Comparative analysis on Land Use Law perspectives in the United States and the European Union, as offered by John R. Nolon and Lora-Tamayo Vallvé

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List of Abbreviations

CJEU	Court of Justice of the European Union
ECHR	European Court of Human Rights
EU	European Union
LRAU	*Ley Reguladora de la Actividad Urbanística*
LUV	*Ley Urbanística Valenciana*
PADD	*Projet d'Aménagement et de Développement Durable*
PAI	*Plan de Acción Integrada*
PLU	*Plan Local d'Urbanisme*
SPA	Special Protection Area
SCOT	*Schéma de Cohérence Territoriale*
SCOTUS	Supreme Court of the United States
U.S.	United States of America

Foreword

I have had the luck to attend Alexander Blewett III School of Law, at the University of Montana, in the United States of America, during the two semesters of the 2019-2020 academic year. The cultural enrichment I experienced and continue to experience on a daily basis (this introduction is written while I am still in the Law School) has contributed to my legal education in a way far more impactful than what I could describe in this text. Suffice to say I will remain forever grateful to both my home institution and the host university for this program and the educational opportunities provided by this exchange.

In the context of this exchange during my last year for the Spanish law degree, I must comply with the advanced written requirement necessary for graduation or "Trabajo de Fin de Grado". With the help of my assigned tutor for this short thesis and the professors at the Law School, I was able to reconcile both my stance in Missoula and the task at hand through a comparative analysis from two legal scholars and authorities in their respective continents. The present work will reflect the duality of the legal cultures, as I experienced it, which goes even further than the Common Law and Civil Law traditions, and how it manifests itself at a federal level in America and at the European Union level in the Old Continent.

Summary

This paper attempts to perform a comparative analysis of both the American and the European Union legal system as it pertains to Land Use Law and, particularly, urban development. In order to do so, we will examine the differences in the distribution and exercise of competences between the States within the federation in America as well as the Member States within the European Union, many of which have federal or equivalent regional systems themselves. This will lead to a natural analysis of the ways in which the EU compensates for a lack of express constitutionalism and delegation of powers, for which we will examine the transversal regulations of environmental protection and sustainable development, and property rights and public contracting law, as well as the relevant case law and the mechanisms through which they affect Land Use Law. Accordingly, each of this fields will be contrasted with the analogous American regulation as a counterpart.

1. Introduction

The latest development of Land Use Law in European Union countries has not only both lead and followed the global trends on the matter through their ability to adapt to the new challenges of the landscape, heralding a renewed interest in issues such as environmental protection, sustainable development of cities, and increased participation of local governments. However, it should be pointed out that the more structural aspect of Land Use Law, namely the holding of competences to regulate the matter, as well as the principles it should follow, could be equated to a similar process lived many decades ago in the United States of America, often referred to as the birth of Modern Land Use Law in the country.

This paper will attempt to draw a structural comparison between the Federal system in the U.S. and the European Union system along with the national and federal systems within it. This comparison will be made through the lens of Land Use Law and, particularly the formal differences between the systems as well as the natural questions stemming from them. A comparison will then be made from the perspective of property rights, and how they are set up and protected in both legal systems, as well as the its implications in Land Use Law.

In order to understand the aforementioned parallel, it is important to distinguish two concepts, both relative to the dynamics between the European Union and the Member States. On the one hand, the concept of "European urbanism", as observed by third parties or non-European commentators, is usually characterized by two main traits: the first one being a lack of understanding of the relationship between the EU institutions and the Member States, particularly, placing the importance of the Treaties and law of the Union farther up than they stand, as well

as the conception of a City Model that opposes or, at least, serves as an alternative to the American one[1].

On the other hand, the concept of Europeanization or, as Lora-Tamayo Vallvé calls it, EUropeanization, is derived from the development of European Union Law itself, in regards to the slow integration and discrete transference of competences from the Member States to the Union. The vehicles through which the EU is regulating these matters that remain formally within the exclusive competence of the Member States are extensively studied by Lora-Tamayo Vallvé and will be revised in this paper for the purpose of an analytic comparison. EUropeanization, as Altes Korthals defines it, can be described as "Europe's penetration into the national system of governance" as well as "adaptation of national and sub-national systems of governance and export of European models". [2]

With this definition at hand, it becomes easy to compare it with the U.S. Federal Government interventionist policy on Land Use Law, and it allows us to use this analysis as a tool to prepare for the effects that the evolution of European Law and further integration will have on Land Use Law in the Member States. This paper is based on the work of Marta Lora-Tamayo Vallvé, who has already applied this comparative and historical view on Land Use Law to the study of both legal systems, as well as the work of John R. Nolon, another widely recognized scholar on the matter, each from their respective side of the Atlantic Ocean.

[1] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 15.
[2] Korthals Altes. Europeanization as Discontinuous Adjustment: A Düsseldorf Court's Impact on Land Development Practice. At https://www.researchgate.net/publication/233028198_Europeanization_as_Discontinuous_Adjustment_A_Dusseldorf_Court's_Impact_on_Land_Development_Practice [accessed on 05.13.2020]

2. Distribution of Land Use Law competences: Federal law in the United States and European Law. Parallels and contrasts

More and more, countries around the world face land use challenges in an interconnected manner that corresponds with the effects of globalization in the economic, legal and environmental spheres.[3] The Millenium Ecosystem Assessment was pivotal towards institutionalizing the necessary guidelines for national frameworks to achieve sustainable development policies and regulations. Amongst these changes, the most relevant for our paper are the following: "addressing ecosystem management issues within broader development planning frameworks, increased coordination between environmental agreements and economic and social institutions, and increased transparency of government and private-sector performance regarding policies that impact ecosystems, including greater involvement of concerned stakeholders in decision-making."[4]

These policies have resulted or promoted a regulatory trend consisting of "the increased participation of municipal governments and their citizens in decision-making regarding sustainable land use patterns".[5] This localist trend allows the administration to operate at ground-level with better awareness of the land use matters and closer to the problems as well as to the stakeholders. At the same time, however, it provides difficulties regarding technical and financial capacity as well as data management, which remains under the control of the upper administrative levels, whether it be regional, national or even international level.

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[3] Land Use Law for Sustainable Development. Edit Chalifour, Nathalie J., Kameri-Mbote, Patricia, Lye, Lin Heng, Nolon, John R. Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. [hereinafter] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon Pg. 856

[4] *Ibid*. Pg. 858

[5] *Ibid.* Pg. 859

This paper intends to show that the manner in which this trend has manifested in European Union Member States presents parallels with the land use control process that has already taken place in the U.S. This process we have described is formally known as "modern" Land Use Law in America, and was rooted in the City Beautiful movement and meant to combat the issue of population overcrowding in urban areas, as it was interpreted to be appropriate that the cities and municipalities planned and managed their own growth.[6] As a result, local governments in america began accumulating competences in the matter of Land Use and urban development.

While there are points of comparison available for the analysis, there is also some distance between both processes, mostly arising from the structural deficiencies of the European Union when compared to a federal state, while at the same time being an intergovernmental organization that surpasses the realm of international law. Such differences manifest themselves in the fact that "European Law has no actual direct powers or common policy on spatial/ territorial or city planning".[7] Nonetheless, this does not impede the EU from regulating the matter through the long arm of other competences it does posses. In section we will discuss the American model, as well as the EU strategy to achieve the desired results in light of its relative deficiencies and the aforementioned structural differences.

2.1. United States' approach to sustainable urban development

City planning as a means to achieve sustainable urban development is framed by the individual country's land use legislation and, in general, their whole constitutional and administrative systems. Each country's laws and response to this challenge "range in aspiration, ambition, and complexity because of cultural,

[6] Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy. California Law Review. Carol M. Rose. Pg. 839.
[7] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 15.

historical, political, and geographical differences".[8] Land Use Laws, as Nolon defines them, are "mechanisms that address each society's emerging problems; they provide strategies that are appropriate to the culture and place of their origin".[9]

To achieve sustainable urban development, however, a certain level of coordination between "levels of government, the private and public sectors, and even nations"[10] is necessary. The U.S. has applied this strategy with the involvement of their three levels of government/ administration: federal, state and local, each with their respective role in land use and urban development. Land Use Law remains a competence of the states in the U.S., as it has not been formally transferred to the federal government and"[u]nder the Tenth Amendment of the U.S. Constitution, the states reserved various powers not delegated to the federal government".[11]

In practice, however, more and more of these competences, have ended up in the far sides of the administrative spectrum, following the aforementioned trend. Local governments are granted express or neccessary authority by the states to manage certain aspects of land use, primarily through environmental regulation. Nolon explains that "[l]ocal governments derive their authority to adopt laws that protect the environment from land use enabling statutes, home rule laws, and special laws directly aimed at environmental protection."[12]

This ability to manage environmental regulations allows the local governments to mitigate the negative impacts of land use, but any doubt about the delegation of authority will be resolved against the municipality, with varying standards in the

[8] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. Pg. 860.
[9] *Infra*.
[10] Compendium of Land Use Laws for Sustainable Development. Ed. John R. Nolon. Pg. 25.
[11] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. Pg. 898.
[12] New Ground: The Advent of Local Environmental Law. Ed. John R. Nolon. In Praise of Parochialism: The Advent of Local Environmental Law. Pg. 11.

courts of different states.[13] Overall, the involvement of local administrations in these matters has been shown to both "encourage citizen participation, leverage and direct the resources of the private sector",[14] and is in line with Principle 10 of the Rio Declaration, which states that: "environmental issues are best handled with the participation of all concerned citizens, at the relevant level".

This trend, however, is not exempt of critics, as an opposite school of thoughts amongst the experts states that the "localities have long borrowed states' police power to regulate land use".[15] These scholars, at the time of the proposal of the "quiet revolution" in the 70's, opined that states should "take back their police power to regulate extralocal issues in a manner that maintained two core values of the quiet revolution: the preservation of the existing land use system and the respect for local autonomy".[16] According to them, local regulations such as zoning ordinances and design controls actually impede "the reforms that environmentalists and the building industry have worked together to develop".[17]

At an international level, different pieces of legislation around the world have weaved what Nolon calls a "connected web of policies, standards, and initiatives competent to address the interconnected stresses on the global population and environment". Such phenomenon can be observed in issues such as that of population crowding management, particularly in coastal communities, regulated by the statutory instruments such as the United Nations Convention on the Law of the Sea, the European Landscape Convention of the Council of Europe or Florence Convention, the Oceans Act in Canada, and Australia's Ocean Policy.

The U.S. has applied a very specific approach to international environmental law which, in turn, has affected their Land Use Law in a similar manner. Regarding

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[13] Ibid.
[14] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. . Pg. 895.
[15] Bronin, Sara C. The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States. At https://law.vanderbilt.edu/files/archive/Bronin-2010.pdf [Visited on 05.20.2020].
[16] *Infra*.
[17] *Infra*.

the issue of coastal crowding, for example, it is interesting to observe that the country is not party to the U.N. Convention on the Law of the Sea, despite being one of its most important promoters and architects, but they nonetheless follow its provisions.[18] This is due, amongst other political factors, because of their interpretation of a dualist legal system, in which "international and domestic laws are seen as operating in separate spheres".[19] According to Mark W. Janis, "international law is generally not thought to be able to make itself effective in a domestic legal order", instead, its application "depends on the constitutional rules of the municipal system itself".[20] This can be observed in the fact that "international law has traditionally not concerned itself with a state's internal laws, and internal matters including domestic laws do not usually affect international treaty obligations"[21] in the U.S.

Despite this advancement in the issue of sustainable urban development, Nolon describes the U.S. system as being: "still highly fragmented and in need of much further improvement to achieve the kind of coherence necessary to join all levels of government and all sectors in a coordinated strategy of sustainable development".[22] This, however, needs to be understood in the context of the sophistication of the U.S. environmental regulatory system. The need for improvement does not disprove the effectiveness of the overall strategy and guidelines, but rather exposes the issues visible during the application, considering that the "[o]peration and effectiveness of its environmental law and regulatory systems (...) is linked to and must be understood in the context of its underlying political structure and set of government institutions".[23]

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[18] Malone, James. The United States and the Law of the Sea after UNCLOS III. At https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3700&context=lcp [Visited in 05.20.2020]
[19] Comparative and Global Environmental Law and Policy. T. Yang. A.Telesetsky. L. Harmon-Walker R. Percival. Pg. 64
[20] International Law. Mark W. Janis. Pg.87
[21] Comparative and Global Environmental Law and Policy. T. Yang. A. Telesetsky. L. Harmon-Walker R. Percival. Pg. 65
[22] Comparative Land Use Law: Patterns of Sustainability - John R. Nolon. Pg. 895
[23] Comparative and Global Environmental LAw and Policy. T. Yang. A. Telesetsky. L. Harmon-Walker R. Percival. Pg. 100

2.2. Sustainable Urban Development in European Union countries and European Law expansive trend

Sustainable development as a principle is one of the main objectives of the European Union, as stated in article 2 of the Maastricht Treaty, but it has been present as an objective within European integration since the Treaty of Rome (art. 2 and 6). Moreover, as Lora-Tamayo Vallvé indicates, "these principles are based on the practical and specific application of legal foundations that are already offered to all the members of the EU, such as Principle 15 of the Declaration of Stockholm, Chapter 7 of Agenda 21 and the differing degrees of implementation of environmental protection by the European constitutions".[24]

Despite these provisions, the current landscape invites the question: how much influence do these instruments have and to what extent has soft law achieved a common land use development policy in Europe? Lora-Tamayo Vallvé has held that integrated environmental management and environmental control can be interpreted as an indirect form of control of land use,[25] and that the Charter of European Planning or Barcelona Charter of 2013 can be interpreted as a hint that "something is boiling towards a final implementation of urban/ planning policy as a European one".[26] At the very least, the author considers that the European Sustainable Cities Report from 1996 –and the programs and measures implemented since its report– constitutes a "European-level reference framework that is conducive to bringing about a veritable change of focus in urban policies underpinned by sustainability".[27]

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[24] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 34
[25] Ibid. Pg. 16
[26] Ibid. Pg. 19.
[27] Ibid. Pg. 30

A key document in the European Framework was the 85/337/EEC Directive and the 97/11/EC amendment, which institutionalized the use and requirement of Environmental Impact Assessment (EIA) on plans and projects. This instrument was, however, criticized on its lack of efficacy in the realm of Urban Law, based on the difficulties in executing the nullity of the act because by the time the judicial or administrative review took place the project was already deployed or ongoing.[28]

To compliment these gaps, the Strategic Environmental Assessment (SEA) Directive 2001/42/EC was put in place, covering the environmental assessment of plans and programs and allowing for the assessment to be performed at the strategic level and preliminary stage, while the EIA would work as a continuous instrument through all the stages of the project.[29] Furthermore, this directive also offers an example of a European law that offers public participation through the planning and programming stages in the realm of land use, although the scope of this law goes even beyond urbanism. However, the Member States still have the competence to determine the administrative level at which the planning itself is made. The trend, nonetheless, is to keep this at ground level, closer to the stakeholders, at the local level.[30]

Through this framework, European institutions can target particular issues within Land Use Law transversely and using the longarm scope of their other competences and policies, without the actual power to regulate it. Furthermore, Lora-Tamayo Vallvé even states that in order to achieve the goals set in the Barcelona Charter, a EU policy Land Use Law and city planning should be set in place, and that a common "European model of land use property rights" would be

[28] Lora-Tamayo Vallvé, Marta. Evaluación ambiental del planeamiento urbanístico en Francia. Cambios y propuestas a raíz de la decisión del Consejo de Estado de 19 de julio de 2017. *Práctica urbanística: Revista mensual de urbanismo*, Nº. 160 (2019), ISSN 1579-4911.
[29] Ibid.
[30] Ibid.

necessary to set such policy in place.[31] This approach to the regulation of property rights will be examined in a following section of this paper.

2.3. Land Use and environmental regulation parallels

For the purpose of conducting this comparative analysis, we will use New York City planning laws as examples of the U.S. Land Use Law system as described per Nolon. On the other hand, we will use French Law as described per Lora-Tamayo Vallvé to represent Land Use Law regulation in a European Union Member State. This comparison will be focused first on the role of local governments and stakeholder participation on Land Use Law and environmental protection as well as the relationship between the different levels of the administration to achieve the same goals in the two systems.

New York laws are useful in this matter for two distinct reasons; for one, they follow the localist trend on land use control, as the New York zone enabling act delegates express authority to the municipalities, and on the other hand, their zone enabling act is based on the 1920's standard zone enabling act promulgated by a federal commission.[32] As Nolon indicates, "[s]tate enabling law in New York authorizes local governments to adopt laws that protect their aesthetic and physical resources".[33] More specifically, the State's regulations "authorize towns, cities, and villages to adopt land use plans and then divide their jurisdictions into zoning districts, to specify land uses permitted in those districts, and to establish administrative agencies to review and approve private sector proposals for land

[31] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 20 & 21
[32] New Ground: The Advent of Local Environmental Law. Ed. John R. Nolon. In Praise of Parochialism: The Advent of Local Environmental Law. Pg. 12
[33] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. Pg. 897

use and development".[34] Section 272-A from art. 16, New York Town Law, illustrates the importance of local government action within this system:

"1. Legislative findings and intent. The legislature hereby finds and determines that:

(a) Significant decisions and actions affecting the immediate and long-range protection, enhancement, growth and development of the state and its communities are made by local governments.

(b) Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town comprehensive planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens."

These powers along with government collaboration can be observed in the regulation of coastal crowding in the State. In this case, the New York State Coastal Erosion Hazard Areas Act and the zone planning regulations work hand in hand to manage threats to the coastal waters environment. The Statutory law itself forsees the municipal role and sets up what Nolon calls an "integrated system" in the following manner: "identification and mapping of coastal erosion hazard areas, the adoption of local laws that control development and land uses within them, the certification of such ordinances by the relevant state agency, and state agency permitting of certain land based development activities within identified coastal areas. Permits for land development projects are not issued unless they comply with established state standards for development in coastal hazard areas." [35]

[34] Ibid. Pg. 895
[35] Ibid. Pg. 897

Furthermore, these laws not only encourage but require the "participation of citizens in an open, responsible and flexible planning process is essential to the designing of the optimum town comprehensive plan."[36] According to Nolon, these regulations also "authorize localities to create stakeholder groups and gives them enduring and profound power to give advice regarding –and to shape– local plans and regulations."[37]

Before we explore the case of France, a parallel between the division of competences in both the EU and the U.S. must be established. Much like the American 10th Amendment, the Treaty of Lisbon provides a distribution of competences between the Union and the Member States based on the principles of subsidiarity, proportionality, and –perhaps most importantly– the principle of conferral. This last principle, found in art. 5 of the Treaty on European Union (TEU), is essentially the equivalent to the U.S. 10th amendment in that it reserves the Member States exclusivity on all competences not expressly conferred to the Union.

The case of France is that of a centralist republic within the EU, and as all member States, France conserves the exclusivity of competences on Land Use Law and city planning, despite the occurrence of the phenomenon described in this paper, as these competences are falling on the far ends of the spectrum, more towards the Union and the local governments. Perhaps as the most centralist member state, land use planning is managed through national law, specifically through the *Directives Territoriales d'Amenagement* and the *Schemas de Cohérence Territorial* (SCOT) .

In order to comply with the requisites of the SEA Directive 2001/42/EC, as Member States must transpose these laws into their own legal framework, France adopted the LSRU (Loi no 2000-1208 du 13 décembre 2000 Relative à la

[36] New York Town Law §272-a. 1.e.
[37] Id.

Solidarité et au Renouvellement Urbains) and its amendment, the Loi Urbanisme et Habitat de 2 de julio de 2003. These laws established a new figure called PADD (Plan d'Aménagement et Développement Durable), included within the PLU (Plan Local d'urbanisme) and function as the keystone of urban planning. The PLU, which functions as both the elementary planning tool and as a proposal for the environmental assessment required by the law, would then come to be as an element of a broader plan, and the PADD would work as a control mechanism warranting compliance with both the city planning general principles established in the law –covering urbanism and environmental concerns– as well as the urban guidelines established by the community.[38]

Despite the fact the PADDs would be relegated to a non-mandatory status –except in the matter of city planning for social housing–, they still exhibit the same trend, what Lora-Tamayo Vallvé calls a decentralizing trend, favoring local governments and including the stakeholders in planning[39]. This approach to city planning also tackles the main critic against the American system, as the PLUs are set up as a part of broader planning controlled by the government, therefore maintaining the ability to address and consider "extralocal" issues.

Another example of the dynamics between national law and European law is exhibited in the relationship between the PLUs and the Natura 2000 network. The Natura 2000 is an EU network that covers protected sites designated under the 1992 Habitats Directive and the Special Protection Areas (SPA) established under the 1979 Birds Directive. This network has such a long-arm that, even if set up as an environmental instrument, it yields major consequences in Land Use Law and allows the Union to regulate the matter. Lora-Tamayo Vallvé has highlighted its relevance stating that "if indeed one can actually speak of a European urban development model as a form of legal and administrative intervention policy on

[38] Lora-Tamayo Vallvé, Marta, "Evaluación ambiental del planeamiento urbanístico en Francia. Cambios y propuestas a raíz de la decisión del Consejo de Estado de 19 de julio de 2017", *Práctica urbanística: Revista mensual de urbanismo*, Nº. 160 (2019), ISSN 1579-4911.
[39] Ibid.

the city, the only successful attempt at acting directly on the control of land use was the creation of the Natura 2000 Network, which affects the classification of land as specially protected land that cannot be developed".[40] The extent of this power, however, is balanced by the fact that the Member States are responsible for proposing the Natura sites and managing them.

According to art. R 121-14, there are two categories of PLU based on the necessary environmental assessment. The first category requires systematic and mandatory environmental assessment, and it covers procedures for the assessment on SCOT, PLUs or community plans that can affect a Natura 2000 site, including revisions or modifications to any project affecting areas protected by their Loi Littoral or any area with a Natura 2000 site in it. The second one only requires environmental assessments based on a case by case merit, and it covers the making, approval or modification of any PLU that does not fall in the first category, and it includes municipal plans of areas adjacent to a territory including a Natura 2000 site in it.[41]

[40] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 95

[41] Lora-Tamayo Vallvé, Marta, "Evaluación ambiental del planeamiento urbanístico en Francia. Cambios y propuestas a raíz de la decisión del Consejo de Estado de 19 de julio de 2017", *Práctica urbanística: Revista mensual de urbanismo*, Nº. 160 (2019), ISSN 1579-4911.

3. Configuration of Property Rights: Public Contracts and Community Case Law

The role of property rights within a legal culture are perhaps one of the most important aspects of said culture's political system, as they give their "holders rights to participate in the national economy and some insulation from arbitrary state action", and, as a system, "[h]ow land is owned is critical to sustainable development".[42] The amount of power that the government reserves itself over privately owned land as well as the public land ownership system are limits within which land use can be regulated, and they will also determine state expropriation on the basis of public interest through institutions such as the public trust doctrine. Such repartition of power and the sphere of private ownership are, as Nolon says, "sensitive to cultural, historical and political differences from country to country".[43]

On this matter, Nolon also distinguishes a global trend, also a consequence of world population increase. According to the author, "the world's national legal systems are becoming more centralized, uniform, and predictable as populations increase and pressures on land use intensify".[44]

How can such a trend coexist with a decentralizing trend regarding city planning, if property rights and Land Use Law are so closely related? This is due to the fact that the more power the administration has, the easier it is to use this power for city planning through the argument of public or general interest. Nolon clarifies, however, that city planning is "a misnomer. Land use planning laws and policies must concern themselves with the entire landscape comprising urban, suburban, exurban, and rural areas."[45] Matter-of-factly, this policymaking goes beyond just city planning and sits at the core of land use of law and environmental law. On

[42] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. Pg. 890
[43] *Infra*.
[44] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. Pg. 891
[45] Ibid. Pg. 868.

this same line, Nolon continues: "What emerged as a body of law focused on human settlements in urban places has become the "law of the land" more comprehensively. From a global perspective, in fact, "land use planning" now reaches to include "ocean planning".

On this section, we will analyze the difference between property rights in the U.S. federalist system as well as the system currently in place in the EU, to compare their effect on their Land Use Law framework. Furthermore, we will try to analyze the weakness and the strengths of said systems and possible solutions as presented by John R. Nolon and Lora-Tamayo Vallvé respectively.

3.1. Land Tenure in the United States; expropriation and Due Process

In the United States, property rights have been heavily influenced and configured by the figure of their federal Supreme Court. This is due to the federalist intention to regulate the amount of influence an individual state can have in the citizen's sphere of private ownership through the Supreme Court of the United States (SCOTUS), considering that "the fact that property rights are held sacred in this country and thus land use regulations are always to demanding if not skeptical review."[46] Lora-Tamayo Vallvé describes the configuration that the American Constitution as a negative approach towards property rights, in the sense that it does not offer a definition for them, but rather it establishes protection mechanisms for it directly (**nor** shall private property be taken).[47]

Materially, this means that the states maintain the competence to define property and ownership rights within their jurisdiction, just as they technically control land use. As part of this competence, the States can use their regulatory power to

[46] New Ground: The Advent of Local Environmental Law. Ed. John R. Nolon. Preface: The Next Generation of Environmental Law. Daniel C. Esty. Pg. xvi
[47] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg.134.

expropriate private property –not only land or real estate– through the doctrine of eminent domain. However, that competence is limited by federal regulations, mainly the requirements of the Fifth Amendment, which states, among other things, that: "No person shall be [...] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". The Fifth Amendment includes two protective clauses regarding both the propriety of the expropriation, regarding the compliance of the public use requirement, as well as the guarantee of a just indemnization for it, formally referred to as the "takings clause" and "compensation clause".[48] Moreover, the Lingle case of 2005 allowed the Court to establish a clear difference between the federal substantive due process clause, which analyzes whether or not the administrative action itself was impermissible, and the takings clause, which analyzes whether or not the action constituted an expropriation.[49]

The SCOTUS enforces the taking clause standard through the application of two legal tests, known as the "per se test" and the "ad hoc" test, that allow it to determine when agency or government action effectively amounts to expropriation. The per se test compares the administrative action to an existing category in the Court's case law, while the ad hoc test is used by the Court to create new categories or standards that allow it to classify said administrative action as a taking. Furthermore, these tests establish a distinction between non-regulatory expropriations, properly known as a "taking", and regulatory expropriation or taking, based on the doctrine of eminent domain.[50] This distinction is particularly relevant for our study, since Supreme Judge Scalia gave the "per se" takings a legal treatment in Lucas v. South Carolina Coastal (1992) that Lora-Tamayo Vallvé deems equivalent to the mandatory expropriation in Civil Law countries in the EU.[51]

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[48] Alexander Gregory S. The Global Debate of Constitutional Property, Lessons for american takings jurisprudence. Pg. 76 & 77.
[49] Urbanismo y derecho de propiedad en Estados Unidos. Marta Lora-Tamayo Vallvé. Pg. 224
[50] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg. 136.
[51] Ibid. Pg. 137.

As a result, states that pass legislation on the matter of property rights do include statutory protection clauses through the direct and explicit regulation of regulatory takings to meet the federal standards.[52] These can take the form of impact assessments modeled after EIAs or another standard –which can be harsher superior that the federal requirements– in order to determine entitlement to compensation.[53] The Florida Private Property Rights Protection Act can serve as an example for such system, offering compensation to burdened owners of land whose property or ability to enjoy it are negatively affected as a result of any government action or regulation . Section 70.001 (3)(e). This can illustrate Nolon's overall description of the American ownership system in the following manner: "The U.S. Supreme Court has balanced private property rights with the right of the state to regulate land".[54]

Furthermore, Due Process as guaranteed in the 14th Amendment offers protection not only as a doctrine for procedural requirements but as right conferred over American citizens and a direct limitation on state action. This manifests itself directly in the realm of administrative law, where any stage agency action is subject to judicial review if deemed contrary to these principles and vulnerating a person's rights. Agency adjudication control a *posteriori* is not unfamiliar to Civil Law countries such as many EU Member States, but the American system is succinctly explained in the following paragraph from Administrative Procedure and Practice by Funk *et at*:

> "A person adversely affected by the agency's action might attack it on the grounds that the person was deprived of property or liberty without due process. Assuming that the person's property or liberty is at stake, the

[52] Urbanismo y derecho de propiedad en Estados Unidos. Marta Lora-Tamayo Vallvé. Pg. 225
[53] New Ground: The Advent of Local Environmental Law. Ed. John R. Nolon.The Potential Role of Local Governments in Watershed Management.A. Dan Tarlock. Pg. 228.
[54] Comparative Land Use Law: Patterns of Sustainability. John R. Nolon. Pg. 890

court will have to determine whether the due process clause obligates the agency to use more procedures than the agency used.

…

After an agency has made its adjudication, a person adversely affected by the decision almost invariably has an opportunity for judicial review."[55]

American administrative law, however, is much more lacking in *a priori* controls. Such deficiency can be observed in the procedural requirements for agency rulemaking. Essentially, there are two categories of rulemaking referred to as formal or informal rulemaking, responding to the level of requirements for formality and publicity, and are regulated in Section 553 of the APA.[56] Article a), however, includes and exemption clause to rulemaking procedures when regulating "(1) military or foreign affairs or; (2) matters relating to agency management or personnel or to public property, loans, grants, benefits or contracts", which allows the administration to bypass the formality of the procedure when rulemaking it comes to certain aspects of expropriation relating to public property.

3.2. Right to Property and expropriation in Europe: Differences with the American system

To explain the legal culture surrounding property rights in the European Union we will primarily use France and Spain as examples of the configuration of ownership in Civil Law frameworks, minding the heterogeneity of regulations across the continent and the Member States. From a comparative standpoint, however, it is important to note that constitutional law plays a very different, much more intrusive role in the regulation of property rights in the U.S. when compared to other states, even other federal or regional states within the E.U. and,

[55] Administrative Procedure and Practice. A contemporary Approach. William F. Funk. Sidney A. Shapiro. Russell. L. Weaver. Pg. 197 & 198

[56] Ibid.

of course, the Union itself[57]. As a result, we will utilize the jurisprudence and criteria set out by the European Court of Human Rights (ECHR), a non-European Union institution, as an equivalent to the SCOTUS in this matter.

We should first analyze the evolution of property rights in the aforementioned countries. The Déclaration des Droits de l'Homme et du Citoyen of 1789 offer a much careful and favorable formulation for the right of ownership, which is described as "sacred and inviolable" in its 17th Article, while at the same time including a right to offer resistance towards oppression in Article 2. According to Lora-Tamayo Vallvé, it represents a first change in the legal culture, which occurred when medieval theology was overcome and property went from the hands of god to that of men through the French Revolution, in the form of a "natural right" with a more individualistic conception than the previous more communal version of it.[58] Spain experienced this transition through the a Decree of the Cortes of Cadiz on June 8th, 1813, in the midst of an ecclesiastical reform and promoted by the *afrancesados.*[59]

According to Lora-Tamayo Vallvé, a "third and new conception of property, the social definition, arises in the twentieth century".[60] Under the liberal policies of the welfare state or l'État-providence in Europe, "expropriation is considered a public power at the service of diverse policies rather than a defensive mechanism for owners, and not only for the execution of public works".[61] Constitutions such as the 1931 Spanish Constitution or the Weimar Constitution by which it was inspired, offer no protection against expropriation in the form of compensation, as

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[57] Urbanismo y derecho de propiedad en Estados Unidos. Marta Lora-Tamayo Vallvé. Pg. 251

[58] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 167.

[59]Robles Muñoz, Cristóbal, "Reformas y religión en las Cortes de Cádiz (1810-1813)", Anuario de Historia de la Iglesia. Vol. 19 (2010) Estudios: La eclesiología de la Revolución (1786-1825). Pg. 105.

[60] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 169.

[61] Ibid.

observed in the configuration offered in Article 135, stating that "property is a duty, its use must simultaneously be at the service of the public good".

The modern treatment of property rights in european law such as the Spanish Constitution of 1978, the Basic Law of the Federal Republic of Germany or the heavily amended Italian Constitution is described by Lora-Tamayo Vallvé as a doctrine that "does not deem property to be a fundamental and inviolable right, but rather an economic right that is subordinated to the general interest and regulated by law". At a European level, we observe the same pattern, exhibited in the fact that the property right protection was included in the European Convention of Human Rights in Protocol Number 1, incorporated to the treaty 4 years after the approval of the Convention itself,[62] and "with numerous reservations".[63]

Nonetheless, the Convention has allowed the ECHR to mimic the SCOTUS approach, but using case law to establish protection mechanisms and limit the Member State's competence on the matter, while they remain the ones competent to define property rights. This is achieved through the interpretation they give to property itself, so even if the controversy in a case arises from the national legislation definition of property, the ECHR judgement will not be based on the technicalities of said country's laws, but rather on an "autonomous meaning" in line with the considerations of human rights.[64] Another relevant distinction between these approaches is that Protocol Number 1 does include a positive definition of property rights as well as a negative one in the form of a close list of conditions to be used as a standard to judge when they have been vulnerated.[65]

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[62] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg.135.
[63] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 167.
[64] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg.135.
[65] Ibid. Pg.136.

Lora-Tamayo Vallvé has stated that the SCOTUS and the ECHR analyze the controversies from very different perspectives, which also part from their distinct approach to the definition of property rights. While the SCOTUS starts analyzing the nature of the administrative action as a regulatory taking to, only then, examine the validity of its motives, the ECHR already has a closed definition and standards, so it directly applies a factual nature analysis to determine the application of the law.[66] A similar trend can be observed in each legal culture considering that the legal discussion in European countries such as Germany, France or Spain, that utilize a statutory law approach to property rights does not revolve around the consideration of expropriations as regulatory or not, since this is implicit in the statutory nature of the regulation or plan, but rather simply on the compensation quantity and formula.[67]

To illustrate the doctrinal difference between both courts Lora-Tamayo Vallvé utilizes the Sporrong and Lönnroth v. Sweden case law and the United States vs. Causby. In the Lönnroth case, the Tribunal clarified that an interference with the exercise or enjoyment of the ownership posed a limit to property rights even if the title of property itself was not perturbed and even if the administrative action itself did not constitute a direct infringement of the provisions of Protocol Number 1. This is due to the holistic interpretation of the provisions in Protocol Number 1, including the recognition of a general right of peaceful enjoyment, as well as the integration of a natural law approach to property rights.[68] This integrating trend illustrates the difference between "property rights" in the Common Law and "property right" in EU Civil Law member states.[69] The analogous Causby case shows how the SCOTUS did not focus its analysis on the enjoyment of property, but rather the extension of the concept and definition of a taking.[70]

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[66] Ibid. Pg.137.
[67] Urbanismo y derecho de propiedad en Estados Unidos. Marta Lora-Tamayo Vallvé. Pg. 253
[68] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg. 139.
[69] Ibid. Pg. 124.
[70] Ibid. Pg. 145

The SCOTUS's doctrine in the Lingle case clarifies that administrative action does not constitute a taking merely because there is a regulation that affects property rights, but rather it will judge on the merits of the general welfare and public benefit if the use of the police power is justified. If the Court falls in favor of the regulatory action or "the public right", the per se or ad hoc tests will be applied in such a way that there will be no taking, and the equivalent will happen *a contrario sensu* if the Court falls for the private or property rights instead.[71]

3.3. Public works, property rights and land use in Europe

One of the key areas of influence of the EU on both land use and property rights is the area of public works, public supply and public service contracts. The Court of Justice of the European Union (CJEU) has given these contracts a broad conceptualization beyond their regulation, causing the change of the national legislation of the Member States affected by them, including Italy, France, Spain, Germany, and others. Furthermore, Lora-Tamayo Vallvé has clarified that such "catch-all classification" of the definition of public works allows European Law to extend its long-arm to the field of urban development and management.[72] Accordingly, we will discuss the relevant european case law in this matter as well as reports and other documents from the Commision and the European Parliament.

For this purpose, we will primarily discuss the CJEU's 26 May, 2011 judgement on the urban development practices in Valencia within the Kingdom of Spain, which primarily posed the question of whether direct execution of urban development constitutes a public works contract.[73] While this case was ruled in favor of Spain and it did not follow the expansionary trend of the CJEU concept of public work, as observed in previous cases such as the Teatro alla Scala in Italy

[71] Ibid. Pg. 139.
[72] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 114.
[73] Ibid. Pg. 117

or the Auroux and Roanne cases in France, where the court utilized a legal analogy to equated a concession for land development to a public work contract,[74] it does, nonetheless, illustrate the dynamics of the European Institutions and the Member States as it pertains to the EU's not only legal but political power as a means to influence national lawmaking.

Even Though Lora-Tamayo Vallvé considers this judgement as a "step backwards",[75] the Court's reasoning stems from Commission's failure to demonstrate that the PAI (Plan de Acción Integrada) or Integrated Action Programmes had the principal object of a public work contract as defined by the directive with facts, bringing forward only "presumptions" to the proceedings. Lora-Tamayo Vallvé describes the Court's motives as a "certain institutional annoyance with the Commission as the plaintiff, in that it failed to act with the necessary zeal in presenting the evidence and arguments that were supposed to defend its position."[76] However, when Advocate general posed the question that direct execution of urban development work could appear in other Member States' national legislation to bypass the Union's requirements on procurement, the Court ratified its standards,[77] which simply were not met by the Commission's case.

On December 13th 2005, the European Parliament approved the Fortue Report after the European Commission raised number of accusations on the *Ley Reguladora de la Actividad Urbanística* (LRAU), Valencia's regional legislation on Urban Development. These allegations related to, amongst other issues, the abuse of law, the destruction of the environment, lack of transparency in the award of public contracts and urban development excess, and blamed the national government for its Land Use framework, the Autonomous Government of

[74] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg. 84.
[75] Ibid. Pg.135.
[76] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 115.
[77] Ibid. Pg. 117.

Valencia for its urban development regulations and the local authorities for their programs.[78]

The main issue with the LRAU, however, were the PAI, which the Commission deemed to be undercover public contracts that failed to comply with the EU's regulations on public works and public services, namely, Directive 93/37 and Directive 2004/18.[79] Spain denied the allegations on their public procurement procedure practices, but, as a response, the Community of Valencia adopted the *Ley Urbanística Valenciana* (LUV) on December 30th of 2006, replacing and repealing the LRAU. The Commission continued its criticism of the regional legislation despite the change in the law through a reasoned opinion, so the EP published another non-binding document on June 21st 2007, condemning similar abuses other Spanish regions and the continuing of abuses in Valencia before the European Commission reported the country to the Court of Justice on July 9th of 2008.[80] On December of 2008, before the case reached the CJEU, the Auken Report was being prepared by the Parliament, calling for the moratorium on the projects that incurred in the alleged violations as well as the initiation of compensatory procedures, with a reminder of the Commission's ability to order a suspension of funds to non-complying regions.[81]

The Fortue and Aeken Reports were a result of lobbying, after over 15,000 petitions from both individuals and associations of European citizens in Valencia to the European Parliament.[82] However, yet another key difference between the EU and the U.S. is the political and economical weight and organization of lobbies as well as their media clout, so even an organized movement such as this one cannot match the American counterparts. Furthermore, Lora-Tamayo Vallvé has identified that the difference in legal culture itself affects the reception of

[78] Ibid. Pg. 177.
[79] Ibid. Pg. 122.
[80] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg.121.
[81] The Europeanisation of Planning Law. The European -land use- silent revolution. Marta Lora-Tamayo Vallvé. Pg. 179.
[82] Ibid. Pg.175.

lobbyist pressure, first stating that the Rule of Law in Europe has a more static meaning, making the laws themselves harder to change, and, second, that the case law-pressure-legislation loop is much more structured in the U.S. when compared to the "sniping" pressure to a particular authority or policy in Europe.[83]

[83] La EUropeización del territorio. Marta Lora-Tamayo Vallvé. Pg.121.

4. Conclusions

Land Use Law in the EU is going through a profound reform as European law evolves and integration grows. There are many lessons on the managing of competence distribution between the different governmental levels that can be learnt from the experiences in the U.S., both from the history and the framework in place as well as from the irreconcilable differences that finally confluence in very similar challenges, albeit with equally distinct solutions to them, such as the case of property rights. These lessons can ease the transition towards the Land Use Law revolution heralded by authors such as Lora-Tamayo Vallvé, and should therefore be taken into consideration to achieve sustainable urban development.

The research for this paper was severely compromised by the COVID-19 global pandemic and sanitary crisis, as I was forced to leave the U.S. and lost access to the academic resources in the University of Montana and the Law School library. Back in Barcelona, access to our Autonomous University of Barcelona's libraries was also restricted. Moreover, there were limitations in the field of Land Use Law and urban development itself, as this matter remained generally unexplored before this paper, particularly the nuances in American law.

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