

The Development of Constitutional Precedence and the Constitutionalization of Individual Rights

Gerald Stourzh

Contents

1	Fundamental Laws and Fundamental Rights in the 17th and 18th Centuries and the Invention of the Word “Unconstitutional” in England	100
2	The Dissociation of “Constitutional” from Legislative Power in North America and the “Constitutionalisation” of Individual Rights (Colonies and States up to 1787/88).....	103
3	Fundamental or Paramount Law on the Federal Level in the United States: Marbury v. Madison 1803 and Obergefell v. Hodges 2015	107
4	Europe, “Constitutional Complaint” (Verfassungsbeschwerde) and “Individual Complaint” (Individualbeschwerde): Roots 1848 and 1867, Beginnings 1919/1920, Breakthrough After World War II	109
	References	111

Abstract The first part concentrates on the emergence in England of “fundamental laws” in the sense of individual rights, the “liberties and properties” of Englishmen. I also show how notably in the case of the notorious “Septennial Act” of 1716, criticism that Parliament violated the “constitution” was expressed, and how about three decades later in the writings of Bolingbroke the word “unconstitutional” was born, gaining wide currency in the North American polemics against the British Parliament prior to independence. In the second part I concentrate on one of the most important aspects of early modern western constitutional history, the dissociation—in North America—of the “higher” positive law of constitutions as opposed to the

This paper is the revised version of a lecture at the ReConFort Meeting Free University of Brussels on 14 March 2016 and summarizes research conducted over many decades and published in several previous publications, partly in English, partly in German; these are indicated in the References.

G. Stourzh (✉)
University of Vienna, Vienna, Austria
e-mail: gerald.stourzh@univie.ac.at

inferior “normal” law of legislatures, at the same time also relativising the supreme character of “law” in the writings of Hobbes and Rousseau, and closely connected to this development, the upgrading of many individual rights to “constitutional rights”, in other words, their constitutionalisation. In the third part I concentrate on two judgments of the U.S. Supreme Court throwing into particularly sharp relief the superiority of constitutional law vis-à-vis ordinarily legislature-made law: the first, long famous, is *Marbury v. Madison* of 1803, and the second one, *Obergefell v. Hodges* of 2015, is fast becoming one of the landmark cases of human rights protection, with the Court stating: “An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.” In the fourth part I concentrate on the development, in Europe, of the only direct connections between individual persons and human rights enshrined in the highest law of the land or even beyond: first, the “*Verfassungsbeschwerde*” (constitutional complaint) first developed in Austria, particularly successful in Germany (commenting also on the different situation in France and in Great Britain); and second, the “*Individualbeschwerde*” (individual complaint) before the European Court of Human Rights, enabling the individual to appeal even against his or her own state for the protection of rights guaranteed by the European Convention of Human Rights.

1 Fundamental Laws and Fundamental Rights in the 17th and 18th Centuries and the Invention of the Word “Unconstitutional” in England

In early modern Europe, *leges fundamentales*, fundamental laws, played a significant role. The term seems to emerge in France around the 1570s. Innocent Gentillet, a writer favourable to the Protestants, named three fundamental laws of the French monarchy: First, the so-called *lex salica*, meaning the exclusion of female succession on the throne; second, the inalienability of crown property, and, most important, the existence of the three estates.¹ Several decades later, in 1607, we find an interesting speech by the first Stuart king in England, James I, at the same time king James VI of Scotland. Fundamental laws, he said, mean different things in England and in Scotland. In Scotland, fundamental laws are only those laws, “whereby confusion is avoided, and their kings’ descent maintained...”—in other words, the settlement of royal succession. But James I added, addressing both Houses of the English Parliament, fundamental laws did not mean “as you doe, of their Common Law, for they have none, but that which is called *IUS REGIS*”.² Referring to the Common Law opened up the whole world of Private law, of what was often said the rights of “*meum et tuum*”. Indeed we find increasing references to individual rights, whether property rights or rights pertaining to the safety of the

¹Stourzh (1995, p. 17).

²Rede vom 31. März 1607 in: McIlwain (1918, p. 300).

person such as the famous “habeas corpus” legislation (Magna Carta, Art. 39/29, Habeas Corpus Act 1679) providing protection against arbitrary arrest as “fundamental” in English political writing during the seventeenth century. I refer to two publications: In 1669, there appeared a booklet called “Angliae Notitia”, widely known and translated. It said that the Commons of England (the Third Estate, in other words), were blessed “for hereditary fundamental Liberties and Properties”... “above and beyond the Subjects of any Monarch in the World.”³ A few years later, 1675, William Penn wrote that he understood by “fundamental laws” “those rights and privileges which I call English, and which are the proper birthrights of Englishmen”, in the first place property rights, second voting rights concerning property rights, and third participation in the judicial power through the system of trial by jury.⁴ In 1679, the habeas corpus act was passed, improving (not establishing!) the protection of free men from arbitrary imprisonment. In 1689, there followed the “Declaration of Rights”.⁵

Now in view of these and other documents I have spoken of the process of “fundamentalising” individual rights in the English legal system, a process which reached its apogee in 1765 with the publication of William Blackstone’s Commentaries on the Laws of England. Blackstone subsumed his treatment of the supreme powers of the land under the heading “The Rights of Persons”. There were three principal rights: the right of personal security, the right of personal liberty, and the right of private property. Yet now, more surprising, there were beneath these, several “auxiliary subordinately rights of the subject”, and among these we find in the first place the “constitution, powers and privileges of parliament.”⁶ Therefore, I have spoken of “fundamentalising” individual rights in England (or Britain) during the seventeenth and eighteenth centuries which I distinguish from the process of “constitutionalising” individual rights, which occurred in America.⁷

In spite of this as it were “fundamental” place of the rights of persons, Blackstone—or indeed English law in general—has developed no procedural way do unto—to “unlaw”, as Cromwell once said⁸—Acts passed by the King or Queen in Parliament except by new laws. Within the limits of parliamentary sovereignty, the English Parliament has on several occasions suspended the Habeas Corpus Act of 1679—first in 1688/89,⁹ and notably during the Wars of the French Revolution and Napoleon, from 1794 to 1800. No procedural “precedence” for laws deemed “fundamental” by public opinion existed, though one cannot imagine “Magna

³“Liberties and Properties” from Chamberlayne’s book are reprinted from the third edition, also giving London 1669 as place and time of the printing, and also in a German translation published in the *Diarium europaeum* of 1670 in: Stourzh (1989, pp. 34–35), *Studien zur Begriffs- und Institutionengeschichte des liberalen Verfassungsstaats*.

⁴Stourzh (1989, p. 29).

⁵Stourzh (1995, pp. 17–21).

⁶Blackstone (1765, pp. 125, 136).

⁷Stourzh (2007, pp. 292–293).

⁸Stourzh (1995, p. 17).

⁹Crawford (1915, pp. 613–630).

Carta” to have been changed by a law of parliament. There has been one law case in 1610, “Dr. Bonham’s case”, where the deciding judge, the famous Edward Coke, held that “in many cases the common law will control Acts of Parliament”, and where he decided against a law privileging the London College of Physicians.¹⁰ This decision angered James I, who removed Coke to another court; its interpretation has led to much controversy, and no additional acts of Parliament were declared void.

There was also, during the seventeenth and eighteenth centuries in England the rise of the notion of “constitution”, describing as it were the whole “package” of basic institutions holding the state together. During the Glorious Revolution of 1689, the last Stuart King James II was charged having attempted “to subvert the constitution of the kingdom”. But in the 18th century, Parliament also on occasion came under attack. In 1701 Daniel Defoe, on the occasion of an incident whose details I have described elsewhere, regretted that the Revolutionaries of 1689 had not provided for the Right of the people “to judge of the Infractions made in their Constitution” either by Parliament or by the Monarch.¹¹ More famous or infamous is Parliament’s “Septennial Act” of 1716, in later decades strongly to be criticised by the American Founders. In that year, Parliament, elected for three years according to existing legislation, prolonged the duration of parliamentary election from three to seven years. But not, as one would assume, for the next Parliament to be elected, but prolonging its own duration from three to seven years.¹² Opponents argued, that frequently elected parliaments were part of the “fundamental constitution” of Britain. It was argued that from the moment where members of parliament were in office beyond the time for which they had been elected, they ceased to be “trustees” of the people; from this moment on they acted “by an assumed power, and erect a new constitution”¹³. Very modern sounding, for the year 1716! But the opponents failed, the majority in Parliaments had its way, and there was no higher instance to appeal to. Nevertheless, the consciousness that there was such a thing as a “constitution” and that there could be infractions on the constitution had been developed, and it did not take too long until an astute politician and political thinker, Lord Bolingbroke, used adjectives like “constitutional” (1730) and “unconstitutional” (1734). It took another three decades until the word “unconstitutional” began to spread widely—in America on the occasion of the so-called “Stamp Act crisis” of 1765, a process that I have described elsewhere,¹⁴ but also by being used in Blackstone’s Commentaries on the Laws of England, a book with a very wide reception both in England and in America.¹⁵

¹⁰Stourzh (1989, p. 49).

¹¹Stourzh (1989, p. 46).

¹²Stourzh (2007, p. 317).

¹³Great Britain Parliament (1739, p. 410).

¹⁴Stourzh (1989, pp. 52–54).

¹⁵Stourzh (2007, pp. 60–79).

2 The Dissociation of “Constitutional” from Legislative Power in North America and the “Constitutionalisation” of Individual Rights (Colonies and States up to 1787/88)

Now I come to the central and most detailed part of my lecture. What I shall discuss in parts three and four concerns themes much better known in Europe, and there I will be briefer.

In North America, an important condition separated the colonial settlers from those having remained in the mother country. They were in need of some basic political documents laying down rules for new communities. These documents were of different kinds; royal charters, privileges given to proprietors empowering them to issue documents regulating the basic framework of a new colony, sometimes agreements of settlers without any higher authority like the “Fundamental Orders” of Connecticut of 1639, only later supplanted or amended by a royal Charter. For the colonial period, I shall concentrate on one most interesting document, “The Charter or Fundamental Laws, of West New Jersey, Agreed Upon” of 1676. This Charter is part of a larger document, “Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey”. The Charter has eleven articles designated as “the common law or fundamental Rights” of West New Jersey. They chiefly embodied rights with reference to criminal procedure, including habeas corpus. This Charter now establishes—for the first time, as far as I can see—a definite procedural difference between its own basic character and that of normal laws which are prohibited from changing the articles of the Charter. These fundamental rights were agreed on “to be the foundation of the Government which is not to be altered by the Legislative Authority or free Assembly hereafter mentioned and constituted. But that the said Legislative Authority is constituted according to these fundamentals to make such laws as agree with and maintain the said fundamentals and to make no laws that in the least contradict, differ, or vary from the said fundamentals under what pretence or allegation whatsoever.”¹⁶

This subordination of ordinary laws to the fundamental rights of the Charter anticipates in an amazing way the First Amendment to the American Constitution of 1791, which reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press: or the rights of the people peaceably to assemble, and to petition the Government for a redress of grievances”. Here we have in both texts, of 1676 and of 1791, the most important innovation of American public law: The subordination and the lower rank of ordinary legislation with respect to the higher law of a fundamental order, from the late 18th century onwards referred to as constitution.¹⁷ If we think not merely of the legislative sovereignty of the British Parliament, if we

¹⁶Stourzh (2007, p. 319).

¹⁷Stourzh (2007, pp. 314–318).

think of the basic importance of “the law” or “la loi” in the works of Hobbes or of Rousseau, the dissociation of “ordinary” law from a higher, yet positive “constitutional” law is all the more remarkable. Among the Americans of the Founding generation, pride in their possessing a constitution of higher ranking than ordinary laws also comes to the fore in the contempt for the self-perpetuating powers of the British Parliament, as evidenced in several critical references to the Septennial Act of 1716. James Madison in 1788, in the *Federalist* (No. 53), heavily criticised the British Parliament’s power of changing by legislative acts some of the most fundamental articles of the government (government meant in the broad sense of political system). And Thomas Paine, in his “Rights of Man” of 1791, observed that the Septennial Act was proof that “there is no constitution in England.”

Yet before entering the sphere of federal law in America, we need to stop at the level of the individual states. Most, though not all of them gave themselves new “constitutions” between 1776 and 1780, and many of them gave themselves “Declarations of Rights”, usually called “Bills of Rights”, as part of their constitution, like notably Pennsylvania or Massachusetts, or added them later on, like New York or New Hampshire. Two of them, Connecticut and Rhode Island, held on to their colonial fundamentals. The first and most famous of these Declarations, that of Virginia, stood as a document apart from the constitution. The rights enumerated in these Declarations were in part natural rights invoked in the struggle for independence, in part former “rights of Englishmen” embodied in numerous colonial documents. As far as the former are concerned, one has spoken of the “Positivierung des Naturrechts”, the “positivisation of natural law”, in the words of Jürgen Habermas.¹⁸

The enhancement of individual rights as elements of a constitution emerges 1776 in a well-known resolution of the town meeting of Concord, Massachusetts: “[W]e Conceive that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession and Enjoyment of their Rights and Privileges, against any Encroachments of the Governing Part.”¹⁹ By the end of the period of constitutional debate from 1776 to 1788, one of the most important constitutional debates in Western history—an American writer writing under the name of “Federal Farmer” in December 1787, (probably Melancton Smith of New York), came up with an amazingly nuanced hierarchy of rights:

“Of rights, some are natural and unalienable, of which even the people cannot deprive individuals. Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws, but the people, by express acts, may alter or abolish them [a reference to the possibilities of amending constitutions]; These, such as the trial by jury, the benefits of the writ of habeas corpus, &c. Individuals claim under the solemn compacts of people, as constitutions, or at least under laws so strengthened by long usage as not to be repealable by the ordinary legislature—and some are common or mere legal rights, that is, such as individuals claim under

¹⁸Habermas (1967, p. 55).

¹⁹Stourzh (2007, p. 96).

laws which the ordinary legislature may alter or abolish at pleasure.”²⁰ This passage displays an amazing grasp of the hierarchy of legal norms, much later developed by Adolf Merkl and Hans Kelsen as “Stufenbau”—Theory of legal norms, though of course Merkl and Kelsen would not have admitted the category of natural rights. I shall soon quote a second example of this grasp of the hierarchy of legal norms. The piece just quoted is also a remarkable example of the lowness of rank of “ordinary laws” of which I have just spoken.

Since the formation of the American state constitutions from 1776 onwards it is possible to speak of modern constitutions having an “Organisationsteil” and a “Grundrechtsteil”, an organisational part and a fundamental rights part. There occurred thus two important processes simultaneously: first, the dissociation of constitutional from ordinary law, and second, what I have called the “constitutionalisation of individual rights.”²¹ And a third process, deriving from the first two, also emerged on the state level prior to the entry into force of the federal constitution: The judicial review of ordinary legislation, measured against the superior law of the constitution.

I consider two cases, though many more have been noted in the literature, the case of *Trevett v. Weeden* in Rhode Island 1786, and the more complete North Carolina case of *Bayard v. Singleton* of 1786/87. First to Rhode Island:

A butcher by name of John Weeden accepted from his clients only gold or silver coins and no paper money—in highly inflationary times. Yet there existed a law of the legislative assembly of Rhode Island, making the refusal to accept paper money a punishable offense; also this law expressly excluded the procedure of trial by jury and thus a case was opened against the butcher. The Court declared its incompetence. Yet it transpired through the press that four of the five judges had voiced the opinion that the law was void, because it was unconstitutional. The judges were asked to appear before the legislative assembly, where they were threateningly told that it had never happened before that a law of “the supreme legislature” had been declared unconstitutional and void, and that this could lead as far as “to abolish the legislative authority”. By the end of the year the four judges said to have spoken of unconstitutionality were not renewed in their office. Yet an interesting accompanying publication has to be mentioned. The lawyer for the butcher Weeden, by name of James Varnum, published a brochure of about 60 pages on the case. He argued that the alleged “supremacy” of the legislative assembly was derived from the constitution (at that time this was still the Royal Charter of 1663 with considerable possibilities of self-determination), and “subordinated” to it. The author expressly referred to Emer de Vattel, famous Swiss author on international law, who had written that the legislature of a nation could not change the constitution since its competence was derived from the constitution. I quote from the French edition (there very soon appeared an English translation): “Enfin, c’est de la constitution que ces législateurs tiennent leur pouvoir, comment pourraient-ils la changer, sans détruire le

²⁰Letters from the Federal Farmer, 1787/88 in: Storing (1981, p. 261).

²¹Stourzh (2007, pp. 314–320).

fondement de leur autorité.”²² The judicial power, Varnum continued, could not recognise as law an act of legislation which contradicted the constitution. And trial by jury was “a fundamental, a constitutional law.”²³

Now to North Carolina, the case of *Bayard v. Singleton*. From the point of view of constitutional history, I consider this case at least as important as the much better known federal case of *Marbury v. Madison*. It also involved the constitutionally guaranteed right of trial by jury. The legislative assembly of North Carolina had passed a law which ordered that suits of persons whose property had been confiscated during the war with Great Britain—in other words persons who had sided with Britain against independence, called “loyalists”—that suits of such persons aiming at the recovery of their property had to be rejected by the courts. The Supreme Court of North Carolina had great doubts that this law was compatible with the constitutional guarantee that property cases had to be dealt with by trial by jury in the ordinary courts. After various attempts for a compromise settlement had failed, the Supreme Court (three judges) judged unanimously that it could not reject the suit. In the reasons for its judgment, the Court said that the legislative assembly had no competence to annul that article of the constitution. If the legislative assembly would ignore the constitution in this case, then it might also ignore it in other cases. Then they might condemn someone to death without trial by jury, or they could nominate themselves legislators for lifetime, or they could even make legislative power hereditary. The Court added that the constitution was “the fundamental law of the land” and therefore the law in question had to be considered as invalid.²⁴

Now at least as interesting as the judgment of the Supreme Court of North Carolina is an article written by James Iredell, a lawyer for the plaintiffs, in August 1786. This excellent jurist, born in England, was later appointed by President Washington a member of the first Supreme Court of the United States. Iredell set to examine possible remedies against violations of the Constitution by the legislative assembly. There was the right of petition to the assembly; he ridiculed the appeal of the electors to the elected, and also referred to the spectre of legislative omnipotence by pointing to the British Septennial Act of 1716! Another remedy would be the right of resistance—in other words, violence. Apart from the fact that this was a dreadful expedient, he argued that the violation of individual rights of single persons would never provoke the majority to armed resistance. There remained then a third remedy: the judicial power. It had to be inquired as to whether the judicial power had “any authority to interfere in such a case”. He affirmed it by a few memorable sentences, worth to be set alongside the much better known ones of Chief Justice Marshall 17 years later: He described the duty of the judicial power as follows:

“The duty of that power, I conceive, in all cases, is to decide according to the *laws of the State*. It will not be denied, I suppose, that the constitution is a *law of the state*, as well as an act of assembly, with this difference only, that it is the *fundamental law*,

²²de Vattel (1863 (1758), p. 168).

²³Stourzh (1989, pp. 58–60).

²⁴Stourzh (1989, pp. 60–62).

and unalterable by the legislature, which derives all its power from it. One act of Assembly may repeal another act of Assembly. For this reason, the latter act is to be obeyed, and not the former. An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent with the constitution, is *void*, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people, not mere servants of the Assembly.*²⁵ A year later, 1787, Iredell held the judges' obligation "to hold void laws inconsistent with the constitution" for "unavoidable", "the constitution not being a merely imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which therefore the judges cannot wilfully blind themselves."²⁶ This logic would have pleased the architects of the "Stufenbau-Theory" of legal norms, to which I have already referred. James Iredell of North Carolina is indeed a precursor of Merkl and Kelsen.

3 Fundamental or Paramount Law on the Federal Level in the United States: *Marbury v. Madison* 1803 and *Obergefell v. Hodges* 2015

Discussion of the Federal draft constitution in 1787–1788 brought forth a new word to designate the higher rank of the constitution with regard to ordinary legislation. In addition to "fundamental", the word "paramount" made its appearance. First, it seems, 1788 James Madison, in article No. 53 of "The Federalist," spoke of "the authority of a paramount constitution."²⁷ "Paramount"—that meant, the highest law of the land. Now the word "paramount" reemerges in one of the best known cases of the federal Supreme Court, the case of "*Marbury v. Madison*" of 1803. It was the first case in which the federal Supreme Court declared a passage of a federal law void, because it contradicted the constitution. The details of the case are not really important. It was no great "political" case. There had been a change of the Presidency from John Adams to Thomas Jefferson. The outgoing President had appointed one William Marbury to the office of justice of peace for the District of Columbia, the outgoing Secretary of State—ironically no one else but John Marshall, at that time amazingly simultaneously Secretary of State and President of the Supreme Court!—had out of negligence failed to deliver the appointment to the appointee, and the new President Jefferson did not wish to have the appointment

²⁵Stourzh (1977, p. 171), emphasis in the original, to be found in: McRee (1858, pp. 147–148).

²⁶Stourzh (1989, p. 317).

²⁷Cooke (1961 (1788), p. 361).

delivered anymore. So Marbury sued and requested that the Supreme Court issue a necessary document ordering delivery of the appointment, called “writ of mandamus”. Now the Supreme Court came to the conclusion that it was not constitutionally empowered to issue such a writ. Famous is the case for the legal reasoning of the opinion of the Court, written by the Chief Justice Marshall himself. The logic was not different from the logic displayed by the North Carolina Supreme Court in 1786. But now an Act of the Federal Congress and the Federal Constitution were at stake. I quote what I consider the central part of the argument:

“The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it....

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered, by this Court as one of the fundamental principles of our society” (Supreme Court of the United States, 5 U.S. 137 1803, at 177).²⁸

The words “paramount” and “written constitution” have become the key words characterising the high rank—the highest rank—of “constitution” in the hierarchy of legal norms.

Now let me jump directly from 1803 to 2015. I do by-pass landmark cases like the Dred Scott case of 1857, declaring slavery to be valid in the entirety of the United States—generally considered as the Supreme Court’s “worst” decision ever—or *Loving v. Virginia* of 1967, ending the punishment of marital relations between blacks and whites, or *Brown v. Board of Education of Topeka* 1954 (ending racial segregation in schools), and go directly to the 2015 case of *Obergefell v. Hodges*. This decision of June 26, 2015, decided with the smallest possible majority of five against a minority of four judges, declared same-sex marriages as constitutional, thereby making the prohibition of same-sex marriages in 13 American States illegal. This case, which I am sure is to be considered one of the great civil rights cases of American constitutional history, has an interesting background. James Obergefell and his partner John Arthur, the latter with the deadly ALS illness (amyotrophic lateral sclerosis) and soon to die, decided to get married in the State of Maryland, because same-sex marriages were prohibited in the State of Ohio, where they lived. After the death of his partner, James Obergefell requested that on the death certificate of his partner, his own name be indicated as spouse. This was refused by the State of Ohio, and the case finally went to the U.S. Supreme Court.

The majority of five, which incidentally included all three women judges sitting on the Court, came in the lengthy “opinion of the Court” to the conclusion based on the 14th amendment to the constitution, notably on its clause that no State shall “deny to any person within its jurisdiction the equal protection of the laws”: I quote

²⁸Commager (1963, p. 193).

from the Court opinion, written by Justice Anthony Kennedy: “An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.” The opinion went on to say that “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”²⁹ Thus the principle formulated by James Iredell or John Marshall at the turn from the 18th to the 19th century—supremacy of the constitution, subordination of ordinary legislation—was powerfully reaffirmed in 2015. I should add that the four judges in the minority all wrote quite bitter minority opinions, suggesting that the majority had gravely disregarded the democratic principle of majority rule; one judge, Justice Scalia—who recently died—went as far as charging the majority of a “juridical Putsch.”³⁰

4 Europe, “Constitutional Complaint” (Verfassungsbeschwerde) and “Individual Complaint” (Individualbeschwerde): Roots 1848 and 1867, Beginnings 1919/1920, Breakthrough After World War II

In this concluding section, I shall concentrate on the development of a *direct access of individuals to the constitution*. The stronger separation of public and private law in (continental) Europe, the growth of separate judicial institutions (unlike the USA), have made this access perhaps more complicated than in America. The most important precondition of gaining access—or wishing to gain access—has been alike in America and Europe the incorporation of basic or fundamental rights (“Grundrechte”) into constitutional texts—something which I discussed in section B. As long as declarations of individual rights—(rights of men and of citizens in the beginnings of the French Revolution, later during the 19th and early 20th centuries chiefly rights of citizens (rights of Belgians, rights of Germans etc.)—remained without a procedural “tie” to individuals, these declarations were chiefly appeals to the legislator, to heed individual rights. But there were attempts to do more. In France, the Abbé Sieyès proposed in 1795 the creation of a “jury constitutionnaire” in order to settle conflicts between legislation and constitution. Complaints were to be directed to the Jury constitutionnaire not merely by both chambers of the envisaged parliament, (Conseil des Anciens, Conseil des 500), but also, and this is most interesting, to individual citizens (“citoyens au nom individuel”).³¹ His plan was not accepted—too strong were in France the sympathies in favour of “la loi.”³²

²⁹U.S. Supreme Court, case of *Obergefell v. Hodges*, 576 U.S.— (2015).

³⁰See Footnote 26.

³¹Pasquino (1998, pp. 93–97), text of Sieyès’ document, *ibid.* (pp. 193–196).

³²Stourzh (2015, p. 114).

In Germany, we note an interesting early development in Bavaria. According to the constitution of 1818, citizens were given the right “to bear complaints concerning the violation of constitutional rights” to the parliamentary assembly, called “*Stände-Versammlung*”. A different level was reached during the revolution of 1848/49. The German draft constitution of 1848/49 envisaged “suits of German citizens concerning violation of rights guaranteed by the German constitution.” A high Court, the *Reichsgericht*, was to decide about such suits. Similarly, the draft constitution for the Habsburg Empire of 1849 provided that suits concerning violation of constitutional rights by civil servants could be addressed directly to the Supreme *Reichsgericht*. Both draft constitutions were never put into practice. In Germany, the idea expressed in the 1849 draft constitution was only to be taken up after World War II. In Austria, for peculiar reasons the liberal tradition of 1848 brought forth a liberal constitution for the non-Hungarian part of the Empire, the so-called December-Constitution of 1867. This was a collection of “fundamental laws”, and one of them, the “Fundamental law on the creation of a *Reichsgericht*” provided that it was competent to hear “complaints of citizens concerning violations of their political rights guaranteed by the constitution”. The procedure concerning the *Reichsgericht* had, however, a great weakness: the administration was not bound to abide by the judgments of the *Reichsgericht*. This legal gap was filled after World War I, when Austria and Czechoslovakia established the first specialised constitutional courts in the world—as distinguished from the U.S. Supreme Court. The Austrian Constitutional Court was created with the law of January 25, 1919 and was incorporated, with slight changes, into the Austrian Constitution of October 1, 1920. The Czechoslovakian Constitutional Court was created by the Constitution of Czechoslovakia of February 29, 1920. While the Czechoslovakian Court had few competences, the Austrian Court obtained the competence to decide on complaints, here rendered in a slightly simplified way, concerning violations of the plaintiff’s constitutionally guaranteed rights by decrees (*Bescheide*) of the administrative agencies of the State, notably based on unconstitutional laws.³³

In Germany, the Constitutional Complaint was first embodied in 1951 in the Law on the Constitutional Court, on the level of an ordinary law. Only in 1969 was it incorporated into the *Grundgesetz* (Art. 93, Paragraph 1, Number 4a). The text very simply states that everyman is entitled to bear complaint—addressed to the Constitutional Court—of having been violated by public authority in one of his or her fundamental rights (*Grundrechte*) or certain other specifically named rights. In the meantime, constitutional complaints have enormously increased and by now amount to about 96% of all cases brought before the Constitutional Court.³⁴ Among rights violated, not merely in Germany, the right to equality before the law has become one of the most important, if not the most important right whose violation is submitted.

In France, skepticism about the “*gouvernement des juges*” was widespread among decades. The Conseil Constitutionnel, established by the de Gaulle constitution of

³³Stourzh (2015, pp. 115–116).

³⁴Stourzh (2015, p. 117).

1958, knew no individual complaint. An attempt by President Mitterand to introduce it in 1989 failed. Now since the constitutional reform of 2008, a peculiar procedure has been introduced, entitled “question prioritaire de constitutionnalité”, in force since 2010. In the course of trials, the question of constitutionality of laws may, after having been examined by the Conseil d’Etat or the Cour de Cassation, be submitted to the Conseil Constitutionnel. This is the first time in France that the examination a posteriori of the constitutionality of laws has become possible.³⁵

In conclusion, I would like to point to the evolution of individual complaints against rights violation beyond the national level. I exclude here the rather limited possibilities offered by various UN Conventions, and I concentrate on the European Declaration of Human Rights of 1950, in force since 1953, with its most important instrument, the European Court of Human Rights, established in 1959. The admission of complaints by individuals first was at the discretion of individual member states; Germany had admitted it in 1955, Great Britain in 1966, and France only in 1981. Since a reform of the Court in 1998, every one of the 47 members of the Council of Europe including Russia is obligated to admit individual complaints. Individual complaints are only possible, when all domestic remedies have been exhausted. The Court became victim of the hopes engendered by the extension of individual complaints to all member states. In 2011, the high point of more than 160,000 pending applications was reached; since then new procedures have begun to reduce this enormous backlog. In Austria, the articles of the European declaration were given the rank of constitutional provisions. In Germany, the articles of the European Convention have no constitutional standing, yet the German Constitutional Court has said in 2004 that German courts are under the obligation of taking into account the judicature of the European Court of Human Rights. In Norway, since 1999 a law has given the European Convention of Human Rights and some other international conventions with relevance for human rights a special rank above other legislation (Law of 21st May 1999 enforcing the status of human rights in Norwegian law).

Thus the European Convention has assumed, in some countries at least and in different ways, a status of precedence vis-à-vis ordinary law, not quite dissimilar to constitutional rights on the national level. With transcending national boundaries, the special protection of human rights which set in 240 years ago, has now reached, in Europe at least, a level which has never before existed in human history.

References

Anonymous [possibly Melancton Smith] (1981 (1787/88)). Letters from the Federal Farmer. Reprinted in: Storing HJ (ed) The complete anti-federalist, vol II. University of Chicago Press, Chicago, pp 214–357

³⁵Stourzh (2015, pp. 117–118).

- Blackstone W (1765) Commentaries on the Laws of England. Book the First vol I. Clarendon Press, Oxford
- Commager HS (1963) Documents of American history, vol I, 7th edn. Appleton-Century-Crofts, New York, p 193
- Cooke JE (ed) (1961(1788)) The federalist. The World Publishing Company, Meridian Books, Cleveland
- Crawford CC (1915) The suspension of the Habeas Corpus Act and the Revolution of 1689. In: English Historical Review, 30(120):613–630
- de Vattel E (1863 (1758)) Le Droit des gens ou Principes de la loi naturelle. In Pradier-Fodéré MP (ed) vol 1. Paris
- Habermas J (1967) Naturrecht und Revolution. In: Theorie und Praxis. Luchterhand, Neuwied, pp 52–88
- McIlwain CH (ed) (1935 (1607)) The Political Works of James I. New York
- McRee GJ (ed) (1858) Life and correspondence of James Iredell, vol II. D. Appleton and Company, New York, pp 147–148
- Pasquino P (1998) Sieyès et l'invention de la constitution en France. Odile Jacob, Paris
- Stourzh G (2015) Die moderne Isonomie. Menschenrechtsschutz und demokratische Teilhabe als Gleichberechtigungsordnung. Vienna/Cologne/Weimar, Böhlau
- Stourzh G (1995) Naturrechtslehre, leges fundamentales und die Anfänge des Vorrangs der Verfassung. In: Starck C (ed) Rangordnung der Gesetze. Vandenhoeck & Ruprecht, Göttingen, pp 13–28
- Stourzh G (1989) Wege zur Grundrechtsdemokratie. Böhlau, Vienna/Cologne. In this book, see particularly: Vom Widerstandsrecht zur Verfassungswidrigkeit: Zum Problem der Verfassungswidrigkeit im 18. Jahrhundert, pp 37–74
- Stourzh G (2007) From Vienna to Chicago and Back. Essays on Intellectual History and Political Thought in Europe and America. University of Chicago Press, Chicago. In this volume, see particularly: William Blackstone: Teacher of Revolution, pp 60–79; Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century, pp 80–99; Equal Rights: Equalizing the Individual's Status and the Breakthrough of the Modern Liberal State, pp 275–303; Liberal Democracy as a Culture of Rights: England, the United States, and Continental Europe, pp 304–334
- Stourzh G (1977) The American revolution, modern constitutionalism, and the protection of human rights. In: Thompson K, Myers RJ (eds) Truth and tragedy. A Tribute to Hans J. Morgenthau. New Republic Book Company, Washington, D.C., pp 162–176
- United States Supreme Court (1803) Case of Marbury v. Madison, 5. U.S. (1 Cranch) 137
- United States Supreme Court (2015) Case of Obergefell v. Hodges, 576 U.S.
- All cases available on the Internet under "Justia U.S. Supreme Court", with further references.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

