

Fundamental Rights in Europe

*Challenges and Transformations in
Comparative Perspective*

FEDERICO FABBRINI

http://www.oxfordbookshop.com
Preview - Copyrighted Material

OXFORD
UNIVERSITY PRESS



Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© F Fabbriini 2014

The moral rights of the author have been asserted

First Edition published in 2014

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013952040

ISBN 978-0-19-870204-7

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Introduction

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

To answer this question, the book argues that it is necessary to compare the European multilevel human rights architecture with other multi-layered regimes for the protection of fundamental rights. The core methodological claim of the book is that the comparative approach provides the most suitable laboratory to explain the constitutional dynamics at play in the European multilevel human rights architecture. In particular, on the basis of several structural and normative arguments, the book maintains that the European multilevel human rights architecture can be meaningfully compared with the federal system of the United States (US). Drawing insights from this comparative exercise, the book reconceptualizes the dynamics at play in the European multi-layered system and advances a model which seeks to explain in a comprehensive and systematic way the implications of a multilevel human rights regime.

The book argues that the overlap and interplay between state and transnational human rights standards generates several recurrent synchronic and diachronic dynamics. From a synchronic perspective, the European multilevel architecture creates several *challenges*. Relevant differences often exist in the degree of protection accorded to each human right, both at the horizontal level—that is, among the member states, with some states providing vanguard degrees of protection for a specific right, and others lagging behind—and at the vertical level—that is, between state law and supranational law. Due to these differences, the interaction of human rights standards in the European multilevel system produces tensions. The nature of these tensions, however, varies depending on whether the standard of protection of a given human right at the transnational level operates as a ceiling—a maximum

level of protection that cannot be superseded by state law—or as a floor—a minimum that can be integrated and enriched by state law.

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

The European architecture also presents, however, important diachronic dynamics. The system is subject to constant *transformations* owing to changes and reciprocal influences between human rights norms and institutions. These transformations may over time affect the challenges that emerge from the interaction between state and transnational laws. To this end, the book maps the most relevant judicial and institutional transformations currently taking place in the European system and evaluates their impact on the existing challenges of ineffectiveness and inconsistency. At the same time, because of the evolving nature of the European human rights system of protection, it is possible to advance conditional proposals for reform in specific areas of human rights law, tailored to address those problematic aspects of the European human rights regime which are left unanswered by ongoing developments.

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

The empirical chapters of the book follow a common structure. First, I outline how the standard of protection of each specific right varies significantly between EU member states. Second, I examine the growing impact of EU and ECHR law in the field and explain how the interaction between state and transnational law has revealed a challenge of either ineffectiveness or inconsistency in Europe. Third, by adopting a comparative perspective, I highlight how analogous dynamics have

emerged in the federal system for the protection of fundamental rights of the US and underline how the US example proves that multi-layered systems are endowed with internal mechanisms to face these challenges successfully, and over time enhance the protection of fundamental rights. In light of this, I explore the more recent jurisprudential and institutional transformations taking place in Europe, and, finally, I discuss what the future prospects for the protection of each of these specific rights in Europe could or should be.

Overall, the content of the book is analytical rather than normative. This is, in fact, a study in *comparative constitutional law* and not in legal or political theory. By bridging the gap between European constitutional law and comparative constitutional law, this work aims to enhance the scientific understanding of the European multilevel system for the protection of fundamental rights. Nevertheless, on the basis of the analytical framework it develops and tests in the four case studies, the book reconsiders the mainstream normative accounts of the protection of fundamental rights in the European multilevel system and underlines how both the sovereigntist and pluralist visions prevailing in European legal scholarship are insufficient. As an alternative, the book indicates what are the key dilemmas that a theory on the protection of fundamental rights in the European multilevel architecture ought to address and offers some concluding arguments on why such a theory would inevitably fit a “federal” vision. As I will emphasize, a new theory for the protection of fundamental rights in the European multilevel human rights architecture would need to face squarely the dilemmas of identity, equality, and supremacy. The only theory that has been so far able to reconcile these three contradictory claims has been the theory of federalism, as distinct from the theory of the federal state. The challenge for European constitutional scholarship is to develop a new federal vision—a “neo-federal” theory—which is able to frame the dilemmas behind the European multilevel architecture for the protection of human rights.

The book is structured as follows. Chapter 1 introduces the European multilevel human rights architecture, advances a comparison with the US federal system, and proposes an analytical model for the examination of the challenges and transformations at play in the European human rights regime. Each of the four subsequent chapters analyzes in detail one of the case studies: Chapter 2 considers the right to due process for suspected terrorists, Chapter 3 the right to vote for non-citizens, Chapter 4 the right to strike, and Chapter 5 the right to abortion. Finally, Chapter 6 compares the four case studies, identifies a number of recurrent patterns, and, on that basis, questions the normative prescriptions of the existing scholarly theories suggesting how to move toward the foundation of a “neo-federal” theory on the protection of fundamental rights in Europe.