

The Prospects of 21st Century Constitutionalism

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“Wir leben insoweit von dem Gedankengut einer Welt, die nicht mehr die unsere ist und, wie wir immer deutlicher sehen, in den tiefen Wandlungen des ausgehenden 20. Jahrhunderts ihren Untergang gefunden hat. Über ihre Grundlagen, bisher als gesichert geltende Bestandteile der Staats- und Verfassungslehre, ist die Geschichte hinweggegangen.” (Konrad Hesse)

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I. Introduction

At the outset of the Millennium and with the advent of a new Century, traditional foundations of constitutional governance face new challenges in the light of enhanced international interdependence, globalization of markets, of technologies and communication way beyond the boundaries of the Nation State. The moment has come to live up to these challenges in legal theory and constitutionalism. The goals of liberty, justice and dignity, of equity but also efficiency and security all remain unimpaired. But ways and means to secure them in coming decades and perhaps centuries need to be developed in the context of an increasingly globalized society.

The past, building upon the achievements and failures of the Westphalian system of Nation States and the republican ideas of the French and American Revolutions brought about the consolidation of constitutionalism within the Western Nation State. The theories of constitutional and traditional public international law emerged as a response to a Europe highly fragmented and torn by devastation. An account of the Thirty Years' War, of religious and political fragmentation, social misery and the decline of law reminds us of the implications of such disorder.¹ This experience created the underpinnings of the modern state.² The call for central governance and sovereignty in the writings of

¹ Cf. G. Mann, *Wallenstein. Sein Leben erzählt von Golo Mann*, 1974.

² See C. Walter, "Constitutionalizing (Inter)national Governance", *GYIL* 44 (2001), 92 et seq.

*Bodin*³ and *Hobbes*,⁴ and for limited government and checks and balances in the works of *Locke*⁵ and *Montesquieu*⁶ all served in differing ways the causes of liberty and peace within the system of Nation States, at their respective times.⁷ Indeed, it is important to recall that all these efforts were directed at achieving freedom and security through governance under contemporary conditions, within the bounds of society, markets and means of communication of that time, seeking to overcome incoherence, fragmentation and abuse of power. Yet, these endeavours were operational answers to their times and societies and cannot claim eternal truth.

Meanwhile, the historical, political and economic context has undergone important changes which a modern theory of constitutionalism has to account for if it is to ensure its traditional functions and to contribute to global governance. With technological advances of the past and present, interaction of states and societies has considerably increased, leading from traditional coexistence to cooperation and even to integration by means of international law and organizations. It is obvious that Constitutionalism of the 21st century needs to address these complexities and to reach beyond the boundaries of the Nation State. This raises difficult theoretical questions as to how this can be achieved. The current efforts mainly focus on the problem as to whether levels of governance other than the Nation State are constitutionally framed or not, and therefore what essential qualities and properties amount to a 'constitution'. No discussion of constitutionalism can ignore this debate. Yet, it will be submitted that attempts to draw strict conceptual boundaries between governance structures with or without a 'constitution' have become increasingly artificial in a world where the boundaries between domestic and international law have been progressively blurred and do not help to solve concrete problems. We shall therefore deal with the discussion on the notion of 'constitution' only to the ex-

³ J. Bodin, *Six livres de la République*, 1993 (first published in 1576).

⁴ T. Hobbes, *Leviathan*, 2000 (first published in 1660).

⁵ J. Locke, *Two Treatises of Government*, 1999 (first published in 1690).

⁶ Ch.L. De Montesquieu, *De l'esprit des lois*, 1998 (first published in 1748).

⁷ See e.g. J.P. Müller, "Wandel des Souveränitätsbegriffs im Lichte der Grundrechte – dargestellt am Beispiel von Einwirkungen des internationalen Menschenrechtsschutzes auf die schweizerische Rechtsordnung", in: R. Rhinow/ B. Ehrenzeller (eds), *Fragen des internationalen und nationalen Menschenrechtsschutzes*, *Zeitschrift für Schweizerisches Recht* 116 (1997), 45 et seq. (57 et seq.), who points out that the purpose of sovereignty was, historically speaking, to secure peace.

tent that it is necessary to demonstrate that an exclusive focus of constitutionalism on the Nation State cannot be maintained. It needs to give way to a graduated approach which views constitutionalism as a process, extending constitutional structures to fora and layers of governance other than nations. The main aim of this article is thus not to define whether different levels or layers of governance, national or international, have a 'constitution', or amount to one, and what the minimal content of the normative concept of 'constitution' should be. Rather, we are interested in the necessary relations and functions of different and existing layers of governance, whatever their nature and quality, considered as an overall complex. Allocating powers among and between these layers, establishing adequate safeguards on different levels of governance — whether or not termed a Constitution — and defining the relationship and interaction between these layers, for example in the field of human rights protection or market access rights, is one of the main tasks constitutionalism will have to achieve in this century. We conceive the core of constitutionalism as a matter of interfacing different layers of governance from local to global levels, building a house with different storeys. This approach satisfies the need to look at different layers in a coherent manner, as forming part of an overall system. Such a system is not static. It rather depicts a process with changing allocations of powers and functions of governance. Many different types of structures and combinations are possible.

Our approach may be an unusual angle to look into constitutional law as it inherently entails an important focus on international law. Yet, we shall argue that, far from being two essentially different systems, public international law and constitutional law have increasingly influenced each other. This has led to a structural rapprochement and great permeability of both legal orders. The gradual process of convergence between international and constitutional law is described in the first part of the article. We then depict the current debate on the notion of 'constitution' to conclude that constitutionalism needs to be decoupled from the Nation State and should be conceived as a graduated concept. On this basis, we finally turn to developing some elements for a theory of 21st century constitutionalism.

IV. Towards a Five Storey House

1. Multilevel Governance

The basic thesis submitted here is that 21st century constitutionalism can no longer be limited to Constitutions with a capital C and thus to the Nation State.¹⁵⁶ With governance expanding into international law, constitutionalism has to reach beyond the boundaries of the nation state in order to secure overall coherence of governance. In our view, constitutionalism needs to encompass different layers, entailing the idea of multi-layered governance, whether or not the different levels amount to having 'Capital C Constitutions' or not.

This idea, of course, is not new. It is inherent to the concept of federalism as a constitutional system, interfacing the layers of sub-federal and federal government, and expressing the doctrines of vertical separation of powers, by allocating explicit and enumerative, but also implied or inherent powers, to different levels of governance. Interestingly, neither the level of the communes, nor the levels of regional, for example European governance, have, however, been included in this scheme. With regard to the global level of governance, it is clearly defined in terms of international, not constitutional law. The relationship of national law and international law is not conceived as a problem of interfacing different constitutional levels of governance, as we observe in relations between federal and provincial or cantonal law. Correspondingly, the relationship between international and domestic law is mainly defined by the national constitution.

Conceiving constitutionalism as an overall system changes these relationships. It depicts the concept of a system with different layers. Some authors have used the notion of "multilevel constitutionalism",¹⁵⁷ "constitutional compound",¹⁵⁸ or "multilevel system".¹⁵⁹ One author of

¹⁵⁶ The following draws from T. Cottier, "Reforming the Swiss Federal Constitution: An International Lawyer's Perspective", in: M. Butler/ M. Pender/ J. Chalrey (eds), *The Making of Modern Switzerland, 1948-1998*, 2000, 75 et seq.

¹⁵⁷ I. Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", *CML Rev.* 36 (1999), 703 et seq.

¹⁵⁸ I. Pernice, "Die Dritte Gewalt im europäischen Verfassungsverbund", *Europarecht* 31 (1996), 29 et seq., (translated by the authors).

this article has suggested using, in the case of Switzerland, the image of a five storey house as a framework of analysis.¹⁶⁰

While we have been familiar with the first, second and third storeys, the constitutional levels of the communes,¹⁶¹ the cantons or sub-federal entities, and of the federal structure, a fourth and fifth level are currently being added. The fourth one amounts to the framework of regional integration, in particular the European Union and its treaties. This level exists whether or not the country is a member of the Union, as it is obliged to adopt laws and regulations in conformity with European law in order to minimize trade barriers and transaction costs.¹⁶² A fifth and emerging level is global. We are thinking here for example of emerging structures of global integration in the field of trade regulation, in particular within the WTO and the Bretton Woods institutions. While they are still embryonic, the rule of global law, effective dispute settlement and enforcement of rights are likely to gradually develop constitutional and supranational structures binding upon both states

¹⁵⁹ H.J. Blanke, "Der Unionsvertrag von Maastricht", *Die öffentliche Verwaltung* 46 (1993), 412 et seq. (422) (translated by the authors); see also Hobe, see note 31, 392, 422; König, see note 98, 274 et seq., 662; Schreuer, see note 154, 453.

¹⁶⁰ Cottier, see note 156; T. Cottier, "Einleitung und Synthesen", in: T. Cottier/ A. Achermann/ D. Wüger/ V. Zellweger, *Der Staatsvertrag im schweizerischen Verfassungsrecht. Beiträge zum Verhältnis und methodischer Angleichung von Völkerrecht und Bundesrecht*, 2001, 1 et seq.; T. Cottier, "The Impact from Without: International Law and the Structure of Federal Government in Switzerland", in: P. Knöpfel/ W. Linder (eds), *Verwaltung, Regierung und Verfassung im Wandel. Gedächtnisschrift für Raimund E. Germann*, 2000, 195 et seq. (227 et seq.).

¹⁶¹ In a country like Switzerland, where the communes enjoy a substantial degree of constitutionally protected autonomy (see article 50 of the Swiss Federal Constitution), it is in our view justified to consider them as an independent level of governance, although this has not been a traditional way of looking at the matter. The expansion of constitutional notions beyond the traditional levels of the Canton and the Federal Government towards regional and global structures also suggests refining domestic levels, so as to give a complete picture of the entire building.

¹⁶² See Cottier, "The Impact from Without", see note 160; R. Mallepell, "Der Einfluss des Gemeinschaftsrechts auf die schweizerische Gesetzgebung", *Swiss Papers on European Integration* No. 21 (1999); W. Wiegand/ M. Brühlhart, "Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft", *Swiss Papers on European Integration* No. 23 (1999).

and organizations of regional integration. Other international fora, perhaps the United Nations, may re-emerge in response to global regulatory needs, and call for adjustment both on the regional, national and cantonal level.¹⁶³

At a minimum, the constitutional system entails two storeys: the Nation State and the international level. Most countries will have three or more layers, up to five, perhaps even more. In federal states, the power of federal entities to cooperate with each other¹⁶⁴ or with other states¹⁶⁵ based on treaties, can give rise to an additional layer, which is situated between the second and the third storey.

The five storey house does not normatively suggest that all layers are of an equal nature or impact. It does not mean that higher levels of regional and international law are more powerful than Constitutions. It simply implies that all these layers should be considered, as a whole, as a constitutional system. Different layers form different parts of a whole. The idea of layers allows us to define, in constitutional terms and applying comparable principles, the allocation of powers among different levels, exceeding traditional levels of federalism. It enables us to understand the structure in terms of regional and global federalism and to ask a new classical question of vertical checks and balances. It permits us to define concepts which are suitable to the operation of all levels and thereby design coherent legal thinking.

It will be objected from the statist point of view that this image and construction are naive and unrealistic. While the centre of powers lies within national Constitutions, all other levels are derived from, and

¹⁶³ The interaction and relationship of different international regimes raises itself difficult constitutional questions of how to establish coherence between those segments of international law. An example in point is the discussion on the relationship between international trade law and human rights law (see Cottier, see note 19; Petersmann, see note 50; Alston, see note 51, Howse, see note 51). Those issues are beyond the scope of this article. But as we will see below (IV. 4), the interaction between 'lower' and 'higher' levels of governance also contributes to further developing a material hierarchy within international law, based on general principles of law and human rights norms.

¹⁶⁴ See article 48 of the Swiss Federal Constitution, which confers on the cantons the power to conclude inter-cantonal treaties and to set up common organizations or institutions.

¹⁶⁵ See article 56 of the Swiss Federal Constitution, empowering the cantons to conclude treaties with other states within the scope of their powers.

subject to, these foundations and powers.¹⁶⁶ The Constitution thus inherently dominates all the other layers. Domestically, cantonal or provincial powers are subject to federal powers. Internationally, regional law and international law are derived from the national Constitutions. It is impossible, the argument will go, to compare these levels and create the impression that they are of any comparable standing and importance. The idea of a five storey house is unrealistic in suggesting that levels above the Constitution can ultimately command. The concept is at odds with the idea of state sovereignty.

We should address these concerns first from a practical and factual angle. It is true and appropriate that the Constitution is and remains at the heart of constitutionalism and the allocation of powers in a state centred system. Yet, as we have seen, its powers have been increasingly made subject to other influences. In domestic law, there is no linear decline of local powers. While federal government has, over time, grown in all federal states, there is also evidence that local powers have been strengthened in a process of devolution or federalization, exploding "the myth of the homogeneity of European nation-states".¹⁶⁷ The United Kingdom, Spain, Italy and Belgium are examples in point. Likewise, as pointed out in Section II. 2 of this article, powers are increasingly shifted from the national level to international and supranational governance structures. Due to the high degree of interdependence between the different levels of governance, the same problem will often be dealt with in different fora, implying a dialogue and interaction between the different layers. The disputes with regard to the European Community's preferential treatment of bananas stemming from the former colonies in the African, Caribbean and Pacific area (ACP countries), frequently referred to as the "Banana-saga" is an example. The validity, respectively the constitutionality of this import regime occupied the European Court of Justice,¹⁶⁸ the German Constitutional

¹⁶⁶ For such an approach, see for instance the 'Maastricht judgment' of the German Constitutional Court, see note 99.

¹⁶⁷ J. Shaw, "Citizenship of the Union: Towards Post-National Membership", in: European University Institute (ed.), *Collected Courses of the Academy of European Law*, Vol. VI, No.1 (1995), 245 et seq. (271).

¹⁶⁸ The banana regulations have triggered over 30 cases in the EC; for the main cases, which in substance upheld the validity of the EC banana regime, see Case 280/93 R, *Germany v. Council*, ECR 1993, 483; Case 466/93, *Atlanta*, ECR 1995, 836; Case C-122/95, *Federal Republic of Germany v. Council*, ECR 1998, I 973 and Joint Cases C-364/95 and C-365/95, *T. Port GmbH III v. Hauptzollamt Hamburg-Jonas*, ECR 1998, I 1023.

Court¹⁶⁹ and the GATT/WTO¹⁷⁰ for over a decade.¹⁷¹ Drawing a factual picture shows a system of different layers interacting in a complex, not in a neat manner: there are many rough edges, but the picture shows nevertheless different layers which do interact and allocate powers on different levels of the overall system.

The factual analysis also reveals a position of the state rather as *pouvoir intermédiaire* between different layers of governance than a 'supreme authority' from which all other governance structures are derived.¹⁷² The Constitution itself can no longer pretend anymore to provide a comprehensive regulatory framework of the state on its own. Of course, there are differences among states, essentially based upon power and might, and graduations exist in different regulatory areas. But conceptually, due to the increasing 'outsourcing of constitutional func-

¹⁶⁹ See the case 2 BVL1/97. The Constitutional Court declared the complaint for violation of the constitutional rights of property, free exercise of a profession and equal treatment inadmissible, reverting to its "Solange II" jurisprudence (BVerfGE 73, 339), according to which complaints are only admissible if the mandatory fundamental-rights standard is *generally* not observed in the EC, as opposed to allegations of a breach of human rights *in an individual case*.

¹⁷⁰ The first two dispute settlement procedures were brought against the EC under the GATT⁴⁷ and concluded that the EC regime was incompatible with the GATT; the panel reports were however vetoed by the EC (see Unadopted Panel Report on European Economic Community Member States' Import Regimes for Bananas, 1993 GATTPD Lexis 11 2, DS32/R of 3 June 1993 and Unadopted Panel Report on the European Economic Community 'Import Regime for Bananas', 181 DS38/R of 18 January 1994, *ILM* 34 (1995), 177 et seq.; under the negative consensus rule of the WTO 1995, the EC was prevented from blocking the adoption of the subsequent panel report, which found the EC in breach of its obligations under the GATT (see Report of the Panel, WT/DS27/R/USA of 22 Mai 1997).

¹⁷¹ For an analysis of the banana dispute, see for example J.H. Jackson/ M. Salas, "Procedural Overview of the WTO EC-Banana Dispute", *JIEL* 3 (2000) 145 et seq.; U. Schmid, "All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana Decision'", *ELJ* 7 (2002), 95 et seq.; J.C. Casante/ G.G. Sander, *Der Streit um die EG-Bananenmarktordnung*, 1999; E. Everling, "Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts", *CML Rev.* 33 (1996), 401 et seq.

¹⁷² Pernthaler, see note 20, 79; P. Saladin, *Wozu noch Staaten*, 1995, 237 et seq.; Hobe, see note 8, 663; Scelles, see note 65, 509 ; König, see note 98, 274 ; Snyder, see note 138, critically calls the idea that the state is the sole source of law the "myth of the state".

tions',¹⁷³ the national Constitution today and in the future is to be considered a "partial constitution,"¹⁷⁴ which is completed by the other levels of governance. Reflecting the intermediary position of the state and the 'incomplete' nature of the national constitutions, the constitutional system is based not on a concept of absolute sovereignty defined as 'competence-competence'¹⁷⁵ but on the idea of sovereignty being shared between the different levels of governance.¹⁷⁶

2. Shared Sovereignty

The concept of divided sovereignty can be traced back to the Federalist Papers and reflects the idea of federalism as a system allocating competences to different layers, as opposed to unitary states:

"An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and

¹⁷³ Cf. under II. 2. a.

¹⁷⁴ Peters, see note 59, 208 et seq.; Walter, see note 2, 194.

¹⁷⁵ For a critique of the concept of absolute sovereignty in an interdependent world, cf. Saladin, see note 172, 28 et seq.; C. Gusy, "Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der Europäischen Union", in: H. Brunkhorst/ M. Kettner (eds), *Globalisierung und Demokratie, Wirtschaft, Recht, Medien*, 2000, 131 et seq. (142 et seq.); N. Walker, "Sovereignty and Differentiated Integration in the European Union", *ELJ* 4 (1998), 356 et seq. (358); K. Jayasuriya, "Symposium: The Rule of Law in the Era of Globalization: Globalization, Law, and the Transformation of Sovereignty: Emergence of Global Regulatory Governance", *Ind. J. Global Legal Stud.* 6 (1999), 425 et seq. (426); T. Fleiner-Gerster, "Problèmes de la souveraineté intérieure et extérieure", in: T. Fleiner/ S. Hutter (eds), *Federalism and Decentralisation*, 1987, 63; T. Fleiner/ L.R. Basta, "Federalism, Federal States and Decentralization", in: L.R. Basta/ T. Fleiner (eds), *Federalism and Multiethnic States, The Case of Switzerland*, 1996, 27; N. MacCormick, "Beyond the Sovereign State", *Modern Law Review* 56 (1993) 1 et seq. (12 et seq., 16); id., "Liberalism, Nationalism and the Post-sovereign State", in: R. Bellamy/ D. Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives*, 1996, 143 et seq.; id., "The Maastricht-Urteil: Sovereignty Now", *ELJ* 1 (1995), 259 et seq. (265 et seq.); J.A. Frowein, "Verfassungsperspektiven der Europäischen Gemeinschaft", *Europarecht Beiheft* No. 1, 1992, 63 et seq. (67 et seq.); Schreuer, see note 154, 453; see also III. 2. a.

¹⁷⁶ Cf. Gusy, see above, 142 et seq.; Pernice, see note 157, 706; Fleiner/ Basta, see note above, 27.

whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, *the State governments would clearly retain all the rights of sovereignty which they clearly before had, and which were not, by that act, exclusively delegated to the United States*".¹⁷⁷

"The necessity of concurrent jurisdiction in certain cases results from the *division of the sovereign power*; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution".¹⁷⁸

The notion of shared sovereignty, as it was conceived at the time in the Federalist Papers, referred to the division of powers between the federation and sub-federal entities. Yet, today, there is no reason why it could not be conceptually extended to international or supranational governance structures.¹⁷⁹

Contrary to the absolute concept of sovereignty, the idea of shared sovereignty offers the advantage that it does not conceive of sovereignty as a "zero sum game — i.e. you either have it or you do not".¹⁸⁰ Given the considerable symbolic value of sovereignty, the mindset the 'winner takes all' is one of the main obstacles to successful diversity accommodation, not only between states and international or supranational regimes but also within multinational states. It furthers extremist positions, such as secessionist demands of ethnic minorities, or, as regards the European Union, calls for a European state, on the one hand, and the denial of any autonomy to the Community legal order on the other hand.

To overcome such conflicts, it is not sufficient to abandon the idea of indivisible sovereignty. We also need to give up the "search for this Kelsenian holy grail",¹⁸¹ i.e. the idea of a *Grundnorm*, a single power

¹⁷⁷ Hamilton/ Madison/ Jay, see note 12, Paper No. 33 (Hamilton), 198 (emphasis added).

¹⁷⁸ Hamilton/ Madison/ Jay, see note 12, Paper No. 33 (Hamilton), 201 (emphasis added).

¹⁷⁹ See Gusy, see note 175, 143.

¹⁸⁰ Jayasuriya, see note 175, 427.

¹⁸¹ Weiler, see note 110, 6.

source from which all law originates.¹⁸² The different levels of governance all derive from different sources of law, reflect different circles of political identities¹⁸³ and have their own *raison d'être*. But they are interlocked and intertwined. Indeed, 'higher' levels of governance fulfil an important function of checks and balances. As Lindseth pointed out in the context of European law, the European Community legal order "seeks to constrain, and in some sense to overcome, the propensity of Nation States to parochialism and self-interest, and therefore represents an autonomous regulatory interest of its own".¹⁸⁴ Contrary to traditional intergovernmental politics, higher levels of governance do not reflect the simple aggregate of Member States' interests, since states in-

¹⁸² Cf. MacCormick, see note 175, 147 et seq. who discusses the monistic theories on whether the 'Grundnorm' is located on the international, European or national level and advocates a pluralistic point of view; see also Frowein, see note 175, 67 et seq.

¹⁸³ On the idea of multiple loyalties, see also III. 2. a and IV. 3. a. The idea of multiple identities is well known to the theory of federalism, understood as a principle of organizing unity in diversity, cf. P. Pernthaler, *Allgemeine Staatslehre und Verfassungslehre*, 1996, 289; H. Kilper/ R. Lhotta, *Föderalismus in der Bundesrepublik Deutschland*, 1996, 30. Without overarching loyalties, federal systems tend to be inherently unstable. As regards the regional and the global level, it is obvious that the corresponding identities are much 'weaker' than on the national or local levels. This should however not lead to the conclusion that transnational identities are impossible to achieve. An interesting theory to conceive of identity formation beyond the Nation State has been advanced by Breton, who uses the term 'pragmatic solidarities', referring to the identification with systems resulting from institutionalized factual interdependencies, cf. R. Breton, "Identification in Transnational Political Communities", in: K. Knop/ S. Ostry/ R. Simeon/ K. Swinton (eds), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*, 1995, 41 et seq.; for a summary of Breton's theory, see Shaw, see note 167, 266 et seq. The identification with the system depends on the efficiency of the institutions, the "participation in collective achievements, and on the perceived fairness of the distribution of costs and benefits". The increased interest of non-state actors in global issues, coupled with the demands for greater transparency and participation rights can be viewed as signs that transnational identities are gradually emerging.

¹⁸⁴ P.L. Lindseth, "'Weak' constitutionalism? Reflections on Comitology and Transnational Governance in the European Union," *Oxford Journal of Legal Studies* 21 (2001), 145 et seq. (148); see also J.H.H. Weiler/ U. Haltern/ F. Mayer, "European Democracy and Its Critics – Five Uneasy Pieces", *Swiss Papers on European Integration* No.1 (1995), 22 et seq.

creasingly have to justify their position considering the aims and interests of the community of states represented in the international regime in question as a whole. "In this sense, transnational governance [...] operates independently of any single government and thus represents an emergent [...] political community with regulatory interests separate and apart from — indeed superior to — the interests of the particular national political communities which comprise it".¹⁸⁵

3. The Relationship Between the Different Levels of Governance

a. The Principle of Supremacy

Considering each level of governance as being autonomous raises the question of how to resolve conflicts between norms originating from different legal sources.¹⁸⁶ Indeed, adopting a pluralist point of view, one has to "conclude that there is no objective basis — no Archimedean point — from which one claim can be viewed as more authentic than the other or superior to the other within a single hierarchy of norms. Rather, the claims [...] to ultimate authority [...] are equally plausible in their own terms and from their own perspective".¹⁸⁷

While this view offers the advantage of "sociological realism",¹⁸⁸ there are nevertheless good reasons to support the principle of supremacy of the 'higher' levels of governance in case of conflict. The *first* is a factual reason: even under traditional precepts, the logic of supremacy of higher levels of governance is generally recognised, given its important roles of co-ordination and coherence. The principle of supremacy of federal law *vis-à-vis* state, provincial or cantonal law is accepted. Similarly, international law is recognized to be of a higher order as expressed by the principle of *pacta sunt servanda*, which fully applies in international relations and triggers, if violated, state responsibility. In European law, the doctrine of supremacy of Community law developed

¹⁸⁵ Lindseth, see above, 148.

¹⁸⁶ Pernice, see note 157, 713 et seq.

¹⁸⁷ Walker, see note 175, 361 et seq.

¹⁸⁸ MacCormick, see note 175, 264; sociological realism refers to the fact that the institutions of a given legal system look to this legal order to assess their competences and the validity of their actions and do not regard those issues as being dependent on another legal order.

by the European Court of Justice has in practice and principle been complied with by all Member States, despite some vociferous resistance from several constitutional courts.¹⁸⁹

The *second* reason in favour of supremacy of higher levels is a functionalist one: a basic hierarchy between the different constitutional levels is necessary to ensure the functioning of the higher levels of governance. The founding fathers of the American Constitution expressed this point as follows:

“[...] we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor. [...]

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster in which the head was under the direction of the members”.¹⁹⁰

A similar view, as regards the supremacy of the European Community and public international law, was for example expressed by *Pierre Pescatore*:

“It is by virtue of its specific nature that Community law — and the same holds true for public international law — pretends to supremacy; the reason is that it is the law of the whole and the whole cannot exist unless the constitutive parts subordinate their interests to those of the whole”.¹⁹¹

¹⁸⁹ See for example the decisions “Solange I” (BVerfGE 37, 271); “Solange II” (BVerfGE 73, 339), “Maastricht”, see note 99, the decision referring to the ‘Banana dispute’ (2 BVL1/97) of the German Constitutional Court, and the decisions ‘Frontini’ (Foro italiano 1974, Vol. I, 314), ‘Granital’ (Giurisprudenza costituzionale 1984, Vol. I, 1098), und ‘Fragd’ (Giurisprudenza costituzionale 1989, Vol. I, 1001) of the Italian Constitutional Court; for a summary of the case law, including decisions of other Member States, see Oppenheimer, see note 99; T. De Berranger, *Constitutions nationales et construction communautaire*, 1995.

¹⁹⁰ Hamilton/ Madison/ Jay, see note 12, Paper No. 44 (Madison), 286 et seq.

¹⁹¹ G. Pescatore, “Aspects judiciaires de l’ acquis communautaire”, *RTDE* 17 (1981), 617 et seq. (632), “C’est en vertu de sa nature propre que le droit communautaire — et la même chose est d’ailleurs vraie du droit international — affirme sa supériorité; c’est parce qu’il est le droit du tout et que

Without a basic hierarchy, the different levels cannot assume their proper co-ordinating functions. The regulation of market access rights and conditions of competition is a good example in point. We can observe that the higher level of governance provides the necessary disciplines and guarantees. This is the case for example in the United States with the interstate commerce clause. The economic liberty, which is guaranteed as a fundamental right in the German and Swiss Federal Constitutions, ensures the same function *vis-à-vis* the Länder and the Cantons, respectively. On the regional and global level, the Four Basic Freedoms guaranteed by European Community law and the market access rights enshrined in WTO law fulfil the same role with regard to the states. All these guarantees, ultimately, show comparable structures which, each on its level, exercise comparable checks and balances over the lower level of governance.

A *third* reason in favour of the principle of supremacy of the higher level of governance can be derived from participation and consent and the binding nature of consent,¹⁹² as expressed in the principle of *pacta sunt servanda*: indeed, supremacy viewed as a system of chains of command, of simply taking orders from above, would be illegitimate. The five storey house does not, however, represent such a system, since higher floors of the building are essentially constituted by lower levels and defined by their input. The way a 'lower' level participates in the 'higher' level therefore is of key importance in order to define as to whether that level and its claim to supremacy is legitimate.¹⁹³

It will not be possible to ensure democratic legitimacy of international rules only by extending participatory rights on the national level. To the extent that the regulatory scope and enforcement mechanisms on supra- and international levels of governance are enhanced, they need to

l'ensemble ne peut exister qu'à la condition que les parties intégrantes subordonnent leurs intérêts à ceux de l'ensemble".

¹⁹² The two reasons justifying the supremacy of 'higher' levels of governance are also implicit in Pernice's reasoning: "[...] primacy of European law in the multilevel constitutional system of the European Union is founded on the *common decision* of the peoples of the Member States to achieve a *functioning* structure of political action above the State level", Pernice, see note 157, 719, (emphasis added).

¹⁹³ On the issue of participation in the higher level of governance, see T. Cottier/ C. Germann, "Die Partizipation bei der Aushandlung neuer völkerrechtlicher Bindungen: verfassungsrechtliche Grundlagen und Perspektiven", in: D. Thürer/ J.F. Aubert/ J.P. Müller (eds), *Verfassungsrecht der Schweiz*, 2001, 77 et seq. (94 et seq.).

be accompanied by increasing participatory rights on that layer.¹⁹⁴ The growing powers of the European Parliament are an example in point. Democratic legitimacy through elected bodies on the regional or global level and the legitimacy, resulting from the national level participating in the 'higher' levels through parliamentary or popular consent, should not be viewed as competing and antagonistic principles. They both aim at representing the citizens, by reflecting a different circle of human identity and loyalty. Such an approach takes into account that individuals are not only simultaneously members of the commune, the canton, the state, but are increasingly also being affected by transnational issues, and therefore want to be heard directly, as members of regional or global polities. In Müller's words, the "segmentation of the subject calls for a more differentiated system of representation".¹⁹⁵

b. Exceptions to Supremacy

Both reasons justifying the principle of supremacy — participation and consent on the one hand, and functionalism, on the other hand — have their limits. Therefore, we regard the principle of supremacy as an ordering principle, which does not apply in an absolute manner. It is therefore important to design criteria under which lower levels and storeys may prevail over higher ones. Today, many Constitutions claim to do so in a general manner. The United States, for example, do not recognize international law as being superior to Constitutional law. The European Community, in effect, does not accept the supremacy of international treaties over primary law. Under a doctrine of multi-layered governance, these traditional doctrines are over-broad. They need to be limited to constellations where primacy of national law can be justified. The doctrine of preserving the core of human rights, as defended by the German Constitutional Court,¹⁹⁶ is appropriate from this perspective. Higher norms cannot prevail to the extent that they infringe inalienable rights of citizens. This is an important safeguard which provides confi-

¹⁹⁴ Cottier, "The Impact from Without", see note 160, 219; Saladin, see note 172, 246 et seq.

¹⁹⁵ J.P. Müller, "Kants Entwurf globaler Gerechtigkeit und das Problem der republikanischen Repräsentation im Staats- und Völkerrecht", in: P. Zen-Ruffinen/ A. Auer (eds), *De la Constitution. Etudes en l'honneur de Jean-François Aubert*, 1996, 133 et seq. (151).

¹⁹⁶ See the decisions 'Solange I', 'Solange II', 'Maastricht' and the decision referring to the 'Banana dispute', see note 189.

dence and allows citizens to embark on multi-layered governance in the first place.¹⁹⁷

Similarly, direct effect of higher law may be denied to the extent that it does not correspond to procedures allowing for appropriate democratic participation, and similar legitimacy as comparable ones under national law.¹⁹⁸ To the extent the national Constitution prescribes that certain issues have to be regulated in statutes adopted by the national parliament, or, in the case of Switzerland, have to be subject to a popular vote, the principle of legality requires similar modes of participation when the same issue is regulated by treaty law. This is to avoid democratic procedures being undermined by an excessive transfer of treaty-making powers to the executive branch. If the requirements of the principle of legality are not met, it is necessary to seek transformation and formal adoption on the appropriate level. Direct effect should be excluded in such constellations, and the Courts should be given the power to instruct legislators to properly implement the agreement within a certain period of time. Failing such implementation, they would return to direct effect in order to honour the agreement. Moreover, the principles of good faith and *pacta sunt servanda*, entail in our view, the duty of states to adapt their domestic constitutional law so as to provide for adequate participation mechanisms before the ratification of a treaty.¹⁹⁹ The constellations in which direct effect of international law can be justifiably denied should thus be rather limited. Again, this is a safeguard

¹⁹⁷ See Cottier/ Hertig, see note 12, 25.

¹⁹⁸ On this issue, see Cottier, "Einleitung und Synthesen", see note 160, 9 et seq. and D. Wüger, "Die direkte Anwendbarkeit staatsvertraglichen Rechts", in: T. Cottier/ A. Achermann/ D. Wüger/ V. Zellweger, *Der Staatsvertrag im schweizerischen Verfassungsrecht. Beiträge zum Verhältnis und methodischer Angleichung von Völkerrecht und Bundesrecht*, 2001, 95-253; a very concise summary can be found in Cottier/ Hertig, see note 12, 25 et seq.

¹⁹⁹ In Switzerland, an amendment of the federal Constitution, accepted on 9 February 2003, extends the facultative referendum to all state treaties which contain important legislative provisions or the implementation of which require the adoption of a federal statute (see the new article 141a § 1 of the Federal Constitution). So as to secure the effective legislative implementation of ratified treaties, the Federal Constitution enables the Parliament to include the implementing legislation in the vote on the state treaty itself (new article 141a § 2). This solution avoids the contradictory situation where an international treaty is ratified but cannot be complied with because the implementing legislation is challenged in a subsequent referendum.

assuring that the fundamental role of law and legislation is maintained even if exercised in the form of international agreements. It combines monism and dualism from a perspective of legitimate multi-layered governance.

Further exceptions to the principle of supremacy may be justified taking into account other fundamental values of a polity, such as, in the case of Switzerland, the institutions of direct democracy.²⁰⁰ In effect, under the Swiss federal Constitution, a popular initiative aiming at the revision of the Constitution is admissible to the extent that it does not violate the peremptory norms of public international law.²⁰¹ *A contrario*, the validity of an initiative contrary to other norms of international law would be upheld. Such a conflict of norms seems unsatisfactory from a legalistic point of view which emphasizes the need for coherence and clear rules of conflict. However, from a sociological point of view, limited exceptions to the principle of supremacy may be necessary to further the acceptance of higher levels of governance in a dynamic process of interfacing different layers. Indeed, absolute supremacy of 'higher law' may overstrain a system whose level of integration is, compared with classical nation states, relatively low, and, in the end, be counter-productive. It does, for example, not come as a surprise that the principle of supremacy, which is recognized in many federal states,²⁰² is not unconditionally accepted in less integrated polities such as multinational federations.²⁰³ In those cases, precedence of 'higher'

²⁰⁰ On this issue, see Cottier/ Hertig, see note 12, 18 et seq.

²⁰¹ Arts 194 § 2 and 129 § 3 of the Swiss Federal Constitution.

²⁰² Cf. article 49 of the Swiss Federal Constitution; article 6 of the Constitution of the United States; article 31 of the German Constitution; article 109 of the Australian Constitution.

²⁰³ In Canada, for example, the Canadian Charter of fundamental rights contains, as a concession to Quebec, the so called 'notwithstanding clause', which enables a province to derogate from a provision of the Charter for a limited period of time. Quebec has used this derogation so as to uphold the validity of its famous 'French only' legislation, see M. Nemni, "Ethnic Nationalism and the Destabilization of the Canadian Federation", in: B. de Villiers (ed.), *Evaluating Federal Systems*, 1994, 148 et seq. In Belgium, no supremacy clause was introduced into the federal constitution, which was explained by the centrifugal character of the Belgium federation. The relationship between federal law and the law of the regions is viewed not in terms of a hierarchy but as two distinct coordinated legal orders, which operate in their respective spheres of competencies, see A. Alen, *Der Föderalstaat Belgien: Nationalismus-Föderalismus-Demokratie*, 1995, 35; F. Ler-

law will only be tolerated if the 'higher' level of governance shows a high degree of sensitivity for the core values of 'lower' levels.

It is submitted that the principles set out above also apply domestically. From this perspective, it is perfectly conceivable to deny the implementation of federal law if it violates core freedoms protected under a provincial constitution. In the end, it is a matter of looking at law from the point of view of the individual. The system as a whole must protect its rights. These rights may be found on different levels and interact and sometimes compete with other levels, the different layers establishing safeguards with regard to both 'higher' and 'lower' layers.

To sum it up, the doctrine of the five storey house entails the idea of communication between different levels. It starts from the presumption of hierarchy, but may allow for derogations to the extent that it is required by the protection of rights.

4. The Normative Interaction Between the Different Layers of Governance

The idea of process, communication and interaction, rather than mechanical precedence of 'higher' levels over 'lower' levels of governance, is important to understand how the constitutional system is evolving towards greater coherence, ensuring that adequate safeguards are established at the appropriate level of governance and that the system as a whole responds to the precepts of traditional constitutionalism. It is important to protect life, liberty and property, and to pursue the goals of human welfare and development in non-discriminatory economic law. But these guarantees and goals need not be present on all levels of governance alike. The evolution of human rights protection is an example in point to analyse the interaction of different layers of governance.

Domestically, human rights are not explicitly guaranteed in communal constitutions, sometimes not even on the provincial level. They are protected by the Federal Constitution, but take effect on all domestic levels of governance. Likewise, these guarantees need not necessarily be

quin-De Vischer, "Les règles de droit", in: F. Delpérée (ed.), *La Belgique fédérale*, 1994, 210 et seq. (210). The constitutional courts of some Member States of the European Union have adopted a similar view with regard to the relationship between the EC legal order and the national legal order (see for example the decision 'Granital' of the Italian Constitutional Court, *Giurisprudenza costituzionale* 1984, Vol. I, 1098).

protected on the fourth or fifth level and apply to international or regional organizations. It suffices in principle that these rights are effectively protected by one of the layers, prevailing over others in this respect. The protection of fundamental rights within international and supranational institutions may, however, become necessary to the extent that these organizations themselves represent a threat to human rights and to the extent that the protection by other layers of governance bears the risk of disruption and legal uncertainty.

The advent of human rights protection in European Community law is an important illustration of this process.²⁰⁴ Conceived as an instrument of economic integration, the Treaty of Rome was limited to the Four Basic Freedoms, aimed at securing market access within the area of the European Community. This functional approach did not require a bill of rights on that level of governance. However, it soon became obvious that European Community legislation, although at the beginning mainly limited to the economic sphere, could conflict with fundamental rights protected by the national constitutions of the Member States and the European Convention on Human Rights. As a consequence, some national constitutional courts made it clear that they were not willing to accept the supremacy of European Community law if fundamental rights were not effectively guaranteed.²⁰⁵ The risk that national courts would subject Community law to national constitutional law, at the price of piercing the doctrine of supremacy in some cases, was an important incentive for the European Court of Justice to recognize fundamental rights as general principles of European Com-

²⁰⁴ Among the vast literature on this issue, see for a succinct summary, P. Craig/ G. De Búrca, *EU Law, Text, Cases, and Materials*, 2003, 317 et seq.; for a comprehensive study on the EU's human rights policy, see P. Alston (ed.), *The EU and Human Rights*, 1999.

The development of the protection of fundamental rights within the EC resembles the advent of human rights protection in Switzerland, in as much that the Swiss Federal Constitution of 1848/1874 did not comprise a comprehensive catalogue of fundamental rights. Similarly to the fundamental freedoms enshrined in the Treaties of Rome, the fundamental rights protected by the Swiss Federal Constitution, in particular the freedom of establishment and the economic freedom, were mainly rights aimed at eliminating trade barriers between the cantons, see T. Cottier/ B. Merkt, "La fonction fédérative de la liberté du commerce et de l'industrie et la loi sur le marché intérieur Suisse: l'influence du droit européen et du droit international économique," in: P. Zen-Ruffinen/ A. Auer (eds), *De la Constitution. Etudes en l'honneur de Jean-François Aubert*, 1996, 449 et seq.

²⁰⁵ See note 189.

munity law,²⁰⁶ which are derived from the constitutional traditions common to the Member States²⁰⁷ and the “international treaties for the protection of Human Rights on which the member states have collaborated or of which they are signatories”,²⁰⁸ the European Convention on Human Rights being of particular significance in this respect.²⁰⁹

Apart from national constitutional courts, the European Court of Human Rights has also given an important impetus in securing the protection of fundamental rights in the European Community legal order. Indeed, the Court has made it clear that the delegation of sovereign powers to international organizations does not free the Member States from their obligations under the European Convention on Human Rights. On this basis, the Court has declared actions brought against the Member States collectively for breach of the European Convention on Human Rights by an act of another international organization admissible.²¹⁰ In doing so, the European Court of Human Rights can indirectly check the compatibility of European Community acts with the European Convention on Human Rights, although the European Community has not adhered to the Convention, which amounts to establishing a material hierarchy between regimes of human rights protection and other international regimes.

²⁰⁶ Case 29/69, *Stauder v. City of Ulm*, ECR 1969, 41. See also *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, ECR 1970, 1125 : “Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. [...] Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure. [...] However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice”.

²⁰⁷ Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, ECR 1970, 1125 at § 4.

²⁰⁸ Case 4/73, *Nold v. Commission*, ECR 1974, 491 § 13.

²⁰⁹ See for example Case 222/84, *Johnston v. Royal Ulster Constabulary*, ECR 1986, 1651, § 18; Case C-260/89, *Ellinki Radiophina Tiléorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and others*, ECR 1991, I 2925, § 41.

²¹⁰ See the judgment *Matthews v. UK*, of 18 February § 34-35.

The fundamental rights doctrine of the European Court of Justice was thus — and still is — being shaped interactively, in a dialogue with national Constitutional law and the European Court of Human Rights, with fundamental rights being defined with input from both national and international law, i.e. the constitutional traditions common to the Member States and international human rights treaties, respectively.

Tendencies of national constitutional law “to transport values from the domestic order to the supra-national and international legal orders”²¹¹ can also be observed with regard to general principles of law, such as equity, transparency, non-retroactivity, proportionality, the protection of good faith and the doctrine of abuse of rights, which provide important corner stones of an overall constitutional system and make essential contributions to the constitutionalizing processes occurring within higher levels of governance.

Conversely, due to the constitutionalization of European and international law, precepts of constitutionalism are increasingly secured on ‘higher’ levels and reflect upon national Constitutional law. To take up the same example — the protection of fundamental rights within the European Union legal order — the European Court of Justice did not only recognize human rights as binding on the European Community institutions. It also held in subsequent case law that the Member States were subject to the same rights within the field of European Community law, namely when they implement European Community rules or derogate from the Four Basic Freedoms. More generally, European Union law explicitly subjects accession and membership of states to the respect of the principles of liberty, democracy, fundamental rights and freedoms and the rule of law.²¹² It also establishes an enforcement procedure to ensure compliance with these principles.²¹³ These provisions are in line with the idea, underlying the international human rights in-

²¹¹ Hobe, see note 8, 663; an interesting example in this respect is article 23 of the German Constitution, which subordinates the delegation of powers to the EU to the respect of core principles: “To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate, delegate sovereign powers”.

²¹² Article 6 in relation with article 7 and 49 of the EU Treaty.

²¹³ Article 7 of the EU Treaty.

struments and the establishment of the ICC, that the protection of these essential guarantees should not be left to states alone.

The overall picture thus already shows a dialectical relationship between the different levels of governance, a communicative constitutional process which slowly brings about a continuing rapprochement of the different levels of governance.²¹⁴ It may help to gradually define minimal constitutional standards which all layers have to meet.

Twenty-first century constitutionalism therefore is characterised by establishing effective safeguards on different levels. While the Constitution remains centre stage, additional levels increasingly act to bring about coherence among different constitutional layers, to interface them. Moreover, they increasingly serve to monitor them. *Custodis custodiae!*

5. The Allocation of Powers

In a multilayered system, defining the relationship and the boundaries between the different levels of governance are essential constitutional functions. To this effect, we cannot limit our analysis to the question of supremacy discussed above. We also need to address the issue of delimitation of jurisdiction or competence between different layers.²¹⁵ Following the traditional model of power allocation in federal states, such as Switzerland, powers of the federal government need in principle²¹⁶ explicit enumeration, while the federal entities otherwise remain uninhibited or sovereign.²¹⁷ In decentralized polities, such as the United Kingdom, the opposite approach generally prevails: competences which are not explicitly attributed to regional governments stay with the central government. Both approaches adopt a pattern of allocation which follows the ideal of assuming the responsibilities for separate tasks and walks of life.

²¹⁴ Peters, see note 59, 213; Frowein, see note 175, 66, who talks about the "dialectical homogenizing effect of the EC" (translated by the authors).

²¹⁵ The following passage draws on Cottier, see note 156.

²¹⁶ Most federal systems know the category of implied powers, which are however rarely used in Switzerland.

²¹⁷ See article 3 of the Swiss Federal Constitution.

a. The Limits of Traditional Pattern of Power Allocation

The traditional model fits a two or three storey house, contained in the nation state, and a system where the scope of regulatory powers and functions of public authorities is relatively limited. It is however bound to run into problems in a five storey house with law-making on the regional and global levels, and regulatory needs in general, increasing. This is so for the following reasons. Firstly, the gradual shift from the liberal to the welfare state and the important changes in the field of science and technology have substantially enhanced regulatory needs. Public powers have increased dramatically and become more complex, which makes it more difficult to clearly define competence allocation. Instead, realities have produced over time a wide entanglement of mixed and joint competences. Secondly, more and more fields are addressed by rules of European and international law. Looking at regulatory approaches both in the European Union and on the global level of the WTO and other international fora, it is important to note that these regulations are generally not of a comprehensive nature. They address key issues and points necessary to bring about the degree of harmonization required with a view to overcoming, for example, excessive trade barriers. International and regional regulation, therefore, is piece-meal and needs to be complemented, if not implemented, by rules of the first three floors of the constitutional building.²¹⁸

More importantly in the present context, international rules do not respect and follow allocations of powers in a given federal or devolved structure. Agreements, regulations and directives of the European Community or international treaties may partly affect the jurisdiction of the federal or central government, and partly of the sub-national, federal or regional entities. As a matter of international or European law, the central or federal government is responsible for implementation and compliance although it often does not have explicit jurisdiction to compel the sub-national entities to implement and comply with rules falling under their jurisdiction.²¹⁹

²¹⁸ On this point and related matters see Cottier, see note 31, 217 et seq.

²¹⁹ A good and telling example in this context is the regulation of government procurement in Switzerland. Overall rights and obligations are defined by the WTO Agreement on Government Procurement. Since the Federal Government has very limited powers to regulate the matter for the Cantons, it only enacted a comprehensive bill on government procurement for the federal entities. Limited rules on non-discrimination are contained in

The same problem can be observed in the European Union, which has itself become an important actor on the international scene. Since the external treaty making power of the European Community does not correspond to the internal constitutional division of powers between the European Community and the Member States, the European Community is liable for compliance with international law without having any means of enforcement.²²⁰

The increase of international and supranational rules thus bears the potential of considerably shifting and upsetting the balance of traditional constitutional patterns. From the point of view of the 'higher' levels of governance, this situation is unsatisfactory since they do not have the powers to implement and enforce obligations on the 'lower' levels, yet have to assume international responsibility. From the perspective of the 'lower' levels (namely the second or third storey), the situation is equally disturbing: the internal division of competences with respect to the immediately superior level of governance (the third, respectively the fourth storey) is being eroded by another 'higher' layer, namely the fourth, respectively the fifth storey.

the internal market bill, partly with differing rules (in social standards) from the Federal Procurement Act. The Cantons undertook to harmonize the matter in an interstate compound, partly inconsistent with the internal market bill, and further legislation exists within the Cantons on the matter, see T. Cottier/ B. Merkt, "Die Auswirkungen des Welthandelsrechts der WTO und des Bundesgesetzes über den Binnenmarkt auf das Submissionsrecht der Schweiz", in: R. von Büren/ T. Cottier (eds), *Die neue schweizerische Wettbewerbsordnung im internationalen Umfeld*, 1996, 35 et seq., with an Annex containing the WTO Agreement on Government Procurement in English, 163 et seq. Since the entry into force of the bilateral agreements between Switzerland and the European Union on 1 June 2002, public procurement has also been governed by a specific agreement on this issue, which builds on and complements the WTO agreement on public procurement, see T. Cottier/ E. Evtimov, "Die sektoriellen Abkommen der Schweiz mit der EG: Anwendung und Rechtsschutz", *Zeitschrift des Berner Juristenvereins* 139 (2003), 84 et seq.

²²⁰ A good example is the Agreement on Trade Related Intellectual Property Rights, which also contains a substantial portion on civil and administrative procedures, for which the EC does not have any internal jurisdiction to regulate. These provisions enlarge responsibilities of the EC in external relations, but leave the matter to Member States domestically, the EC having no jurisdiction to enforce these rules contained in a so-called mixed agreement.

b. Reallocation of Powers

Although it is often perceived as such, the allocation of powers is not a one way street, leading inexorably to the demise of the Nation State and the erosion of sub-national layers: instead of transferring regulatory powers to the fourth and fifth floor of the building, regional and global liberalization and market integration lead to new constitutional problems on the first, second and third floors. They bring about new tasks which, in the past, have not existed to the same extent. Take the example of social and economic integration of foreign residents and their families with a different cultural background. With the globalization of the economy and communications and decreasing costs for transportation, traditional communities have to cope with an increasing number of foreigners. Like most European countries, Switzerland, for instance, has become a destination of immigration, not so much for Europeans, but from cultures overseas.²²¹ Rights and obligations of this segment of the population — amounting to some 20 per cent in Switzerland — need to be addressed and better defined in constitutional law. The Constitution should not remain silent with respect to one fifth of the population. It ought to recognize the core functions of integrating foreign nationals and residents, to establish principles, rights and obligations, to provide for programs and set forth the interaction of the national and sub-national responsibilities in the field. The Constitution has to be a factor of integration not only for the nationals, but for all humans living under its umbrella in a given society.

c. Shared and Interlocked Powers

Globalization and regionalization thus lead to allocation of powers both from 'lower' to 'higher' and from 'higher' to 'lower' levels of governance. Nevertheless, it is the former aspect which is commonly perceived by the citizens, resulting in demands of 'renationalization',²²²

²²¹ See T. Straubhaar, "Auswirkungen des freien Personenverkehrs auf die Migration in Westeuropa", *Swiss Papers on European Integration*, No. 4 (1996), 13 et seq.; and D. Chambovey, "L'impact potentiel de la libre circulation des personnes avec les pays de l'Espace économique européen sur les flux migratoires en Suisse", *Swiss Papers on European Integration* No. 4 (1996), 37 et seq.

²²² See Dicke et al., see note 20, 27 et seq.

calls for subsidiarity,²²³ and efforts to re-establish a more clear-cut division of competences.²²⁴ To the extent that many problems cannot be efficiently addressed on the national level, 'renationalization' does not offer a practicable solution. What would be gained in terms of decision-making autonomy would be lost in terms of efficiency and substantive, output oriented, legitimacy. Adopting a pattern of allocation which follows the ideal of assuming the responsibilities for separate tasks and walks of life reflects the wish to establish an intangible core of sovereignty safe from any intrusion from outside. Although such desire is understandable from a psychological point of view, the allocation of exclusive competences often fails to provide workable solutions.²²⁵ Moreover, we argue that it may conflict with the idea, expressed in the principle of subsidiarity, that governance should be carried out as close to the citizens as possible.²²⁶

Some examples may illustrate the difficulties in dividing policy fields into exclusive spheres of competences: most people will intuitively

²²³ The principle of subsidiarity, which plays an important role in the European Union, is increasingly also referred to with a view to limiting competences of the global level. See R. Howse, "Symposium: The Boundaries of the WTO: From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime", *AJIL* 96 (2002), 94 et seq. (112); J. Bourgeois, "Subsidiarity" in the WTO Context from a Legal Perspective", in: M. Bronckers/ R. Quick (eds), *New Directions in International Economic Law. Essays in Honour of John H. Jackson*, 2000, 35 et seq.; R.O. Keohane/ J.S. Nye Jr., "Introduction", in: J.S. Nye Jr./ J.D. Donahue (eds), *Governance in a Globalizing World*, 2000, 37 et seq.

²²⁴ See the Declaration 23 of the Treaty of Nice (Declaration on the Future of the European Union), which enumerates, among the issues to be addressed, "how to establish and monitor a more precise delimitation of powers between the EU and the Member States, reflecting the principle of subsidiarity".

²²⁵ See G. De Búrca, "Reappraising Subsidiarity's Significance after Amsterdam", *The Jean Monnet Working Paper* No. 7 (1999), 4 et seq.; id., "Setting Constitutional Limits to EU Competence?", *Francisco Lucas Pires Working Papers Series on European Constitutionalism*, Working Paper No. 2 (2001), 15 et seq. and R. Dehousse, "Réflexions sur la naissance et l'évolution du principe de subsidiarité", in: F. Delpérée (ed.), *Le principe de subsidiarité*, 2002, 361 et seq. (364 et seq.).

²²⁶ See also N. MacCormick, "A Comment on the Governance Paper", *The Jean Monnet Working Paper* No. 6 (2001), 172; Lerquin-De Vischer, "Existe-t-il un principe de subsidiarité", in: F. Delpérée (ed.), *Le principe de subsidiarité*, 2002, 21 et seq.

agree that cultural matters should not be governed on the European but on the national or local level, whereas market liberalization requires concerted action on the supra- or international level. The free movement of goods and services, however, will necessarily touch upon cultural issues, such as film, broadcasting, music, the import and export of art objects.

In contrast, people will generally view environmental protection as a global concern. Whereas it is true that problems such as global warming cannot be efficiently resolved without international cooperation, other problems pertaining to the protection of the environment, such as urban planning, need in turn to be addressed on 'lower' levels of governance. Moreover, transboundary environmental problems do not need to be regulated comprehensively on the global level. To take the example of global warming, international law may prescribe the goal to be reached in terms of CO₂ reduction, while it is up to 'lower' levels of governance to choose the means to reach that aim and to implement them.

As these examples show, it would thus not be feasible to attribute an exclusive competence in the field of environmental protection or culture to one level of governance. Critics may object that it would be possible to either subdivide these policy fields, by distinguishing, for example, global warming, urban planning, protection of forests and moors, or laying down exceptions in competence clauses, for example by attributing an exclusive competence for cultural issues to local governance, with the exception of measures pertaining to market liberalization. Both approaches have their limits. Constitutions cannot address all the relevant issues and exceptions in a given policy field without losing their character of fundamental charters of a political order and becoming highly technical texts, inaccessible to most citizens. Too detailed regulations would also contradict the requirements of both stability and flexibility: constitutions should be open and flexible enough to evolve with the political community without requiring too frequent amendments.

In *Dehousse's* words, the main obstacle to a pattern of exclusive power allocation is that reality cannot be cut in neat slices and distributed to different authorities.²²⁷ If the concept of exclusive competences is to be rejected, what other options may help to define the substantive powers of the different levels of governance? An efficient solution should in our view combine both substantive and procedural remedies.

²²⁷ Dehousse, see note 225, 364, translated by the authors.

d. Substantive Remedies

Substantive remedies mainly rely on the principle of subsidiarity to act as a corrective device against centralizing tendencies of 'higher' levels of governance and the correlated erosion of national and local competences. In general terms, the principle of subsidiarity implies that a certain issue should only be governed on a 'higher' level of governance if it cannot be appropriately addressed on a 'lower' level. As is frequently pointed out, the criterion of 'appropriateness' is itself a fluid concept which can be defined in different terms.²²⁸ Should, for instance, the 'higher' level of governance address an issue only if it cannot be resolved at all on the lower level or as soon as a more efficient solution may be obtained on the 'higher' level?²²⁹ The first approach focuses mainly on process, i.e. the concern to ensure adequate participation of the people affected by the decision. It takes into account that citizens identify more strongly with 'lower' than with 'higher' levels of governance.²³⁰ The second approach emphasizes the outcome, stressing the capacity of a particular level of governance to effectively deal with a certain issue.²³¹ Similarly to the principle of proportionality, the principle of subsidiarity thus requires balancing different interests. This implies, in our view, that both aspects — process and outcome — should be taken into account.²³² Instead of attributing a policy field to one level of governance, the principle of subsidiarity will in many cases call for regulatory powers being spread over different levels of governance. Whereas it may be necessary for 'higher' levels to set some common standards in a policy field, by enacting framework regulations (*Rahmengesetze*),²³³ or opting for some 'softer' instruments, such as recommendations, further elaboration should and can often be left to the

²²⁸ See for instance De Búrca, "Reappraising Subsidiarity's Significance", see note 225, 9.

²²⁹ See A. Dubach, "Integration und Subsidiarität", *Swiss Papers on European Integration* No. 8 (1996), 1 et seq. (18).

²³⁰ De Búrca, see note 225, 12.

²³¹ For the distinction of 'process' and 'outcome', see De Búrca, "Reappraising Subsidiarity's Significance", see note 225, 4.

²³² For a definition of the subsidiarity principle taking into account both the democratic principle of governance as close to the citizens as possible and efficiency, see MacCormick, see note 226, 172: "governmental tasks should be carried out at a level as close to the citizens affected as is consistent with equity and with efficiency in the pursuit of common goods."

²³³ See Cottier, see note 156, 88.

'lower' levels of governance. As the experience of the European Community has shown, a flood of detailed regulations delegitimizes European governance. Anecdotes frequently related by sceptical European Union citizens mock the bureaucratic European Community regulating issues of such great importance as the labelling of shoes.²³⁴ Limiting the action of 'higher' levels of governance mainly to framework regulations implies that an issue can rarely be attributed to one level of governance alone²³⁵ and that we are "fated to live with multiple levels of government".²³⁶ Many, if not most policy fields, need to be shared between the second, third, fourth, and increasingly also the fifth floor of the constitutional building, which makes attempts to identify exclusive spheres of jurisdiction an ineffective tool of power allocation. A more flexible solution, consisting for example in listing the policy fields which should be *predominantly* exercised on a certain level of governance,²³⁷ without categorically excluding the intervention of other levels, would combine the advantages of transparency and a necessary amount of flexibility. Such an approach will however only be politically acceptable if it is accompanied by effective procedural safeguards.

e. Procedural Remedies

Procedural remedies to compensate for the loss of powers due to the internationalization of law-making consist in reinforcing both direct²³⁸ and indirect²³⁹ participatory rights of 'lower' levels of governance in the decision-making processes on 'higher' levels. The relationship between different levels is thus revealed by the notions of *symbiosis and consociation*, rather than strict separation of regulatory domains and tasks.²⁴⁰ The more lower levels of governance have a say in the decisions taken

²³⁴ The example of shoe labelling was mentioned in the first report of the Commission on subsidiarity as an example in which EC legislation was abandoned, cf. Dehousse, see note 225, 363.

²³⁵ See De Búrca, "Reappraising Subsidiarity's Significance", see note 225, 4.

²³⁶ MacCormick, see note 226, 172.

²³⁷ Dehousse, see note 225, 365.

²³⁸ By direct participation, we refer for example to the Council of Ministers, which enables the Member States to take part in the law-making procedure on the EC level.

²³⁹ By indirect participation, we mean for example procedures allowing sub-national entities to influence the position national authorities will defend on the regional and international level.

²⁴⁰ P. Taylor, *The European Union in the 1990s*, 1996, 181.

on 'higher' levels, the less important clear cut allocations of powers are. The rising popularity of the principle of subsidiarity in the European Community is a good example in point: it was only with the advent of majority ruling in the Council and the increasing impact of the European Parliament and the correlated diminished influence of the Member States in the decision-making procedures on the regional level that the idea of subsidiarity arose and then became a household name.²⁴¹ Job allocation therefore is inherently linked to *decisional processes within the respective constitutional level*, and it is here, in our view, that remedies should be sought in the first place.

Procedural solutions should not be limited to compensating the lack of exclusive jurisdiction to prescribe by appropriate representation on higher echelons of the constitutional order. They should also entail the duty of law and decision-making institutions to consult with national and regional institutions before initiating new legislative acts and to justify why the envisaged action cannot be appropriately dealt with by a 'lower' level of governance.²⁴² As the experience of most federal states and the European Union has shown, constitutional courts, or the European Court of Justice, respectively, often uphold centripetal tendencies of the legislative and executive branch based on a teleological interpretation of federal or European Community law.²⁴³ Effective po-

²⁴¹ Cottier, see note 156, 88 et seq.; Dehousse, see note 225, 362.

²⁴² See Bausili, see note 105, 8; De Búrca, "Reappraising Subsidiarity's Significance", see note 225, 33 et seq.

²⁴³ See Weiler/ Haltern, see note 108, 443; So far, the ECJ annulled acts of Community institutions for breach of the principle of proportionality or legality, but never for violation of the principle of subsidiarity, cf. Bausili, see note 105, 10, footnote 24.

The teleological interpretation of EC law by the ECJ, expressed in the '*effet utile*' doctrine, has, as pointed out above, met with resistance from national constitutional courts. See on this subject the Maastricht decision by the German Constitutional Court, see note 105.

On the global level, in the framework of the WTO, the concern of the Member States to prevent a dynamic interpretation of WTO law by the panels resulted in the adoption of article 3 § 2 of the Dispute Settlement Understanding (DSU). This provision reads as follows: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. *Recommendations and rulings of the DSB cannot add to or*

licing of boundary disputes may thus require that a different tribunal, consisting of representatives of both levels of governance affected by the controversy would settle such disputes.²⁴⁴ On the European Community level, representatives of the regions or cantons should also be granted standing before such a tribunal, so as to avoid national governments eroding the internal division of competences by legislating a certain issue on the Community level.²⁴⁵

6. The Role of the Judiciary

Twenty first century Constitutionalism will also allow developing more coherent views on the role of the judicial branch in international economic law. The current situation is marked by a dichotomy between domestic review and international review. The current paradoxes may be assuaged:²⁴⁶ while international judges today in the WTO tend to apply a relatively intrusive standard of review, scrutinizing *de novo* national legislation or administrative action for compliance with WTO law, the review of their colleagues on regional or national levels is characterized by relative restraint, they often limit judicial review to the extent that all decisions not considered capricious and arbitrary will escape judicial protection. International review reflects the functionalist tradition of GATT whose focus is on trade liberalization, whereas the attitude of the domestic courts is marked by the traditional perception of constitutionalism being limited to the domestic sphere: foreign relations, including external economic relations, are still considered the prerogative of an unrestrained executive branch.²⁴⁷ This paradox cannot be overcome on the basis of current precepts of administrative and inter-

diminish the rights and obligations provided in the covered agreements". (emphasis added). The same obligation is also laid down in art. 19 § 2 DSU.

²⁴⁴ Such proposals have been made by Weiler/ Haltern, see note 108, 447; MacCormick, see note 226, 181; the need for external control is also stressed by Bausili, see note 105, 5 et seq.

²⁴⁵ MacCormick, see note 226, 181; Bausili, see note 105, 6.

²⁴⁶ The following section is drawn on T. Cottier/ M. Oesch, "The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework", in: T. Cottier/ P.C. Mavroidis (eds), P. Blatter (associated editor), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO*, The World Trade Forum Vol. 4 (forthcoming).

²⁴⁷ See under II. 1.

national law looked upon as belonging to very different walks of life and systems. More coherent standards of review and a more appropriate role of the judiciary can only be created if we regard all levels as forming part of one system operating under the idea of constitutionalism: national courts would generally be required to adopt a stricter standard of review on the basis that the principle of separation of powers and the rule of law apply both to domestic and international law alike. WTO panels' attitude would in turn need to shift from a functionalist to a constitutional approach, which would allow for a more nuanced balancing between market access rights and other legitimate policy concerns. We suggest that standards of review should be determined on all levels based on the criteria of justiciability, i.e. the question as to whether a court is suitable to decide a particular issue, or whether the matter should be left to the political process. Again, there will be differences, as courts enjoy different roles and positions in different constitutional systems. These differences can be taken into account, as the matter of justiciability cannot be isolated from the constitutional situation of a court in a given system. But it will allow an assessment of the position of the court based on common criteria and an identification of minimal standards of judicial review, which the higher level of governance will need to apply in order to fulfil its role of providing checks and balances and defend the rights of those who are not represented in a particular polity.

V. Conclusion

The attempt to sketch a doctrine of 21st century Constitutionalism roots in practical problems encountered in constitutional, regional and international law in coping with the challenges of regionalization and globalization. It is not an effort to please theory, but to assist in developing tools which allow legislators, executive and judicial branches of government to cope with the complex interaction of different regulatory issues. We do not believe that current disputes relating to the concept of 'constitution' are an ample basis to address these practical problems. Attempts to determine whether the European Union, or the WTO, for instance, already have a constitution or should and are able to have one tend to polarize the debate by apprehending complex political and social realities in black and white terms and focus too narrowly on a single level of governance. We submit that a limitation of constitutionalism to the Nation State clearly is no longer suitable to

structure the interaction of different layers of governance in a fruitful manner. Globalization and regionalization have resulted in the transfer of many regulatory issues from the national to the regional and global level. Due to this process of de-nationalization, new levels of governance have emerged on the regional and global level which need to be interfaced with the national and subnational levels: defining the relationship and interaction between the different levels of governance is an important task that modern constitutionalism has to achieve.

The different levels of governance represent themselves, or consist of, more or less constitutionalized regimes which are not static and can evolve along with the regulatory tasks ascribed to them. The more complex, the more intrusive a level of governance is, the more it will be necessary to develop its constitutional qualities. To reflect and critically assess this reality, we have supported a graduated concept of constitutionalism which puts more emphasis on process and interaction than on strict conceptual boundaries and momentous events of constitution-making, focusing on how the constitutional functions can be secured, considering the different levels of governance as forming part of an overall constitutional system. For this purpose, we have suggested, as a framework of analysis, taking recourse to a multi-storey house, which needs to be coordinated in a practical way. Indeed, issues like allocation of powers and the definition of coherent standards of review, which we have addressed in this paper, necessarily imply an interplay of different levels and cannot be solved by focusing on one layer in a isolated manner. With regard to the relationship between the different levels of governance, we have argued that the supremacy of 'higher' levels is necessary for the sake of overall coherence, but not in absolute terms. Essential guarantees, to be found on any of these layers, may prevail to the extent that they protect core values and rights of individuals and mankind. It is thus a relation of mutual communication, not subordination, which characterizes the prospects of 21st century Constitutionalism.