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Human Rights in the EU: Historical, Comparative and Critical Perspectives

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Abstract:

The chapter examines the foundational role that human rights play in the project of European integration, addressing the topic from three perspectives. First, it recounts the history of the protection of fundamental rights in the EU to emphasize that human rights have always been at the heart of the EU. Second, it compares the protection of fundamental rights in the EU with the protection at the national and international level to make the point that, actually, the EU human rights system is older and more established than most national and international systems in Europe. Third and finally, however, it also approaches the protection of human rights in the EU from a critical perspective, showing how the lack of strong mechanisms of executive enforcement in EU law constitutes a problem as the EU a faces centrifugal pressures from several member states.

KEYWORDS: European Union, human rights, history, comparison, member states

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1. Introduction

Arbeit macht frei. We cannot understand the foundational importance of human rights in the project of European integration if we don't start from reflecting on these three words, carved onto the iron gate of the Auschwitz concentration camp. For the project of European integration was, is, and should remain overall a project of human redemption for a continent historically guilty of inhuman action. While the roads of integration have been many, the end point, the mission of Europe, is peace, and with it the prevention of new atrocities. In this grand vision, human rights are not just an add-on. They are the foundation of the project and its *feuille de route*.

The core argument of this chapter is that the protection of fundamental rights is a centerpiece of the European Union (EU). The purpose of this chapter is to examine from an historical, comparative but also critical perspective the transformations in the protection of fundamental rights in the EU, shedding light on the central role that these have played – and should continue to play – in the EU. The chapter develops this argument by considering three overlapping dimensions of the protection of fundamental rights in the EU legal order.

First, the chapter examines the protection of fundamental rights in the EU in historical terms, with the aim to show a striking continuity in the importance human rights considerations have played in the project of European integration. The chapter emphasizes how human rights objectives were prominently in display in the early 1950s, when the first steps directed at federalizing a continent devastated by the war were undertaken. As the chapter suggests, this understanding helps to explain the judicial creation of an unwritten Bill of Right for the EU, starting from the 1960s until the 1990s. Moreover, the chapter underlines how human rights were among the key concerns shaping the latest transformations of the EU: after the Cold War, efforts at widening and deepening were underpinned by a new, explicit recognition of the human rights vocation of the EU, epitomized by the adoption of the Charter of Fundamental Rights.

Second, the chapter examines how the protection of fundamental rights in the EU fared compared to that in the member states – as well as in the other European regional organization devoted to the protection of fundamental rights, the Council of Europe. In this regards, the chapter highlights how (with few exceptions) the creation of norms and institutions for the protection of fundamental rights in the EU has been preceding – rather than following – developments elsewhere in Europe. Since an early phase, in fact, the EU has been endowed with a substantive set of norms, and an articulated institutional architecture, to protect human rights. While a handful of European countries had some kind of tradition of human rights protection, or human rights rhetoric, the vast majority of the current 28 member states of the EU were still authoritarian systems by the time the EU had already an advanced human rights architecture.

These considerations are relevant for the third point I will make in this chapter: it is imperative that the Union remains committed toward the protection of fundamental. Given its history, and its comparative experience, the EU should continue to protect human rights, in substance and form. Moreover, the EU should remain vigilant that human rights are respected – at the transnational level, but also within the member states. While it is frequent to hear claims that the EU should keep out from the business of looking into the human rights performance of the member states, this chapter will argue exactly the opposite: the Union should become even more attentive on what the states are doing. From a critical perspective, however, wrong political incentives currently prevent the EU political branches of government from meeting this challenge. As the chapter concludes, therefore, adequate institutional reforms ought to be considered to make sure that the EU remains a force for promoting and protecting human rights in 21st century Europe.

2. Historical perspective

Since the beginning, the project of European integration was concerned with human rights.[1] Efforts to reunite the continent after two bloody civil wars prominently featured human rights considerations. This is evident of course in the initiative to establish the Council of Europe in 1949, within which the European Convention on Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950, as a bulwark against any possible slide back in the direction of the human rights horrors committed during the war. But this also transpires from the post-war debates and the proposals in favor of establishing a political, federal-like organization, between France, West Germany, Italy and the Benelux countries. This effort, which took off with the Schuman declaration of 1950, and the establishment of the European Carbon and Steel Community (ECSC) by the Treaty of Paris in 1951, had immediately a clear human rights dimension.

In particular, as Grainne de Búrca has recently explained, the importance of the protection of fundamental rights for the founding generation emerges patently from the early attempts to endow the new Europe with a human rights instrument, and to ensure a formal connection between the EU and the just-enacted ECHR.[2] The draft Treaty establishing the European Political Community (EPC), drafted in 1952–53 as a follow-up of the ESCS, specifically provided that the ECHR would become an integral part of the basic law of the EPC.[3] In the work of the drafting committee, moreover, it was clearly assumed that the instruments of human rights protection being created would operate both vis-à-vis the public authorities of the Community, and vis-à-vis the states, hence ensuring respect for common values also at the national level. Finally, the draft of the EPC established an ambitious institutional architecture of human rights enforcement, with both judicial and political mechanisms of supervision and redress.[4]

Grainne de Búrca's exploration of the pre-history of human rights in the European legal order challenges the widespread view that the European integration process was initially concerned only with markets and economies, and proves how instead human rights shaped the early debates about the future set-up of the EU already in the 1950s.[5] This is not surprising for anyone appreciating the condition of Europe after World War II. Altiero Spinelli's *Manifesto di Ventotene* reflects an equal aspiration for unity *and freedom*,[6] and the rhetoric of the *Mouvement européen* was largely imbued with rights' aspirations.[7] In fact, it is noteworthy that "the documents available from the 1953 Intergovernmental Conference provide no evidence that any of the participants objected to any of the EPC treaty provisions dealing with human rights."[8]

Needless to say, the abandonment of the EPC Treaty after France's failure to ratify the European Defense Community Treaty in 1954, lead the Member States of the ECSC to follow a different strategy of integration, focused on "a carefully limited set of economic concerns rather than by immediately pursuing an open-ended political agenda."[9] Hence, the 1957 Treaty of Rome, establishing the European Economic Community (EEC) and the European Atomic Energy

[1] See Federico Fabbrini, *Fundamental Rights in Europe* (OUP 2014).
[2] Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105. *American Journal of International Law* 649.
[3] Ibid 660.
[4] Ibid 661.
[5] Ibid 651.
[6] See Andrew Glencross & Alex Trechsel (eds), *EU Federalism and Constitutionalism: The Legacy of Altiero Spinelli* (Routledge 2010).
[7] See Mikael Madsen and Chris Thornhill (eds), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* (CUP 2014).
[8] de Búrca (n) 663.
[9] Ibid 652.

Community (Euratom), did not include a full-fledge regime for the protection of fundamental rights within the EU system comparable to that envisaged in the draft EPC.

Yet, it is once more a revisionist oversimplification to claim that the EEC had nothing to do with human rights. To begin with, the EEC Treaty introduced new economic freedoms for natural and legal person, and entrenched a prohibition of discrimination based on nationality – which was of significant relevance for the millions of migrant workers who, for instance, had moved from Southern Italy to the mining regions of Benelux and Rheinland. Moreover, the EEC Treaty also enshrined the principle of equal pay for equal work, prohibiting discrimination based on gender: while this principle had a peculiar political rationale – namely preventing inter-state competition which would arise from the unfair dumping of labor costs through the employment of female employees[10] – it still represented a major break-through for the principle of equality.

Given this background, it is not really surprising that the European Court of Justice (ECJ) – the highest judicial organ of the Communities – began protecting fundamental rights in a praetorian manner soon after its establishment. As is well known, the introduction of an unwritten catalogue of fundamental rights at the supranational level has been one of the greatest achievements of the ECJ.[11] Despite the lack of a charter of rights in the Treaty of Rome, starting with the *Stauder* judgment of 1969 the ECJ held that fundamental rights formed part of the general principles of Community law.[12] In its effort to identify a *corpus* of human rights norms for the EU, the ECJ drew inspiration from the the common constitutional traditions of the Member States and, as stated in the 1974 *Nold* decision, from "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."[13] In *Rutili*, the ECJ clarified that the ECHR represented a source of special importance, also in light of the fact that all member states had by then become parties to the ECHR.[14]

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",[15] and that it was therefore an attempt to foster the newly crafted doctrines of supremacy and direct effect of Community law within the national legal systems.[16] 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."[17] 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

[10] See Catherine Barnard, 'Gender Equality in the EU: A Balance Sheet' in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 215, 216.
[11] 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 at al (eds), *The EU and Human Rights* (OUP 1999) 859.
[12] Case 29/69 *Stauder* [1969] ECR 419. But see also Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
[13] Case 4/73 *Nold* [1974] ECR 491.
[14] Case 36/75 *Rutili* [1975] ECR 1219.
[15] See C. Cost n. 183/1973 *Frontini* (holding that the supremacy of EU law cannot extend to the point of undermining the protection of state constitutional rights); BVerfGE 37, 271 (1974) *Solange I* (idem).
[16] See Jurgen Kühling, 'Fundamental Rights' in Armin von Bogdandy and Jurgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2006) 501 and 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.
[17] Brun Otto Bryde, 'The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism' in Miguel Poiares Maduro and Loïc Azoulai (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.

the member states.[18] 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."[19]

Be that as it may, the ECJ was able to promote a significant expansion of human rights within the areas on which the EEC had competence.[20] From the 1960s until the 1990s the ECJ built up an important human rights case law, recognizing among others a right to property,[21] a right to a fair trial,[22] the privilege against self-incrimination[23] – but also the freedom to provide services in the field of abortion.[24] Furthermore, while the ECJ required that EU institutions comply with fundamental rights, it also policed compliance by the member states, when they implement Community law,[25] or when they exploit derogations permitted by Community law.[26]

The human rights *acquis* of the ECJ proved of major help when, at the beginning of the 1990s, the EU institutions and its member states faced the momentous transformations produced by the fall of the Berlin Wall. These events offered the opportunity to deepen the process of European integration among the member states, paving the way towards its widening with the accession of new member states.[27] Hence, with the Treaty of Maastricht of 1992, the EEC was transformed into the European Community (EC) and endowed with new powers, including in the context of Economic and Monetary Union (EMU), and embedded into a broader organization, the EU, with competence also in the area of Common Foreign and Security Policy (CFSP) and Justice and Home Affairs. In the field of fundamental rights, then, Article F EU Treaty codified the principle already elaborated in the case law of the CJEU that the EU "shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law", thus enhancing the role of the ECJ as a court with an explicit mandate to protect human rights in the EU.[28]

As Wojciech Sadurski has underlined, the explicit recognition of human rights in the text of primary EU law reflected the awareness of policy-makers that the end of the Iron Curtin would lead to the enlargement of the EU toward Central and Easter European countries.[29] However, because these nations had not been able to develop a human rights or rule of law tradition due to the Soviet occupation,[30] Western European states felt the need to clarify what were the key values underpinning the EU, and what would be the pre-conditions for acceding to it.[31] In fact, respect for human rights and the rule of law were entrenched on top of the list of the so-called Copenhagen

[18] See infra Section 3.
[19] Bryde (n) 121, quoting Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr 1972) 716.
[20] See José Cuñha Rodriguez, 'The Incorporation of Fundamental Rights in the Community Legal Order' in Miguel Poiares Maduro and Loïc Azoulai (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.
[21] See Case 44/79 *Hauer* [1979] 3727.
[22] See Case 222/84 *Johnston* [1986] ECR 1651.
[23] See Case 374/87 *Orkem v Commission*, [1989] ECR 3283.
[24] See Case C-159/98 *Grogan* [1991] ECR I-4685.
[25] See Case 5/88 *Wachauf* [1989] ECR 2609.
[26] See Case C-260/89 *ERT* [1991] ECR I-2925.
[27] See Ingolf Pernice and Ralf Kanitz, 'Fundamental Rights and Multilevel Constitutionalism in Europe, Humboldt Universität Walter Hallestein Institut Paper No. 7/2004.
[28] 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.
[29] 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.
[30] See infra Section 3
[31] Ibid 386.

criteria – drafted in 1993 by the European Council – needed to qualify for membership in the EU.[32] Moreover, as the prospect for accession became closer, the Treaty of Amsterdam of 1997 (which also renamed Article F of the Treaty of Maastricht as Article 6 TEU) introduced a political mechanism to ensure member states' compliance with the Union's fundamental rights principles.[33] According to then Article 7 TEU, the European Council could vote by unanimity (with the exclusion of the member state concerned) to suspend the voting rights of a member state found to be in "serious and persistent breach" of human rights.

As is well known, the first potential attack against the human rights principles of the EU did not come from a post-Communist country, but rather from one of the member states which joined the EU in 1995: Austria. Moreover, the mechanism of Article 7 proved inefficient: since that clause could only be activated *after* a breach of human rights had taken place, in 1999 the then 14 other states of the EU decided to respond to the entry into government of a xenophobic, right wing party by acting outside the framework of EU law, through the suspension of diplomatic relations with Austria.[34] This strategy – aimed at preventing a member country from faulting the common values of the EU, and thus at tackling a potential violation of human rights *before* it happened – was eventually codified at the next round of treaty revisions in EU primary law.[35] The Treaty of Nice of 2001, in fact, introduced in Article 7 TEU a new procedure, whereby the Council acting by a super majority of its members can take action against a member state where there is "a clear risk of a serious breach" of the rule of law, democracy and the protection of fundamental rights.

The high investment on human rights issues emerging in the political and legal debates taking place in the EU during the 1990s underlines the foundational importance that the protection of fundamental rights has continued to have throughout the project of European integration. Even in a period when the EU was making quick steps toward completing the common market and creating an EMU, rights considerations were central in shaping the constitutional design of the EU. This trend reached its apex when, in 1999, the European Council meeting in Cologne decided to establish a special Convention charged to draft a Charter of Fundamental Rights for the EU.[36] The Convention – which blended, in an innovative fashion, delegates of national governments together with representatives of the EU institutions and national parliaments – worked swiftly to produce an ambitious Bill of Rights, working on the assumption that the document would become binding for the Union and its member states.[37]

The Charter of Fundamental Rights was conceived as as a restatement of the general principles of EU fundamental rights law but is *de facto* quite innovative in many respects.[38] In fact, it represents arguably the most update and complete human rights document existing world-wide. The Charter overcomes the Cold War distinction between, on the one hand, civil and political rights, and, on the other, social and economic rights. Moreover, it includes a number of modern provisions reflecting the need and concerns of the contemporary era – such as the right to privacy and data protection, and environmental rights.

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[32] European Council Conclusions, Copenhagen, 21-22 June 1993, SN 180/1/93.

[33] See Bruno de Witte & Gabriel Toggenburg, 'Human Rights and Membership of the European Union' in Steve Peers and Angela Ward (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Hart Publishing 2004) 59.

[34] Sadurski (n) 400.

[35] De Witte & Toggenburg (n) 60.

[36] European Council Conclusion, Cologne, 3-4 June 1999.

[37] See the position taken by Roman Herzog the President of the Convention, and former President of the German Constitutional Tribunal, on 17 December 1999, CHARTE 4105/00 BODY 1, Annex 1 (reporting his view that the Convention should work "as if [the Charter were to become] a legally binding list").

[38] Marta Cartabia, 'L'ora dei diritti fondamentali nell'Unione Europea' in Marta Cartabia (ed), *I diritti in azione* (Il Mulino 2007) 13, 51.

The Charter is opened by an inspired preamble and structured in 7 thematic chapters. Title I ("Dignity") affirms the value of human dignity and the prohibitions of the death penalty, of torture and slavery. Title II ("Freedoms") entrenches a plurality of civil rights, including free speech, freedom of religion, freedom of assembly – but also the right to education, the right to privacy and the right to asylum. Title III ("Equality") affirms the prohibition of discrimination, based on gender, race, color ethnic or social origin, language, religion or belief: moreover, it proclaims the right of the child, of the elderly and of the persons with disabilities. Title IV ("Solidarity") protects a plurality of social rights, ranging from the rights to collective bargaining and strike, to the rights of social security and health care – up to the rights to consumer and environmental protection. Title V ("Citizen's Rights") encompasses inter alia several political rights, the right to free movement and the right to a good administration. Title VI ("Justice"), then, includes a variety of rights related to the civil and criminal process, including the right to an effective remedy, the presumption of innocence and the principle of *ne bis in idem*.

Finally, Title VII of the Charter ("General Provisions Governing the Interpretation and the Application of the Charter") sets horizontal provisions on the application and the interpretation of the Charter. With regard to the former, Article 51 disposes that the Charter shall apply to the institutions of the EU as well as to the Member States "when they are implementing Union law" – a clause which has been interpreted to reflect the pre-existing case law of the ECJ.[39] With regard to the latter, Article 52 provides that rights enshrined in the Charter can be subject to limitations in accordance with the principle of proportionality, and provided their essence is not infringed. Moreover, Article 52 also includes a reconciliation clause, which requires the interpreter to read provision of the Charter which tracks provision of the ECHR, in accordance with ECHR law. Otherwise, Article 53 also introduces a safeguard clause – whose meaning however ought to be subject to qualifications[40] – which affirms that nothing in the Charter shall be "interpreted as restricting or adversely affecting human rights as recognized, in their respective fields of application, by Union law," by the ECHR and by member state's constitutions.

The Charter of Fundamental rights was officially proclaimed in Nice in December 2000 by the EU institutions – with a non-binding status.[41] Given its comprehensive features, however, the Charter was soon actively employed by the EU (and national) judiciary as an advanced instrument for the protection of fundamental rights.[42] The Charter was then included as Part II of the Treaty establishing a Constitution for Europe in 2003.[43] Moreover, after the failure of the Constitution in the French and Dutch referenda of 2009, the Charter was "saved" by the Treaty of Lisbon.[44] Article 6 TEU, as modified by the Treaty of Lisbon, in fact, states that the EU recognizes the rights and freedoms set out in the Charter, "which shall have the same legal value as the Treaties." Since the entry into force of the Treaty of Lisbon on 1st December 2009, therefore, the Charter has acquired

[39] See Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/32.
[40] See Fabbrini (n 1) 39.
[41] See Koen Lenaerts and Eddy de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *Common Market Law Review* 273.
[42] See Case T-54/99, *max.mobil*, ECLI:EU:T:2002:20; Case C-540/03, *Parliament v. Council*, ECLI:EU:C:2006:429.
[43] See 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.
[44] See Bruno de Witte, 'Saving the Constitution? The Escape Routes and their Legal Feasibility' in Giuliano Amato, Hervé Bribosia, and Bruno de Witte, *Genesis and Destiny of the European Constitution* (Bruylant 2007) 919.

the status of EU constitutional law,[45] and binds the EU institutions and the member states when their action falls under the scope of application of EU law.[46]

The codification of a Charter of Fundamental Rights, however, has not implied a fossilization of the protection of human rights in the EU.[47] To the contrary, taking inspiration from the Charter, the ECJ has delivered in the last few years a series of remarkable decisions on human dignity, [48] non-discriminations on the basis of gender [49] or sexual orientation, [50] freedom of expression,[51] social rights,[52] political entitlements,[53] as well as due process rights in the context of national security.[54] In the field of privacy and data protection then, the ECJ has vested with confidence the role of a human rights court, [55] holding inter alia that data subjects have a fundamental right to be protected against systematic retention of personal data for law enforcement purposes,[56] a right to request removal of data about them from on-line search engines,[57] as well as a right to know how their data will be used when they are transferred to third countries.[58]

Moreover, the protection of fundamental rights is today also an important policy of the Union, both internally and externally.[59] Since 2007 the EU has a Fundamental Rights Agency, empowered to monitor and promoted human rights;[60] the European Parliament is endowed with an ad hoc Committee on Civil Liberties which verifies the human rights compliance of EU legislation;[61] and the European Commission has recently created a post of First Vice President with responsibility on the Charter of Fundamental Rights and the Rule of Law.[62] In its interaction with

[45] See Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *Common Market Law Review* 617.
[46] See Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945.
[47] See Cartabia (n) 37.
[48] See Case C-36/2002, *Omega* [2004] ECR I-9609 (recognizing a fundamental right to dignity as a justification for the limitation of the freedom of movement of goods).
[49] See e.g. Case C-285/1998, *Kreil* [2000] ECR I-69 (declaring incompatible with EU law a provision of the German Constitution prohibiting women from serving in the military); Case C-46/07, *Commission v. Italy* [2008] ECR I-151 (declaring incompatible with EU law a provision of the Italian social security legislation setting up a different retirement age for men and women).
[50] See e.g. Case C-117/2001, *K.B.* [2004] ECR (recognizing the right of transsexuals); Case C-423/2004, *Richards* [2006] ECR II-3585 (idem).
[51] See e.g. Case C-112/2000, *Schmidberger* [2003] ECR I-5659 (recognizing the right to freedom of expression as a justification for the restriction of the freedom of movement); Case C-380/05, *Centro Europa 7* [2008] ECR I-349 (declaring incompatible with EU law a provision of the Italian media law which did not ensure pluralism in the broadcasting system).
[52] See e.g. Case C-184/99, *Grzelczyk* [2001] ECR I-6193 (recognizing the right of migrant students to obtain social security benefits in the host state); Case C-438/05, *Viking* [2007] ECR I-10779 (recognizing a fundamental right to strike).
[53] See e.g. Case C-300/04, *Eman & Sevinger (Aruba)* [2006] ECR I-8055 (holding a Dutch law restricting the franchise to the EU Parliament of Dutch citizens residing in Aruba incompatible with EU law).
[54] See Joined Cases C-402/05 P and C-415/05 P, *Kadi & Al Barakaat* [2008] ECR I-6351, and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Council, Commission and United Kingdom v. Kadi*, judgment of 18 July 2013, nyr.
[55] See Federico Fabbrini, 'The EU Charter of Fundamental Rights and the Right to Data Privacy: The European Court of Justice as a Human Rights Court' in Sybe De Vries et al (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart Publishing 2015) 261.
[56] See Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014:238.
[57] See Case C-131/12, *Google Spain v. Agencia Española de Protección de Datos (AEPD)*, EU:C:2014:317.
[58] See Case C-362/14 *Schrems*, EU:C:2015:650.
[59] See Philip Alston & Joseph H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston et al (eds), *The EU and Human Rights* (OUP 1999) 3.
[60] Council *Regulation* (EC) No 168/2007 establishing an EU Agency for Fundamental Rights OJ 2007 L 53/1.
[61] See Vicki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015).
[62] European Commission President Jean-Claude Juncker, Mission Letter to Frans Timmermans, 1 November 2014.

the rest of the world, then, the EU pursues a human rights inspired foreign policy,[63] and the Vice President of the Commission who is High Representative for the EU in CFSP adopts periodically an external EU human rights agenda, and reports on it to the Council.[64]

Needless to say, the protection of fundamental rights in the EU – as everywhere else – is not without its shadows too.[65] The EU institutions and the member states bare the guilt for having watched idly while a new genocide was being committed in the European continent in the early 1990s – with Dutch soldiers policing the Muslim enclave of Srebrenica handing over women and children to Serb forces for mass extermination.[66] And the EU courts have also missed opportunities to further develop the protection of human rights: much criticisms, in particular, have been voiced at the decisions of the ECJ to block, first in 1996,[67] and then in 2014,[68] the accession of the EU to the ECHR – despite the fact that the new Article 6(3) TEU, as modified by the Lisbon Treaty, explicitly required so as a way to enhance the consistency of the European multilevel human rights architecture.[69] Nevertheless, the fact that the EU has "for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe" was the key motive that prompted the Nobel Committee to award to the EU the Peace Prize in 2012.[70]

In conclusion, in Europe anno 2016, the protection of fundamental rights remains as important for the EU as it was at the beginning of the project of European integration. As this section has claimed, human rights considerations inspired the creation of supranational authorities in Europe, and prominently featured in legal and institutional proposals under debate in the early 1950s. Human rights considerations, then, motivated the judge-made developments of the EU legal order steered by the ECJ since the 1960s, which lead to the creation of an unwritten human rights acquis for the EEC. Human rights consideration finally, shaped the transformations of the EU after the end of the Cold War – prompting the codification of the ECJ human rights doctrine, the establishment of new mechanisms of political supervision, and eventually the proclamation of a Charter of Fundamental Rights for the EU. At any historical stage in the development of the project of European integration, in other words, the protection of fundamental rights represented a key concern, and a key incentive for integration – suggesting that the protection of fundamental right ought to be seen as a normative foundation of the EU.

3. Comparative perspective

The previous section has explained that the EU has been involved in the business of human rights since its creation: from an historical perspective, the protection of fundamental rights has been a *Leitmotiv* in the project of European integration. This section takes a step forward and claims that the EU has greater experience with the protection of human rights that most other (national and international) public authorities in Europe: from a comparative perspective, the EU has been involved in the business of human rights protection longer than almost any European state or

[63] See Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP 2016).
[64] High Representative of the EU Communication, 'Action Plan on Human Rights and Democracy (2015-2019): Keeping Human Rights at the Heart of the EU Agenda', 28 April 2015, JOIN(2015)16 final.
[65] See infra Section 4.
[66] See Joseph H.H. Weiler, 'Deciphering the Political and Legal DNA of European Integration' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013) 143.
[67] See Opinion 2/94 [1996] ECR 1759.
[68] See Opinion 2/13 EU:C:2014:2454.
[69] But see also Protocol No. 8 TEU.
[70] See Nobel Prize, 'European Union (EU) – Facts', available at: http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/eu-facts.html (last visited 24 May 2016).

regional organization.[71] While the reader may find this claim surprising in an era of growing Euroscepticism, this section endeavors to shed light on several hard facts which are often neglected in the public debate about human rights and the EU.

In contemporary constitutional law theory the protection of fundamental rights is typically associated with the existence within a given legal system of substantive and institutional guarantees which are capable of securing respect for human rights.[72] Human rights require, in substantive terms, the existence of a catalogue of fundamental rights entrenched in the supreme law of the land – and thus removed from the ordinary legislative process, so that transient majorities are unable to change the catalogue of human rights at will.[73] Moreover, human rights require, in institutional terms, the existence of mechanisms of enforcement, capable to sanction possible rights' infringements: since the end of World War II, in particular, widespread consensus exists on the idea that courts ought to play such a role.[74] At the same time, based on the experience of totalitarianism of the first half of the 20th century, contemporary constitutionalism requires judicial review to operate not only vis-à-vis the executive branch, but also vis-à-vis the legislature: as the legislative power can infringe on human rights just as much as the executive, the power of courts to strike down legislative action is today universally considered as a condition to ensure the protection of fundamental rights and freedoms in a legal system.[75]

Now, when measured by these standards, the EU appeared to fare better than most competitors in the protection of fundamental rights – since an early phase of the project of European integration. As reported in the previous section, since the 1960s the EU came to have a judge-made catalogue of fundamental rights – considered part of the general principles of EU law.[76] This unwritten but substantive bill of rights had thus a constitutional status, being beyond the reach of the EU institutions and of the EU member states in their legislative capacity. Moreover, the EU was endowed with an institutional architecture designed to ensure compliance with constitutional norms.[77] In particular, already the Treaty of Rome explicitly created multiple mechanisms of judicial review of executive and legislative action: Either through the preliminary reference procedure[78] – which allows (or in some case: compels) national courts to refer a question to ECJ on the interpretation or validity of EU law (and indirectly also of national law) – or through the action for direct annulment[79] – which allows European *resortissants* to challenge EU legal measures directly and individually afflicting them – the ECJ was vested with the power to "ensure that in the interpretation and application of the Treaties the law is observed."[80]

This state of affairs is remarkable when compared with the substantive and institutional features of the other public authorities existing in Europe at the time. At the regional level, the Council of Europe has been explicitly designed as an organization for the promotion and the

[71] For a comparison of the EU system for the protection of fundamental rights with the systems in place in other federal regimes, and notably in the United States see instead Fabbrini (n 1) 25.
[72] See e.g. Georg Nolte (ed), *European and US Constitutionalism* (CUP 2005) and Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans., OUP 2010).
[73] See e.g. Andras Sajó, *Limiting Government: An Introduction to Constitutionalism* (CEU Press 1999) and Augusto Barbera, *Le basi filosofiche del costituzionalismo* (Laterza 1996).
[74] See e.g. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale UP 1962) and Ahron Barak, *The Judge in a Democracy* (Princeton UP 2006).
[75] See e.g. Gustavo Zagrebelsky, *Il diritto mite* (Einaudi 1992) and Dieter Grimm, *Die Verfassung und die Politik: Einsprüche in Störfällen* (Beck 2001).
[76] See Giuseppe Federico Mancini, *Democracy and Constitutionalism in the European Union* (Hart Publishing 2000).
[77] See Pierre Pescatore, *Le droit de l'intégration* (1972 repr. Bruylant 2005).
[78] See Art 177 TEEC, now Art 267 TFEU.
[79] See Art 173 TEEC, now Art 263 TFEU.
[80] See Art 19 TEU.

protection of human rights.[81] The ECHR, in fact, listed a set of civil and political rights which Contracting Parties committed to respect within their domestic systems. However, the mechanisms of enforcement of the ECHR were initially fairly weak.[82] While the ECHR did establish a Court – the European Court of Human Rights (ECtHR) – access to this institution was filtered by a political mechanism designed to shield the member states: Pursuant to the original text of the ECHR, a European Commission of Human Rights (ECommHR) was empowered to decide on the cases, and propose a friendly settlement to the disputes. The decision to refer a controversy to the ECtHR rested on the ECommHR alone, and for its first 30 years of existence the ECtHR only received a handful of cases, often in the context of state-to-state conflicts.[83]

At the same time, the protection of fundamental rights suffered from significant substantive or institutional weaknesses also at the national level. The six founding states of the EU all bear the blunt, albeit with different degrees, of the horrors of the Holocaust. While the guilt stood mainly on Nazi Germany, as Joseph H.H. Weiler has remarked, also in the other five states "important social forces became complicit and were morally compromised. This was obviously true of Fascist Italy and Vichy France. But even the little Luxembourg contributed one of the most criminally notorious units to the German army, and Belgium distinguished itself as the country with the highest number of indigenous volunteers to the occupying German forces. The betrayal of Anna Frank and her family by their good Dutch neighbors was not an exception but emblematic of the Dutch society and government, which tidily handed over their entire Jewish citizenry for deportation and death."[84] The rise of totalitarian regimes in the 1920s and 1930s and the bloodshed of war during the 1940s had demonstrated the fragility of the liberal state, built on 19th century ideas of the rule of law, parliamentary supremacy, and state self-limitation. Given the failure of majoritarianism one would have expected that after the War states would take steps to protect fundamental rights by creating counter-majoritarian institutions, keeping in check democratic legislatures.

Yet, of the six founding states of the EU only three overhauled their constitutional systems, only two of them established checks on the exercise of legislative power and only one of them adopted new mechanisms to adjudicate human rights claims on a broad basis. In Belgium, the Netherlands, and Luxembourg the termination of the hostilities of World War II and the re-organization of public life simply brought to the re-establishment of the constitutional charters governing the states – dating respectively to 1814, 1831 and 1842. A few amendments were adopted to update the content of these Constitutions. Notably, in the Netherlands, a constitutional revision enacted in 1956 introduced new provisions regulating the relationship between the Dutch legal order and international law, recognizing the supremacy of duly ratified treaties over conflicting domestic acts.[85] Yet the structure of these documents remained solidly grounded in *Rechtsstaat* ideas that judicial oversight would operate only vis-à-vis the executive branch, while the democratic legislature would remain the main source for the protection of fundamental rights catalogued in the Constitution. At its extreme, the Dutch Constitution even preserved the written prohibition of judicial review of legislation originally introduced in 1848, confirming its faith in the capacity of the political process to correct its own excesses.[86]

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[81] See Andrew Moravcsik, 'The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217.

[82] See Danny Nicol, 'Original Intent and the European Convention on Human Rights' [2005] Public Law 152.

[83] See e.g. *Ireland v. United Kingdom* [1978] ECHR 1 (finding a violation of Article 3 by the UK in Northern Ireland).

[84] Joseph H.H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) 9 *International Journal of Constitutional Law* 678, 685, fn 2.

[85] See Arts 65-66 Const. Nl.

[86] See Maurice Adams & Gerhard van der Schyff, 'Judicial Review by the Judiciary in the Netherlands: A Matter of Politics, Democracy or Compensating Strategy?' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 399.

France, then, was rhetorically *la patrie de droits de l'homme*, but in constitutional terms, the end of World War II led to the restauration. The Constitution of the Fourth Republic of 1946 re-created a parliamentary form of government with no external checks on legislative powers. The Constitution did not include any catalogue of right, save for a reference in the non-binding preamble to the Declaration of the Rights of Man and Citizen of 1789 and to a new set of political, economic and social principles "especially necessary to our times." The 1946 Constitution established a Constitutional Committee composed by members of the legislature and the President of the Republic, but its task was purely advisory.[87] Nor much changed after the Algerian crisis and the *retour* of Général de Gaulle. Once again, the Constitution of the Fifth Republic – adopted in 1958 (after the entry into force of the Treaty of Rome and the ECHR) – did not include any reference to fundamental rights but in the preamble. And albeit it established a Constitutional Council it gave to this body mainly the task to keep in check the Parliament (whose powers were explicitly tailored) against encroachments into the Presidential prerogatives (whose powers were hardly defined).[88] As Alec Stone Sweet has explained,[89] it took a revolution for the Constitutional Council to begin in 1971 referring to human rights in its review.[90] And until 2008,[91] the Constitutional Council remained constrained, its review being subject to referral by political institutions and confined to the examination of the bills of Parliament a priori, before their enactment.[92]

Hence it is only in Italy and West Germany that new mechanisms to review and constrain the action of the political branches were put in place. The Italian Constitution of 1948 codified a long list of civil, political, social and economic rights and created a constitutional court to arbitrate conflicts between branches of government and review legislation.[93] Yet, as the Constitution was the result of a compromise between several political forces (including Communist and Liberal parties wary of judicial review), the role of the *Corte Costituzionale* was tempered.[94] In fact, the functioning of the court and the modalities for the exercise of its review were delegated to a constitutional act and then to an ordinary statute, which delayed the beginning of the court's operation to 1956.[95] Pursuant to Italian legislation the constitutional court was entrusted of review of legislation in direct proceedings – in which the state challenged regional legislation, or vice-versa – or in indirect proceedings – i.e. preliminary reference submitted by ordinary courts who doubted about the constitutionality of legislation they had to apply in the course of an ordinary civil, criminal or administrative case or controversy.[96] Hence, republican legislation ended up delegating to the ordinary judiciary (which was at worse compromised with Fascism, and at best committed to a formalistic-legalistic approach) the task to act as a bulwark against possible human rights

[87] See Didier Maus, 'Les origines : avant 1958, l'impossible contrôle de constitutionnalité' Michel Verpeaux & Maryvonne Bonnard (eds), *Le Conseil Constitutionnel* (La documentation Française 2007) 15.
[88] See the position taken by Michel Debré, Minister of Justice and main author of the French Constitution, in front of the Conseil d'Etat on 15 August 1958 (reporting the view that the Constitutional Council ought to serve as the "watchdog" of Parliament, protecting the *domaines réservés* of the President of the Republic).
[89] Alec Stone-Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (OUP 1992).
[90] See Décision no. 71-44 DC of 16 July 1971 (recognizing that the preamble of the Constitution of 1958, which refers to the Preamble of the Constitution of 1946 and to the Declaration of the Rights of Men and Citizens of 1789 constitute part of the benchmark the Constitutional Council uses to exercise judicial review).
[91] See infra n __
[92] See Federico Fabbrini, 'Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation' (2008) 9 *German Law Journal* 1297.
[93] See Giuseppe Franco Ferrari (ed.), *Introduction to Italian Public Law* (Giuffré 2008).
[94] See Enzo Cheli, *Il giudice delle leggi* (Il Mulino 1996).
[95] See Legge costituzionale del 9 febbraio 1948; and legge dell'11 marzo 1953, no. 87 (It).
[96] See Vittoria Barsotti et al., *Italian Constitutional Justice in Global Context* (OUP 2015).

violations – reflecting what Sabino Cassese has called a striking continuity between the pre-War and the post-War Italian state.[97]

In West Germany, instead, the Basic Law adopted in 1949 introduced a major break with the past. The fact that Germany was an occupied, and divided state, and that therefore the exercise of constitution-making was not the result of a sovereign decision, played a key role.[98] By drafting for the defeated country a new basic law, the allied nations enshrined dignity as the cornerstone of the new constitutional order, established federalism as a way to diffuse future threats to centralization of power,[99] and created a powerful constitutional court.[100] Besides competences analogous to those of the Italian constitutional court, the German *Bundesverfassungsgericht* was also entrusted with the adjudication of individual direct complaints: any German citizens doubting about the compatibility of any executive, legislative or judicial act with the human rights protected by the Basic Law could bring a case to the constitutional court asking it to declare the act unconstitutional.[101] This unprecedented mechanism – called *Verfassungsbeschwerde* – coupled with the mandate that West Germany participate in project of European integration, was designed to ensure that Germany's future would lay safely in the direction of peace and human rights. Unsurprisingly, if you wish, counter-majoritarianism and human rights concerns reached their nadir in West Germany.

However, as Giacomo Delledonne and I have argued elsewhere, despite the fact that the new constitutional systems of West Germany and Italy included important new substantive and institutional features designed to protect and promote fundamental rights, the record of national constitutional courts in the field of human rights during the 1950s and 1960s was weaker than what it is generally thought.[102] Even though both the *Bundesverfassungsgericht* and the *Corte Costituzionale* were technically empowered to review national legislation in light of constitutional human rights, a systematic study of the case law of these courts shows that in their earlier years of existence they were cautious in protecting fundamental rights.[103] Besides purging the legal order from Nazi and Fascist norms, the Italian and German constitutional courts were mainly concerned with issues of structure.[104] Thus, at least in an earlier phase, protection of constitutionally entrenched fundamental rights was more the *indirect* result of the struggle to deal with totalitarian past than a goal in itself. Certainly, by the late 1960s these constitutional tribunals had established themselves within the legal order and evolved into an important force for the protection of human rights.[105] But the important point to be made here is that this development substantially corresponds with the period in which also the ECJ started developing a human rights catalogue for the EU too.[106]

In sum, a comparison of the substantive and institutional architectures for the protection of human rights at the national and EU level in the first two decades after World War II, shows that the EU was endowed with a more advanced human rights regime that four of the six founding member states, which had not constitutionalized a catalogue of human rights and empowered a

[97] See Sabino Cassese, *Governare gli italiani. Storia dello Stato* (Il Mulino 2014).
[98] See John Gimbel, *The American Occupation of Germany: Politics and the Military, 1945-1949* (Stanford UP 1968).
[99] See Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. I (2nd ed. Beck 1984) 666.
[100] See Donald Kommers & Russel Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed. Duke UP 2012).
[101] See Arts 90 to 95 *Bundesverfassungsgerichtsgesetz* vom 12. März 1951 (Ger.).
[102] Giacomo Delledonne & Federico Fabbrini, 'The Founding Myth of EU Human Rights Law: Revisiting the Origin of the European Human Rights Jurisprudence' XXX
[103] Ibid.
[104] Ibid.
[105] See e.g. Dieter Grimm, 'The Role of Fundamental Rights After Sixty-Five Years of Constitutional Jurisprudence in Germany' (2015) 13 *International Journal of Constitutional Law* 9 and Tania Groppi, 'The Italian Constitutional Court: Towards a "Multilevel System" of Constitutional Review' (2008) 3 *Journal of Comparative Law* 101.
[106] Delledonne & Fabbrini (n).

constitutional court to review its compliance. At the same time, while post-Nazi West Germany and post-Fascist Italy had moved toward the entrenchment of human rights in their new constitutions, and the creation of ad hoc institutions tasked to police compliance with fundamental liberties both by the executive and the legislature, the track-record of national constitutional courts highlights that the protection of human rights at the state level was really no more advanced in substance than the one existing at EU level. While much scholarship has been devoted to study the influence that the German and Italian constitutional courts had on the rise of the EU human rights jurisprudence, the fact remains that both national and EU courts essentially started to play an important role in the field of human rights protection simultaneously, from the late 1960s.[107]

The EU has also maintained a lead in the protection of fundamental rights in comparison with the new member states and the (reformed) institutions of the Council of Europe over the years. In fact, few of the countries joining the EU in the seven rounds of enlargements (1973, 1981, 1986, 1995, 2004, 2007 and 2013) had institutional and substantive mechanisms of human rights protection – not to mention a human rights tradition – which matched that of the EU. Certainly, the United Kingdom (UK) had a centennial history of respect for civil rights:[108] in its unique evolution, the British system had internalized human rights considerations through acts of Parliament and constitutional conventions,[109] and the democratic tradition had succeeded in preventing slides toward autocracy. In fact, in the 1940s the UK had been the only country standing alone against the winds of totalitarianism blowing from the continent (and the bombs of the *Luftwaffe*). However, by the time it became an EU member in 1973, the UK did not have a written Constitution and under the doctrine of parliamentary sovereignty, the UK excluded that judges could review Westminster legislation for compliance with human rights. While these constitutional features reflected a model of political constitutionalism proper of the Commonwealth tradition,[110] they remained at odds with the reality of EU law: in fact, with the adoption of the Human Rights Act in 1998,[111] also the UK would eventually entrench human rights as part of the supreme law of the land,[112] and embrace judicial review as part of its system.[113]

Comparable features also characterized the Nordic countries (Denmark, Sweden and Finland) – which in their self-conception had a proud tradition of human rights, but either lacked human rights documents, or lacked human rights judicial review.[114] Ireland, instead, had a written Constitution since 1937, and recognized judicial review.[115] But the Constitution only included a few fundamental rights provisions, and although the Supreme Court has identified several unenumerated rights it has done so mostly on the basis of the Catholic commitment expressed in the Constitution's preamble.[116] A similar situation existed in Austria: the Constitution of 1920 – amended in 1929, suspended after the *Anschluss*, and resumed in 1945 – had been the first ever to create a constitutional court, on the Kelsenian model.[117] However, the Constitution only included structural

[107] See supra n __
[108] See Charles McIlwain, *Constitutionalism: Ancient and Modern* (Cornell UP 1947).
[109] See Albert V. Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed. Liberty Classics 1915).
[110] See Richard Bellamy, *Political Constitutionalism* (CUP 2007).
[111] See infra n __
[112] See D. Vick, 'The Human Rights Act and the British Constitution' (2002) 37 *Texas International Law Journal* 329.
[113] See Richard Gordon and Tim Ward, *Judicial Review and the Human Rights Act* (Routledge 2001).
[114] See Marlene Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review' (2010) 48 *Journal of Common Market Studies* 1039.
[115] See Seamus O'Tuama, 'Judicial Review Under the Irish Constitution: More American Than Commonwealth' (2008) 12 *Electronic Journal of Comparative Law* 1.
[116] See Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1226, 1273.
[117] See Hans Kelsen, 'La garantie juridictionnelle de la Constitution (La justice constitutionnelle)' [1928] *Revue Droit Public* 197.

provisions.[118] Moreover, frozen in the Cold War, the country had arguably not developed a strong human rights culture, as evidenced by the previously mentioned 1999 crisis.[119] As for the countries of Southern, Central and Eastern, Europe, the admission to the EU corresponded with the transition toward democracy and human rights.[120] It is a fact that when the EU had already an established system for the protection of fundamental rights, illiberal autocracies were ruling Spain, Portugal, Greece, Poland, Hungary, Estonia, Lithuania, Latvia, Romania, Bulgaria, Czekia, Slovakia, Slovenia and Croatia (the last 4 countries, of course, did not even exist, as they only emerged from the break-up of Czechoslovakia and Yugoslavia in the 1990s). It is also worth recalling that this was true for *half of Germany* – a reality quickly forgotten with the reunification.[121]

As is well known, the admission to the Union, or the prospect thereof, together with the influence of the ECHR, had important effect on the protection of human rights in the domestic constitutional system of many European countries. From the late 1970s in Greece, Portugal and Spain,[122] to the early 1990s with the post-Communist countries of Central and Eastern Europe[123] – 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.[124] Moreover, the protection of fundamental rights has recently also gained a new momentum in those countries of Western and Northern Europe in which no such constitutional transformation took place after World War II. Hence, judicial review of legislation has been introduced step by step in Belgium and Luxembourg,[125] expanded (as mentioned) in France in 2008,[126] and started being debated in the Netherlands.[127] Moreover, in the UK, the Parliament decided in 1998 to incorporate the ECHR into domestic law through the Human Rights Act,[128] which 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.[129] Finally in the Nordic countries, Sweden and Finland, also introduced human-rights-based judicial review.[130]

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[118] See Manfred Stelzer, *The Constitution of the Republic of Austria* (Hart Publishing 2011).
[119] See supra n __
[120] Giuseppe de Vergottini, *Le transizioni costituzionali* (Il Mulino 1998).
[121] With the unification of West Germany and East Germany in 1991, the latter was annexed into the constitutional system of the former, and into the EU, without having to undertake human rights conditionality.
[122] See Victor Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' (2008) 3 *Journal of Comparative Law* 22 (on Spain) and Antonio Cortes & Teresa Violante, 'Concrete Control of Constitutionality in Portugal: A Means Toward Effective Protection of Fundamental Rights' (2011) 29 *Penn State International Law Review* 759 (on Portugal).
[123] See Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Springer 2005) (on Poland, Hungary and Czechoslovakia) and Anneli Albi, *EU Enlargment and the Constitutions of Central and Eastern Europe* (CUP 2005) (on the Baltic states).
[124] See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000).
[125] See e.g. Paolo Carrozza, *La* Cour d'arbitrage *belga come corte costituzionale* (Cedam 1985) (on Belgium) and Nicole Kuhn and Eric Rousseaux, 'La Cour constitutionnelle luxembourgeoise: dernière pierre à l'édifice des cours constitutionnelles en Europe occidentale' (2001) 53 *Revue internationale de droit comparé* 453 (on Luxembourg).
[126] See Loi constitutionnelle n° 2008-724, J.O.R.F., 24 juillet 2008, p. 11890 (Fr.).
[127] See Gerhard van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?' (2010) 11 *German Law Journal* 275.
[128] See 46 Eliz. 2, c. 42 (Eng.).
[129] 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 et al (eds), *Promoting Human Rights Through Bills of Rights* (OUP 1999) 233.
[130] See e.g. Joakim Nergelius, 'Judicial Review in Swedish Law. A Critical Analysis' (2009) 78 *Nordic Journal of Human Rights* 142 (on Sweden) and Tuomas Ojanen, 'From Constitutional Periphery Toward the Centre: Transformations of Judicial Review in Finland' (2009) 78 *Nordic Journal of Human Rights* 194 (on Finland).

Overtime, the ECHR system of protection has made major improvements too.[131] In particular, since the enactment of the 11th additional Protocol to the ECHR in 1998, the ECommHR filtering system has been abolished and the ECtHR has been transformed into a permanent institution: 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.[132] 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.[133] The institutional reforms led to its progressive constitutionalization of the ECtHR.[134] But it also produced problems, and backlash. With thousands of cases pending before the ECtHR, Protocol 14th aimed at enhancing the capacity of the ECtHR to cope with its soaring case law.[135] And with increasing opposition to the performance of the ECtHR, Protocol 15th and 16th sought to reduce the power of the ECtHR, enshrining the principle of subsidiarity in the preamble of the ECHR, and allowing national courts to ask advisory opinions to the ECtHR, the effect of which is to prevent cases from being admissible to the ECtHR after the exhaustion of domestic remedies.[136]

In conclusion, if we regard the protection of fundamental rights in constitutional terms, as the existence of substantive norms and of institutional mechanisms to enforce these norms, also against action by the legislature, the EU appears to have had a longer tradition in human rights protection than most other public authorities in Europe: from a comparative perspective, the EU has been involved in the protection of rights longer than the vast majority of EU member states, and arguably also of the Council of Europe. Certainly, several countries – including France and the UK – had a political tradition of proclaiming human rights; and others – especially Germany and Italy – had taken major steps toward constitutionalizing human rights after World War II. Moreover, the ECHR had been established as an organization specifically tasked to promote and protect human rights beyond the states – and overtime became a highly effective forum for human rights review. However, the EU can certainly assert an important experience in the field of human rights, with a history of fundamental rights recognition and enforcement which predates the norms and practices of many European states, and the rise of the ECtHR as a permanent court for human rights in Europe. This, in my view, represents another important facet of the foundational status played by the human rights within the constitutional architecture of the EU.

[131] See 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.
[132] See ECHR Articles 34 (right to individual application) and 41 (right just satisfaction to the injured party).
[133] See Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (OUP 2008).
[134] See Steven Greer & Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655.
[135] See Lucius Caflish, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 *Human Rights Law Review* 403.
[136] See Jonas Christoffersen and Mikael Madsen (eds), *The European Court of Human Rights between Law and Politics* (CUP 2011).

4. Critical perspective

As the previous sections have pointed out, the EU has been involved in the business of human rights since the early phases of its existence; moreover, the EU has a longer experience in the field of human rights protection than the majority of other public authorities in Europe. This state of affairs is relevant for the last point I want to discuss in this chapter: it is important that the EU continues to remain engaged in securing and promoting the protection of fundamental rights – both at the national and transnational level. In recent years, in fact, respect for human rights in Europe has been challenged by political and legal developments, which have increasingly questioned past achievements in the protection of basic freedoms and the rule of law. This evolving reality calls for action by the EU. As Antonio Cassese, Andrew Clapham and Joseph H.H. Weiler argued a quarter of a century ago, "human rights protection is a question of constant vigilance."[137] And constant vigilance is certainly needed in Europe also today to ensure that its human rights system continues to live up to its challenges.

Let's be clear: the EU itself is not immune from pressure to compromise on the protection of human rights for short term political goals – witness the recent deal brokered in March 2016 by the European Council with Turkey to stem the flow of migrants escaping torn-war Syria and other countries of the Middle-East:[138] the agreement, which provides for the automatic return to Turkey of migrants who arrive into the Greek islands, without allowing them to file an asylum application claim, raises relevant issues of conformity with international and European law on the rights of the refugee.[139] But let's be frank: today the main challenges to the protection of fundamental rights come from the national level. In the face of growing centrifugal pressures at the state level, the EU should become more vocal against possible human rights backsliding in Europe. The project of European integration was driven by the desire to overcome the darkness of the past, restoring peace and promoting human rights – so the preservation of these aims should remain a driving force of EU action.[140] Moreover, the EU has been able to experiment with the protection of human rights for over 75 years – so it has acquired a substantial know-how in the field.[141]

All this legitimizes the EU to intervene whenever human rights values are under threat. In fact, EU intervention in protecting human rights within the member states is consistent with the principle of subsidiarity.[142] As I have argued elsewhere,[143] subsidiarity represents a constitutional method to allocate authority in a multi-layered architecture in which several jurisdictions, each endowed with legislative powers, overlap and interact. As a functional criterion for the relations of powers in the European constitutional system, the principle of subsidiarity is a dynamic concept that can, at times, curb the exercise of legislative powers by the EU, to the benefits of the autonomy of the member states; and, at other times, endow the EU with the authority to regulate a field which goes beyond the capabilities of the member states separately. In the field of fundamental rights, therefore, the principle of subsidiarity calls for action by supranational authority whenever respect

[137] 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 Verlag 1991) 1, 75.
[138] See EU-Turkey Statement, 18 March 2016, Doc. 144/16.
[139] See United Nations High Commissioner for the Refugee, press release, 'UNHCR Calls for Safeguards to be in Place Before Returns Begin', 1 April 2016.
[140] See 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.
[141] See Robert Schütze, 'Three "Bills of Rights" for the European Union' (2011) *Yearbook of European Law* 1.
[142] See Art 5 TEU.
[143] Federico Fabbrini, 'The Principle of Subsidiarity' in Robert Schütze & Takis Tridimas (eds), *The Oxford Principles of European Union Law* (OUP 2016).

for common human rights principles is challenged in a given member state by the resurgence of intolerance and authoritarianism.[144]

Yet, from a critical perspective, this section points out that the ability of the EU to stand up for the protection of fundamental rights is weakened by institutional problems: contrary to the EU courts, which are well designed to take fundamental rights seriously, the EU political branches of government are subject to political incentives and institutional constraints which reduce their willingness and ability to become meaningful actors in the protection of human rights vis-à-vis states which wilfully disregard the constitutional values on which the EU is founded. This state of affairs has to be addressed through broader institutional reforms designed to enhance the functioning of the EU system of governance. In fact, it is ironic that currently the European Commission enjoys intrusive powers to intervene in the budgetary processes of the member states to correct possible violations of EU fiscal rules, while instead it is largely powerless vis-à-vis member states which flout EU common human rights values. This inconsistency – which is the result of asymmetric rules and perverse political incentives – can, and should, be addressed within the framework of the ongoing projects of institutional reform of the EU (and the Eurozone) – by strengthening the EU executive power's legitimacy and capacity of action.

As Kim Lane Scheppele has argued, the European human rights architecture has been dramatically shaken by the recent developments occurring in Hungary.[145] Following a sweeping electoral victory in 2010, the right wing government of Prime Minister Orban quickly took steps to entrench its powers and overhaul the constitutional system. Without much debate, the new government adopted in few months a new constitution, which significantly altered the protection of fundamental freedoms recognized in the previous constitution.[146] Moreover, the constitution created new special legislation, to be approved by a super-majority in Parliament, tasked to set, among others, the design of the electoral system – essentially granting to the governing party the possibility to tailor electoral districts to its specific needs. Finally, the Orban government purged the judiciary and the independent authorities, modifying the composition of the constitutional court so as to pack it with loyalists, and shutting down the previous data protection authority, to replace it with a government-controlled body, also charged of freedom of information.[147]

The Hungarian experience, however, has not remained exceptional. On the contrary, it served as a template for recent developments in Poland. Following the victory of the conservative *Prawo i Sprawiedliwość* (*PiS*) in both presidential and parliamentary elections in 2015, the new ruling party opened a stand-off with the Polish constitutional tribunal – one of the key institutions created by the Polish Constitution of 1997 to protect human rights.[148] Whereas the departing government had appointed five new judges to the 15-members tribunal (to fill three vacant seats, and anticipate the vacancy of two more members), in November 2015 the new President of the Republic refused to swore in all these judges, and appointed instead other five persons. Moreover, when the constitutional tribunal ruled that the action of the President was unlawful, and that three of the judges appointed by the previous government had to be sworn in, the government retaliated by passing ordinary legislation changing the functioning of the constitutional tribunal, which

[144] See Armin von Bogdandy et al, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 *Common Market Law Review* 489.
[145] Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution', in Armin von Bogdandy & Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (Hart Publishing 2015) 111.
[146] See Kriszta Kovacs and Gabor Attila Toth, 'Hungary's Constitutional Transformations' (2011) 7 *European Constitutional Law Review* 183.
[147] See Joakim Nergelius, 'The Hungarian Constitution of 2012 and its Protection of Fundamental Rights' Swedish Institute for European Policy Studies, European Policy Analysis No. 3/2012.
[148] See Lech Garlicki, 'La justice constitutionnelle en Pologne' in Marc Verdussen (ed), *La justice constitutionnelle en Europe Centrale* (Bruylant 1997) 89.

prohibited the tribunal from striking down legislation unless 2/3 of the judges voted for unconstitutionality. [149] And when the constitutional tribunal ruled that this statute was unconstitutional, the government refused to publish the tribunal's judgment in the official state gazette (as the Constitution would require it to do).[150]

Besides Poland, in addition, also Romania has been facing a constitutional crisis – with the Prime Minister and the President of the Republic struggling to assert their power, even in disregard of the decisions of the national constitutional court.[151] But recent actions challenging principles of protection of fundamental rights and respect for the rule of law are certainly not limited to Central and Easter Europe.[152] In Western Europe, France has stand out for its decision to introduce a national state of emergency in November 2015, suspending constitutional rights and granting the police unfettered powers to surveil, undertake searches and seizures and even detain persons without a judicial warrant:[153] while the state of emergency was taken after tragic terrorist attacks, it was renewed twice – making the responses adopted by the Bush administration in the United States (USA) after 9/11 look almost like a model of constitutional best practices.[154] And in Northern Europe, Denmark has distinguished itself for the adoption of legislation allowing the police to strip search asylum seekers to appropriate any value in currency and gold over 10,000 Danish kronas[155] – re-evoking the sad days when the Jews were subject to the same treatment…

These recent developments have prompted reactions by the European institutions (as well as by the USA, which has been forced to remain a strong voice for human rights and democracy, 75 years after the end of World War II, and 25 years after the end of the Cold War).[156] Within the Council of Europe, the Venice Commission on Democracy through Law – an advisory body charged to assist and evaluate member states' legislative activity[157] – has produced reports criticizing the constitutional involution in Hungary,[158] and Poland;[159] the Commissioner for Human Rights has raised concerns on the policy measures under considerations in Denmark;[160] and the Secretary General of the Council of Europe has expressed preoccupation for the use of the state of emergency in France.[161] Within the EU, then, the European Parliament has adopted strongly-worded resolutions – although of a non-legally binding nature: in 2013 the European Parliament condemned Hungary for the introduction of constitutional reforms which contrast with the funding principles of the EU and demanded the Hungarian authorities to implement as swiftly as possible a

[149] See Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym (Dz. U. poz. 2217) (Pl.).
[150] See Joanna Berendt, 'Polish Court Strikes Down Law Limiting its Powers, Inflaming a Crisis', The New York Times, 9 March 2016.
[151] See Vlad Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis' (2015) 13 *International Journal of Constitutional Law* 246.
[152] See Carlos Closa & Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2015)
[153] **Loi n° 2015-1501 du 20 novembre 2015,** JORF n°0270 du 21 novembre 2015 p. 21665 (Fr.).
[154] See Scott Matheson, *Presidential Constitutionalism in Perilous Times* (Harvard UP 2008) (discussing measures adopted after 9/11, but stressing that these never implied a suspension of the Constitution, or a state of emergency).
[155] Lov nr 102 (Lov om ændring af udlændingeloven) af 03/02/2016 (Dk.).
[156] See Daniel R. Kelemen & Mitchell Orenstein, 'Europe's Autocracy Problem: Polish Democracy's Final Days?' Foreign Affairs, 7 January 2016.
[157] See Maartje De Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 *American Journal of Comparative Law* 1.
[158] Venice Commission Opinion of 20 June 2011 on the new Constitution of Hungary, no. 621/2011.
[159] Venice Commission Opinion of 12 March 2016 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, no. 833/2015.
[160] Letter of Nils Muižnieks, Commissioner for Human Rights to Inger Støjberg, Danish Minister of Immigration, Integration and Housing, 12 January 2016.
[161] Lettre du Thorbjørn Jagland, Secrétaire Général du Conseil de l'Europe à François Holland, Président de la République Française, 22 January 2016.

number of recommendations on a broad swath of measures.[162] And in 2016 it condemned the Polish authorities for flouting the rulings of the constitutional tribunal, and called on it to give proper publication to its ruling under heightened European supervision.[163]

Also the European Commission has taken initiatives to stop the backsliding occurring in several member states. Yet, notwithstanding calls by the European Parliament,[164] the Commission has consistently ruled out the possibility to activate Article 7 TEU, which, as mentioned, would allow suspending voting rights for member states in breach of EU values.[165] On the contrary, the Commission has pursued other avenues. On the one hand, the Commission has started fast-track infringement proceedings against Hungary,[166] for instance challenging in 2012 the legislation adopted by the Orban government reducing the retirement age of judges, or modifying the functioning of the national data protection authority.[167] On the other, it has also designed a new framework to supervise compliance with the rule of law,[168] and has put that in practice for the first time vis-à-vis Poland in January 2016.[169] However, while the action resulting in judicial proceedings has been fairly successful, the political steps taken to initiate a structured dialogue with the relevant member state have been largely ceremonial. In fact, the ECJ – building on its solid track-record of protecting fundamental rights[170] – has taken seriously the task of striking down those pieces of national legislation which conflicted with the human rights values underpinning the EU, including prohibition of discrimination based on age,[171] and the protection of privacy.[172] On the contrary, the political negotiations undertaken by the Commission with Hungary and Poland have so far lacked in credibility – and failed to deliver relevant change.[173]

As Dimitry Kochenov and Laurent Pech have explained, the new Commission rule of law framework reflects a "light-touch" approach, which falls short of what is required to effectively address internal threats to EU values.[174] The toolbox created by the Commission to monitor and enforce the rule of law and the protection of fundamental rights within the member states in its "pre-Article 7 TEU procedure" consists of an assessment of the situation, coupled with the adoption of recommendation and a follow-up. However, "[t]he proposal is based on the presumption that a discursive approach, that is, a dialogue between the Commission and the member state possibly in breach of [EU values] is bound to produce positive results."[175] But the Commission has effectively

[162] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, P7_TA(2013)0315.
[163] European Parliament resolution of 13 April 2016 on the situation in Poland, P8_TA(2016)00123.
[164] See e.g. European Parliament resolution of 16 February 2012 on the recent political developments in Hungary, P7_TA(2012)0053, para 7.
[165] See supra n __
[166] See Art 258 TFEU.
[167] See European Commission press release, 'European Commission launches accelerated infringement proceedings against Hunagry', 17 January 2012, IP/12/24.
[168] European Commission Communication, 'A New Framework to Strengthen the Rule of Law', 11 March 2014, COM(2014)158 final.
[169] European Commission fact sheet, 'College Orientation Debate on Recent Developments in Poland and the Rule of Law Framework', 13 January 2016, MEMO/16/62.
[170] See supra Section 2.
[171] See Case C-286/12 *Commission v. Hungary*, ECLI:C:2012:687 (holding that the radical lowering of retirement age for Hungarian judges constitutes unjustified discrimination based on age).
[172] See Case C-288/12 *Commission v. Hungary*, ECLI:C:2014:237 (holding that the premature termination of the term of the national data protection authority infringed EU data protection and privacy law).
[173] See Carlos Closa, 'Reinforcing Rule of Law Oversight in the European Union', EUI Working Paper RSCAS No. 25/2014.
[174] Dimitry Kochenov & Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512, 514.
[175] Ibid 532.

no power to coerce a recalcitrant state: moreover, because the dialogue between the Commission and the state concerned occurs confidentially, also the potential of a "name and shame" strategy is hampered. Certainly, as Kochenov and Pech have explained, the Commission framework is better that the annual rule of law dialogue activated in November 2014 by the Council[176] – which is a toothless peer-review process, largely aimed at weakening even further the initiative of the Commission.[177] However, the soft-law nature of the Commission's initiative remains a problem when dealing with countries which are willingly embracing illiberal democracy.[178]

The weakness of the Commission in policing member states' compliance with human rights, moreover, strikes when compared with the power that the Commission has to interfere in the budgetary processes of the member states. As I have explained in a recent book,[179] in the aftermath of the Euro-crisis, new EU legislation,[180] and intergovernmental agreements concluded by the quasi-unanimity of the EU member states[181] have entrusted to the Commission extensive authority to surveil states' fiscal policy. In particular, each member state of the Eurozone must submit its annual budget bill to the European Commission before this is tabled for discussion in the national Parliament, and the Commission can request sweeping changes if it finds that the draft bill fails to comply with the deficit and debt rule of the so-called Stability and Growth Pact (SGP).[182] Moreover, EU countries facing fiscal difficulties and receiving bail-outs, have been subject to even greater scrutiny, with the European Commission (together with the International Monetary Fund, and the European Central Bank) essentially taking over the management of national economic policy under the conditions set in the program of financial adjustment.[183]

The decision to grant strong enforcement powers to the Commission in the field of EMU in the aftermath of the Euro-crisis – while not unproblematic under many respects[184] – stem from the awareness that compliance with common budgetary rules could hardly be secured through peer review in the Council: in fact, the SGP had become a paper tiger since in 2003 the Council discretionally refused to follow up the request of the Commission to start an excessive deficit procedure against Germany and France for violating EU deficit rules[185] – a position upheld by the

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[176] Italian Presidency Note to the Council of the EU, 'Ensuring respect for the rule of law in the EU', Doc. 15206/14, Brussels, 14 November 2014.

[177] Kochenov & Pech (n) 534.

[178] See Kim Lane Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23 *Transnational Law & Contemporary Problems* 51.

[179] Federico Fabbrini, *Economic Governance in Europe* (OUP 2016).

[180] See especially the so-called "two-pack": Regulation 473/2013 of 21 May 2013 of the European Parliament and the Council on monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits in euro-area Member States OJ 2013 L 140/11; Regulation 472/2013 of 21 May 2013 of the European Parliament and the Council on enhanced surveillance of euro-area Member States experiencing or threatened with serious difficulties with respect to their financial stability OJ 2013 L 140/1.

[181] See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, [hereinafter Fiscal Compact], available at http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf (last visited 1 June 2014).

[182] See Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Federico Fabbrini et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014).

[183] See Lina Papadopoulou, 'Can Constitutional Rules, even if 'Golden', Tame Greek Public Debt?' in Federico Fabbrini et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 223.

[184] See Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 *Common Market Law Review* 1621.

[185] See Stefan Collignon, 'The End of the Stability and Growth Pact?' (2004) 1 *International Economics and Economic Policy* 15.

ECJ.[186] Within the Council, in fact, political dynamics work to chill any serious efforts at enforcing binding rules.[187] Since the Council represents state government, the pressure for national ministers to reciprocally shield themselves is strong: when a member state is disobeying the rules, other countries have therefore limited incentives to sanction that behaviour, since they know that in the future they may find themselves in the same position.[188] In fact, just as much as the Council has traditionally been unwilling to enforce the SGP in the field of economic governance, the European Council and the Council have also been unwilling to resort to Article 7 TEU (or, for that matter, to any other action) in the field of human rights protection.[189] The logic of empowering the European Commission was driven therefore by a desire to avoid politicization.

However, as Daniel Kelemen has argued, the problem is that the European Commission has increasingly been dragged into a dynamic of politicization too.[190] In particular, following the decision by the main political parties to present at the May 2014 European Parliament elections *Spitzenkandidaten* for the post of European Commission President,[191] the EU has moved towards a parliamentary form of government.[192] By accepting to appoint as Commission President the leader of the party winning the highest percentage of popular votes, the European Council has legitimated (albeit perhaps pro tempore)[193] a relation of confidence between the European Parliament and the head of the European Commission.[194] While many aspects of the system of governance of the EU are not those of a parliamentary regime, the Juncker Commission has clearly sought to construe its role as that of the cabinet of a parliamentary government. Yet, this has taken a toll in terms of respect for the rule of law: because a parliamentary government depends on the support of members of parliament (MEPs) to function, the Commission has become wary of prosecuting alleged state violations of EU rules in the name of party politics.[195] Leaving aside the discretion exercised by the Commission in the application of EU budgetary rules in light of the political affiliation of the member states concerned, in the area of human rights the Commission has down-played its criticism of the Orban's government, because MEPs of the *Fidesz* party made up a substantial delegation within the European Peoples' Party backing the Barroso and Juncker Commissions.[196]

Thus, as Kelemen put it, "ironically, the drive to enhance EU democracy by politicizing the selection of the Commission Presidency may actually create incentives for EU leaders to tolerate threats to democracy at the national level."[197] Considering the other problems associated with a parliamentary form of government for the EU, therefore, consideration should be given to other institutional solutions for the future of Europe.[198] In particular, elsewhere I have made the case in

[186] See Case C-27/04, *Commission v. Council* [2004] ECR I-6649 (recognizing Council's discretion whether to impose sanctions under the SGP or held in abeyance the excessive deficit procedure recommended by the Commission).
[187] See Christian Calliess, 'The Governance Framework of the Eurozone and the Need for a Treaty Reform' in Federico Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) 37.
[188] See Dorothee Heisennberg, 'The Institution of 'Consensus' in the European Union: Formal versus Informal Decision-Making in the Council' (2005) 44 *European Journal of Political Research* 65.
[189] See supra n __
[190] Daniel Kelemen, 'Towards a New Constitutional Architecture in the EU?' in Federico Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) 197.
[191] See European Parliament Resolution of 22 November 2012 on the Elections to the European Parliament in 2014, P7_TA(2012)0462, para 1.
[192] See Simon Hix, *What's Wrong with the European Union and How to Fix it?* (Polity Press 2008) 162.
[193] See European Council Conclusions, 27 June 2014, EUCO 79/14, para 27 (stating, to address the concerns of the UK, that "the European Council will consider the process for the appointment of the President of the European Commission for the future, respecting the European Treaties.").
[194] European Parliament press release, 'Parliament Elects Jean-Claude Juncker as Commission President', 15 July 2014.
[195] Kelemen (n) 210.
[196] Ibid 212.
[197] Ibid.
[198] See Sergio Fabbrini, *Which European Union? Europe after the Euro Crisis* (CUP 2015).

favor of endowing the EU with a new executive institution, a European President, institutionally separate from the legislative branch, albeit controlled by the latter, entrusted with effective powers, and to be popularly elected through an electoral mechanism which reconciles majoritarianism with federalism's concerns.[199] This institutional proposal revives ideas already advanced in 2003during the Constitutional Convention,[200] and builds on the recent incremental build-up of the President of the European Council.[201] In fact, while the need to "reinforc[e] the capacity of the European level to take executive [...] policy decisions"[202] has been regarded as essential at the highest EU decision-making level, proposal to the strengthen executive power in the EU along a presidential logic has gained approval from several member states, including France,[203] and Italy.[204]

While all the debate on strengthening the executive authority of the EU has been focused on the advantages that this would produce in the field of economic governance, it is clear that a reformed European presidency would have positive effects also for the protection of human right. In fact, an executive authority, which neither depends from horse-trading in the European Parliament nor suffers from peer-pressure in the European Council, could police more effectively states' compliance with EU fundamental rights. As any student of US history knows, after all, it was the US President that eventually enforced desegregation in the Southern states – at one point by sending the 101° Airborne Division to Little Rock to escort black students into their schools.[205] Of course, it is unlikely that an EU President would yield equivalent powers.[206] But as an institution elected by the people across Europe it would have greater legitimacy to speak against a member state which flouts EU values.[207] And, if entrusted with adequate means, also of an economic and financial nature, it could have a greater leverage vis-à-vis heads of state or government who run amok.[208]

For the purpose of this chapter, I cannot discuss how the proposal briefly articulated above could come into effect. Elsewhere, nonetheless, I have discussed the legal and political windows of opportunity to reform the EU institutional system,[209] including the need to reincorporate the Fiscal Compact within the EU by 2018,[210] and to accommodate the British requests for a new settlement in

[199] Fabbrini (n) 233.

[200] See Georgios Papandreou, contribution to the debate of the European Convention, amendment No. 43, in Convention Secretariat, Summary sheet of proposals for amendments, 9 May 2003, CONV 709/03 (making the case for the direct, popular election of the President of the European Council).

[201] See President of the European Council, Herman Van Rompuy, Speech, Brussels, 1 December 2014, EUCO 257/14 (defining the President of the European Council as the President of the Union as a whole).

[202] Four President Report "Towards a Genuine EMU", 25 June 2012, 17.

[203] See French President François Hollande, "Intervention liminaire de lors de la conférence de presse", Paris, 16 May 2013, 6 (speaking of "un gouvernement économique qui se réunirait, tous les mois, autour d'un véritable Président nommé pour une durée longue et qui serait affecté à cette seule tâche.").

[204] See Italian Prime Minister Matteo Renzi, Speech at the European Parliament, Strasbourg, 2 July 2014. See also Italian Secretary for EU Affairs, Sandro Gozi, Op-Ed, "Europa, quegli scossini che facilitano il rilancio di una nuova governance", Il Sole 24 Ore, 28 May 2015 (stating that Europe needs "un Presidente della zona euro a tempo pieno").

[205] See David Armor, *Forced Justice: School Desegregation and the Law* (OUP 1996).

[206] It also goes without saying that the stronger the presidency, the greater the threat that it may *itself* pose a threat to the protection of rights. See Eric Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (OUP 2010). This is why the presidency must be designed within a system of checks and balances.

[207] See also Joseph H.H. Weiler, Editorial, "Fateful Elections? Investing in the Future of Europe" (2014) 25 *European Journal of International Law* 361, 365 (stating that the selection of the Commission President in light of the result of the election of the European Parliament "compromises the ability in a political sense for this or that candidate to say with authority 'I was elected by the peoples of Europe'.").

[208] See Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014).

[209] See Fabbrini (n) 277.

[210] See Art 16 Fiscal Compact.

the EU.[211] Policy awareness of the need to improve the system of governance of the EU is widespread and growing, at least within the Eurozone.[212] And even though, as mentioned, this ongoing debate does not consider at all the rule of law crisis of the EU, steps to handle the Euro-crisis would produce unexpected benefits also in terms of human rights protection.

In conclusion, however, the following point has to be made: if the EU is to remain a vocal actor in the protection of fundamental rights today – as this Section has argued – it must reform its institutional system, so as to be able to tackle threats emerging from the member states effectively. From a critical perspective, the EU is currently lacking adequate mechanisms to vigilate against illiberal backsliding within the EU member states – arguably the greatest threat to the peace and human rights achievements of 75 years of European integration. While EU courts constitute a vital force for the protection of fundamental rights in Europe, also the political branches of government must raise up to the challenge. Since that current regime produces the wrong political incentives on the Council, but also on the Commission, it is worthwhile to start thinking about alternative models of institutional design, which may endow the EU with the power and legitimacy to tackle effectively human rights challenges within the states. In this regard, the proposal to create a European President, advanced in the context of the debates about the future of EMU, may represent a step forward also as far as the protection and promotion of human rights is concerned.

5. Conclusion

This chapter began citing Auschwitz, it continued mentioning Srebrenica and concluded indicating the challenges ahead in the protection of fundamental rights in Europe. In a continent like Europe, with such a dramatic history, it is imperative that strong substantive norms and institutional mechanisms to protect human rights remain in place. In fact – as this chapter has claimed – human rights are a foundational element of the project of European integration, and the mission of promoting and protecting fundamental rights ought to remain a clear component of the action of the EU, including through new and improved institutional solutions.

This chapter sought to examine the normative value of human rights within the legal order of the EU. The examination has been carried out through three perspectives.

As Section 2 has explained from an historical perspective, the EU has been built on ruins of the Holocaust, and the protection of human rights has prominently featured in the political ideas and constitutional proposals of the early European Communities. Moreover, human rights have remained a key concerns at each and every stage of the process of European integration: from the 1960s to the 1990s, the ECJ complemented the common market with an unwritten catalogue of fundamental rights, with constitutional status. During the 1990s, the transformation of the EU, with steps toward EMU and CFSP among others, prompted the codification of new rights, and new mechanisms to protect them. And at the dawn of the 21st century, the EU has been endowed with a full-fledge Charter of Fundamental Rights – arguably the most articulated and advanced human rights document to date. This striking continuity in the importance that human rights have played throughout EU history reveal the deep normative importance that they play for the EU.

As Section 3 has pointed out from a comparative perspective, the EU has also been involved in the business of protecting fundamental rights for longer than most other public authorities in Europe. If contemporary conceptions of constitutionalism require human rights to be protected through supra-legislative norms and judicial review of legislation, the EU can be credited for having

[211] See European Council Conclusions, 18-19 February 2016, EUCO 1/16.
[212] See Five President Report, "Completing Europe's Economic and Monetary Union", 23 June 2015.

features such guarantees since its early existence. Yet, while a handful of European countries had some kind of tradition of human rights protection, or human rights rhetoric, the vast majority of the current 28 member states of the EU lacked effective mechanisms of human rights review – or were still *tout court* authoritarian regimes – by the time the EU had already an advanced human rights architecture. Moreover, while the Council of Europe had been created to entrench rights, the blossoming of the ECHR would only occur after important institutional reformed overhauled the institution later in history. While of course the EU has not been the only European player in the field of human rights it can certainly assert a long and continuous experience – a further evidence of how much engrained human rights are within the constitutional architecture of the EU.

As Section 4 claimed from a critical perspective, however, the EU human rights system is currently facing important challenges – and its political branches of government may not be institutionally fit to live up to these challenges. Because the achievements of 75 years of peace and freedom cannot be given for granted, special vigilance is needed – also (in fact: particularly) vis-à-vis the member state. However, while the EU courts have proved to be willing and able to take fundamental rights serious, the European Commission and the Council have failed to tackle adequately the growing threats to the EU human rights *acquis* stemming from several member states. In order to address this state of affairs, new institutional solutions have to be considered and promoted for the EU – and the debate about reforming the EMU can offer a major opportunity to eventually endow the EU with a strong executive power, directly legitimated by the European citizen, and capable to police compliance with EU human rights principles across the Union.

Cynical observer will argue that such proposals are too ambitious and that it is hard to move *forward* on integration. Yet, we should all be aware that it is all too easy to move *backward*, and reawaken the dark clouds of Europe's past. This should serve as an additional encouragement to put even more effort to relaunch the EU human rights project even further.

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