Perspectives on Federalism

Diversity of Constitutional Rights in Federal Systems. A Comparative Analysis of German, American and Swiss Law

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> 'It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'
>
> Justice Brandeis, dissenting opinion, *New State Co.* v. *Liebmann* (1932)[1]

The contribution of subnational constitutions to the development of constitutional law – Subnational recognition of a diversity of fundamental rights as symbol of constitutional autonomy – Identical, less protective and more protective subnational rights – Diversity in sources, uniformity in application – Positive rights and the provision of public goods – federal courts and state courts: federal chemistry and constitutional laboratories

The purpose of this article is to examine the relationships between federalism and the protection of individual rights in Germany, in Switzerland and in the United States. Federalism provides constitutional and judicial protection of individual rights at both the federal and state levels. Nevertheless, these generally favourable effects are offset by the fact that constitutional protection of rights often leads to centralising and unifying effects.

In spite of this, my intention is to demonstrate that we should give due consideration to the state constitutions and that state supreme courts have a valuable

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[1] 285 US 262, 311 (1932). *See* the concurring opinion of Judge O'Connor about *Cruzan c. Missouri Department of Health*, 497 US 261, 287-292 (1990).

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contribution to make to the evolution of constitutional law. Although at the present stage of European integration, the comparison of federal states to the constitutional order of the European Union is not straightforward, scholarship in the field of EU constitutional law has touched on very similar issues of protection of fundamental rights as exist within federal systems.[2] However, I will restrict myself in this article to the relationship between subnational and national constitutions in federal states.

The construction of a unique federal model presenting certain systematic characteristics seems to us impossible since federalism exists in many forms and configurations. Nevertheless, federal structures are based on recurring principles, and among them appears the principle of autonomy.[3]

The word 'autonomy', derived from *autonomos,* originally denotes the faculty to give oneself one's own laws and more specifically 'the possibility to govern oneself freely'.[4] In a legal sense, the notion of 'constitutional autonomy' in a federal system signifies every state's liberty to adopt its own constitution ('*Kompetenz zur Verfassunggebung*')[5] and to determine its form and its content, on the condition that it respects the limits imposed by federal law.

Constitutional autonomy is equivalent to the ability to predetermine the content of states' acts: it confers on state constitutional power the possibility of guiding the action of state organs. Fundamental rights represent the traditional forms of limitation and orientation of states' actions, insofar as they predetermine – negatively or positively – the content of those acts, in protecting individuals in their sphere of liberty, of autonomy, against interferences of the State organs.

However, constitutional autonomy presupposes the existence of a framework, of limits within which it unfolds. Therefore, federal units organise themselves

[2] Thus, some authors have denied (most principled J.H.H. Weiler, 'Eurocracy and Distrust', *Washington Law Review* (1986) p. 1121; further elaborated in 'Fundamental Rights and Fundamental Boundaries', in *The European Union and Human rights*, N. Neuwahl and A. Rosas (eds.), The Hague et alibi, 1995, p. 51 et seq., and reprinted as 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Space', in J.H.H. Weiler, *The constitution of Europe: 'Do the new clothes have an emperor?' and other essays on European integration* (Cambridge University Press 1999) p. 109; while others have asserted that there is such a thing as more protective and less protective fundamental rights norms, and hence that there may be situations of a 'true collusion' or collision of fundamental rights as protected at European Union and national level (*see* L.F.M. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union', 35 *Common Market Law Review* (1998) p. 629.

[3] *See* G. Scelle, *Manuel élémentaire de droit international public*, 2nd edn. (Paris, Domat-Montchrestien 1948) p. 256; C.J. Friedrich, *Tendances du fédéralisme en théorie et en pratique*, Translation by A. and L. Philippart, (Bruxelles, Institut belge de Science politique 1971) p. 19.

[4] *Dictionnaire de l'Académie française*, Vol. I, 9th edn. (Paris, Imprimerie nationale 1992) p. 155.

[5] *See* H. Kelsen, *Allgemeine Staatslehre* (Berlin, Springer 1925) p. 208.

freely but have to respect 'homogeneity clauses'[6] and a certain 'fidelity' or 'loyalty' towards the federation. Moreover, constitutional autonomy is subordinated to the criterion of 'superposition', which implies in particular the primacy of federal law *vis-à-vis* state law. This restricts the significance of state constitutional rights inasmuch as they must be in conformity with federal – constitutional or statutory – law, of course within the competence laid down in the constitution. This principle explains the fact that state constitutional rights are largely considered to be useless or 'silent'[7] by citizens and legal doctrine,[8] which consider them to be 'less prestigious' than the federal sources of rights.[9] Consequently, relations between state and federal constitutional rights are often ignored because federal rights are only considered from the perspective of their influence on the state rights.

The choice of federal systems discussed in this article was based on three considerations: a *'material condition'* relative to the existence of state constitutions and within these documents the existence of catalogues of constitutional or 'fundamental' rights. German *Länder*, Swiss cantons and American states have the quality of 'states' and are generally described as 'sovereign' – in the United States – or 'autonomous' – in Germany and in Switzerland.[10] They consequently have the competence for self-organisation, to write their own constitutions and to adopt declarations of rights. Those documents are mostly 'complete constitutions' securing constitutional rights in addition to those of the federation: the Founding Fathers laid special emphasis on guaranteeing individual human rights and civil rights which are directly applicable and binding on all state activities and may be enforced by courts. In fact, most of the subnational units had their own constitutions a long time before the Federal Constitution was adopted.

Moreover, as there is no real protection of fundamental rights without the support of a juridical structure that permits sanctions for the violation of these rights, we will take into account an *'institutional condition'* related to the existence of

[6] *See* Art. 28 § 1 and Art. 1 § 3 Basic Law, Art. 4 American Constitution, Art. 51 Swiss Constitution.

[7] *See* K. Eichenberger, 'Die Verfassungsgerichtsbarkeit in den Gliedstaaten der Schweiz', in C. Starck, K. Stern, *Landesverfassungsgerichtsbarkeit*, 'Studien und Materialien zur Verfassungsgerichtsbarkeit', Vol. 25 (Baden-Baden, Nomos 1983), p. 435-460.

[8] *See* B.C. Canon, 'Review of Constitutional Politics in the States', 91 *American Political Science Review* 1997, p. 200: 'I barely have a clue as to what my state constitution provides. I will bet that most persons who read this book review are in the same foggy state of mind about their own state constitution's provisions.'

[9] *See* N. Feyler, Note, 'The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws', 14 *New York University Review of Law and Social Change* (1986) p. 973.

[10] *See* in Germany: K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. I (C.H. Beck 1988) p. 668, § 19 III 2; and in Switzerland: J.-F. Aubert, *Traité de droit constitutionnel suisse*, Vol. I (Neuchâtel, Ed. Ides et Calendes 1967) p. 224, §§ 589-590; V. Martenet, *L'autonomie constitutionnelle des cantons* (Bâle & Genève, Helbing et Lichtenhahn 1999) p. 37.

constitutional jurisdictions in the federal units. Indeed, state constitutional law is based on both the texts of constitutional provisions and judicial interpretations of such provisions and it applies in the subnational units where such a constitutional jurisdiction interprets the state constitution. All *Länder* have constitutional courts (*Landesverfassungsgerichte*) which have the task of examining the compatibility of acts taken by the state power with its own constitution[11] and the role of most authoritative interpreter of state constitutions. In every American state, a state supreme court plays the role of a constitutional court too. Nevertheless, a dualist system of constitutional courts is not a prerequisite. Indeed, in Switzerland, although cantons have a very wide autonomy in terms of judicial organisation, Article 52 of the Federal Constitution indicates that 'The Confederation shall protect the constitutional order of the Cantons' and, according to Article 189, the Federal Tribunal[12] shall have jurisdiction over violations of federal law, public international law, intercantonal law, cantonal constitutional rights and federal and cantonal provisions and political rights. Nevertheless, although the Federal Tribunal seems to exercise an overwhelming influence, the control of cantonal acts is above all the responsibility of cantonal authorities. At the present time, only six Cantons entrusted a special court with the task of controlling cantonal acts in relation to federal as to cantonal constitutional rights.[13] But, furthermore, every cantonal authority is competent to control cantonal acts in relation to federal law: they act indeed as constitutional jurisdictions.[14] Finally, we will consider a *'procedural condition'*, namely the existence of judicial remedies for citizens of subnational units, whether it is a question of an individual complaint to the *Landesverfassungsgericht* as in Germany (*Landesverfassungsbeschwerde*) or of a judicial reference procedure.

What emerges from the study of German, Swiss and American law is that primacy of federal law seems to explain the lack of interest aroused by subnational

[11] The *Landesverfassungsgerichte* (LVerfGe) are not in the same hierarchical structure as the *Bundesverfassungsgericht* (BVerfG), but rather each is a court of first and last instance in its own hierarchy. Thus the BVerfG has exclusive jurisdiction over issues relating to the Federal Constitution, and each LVerfG has exclusive jurisdiction over its State Constitution *(Landesverfassung)*. Interestingly, it is not a duty, but rather a right for each Land to set up a LVerfG, if it chooses to. Thus not all *Länder* originally established one, and some have exercised the right more flexibly to set up a *Staatsgerichtshof* (StGH) rather than a LVerfG, which acts as a supreme court of general jurisdiction in the Land, and is not restricted to constitutional disputes.

[12] The Federal Tribunal is the Swiss Federal Supreme Court and this the highest judicial authority in the land.

[13] *See* C. of Nidwald (Art. 69 C.), Basel Land (Art. 37 C.), Jura (Art. 103), Grisons (Art. 55 C.); Vaud (Art. 136 C.) and Basel City (§ 116).

[14] Cantonal authorities (judicial and governmental authorities) not only have the right but also the *obligation* to control the conformity of cantonal and communal acts in relation to federal law. *See*: ATF (Arrêts du Tribunal Fédéral) 82 I 217 [221], cons. 1; 91 I 312 [314], cons. 3a; 112 Ia 311 [313], cons. 2c; 117 Ia 262 [265], cons. 3a.

constitutions, which are often considered to be overly long[15] and 'unstable'[16] documents. Nevertheless, it seems erroneous to argue that a simple analysis of federal constitutions is sufficient to expose the constitutional 'corpus' in the sphere of constitutional or fundamental rights properly. Subnational constitutions in Germany, in the United States or in Switzerland not only very often anticipated the federal declaration of rights[17] but they usually offer a wider rights catalogue than the federal constitution. Consequently, the final purpose of this study is to demonstrate that we should give due consideration to state constitutions and that subnational entities have a valuable contribution to make to the evolution of constitutional law.

Diversity in the recognition of individual rights as a symbol of the constitutional autonomy of subnational units

There is undeniably a potential diversity in the sources of rights and liberties within the federal structures. This is reflected in the large variety of rights secured in state constitutions.

Firstly, it seems important to distinguish different systems of subnational constitutional rights protection; close examination shows us that some contain identical catalogues to federal equivalents whilst others can be rather more restrictive or extensive than their federal counterparts.

Identical or similar provisions

German, Swiss and American subnational constitutions are often considered to be quite similar to their respective federal constitutions, and although they are not

[15] Many German constitutions contain a list of individual rights and very general principles (*'Staatsziele'*, *'Staatszielbestimmungen'*). Most of the Swiss constitutions include references to 'fundamental rights' (*'droits fondamentaux'*) or to 'individual rights' (*'droits individuels'*, *'droits personnels'*) and to *'general principles'* (*'principes généraux'*, *'Allgemeine Grundsätze'*), to 'Public tasks' (*'tâches de l'Etat'*, *'öffentliche Aufgaben'*), to 'public objectives' (*'objectifs publics'*, *'Staatsziele'*) or to 'social objectives' (*'objectifs sociaux'*, *'Sozialziele'*). About that situation in the United States: *see* J.A. Gardner, 'The failed discourse of state constitutionalism', 90 *Michigan Law Review* (1992), p. 819 (about the Art. XIV § 1 C. New York). *See also*: ibid, 'What Is A State Constitution', 24 *Rutgers Law Journal* (1993), p. 1025.

[16] Many state constitutions, for example, are very often subject to modification. *See* J.A. Gardner, *supra* n. 15, 90 *Michigan Law Review* (1992) p. 820; 24 *Rutgers Law Journal* (1993) p. 1027; P.W. Kahn, 'State Constitutionalism and the Problems of Fairness', 30 *Valparaiso University Law Review* (1996) p. 471.

[17] 'L'attention vouée par les constitutions cantonales aux libertés a été d'abord la cause, puis la conséquence de la subsidiarité de la protection fédérale de celles-ci. Ce sont les premières qui, avant même la création de l'Etat fédéral, garantissaient des droits et des libertés à leurs citoyens. La garantie fédérale s'est peu à peu développée et étendue, mais toujours en fonction des garanties cantonales: d'abord pour en combler les lacunes, puis pour les compléter, enfin pour les supplanter' (in A. Auer, G. Malinverni, *Droit constitutionnel suisse*, Vol. 2, 1st edn. (Berne, Staempfli 2000) p. 40, § 81).

necessarily so, this is the case in many other federal systems.[18] As example of this kind of similarities, the German Basic Law (*Grundgesetz*) contains provisions concerning the protection of human dignity: Article 2 provides that

> Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authority.

This formula was largely reproduced in the first *Länder* constitutions of Hesse (Article 3), Bavaria (Article 100) and Bremen (Article 5). Many 'new' *Länder* adopted similar provisions too, for example Saxony, Saxony-Anhalt, Brandenburg, Thuringia and Berlin. Similar parallelisms can be observed in the Swiss cantonal constitutions; for example, provisions in relation to equal protection clauses, protection of human dignity or prohibition of torture are often drawn up in very similar terms. This is also true in the United States, where state constitutional rights in the area of criminal procedure or free speech are often modelled on federal provisions.[19]

It is impossible to conclude that there is a normative conflict between rights coinciding with federal guarantees. They consequently do have a real and substantive character because of the concordance between two norms stemming from superposed legal systems. The copying of federal fundamental rights by states can indeed be useful, essentially because state fundamental rights can be interpreted differently by the state courts and, in last resort, by state supreme courts. However, this impact is not unanimously recognised in Germany, Switzerland and in the United States.

In Germany, the Federal constitutional Court affirmed in an important decision of 1974 that 'federal constitutional law does not "*trump*" identical state constitutional law'.[20] On the other hand, the Federal Tribunal in Switzerland developed a restrictive jurisprudence toward this category of rights: when cantonal provisions do not expand beyond federal guarantees, they have no 'independent impact'.[21] This point of view, followed by a large segment of legal writing and by

[18] *See* R.F. Williams, 'State Constitutional Law Processes', 24 *William & Mary Law Review* (1983), p. 169; ibid, *State Constitutional Law: Cases and Materials*, 4th edn. (Charlottesville, Lexis 2006). *See also* G.A. Tarr, *Understanding State Constitutions* (New Jersey, Princeton University Press 1998).

[19] For example, the 4th Amendment is emulated by Art. 1 § 12 C. Florida and Art. 3 § 6 C. Virginia.

[20] BVerfGE 36, 342.

[21] *'Keine selbständige Bedeutung'* or *'keine eigene Tragweite'*. *See* ATF 5, 334 [337], *Bank in St-Gallen und Toggenburger Bank*; 7, 502 [512], *Obrist*; 11, 156 [158], *Sprenger*; 12, 93 [105], *Schaaff*; 15, 730 [734], *Weber*; 51 I 485 [498], *Forster*; 55 I 226 [227], *Dellberg*; 93 I 130 [137], 22.2.1967, *Erben Schulthess und Erben Bäggli*; 94 I 602 [610], *Häfeli*, 10.7.1968; 95 I 356 [359], *Achermann*, 17.9.1969; 96 I 219 [223], *Nöthiger*; 98 Ia 418 [421], *Danuser*; 99 Ia 262 [266], *Minelli,* 4.8.1973; 102 Ia 468 [469], *Buchdruckerei*

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federal political authorities in the context of the 'guarantee' of the cantonal constitutions by the Federal Assembly (*procédure de garantie fédérale*),[22] leads some authors to think that these rights, because of the supremacy of federal law, are completely useless and little more than 'monuments'.[23] However, there is no general agreement on this argumentation and some authors such as Andreas Auer and Giorgio Malinverni consider that these provisions 'take a place alongside federal and international protection, as a *complementary* source of constitutional rights, that litigants can invoke and that constitutional jurisdictions can enforce in a independent way.'[24]

In the United States, a large number of authors argue that in such a case states should follow the interpretation given to the analogous federal provisions by the Supreme Court,[25] except where there is a distinctive – usually historical – diver-

Elgg AG, 6.10.1976; 103 Ia 293 [294], *Bonzi*, 23.21977; 104 Ia 434 [435], *Yolande Stauffacher*, 20.9.1978; 104 Ia 480 [485], *Meylan*, 8.2.1978. *See* A. Filli, *Die Grundrechte der Kantonsverfassungen im Gefüge des schweizerischen Staatsrechts*, Ph.D. Dissertation (Bâle, Econom-Druck 1984) p. 50.

[22] Legislative power is exercised in Switzerland by the Federal Assembly (Assemblée fédérale), which consists of two chambers with equal rights: the Council of States (46 deputies representing the cantons) and the National Council (200 deputies representing the people). The Federal Assembly elects the seven members of the Executive (the Federal Council) and the Federal President. It is also competent for the relations between the Confederation and the cantons. In particular, it grants federal guarantee to the cantonal constitutions. Indeed, according to Art. 51 of the Swiss Constitution, 'Every Canton shall adopt a democratic constitution. The cantonal constitution must be approved by the people, and must be subject to revision if a majority of the people so requires. The cantonal constitutions must be guaranteed by the Confederation. The Confederation shall grant this guarantee, if the constitutions are not contrary to federal law.' Moreover, Art. 172 indicates that the Federal Assembly shall play this role: 'the Federal Parliament shall maintain the relations between the Confederation and the Cantons' (§ 1) and that 'it shall guarantee the cantonal constitutions' (§ 2).

[23] J.-F. Aubert, *Traité de droit constitutionnel suisse*, *supra* n. 10, § 1755. *See also*: M. Kurer, *Die kantonalen Grundrechtsgarantien und ihr Verhältnis zum Bundesrecht*, Ph.D. Dissertation (Zürich, Schulthess Polygraphischer Verlag 1987) p. 143; U. Häfelin, 'Die Grundrechte in den Schweizer Kantonsverfassungen', in *Der Föderalismus und die Zukunft der Grundrechte* (Wien, Böhlau 1982) p. 41; B. Knapp, 'Le recours de droit public – facteur d'unification du droit cantonal et d'émiettement du droit fédéral', *Revue de droit suisse* (1975), vol. II, p. 222; M. Imboden, 'Die staatsrechtliche Bedeutung des Grundsatzes "Bundesrecht bricht kantonales Recht"', in *Staat und Recht: ausgewählte Schriften und Vorträge* (Basel, Stuttgart, Helbing und Lichtenhahn 1971) p. 138.

[24] Some authors even think that it is because cantonal constitutions include references to individual rights that they are 'real' constitutions (*see* P. Häberle, 'Die Kunst der kantonalen Verfassunsgebung – das Beispiel einer Totalrevision in St. Gallen (1996)', *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* (1997) p. 112). *See also*: W. Kälin, 'Chancen und Grenzen kantonaler Verfassungsgerichtsbarkeit', *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* (1987) p. 233 at p. 245-248; A. Auer, 'Les constitutions cantonales: une source négligée du droit constitutionnel Suisse', *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* (1990), vol. 91, p. 24; M. Hottelier, 'Le nouveau fédéralisme judiciaire aux Etats-Unis : un modèle pour la Suisse ?', in *De la Constitution: études en l'honneur de Jean-François Aubert* (Neuchâtel, Helbing & Lichtenhahn 1996) p. 509-518.

[25] *See* P.S. Hudnut, 'State Constitutions and Individual Rights: The Case for Judicial Restraint', 63 *Denver University Law Review* (1985) p. 85 at p. 104; G. Deukmejian, C.K. Jr. Thompson, 'All Sail

gence between the two provisions that justifies a different interpretation.[26] This conception is nevertheless not shared by everyone, since it goes against principles of federalism in a certain way.[27] The fact that two provisions have the same content does not prevent state supreme courts from interpreting state constitutional rights differently from the way the Supreme Court interpreted equivalent federal rights. According to this point of view, the only allegiance that state supreme courts owe to the federal Constitution, which is implied by the supremacy clause, consists in establishing that no violation of federal constitutional rights occurs in the cases judged by them.

Moreover, the adoption of provisions that are similar to federal constitutional rights is a simple *choice* that ensues from their constitutional autonomy. The supremacy clause applies only in case of a conflict between two rights provisions. Yet this cannot be the case when two norms are in every respect identical and when federal and state levels interact in a sphere in which they are both competent. These two provisions therefore have an 'autonomous' impact and can be interpreted independently by state courts, particularly in Germany and in the United States.

However, the state constitutional rights revealing the greatest diversity among federal systems are those rights that are 'independent' from – different from – federal protection. These more restrictive or more expansive rights show a real diversity which is often ignored and misrepresented.

State provisions less protective than the federal constitution

State constitutions are not compelled to recognise positively all the rights set out by the federal constitution; indeed they need not protect *any* rights. Such a restrictive protection can occur in two cases: either when state constitutions protect the same rights as the federal constitution but restrict the scope of the protection offered, insert broader restrictions; or when they ignore certain rights protected by the federal constitution.

In Germany, these restrictive provisions exist especially among the *Länder* constitutions adopted before 1949: for example, the provisions related to the death

and No Anchor – Judicial Review under the California Constitution', 6 *Hastings Const. L. Q.* (1978-1979) p. 987-996; E.M. Maltz, 'The Dark Side of State Court Activism', 63 *Texas Law Review* (1985) p. 995 at p. 1012-1016.

[26] *See* the opinions of Judge Miller about *People* v. *Krueger*, 675 N.E. 2d 604, 613 (Illinois, 1996) and *People* v. *Washington*, 665 N.E. 2d 1330, 1342 (Illinois, 1996). *See also*: S.J. Twist, L.L. Munsil, 'The Double Threat of Judicial Activism: Inventing 'New' Rights in State Constitutions', 21 *Arizona State Law Journal* (1989) p. 1005.

[27] *See* H.J.D. Heiple, K.J. Powell, 'Presumed Innocent: The Legitimacy Of Independent State Constitutional Interpretation', 61 *Albany Law Rev.* (1998) p. 1507 at p. 1512.

penalty.[28] As to the constitutional texts adopted after 1949, the Brandenburg constitution contains for example a provision permitting statutory restrictions to the freedom of movement and travel[29] or to free speech.[30] This scenario is rarer in the United States because of the concision of the American Federal Constitution. Some state constitutions conceive some rights in a more restrictive way, but it is above all the interpretation of those rights by state supreme courts that may contradict the interpretations developed by the federal court.[31] As for Switzerland, in the field of the equality clause or the prohibition of discrimination, some cantonal constitutions are very succinct, for example the constitutions of Schaffhausen and Fribourg, which affirm solely that 'nobody should be discriminated against'.[32] Older constitutions often lack clarity: for example, the Valais constitution of 1907 contains a brief provision specifying that 'every citizen is equal before the law' (Article 3).[33] Four constitutions are even silent on,[34] or only refer to the equality between men and women.[35]

The impact of 'more restrictive constitutional rights' is generally limited in the federal context, because insofar as there is a conflict between two norms, it is resolved by Article 31 of the German constitution, Article VI § 2 of the American Constitution or Article 49 of the Swiss constitution. Thus, in Germany, the prevailing school of thought (*Mindeststandardlehre*) considers that these rights have no value inasmuch as the Basic Law represents a 'minimum standard' below which neither subnational law, nor European human rights protection can go (whether

[28] Art. 3 § 1-2 and Art. 103 § 1-3 C. Rhineland-Palatinate; Art. 47 § 4 C. Bavaria; Art. 121 § 2 C. Bremen; Art. 21 § 1 ph. 2 C. Hesse. *See* S. Jutzi, *Die öffentliche Verwaltung*, 1988, pat 871; *ZRP*, 1989, at 68; U. Storost, in W. Fürst, R. Herzog, Dieter C. Umbach (eds.), *Festschrift für Wolfgang Zeidler* (Berlin, New York, W. de Gruyter 1987), p. 1199; C. Pestalozza, *Verfassungen der deutschen Bundesländer*, 3rd edn. (München, Deutscher Taschenbuch Verlag 1988), p. 14.

[29] Art. 17 § 2 C. Brandenburg.

[30] Art. 19 § 1 C. Brandenburg.

[31] *See* R.F. Williams, *State Constitutional Law: Cases and Materials*, *supra* n. 18, p. 239; B. Latzer, 'Four Half-Truths About State Constitutional Law', 65 *Temple Law Review* (1992) p. 1123-1130; B. Latzer, 'Whose Federalism? Or, Why 'Conservative' States Should Develop Their State Constitutional Law', 61 *Albany Law Review* (1998) p. 1399; E.M. Maltz, 'False Prophet – Justice Brennan and the Theory of State Constitutional Law', 15 *Hastings Const. Law Quarterly* (1988) p. 429; M.A. Crossley, Note, 'Miranda and the State Constitution: State Courts Take A Stand', 39 *Vanderbilt Law Review* (1986) p. 1693. *See State* v. *Smith*, 301 Or. 681, 725 P. 2d 894 (Oregon, 1986); *Serna* v. *Superior Court*, 40 Cal. 3d 239, 707 P. 2d 793, 799 (California, 1985); *State* v. *Hopper*, 118 Wash. 2d 151, 822 P. 2d 775, 778 (Washington, 1992); *State* v. *Jackson*, 503 S.E 2d 101, 103 (North Carolina, 1998).

[32] Art. 11 § 1-2 C. Schaffhausen; Art. 9 § 1-2 C. Fribourg.

[33] *See* Art. 2 § 1 C. Appenzell Outer Rhodes of 1872. *See also* Art. 2 § 2 C. Geneva and C. of Lucerne, Schwyz and Zoug.

[34] *See* C. of Obwald, Soleure, Thurgovie and Grisons.

[35] Art. 6 § 1 C. Jura; Art. 7 § 2 C. Ticino; Art. 2b C. St. Gall.

in the European Community[36] or Council of Europe context). Also in Switzerland the Federal Council (*Conseil Fédéral*) and the Federal Assembly,[37] like the Federal Tribunal, refuse to recognise the validity of any cantonal provisions that are less protective than the corresponding federal provisions;[38] a solution largely approved by the majority of authors.[39] State constitutions can therefore only guarantee protections that are '*at least equal*' to the federal Constitutional 'requirements'. However, the authors of the German 'doctrine of compatibility' (*Vereinbarkeitslehre*) consider that 'a limited standard as regards constitutional rights is better than no standard at all'[40] and defend a 'compatibility thesis'. According to this, these rights remain in force when they are 'in accordance' with the Basic Law, that is when they 'partially agree' ('*partiell übereinstimmen*') with their federal counterparts.[41] The jurisprudence of the German Federal Constitutional Court goes in this direction: it affirmed in an important decision in 1997 that 'even when state constitutional rights go beyond or below federal guarantees, they are not *per se* against federal law insofar as they merely represent a "minimal guarantee", which does not prevent a broader guarantee at the federal level.'[42]

In the United States, the solution seems simpler as the federal Constitution can be invoked in state courts and must – in principle – be enforced as 'the supreme law of the land'. The state court can therefore consider both provisions directly, and retains a certain freedom of interpretation as to the extent of state constitutional protection to be offered. State courts have the choice to allow federal guarantees to supplant the provisions of the state constitutions; but if they choose to follow federal precedent to bolster nationwide conformity, they destroy the 'double security' designed to protect their citizens. Furthermore, citizens retain the possibility of referring to the rights incorporated by the 14th Amendment.[43] In Swit-

[36] Although in Art. 23 of the *Grundgesetz,* this is formulated in terms of fundamental rights protection 'essentially equivalent' to the Federal constitution. In BVerfG, 2 BvL 1/97 of 06.07.2000 (*Bananas*) the *Bundesverfassungsgericht* held that in order to be admissable any complaint should state that the overall level of protection has decreased below the level of overall equivalence.

[37] The Federal Council is the Swiss federal government. It is a collegial executive of seven members.

[38] Cf. FF (Feuilles fédérales), 1987, II, p. 626 at p. 632; FF, 1989, III, p. 706 at p. 711; FF, 1989, III, p. 833, 839-840; FF, 1994, I, p. 401 at p. 407; FF, 1996, I, p. 965 at p. 970-971.

[39] *See* U. Häfelin, 'Die Grundrechte in den Schweizer Kantonsverfassungen', in *Der Föderalismus und die Zukunft der Grundrechte*, *supra* n. 23, p. 39; M. Kurer, *supra* n. 23, p. 145-146, p. 151.

[40] *See* M. Sachs, *Kommentar zum Grundgesetz,* 4th edn. (München, Beck 2007), Art. 142.

[41] *See* W. Rüfner, 'Zum Verhältnis von Bundes- und Landesverfassungsgerichtsbarkeit im Bereich der Grundrechte', *Die öffentliche Verwaltung* (1967) p. 669.

[42] BVerfGE 96, 345 [365]; 36, 342 [361].

[43] *See* the history of the process of 'incorporation' through the 14th Amendment. *See Slaughterhouse Cases* of 1873 (83 US (16 Wall.) 36, 76) and *Chicago, Burlington & Quincy Railway Co.* v. *Chicago* of 1897 (166 US 226, 258).

zerland also, certain authors consider that cantonal constitutional autonomy includes the freedom to prescribe less protective provisions in cantonal constitutions than those guaranteed by federal law.[44] Consequently, were a cantonal right to 'stay below' the standard of the federal Constitution, there would be no violation of federal law justifying the refusal or withdrawal of the 'validation' accorded by the federal Parliament to the cantonal constitution.[45] This does not lead to a diminishing of the rights protection in the canton, for applicants are still able to invoke the corresponding federal provision.[46]

State constitutional rights offering broader guarantees

Theoretically, subnational units are perfectly entitled to extend the guarantees contained in federal constitutions. They can broaden the material or personal scope of state constitutional rights protection, or limit the restrictions that can be imposed on these rights to stricter conditions.[47] For example and in a symbolic way, in Germany as in Switzerland, the equality clause is often 'completed' by the *Länder* and cantonal constitutions. In this way, the Swiss federal Constitution stipulates in its Article 8 § 2 that 'no person shall suffer discrimination, particularly on grounds of origin, race, sex, age, language, social position, lifestyle, religious, philosophical or political convictions, or because of a corporal or mental disability.' However, some cantonal constitutions add to this list the prohibition of any discrimination on grounds of skin colour or way of life,[48] age,[49] state of health,[50] ethnic group[51] or 'sexual orientation'.[52] Concerning the right of petition, some cantonal constitutions compel the authority concerned to provide a response to the author of the petition, as in the cantons of Glarus (Article 60 al. 2), Berne (Article 20 al. 3), Zurich (Article 16) or Basel City (Article 11 al. 1b).

In spite of a minority opinion in legal thought that considers that the federal Constitution is a 'maximal guarantee',[53] in general – whatever the country – if a

[44] *See* V. Martenet, *supra* n. 10, p. 429; A. Auer, *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* (1990), *supra* n. 24, p. 22-25.

[45] *See* ATF 106 Ia 267 [271], *Oswald*.

[46] *See* FF 1989, III, p. 706 at p. 712; 1989, III, p. 833 at p. 840.

[47] *See* M. Kurer, *supra* n. 23, p. 148-150; M. Hottelier, *Le Bill of Rights et son application aux Etats américains Etude de droit constitutionnel des Etats-Unis, avec des éléments comparatifs de droit suisse* (Bâle, Helbing & Lichtenhahn, Collection Genevoise, 1995) p. 139-140.

[48] Art. 10 § 1-2 C. Berne; Art. 5 § 2 C. Appenzell Outer Rhodes.

[49] Art. 5 § 2 C. Appenzell Outer Rhodes.

[50] Art. 7 § 1 C. Tessin.

[51] Art. 8 § 12 C. Neuchâtel; Art. 8 § 2 C. Basel City.

[52] Art. 11 § 2 C. Zurich.

[53] *See* in Germany: E.-W. Böckenförde, R. Grawert, 'Kollisionsfälle und Geltungsprobleme im Verhältnis von Bundesrecht und Landesverfassung', *Die öffentliche Verwaltung* (1971) p. 119 at p. 121;

state constitution contains a broader protection, it must be applied. For example, the United States Supreme Court decided, in a famous decision of 1980, *Pruneyard Shopping Center* v. *Robins*[54] that 'the First Amendment (…) does not *ex proprio vigore* limit a State's (…) sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.' Furthermore, in spite of the supremacy clause, state supreme courts can deduce from their constitutions some individual rights that do not exist at the federal level or they can interpret state constitutional rights more 'liberally' than their federal counterparts,[55] insofar as such an interpretation would not contradict any right secured at the federal level. The Supreme Court, which already developed this idea in 1967 in a decision *Cooper* v. *California*;[56] and later in 1975 in a decision *Oregon* v. *Hass*[57] reaffirms it regularly.[58] Such a position reminds one of Stewart G. Pollock who affirmed in 1982: 'Although the state constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete.'[59]

It is clear that sources of constitutional rights are diverse in federal states, yet it is important to consider whether this potential diversity is materialised through particular mechanisms of protection.

A trend of standardisation in the implementation of state constitutional rights

The existence of a federal structure permits the juxtaposition – or superposition – of two levels of constitutional instruments protecting individual rights. Nev-

S. Jutzi, *Landesverfassungsrecht und Bundesrecht- Kollisionslagen und Geltungsprobleme, exemplifiziert an sozialen und wirtschaftlichen Bestimmungen des Landesverfassungsrechts* (Berlin, Duncker & Humblot, Schriften zum Öffentlichen Recht 1982) p. 37; S. Jutzi, 'Grundrechte der Landesverfassungen und Ausführung von Bundesrecht', *Die öffentliche Verwaltung* (1983) p. 836; M. Sachs, 'Die Grundrechte im Grundgesetz und in den Landesverfassungen – Zur Voraussetzung des Normwiderspruchs im Bereich der Art. 31 und 142 GG', *Die öffentliche Verwaltung* (1985) p. 469 at p. 472.

[54] *Pruneyard Shopping Center* v. *Robins*, 447 US 74, 80-81 (1980). *See City of Mesquite* v. *Aladdin's Castle*, Inc. 455 US 283 (1982).

[55] Cf. A.E.D. Howard, 'Protecting Human Rights in a Federal System', in M. Tushnet (ed.), *Comparative Constitutional Federalism. Europe and America* (New York, Greenwood Press 1990) p. 115-137.

[56] 386 US 58, 62 (1967): '(The state has) power to impose higher standards on searches and seizures than required by the Federal Constitution of it chooses to do so.'

[57] 420 US 714, 719 (1975): '(A) State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.'

[58] About a recent example: *see Arizona* v. *Evans*, 514 US 1, 115 S. Ct. 1185, 1190 (1995): '(State) courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'

[59] *Right to Choose* v. *Byrne*, 91 N.J. 287, 300, 450 A. 2d 925, 931 (1982).

ertheless, this does not prejudge the existence of appropriate mechanisms of protection which allow an 'autonomous' scope of rights protection. Contrary to the diversity in the sources noted, we notice a certain uniformity in their application. This phenomenon results both from the supremacy clause contained in federal constitutions and from the diversity in the way federal courts influence their state counterparts.

The ambiguous treatment of 'positive' state rights by federal law

The case of more extensive rights than those contained in the federal constitution, or of rights 'alien' to the federal constitution ('*aliud-Grundrechte*') is very interesting in the sense that it illustrates very well the realisation of the constitutional autonomy of subnational units.

In Germany, some *Länder* constitutions guarantee a right to education,[60] a right to work,[61] a right to a shelter[62] or a right to culture.[63] Moreover, in contrast to the federal Constitution, the majority of the *Länder* constitutions address the arts and culture more specifically – the only exception being the city-state of Hamburg. Three of the *Länder* – Bavaria, Brandenburg and Saxony – include culture among the main social goals of the state in clauses such as: 'Bavaria is a legal, cultural and social state' (Article 3 § 1).

In Switzerland,[64] the constitutions of Jura, Basel Land, Solothurn, Aargau and Berne include rights that have no counterpart in the federal constitution, such as the particular right to scholarships and student loans[65] or two emblematic rights such as the right to shelter[66] and the right to work.[67] For example, the Article 29 of the Berne constitution provides that:

> Everyone has the right to shelter when in need, to the means required for a decent standard of living, and to basic medical care. Every child has the right to protection, welfare provision and care as well as to a school education that is commensu-

[60] Art. 27 § 1 C. Bremen; Art. 8 § 1 C. North Rhine-Westphalia; Art. 11 § 1 C. Baden-Württemberg; Art. 102 § 1-1 C. Saxe; Art. 29 § 1 C. Brandenburg; Art. 4 § 1 C. Lower Saxony; Art. 20 § 1 C. Berlin.

[61] Art. 166 § 2 C. Bavaria; Art. 8 § 1 C. Breme; Art. 45-2. C. Sarland; Art. 24 § 1-3 C. North Rhine-Westphalia; Art. 7 § 1 C. Saxony; Art. 18 C. Berlin. *See also* Art. 37 § 1 C. Baden; Art. 48 C. Brandenburg; Art. 28 § 2 C. Hesse.

[62] Art. 106 § 1 C. Bavaria; Art. 47 C. Brandenburg; Art. 14 § 1 C. Breme; Art. 7 § 1 C. Saxony.

[63] Art. 11 § 1 C. Baden-Württemberg; Art. 128 C. Bavaria; Art. 29 C. Brandenburg; Art. 27 § 1 C. Breme; Art. 8 C. North Rhine-Westphalia; Art. 7 § 1 C. Saxony; Art. 20 C. Thuringia.

[64] *See* A. Filli, *supra* n. 21, p. 190-205; M. Kurer, *supra* n. 23, p. 100-117; P. Saladin, M. Aubert, 'Constitution sociale', in W. Kälin, U. Bolz (eds.), *Manuel de droit constitutionnel bernois* (Berne, Staempfli 1995) p. 95-104.

[65] Art. 10 § C. St-Gall.

[66] Art. 10A C. Geneva; Art. 22 § 1 C. Jura.

[67] Art. 19 C. Jura ; Art. 29 C. Berne.

rate with their abilities and free of charge. The victims of serious offences have the right to assistance in overcoming their difficulties.

As for the United States, historically, state constitutions have focused not only on the political structure of government, but also on the provision of public goods or on the promotion of community values. Since the eighteenth century, some state constitutions have included a range of social and economic provisions. Some of them contain 'positive rights'[68] such as the right to public assistance, or related to health care and alleviation of poverty,[69] education,[70] work[71] or environment.[72] This is also the case of the promotion of equality between men and women[73] and of rights of victims.[74]

An interesting phenomenon becomes apparent here: the change from a 'defensive,' or 'negative' conception of rights to a positive one.[75] Commentators typically distinguish between negative rights (sometimes referred to as 'first-generation rights') and positive rights (or 'second-generation' or 'social rights'). Negative rights comprise defensive claims against 'invasion' by the state: 'If negative

[68] *See* H. Hershkoff, 'Positive Rights and State Constitutions: the Limits of Federal Rationality Review', 112 *Harvard Law Review* (1999) p. 1131; ibid., 'Positive Rights and the Evolution of State Constitutions', 33 *Rutgers Law Journal* (2002) p. 799-834; ibid., 'Rights and Freedoms under the State Constitution: A New Deal for Welfare Rights', 13 *Touro Law Review* (1997) p. 631; B. Neuborne, Foreword, 'State constitutions and the Evolution of positive Rights', 20 *Rutgers Law Journal* (1989) p. 881-901; P.J. Galie, 'State Courts and Economic rights', 496 *The Annals of the American Academy of Political and Social Science* (1988) p. 76-87.

[69] *See* Art. XVII § 1 C. New York; Art. XI § 4 C. North Carolina; Art. IV § 88 C. Alabama; Art. 12 § 3 al. 3 C. Montana; Art. 17 § 3 C. Oklahoma; Art. 7 § 18 C. Wyoming; Art. XXIV § 3 C. Colorado; Art. IX § III al. 1 C. Georgia; Art. IX § 3 C. Hawaii; Art. X § 1 C. Idaho; Art. IX § 3 C. Indiana; Art. VII § 4 C. Kansas; Art. IV § 86 and Art. XIV § 262 C. Mississippi; Art. 13 § 1 al. 1 C. Nevada; Art. XI § 2 C. Texas; Art. IXI § 2 C. Utah; Art. IX § 2 C. West Virginia; Art. XLVII (Amendement) Massachusetts; Art. 16, §§ 3 and 11, Art. 34 C. California; Art. 12 § 8 C. Louisiana; Art. 4 § 51 C. Michigan. *See* D. Braveman, 'Children, Poverty, and State Constitutions', 38 *Emory Law Journal* (1989) p. 577; A.S. Cohen, 'More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter', 38 *Emory Law Journal* (1989) p. 615. *See Franklin* v. *New Jersey Department of Human Services* (543 A.2d 56, 66 [N.J. Super Ct. App. Div. 1988]); J.C. Connell, 'A right to Emergency Shelter for the Homeless Under the New Jersey Constitution', 18 *Rutgers Law Journal* (1987) p. 765-822.

[70] Art. 15 C. North Carolina.

[71] *See* Art. 1 § 6 C. Florida; Art. 1 § 7 C. North Dakota; Art. 6 § 2 C. South Dakota; Art. 1 § 17 C. New York. *See also* Art. 1 § 6 C. Florida of 1968; Art. 1 § 29 C. Missouri of 1945; Art. 1 § 19 C. New Jersey of 1947.

[72] *See* Sect. 27 C. Pennsylvania.

[73] Art. 1 § 28 C. Pennsylvania.

[74] Art. 32 C. Missouri; Art. 35 C. Washington; Art. 37 C. North Carolina.

[75] About this distinction: *see* S. Bandes, 'The Negative Constitution: A Critique', 88 *Michigan Law Review* (1990) p. 2271.

rights provide a shield, positive rights extend a sword, entailing affirmative claims that can be used to compel the state to afford substantive goods or services as an aspect of constitutional duty.'[76] But the scope of these affirmative claims seems to be very limited.

In Switzerland, cantonal constitutional provisions affording social rights have been considered to be in accordance with federal law in the context of the 'validation' of cantonal constitutions.[77] Nevertheless, it does not mean that they are enforceable and plainly justiciable. Neither in Swiss law, nor in German law, is this characteristic admitted.

In the United States, provisions related to public education are also very interesting. In this field, federal law is restricted to the affirmation that

> (…) no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (Section 1 of the 14th Amendment).

On the other hand, many states have decided to guarantee positive rights, which imply an 'affirmative duty' for the state governments.[78] Nevertheless, these provisions are rarely applied by state courts, 'hesitant' with regard to such generous rights guarantees. Moreover, even when state judges make use of these rights, they consider them more to be a 'source of inspiration' to influence the implementation of due process or equal protection clauses. For example, state provisions concerning education have encouraged state courts to draft constitutional

[76] H. Hershkoff, 'Positive Rights and State Constitutions: the Limits of Federal Rationality Review', 112 *Harvard Law Review* (1999) p. 1131. In the United States as in Germany or in Switzerland, many commentators dismiss positive rights as not sufficiently 'constitutional', maintaining that a state's attention to social and economic matters is best expressed through statutory provision and not constitutional text.

[77] Cf. FF, 1977, II, p. 259 (about Art. 18 to 23 C. Jura); FF, 1992, V, p. 1157 at p. 1168-1169 (about Art. 10 A C. Geneva); FF, 1994, I, p. 401 (about Art. 29 C. Berne); FF, 1996, I, p. 965 (about Art. 24 C. Aargau).

[78] Art. X § 1 C. Montana of 1973 indicates that 'It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state. (…) The legislature shall provide a basic system of free quality public elementary and secondary schools. (…) It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.' *See* Art. VIII § 1 C. Connecticut; Art. VIII § 1 C. Maryland; Art. VIII § 4 C. New Jersey; Art. VIII §§ 1 and 2 C. North Dakota; Art. VII §§ 1 to 3 C. Texas; Art. VI § 2 C. Ohio of 1851. *See* B. Neuborne, Foreword, 'State constitutions and the evolution of positive rights', 20 *Rutgers Law Journal* (1989) p. 881-901.

principles regarding school financing, despite the Supreme Court's refusal to recognise an equal protection in this field at the federal level.[79]

A general characteristic of positive rights is that they reflect the 'constitutional identity' (*Verfassungsidentität*) of subnational units,[80] even if they 'often promise more than they are able to provide'.[81]

This specific category of rights faces another problem: their impact is determined by the 'space of liberty' left by federal law.

A diversity that only exists in the field of the exclusive competences of federal units

Another difficulty is due to the fact that state provisions concerning individual rights have to be *in accordance with* federal – constitutional and statutory – law in order to be effectively applied. In fact, subnational individual rights that are likely to be more effective intervene in the domains in which states have exclusive competence. In these fields, any federal statute is likely to contradict state provisions, simply because there is theoretically none: only provisions of the federal Constitution can limit their impact.

The distribution of competences between federal and state levels differs in the three countries. In Germany, the *Länder* have an 'exclusive competence' in the fields of education and school, religion and culture – fields that are strongly associated with their cultural 'sovereignty' or 'autonomy' (*Kulturhoheit*). On the other hand, work, social welfare and economy are competences of the federal level.

In the United States the situation seems to be more complex. While states are competent in a majority of domains, Congress often intervenes in areas in which states share competence. Thus, whilst the Constitution remains perhaps obscure on this point, the Supreme Court's case-law has protected the autonomy of state action unless Congressional intervention clearly intended to exert the supremacy of federal law. A particularly vociferous saga was played out in the context of same-sex marriages, causing a lot of ink to flow the last few years in states like Vermont.[82]

[79] *See Rodriguez* v. *San Antonio Independent School District*, 411 US 1 (1973). *See also Robinson* v. *Cahill*, 62 N.J. 473, 303 A.2d 273 (New Jersey, 1973); *Abbott* v. *Burke*, 495 A.2d 376 (1985); *Seattle School District No. 1* v. *State*, 97 Wash. 2d 534, 647 P. 2d 25 (Washington, 1982).

[80] *See* R.A. Schapiro, 'Identity and interpretation in state constitutional law', 84 *Virginia. Law Review* (1998) p. 389. In Germany, this question has also been raised by numerous authors. *See* W. Graf Vitzthum, 'Auf der Suche nach einer sozio-ökonomischen Identität? – Staatszielbestimmungen und soziale Grundrechte in Verfassungsentwürfen der neuen Bundesländer', 11 *Verwaltungsblätter für Baden-Württemberg* (1991) p. 404-414; R. Wahl, 'Grundrechte und Staatszielbestimmungen im Bundesstaat', 112 *Archiv des öffentlichen Rechts* (1987) p. 45; D. Grimm, 'Verfassungsfunktion und Grundgesetzreform', 92 *Archiv des öffentlichen Rechts* (1972) p. 494.

[81] *See* V. Martenet, *supra* n. 10, p. 431.

[82] *See Baker* v. *State,* 744 A.2d 864 (Vermont, 1999); *Baehr* v. *Lewin*, 74 Haw. 648, 852 P. 2d 44 (Hawaii, 1993); R.F. Williams, 'Old Constitutions and New Issues: National Lessons From Vermont's State Constitutional Case on Marriage of Same-Sex Couples', 43 *Boston College Law Review* (2001) p. 73-123.

Nevertheless, this assertion is not absolute. For example, in Switzerland, most competences are 'concurrent', that is cantons are competent as long as the confederation does not legislate. Nevertheless, in spite of the fact that there are virtually no longer any areas in which the cantons have exclusive competence, cantonal constitutional rights still have great actual relevance: they can influence the jurisprudence of the cantonal constitutional jurisdictions and of the Federal Tribunal. Furthermore, they are all part of the national 'constitutional identity'.

The impact of state constitutional rights is not only limited by the supremacy of federal law; it is also restricted by the fact that constitutional protection of rights often has centralising and unifying effects.

The influence of federal constitutional courts

Whilst they have sometimes encouraged state courts to free themselves from federal 'influence' and to become more 'autonomous', one must admit that federal courts employ many vectors of 'centralisation', which however do not prevent federal units from becoming real 'constitutional laboratories'.

It seems necessary to distinguish the means by which federal constitutional courts exert their influence over their subnational counterparts. These influences can first of all be described as 'direct', as federal constitutional courts have the right to 'review' decisions of state supreme courts, in order to maintain a certain form of unity despite the diversity inherent to all federal systems.

The American Supreme Court serves as the final instance of interpretation of any question of federal law.[83] Nevertheless, the Supreme Court has tried to temper this assertion, as judges affirmed in 1875, in the decision *Murdock* v. *City of Memphis*:[84] when state courts base their decisions on state constitutions, federal judges should refuse to intervene, except for specific cases also arousing a question of federal law.[85] Subsequently, the decision *Michigan* v. *Long*[86] of 1983 affirmed that under the doctrine of 'adequate and independent state grounds', state court decisions which rest upon an adequate state ground will not be reviewed by the United States Supreme Court. This doctrine laid the foundations of a constitutional limit on the United States Supreme Court's jurisdiction: the Court has no jurisdiction to review a state decision which is adequately based on state grounds. It primarily serves federalist concerns, since it expressly recognises the separation of federal and state law and prevents federal courts from determining matters of

[83] *See* Judiciary Act of 1789. *See also Martin* v. *Hunter's Lessee* (1816); *Cohens* v. *Virginia* (1821).

[84] 87 US (20 Wall.) 590 (1875).

[85] This decision was confirmed in 1945 in the decision *Herb* v. *Pitcairn*, 324 US 117 (1945).

[86] 463 US 1032-1402 (1983); *Colorado* v. *Nunez* (1983); *Florida* v. *Myers* (1984); *Massachusetts* v. *Upton* (1984); *State* v. *von Bulow* (1984); *Herb* v. *Pitcairn* (1945); *Oregon* v. *Hass* (1975); *Delaware* v. *Prouse* (1979); *South Dakota* v. *Neville* (1983).

state law solely because a federal issue is also present. Consequently, state decisions which extend protections beyond those provided by the federal Constitution will be respected by the federal courts and will not be subject to review even if the case also raises federal constitutional issues – only so long as no federal law is violated.

In Germany, even if the Federal Constitutional Court holds a particular position within the constitutional jurisdiction, *Landesverfassungsgerichte* are only competent to ensure the respect of *Länder* constitutions. Two 'constitutional spheres' or 'constitutional jurisdiction levels' are placed side by side.[87] Nevertheless, this is not absolute. If *Länder* courts conclude that the Basic Law has not been violated, they decide this matter. If they believe that the Basic Law has been violated, they shall use the referral procedure mentioned below. So to a certain extent, *Länder* courts do ensure respect of the Basic Law. Two provisions nuance this relationship of autonomy. Article 100 § 1 provides that

> If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by *Land* law and where a *Land* law is held to be incompatible with a federal law.

Article 100 § 3 also indicates that

> If the constitutional court of a *Land*, in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, it shall obtain a decision from the Federal Constitutional Court.

This latter provision above all permits the federal court to play the role of 'filter' upstream in order to avoid potential divergences usually considered to be 'injurious' to the functioning and survival of federalism.

In Switzerland this influence is more than direct insofar as the Federal Tribunal controls the conformity of cantonal acts (norms and decisions) with federal and international law but also with cantonal constitutional, i.e., fundamental rights. In accordance with Article 52 § 1 of the Swiss Constitution, it must in fact serve as the last instance enforcing the supremacy of cantonal constitutional rights over

[87] *See* BVerfGE 4, 178.

cantonal acts in the context of the '*recours en matière de droit public*'.[88] Consequently, although the Federal Constitution also implicitly empowers the cantons to control the conformity of cantonal acts to their cantonal constitutions by way of specialised courts, cantons are in fact under the supervision of the federal Supreme Court. Many commentators lament this 'shortcoming',[89] because it prevents cantons from developing an 'independent' and substantive constitutional case-law and because it thwarts the federalist goal of material state autonomy.

In fact, in Switzerland, in Germany and in the United States, although diversity is still possible in the jurisprudence of state courts, even though checked by the top of the federal judiciary, federal constitutional courts seem to consider carefully the argument according to which the 'risk' of divergent jurisprudence 'should be first of all considered as a characteristic and a consequence of the diversity inherent to any Federation and as a chance for the development of important innovative impulses.'[90] Furthermore, these courts are responsible for another process of centralisation, insofar as they are used to 'shape' the state constitutional orders, and in the name of the protection of rights, impose on federated entities implicit and 'indirect' standards that limit the ability to make choices in the exercise of state constitutional powers. Moreover, state courts often feel obliged to follow the opinion of the federal court, although they sometimes adopt a certain 'judicial activism' and subsequently play the role of 'constitutional laboratories'.

State constitutional courts as wasted 'constitutional laboratories'

Federal courts always have the final word on individual rights under the federal constitution. In light of the elements considered above, it appears to us that the real question remains whether this is really a problem, if it does not *prevent* federated states from affording higher levels of protection under their own human rights catalogues.

Even if, for the most part, rights described in state constitutions usually resemble those in the federal constitution, states *can* accord broader protection to their residents than the federal constitution. They can indeed play the role of constitutional 'laboratories',[91] implementing 'constitutional innovations' that can

[88] This *'recours en matière de droit public'* is an individual's right to petition the Federal Tribunal on questions of constitutional rights violations. It embodies a unique remedy including the former *'recours de droit administratif'* and *'recours de droit public'* that existed before the reform of the Swiss federal judiciary initiated in 2000 and completed in Jan. 2007. *See*: F. Bellanger, T. Tanquerel (eds.), *Les nouveaux recours en droit public* (Genève, Zurich, Bâle, Schulthess, Pratique du droit administratif 2006).

[89] *See* K. Eichenberger, *supra* n. 7, Vol. II, p. 435-460.

[90] Cf. H. Dreier, *Commentary*, Basic Law, Art. 31, § 42, p. 623.

[91] For example, in the United States, some states hold that their residents have an 'expectation of privacy' in their garbage, or hold that traffic 'check lanes' are unconstitutional, although the

be adopted by other state constitutional courts ('sister courts') or by the federal constitutional court. Thus, the juridical 'chemistry' arising from such innovation can only, in our opinion, lead to a progressive perfection of human rights protection. Indeed, it is this quality that truly distinguishes *federal* states, and remains their true advantage over centralised equivalents. Consequently, in areas where both federal and state constitutions protect similar or identical rights, subnational courts sometimes interpret their constitutions to be more protective, or to provide more rights for individuals.

Our analysis has concluded that there is a great diversity in the solutions reached in various countries. Nevertheless, in Germany, constitutional jurisdiction is very homogeneous; only the constitutional court of Bavaria has created an original and innovative approach such as in the famous case of the 'crucifix'. For example, the Federal Constitutional Court decided in a famous decision of 1995[92] that the presence of crucifix in public schools violated the religious freedom of children and parents (Article 4 § 1 Basic Law).[93] Subsequently, the Bavaria legislature adopted an 'acceptable compromise solution' in admitting crucifixes in classrooms on the grounds of the history and culture of Bavaria. According to the new law, when the presence of this crucifix seriously compromises the liberty of conscience of the children, the school director must find an 'amicable agreement'. This possibility led the Bavarian Constitutional Court to consider that the text in its new formulation was thenceforth *in conformity* with the requirements laid down by the Federal Constitutional Court.[94]

In the United States, state courts have been real 'laboratories' since the 1970s and the New Judicial Federalism.[95] For example, before the Supreme Court con-

United States Supreme Court has held that the federal Constitution does not recognise such rights. About the notion of 'laboratory': *see New State Ice Co.* v. *Liebmann*, 285 US 262, 311 (1932); *Truax* v. *Corrigan*, 257 US 312, 344 (1921). *See*: J.A. Gardner, 'The 'States-as-Laboratories' Metaphor in State Constitutional Law', 30 *Valparaiso University Law Review* (1996) p. 475.

[92] BVerfGE 93, 1 (BvR 1087/9). *See Europäische Grundrechte Zeitschrift* (1995) p. 359; *Neue Juristische Wochenschrift* (1995) p. 2477; *Juristenzeitung* (1995) p. 942; *Deutsche Verwaltungsblätter* (1995) p. 101. *See* the numerous commentaries about this decision: M. Fromont, O. Jouanjan, *Annuaire international de justice constitutionnelle* (1995), p. 963; C. Grewe, A. Weber, *Revue française de droit constitutionnel* (1996) p. 183; G. Czermak, *Neue Juristische Wochenschrift* (1995) p. 3348; W. Flume, *Neue Juristische Wochenschrift* (1995) p. 2904; H. Goerlich, *Neue Zeitschrift für Verwaltungsrecht* (1995) p. 1184; J. Isensee, *Zeitschrift für Rechtspolitik* (1996) p. 10; C. Link, *Neue Juristische Wochenschrift* (1995) p. 3353; J. Müller-Volbehr, *Juristenzeitung* (1995) p. 996; J. Neumann, *Zeitschrift für Rechtspolitik* (1995) p. 381; H. Reis, *Zeitschrift für Rechtspolitik* (1996) p. 56; K. Redeker, *Neue Juristische Wochenschrift* (1995) p. 3369; L. Renck, *Zeitschrift für Rechtspolitik* (1996) p. 16; R. Zuck, *Neue Juristische Wochenschrift* (1995) p. 2903.

[93] 'Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.'

[94] BayVerfGH, 1.8.1997, *Kreuze in Klassenräumen*.

[95] *See* W.J. Brennan, Special Supplement, *State Constitutional Law*, *National Law Journal*, 29 Sept. (1986) p. S1; *Symposium on the Revolution in State Constitutional Law—Foreword*, 13 *Vermont Law Review*

demned criminal repression of homosexual relations in 2003,[96] many state supreme courts had decided in the same way. In a decision *Commonwealth* v. *Wasson*[97] of 1992, the Supreme Court of Kentucky had already turned down a law that criminalised homosexual sodomy[98] arguing that it violated rights to privacy and equal protection secured by the Kentucky Constitution, while the Supreme Court refused to develop this point of view in a decision *Bowers* v. *Hardwick*.[99] Refusing to follow the interpretation given by the Supreme Court of the federal Constitution, the Supreme Court of Kentucky based its decision on its own Constitution of 1891[100] and on the common law in force at that time.

Possibilities opened up for state courts

After decades of looking no further than federal requirements, state court reliance on federal law remains deeply entrenched. State courts continue to view federal law as the primary source for settling individual rights cases. Nevertheless, in the last twenty-five years, state constitutional law has moved out of the shadow of federal constitutional law. In the United States, especially, state courts have recognised that even state constitutional language that resembles federal constitutional language can provide an opportunity for the autonomous development of state law. Furthermore, American and German state courts have applied their constitutional skills to construe and to enforce a wide variety of state constitutional provisions that have no federal counterpart.

Constitutional rights included in the state constitutions have an independent impact only when they do not collide with a right guaranteed by the federal constitution or with a provision of federal law. The absence of such a conflict becomes

(1988) p. 11 (calling the movement 'the most significant development in American constitutional jurisprudence today'); *State Constitutions and the Protection of Individual Rights*, 90 *Harvard Law Review* (1977) p. 495. *See* R.F. Williams, Foreword, 'Looking Back at the New Judicial Federalism's First Generation', 30 *Valparaiso University Law Review* (1996) p. xiii ; G.A. Tarr, 'The New Judicial Federalism in Perspective', 72 *Notre Dame Law Review* (1997) p. 1097 at p. 1111-1112.

[96] *Lawrence* v. *Texas*, 539 US 558 (2003).

[97] 842 S.W. 2d 487 (Kentucky, 1992).

[98] *See Commonwealth* v. *Bonadio*, 415 A. 2d 47, 49-50 (Pennsylvania, 1980); *People* v. *Onofre*, 415 N.E. 2d 936, 939-943 (New York, 1980).

[99] 478 US 186, 190-192 (1986) that begins with these words: '(We) are not bound by decisions of the United States Supreme Court when deciding whether a state statue impermissibly infringes upon individual rights guaranteed in the State Constitution so long as state constitutional protection does not fall below the federal floor' (842 S.W. 2d, at 492).

[100] Cf. Art. 1st of the Kentucky Bill of rights: 'All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: (…) First: The right of enjoying and defending their lives and liberties. (…) Third: The right of seeking and pursuing their safety and happiness.' *See Commonwealth* v. *Wasson*, 842 S.W.2d 487.

then a *sine qua non* condition to the apparition of a 'competition' (*Grundrechtskonkurrenz*) between two provisions stemming from two different judicial orders.

Consequently, federal law establishes a 'constitutional minimum'[101] (*Mindeststandard*)[102] below which federal units cannot go according to federal logic. States, *Länder* and cantons can only guarantee protection 'at least equal' to federal provisions.[103] They could play the role of 'laboratories' and could truly 'experiment' in the field of constitutional rights as in other fields where they are competent. This role is particularly important when federal units have an exclusive competence: successful experiences can then be 'adopted' vertically or horizontally.[104] Perhaps lamentably, such an opportunity is often relinquished for reasons of judicial politics and federalist realities.

Nevertheless, the impact of state constitutional rights depends above all on the activity of state constitutional courts – when they exist. Such a prerequisite helps state constitutions become more than just 'constitutional poetry'.[105] Indeed, some believe that the disuse of the constitutional autonomy granted to federated entities could render such autonomy nugatory.[106] Inversely, for some scholars, the existence of an independent body of state law which may differ significantly from its federal counterpart adds to the law's complexity and is not 'healthy' for the constitutional and judicial system. It seems important to consider this point of view. Should the state courts march in lock-step with federal precedents, thereby

[101] *See* the expressions of *'country-wide minimum'* and *'national constitutional standard'*. Judge Robert Utter uses the terms of 'lowest common denominator' in *Alderwood Assocs.* v. *Washington Envtl. Council* (State supreme court of Washington 1981). *See* D.T. Beasley: 'if a state's protection of individual rights droops too low (…) The federal Bill of Rights is the floor whereas the state bills of rights are the ceiling. The state can reach above the floor but cannot drop below it. The room in between is where it is all worked out' (in 'Federalism and the Protection of Individual Rights: The American State Constitutional Perspective', *Georgia State University Law Review* (1994-1995) p. 681). She uses the words '*safety net*' (p. 695).

[102] J. Dietlein, *Die Grundrechte in den Verfassungen der neuen Bundesländer – zugleich ein Beitrag zur Auslegung der Art. 31 und 142 GG* (München, Schriftenreihe Studien zum öffentlichen Recht und zur Verwaltungslehre, vol. 54, 1993) p. 10.

[103] According to the Court of Appeal of New York: '(the federal constitution) defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority' (*Cooper v Morin*, 49 NY2d 69, 79 (1979). *See* R.F. Williams, *State Constitutional Law: Cases and Materials, supra* n. 18, p. 222.

[104] *See* G.A. Tarr, M.C. Porter, *State Supreme Courts in State and Nation* (New Haven, London, Yale University Press 1982) p. xxi–xxii. Cf. R.F. Williams, *Boston College Law Review* (2001), *supra* n. 82, p. 98: 'Alternatively, state courts look for guidance from other state courts interpreting similar or identical *state* constitutional provisions, rather than looking vertically to United States Supreme Court decisions interpreting *federal* constitutional provisions.'

[105] *See* A. Filli, *supra* n. 21, p. 32: 'Grundrecht in Kantonsverfassungen: Dekoration oder staatsrechtliche Notwendigkeit?' Nevertheless, when state constitutional courts do not exist, like in some cantons in Switzerland, other (lower) courts still can do some experimenting.

[106] *See* V. Martenet, *supra* n. 10, p. 458.

losing any opportunity to contribute to the growth of state constitutional law and destroying the 'double security' designed to protect their citizens?

Furthermore, one wonders whether the absence of federal judicial precedents by which state courts could be inspired implicitly encourages the latter to create liberal approaches of their own. If so, what should be the modalities by which courts decide to embark upon a course of decisional parallelism with the federal bench or to strike out on their own, notwithstanding the possible divergence from federal law? In doing so, one also wonders what constitutional interpretation methods the state courts should apply? Such questions demand an answer, a call to which neither state nor federal courts have offered clear responses. In our opinion, there is an inherent incoherence in refusing the potential for 'chemistry' which is at the heart of the federal structures put in place in the countries examined. Such questions would prove particularly interesting if one were to compare the cases of federal states, that is to say the relationship among the courts within three national states, and the original experience of the European Union. But this would require a separate investigation.

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