

European Constitutional Law: Some Reflections on a Concept that Emerged in the Second Half of the Twentieth Century

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I. THE NOTION OF EUROPEAN CONSTITUTIONAL LAW

The notion of a constitution is traditionally conceived of as the basic legal order of a state. In today's Europe, especially within the European Union, this notion is sometimes used to refer to the principal rules of European Union Law, especially the important provisions of the EC-Treaty and EU-Treaty, the so-called primary law. The European Court of Justice employs the term in some of its decisions, and legal literature has partly followed this position.¹ Further, the European Convention on Human Rights, an international Treaty guaranteeing constitution-like individual rights, has also been described as a (partial) constitution.² This state-bound term as applied to nonstate entities is highly controversial. Those who defend this conceptual transfer do not sufficiently explain their reasons.

The term "constitution" is not legally defined. The constitution as a *Grundnorm* in the legal order of a state cannot be normatively defined by the order of the state itself, because the constitution, as the

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1. See Case 294/83, Parti écologiste "Les Verts" v. Parliament, 1986 E.C.R. 1365; Opinion 1/91, 1991 E.C.R. I-6102 (concerning the European Economic Area).

2. See Frowein, *Die Herausbildung europäischer Verfassungsprinzipien*, in Festschrift Werner Maihofer 149 (1998).

highest norm, cannot be defined with binding effect by rules on the same normative level. Higher law only exists outside the state, i.e., in the form of public international law, which establishes no rules (and could establish none) concerning the definition of the inner state Grundnorm. Nor could a definition exist in EU Law which is not, *a priori*, capable of providing an extra-state-law definition, though EU Law imposes many obligations on the structure of the internal legal order (which must be democratic, obedient to the requirements of the rule of law, and fully respect individual freedoms).

The fact that a people has created a constitution for a state implies that this shall be the fundamental legal order of the state, the Constitution, but does not imply that only what it has created can qualify as a constitution. The people determine, by the extra-legal constituent act, the constitution and its contents, but do not generally define the term constitution itself, nor attribute a constitution exclusively to a state.

The term “constitution” remains defined by convention, an implicit agreement between those who apply it (as politicians) or those who analyse it (as scientists). The term “constitution” is a variable term, due to historical changes. If the phenomenon connected with the typical functions of state constitutions is evolving, and thus appearing elsewhere, outside the state, there is no impediment preventing the use of the originally state bound term in new areas. Those who carry out this terminological and conceptual extension of the notion of constitution are politicians and scientists.

A. What Are the Functions of the Constitution in a Traditional Sense?

The functions of the constitution are (1) to regulate how the state is organised (state institutions, distribution of competences, territorial organisation, etc.), (2) to define the main goals of the state (to be a democracy, to be a republic or a monarchy, to follow the rule of law, to realise social welfare, to be open to international law), and (3) to regulate the main relations towards the individual (by guaranteeing fundamental rights). The third aspect has acquired great significance in the late twentieth century.

The state institutions, as foreseen by the constitution, function to fulfil tasks, to legislate on certain fields, to execute the legislation, to make policy decisions for the future, and to judge on the basis of the laws. These functions have been dissociated to a considerable extent from the state and transferred to supranational organisations, i.e., to

the European Communities, and, in some respects, *e.g.*, to the European Union. Thus, important parts of what had formerly been regulated by the constitution in the state itself has now shifted to the supranational level. It is no longer the state constitution that covers the new institutional situation, but supranational law. In a functional way, the body of supranational law takes over a good part of the objects formerly covered by the state constitution. This phenomenon of substitution can also be seen in areas 2 and 3 of the constitutional functions (as defined *ante*): The supranational entities establish basic structural principles in their areas of competence such as democracy, rule of law, social welfare, respect of international law, etc., in the same way as the state could. Furthermore, the freedoms of the individual could potentially be seriously affected by the supranational power. Supranational law has therefore assumed, through the development of the unwritten general principles guaranteeing fundamental rights, the function of protection of the individual. Generally, we can conclude that wide parts of state constitutional functions have been assumed by the supranational legal order by means of transfer of internal sovereign rights (*Hoheitsrechte*).

This process of substitution also justifies the application of the term “constitutional law” to the primary law of the three European Communities as well as of the European Union. This is true at least in so far as this legislation, which principally embodies the foundation treaties as amended by the various reform treaties (the Single European Act, the Maastricht Treaty, and the Amsterdam Treaty), establishes rules of basic importance. The protection of fundamental human rights and the principle of the rule of law do not exist in the form of written primary law, but in unwritten, judge-made fundamental principles with equal status as primary law.³

This kind of European constitutional law is only valid for the 15 (and soon more) member states of the European Union and in the substantial fields covered by these bodies of law.⁴ The question also

3. See Krück, *Commentary on Article 164*, in V.D. GROEBEN, THIESING, EHLERMANN §§ 27-39 (5th ed. 1997).

4. It should be noted that the three European Communities, the European Community (formerly called European Economic Community), the European Coal and Steel Community (ECSC), and EURATOM, are three supranational organisations with independent legal personalities; the European Union must be distinguished from them. The European Union which, according predominant opinion, has no independent legal personality, is comprised of three so-called “pillars”: pillar I is the supranational pillar consisting of the three aforementioned European Communities (thus, in pillar I there is identity between the European Union and the three European Communities); pillar II covers the intergovernmental cooperation of the members states in the field of Common Foreign and Security Policy; pillar III refers to cooperation on matters of Justice and Home Affairs. Though the institutions of the three European Communities

arises as to whether the European Convention on Human Rights can be described as constitutional law. This convention is valid for the forty-one member states of the Council of Europe and guarantees, in a very similar way to a national constitution, fundamental and human rights assured by the jurisdiction of the European Court of Human Rights in Strasbourg. This convention, and its additional protocols, are binding on all European states who have ratified them. All member states of the European Union are bound by the Convention which has a considerably wider field of application than the EC/EU. The latter are internationally bound neither by the Convention, nor by the additional protocols, but have unilaterally, in the Treaty on the European Union, recognised the applicability of the Convention by the EC institutions. However, the Court at Strasbourg has no jurisdiction over EC/EU acts which fail to comply with the Convention.

It seems justified to describe the Convention and its additional protocols as constitutional law binding on the signatory states. The reasons for such a description are, however, different from those concerning EC/EU. The main argument seems to be that the Convention is closely connected to the internal legal order of the signatory states. This connection has an external and an internal aspect: The external aspect, which applies to all the signatory states, allows an individual who has attempted and failed to secure redress for breaches of his fundamental and human rights before the national courts to apply to the Strasbourg Court which can re-examine his claim under the Convention. The Convention resembles a second Constitution, a common European standard for internal legal orders, as far as guarantees of basic rights are concerned. The national constitution is no longer the Grundnorm for the protection of the individual; the Grundnorm has shifted to the Convention in this area. Although internal normative, executive and judicial acts which do not

are shared, the legal orders are kept distinct from one another. It can also be said that there is a legal order of the European Union in the areas of pillars II and III, though the activities of the European Union in the areas of these pillars go on in the form of public international law. There are, besides the conclusion of international treaties, specific forms of legal acts adopted by the institutions of the European Union (especially the Council of Ministers). For this reason, the activities within pillars II and III constitute the distinct legal order of the European Union and do not merely belong to the sphere of traditional public international law. Also international treaties concluded by the member states in this framework create a specific European Union law with the main characteristics of public international law, but with some particularities justifying reference to a distinct EU legal order.

comply with the Convention are not automatically void,⁵ and judgements of the Strasbourg Court cannot repeal or suspend internal acts violating the Convention, the relationship between internal legal orders, especially the constitutions, and the Convention is a very close one. Thus, it is up to the individual to appeal against the acts of internal institutions of the state to the Court in Strasbourg, even if these acts are sanctioned under the national constitution. By the traditional standards of international law this power of the individual is quite extraordinary. The reform of 1998 has added an element of great importance: once the Convention has been ratified (which is now obligatory for members of the Council of Europe), jurisdiction of the Strasbourg Court (transformed into a permanent Court) is automatic and no longer depends on the consent of the signatory state to submit itself to the jurisdiction.⁶ This mechanism intensifies the connection between the internal order and the Convention. In conclusion, there seem to be good reasons to describe the Convention as a constitution (albeit limited to protection of individual rights).

There is also an internal aspect which confirms the above conclusion and is particularly important for those signatory states who accord the Convention great importance in their domestic legal order. There seem to be three types of approach to the Convention: the first which elevates the Convention to a higher rank as compared to the provisions of purely internal law; a second approach which regards the Convention in an intermediate way; and the third which limits its effects to those of a normal international treaty. It seems that the third type is about to disappear. In early 1999 Great Britain passed an Act of Parliament, the Human Rights Act, incorporating the Convention (which had previously been binding only on an international level) into the internal legal order with the positive consequences of application and interpretation by domestic judges.⁷ An example of the first approach is Austria, where the Convention has been adopted as internal constitutional law embodying the main part of the internal guarantees of fundamental rights. The broad second approach can be divided into two subgroups: The first subgroup includes states who give the Convention a preferred position in internal law without making it constitutional law. An example is Spain, where Art. 10 of

5. The invalidity of such acts cannot be derived directly from incompatibility with the Convention. However, in some signatory states the Convention has the force of internal constitutional law and thus any incompatibility automatically voids even internal acts.

6. See Frowein/Peukert, *Europäische Menschenrechtskonvention*, EMRK-Kommentar (2d ed. 1996).

7. This Act entered into force for England and Wales on 2nd of October 2000.

the Constitution requires all state institutions to interpret the fundamental rights guarantees of the Constitution in the light of international agreements, with particular regard to the Convention. Thus, the interpretation of the Convention rights by the Strasbourg Court exerts a defining influence on the internal concept of fundamental rights, to the extent that we can almost speak of the Strasbourg doctrine prevailing over the domestic approach. Another example is the Netherlands where the Constitution forbids disapplication of an Act of Parliament that contradicts the Constitution itself. However, there is an obligation on the judge to observe strictly the requirements of international instruments including the Strasbourg Convention and to declare inapplicable any Act of Parliament which is incompatible. Thus, the Strasbourg Convention replaces the national constitution, in protecting individual rights from legislative violations.⁸ Another example is France where a monist approach to the relationship between international and national law exists; Art. 55 of the French Constitution of 1958 declares that such treaties (if duly ratified and promulgated by the President and on the basis of reciprocity) are directly applicable and gives them priority over Acts of Parliament. Thus, judges must apply the Convention even if a national law contradicts it.

A second subgroup includes Germany where a dualist approach exists, and the Convention is introduced into the German legal order in the form of an ordinary Act of Parliament. This means that the position of the Convention is inferior to that of the Constitution and is subject to the rule of *lex posterior*. However, the German Constitutional Court, taking account of the particular importance of the Convention, applies it while interpreting constitutional provisions. Thus, the Constitutional Court interpreted the abstract term of *Rechtsstaat* (rule of law) embodied in Art. 20 of the Basic Law so as to encompass the conventional guarantee of the presumption of innocence.⁹ In this way, the Court constitutionalised the Convention in spite of its formal inferiority to the Constitution. It should be noted that the new Constitutions of the democracies of Central and Eastern Europe used the Convention as the basis for the shaping of their own constitutional fundamental rights guarantees.¹⁰

8. See ARNOLD, *FESTSCHRIFT BODO BÖRNER* 7-28 (1992).

9. See German Constitutional Court, Reports vol. 74, 370.

10. See Arnold, *Le principe de l'Etat de droit dans les nouvelles Constitutions de l'Europe centrale et orientale*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE, STUDIES IN MEMORY OF ROLV RYSSDAL* 65-78 (Paul Mahoney et al. eds., 2000).

In conclusion, the aforementioned ‘internal aspect’, referring to the various degrees of influence of the Convention on the internal legal order, provides a further argument in favour of recognising the constitutional character of the Convention. The close relationship between internal orders and Convention is even more evident in systems which fully recognise its importance. As far as states with a more traditional approach to the Convention are concerned, however, the external aspect, as analysed *ante*, is sufficient confirmation of the constitutional character of the Convention. As a result of these reflections we recognise three levels of constitutional law in Europe: the national level, the supranational level and the level of the European Convention on Human Rights.¹¹

B. *The Territorial Diversity*

European constitutional law is not geographically a clearly defined term. As between the second and third level (mentioned above) there is a clear divergence. European constitutional law on the EC/EU level is valid only for the fifteen member states while the European Convention on Human Rights has a far wider sphere of applicability. European constitutional law can also be referred to as the total of all the constitutional orders of European states including those which are neither members of the European Union nor signatory states of the European Convention on Human Rights.

It should also be noted that the constitutional law which exists in the European states displays common features. An example is the field of the protection of fundamental rights. Art 19(2) of the German Grundgesetz contains a very important guarantee which prevents the legislature from changing or altering the nuclei of fundamental rights, that is their essential content, or “Wesensgehalt.” This guarantee has been adopted by the Spanish constitution created after the end of Franco’s dictatorship and was also embodied in the Portuguese constitution.¹² Some of the new democratic constitutions of Central

11. See also Arnold, *L'exposition des constitutions européennes aux influences externes*, in PERSPECTIVAS CONSTITUCIONAIS, NOS 20 ANOS DA CONSTITUIÇÃO DE 1976, vol. 2, at 673-94 (Jorge Miranda ed., Coimbra 1997), and his lectures of 1997 on “L’interaction entre la jurisprudence des Cours constitutionnelles nationales et la jurisprudence des Cours européennes” at the Institut des Hautes Études Européennes, Robert Schuman University of Strasbourg. I also refer to the forthcoming analyses on the relation of European and National Constitutional Law to be published by the Association “Deutsche Staatsrechtslehrer” (congress in Leipzig in October 2000) formulated by the Professors Pernice, Huber, Luebbe-Wolfe and Grabenwarter (of whom Prof. Pernice is an advocate of “multilayer constitutionalism” (Verfassungsverbund) the basis of which is the integration of the various constitutional sources in Europe).

12. See SPAN. CONST. art. 53, § 1; PORT. CONST. art. 18, § 3

and Eastern Europe, created after the fall of Communism, have also expressly adopted such a guarantee. This shows a common constitutional element which is decisive for the efficiency of fundamental rights protection. It seems that in these countries constitutional jurisprudence, when interpreting this “Wesensgehalt” clause, employs the same or similar concepts. Another example is that fundamental rights are interpreted in a way which favours the individual by strengthening the mechanisms of the guarantee, by enlarging the field of application of the fundamental rights and by interpreting them in the sense of “*effet utile*,” etc. It seems that the tendency to strengthen the fundamental rights protection is a common European tendency even if the instruments and the arguments employed to do so are substantially identical in only a few countries. Interpretation and comparison of constitutional laws can result in the finding of legal concepts which differ from state to state or from state group to state group, yet there can still exist common tendencies, common basic concepts, similar results and similar (yet diverging) legal instruments etc.

Convergence in constitutional concepts in the various European states can be a result of common basic ideas developing globally or regionally in Europe such as the value of human dignity, anthropocentrism,¹³ the increasing importance of the rule of law connected to the common acceptance of such high level values as the dignity of man, human autonomy and liberty. Emerging central themes also include the readiness to recognise the superiority of International Law, etc. Common ideas lead to common solutions in separate legal orders. The transparent process of communication and the great influence of the EC/EU order and the European Convention on Human Rights, as well as the global evolution of generally accepted values especially in the field of human rights, contribute to the creation of common political and judicial attitudes.

Beside these factors, the interest of (constitutional) judges in foreign solutions of legal problems has influenced legal thinking. It is well known that constitutional courts compare their own solutions with those of foreign constitutional courts. There are many examples of situations when constitutional courts, in particular in systems which have similar constitutional structures (e.g., Germany and Spain), utilise concepts and arguments from other states. All these

13. See ARNOLD, *La Declaración Universal de Derechos Humanos y su importancia para el desarrollo de la cultura del derecho*, in LA DECLARACIÓN UNIVERSAL DE LOS DERECHOS HUMANOS EN SU 50 ANIVERSARIO, BALADO/REGNEIRO (dir.) 66 (Madrid 1999).

cases refer to interaction of lawyers, courts and politicians who do this by their own will.

These are parallel developments in separate legal orders. There are, however, also normative interconnections which lead to vertical effects of convergence: the European Convention on Human Rights contributes to the emergence of common legal understandings in the field of protection of individual rights in all the signatory states. This leads to a harmonisation of the protection of fundamental rights, to a greater extent in systems where interpretation of the national fundamental rights must comply with the Strasbourg Convention, and, to a lesser extent, in other systems where the Convention does not have a preferred constitutional position. Even in systems where the convention is introduced into the internal legal order as a traditional international treaty the harmonising effect is, nevertheless, considerable.

EC/EU Law is also harmonising the constitutional law of the fifteen member states. This effect is recognisable only in those areas of constitutional law which are directly affected by the supranational legal order. The fact that, for example, Community law is substantially influenced by national constitutional law (especially in the area of the protection of individual rights) means that a member state can export a certain constitutional concept to the community which, by incorporating this concept, gives it back to that state and to all other member states.

If one were to say that the constitutional orders of the different European states develop concepts and principles which are the same as or similar to those of the constitutional order of another state or another group of states, one would not be speaking of European constitutional law in a narrow sense. It is possible to describe these concepts or principles as being common to several or most or all European states (member states of the European Union or signatory states of the European Convention on Human Rights or even other European states which do not belong to these two categories). This description does not imply any direct normative consequence on a European-wide level. On the other hand, however, it can be that these separate concepts or principles (with the same or similar content) have great influence in shaping EC Law, especially in the field of unwritten fundamental rights, which is derived from common constitutional tradition. If there are common solutions in the various European states, they can be a good basis for the judicial development of general principles of Community law.

It can also be taken into account that, apart from contributing to these EC law principles, convergent constitutional concepts, principles or rules can create general principles of European states (to be distinguished from those of the EC/EU), perhaps among forty-one member states of the Council of Europe bound to the European Convention on Human Rights. Such general principles can serve as interpretation guidelines for internal constitutional law if it is ambiguous or has only a general content which must be made more precise; interpretation can and should refer to such principles, common to European states.

C. Should a European Constitution Be Created?

A different question is whether a “European Constitution” should be created, especially since a convention is preparing a draft charter of fundamental rights. Further, a group of experts has proposed to create a so-called constitutional treaty by remodernising the existing EC treaty itself. This plan would divide the EC treaty into two parts: a general part containing provisions concerning the institutions, their competences, their relations to member states, etc.; and a second part with more technical provisions, in particular in the fields of EC politics. It is not yet clear whether the charter of fundamental rights will be incorporated into the first part of the treaty or if it will simply form a separate charter.

When considering the concepts of a European Constitution it is necessary to reflect on a multitude of questions: Should it be a constitution for the European Union with fifteen member states? Should it be a constitution for all forty-one members of the Council of Europe with the European Convention on Human Rights as its basis? Should it go beyond and include all European states? Should it be a “real” constitution voted on by the peoples of the relevant states? Should the consent of the national parliaments be sufficient when voting on the aforementioned “constitutional treaty”? Should the constitution be superior to EC primary law or on the same level? Should the Constitution apply only on the EC/EU level or should it extend to the interior of the European states?

A European Constitution has not yet been created; a couple of attempts have been made without success. The political divergence of those who defend such a step and those who oppose it was too great for the realisation of this project. If a constitution, as outlined above, were to come into existence it would not be revolutionary, but a traditional constitution. It would be the result of a long evolution and

it would not create a new entity like a European state; it would, however, cover the already existing supranational organisation. Such a constitution would replace all the written and unwritten elements of EC/EU Law which are of fundamental importance: the institutions, their competences, the supremacy of community law and its immediate effect, and the principle of subsidiarity, etc. The rule of law and fundamental rights as unwritten components of EC Law would also be taken over. Naturally, the creator of a European Constitution would be free to modify what had previously been developed; however, such a constitution would tend to find its basis in former developments.

If a “*Verfassungsvertrag*,” constitutional treaty, were to be created, the relationship of this constitutional treaty with the existing EC primary law would be very close. This would be a very conservative and evolutive way to understand a constitution as the natural continuation of the existing primary law. This method would take over the body of written provisions which up to now has been declared as the constitutional law of the EC by the ECJ and some legal literature. This body of written law would be completed by formalizing those parts of EC constitutional law such as fundamental rights and the rule of law which are mainly unwritten and developed by the European judges.

If the peoples of the member states were to create a European Constitution (not integrated into the EC treaty), the link to the body of EC law which has developed up to now would not be so intimate. Nevertheless, the experience of more than forty years has consolidated the system and structure of existing Community law. It cannot be abolished or fundamentally changed. Also a new constitution, even if voted by the peoples of the member states, would have to be based around the existing community structures and concepts.

II. THE INTERDEPENDENCE OF THE DIFFERENT LEVELS OF CONSTITUTIONAL LAW IN EUROPE

The three existing levels of European constitutional law (as described above) are, in many respects, dependant on each other. They influence each other in vertical and horizontal ways. As to the degree of integration, the interdependence within the EC/EU is of the highest intensity. Community law is superior to national law; this means that the community legal order directly influences the national constitutional systems to a great extent. The field in which the

national constitution remains to be applied is considerably reduced. EC law sets aside national constitutional law (at least according to the European Court of Justice).¹⁴ The vertical influence can also be seen working in the opposite direction: member states' constitutional systems influence Community law especially in the field of fundamental rights and the rule of law, which are derived from the constitutional traditions of the member states. The national elements are introduced into the Community order. For example, the system employed to protect fundamental rights in Germany is applied in some decisions of the European Court of Justice, e.g., in the famous *Hauer* case.¹⁵ Another example is the German principle of proportionality, which has been transferred to the Community level in the form of the three elements developed by the German Constitutional Court. These imports at community level are integrated into the EC constitutional order and, perhaps in a modified form, returned to the member state(s) of origin and simultaneously exported to all the other member states.

A vertical influence is also exerted by the European Convention on Human Rights, which is closely attached to the internal constitutional order of many states. The concepts of fundamental and human rights within the states' constitutions are being adapted to comply with the Convention and the jurisprudence of the Strasbourg Court. The influence of this on the signatory states is very strong; however, the influence of the signatory states towards the Convention is less important. It should be noted that some concepts have been adopted from the legal systems of the member states such as the concept of property in German Law, which has influenced the interpretation of Art. 1 of the Additional Protocol to the Convention.

The European Convention on Human Rights also has a horizontal sphere of influence: the European Communities observe the Convention rights unilaterally, as laid down in Art. 6(2) of the Treaty of European Union. The EC is not a formal member nor a signatory of the European Convention on Human Rights. It has, however, by this unilateral obligation pledged to observe the rights of the Convention; the Convention thus strongly influences EC thinking. The national level of constitutional law is indirectly connected between the states by the medium of EC Law and the European Convention on Human Rights, but there is no direct connection.

14. Case 11/70, *Int'l Handelgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1135.

15. Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3744-3749.

III. THE DEVELOPMENT OF EUROPEAN CONSTITUTIONAL LAW IN THE TWENTIETH CENTURY

The great developments of Constitutional law in Europe have taken place during the late twentieth century. It seems possible to put the major changes into a hierarchy according to the extent to which they are dynamic. Protection of fundamental rights can be placed at the top of the list, followed by the rule of law, regionalism, federalism, the attitude to international law, and finally (of a more static nature) the state institutions themselves. Returning to the protection of human rights, it should be noted that fundamental rights have been accorded an adequately high position in the hierarchy. The value of the dignity of man as formulated by the German Grundgesetz of 1949 has been inserted into the Spanish, Portuguese, and Greek Constitutions of the 1970s.¹⁶ In some of the new constitutions of the Central and Eastern European Democracies this value is expressly written in the text. It expresses clearly the new approach of anthropocentrism which is the conceptual basis for the idea that all state power (as well as supranational power) must only have the aim to promote man, assuring his physical existence, furthering his social welfare and promoting his personality. The state exists for this purpose; man does not exist for the purposes of the state. State centrism, which was predominant in the nineteenth and early twentieth century, is no longer of substantial importance.

It should also be noted that the basic value of the dignity of man is recognised all over Europe for the very basis of the protection of fundamental rights. In constitutions where the dignity of man is not expressly guaranteed, it is implicitly embodied in the constitutional law because it is necessarily connected to the idea of liberty of man. This “anthropocentric” approach has also led to changes in the attitude towards the protection of fundamental rights: their field of application has been interpreted in a broad sense, covering all new developments in technology which could potentially endanger the individual (genetic engineering, data processing, new communication technologies, etc.). Old texts have been modernised by the judges and applied to modern questions; thus, the French Declaration on Human and Civil Rights of 1789 along with its guarantee of “sacred property” was the basis for the invalidation of Mitterand’s bank nationalisation law. The interpretation of fundamental rights applies the “*effet utile*” principle giving them full effect (*ratione materiae* as well as *ratione personae*). The Constitution is seen as a dynamic “living” instrument

16. See SPAN. CONST. art. 10, § 1; PORT. CONST. art. 1, § 1; GREEK CONST. art. 2, § 1.

with the task of strengthening fundamental rights. It is relevant that the modern legislator is no longer allowed to restrict fundamental rights without limits. The Constitution is conceived of as the supreme law of the land, superior to the legislature which cannot eliminate or seriously hamper the protection of the individual.

The aforementioned “Wesensgehaltsgarantie” assumes the very essence of a fundamental right and the principle of proportionality by limiting the legislature itself. Moreover, in an increasing number of European countries, constitutional jurisdiction controls violations of the constitution by the legislature, especially with respect to fundamental rights. Further, international human rights guarantees have confirmed the level of internal protection; the ECHR has a strong influence on national methods of protecting human rights and contributes to the recognition in the internal orders of the signatory states of the necessity of a high level of protection of fundamental rights. The internationalisation of the protection of fundamental rights has not weakened the position of the individual, rather it has confirmed and assured it.

These developments are common in the constitutions of European countries, at least in tendency. *Rule of Law (Rechtstaat, Etat de droit)* has also developed into a very efficient concept which is now closely connected with the protection of the individual: the purely formal position in the nineteenth and early twentieth century has been replaced by a “material” concept essentially based on the values of dignity, autonomy, and liberty of man; this indicates the strong connection between the protection of fundamental rights and the modern concept of the rule of law. Another important progression is the fact that in a number of European states the constitution is now considered to be the supreme law and a powerful weapon in the hands of the judiciary. Even within very traditional systems such as England, where the Sovereignty of Parliament excludes the challenge of Acts of Parliament, signs of change are visible due to the influence of EC-Law: the House of Lords followed the ECJ in the *Factortame* case¹⁷ and confirmed the disapplication of Westminster law for incompatibility with Community law.

In France, which does not adhere to the principle of Parliamentary Sovereignty to the same extent, the courts are

17. See All England Law Reports 1991, 70; see also Case C-213/89, the Queen v. Secretary of State for Transport *ex parte* Factortame Ltd., 1990 E.C.R. I-2433; Arnold, *Das Verfassungsprinzip gerichtlicher Kontrolle von Legislative und Exekutive—Gemeinsamkeiten und Unterschiede*, in GEMEINSAMES VERFASSUNGSRECHT IN DER EU 140 (Müller-Graff/Riedel ed., 1998).

nevertheless very reticent before questioning law (*loi*) as the expression of the people's will. Preventative Act Control by the Conseil Constitutionnel (introduced in the Constitution of the 5th Republic) has been enlarged and deepened, and it is not astonishing that this Court formulated in 1985: "*la loi n'est l'expression de la volonté générale que dans le respect de la Constitution.*"¹⁸ The priority of the Constitution as a text in which such anthropocentric values are expressly or implicitly embodied is a key characteristic of current constitutional thinking.

Only a few words can be said in this limited space regarding further developments: Regionalisation is a predominant constitutional feature in Europe. It can be said that states have shown a tendency to regionalise their territories, or to extend and deepen existing regional structures. There have been very significant developments, *e.g.*, in Great Britain (where a quasi-federalisation is going on), and in Italy (where central competences have been decentralised to a considerable extent, especially by the *legge Bassanini*).¹⁹ Federalism, as an advanced form of regionalism, proceeds at a slower pace and has been weakened rather than strengthened. The modern welfare state is not very favourable to federalism, tending to equalise for reasons of equal participation in benefits; there is a tendency of convergence between federal and regional systems.

Progress in internationalism is a characteristic of the late twentieth-century state. The "*offene Staatlichkeit*" (the open state) is indispensable in our time of globalisation and embraces the willingness to participate in common international actions, to conform to international trade conventions, *e.g.*, the WTO, and to observe strictly the rules of public international law, etc. Multistate integration, as a special form of international relations, is at an advanced stage of internationalisation. The readiness to accept a considerable reduction in external sovereignty of a particular intensity in European integration equates with a far-reaching identification with the idea that political, economic, and cultural progress lies in international co-operation, and that inter- or even supranationalisation of internal matters is a necessary contribution of a state to the International community in the late twentieth century.

18. CONSEIL CONSTITUTIONNEL, EVOLUTION DE LA NOUVELLE-CALÉDONIE, 85-197 DC, Rec. 70, 23 août 1985.

19. See WOELK, KONFLIKTREGELUNG UND KOOPERATION IM ITALIENISCHEN UND DEUTSCHEN VERFASSUNGSRECHT: "LEALE COLLABORAZIONE" UND BUNDESTREUE IM VERGLEICH 289-94 (1999).

State institutions are deeply rooted in a state's tradition and not likely to change in the course of time. Here we see no important changes except for the installation and extension of the competence of the constitutional courts. The latter, however, is closely related to the development of the rule of law and therefore shares its dynamics. Conversely, substantive reforms are very difficult to effectuate, a significant sign of their 'conservative' character, i.e., their "inertia."

IV CONCLUSION

It can be said that three levels of constitutional law exist in Europe which influence each other. Their interdependence furthers the emergence of a common body of European constitutional law. While the fundamental parts of EC primary law and the ECHR are forms of such a law, the constitutions of the European states are separate bodies which form the bases of common principles of a supreme European constitutional law.

Much progress has been made in the late twentieth century in various fields of European constitutional law, especially the protection of fundamental rights and the rule of law. "Anthropocentrism" is therefore developing in constitutional law.