constitutional Law Perspectives on a Possible Post-Roe World’ (2007) 51 *St. Louis University Law Journal* 685, 690

²¹³ See Vicki Jackson, *Constitutional Engagements in a Transnational Era* (OUP 2010) 213 (arguing that in several “federal systems, regulation [of abortion] not only varies substantively but takes place (or not) in quite different ways as between national and subnational levels.”)

As Stephen Gardbaum has convincingly explained, this seems to be particularly the case in the United States of America (US).²¹⁴ Whereas in other federal systems, such as Canada or Switzerland, criminal law and, by implication, the regulation of abortion, is a field of federal competence²¹⁵ and is thus subjected to a uniform federal legislation, or lack thereof,²¹⁶ in the US, jurisdiction over criminal law and abortion belongs to the constituent states, albeit under constraints imposed by the federal government.²¹⁷ In addition, contrary to other federal countries such as Australia, where criminal law and, by implication, the regulation of abortion, is also within the competences of the constituent states²¹⁸ but is essentially addressed in a uniform manner,²¹⁹ the US has historically displayed a wide variation in the way in which the several states have regulated abortion rights.²²⁰

Therefore, a comparative assessment of the US constitutional experience can illuminate the challenges and developments at play in the field of abortion law in the European system.²²¹ A number of clarifications, however, are necessary.²²² The comparison between the constitutional dynamics shaping the issue of abortion in the US and Europe neither implies that the two systems are identical nor suggests that the two systems will necessarily develop along the same lines. Despite the fact that the EU and the ECHR “have increasingly taken on the features of full-blown

²¹⁴ S. Gardbaum (n 212) 687, 90

²¹⁵ See Article 91(27), Const. Can. [Const. Act 1867, 30 and 31 Vict., c. 3 (UK)] (attributing to the federal government the competence in the field of criminal law); Article 123, Const. Switz. (same). Note that this is also the case also in the two federal countries that are members of the EU, Germany and Austria. See *supra* text accompanying n 36 and 81 ff

²¹⁶ Article 119(2), Code Pénal Suisse, as amended by Loi Fédérale du 23 Mars 2001, RO 2002 p. 2989 (Switz.) (allowing abortion within the first trimester upon request of a woman in a state of distress and at any time if required, upon indication of a medical practitioner, to prevent the threat of a serious harm to the physical integrity or mental distress of the woman). In Canada, on the contrary, there is at present essentially *no* federal legislation on abortion as Section 251, C-34 of the Criminal Code, R.S.C. 1985 (Can.) was declared unconstitutional by the Canadian Supreme Court in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, on the ground that it violated the principles of liberty codified in Section 7 of the 1982 Canadian Charter of Rights and Freedom and never replaced. In the absence of federal intervention, the attempt by the province of Nova Scotia to enact a criminal ban of abortion was also declared unconstitutional by the Canadian Supreme Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 on the ground that the competence over criminal law and, by implication, over abortion belongs to the federal government.

²¹⁷ See *infra* text accompanying n 217-220

²¹⁸ See Article 51 and 52, Austral. Const. (detailing the competences of the federal government without enumerating criminal law, which therefore belongs to the states and territories)

²¹⁹ See Elizabeth Kennedy, ‘Abortion Laws in Australia’ (2007) 9 *The Royal Australian and New Zealand College of Obstetricians and Gynaecologists* 36 (arguing that a common law defense of necessity precludes punishment for abortion performed on medical grounds and applies in the states of Victoria, New South Wales, and Queensland, while specific health legislation precludes punishment for abortion under medical certification and is in force in Western Australia, Tasmania, South Australia, the Northern Territory and the Australian Capital Territory)

²²⁰ See *infra* text accompanying n 236

²²¹ On the advantages of comparing the European system with the US federal architecture, see generally Mauro Cappelletti et al, ‘General Introduction’ in Mauro Cappelletti et al, *Integration Through Law: Europe and the American Federal Experience. Volume 1, Book 1* (de Guyter 1986) 3; George Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94 *Columbia Law Review* 332

²²² On the caveats that are necessary when undertaking a comparison of the EU with the US see Daniel Elazar, ‘The United States and the European Union: Models for Their Epochs’ in Robert Howse and Kalypso Nicolaïdis (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 31; Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009)

constitutional structures,”²²³ there are still some significant differences between the European multilevel architecture and the US federal system, and many of these differences are likely to remain for at least the near future.

As I have explained in the first chapter, however, the US federal system and the European multilevel architecture share an important structural analogy: they both feature a pluralist constitutional arrangement for the protection of fundamental rights in which rights are simultaneously recognized at the state and federal or supranational levels and adjudicated by a plurality of institutions operating in these multiple layers.²²⁴ Hence, a comparative assessment of how the US constitutional system has dealt with abortion rights issues over time raises useful insights for understanding the current European challenges. In addition, this comparison provides some cautionary tales that help observers appreciate the possible scenarios that might open up in the future in the European multilevel human rights system.²²⁵

Abortion laws in the US in the early 1960s closely resembled the European laws of the same time. During the 19th century, all of the states of the federation had enacted criminal bans on abortion, with the primary aim of protecting the potential mother from the abortionist.²²⁶ By the turn of the century, however, anti-abortion laws had been redrafted with the goal of protecting the fetus rather than protecting the woman and had acquired a “symbolic social curb [...of] women’s autonomy over their own bodies [and...] sexual relations.”²²⁷ The standard format of abortion legislation in US states “typically made it a crime for anyone to perform an abortion and also usually made it a crime for a woman to obtain one.”²²⁸ Most states only allowed the termination of pregnancy when strictly necessary to save the woman’s life.²²⁹

By the 1960s, however, pressures had emerged in many states to change restrictive abortion legislations, either by reforming them or by abolishing them.²³⁰ In 1962, the American Law Institute (ALI) published its Model Penal Code, which, in reconsidering the entire system of US criminal law, also offered a model of reform for abortion laws.²³¹ The Code removed the criminal sanctions for the performance of an abortion when the medical practitioner certifies that “there is substantial

²²³ S. Gardbaum (n 212) 694

²²⁴ See generally A. Torres Pérez (n 17); D. Halberstam (n 19)

²²⁵ See Ernest A. Young, ‘Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism’ (2002) 77 *New York University Law Review* 1612

²²⁶ On the history of abortion law in the US, see David Garrow, *Liberty and Sexuality: the Right to Privacy and the Making of Roe v. Wade* (University of California Press 1994); Natalie Hull and Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (University Press of Kansas 2010)

²²⁷ N. Hull and P.C. Hoffer (n 226) 47

²²⁸ M. Tushnet (n 2) 45

²²⁹ See Edward Veitch and R.R.S. Tracey, ‘Abortion in the Common Law World’ (1974) 22 *American Journal of Comparative Law* 652, 663

²³⁰ See M. Tushnet (n 2) 47

²³¹ See E. Veitch and R. Tracey (n 229) 664

risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.”²³² In the following years, a number of state legislatures amended their codes to incorporate the changes suggested by the ALI.²³³ Others adopted even more liberal reforms, allowing abortion on demand up to the first trimester or later.²³⁴

Because the reform of state laws proceeded unevenly, however, advocates for changes began to mount challenges against restrictive abortion laws before the state judiciary.²³⁵ For instance, in 1969, the California Supreme Court found that the state’s act prohibiting abortion, except when necessary to save the woman’s life was unconstitutionally vague under the state Constitution.²³⁶ Also the federal judiciary, however, soon became a forum for legal attacks against restrictive state abortion laws. Since the late 1920s, indeed, the US Supreme Court had begun interpreting the “due process” clause of the Fourteenth Amendment to the US Constitution²³⁷ to “incorporate” parts of the first ten amendments to the US Constitution, commonly referred to as the Bill of Rights.²³⁸ As a result of this transformative jurisprudence, the US Supreme Court mandated states’ adherence to and protection of many of the fundamental rights articulated in the Bill of Rights, and plaintiffs were empowered to rely on these rights to challenge states’ legislations before the federal judiciary.²³⁹ In the early 1970s, thus, federal district and circuit courts began to embrace claims that restrictive state abortion laws conflicted with the fundamental right guarantees protected

²³² Section 230.3(2), Model Penal Code (1962)

²³³ See Colorado Rev. Stat. par 40–2–50, par 40–2–51, par 40–2–52 (1967); North Carolina Gen. Stat. par 14–45.1 (1967); California Health and Safety Code par 25950–54 (1967)

²³⁴ See New York Penal Law par 125.05.3 (1972) (justifying abortion upon request within 24 weeks from the commencement of pregnancy); Hawaii Rev. Stat. par 453–16(c) (1972) (justifying abortion on demand until viability).

²³⁵ See D. Garrow (n 226)

²³⁶ *People v. Belous*, 71 Cal. 2d 954 (Cal. 1969). On the approach of the California judiciary on the issue of abortion, see *People v. Abarbanel*, 239 Cal. App. 2d 31 (1965) (holding, under the aegis of the pre-1967 legislation, that abortion was not criminal if the doctor performing it believed in good faith that the mother would have committed suicide)

²³⁷ Fourteenth Am. to the US Const. (“Nor shall any State deprive any person of life, liberty, or property, without due process of law.”). On the Due Process Clause of the Fourteenth amendment, see John Orth, *Due Process of Law: A Brief History* (University Press of Kansas 2003); William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Harvard University Press 1988)

²³⁸ See *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that the freedom of speech, protected by the First Amendment to the US Constitution from abridgment by Congress, was among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states). A major debate as to whether the Fourteenth Amendment incorporated *all* the Bill of Rights to the US Constitution or only *some* provisions of it developed in the last century. Three different opinions can be identified in this debate. A first doctrine, called the doctrine of selective incorporation (mainly advocated by US Supreme Court Justice Brennan), favored the incorporation in the law of the states (only) of specific rights contained in the federal Bill of Rights. A second position, called the 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 (advocated 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 and on the results achieved by the Supreme Court, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 2000)

²³⁹ See John Paul Stevens, ‘The Bill of Rights: A Century of Progress’ in Geoffrey Stone et al (eds), *The Bill of Rights in the Modern State* (University of Chicago Press 1992) 13; Michael Zuckert, ‘Toward a Corrective Federalism: the United States Constitution, Federalism and Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (1996) 75

by the US Constitution²⁴⁰ and most specifically with, the right to privacy which the Supreme Court had recognized in *Griswold v. Connecticut*.²⁴¹

Needless to say, the 18th century Bill of Rights of the US Constitution—much like the 20th century fundamental laws of the EU member states, the ECHR, and the EU treaties—does not contain an explicit, textual protection for the right to an abortion.²⁴² In the paramount 1973 *Roe v. Wade* decision,²⁴³ however, the US Supreme Court found that the federal Constitution protected an unenumerated right to abortion and that state laws prohibiting abortion were unconstitutional.²⁴⁴ In *Roe*, the Supreme Court invalidated an old Texas statute, which made abortion a crime in all circumstances.²⁴⁵ On the same day that the Court delivered its *Roe* judgment, it also struck down, in *Doe v. Bolton*,²⁴⁶ another more modern abortion statute from Georgia that criminalized abortion except on medical grounds.²⁴⁷

Writing for a seven-to-two majority of the Supreme Court, Justice Blackmun stated that the right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”²⁴⁸ The Court rejected the argument that a woman’s right to abortion was absolute; rather, it acknowledged that “some state regulation in areas protected by that right is appropriate.”²⁴⁹ Like the ECtHR,²⁵⁰ the Court refused to speculate on “the difficult question of when life begins.”²⁵¹ But it unequivocally stated that the fetus could not be regarded as a person within the meaning of the Fourteenth Amendment in order to justify restrictive states’ anti-abortion statutes.²⁵²

In light of this constitutional assessment, the Court developed its well-known “trimesters guidelines,” clearly dictating the legitimate contours within which a state could regulate abortion:²⁵³ “(a) For the stage prior to approximately the end of the first trimester [of pregnancy], the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s

²⁴⁰ See N. Hull and P.C. Hoffer (n 226)

²⁴¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut law prohibiting the selling of contraceptives even to married couples was in violation of the right to privacy, a right that the Court derived from aggregating the penumbras of the Bill of Rights and other Amendments to the Constitution)

²⁴² See however the Ninth Am. to the US Const. (stating that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). See also M. Tushnet (n 2)

²⁴³ 410 U.S. 113 (1973)

²⁴⁴ The decision of the US Supreme Court in *Roe v. Wade* is the object of detailed assessment in any US constitutional law casebook. See Gerald Gunther and Kathleen Sullivan, *Constitutional Law* (13th ed Foundation Press 1997) 530. For a comparative perspective, see also V. Jackson and M. Tushnet (n 15); M. Cappelletti and W. Cohen (n 15)

²⁴⁵ Texas Penal Code, arts. 1191–94 (1961), invalidated by *Roe v. Wade*, 410 U.S. 113 (1973)

²⁴⁶ *Doe v. Bolton*, 410 U.S. 179 (1973)

²⁴⁷ Georgia Criminal Code, paras 26–1201–03 (1968), invalidated by *Doe v. Bolton*, 410 U.S. 179 (1973)

²⁴⁸ *Roe*, at 153

²⁴⁹ *Ibid* at 154

²⁵⁰ See *supra* text accompanying n 184

²⁵¹ *Roe*, at 159

²⁵² See E. Veitch and R. Tracey (n 229); R. Dworkin (n 21)

²⁵³ See N. Hull and P.C. Hoffer (n 226) 176; M. Tushnet (n 2) 73

attending physician; (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”²⁵⁴

The *Roe* decision generated strong reactions²⁵⁵ and effectively transformed the issue of abortion into “*the* central legal problem” of contemporary US constitutional law.²⁵⁶ Attempts were made at the federal level to overrule *Roe* through the enactment of a human life amendment²⁵⁷ and to limit *Roe*’s impact by prohibiting the financing of abortion through federal funds.²⁵⁸ The main responses to the decision nevertheless occurred at the state level.²⁵⁹ Indeed, *Roe* “federalized (rather than nationalized) abortion policy, making state legislatures supporting players in abortion policymaking.”²⁶⁰ In many states, “legislatures responded to *Roe* by enacting new restrictions that attempted to reduce the number of abortions without challenging what came to be called *Roe*’s ‘central premise’—that the Constitution barred states from making it a criminal offense to have or perform *any* abortion.”²⁶¹

Whereas a handful of states enacted statutes that were facially incompatible with *Roe* and thus directly defied the decision of the Supreme Court,²⁶² other states passed legislation purporting to circumvent the Court’s decision by denying public financing for abortion and setting strict conditions under which abortions would be allowed, such as requiring abortions to be performed in hospitals, requiring prior parental and spousal consent, and waiting periods.²⁶³ In a series of decisions in the twenty years following *Roe*, the Supreme Court struck down many such state laws, including: the imposition of spousal consent,²⁶⁴ mandatory waiting periods,²⁶⁵ and the requirement

²⁵⁴ *Roe*, at 164-65

²⁵⁵ Compare John Hart Ely, ‘The Wages of the Crying Wolf: A Comment on *Roe v. Wade*’ (1973) 82 Yale Law Journal 920 (criticizing the decision), with Laurence Tribe, ‘Toward a Model of Roles in the Due Process of Life and Law’ (1973) 87 Harvard Law Review 1 (defending it). See also Richard Fallon, ‘If *Roe* Were Overruled: Abortion and the Constitution in a Post-*Roe* World’ (2007) 51 St. Louis University Law Journal 611

²⁵⁶ Ann Althouse, ‘A Response to “If *Roe* Were Overruled”’ (2007) 51 St. Louis University Law Journal 761 (emphasis in original)

²⁵⁷ See N. Hull and P.C. Hoffer (n 226) 186 (“within three years [of *Roe*] more than fifty differently worded amendments to ban or cut back on abortion had reached the floor of Congress.”)

²⁵⁸ This was accomplished via the 1976 Hyde Amendment to Title X of the Public Health Service Act, which was systematically re-enacted in successive Health Service appropriations bill and is now codified as Pub. L. No. 111–8, H.R. 1105, Div. F, Title V, Gen. Provisions, par 507(a) (2009)

²⁵⁹ For an assessment of the federalism issues involved, see Anthony Bellia, ‘Federalism Doctrines and Abortion Cases’ (2007) 51 St. Louis University Law Journal 767

²⁶⁰ Glen Halva-Neubauer, ‘Abortion Policy in the Post-*Webster* Age’ (1990) 20 *Publius* 27, 32

²⁶¹ M. Tushnet (n 2) 76

²⁶² See E. Veitch and R. Tracey (n 229) 668; G. Halva-Neubauer (n 260) 32

²⁶³ See M. Tushnet (n 2) at 76-78; N. Hull and P.C. Hoffer (n 226) 189

²⁶⁴ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976)

that abortions be performed only in hospitals.²⁶⁶ In *Bigelow v. Virginia*,²⁶⁷ the Court struck down a Virginia statute, which, much like the Irish ban challenged before the ECJ in *Grogan*,²⁶⁸ prohibited the advertising of abortion providers in other US states.²⁶⁹

At the same time, the Supreme Court upheld state laws imposing women's informed consent,²⁷⁰ requiring parental notification,²⁷¹ and foreclosing both state and federal public funding for elective abortions.²⁷² In addition, under the influence of newly appointed judges and, possibly, under pressure from states' legislatures, the Court incrementally retracted from *Roe*'s rigid trimester formula.²⁷³ The reasoning of the Court in *Roe* had been criticized, from a liberal perspective, for overemphasizing the role of medical doctors in the decision and failing to address the issue of women's autonomy and equality.²⁷⁴ In contrast, conservative critics found that *Roe*'s prohibition of any state regulation of abortions during the first and second trimesters represented an unwarranted interference by the federal judicial branch in a matter that should be decided by the state legislature, through the states' democratic processes.²⁷⁵

This eventually paved the way for the Court's 1992 decision in *Planned Parenthood v. Casey*.²⁷⁶ In a plurality opinion jointly written by Justices Kennedy, O'Connor, and Souter, the Supreme Court upheld *Roe*'s core holding that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."²⁷⁷ However, it rejected *Roe*'s trimester framework, replacing it with the "undue burden" test.²⁷⁸ Under this test, a state's

²⁶⁵ See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)

²⁶⁶ See *Ibid*

²⁶⁷ 421 U.S. 809 (1975)

²⁶⁸ See *supra* text accompanying n 128

²⁶⁹ See R. Fallon (n 255) 628

²⁷⁰ See *Danforth*, at 52. Informed consent requirements are a core component of the relationship between medical doctors and patients and require doctors to disclose and discuss with the patient the patient's diagnosis (if known), the nature and purpose of a proposed treatment or procedure, its risks and benefits, and the alternatives (if available)

²⁷¹ See *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983)

²⁷² See *Maher v. Roe*, 432 U.S. 464 (1977) (upholding the constitutionality of a Connecticut statutory provision denying public funding for elective abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the constitutionality of the Hyde Amendment)

²⁷³ See N. Hull and P.C. Hoffer (n 226) 214; D. Garrow (n 226) 600

²⁷⁴ See Donald Regan, 'Rewriting *Roe v. Wade*' (1979) 77 *Michigan Law Review* 1569; Ruth Bader Ginsburg, 'Some Thought on Autonomy and Equality in Relation to *Roe v. Wade*' (1985) 63 *North Carolina Law Review* 375

²⁷⁵ In the anti-*Roe* rhetoric, there does not seem to be an express Tenth Amendment criticism to the limitation on state authority produced by the Supreme Court decision. Tenth Am. to the US Const. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") However, much of the criticisms to the praetorian action of the Supreme Court in *Roe* are inspired by the belief that abortion laws should be addressed by the states' legislative processes, rather than by federal courts. See Clarke Forsythe and Stephen Presser, 'The Tragic Failure of *Roe v. Wade*: Why Abortion Should Be Returned to the States' (2005) 10 *Texas Review of Law and Politics* 85

²⁷⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)

²⁷⁷ *Ibid* at 879

²⁷⁸ See M. Tushnet (n 2) 82. On the undue burden test, see also Erin Daly, 'Reconsidering Abortion Law: Liberty, Equality and the New Rhetoric of *Planned Parenthood v. Casey*' (1995) 45 *American University Law Review* 77; Earl Maltz, 'Abortion, Precedent and the Constitution: A Comment on *Planned Parenthood v. Casey*' (1992) 68 *Notre Dame Law Review* 11

regulation of abortion would be regarded as “invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”²⁷⁹

Applying the undue burden test in *Casey*, the Supreme Court upheld a number of provisions in the Pennsylvania law at issue, including the imposition of informed consent and a waiting period for women seeking abortions.²⁸⁰ However, the Court struck down the spousal notification requirement, arguing that due to the threat of violence that a woman might face if she had to inform her partner of her decision to seek an abortion,²⁸¹ the provision represented a substantial obstacle to a woman’s right to choose and was comparable, for all practical effects, to a proviso “outlaw[ing] abortion in all cases.”²⁸² Therefore, it has been argued that *Casey* saved *Roe*.²⁸³ At the same time, however, the Court made clear “that state regulations [would] almost invariably pass[] muster,”²⁸⁴ unless they attempted to bar abortion *tout court*.²⁸⁵

Although it has been argued that *Casey* somehow “settled the abortion dispute, both by establishing a majoritarian, split-the-difference standards, and perhaps more importantly, by providing a template that helps states determine what types of abortion regulations can be constitutionally pursued,”²⁸⁶ the two decades following the decision featured a wide array of activities by both the federal and the state legislatures.²⁸⁷ In 1994, the US Congress enacted its first piece of legislation in the field of abortion law, making it a federal crime to harass and obstruct lawful providers of abortion.²⁸⁸ In 2003, Congress enacted a ban on the performance of abortion through the “intact dilate and extraction” technique (referred to by its critics as “partial birth abortion”),²⁸⁹ an act that—despite the existence of a contrary precedent,²⁹⁰ federalism concerns,²⁹¹ and limited legislative findings²⁹²—was upheld by the Supreme Court in *Gonzales v. Carhart*.²⁹³

²⁷⁹ *Casey*, at 878

²⁸⁰ *Ibid* at 879

²⁸¹ *Ibid* at 893

²⁸² *Ibid* at 894

²⁸³ See Ronald Dworkin, ‘*Roe Was Saved*’ in Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 117

²⁸⁴ N. Hull and P.C. Hoffer (n 226) 258

²⁸⁵ See Brent Weinstein, ‘The State’s Constitutional Power to Regulate Abortion’ (2005) 14 *Journal of Contemporary Legal Issues* 229; Reva Siegel, ‘Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*’ (2008) 117 *Yale Law Journal* 1694

²⁸⁶ Neal Devins, ‘How *Planned Parenthood v. Casey* (Pretty Much) Settled the Abortion Wars’ (2009) 118 *Yale Law Journal* 1318, 1322

²⁸⁷ See N. Hull and P.C. Hoffer (n 226) 265

²⁸⁸ Freedom of Access to Clinic Entrance Act (FACE), Pub. L. 103-259 (1994), codified at 18 U.S.C. par 248

²⁸⁹ Partial-Birth Abortion Ban Act (PBABA), Pub. L. 108-105 (2003), codified at 18 U.S.C. par 1531

²⁹⁰ See *Stenberg v. Carhart*, 530 US 914 (2000) (declaring a Nebraska statute that prohibited the intact dilate and extraction abortion technique as unconstitutional)

²⁹¹ Congress enacted the PBABA pursuant to Article I, §8, cl. 3 US Const. – the so-called “Commerce Clause” (granting Congress the power to regulate commerce among the several states). Some criticism has been raised however, as to whether the regulation of the intact dilate and extraction abortion technique represented a permissible exercise of Congress’ power under the Commerce Clause. See generally Robert Pushaw, ‘Does Congress Have the Constitutional

At the state level, several scholars have emphasized how states were generally uninterested in pushing the boundaries of *Casey*²⁹⁴ or *Gonzales* by enacting measures that challenged *Roe* outright.²⁹⁵ Nevertheless, it appears that in the last twenty years many states have enacted increasingly restrictive abortion laws.²⁹⁶ The latest and most remarkable example is perhaps represented by South Dakota, which recently introduced, for the first time in the US, a directive counseling requirement, similar to the German model,²⁹⁷ which obliges women seeking an abortion to consult with pro-life pregnancy centers, even if they seek an abortion during the first trimester of pregnancy.²⁹⁸ Because of such legislative experimentations, wide variations among states' approaches to abortion exist today, even though all such legislation must take place within the framework of permissible limitations set by the Supreme Court.²⁹⁹ The contemporary picture of abortion regulation in the states of the US highlights a "crazy-quilt pattern of the laws—a diversity that resembles the diversity of state law during the 'reform' period of the late 1960s."³⁰⁰

On the one hand, a number of states have passed legislation that restricts abortion to the greatest extent permitted by federal law.³⁰¹ To this end, together with more traditional provisions imposing parental notification, waiting periods, or informed consent requirements,³⁰² recent statutory enactments require women to hear about all potential medical complications that could arise from an abortion (even those complications that are irrelevant in their cases),³⁰³ require women to hear ultrasounds of the fetus,³⁰⁴ and, as mentioned, undergo directive counseling.³⁰⁵ A series of demanding targeted regulations for abortion providers are also in force in several states.³⁰⁶

Power to Prohibit Partial Birth Abortion?' (2005) 42 Harvard Journal on Legislation 319. The US Supreme Court did not address this federalism concern in reviewing the PBABA in *Gonzales v. Carhart*, 550 U.S. 124 (2007)

²⁹² See D. Garrow (n 6) 25; R. Siegel (n 285) 1766

²⁹³ *Gonzales*, at 162 (upholding the PBABA by affirming that Congress enjoys wide discretion in its fact-finding assessment)

²⁹⁴ See N. Devins (n 286) 1336

²⁹⁵ See D. Garrow (n 6) 43

²⁹⁶ See Judith Waxman, 'Privacy and Reproductive Rights: Where We've Been and Where We're Going' (2007) 68 Montana Law Review 299, 315 (arguing that "*Casey* has led directly to a growing number of legislative restrictions on abortions"). See also *supra* text accompanying n 5

²⁹⁷ See *supra* text accompanying n 92-98

²⁹⁸ See *supra* text accompanying n 6

²⁹⁹ See generally NARAL Pro-Choice America Foundation, 'Who Decides? The Status of Women's Reproductive Rights in the United States' (2011) available at <http://www.prochoiceamerica.org/government-and-you/who-decides>

³⁰⁰ N. Hull and P.C. Hoffer (n 226) 265

³⁰¹ See N. Devins (n 286) 1339

³⁰² See Rebecca Dresser, 'From Double Standard to Double Bind: Informed Choice in Abortion Law' (2008) 76 George Washington Law Review 1599, 1602-1603

³⁰³ See Harper Jean Tobin, 'Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws' (2008) 17 Columbia Journal of Gender and Law 111

³⁰⁴ See Guttmacher Institute, 'State Policies in Brief: Requirements for Ultrasound' (2011) available at http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf

³⁰⁵ See *supra* text accompanying n 8

³⁰⁶ See NARAL Pro-Choice America Foundation, 'Targeted Regulation of Abortion Providers (TRAP)' (2011) available at <http://www.prochoiceamerica.org/what-is-choice/fast-facts/issues-trap.html>. TRAP measures are laws that

Finally, whereas the unenforceable pre-*Roe* statutory prohibitions of abortion remain on many states' statutory books,³⁰⁷ some states have enacted so-called trigger laws, which would automatically outlaw abortion if the Supreme Court were to overrule *Roe*.³⁰⁸

On the other hand, a number of states have autonomously decided to supersede the federal standard by offering even greater constitutional protection for the right to an abortion than the federal minimum.³⁰⁹ Following the lead of the California Supreme Court,³¹⁰ nine state superior courts have concluded that their state constitutions contained an independent right to abortion.³¹¹ In addition, inferior courts in nine other states have recognized a state constitutional right to abortion or privacy.³¹² Finally, broad recognition of the right to abortion without any major statutory limitations is provided in the legislation of many other states with the consequence that, even in the unlikely case that the Supreme Court overrules *Roe*, abortion would be lawful in a plurality of US states.³¹³

In conclusion, the assessment of the US constitutional experience in the field of abortion law highlights an evolving pattern. Historically, the competence over criminal law belonged to the several states and by the late 1960s, wide variations existed in the ways in which each state regulated abortion. The Supreme Court's *Roe v. Wade* decision imposed a unifying standard, recognizing a woman's fundamental right to decide privately whether to carry on a pregnancy and precluding states from criminalizing abortion. Since that decision, however, the Supreme Court has taken a number of retreating steps, recognizing wider room for states to maneuver, albeit within the limits of the *Casey* undue burden test. As a consequence, significant differences remain today in the regulation of abortion in the several US states, but a common floor of protection—recognizing a woman's right to terminate her pregnancy at least during the first trimester of pregnancy—is solidly grounded in the Supreme Court's interpretation of the US Constitution.³¹⁴

single-out the medical practices of doctors who provide abortions and impose requirements on them that are different and more burdensome than those imposed on other medical practices

³⁰⁷ See R. Fallon (n 255) 614

³⁰⁸ See Matthew Berns, 'Trigger Laws' (2009) 97 *Georgetown Law Journal* 1639, 1641-42

³⁰⁹ On the possibility for state constitutions to offer greater fundamental rights protection than the minimum provided by federal law see William Brennan, 'State Constitutions and the Protection of Individual Rights' (1997) 90 *Harvard Law Review* 489, 491; Stewart Pollock, 'State Constitutions as Separate Sources of Fundamental Rights' (1983) 35 *Rutgers Law Review* 707, 707

³¹⁰ See *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 796 (Cal. 1981) (holding that the right to "procreative choice" under the California Constitution is "at least as broad as that described in *Roe v. Wade*").

³¹¹ See eg *Hope v. Perales*, 189 A.D.2d 287 (N.Y. 1993). On the expansive interpretation of state constitutions offered by some state courts in the field of abortion law, especially with regard to state funding of abortion, see Janice Steinschneider, 'State Constitutions: The New Battlefield for Abortion Rights' (1987) 10 *Harvard Women's Law Journal* 284, 284-87; Linda Vanzi, 'Freedom at Home: State Constitutions and Medicaid Funding for Abortions' (1996) 26 *New Mexico Law Review* 433

³¹² See S. Gardbaum (n 212) 687

³¹³ See R. Fallon (n 255) 614 (noting that "many states formally repealed their old abortion laws after *Roe*, [but] seventeen states currently have laws on their books that would forbid nearly all abortions.")

³¹⁴ See V. Jackson (n 213) 213; D. Garrow (n 6) 19

4. Recent developments: the case law of the European Human Rights Court

The dynamics at play in the US constitutional system have produced over time a more consistent framework for the regulation of abortion rights throughout the US, while still preserving a degree of diversity among the several states. The US Supreme Court now ensures a minimum federal standard of protection for the right to an abortion: states can supersede this standard and integrate it, but they cannot place undue burdens that would substantially impair a woman's right to an abortion. In light of the US experience, this Section addresses the question whether a comparable evolution toward the definition of a supranational minimum standard for the protection of abortion rights can be detected in the most recent transformations taking place in the law in the books and the law in action in the European human rights system. To this end, I focus on the recent decision of the Grand Chamber of the ECtHR – the December 2010 ruling in *A., B. & C. v. Ireland* – and on the May 2011 follow up case of *R.R. v. Poland*.³¹⁵

The case concerned three women, two Irish citizens and a Lithuanian citizen residing in Ireland, who had to travel to England to terminate their pregnancies due to the Irish prohibition on abortion.³¹⁶ The first applicant was an unmarried and unemployed woman, who already had four children and sought an abortion for reasons of health and well-being and out of a concern that an additional pregnancy would make it impossible for her to raise her children.³¹⁷ The second applicant had become pregnant unintentionally and had been initially warned that there was a substantial risk of an ectopic pregnancy. By the time she decided to seek an abortion, the risk had been excluded but the woman was willing to terminate her pregnancy out of well-being concerns.³¹⁸ The third applicant had become pregnant after a three-year chemotherapeutic treatment for a rare form of cancer. Although the pregnancy seriously threatened a recurrence of the cancer and imperiled her life, the woman was unable to obtain advice from Irish doctors on whether she was entitled to an abortion in Ireland, and she therefore decided to seek an abortion in England out of concern for her life.³¹⁹

All of the applicants complained that the Irish prohibition on abortion restricted their ECHR rights.³²⁰ They maintained that the criminalization of abortion violated Article 3, since it produced stigma and prejudice against women seeking an abortion, which humiliated and degraded their

³¹⁵ *A., B. and C. v. Ireland*, ECHR [2010] Application No. 25579/05 (GC); *R.R. v. Poland*, ECHR [2011] Application No. 27617/04

³¹⁶ *A., B. and C* par 11-12

³¹⁷ *Ibid* par 13-17

³¹⁸ *Ibid* par 18-21

³¹⁹ *Ibid* par 22-26

³²⁰ *Ibid* par 113

dignity.³²¹ They also claimed that the prohibition of abortion was contrary to Article 14, which prohibits discrimination, and Article 13, which requires contracting parties to the ECHR to set up effective domestic remedies to vindicate their conventional rights.³²² The third applicant complained that the impossibility of obtaining advice as to the medical implications of a pregnancy for her cancer also amounted to a violation of Article 2, which enshrines the right to life.³²³ Finally, all the applicants claimed that the Irish prohibition of abortion represented an undue interference with their right to respect for private life protected by Article 8.³²⁴

The ECtHR began its opinion by explaining the Irish legal framework on abortion in great detail and reporting the criticisms and proposals for reform that had been discussed both at the national and international levels.³²⁵ It then addressed the admissibility issue, distinguishing the present case from the *D.* case.³²⁶ As far as the first two petitioners were concerned, the ECtHR stated that they could not be required to pursue and exhaust the domestic avenues of recourse before applying to the ECtHR as it was clear that a domestic complaint alleging a violation of the ECHR due to the impossible nature of obtaining an abortion in Ireland for health and well-being reasons did not have “any prospect of success, going against [...] the history, text and judicial interpretation of Article 40.3.3 of the [Irish] Constitution.”³²⁷ As far as the third petitioner was concerned, the ECtHR underlined how the lack of domestic legislation implementing the right to abortion to save the life of the mother was at the core of her complaint and therefore had to be addressed on the merits.

On the substantive issues of the case, the ECtHR summarily rejected the claim of a violation of Article 3 ECHR, arguing that the “facts alleged d[id] not disclose a level of severity falling within the scope” of the contested provision.³²⁸ The Court also rebuffed the third applicant’s complaint under Article 2 ECHR because “there was no legal impediment to the third applicant travelling for an abortion abroad.”³²⁹ The ECtHR then moved to address the alleged violation of Article 8 ECHR by considering separately the complaint of the first two applicants “that they could not obtain an abortion for health and / or well-being reasons in Ireland,”³³⁰ and later, the complaint

³²¹ Ibid

³²² Ibid

³²³ Ibid

³²⁴ Ibid

³²⁵ Ibid par 27-112

³²⁶ See *supra* text accompanying n 197–198

³²⁷ *A., B. and C* par 147

³²⁸ Ibid par 164

³²⁹ Ibid par 158

³³⁰ Ibid par 167

of the third petitioner “about the absence of any legislative implementation of Article 40.3.3 of the [Irish] Constitution.”³³¹

According to the ECtHR, although Article 8 ECHR could not “be interpreted as conferring a right to abortion,”³³² its well-consolidated case law made it clear that “legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman,”³³³ protected by Article 8 ECHR.³³⁴ As a consequence: “[t]he prohibition in Ireland of abortion where sought for reasons of health and / or well-being about which the first and second applicants complained, and the third applicant’s alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8.”³³⁵ Nevertheless, the “difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, require[d] separate determination of the question whether there ha[d] been a breach of Article 8.”³³⁶

The third applicant’s case raised an issue that had already been considered by the ECtHR: that is, the existence of a series of *positive* obligations stemming from Article 8 ECHR that require the contracting parties to set-up an effective legal framework at the domestic level to verify whether the conditions for obtaining a lawful abortion had been met.³³⁷ In contrast, the first two applicants’ cases raised a novel issue: they presented the ECtHR with the first “opportunity to develop certain general Convention principles on the minimum degree of protection to which a woman seeking an abortion would be entitled”³³⁸ and to expound upon the *negative* obligations that limit the authority of the contracting parties to prohibit voluntary termination of pregnancy.

The ECtHR reached different conclusions in the two scenarios, agreeing unanimously on a violation of Article 8 ECHR with regard to the third applicant but dividing sharply on the complaint of the first two applicants.³³⁹ In the case of the third applicant, the ECtHR, by drawing heavily on the *Tysiác* precedent,³⁴⁰ remarked how Article 8 ECHR “may also impose on a State certain positive obligations”³⁴¹ and that these obligations may require “the implementation, where appropriate, of

³³¹ Ibid. However, the ECtHR did not address the complaints under Articles 13 and 14 ECHR because, according to the ECtHR, its decision based on Article 8 was decisive and rendered consideration of Articles 13 and 14 unnecessary.

³³² *A., B. and C.* par 214

³³³ Ibid par 213

³³⁴ See *supra* text accompanying n 185–92

³³⁵ *A., B. and C.* par 214

³³⁶ Ibid

³³⁷ See *supra* text accompanying n 185–92

³³⁸ *A., B. and C.* par 193

³³⁹ See Diletta Tega, ‘Corte Europea dei diritti: l’aborto tra margine di apprezzamento statale e consenso esterno’ [2011] Quaderni Costituzionali 159 (providing an early comment on the decision). See also Fiona de Londras, ‘Ireland Is Still in Denial Over Abortion’ *The Guardian* (London, 16th December 2010) 6; Carl O’Brien, ‘State Loses Case on Woman’s Abortion Right’ *Irish Times* (Dublin 17th December 2010)

³⁴⁰ See *supra* text accompanying n 185–98

³⁴¹ *A., B. and C.* par 244

specific measures in an abortion context.”³⁴² The ECtHR underlined how, under the *X*. doctrine of the Irish Supreme Court, abortion could be obtained lawfully in Ireland when there was a real and substantial risk to the life of the mother—as distinct from the health of the mother—and this risk could only be avoided by a termination of the pregnancy.³⁴³ The ECtHR then noted that the case of the third applicant would fit within this category; however, it found that no effective mechanisms existed under domestic law to ensure a right to an abortion in such life-saving situations.³⁴⁴ The ECtHR noted a variety of factors that revealed the ineffectiveness of Irish domestic law in ensuring that a woman could access an abortion when necessary to save her life.

First, the ECtHR raised “a number of concerns as to the effectiveness of [the medical] consultation procedure as a means of establishing the third applicant’s qualification for a lawful abortion in Ireland.”³⁴⁵ The ECtHR emphasized that no legal framework existed “whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved.”³⁴⁶ The ECtHR then remarked how the existence of severe criminal sanctions for unlawful abortions “constitute[s] a significant chilling factor for both women and doctors in the medical consultation process.”³⁴⁷

Second, the ECtHR underlined how a constitutional complaint was not a satisfactory means of protecting the third applicant’s right to respect for her private life. Constitutional courts are not “the appropriate *fora* for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State”³⁴⁸ because “it would be wrong to turn the High Court into a ‘licensing authority’ for abortions.”³⁴⁹ Furthermore, “it would be equally inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable.”³⁵⁰

The ECtHR concluded that Ireland had violated Article 8 ECHR by failing to provide the third applicant, whose life was at risk due to her pregnancy, with adequate procedures by which she could establish her right to a lawful abortion in Ireland. In the ECtHR’s view: “[t]he uncertainty generated by the lack of legislative implementation of Article 40.3.3 [of the Irish Constitution], and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to

³⁴² *Ibid* par 245

³⁴³ *Attorney Gen. v. X* [1992] I.L.R.M. 401 (H. Ct.). See *supra* text accompanying n 114–15

³⁴⁴ *A., B. and C.* par 250

³⁴⁵ *Ibid* par 253

³⁴⁶ *Ibid*

³⁴⁷ *Ibid* par 254

³⁴⁸ *Ibid* par 258

³⁴⁹ *Ibid*

³⁵⁰ *Ibid* par 259

a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation."³⁵¹ The ECtHR found that this amounted to a violation of Article 8 ECHR.

In contrast, in the case of the first two applicants, eleven out of seventeen judges of the ECtHR's Grand Chamber concluded that Ireland had not violated the negative obligations stemming from Article 8 ECHR, which prohibits contracting parties from interfering with the right to respect for private life. The majority of the ECtHR acknowledged that "the prohibition of the termination of the first and second applicants' pregnancies sought for reasons of health and / or well-being amounted to an interference with their right to respect for their private lives."³⁵² However, in undertaking the three-tier proportionality test, required by Article 8(2) ECHR to verify whether the interference was "in accordance with the law," pursued a "legitimate aim," and was "necessary in a democratic society,"³⁵³ the ECtHR concluded that the Irish prohibition of abortion did not disproportionately interfere with the first and second applicants' right to respect for private life.³⁵⁴

On the first issue, whether the interference with Article 8 ECHR was in accordance with the law, the ECtHR simply recalled its *Open Door* ruling.³⁵⁵ On the second issue, whether the interference pursued a legitimate aim, the ECtHR remarked how under Irish law, the right to life of the unborn was based "on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then."³⁵⁶ The ECtHR hence affirmed "that the impugned restriction [...] pursued the legitimate aim of the protection of morals."³⁵⁷ Finally, on the third and most relevant question, whether the interference with Article 8 ECHR was necessary in a democratic society, the ECtHR clarified that in the present case, it had to "examine whether the prohibition of abortion in Ireland for health and / or well-being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other hand, profound moral values of the Irish people."³⁵⁸ Given "the acute sensitivity of the moral and ethical issues raised by the question of abortion,"³⁵⁹

³⁵¹ Ibid par 264

³⁵² Ibid par 216

³⁵³ Article 8(2), ECHR

³⁵⁴ *A., B. and C.* par 242

³⁵⁵ *Open Door Counselling* par 73 (finding the Irish prohibition on abortion in accordance with the law as clearly based in domestic constitutional law). See *supra* text accompanying n 161-72

³⁵⁶ *A., B. and C.* par 226

³⁵⁷ Ibid par 227

³⁵⁸ Ibid par 230

³⁵⁹ Ibid par 233

however, the ECtHR decided that Ireland enjoyed a “broad margin of appreciation”³⁶⁰ in determining whether a fair balance was struck between the two conflicting values.³⁶¹

The ECtHR also examined “whether this wide margin of appreciation is narrowed by the existence of a relevant consensus” among the other European states and, significantly, underlined how “a substantial majority of the Contracting States of the Council of Europe [...] allow[] abortion on broader grounds than accorded under Irish law.”³⁶² In the factual part of the decision, the ECtHR had already remarked how: “Abortion is available on request (according to certain criteria including gestational limits) in some 30 Contracting States. An abortion justified on health grounds is available in some 40 Contracting States and justified on well-being grounds in some 35 such States. Three Contracting States prohibit abortion in all circumstances (Andorra, Malta and San Marino). In recent years, certain States have extended the grounds on which abortion can be obtained (Monaco, Montenegro, Portugal and Spain).”³⁶³

Despite the existence of a clear European trend in favor of the legalization of abortion,³⁶⁴ the majority of the ECtHR denied that “this consensus decisively narrow[ed] the broad margin of appreciation of the State.”³⁶⁵ To justify this conclusion, the ECtHR affirmed that there was no agreement on the “scientific and legal definition of the beginning of life”³⁶⁶ and that “this consensus [could] not be a decisive factor in the Court’s examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention.”³⁶⁷

Therefore, the ECtHR denied “that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life [...] and as to the consequent protection to be accorded to the right to life of the unborn, exceed[ed] the margin of appreciation accorded in that respect to the Irish State.”³⁶⁸ In addition, the ECtHR mentioned in passing how Irish women still had “the option of lawfully travelling to another State”³⁶⁹ to seek an abortion and to receive information about abortion services overseas (without considering, however, the discriminatory effects that this possibility has on high-income and low-

³⁶⁰ Ibid

³⁶¹ See *supra* text accompanying n 169-172

³⁶² *A., B. and C.* par 234-235

³⁶³ Ibid par 112

³⁶⁴ See *supra* Section 1

³⁶⁵ *A., B. and C.* par 236

³⁶⁶ Ibid par 237

³⁶⁷ Ibid

³⁶⁸ Ibid par 241

³⁶⁹ Ibid par 239

income women).³⁷⁰ The ECtHR thus concluded that there had been no violation of Article 8 ECHR as regards the first and second applicants.

The decision of the majority of the ECtHR prompted a vigorous dissent by six judges. In a joint opinion, the minority disagreed with the majority's finding that Ireland had not violated Article 8 ECHR with regard to the first and second applicants and blamed the majority for: "[I]nappropriately conflating... the question of the beginning of life (and, as a consequence, the right to life), the States' margin of appreciation in this regard, with the margin of appreciation that States have in weighing the right to life of the fetus against the right to life of the mother or her right to health and well-being."³⁷¹ Rather, the dissenting judges argued that the court should consider two elements when applying the proportionality test.

The first element considered was the existence of a "clear [...] consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion."³⁷² According to the dissenting judges, the precedents of the ECtHR demonstrated that, whenever a consensus existed, this "decisively narrow[ed] the margin of appreciation" given to the member states.³⁷³ As the dissent's opinion emphasized: "[T]his approach is commensurate with the 'harmonising' role of the Convention's case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence."³⁷⁴

Given the existence of a "strong" consensus in the case at hand,³⁷⁵ according to the dissenting judges, the decision of the ECtHR to refrain from narrowing the margin of appreciation granted to Ireland out of concern for the profound moral values of the Irish people amounted to a "real and dangerous" disregard of established precedents.³⁷⁶ Indeed, in the dissent's view, it is only when no European consensus exists that the ECtHR should "refrain[] from playing its harmonising role, preferring not to become the first European body to 'legislate' on a matter still undecided at European level."³⁷⁷ The second element that, according to the dissenting judges, the court should consider when applying the proportionality test was the "striking"³⁷⁸ severity of "the (rather

³⁷⁰ See *infra* text accompanying n 453-460

³⁷¹ *A., B. and C. (JJ. Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, Joint Partly Dissenting)* par 2

³⁷² *Ibid* par 4

³⁷³ *Ibid* par 5

³⁷⁴ *Ibid*

³⁷⁵ *Ibid* par 6

³⁷⁶ *Ibid* par 9

³⁷⁷ *Ibid* par 5

³⁷⁸ *Ibid* par 10

archaic) law,”³⁷⁹ which punished abortion in Ireland with the sentence of life imprisonment.³⁸⁰ The dissenting judges concluded that it was “clear that in the circumstances of the case there has been a violation of Article 8 with regard to the first two applicants.”³⁸¹

In conclusion, the analysis of *A., B. & C. v. Ireland* reveals that the ECtHR has fallen short of bringing Europe along the path set forth by the US Supreme Court in *Roe v. Wade*.³⁸² The ECtHR found a violation of Article 8 ECHR as far as the third applicant was concerned because Ireland had breached its positive obligations to set up an adequate domestic legal framework by which the petitioner could establish her right to a lawful abortion for life-saving purposes. However, a majority of the ECtHR concluded that the Irish prohibition of abortion on health and well-being grounds did not amount to a disproportionate interference with the first and second applicants’ rights to respect for private life. Yet, although the ECtHR has not delivered a decision analogous to *Roe v. Wade*, it is difficult to predict what the consequences of the ruling will be, both for the member states and the future case law of the ECtHR.³⁸³

Indeed, in May 2011, the Fourth Section of the ECtHR delivered another innovative abortion decision that, widely quoting *A., B. & C. v. Ireland*, marked a further step toward the protection of the right to an abortion at the supranational level in Europe. The case, *R.R. v. Poland*,³⁸⁴ concerned a Polish woman who, although she was informed since the early days of pregnancy that her fetus might be affected by a serious genetic disease, was not able to obtain the medical test needed to ascertain the impairment of the fetus and eventually delivered a baby affected by the Turner syndrome. In her application to the ECtHR, the woman complained that it was impossible for her to obtain timely prenatal tests because the medical doctors with whom she consulted had intentionally postponed all genetic examinations. Because of these deliberate medical delays, the woman was unable to obtain an abortion within the time limits provided by the law, which permits termination of pregnancy within the first twenty-four weeks for reasons of fetal impairment.³⁸⁵

³⁷⁹ Ibid

³⁸⁰ See *supra* text accompanying n 105

³⁸¹ *A., B. and C.* (JJ. Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, Joint Partly Dissenting) par 11

³⁸² That the decision of the ECtHR in *A., B. and C.* could result in Europe’s *Roe v. Wade* had been discussed as a possible (or even likely) scenario. See Shannon Calt, ‘*A., B. and C. v. Ireland: “Europe’s Roe v. Wade”*’ (2010) 14 Lewis and Clark Law Review 1189; Sarah Pentz Bottini, ‘Europe’s Rebellious Daughter: Will Ireland Be Forced to Conform Its Abortion Law to That of Its Neighbours?’ (2007) 49 Journal of Church and State 211

³⁸³ As for the implication of the decision on the legislation of the contracting parties, see Alessandra Osti, ‘Corte Europea dei diritti: accelerazione della legalizzazione dell’aborto in Irlanda?’ [2011] Quaderni Costituzionali 156, 158 (arguing that, despite its apparently restrictive approach, the decision of the ECtHR could still “accelerate the process of legalization of abortion in Ireland.”)

³⁸⁴ *R.R. v. Poland*, ECHR [2011] Application No. 27617/04

³⁸⁵ See *supra* text accompanying n 100

In its decision, the ECtHR ruled that Poland had violated Article 8 ECHR. By recalling its precedents, the ECtHR remarked that “[w]hile a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be ‘shaped in a coherent manner.’”³⁸⁶ The ECtHR emphasized the “critical importance”³⁸⁷ of the time factor in a woman’s decision to terminate a pregnancy and underlined how it had “not been demonstrated that Polish law as applied to the applicant’s case contained any effective mechanisms which would have enabled the applicant to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not.”³⁸⁸ It thus concluded that the Polish authorities had “failed to comply with their positive obligations to secure to the applicant effective respect for her private life and that there ha[d] therefore been a breach of Article 8.”³⁸⁹

In an unprecedented move, however, the ECtHR also found Poland in violation of Article 3 ECHR, which sets up an absolute prohibition against torture and inhumane and degrading treatments. In the ECtHR’s view, “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.”³⁹⁰ However, the circumstances of the case unequivocally led to the conclusion that this minimum threshold of severity had been passed. The ECtHR noted that the applicant had “tried, repeatedly and with perseverance, through numerous visits to doctors and through her written requests and complaints, to obtain access to genetic tests which would have provided her with information confirming or dispelling her fears; to no avail.”³⁹¹ In addition, it emphasized how the applicant “was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by information that the fetus could be affected with some malformation.”³⁹²

As the ECtHR explained, however, although the woman “suffered acute anguish [...h]er concerns were not properly acknowledged and addressed by the health professionals dealing with her case [...who showed no regard for] the temporal aspect of the applicant’s predicament.”³⁹³ Because of the deliberate delay by the medical doctors, the woman “obtained the results of the tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion as the time limit provided for by [the Polish

³⁸⁶ *R.R.* par 187 (quoting *A., B. and C.* par 249)

³⁸⁷ *Ibid* par 203

³⁸⁸ *Ibid* par 208

³⁸⁹ *Ibid* par 214

³⁹⁰ *Ibid* par 148

³⁹¹ *Ibid* par 153

³⁹² *Ibid* par 159

³⁹³ *Ibid*

Abortion Act] had already expired.”³⁹⁴ In light of the conduct of the public authorities, the ECtHR expressed its “regret that the applicant was so shabbily treated by the doctors dealing with her case” and concluded that the humiliation suffered by the woman and the impossibility of availing herself of a lawful abortion on fetal impairment grounds amounted to a violation of Article 3.³⁹⁵

In the end, the *R.R. v. Poland* decision finding a violation of Article 3 ECHR in the Polish abortion context, suggests that the Grand Chamber ruling in *A., B. & C. v. Ireland* is not an obstacle for further judicial developments and greater supranational protection of the dignity of women in the field of abortion rights. In addition, the *R.R. v. Poland* decision predicts that the complex questions of balancing state sovereignty and women’s autonomy will remain a core feature of the ECtHR case law in the years to come.³⁹⁶ At the same, whether the creation of a more consistent framework for the regulation of abortion rights in Europe remains a possible scenario will also depend on transformations taking place in the EU constitutional system.

5. Future prospects: beyond the Lisbon Treaty

The Lisbon Treaty, that entered into force on December 1, 2009,³⁹⁷ has significantly reshaped the EU human rights architecture and its connection with the systems for the protection of fundamental rights established at the national and international levels.³⁹⁸ The Lisbon Treaty rescued most of the substantive and institutional innovations contained in the abandoned 2003 Constitutional Treaty and can therefore be regarded as a momentous reform of the EU constitutional system.³⁹⁹ Its potential impact on the protection of fundamental rights and on the controversial issue of the right to an abortion needs to be considered. The Lisbon Treaty has provided the legal basis for the accession of

³⁹⁴ Ibid

³⁹⁵ Ibid par 160

³⁹⁶ See Elizabeth Wicks, ‘*A., B. and C. v. Ireland: Abortion Law Under the European Convention on Human Rights*’ (2011) 11 Human Rights Law Review 556, 565 (arguing that *A., B. and C. v. Ireland* “hints at a more interventionist Court in future abortion cases.”). See also Judith Resnik, ‘The Production and Reproduction of Constitutional Norms’ (2011) 35 NYU Review of Law and Social Change 226, 244 (arguing that abortion cases are likely to remain a key issue in the docket of the ECtHR and other constitutional courts worldwide in the near future)

³⁹⁷ See generally Jacques Ziller, *Il nuovo Trattato Europeo* (Il Mulino 2007) 178; Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 Common Market Law Review 617

³⁹⁸ See Marta Cartabia, ‘I diritti fondamentali e la cittadinanza dell’Unione’ in Franco Bassanini and Giulia Tiberi (eds), *Le nuove istituzioni Europee: Commento al Trattato di Lisbona* 81 (Il Mulino 2008); see also Giacomo di Federico, ‘Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty’ in Giacomo di Federico (ed), *The EU Charter of Fundamental Rights* (Springer 2009) 15 (regarding the impact of the Lisbon Treaty on the protection of fundamental rights in the EU system)

³⁹⁹ See Bruno de Witte, ‘Saving the Constitution? The Escape Routes and their Legal Feasibility’ in Giuliano Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 919

the EU to the ECHR, paving the way for external supervision by the ECtHR on the human rights conduct of the EU.⁴⁰⁰

In addition, pursuant to the new Article 6(1) of the EU Treaty (TEU), the Charter of Fundamental Rights (CFR), which was only proclaimed in 2001 by the EU institutions, has now acquired the “same legal value” as the other EU treaties (that is, the formal status of EU constitutional law).⁴⁰¹ The CFR is the first written EU Bill of Rights⁴⁰² and was initially conceived as a codification of the fundamental rights recognized by the ECJ. The CFR, however, contains a complete and coherent catalogue of rights that extends well beyond a mere jurisprudential restatement; rather, it features one of the most advanced human rights instruments worldwide.⁴⁰³ Hence the CFR includes a number of provisions⁴⁰⁴ that are relevant to the issue of abortion including, safeguarding a right to life,⁴⁰⁵ protecting private life⁴⁰⁶ and recognizing a general principle of equality without discrimination.⁴⁰⁷

The CFR binds all the EU institutions and the member states when they act within the scope of application of EU law.⁴⁰⁸ Since the ECJ had already acknowledged in *Grogan* that abortion constituted a service within the meaning of EU law,⁴⁰⁹ it would appear that any national regulation on abortion would fall within the scope of application of EU law and would thus be subject to compliance with the fundamental rights principles contained in the CFR.⁴¹⁰ At the same time, whereas in the early 1990s, in the *Grogan* case, the ECJ was able to get around the Irish domestic ban on information about abortion services on purely economic grounds,⁴¹¹ it would seem that today, given the binding nature of the CFR, any possible challenge to a national measure restricting

⁴⁰⁰ See Alessandra Giannelli, ‘L’adesione dell’Unione Europea alla CEDU secondo il Trattato di Lisbona’ [2009] *Diritto dell’Unione Europea* 684; Francis Jacobs, ‘The European Convention on Human Rights: The EU Charter of Fundamental Rights and the European Court of Justice’ in Ingolf Pernice et al (eds), *The Future of the European Judicial System in Comparative Perspective* (Nomos 2006) 291

⁴⁰¹ See Emanuelle Bribosia, ‘L’avenir de la protection de droits fondamentaux dans l’Unione Europeanopéenne’ in Giuliano Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 995; Julianne Kokott and Christoph Sobotta, ‘The Charter of Fundamental Rights of the European Union After Lisbon’ (EUI Working Papers – Academy of European Law No. 6, 2010)

⁴⁰² Koen Lenaerts and Eddy de Smijter, ‘A Bill of Rights for the European Union’ (2001) 38 *Common Market Law Review* 273

⁴⁰³ See Armin Von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights at the Core of the European Union’ (2000) 37 *Common Market Law Review* 1307; Marta Cartabia, ‘L’ora dei diritti fondamentali nell’Unione Europea’ in Marta Cartabia (ed), *I Diritti in Azione* (Il Mulino 2007) 13

⁴⁰⁴ But see also Preamble, CFR (stating that the CFR “places the individual at the center of its activities.”)

⁴⁰⁵ Article 2, CFR

⁴⁰⁶ Article 7, CFR

⁴⁰⁷ Article 21, CFR

⁴⁰⁸ See Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Market Law Review* 945; Alexander Egger, ‘EU-Fundamental Rights in National Legal Orders: The Obligations of Member States Revisited’ (2006) 25 *Yearbook of European Law* 515

⁴⁰⁹ See *supra* text accompanying n 130-132

⁴¹⁰ See R. Lawson (n 3) 174 (arguing that, in regard to the *Grogan* decision, “it seems inevitable that the ECJ will sooner or later be confronted with the same matter.”)

⁴¹¹ See D. Cole (n 3) 126; D.R. Phelan (n 124) 686

abortion would inevitably require the ECJ to consider the human rights issues involved in the case. This clearly shifts the theoretical underpinnings of the ECJ's oversight from an internal market paradigm toward a fundamental rights paradigm.⁴¹²

The potential for the above scenario to take place *in the abstract* seems to be confirmed by the legal safeguards that a few EU member states have adopted to prevent such a future development.⁴¹³ Protocol No. 30 on the Application of the CFR,⁴¹⁴ which Poland and the UK secured from the other EU member states during the negotiations of the Lisbon Treaty, represents the first piece of evidence in this regard.⁴¹⁵ The Protocol is attached to the EU treaties and has their same legal status. It affirms that the CFR “does not extend the ability of the [ECJ], or any court or tribunal of Poland or of the [UK], to find that the laws, regulations or administrative provisions, practices or action of Poland or of the [UK] are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”⁴¹⁶

The UK and Poland sought the adoption of the Protocol in order to limit the impact of the CFR upon their national legal systems. For the UK, its support of the Protocol did not stem from a concern for its permissive abortion law, but, rather (as explained in chapter 4 on strike laws), out of fear that the social rights provisions of the CFR could destabilize its labor market.⁴¹⁷ In contrast, Poland primarily viewed the Protocol as a legal instrument to shield its restrictive abortion regulation from EU supervision.⁴¹⁸ This is confirmed by the non-binding unilateral declaration No. 61 in which Poland makes further efforts to affirm its position that the CFR “does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.”⁴¹⁹

The redundancy with which the treaties affirm that the CFR does not extend the competences of the EU provides additional evidence of several member states' concerns when

⁴¹² See Giorgio Sacerdoti, ‘The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens’ Europe’ (2002) 8 *Columbia Journal of European Law* 37; Rick Lawson, ‘Human Rights: The Best is Yet to Come’ (2005) 1 *European Constitutional Law Review* 27

⁴¹³ See Koen Lenaerts and Eddy de Smijter, ‘The Charter and the Role of the European Courts’ (2001) 8 *Maastricht Journal of European and Comparative Law* 90; Antonio Bultrini, ‘I rapporti tra Carta dei diritti fondamentali e CEDU dopo Lisbona: una straordinaria occasione di sviluppo per la tutela dei diritti umani in Europeanopa’ [2009] *Diritto dell’Unione Europea* 700

⁴¹⁴ Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ 2010 C 83/313

⁴¹⁵ See Stefano Amedeo, ‘Il Protocollo n. 30 sull’applicazione della Carta a Polonia e Regno Unito e la tutela “asimmetrica” dei diritti fondamentali: molti problemi, qualche soluzione’ [2009] *Diritto dell’Unione Europea* 720; Catherine Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric Over Reality?’ in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2010) 257

⁴¹⁶ Protocol No. 30, OJ 2010 C 83/314

⁴¹⁷ See C. Barnard (n 415) 270

⁴¹⁸ See A. Czerwinski (n 101) 663

⁴¹⁹ Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union, OJ 2010 C 83/358

considering a binding CFR; namely, its possible spill-over into the domestic legal systems through the human rights adjudication of both the ECJ and the national courts.⁴²⁰ This same idea is restated multiple times, including in Article 6(1)(2) TEU, in Article 51(2) of the CFR itself, in the joint non-binding declaration No. 1 of the EU member states annexed to the EU treaties,⁴²¹ and in the unilateral declaration No. 53 by the Czech Republic on the CFR.⁴²² In light of the *Grogan* case, it is uncertain whether these provisions will effectively prevent the ECJ from ruling on a new abortion case.⁴²³ Still, importantly, the EU treaties contain other *ad hoc* clauses designed to protect specific national abortion laws.⁴²⁴

For example, in its 2003 Accession Agreement to the EU, Malta obtained a special provision, Protocol No. 7, which leaves unaffected “the application in the territory of Malta of national legislation relating to abortion.”⁴²⁵ Moreover, the consolidated version of the EU treaties post-Lisbon has preserved the 1992 Irish protocol (renumbering it as Protocol No. 35),⁴²⁶ ensuring that “nothing in the [EU treaties] shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.”⁴²⁷ The December 2008 Conclusions adopted by the European Council after the rejection of the Lisbon Treaty in the first Irish referendum of 2008 and paving the way to the second, successful, Irish referendum in 2009,⁴²⁸ provided an additional “guarantee that the provisions of the Irish Constitution in relation to the right to life [...] and the family are not in any way affected by the fact that the Treaty of Lisbon attributes legal status to the [CFR].”⁴²⁹

Legal scholars debate whether these provisions of the EU treaties can be truly effective.⁴³⁰ Contrary to the purely *political* declarations, the additional Protocols have the same *legal* value as the EU treaties; however, scholars have argued that, for instance, Protocol No. 30 “is totally useless: it can not prohibit lawyers from requesting the application of the rights codified in the CFR.”⁴³¹ In addition, if one considers that Protocol No. 30 purportedly only aims to “clarify the application of the [CFR] in relation to the laws and administrative actions of Poland and the [UK] and of its

⁴²⁰ See J. Ziller (n 397) 170

⁴²¹ Declaration Concerning the Charter of Fundamental Rights of the European Union, OJ 2010 C 83/337

⁴²² Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union, OJ 2010 C 83/355

⁴²³ Any such ruling, in fact, would not be an extension of the regulatory competences of the EU. See *supra* text accompanying n 395-96

⁴²⁴ See D. Curtin (n 146) 47; A. Czerwinski (n 101) 654. See also Peta-Gaye Miller, ‘Member State Sovereignty and Women’s Reproductive Rights: The European Union Response’ (1999) 22 Boston College International and Comparative Law Review 195

⁴²⁵ Protocol No. 7 on Abortion in Malta, OJ 2003 L 236/947

⁴²⁶ See *supra* text accompanying n 145

⁴²⁷ Protocol No. 35 on Article 40.3.3 of the Constitution of Ireland, OJ 2010 C 83/321

⁴²⁸ See John O’ Brennan, ‘Ireland and the Lisbon Treaty: *Quo Vadis?*’ (CEPS Policy Brief No. 176, 2008) 13 (describing the failure of the first Irish referendum to approve the Lisbon Treaty, and the step that Ireland took to take a second, successful referendum)

⁴²⁹ Presidency Conclusions, European Council, 11-12 December 2008, EU Doc. 17271/08, par 2

⁴³⁰ See J. Kokott and C. Sobotta (n 401) 12; S. Amedeo (n 415) 720

⁴³¹ J. Ziller (n 397) 178

justiciability within Poland and the [UK],”⁴³² it would seem that its effect is not to opt-out from the CFR.⁴³³ Rather, Protocol No. 30 “is an exercise in smoke and mirrors,” largely motivated for presentational reasons.⁴³⁴

At the same time, the concessions granted in the Irish and Maltese abortion protocols, as well as the political reassurances that the European Council made to Ireland after the first unsuccessful referendum on the Lisbon Treaty, reveal a pattern. These concessions reflect a trend to accommodate in the EU treaties “the distrust of several states toward the EU”⁴³⁵ and its human rights instruments. In this context, it is not easy to imagine that the ECJ will, *in practice*, fully incorporate the fundamental rights guarantees included in the CFR within the legal systems of the member states, along the lines pursued by the US Supreme Court in its gradual incorporation of the Bill of Rights into the legal systems of the states.⁴³⁶ Nor is it easy to imagine that the ECJ will inaugurate a review of domestic legislation limiting abortion rights for its compatibility with the transnational human rights standard enshrined in the CFR at any time in the near future.⁴³⁷

Still, as Miguel Poiares Maduro has persuasively argued, the CFR has a double constitutional life.⁴³⁸ On the one hand, it is regarded as “a simple consolidation of the previous fundamental rights *acquis* aimed at guaranteeing regime legitimacy.”⁴³⁹ On the other hand, the CFR can be seen as “a bill of rights of a political community, a constitutional document that is part of a complete political contract among citizens and that therefore legitimises new claims and an increased incorporation at the state level.”⁴⁴⁰ At the moment, it is impossible to predict which of these two visions will prevail. Yet, the US experience with its Bill of Rights demonstrates that “intentions and outcomes may differ greatly.”⁴⁴¹ Nothing precludes the CFR from becoming a

⁴³² Protocol No. 30, 2010 OJ C 83/313

⁴³³ C. Barnard (n 415) 270 (arguing that the Protocol No. 30 contains a genuine opt-out for the UK and Poland only insofar as the social rights contained in Title IV of the CFR are concerned.). See Article 1(2) of Protocol No. 30, OJ 2010 C 83/314 (affirming that “for the avoidance of doubt, nothing in Title IV of the Charter creates justifiable rights applicable to Poland or the [UK].”)

⁴³⁴ C. Barnard (n 415) 283

⁴³⁵ J. Ziller (n 397) 170. See also Steve Peers, ‘The “Opt-Out” that Fell to Earth: The British and the Polish Protocol Concerning the EU Charter of Fundamental Rights’ [2012] Human Rights Law Review 1

⁴³⁶ See Jochen Frowein, Stephen Schulhofer and Martin Shapiro, ‘The Protection of Fundamental Rights as a Vehicle of Integration’ in Mauro Cappelletti et al (eds), *Integration Through Law: Europe and the American Federal Experience. Volume 1, Book 3* (de Gruyter 1986) 231 (examining whether the process of incorporating the fundamental rights standards contained in the federal Bill of Rights could possibly take place also in the European context); see also Koen Lenaerts, ‘Federalism and Rights in the European Community’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 139

⁴³⁷ See Bruno de Witte, ‘The Past and the Future Role of the European Court of Justice in the Protection of Human Rights’ in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 859, 873

⁴³⁸ Miguel Poiares Maduro, ‘The Double Constitutional Life of the Charter of Fundamental Rights of the European Union’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights* (Hart Publishing 2003) 269

⁴³⁹ *Ibid*

⁴⁴⁰ *Ibid* at 292

⁴⁴¹ *Ibid* at 299 (recalling how the US Bill of Rights was adopted under pressure from those who opposed the federation, but it later constituted one of the most important elements of federal control over the states)

powerful federalizing element that sets the minimum human rights standard with which states shall comply “to an extent that the Union can actually function.”⁴⁴²

De jure condendo, a similar development may even be advisable in the field of abortion rights on the basis of an equality argument. I do not intend to articulate here a complete normative theory of equality as a justification for protecting the right to abortion in Europe, comparable to the claims made by a number of distinguished US scholars in favor of grounding the central premise of *Roe v. Wade* in the equal protection clause of the Fourteenth amendment of the US Constitution.⁴⁴³ What I want to briefly suggest, however, is that in the European context too, the regulation of abortion raises a number of equality concerns.⁴⁴⁴ In fact, in a multilevel constitutional system, states’ bans on abortion can produce discriminatory effects that are hard to accept.

In the previous Sections, I explained how a minority of EU member states, notably Ireland, Poland, and Malta, have enacted extremely restrictive abortion laws, prohibiting women from obtaining an abortion at home except when necessary to save their lives or protect against grave injury their health.⁴⁴⁵ At the same time, women residing in these states have a right—protected under EU law, ECHR law, and now often also codified under domestic law—to be informed about abortion providers in other EU countries. In addition, women in these countries have the right to travel abroad if they want to terminate their pregnancies.⁴⁴⁶ Women are able to exercise these rights without facing any risk of prosecution or subjection to the severe domestic criminal sanctions against abortion.⁴⁴⁷

The possibility for a woman to escape the restrictive domestic abortion bans by going abroad and to avoid prosecution in her home state has shaped the jurisprudence of the European supranational courts.⁴⁴⁸ In fact, this go-around is precisely what prompted AG Van Gerven in *Grogan* to conclude that the Irish ban on information about abortion services was not disproportionate.⁴⁴⁹ In his opinion, AG Van Gerven clearly affirmed that “a ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their

⁴⁴² R. Lawson (n 416) 36

⁴⁴³ See D. Regan (n 274) 1569; R.B. Ginsburg (n 285) 385; R. Siegel (n 297) 1694

⁴⁴⁴ See Ronald Dworkin, ‘What the Constitution Says’ in Ronald Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 110 (providing a liberal jurisprudential statement that the right to abortion is linked to a “moral reading” of the constitutional principles of liberty and equality). But see R. Dworkin (n 20) (grounding the right to procreative autonomy in the constitutional principle of freedom of religion)

⁴⁴⁵ See *supra* Section 1

⁴⁴⁶ See *supra* Section 2

⁴⁴⁷ See Abigail-Mary Sterling, ‘The European Union and Abortion Tourism: Liberalizing Ireland’s Abortion Law’ (1997) 20 *Boston College International and Comparative Law Review* 385. For a comparative perspective, see generally Seth Kreimer, ‘The Law of Choice and the Choice of Law: Abortion, the Right to Travel and Extraterritorial Regulation in American Federalism’ (1992) 67 *NYU Law Review* 451

⁴⁴⁸ Indeed, it could even be argued that because women theoretically can get out of restrictive bans on abortion by leaving their home countries for the abortion, the European supranational courts are more protective of the member states’ autonomy to ban abortions since, viewed from one perspective, this ban is not absolute.

⁴⁴⁹ See *Grogan*, Opinion of AG Van Gerven, par 29

return from abroad”⁴⁵⁰ would never be tolerated under EU law. Furthermore, the ECtHR cited the fact that the Irish law granted women the ability to opt-out of the abortion ban by “lawfully travelling to another State”⁴⁵¹ as one of the justifications for its ruling in *A., B. & C. v. Ireland*.⁴⁵²

The consequence of all this is that the Irish, Polish and Maltese abortion domestic bans, along with their equivalents, effectively constrain only those women who cannot side-step the national prohibition by travelling to another EU state.⁴⁵³ In other words, these laws only prohibit abortion to those women who do not possess sufficient private economic resources to leave their countries to terminate a pregnancy. This situation is clearly discriminatory, as the undue burden of an unwanted pregnancy is only imposed on low-income women.⁴⁵⁴

Nevertheless, in its argument before the ECtHR in *A., B. & C. v. Ireland*, the Irish government, while openly acknowledging that in 2007 at least 4,686 women travelled to the UK to have an abortion,⁴⁵⁵ it still resolutely argued that Ireland’s high protection of the unborn child’s right to life justified a domestic prohibition on abortion.⁴⁵⁶ In the same case, the majority of the ECtHR did not address whether the Irish abortion ban was compatible with the non-discrimination clause of the ECHR. The Grand Chamber majority laconically stated that: “[Although] it may even be the case [...] that the impugned prohibition on abortion is to a large extent ineffective in protecting the unborn in the sense that a substantial number of women take the option open to them

⁴⁵⁰ Ibid

⁴⁵¹ *A., B. and C.* par 239

⁴⁵² See *supra* text accompanying n 370

⁴⁵³ See Cook and Dickens (n 24) 59 (describing the socially discriminatory impact that abortion bans produce). See also Council of Europe Parliamentary Assembly, Resolution 1607 (2008) par 4, (remarking that “a ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion ‘tourism’ which is costly, and delays the timing of an abortion and results in social inequities.”) The discriminatory effects that are produced by an abortion ban have also been highlighted by the report of the EU Network of Independent Experts on Fundamental Rights, ‘Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States’ (2005) available at http://crldho.cpd.r.ucl.ac.be/documents/Download.Rep/Reports2004/En.synth.rep_2004.pdf (stating that “[a] woman seeking abortion should not be obliged to travel abroad to obtain it, because of the lack of available services in her home country even where it would be legal for her to seek abortion, or because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence. This may be the source of discrimination between women who may travel abroad and those who, because of a disability, their state of health, the lack of resources, their administrative situation, or even the lack of adequate information may not do so.”) For further data concerning the number of women travelling abroad to seek abortion, see Mark Hennessy, ‘Money Plays Ever Increasing Role in Decisions of Irish Women to Travel’ *The Irish Times* (Dublin 17th December 2010); Steve Clements and Roger Ingham, ‘Improving Knowledge Regarding Abortions Performed on Irish Women in the UK’ (Crisis Pregnancy Agency Report No. 19, 2007) available at <http://www.crisispregnancy.ie/pub/CPA%20Abortion%20Trends%2019.pdf>; Astra Network, ‘Reproductive and Health Supplies in Central and Eastern Europe’ (2009) available at <http://www.astra.org.pl/PAI%20astra%20report%202009.pdf>. See also the reports of the UN Human Rights Committee: CCPR/C/IRL/CO/3, Concluding Observations on Ireland, 30 July 2008, par 13; CCPR/CO/82/POL, Concluding Observations on Poland, 2 December 2004, par 8

⁴⁵⁴ For the argument that laws forbidding abortion require women to behave as Samaritans, see D. Regan (n 274) 1569

⁴⁵⁵ *A., B. and C.* par 183

⁴⁵⁶ Ibid par 185

in law of travelling abroad for an abortion not available in Ireland [...] it is not possible to be more conclusive.”⁴⁵⁷

Yet a legal regime that discriminates between women by making abortion possible and lawful only for the women that can financially afford it and making it impossible and unlawful for the poor, conflicts with the principles of equality that should govern any liberal democratic constitutional system.⁴⁵⁸ From this point of view, Article 21 of the CFR codifies a general principle of equality in the EU basic laws for the first time and expressly prohibits any discrimination on grounds of property.⁴⁵⁹ *De lege ferenda*, therefore, it might be desirable for the ECJ, in cooperation with the national courts, to take the appropriate steps to enforce this fundamental guarantee of the CFR if necessary also by quashing national abortion legislations that discriminately impact low-income women.⁴⁶⁰

Needless to say, because of the previously mentioned legal constraints on the application of the CFR, the scenario I am depicting is perhaps unlikely to occur in the near future. In any case, a ruling by the ECJ that national bans on abortion violate the CFR would likely raise a loud public reaction, equivalent to that following *Roe v. Wade*: the decision would be welcomed by some and demonized by others. From a purely normative point of view, however, a judicial opinion stating that laws prohibiting abortion are incompatible with the EU’s non-discrimination principle would simply be the acknowledgment that restrictive domestic rules having a disparate impact on rich and poor women can no longer be acceptable in an “ever closer Union.”

In conclusion, the entry into force of the Lisbon Treaty represents a potential turning point for the protection of fundamental rights in the EU constitutional system. As the CFR, in particular, has acquired binding legal value, the EU will now be endowed with a comprehensive and advanced Bill of rights on the basis of which actions by the supranational institutions and the member states that fall within the scope of application of EU law may be reviewed.⁴⁶¹ Nevertheless, whether this transformation will have a major impact on the domestic legal systems of the EU countries remains to be seen. Some states have inserted a number of legal caveats and reservations into the EU treaties

⁴⁵⁷ Ibid par 239

⁴⁵⁸ See R. Dworkin (n 447) 27

⁴⁵⁹ On the principle of equality in the post-CFR EU constitutional system, see Paolo Caretti, ‘L’uguaglianza: da segno distintivo dello Stato costituzionale a principio generale dell’ordinamento comunitario’ in Paolo Caretti and Maria Cristina Grisolia (eds), *Lo Stato Costituzionale* (il Mulino 2010) 513; Dimitry Kochenov, ‘Citizenship Without Respect: The EU’s Troubled Equality Ideal’ (Jean Monnet Working Paper No. 8, 2010)

⁴⁶⁰ On the inescapable role that the judiciary plays in addressing the moral issues involved with abortion and to remedy inequalities, see Susanna Mancini and Michel Rosenfeld, ‘The Judge as a Moral Arbiter? The Case of Abortion’ in Andras Sajó and Renata Uitz (eds), *Constitutional Topography: Values and Constitutions* (Boom Eleven 2011); see also Robert Post and Reva Siegel, ‘*Roe* Rage: Democratic Constitutionalism and Backlash’ (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373

⁴⁶¹ See R. Lawson (n 415) 36; M. Cartabia (n 403) 103

in order to prevent the ECJ and the national courts from consistently making use of the CFR to review national laws, including abortion laws.⁴⁶²

As things stand now, the European abortion regime reflects what may be called a system of “hard pluralism.”⁴⁶³ Despite the existence of a growing consensus among the EU member states in favor of legalizing abortion, relevant regulatory differences persist among EU countries. The rise of supranational law through the case law of the ECJ and the ECtHR has placed growing constraints upon, and new challenges for, the regulatory autonomy of the member states, but has not reached the point of prohibiting states from maintaining restrictive abortion laws. Thus, while the possibility for pregnant women to travel from one state to another to seek termination of pregnancy is solidly grounded in the fabric of both EU and ECHR law, the transnational floor for protecting abortion rights enforced throughout Europe is still very weak.

Yet, from a normative standpoint, the existence of strict national abortion bans in a multilevel system in which resourceful women can evade the domestic restrictions by travelling to other EU states has discriminatory effects that undermine the principle of equality. In this situation, if the ECJ, in cooperation with national courts and under the CFR, were to review the most restrictive domestic abortion laws, it could foster the establishment of a less discriminatory legal regime. Such a regime may be called a system of “soft pluralism.” Under this framework, a woman’s right to an elective abortion, at least in the early phase of pregnancy, would be recognized at the supranational level, while states would still be free to integrate (or qualify or supersede, but not impair) this supranational standard to reflect their domestic policy preferences.

Indeed, as the United States’ experience with abortion rights shows, the imposition of a uniform transnational standard that does not allow for any local variation is bound to fail in a federal union that is premised upon states maintaining a degree of autonomy.⁴⁶⁴ At the same time, a minimum standard across the federal, multilevel architecture to protect a woman’s right to choose

⁴⁶² See C. Barnard (n 415) 283; S. Amedeo (n 418) 720

⁴⁶³ I borrow the terms “hard” and “soft” pluralism from Mark Rosen, “‘Hard’ or ‘Soft’ Pluralism? Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers” (2007) 51 *St. Louis University Law Journal* 713, who uses them to describe two alternative visions of federalism in the context of US abortion laws. Note, however, that I use the expressions “hard” and “soft” pluralism differently. To begin with, whereas he describes a system of “hard pluralism” as a federal arrangement (eg the one that, in his opinion, would exist in the US if *Roe v. Wade* were overruled) in which any constituent state of the federation can enforce its abortion ban extra-territorially (eg prohibiting its citizen from travelling abroad for an abortion), I instead regard “hard pluralism” as the abortion regime currently in force in Europe. Therefore, for my purposes, “hard pluralism” refers to a regime where states can enact abortion ban *but cannot* enforce them extraterritorially because of the constraints of supranational laws. The European arrangement that I describe would be a system of “soft pluralism” in Rosen’s terminology. In addition, whereas Rosen advocates for a system of “hard pluralism” I am convinced that “soft pluralism” would be more appropriate in the European multilevel system

⁴⁶⁴ See Daniel Elazar, ‘Federalism, Diversity and Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 1; Eric Stein, ‘Uniformity and Diversity in a Divided-Power System: the United States’ Experience’ (1986) 61 *Washington Law Review* 1081, now reprinted in *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism* (University of Michigan Press 2000) 309

whether to terminate her pregnancy appears to be a necessary condition to avoid discrimination and to ensure “a single and comprehensive vision of justice” for all members of the polity.⁴⁶⁵ Whether the European abortion regime will evolve from a system of hard pluralism to one of soft pluralism, however, depends on the future role of the CFR and “its potential for polity building in the EU.”⁴⁶⁶

Conclusion

At the dawn of the second decade of the twenty-first century, abortion and reproductive rights continue to remain extremely controversial topics on both sides of the Atlantic. In early April 2011 in the US, conservative opposition toward the allocation of federal funds to abortion providers almost derailed the difficult budget deal reached between Congress and the President and threatened to shut down the federal government.⁴⁶⁷ Simultaneously in Europe, major protests accompanied the enactment by the Hungarian nationalist government of the new Constitution, which now includes a provision to protect embryonic and fetal life “from the moment of conception,”⁴⁶⁸ a measure that critics describe as contrasting with EU fundamental rights and European constitutional values.⁴⁶⁹ At the same time, as Ireland’s continuing difficulties in implementing the ECtHR ruling indicate, nothing suggests that the heated constitutional debates over abortion are likely to scale down in the near future.⁴⁷⁰

This chapter has analyzed the implications that arise in the field of abortion law from the complex interaction among national and supranational laws in Europe. Section 1 surveyed the main regulatory models that emerge from the states’ legislation and practice in the field of abortion law. It underlined the growing trend in favor of the protection of a right to voluntary termination of pregnancy in Europe and the exceptions to this consensus, reflected in the strong disapproval of abortion in the laws of countries such as Ireland, Malta, and Poland. Section 2 examined the rising impact of EU and ECHR law in the field of abortion law and explained how the case law of the ECJ and the ECtHR has incrementally produced a set of substantive checks and procedural balances on the autonomy of the member states in the regulation of abortion.

⁴⁶⁵ Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 134

⁴⁶⁶ See M.P. Maduro (n 438) 292. Incidentally, it may be noticed that the considerations developed here with reference to Europe and the discriminatory effects that strict state abortion laws can produce in a federal system can be applied, *ceteris paribus*, to the US. For a discussion of these issues in an hypothetical post-*Roe* scenario, see R. Fallon (n 254) especially 647

⁴⁶⁷ See Jennifer Steinhauer, ‘Late Clash on Abortion Shows Conservatives’s Sway’ *The New York Times* (New York, 9th April 2011) A1

⁴⁶⁸ See Article II, Hung. Const.

⁴⁶⁹ See Joëlle Stolz, ‘La nouvelle Constitution hongroise, jugée réactionnaire, soulève l’inquiétude’ *Le Monde* (Paris, 17th April 2011)

⁴⁷⁰ See Mary Minihan, ‘Cabinet Discussed Possible Changes to Abortion Law’ *Irish Times* (Dublin, 20th April 2011)

I have argued that the overlap between domestic and transnational norms in the European multilevel architecture generates a new challenge of inconsistency in the field of abortion law. Section 3, however, made it clear that the constitutional dynamics at play in the European multilevel system are not unique. Indeed, a comparative assessment highlights that a number of tensions have also characterized the US constitutional experience with abortion law. While states' laws differed in the early 1970s, the *Roe v. Wade* decision of the US Supreme Court established a federal constitutional right for women to interrupt their pregnancies. The recognition of a federal minimum standard for the protection of the right to an abortion, however, has not prevented the states from further intervening in the field and, as a result, a plurality of regulatory models are still in place today throughout the US

Whether the recent developments occurring in the European multilevel architecture point toward an analogous evolution is unclear. Section 4 examined the recent Grand Chamber decision of the ECtHR in *A., B. & C. v. Ireland* and explained why the ruling cannot be fully regarded as Europe's equivalent to *Roe v. Wade*. The ECtHR unanimously ruled that Ireland had violated the ECHR for failing to provide an adequate legal framework by which a woman whose life was in peril due to her pregnancy could establish her right to an abortion in Ireland. At the same time, however, a majority of the ECtHR rejected the facial challenge against the Irish abortion ban, recognizing, despite the growing European pro-choice consensus, a margin of appreciation to the ECHR contracting parties in the field of abortion law.

Section 5 assessed the CFR and the alternative scenarios that opened up in the EU constitutional system after the entry into force of the Lisbon Treaty. A number of legal constraints have been placed in EU primary law to prevent the ECJ and the national courts from developing a substantive CFR-based review of member states' restrictive abortion laws. Yet, as I have argued, from a normative point of view, a CFR-based review of member states' abortion laws may be the only satisfactory solution to the discrimination resulting from a regime in which resourceful women are able to escape domestic abortion bans by travelling abroad, and poor women are not. Whether the CFR will play the same constitutionalizing role in the EU multilevel architecture that the Bill of Rights has played in the US federal system is a tantalizing question that only the future will answer.

Conclusion

This thesis has analyzed the constitutional dynamics taking place in European multilevel human rights architecture. Its purpose has been to examine the implications that emerge from the overlap and interplay between state and transnational laws dealing with the protection of fundamental rights. In the last two decades, the protection of fundamental rights has blossomed in Europe. Rights have gained in importance and status at the state level, in the legal order of the European Union (EU) and in the framework of the European Convention on Human Right (ECHR). At the same time, institutions for the protection of rights – and notably courts adjudicating rights’ claims – have seen their role strengthened everywhere in Europe. Yet, the consequences of these profound constitutional transformations have remained largely unexplored since the prevailing scholarly narratives have offered only a partial assessment of the new European legal reality.

To examine the dynamics at play in the European architecture, this thesis has advanced a new, “neo-federalist”, narrative based on a comparison with the federal arrangement for the protection of right of the United States of America (US). As it has been explained, the US federal system presents numerous empirical and normative features which make it a particularly suitable example for comparison with the European multilevel architecture. The US is structurally characterized by a plurality of Bills of Rights and by a multiplicity of courts adjudicating them. In addition, the US has historically experienced an enduring normative tension between the need to ensure uniformity and the desire to accommodate diversity in the field of human rights. As it has been argued, therefore, a comparative-based assessment of the European multilevel system can shed essential insights to understand the dynamics at play in the field of fundamental rights in Europe.

The thesis, in particular, has identified two set of dynamics taking place in the European architecture. The thesis has explained that the interplay between different state and transnational human rights standards generates several *challenges*. A challenge of ineffectiveness was identified

in those cases where transnational law operates as a ceiling for the protection of a given human right, interacting with the more advanced standards existing in several vanguard member states; while a challenge of inconsistency was identified in those cases where transnational law operates as a floor for the protection of a given human right, interacting with the less advanced standards existing in several laggard member states. The thesis, however, has underlined how the European architecture is also subject to ongoing *transformations*. Judicial and institutional changes constantly reshape the multilevel system and further reforms can be envisaged *de jure condendo* to address the remaining challenges in the protection of fundamental rights in Europe.

To provide empirical backing to the analytical framework it developed, the thesis has then taken into account four case studies, dealing with the right to due process for suspected terrorists, the right to vote for non-citizens, the right to strike and the right to abortion. The case studies covered the four “generations” of rights conventionally identified in constitutional scholarship (civil, political, social and “new generation” rights). In all cases the thesis found the recurrence of analogous patterns. Hence, it was underlined that states vary in the degree of protection they accord to each considered right; that the impact of transnational human rights law is relative, since it depends from the vanguard or laggard nature of the underlying state law; and that the European architecture for the protection of fundamental rights can be reformed – and often should be reformed – to ensure a more effective and consistent protection of human rights in Europe.

In analyzing the protection of fundamental rights in Europe, this thesis has focused on the constitutional dynamics emerging from the interaction between state and transnational human rights standards in several substantive areas of the law. In exploring the labyrinth of fundamental rights in Europe, the question of what are the implications of a multilevel human right system has been the guiding thread of the analysis. It goes without saying, however, that other threads could have been followed and that further threads will need to be followed in the future. Many interesting issues of contemporary European human rights law have not been the object of this research and I am aware of the limited purpose of my inquiry. At the same time, as the European system for the protection of fundamental rights evolves, new questions arise and new investigations will become necessary. Among others, I would like to suggest in particular three debates which promise to bear fruitful developments for the future study of European human rights law.

A first debate – which was already mentioned in several parts of this thesis, but which will require supplementary, *ad hoc*, examination – is that about the accession of the EU to the ECHR. The EU and the ECHR were both established in the aftermath of World War II to ensure peace and prosperity in Europe, but had never been formally connected. The issue of the accession of the EU to the ECHR had been for long on the agenda of the EU institutions but was never accomplished,

for either legal or political reasons. Now, after the Lisbon Treaty mandated the accession of the EU to the ECHR, the process for the reunification of the two institutions is under way, but will still take several years to be completed. While some uncertainty remains about the precise effects of the accession, it seems plausible to maintain that this event has the potentials to change in relevant ways the European architecture for the protection of fundamental rights, notably by fostering the convergence between EU and ECHR standards.

A second debate worth attention, regards the ECHR and its future influence in the legal system of the member states. On this issue, it may be noticed that two potentially opposing trends are currently underway. On the one hand, in the last decade, the ECHR has experienced a remarkable process of incorporation in the legal systems of the states. Many states have attributed to the ECHR a quasi-constitutional status, either in law or in practice, and courts in multiple jurisdictions routinely resort to the ECHR to exercise constitutional review of legislation. The interaction between the EU and the ECHR (including the prospective accession of the former to the latter) sustains this development. On the other hand, however, recent inter-governmental proposals have been brought forward to curb the role of the ECtHR and limit the capacity of the ECHR to form the basis for domestic human rights review. At the moment, it is unclear which of these trends will succeed. Yet, the result of this *enjeux* will determine whether the states' systems of human rights adjudication will develop in either a more open or a more autarchic direction.

A third debate, finally, concerns the relationship between the system for the protection of fundamental rights of the EU and the legal orders of the member states, and especially the implications of the political mechanism set up in Article 7 EU Treaty to ensure member states' compliance with the values of respect for human dignity, freedom, democracy, equality, the rule of law and human rights on which the EU is founded. Indeed, while so far the EU political branches have had few opportunities to reflect on their role in policing respect for fundamental rights by the states, a number of recent developments taking place, particularly, in Hungary have raised concerns about the sustainability of the rule of law within several EU member states. As the ghosts of intolerance return alive in many regions of the European continent, it would seem imperative for the EU institutions to re-consider the nature of their supervision on the human rights practice of the member states and pressing questions thus emerge as to what supranational checks and balances are due to ensure the protection of basic rights in the emerging EU polity.

Whatever the future of the European human rights regime will be, nevertheless, it would seem that at least one point remains out of the fray. The tension between unity and diversity, the blend between centrifugal and centripetal forces and the search for a workable balance between the need of homogeneity and the desire for heterogeneity will continue to remain at the core of the

European normative space. By analyzing in a comparative perspective the constitutional experience of the US, and by emphasizing how the US tradition of federalism embodies values of freedom, pluralism and self-governance, this thesis has argued the European multilevel human rights architecture can be meaningfully re-conceptualized as a “neo-federal” system. In the European multilevel architecture, as in the US constitutional system, the never-ending quest for *unitas in diversitate* is precisely what constitutes the essence of the federal method.

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