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Swiss Cantonal Constitutions as Sources of Law for the Protection of Fundamental Rights

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Abstract

Under Swiss Law, there are two levels of constituent powers. Both have adopted their own Bills of Rights. In this case, cantonal Bills of Rights are considered as a complementary source to the federal Bill of Rights. Nevertheless, in this paper, we demonstrate that cantonal constitutions have nourished federal constitutional law and continue to do it. They play a role of source of law, which is more today in a material than in a formal sense.

The adoption of Bills of Rights at the national and international levels raises the question of the usefulness of numerous legal texts to protect individuals. In constitutional law, federal States feature such hypothesis of multiple Bills of Rights. Theoretically, such formal constitutional diversity can give rise to two different scenarios. Either there is no influence between the various bills of rights, as is the case in the United States where this is referred to as a dualistic model of constitutionalism; or one Bill of Rights influences the other, and in this case of interconnection the federal State has an effect of nationalisation. This top-down phenomenon results in a uniform

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application and interpretation of fundamental rights, voiding the substance of human rights enshrined in the Bill of Rights of the states. Nevertheless, such phenomenon can also translate into an opposite dynamic when sub-national authorities take the lead in the development and interpretation of human rights. In the United States again, we also see that State courts take the lead where Supreme Court case law leaves off. This change in the judicial dynamic in the matters of fundamental rights is a dialogic model of constitutionalism.

In Swiss legal literature several scholars have noted a parallel between the development of fundamental rights in US and Swiss law. A difference appears, however, in terms of institutions. In US law, the dynamic takes place between judicial institutions, whereas in Swiss law, it involves two levels of constituent power: the federation and the cantons. In this particular case, this double legal standard raised the issue of the usefulness of cantonal provisions in terms of protection of fundamental rights. At one point, a scholar considered that cantonal bills of rights (in cantonal constitutions) were only « monuments, they only have a historical value ».

3 For a comparison between American and German cases, see O. Beaud, « Droits de l'homme et formes politiques/le cas particulier de la Fédération », RUDH, 2004, pp. 16-26. The French scholar describes the phenomenon of nationalization (« fédéralisation ») of fundamental rights as the process by which « la Fédération se substitue largement aux Etats fédérés comme principal garant des droits de l'individu » (ibid., p. 22).


7 M. Hottelier, « Le nouveau fédéralisme judiciaire aux Etats-Unis », op.cit., note 6, p. 517.

8 J.F. Aubert, Traité de droit constitutionnel suisse, op.cit., note 6, p. 632, n°1755. At that time, Aubert noted that opinions differed on the question of utility of cantonal constitutions. He observed, on one side, the declaration of Prof. H. Huber, on 6 February 1962, in front of the legislative assembly of Neuchâtel canton (Bulletin du Grand Conseil Neuchâtelois, 1962, p. 441); on the other side, the point of view of
Others thought that cantonal constitutions were generally «neglected sources».

Today, cantonal Bills of Rights are considered as a complementary source. In this paper, we propose to focus on the Swiss case and we will demonstrate to which extent cantonal constitutions have nourished federal constitutional law. This added value, from a constitutional perspective, is not only significant with regard to the number of fundamental rights guaranteed, but also in terms of building a catalogue of these rights. In our analysis we will use the classical distinction between formal and material sources of law. To avoid anachronisms, we will use, depending of the historical context, the terms of individual rights and fundamental rights. Furthermore, against the backdrop of this added value of cantonal constitutions to the Swiss constitutional law, we will also emphasise the question of compatibility between these two sources. In this respect, we will then point out the political dynamic between the two levels of power through the analysis of the political discourse of the federal government. In this context we will begin with preliminary remarks about Swiss constitutional law and the constituent power of cantons (1). Then, and following a historical perspective, we will indicate the input of cantonal constitutions in the context of the progressive construction of the Federation (2). Within this new institutional framework, we observe an integration of the federal dynamic under the activity of the Federal Court, which contributed to the development of federal constitutional law (3). However, as the federal fundamental rights dynamic lost momentum, it became time for cantons to provide the impetus for a «new cantonal constitutionalism» (4).

1. Preliminary Remarks

Switzerland is a federal State. It is constituted of cantons, which previously were sovereign states and which, in the Federation, continue to retain the power to adopt a constitution. There are thus one Federal Constitution and 26 cantonal constitutions. Since 1999, the Federal
Swiss cantonal constitutions as sources of law

Constitution contains its own catalogue of fundamental rights. Cantonal constitutions contain fundamental rights provisions as well, but in very different forms. Some do not contain a specific Bill of Rights and instead include a few provisions about civil liberties (we called it a model of limited Bill of Rights); others refer to federal and international laws (it can be named a model of referenced Bill of Rights); and twenty-three cantons have a detailed catalogue of fundamental rights (model of completed Bill of Rights).

Cantons are autonomous in defining their own state structure, state organisation, cantonal legislation, state goals and principles of state action (policies)\textsuperscript{11}. Nevertheless, their autonomy is constrained by substantial and procedural federal provisions. From a substantial point of view, cantons must have to be democratic. This condition is fulfilled when people elect the cantonal parliament through a universal, equal and free voting process (art. 34, Federal Constitution).\textsuperscript{12} Their constitution must be adopted in a democratic manner. Apart from this democratic principle of organisation, there are no obligations for the cantonal constitutions to contain a Bill of Rights. Unlike the German « Grundgesetz » (the Basic Law for the Federal Republic of Germany), Swiss constitutional law does not prescribe specific provisions in establishing their constitution\textsuperscript{13}. From a procedural point of view, their constitutions must be guaranteed by the federal assembly. This federal guarantee implies a substantive aspect and a procedural aspect.

First, it means that cantonal constitutions must respect federal law (art. 51, para. 1, Federal Constitution).\textsuperscript{14} This rule corresponds to the principle of federal law supremacy. The notion of federal law is broadly understood: it includes the Federal Constitution, federal statutory law and ordinance, general principles of law deducted from the federal case law and international law in the respect of its monistic approach. It implies that, on

\begin{itemize}
\item P. EGLI, Introduction to Swiss Constitutional Law, Zurich/St Gall, Dike, 2016, p. 43.
\item Art. 142 of the Basic Law: « Notwithstanding Article 31, provisions of Land constitutions shall also remain in force insofar as they guarantee basic rights in conformity with Articles 1 to 18 of this Basic Law » (« Ungeachtet der Vorschrift des Artikels 31 bleiben Bestimmungen der Landesverfassungen auch insoweit in Kraft, als sie in Übereinstimmung mit den Artikeln 1 bis 18 dieses Grundgesetzes Grundrechte gewährleisten »). J. P. MÜLLER, « Droits fondamentaux », in Manuel de Droit constitutionnel bernois, Saladin, Nuspliger et Gerber (ed.), Bern, Stämpfli, 1995, pp. 31-33.
\item The rule of federal guarantee was adopted in the Constitution of 1848. There are also two others federal guarantees encompassed in the Federal Constitution. One guarantees the protection of the constitutional order of the cantons (art. 52 Federal Constitution) and the other concerns the protection of the existence and territory of the cantons (art. 53 Federal Constitution).
\end{itemize}
the one hand, cantons must have their own written constitution and, on the other hand, they have to respect the federal Bill of Rights, unwritten constitutional rules and international human rights law. Regarding the procedure of the federal guarantee, it requires cantonal constitutions to be approved by the Federal Assembly (the Parliament) (art. 51, para. 2 Cst).

Second, there is the procedural aspect of the federal guarantee to be considered. This procedure is a political review of the compatibility of the cantonal constitutional provisions with federal law. It is driven by the Federal Assembly (art. 172, para. 2, Federal Constitution). It means that, each time cantons modify their constitution – « partial constitutional amendment » or full revision, so-called « révision totale » –, it must be submitted to the Federal Assembly (after the cantonal referendum). The procedure must be conducted by the question of compatibility with the federal law. When the Federal Assembly makes its decree, it has three options. The first is to confirm compatibility. The second is to reject the submission on the grounds that the cantonal constitutional provision is not in conformity with federal law. The cantonal provision is then invalid, whatever the canton decides about it thereafter. The third option is to express a reservation. The decision of the Federal Assembly affects the application of cantonal constitutional law by the federal Court. The Court considers itself bound by the parliamentary review and refuses to again review the conformity with the superior law, except if the federal law was modified since the Federal Assembly’s decision. In practice, the federal government (the Federal Council) assists the Federal Assembly in the review. More precisely, the Federal Department of Justice and Police is responsible for this task. Some scholars therefore consider that the Department of Justice is in fact the institution in charge of the constitutional review. In this function, the federal government prepares a preliminary report in which it recommends or does not recommend the validity of the cantonal constitution in which it validates or invalidates the compatibility of the cantonal constitutions federal

17 J.F. AUBERT, op.cit., note 6, p. 218, n°573.
18 See Federal Court, decision X. versus Kantonsgericht Appenzell I.R., 27 November 1985, ATF 111 la 239, p. 324, n°3; Federal Court, decision Walker versus Regierungsrat des Kantons Appenzell A.R., 26 September 2014, ATF 140 I 394, p. 399, n°7.2; See also case law cited by P. MAISON, op.cit., note 11, p. 110.
19 A. AUPER, La juridiction constitutionnelle en Suisse, op.cit., note 16, p 147, n°259.
law\textsuperscript{20}. From 1851 to 2005, the federal government has also translated cantonal constitutions into the other official languages, helping in the dissemination of cantonal constitutional ideas\textsuperscript{21}. These reports present cantonal provisions, the procedure of the cantonal revision, but comments as well. Preliminary reports are considered with great attention by the Federal Assembly. In each chamber of the Parliament, they constitute the basis for the analysis and discussion of cantonal constitutions or amendments\textsuperscript{22}.

Following these three remarks concerning the general state structure of Switzerland and the constituent power of its cantons, we may show how much those sub-national entities have helped to build the protection of fundamental rights under Swiss law.

2. Cantonal Constitutions as Formal Sources of Law for Individual Rights

The beginning of the modern Swiss constitutional history dates back to 1798\textsuperscript{23}. After the French invasion, a national constitution was adopted on 12 April 1798 and based on the French Constitution of 1795\textsuperscript{24}. Inspired by the Declaration of the Rights of Man and of the Citizen of 1789, the Swiss Constitution sets out individual rights (personal freedom, freedom of assembly, etc.). This new state was a unitary republic (the Helvetic Republic, 1798-1803), made up of cantons. Many of them had previously been states as well, but were then reduced to administrative districts\textsuperscript{25}. In 1802, the Helvetic Republic was replaced by a Confederation that comprised 22 cantons. Several other constitutions followed, in 1802 and 1803 (the

\textsuperscript{20} Ordinance on the Organization of the Federal Department of Justice and police of 17 November 1999 (Ordonnance sur l’organisation du Département fédéral de justice et police du 17 novembre 1999, RS 172.213.1), Art. 7 al. 5.
\textsuperscript{21} Art. 2 federal ordinance of 1851.
\textsuperscript{22} A reporter presents conclusions to the assembly, there is a vote article by article and on all the text. All debates are published in the Bulletin official. It concludes with the adoption of a simple federal decree (art. 163, para. 2, Federal Constitution). See P. MAHON, op. cit., p. 111, n°86.
\textsuperscript{23} J.F. AUBERT, op. cit., note 6, p. 4, n°6.
\textsuperscript{25} A. AUER speaks of a blackout of the Helvetic on cantons, in A. AUER, Staatsrecht der schweizerischen Kantone, Bern, Stämpfli verlag, 2016, p. 203, n°515.
Mediation Act). These texts focused on the question of the organisation of government. Several of them still expressed the principle of equality, religious freedom (limited to Protestants and Catholics) and freedoms of movement and industry. In parallel, cantons were again sovereign states as of 1801 and had to adopt – forced by Napoleon Bonaparte – their own constitution as form of government. In this sense, it was their first constitutional experience. In some cantons, individual rights appeared in their constitution as well. Some of them had additional guarantees such as those against arbitrary detention or evoked the obligation of supervision of the schools and social assistance for needy people. Both levels of constitutions thus refer, to some extent, to civil and politic freedoms. Some cantonal constitutions have a few additional provisions concerning social rights. At that point in time, one cannot consider that one constituent power takes the lead on the other to protect people.

Indeed, the idea of constitutionalism flourishes during the period called the Regeneration (1830-1848), following the Restoration period (1815-1830). Political ideas of the Paris revolution of July 1830 spread to some Swiss cantons. The economic and social development in cantons and the influence of political philosophers, such as Benjamin Constant from the canton of Vaud and Ludwig Snell in Zurich, strengthened this new wind in favour of freedom. The theory of liberalism entered the mainstream. Eleven cantons were concerned: Zurich, Bern, Lucerne, Fribourg, Solothurn, Basel, Schaffhausen, St. Gallen, Aargau, Thurgau and Vaud. All adopted new constitutions, some of which were based on constituent assemblies. Many of them devoted a section to individual rights. For example, the Constitution of the canton of Vaud of 25 May 1831 opened with a chapter entitled

28 Ibid., pp. 235 and 240.
29 Ibid., pp. 243-244.
30 For a comparison of individual rights guaranteed in each cantonal constitution, see ibid., pp. 241-243.
31 Ibid., p. 246.
34 Ibid., pp. 333-336.
« General Provisions and Guarantees »\textsuperscript{35}. Some freedoms were enshrined in all « regenerated » constitutions (property right, right of establishment, right to petition or freedom of the press)\textsuperscript{36}. Some others were placed only in a few constitutions. For example, Bern and Basel-land included the freedom of education\textsuperscript{37}. Bern guaranteed the presumption of innocence\textsuperscript{38}. Basel-land has a provision on the freedom of association\textsuperscript{39}. Some constitutions extended the freedom of press to the freedom of expression (Lucerne, Basel-land, Thurgau and Aargau)\textsuperscript{40}. Regarding the freedom of trade, regenerated cantons did not guarantee the same level of freedom, depending on their commercial tradition\textsuperscript{41}.

When the first Federal Constitution was adopted on September 12, 1848, the Federal Constitution did not express a specific commitment for individual rights\textsuperscript{42}. No chapter on individual rights was included in the constitution. Only a few rights were enshrined in the federal charter\textsuperscript{43}. As emphasised by Alfred Kölz, the individual rights had not been discussed in depth because « after the constitutional struggles of the thirties, the ideas of individual freedoms were entrenched ». Furthermore, in agreeing to constitute a federal State, cantons received a guarantee of protection of their territory and of their constitution. In this context, the Federal Constitution maintained their sovereignty as long as cantonal competences had not been

\textsuperscript{35} It lays down the equality of cantonal citizens before the law (art. 2), personal freedom (art. 4), the inviolability of the home (art. 5), the right to property (art. 6), the right to petition (art. 8).

\textsuperscript{36} A. Kölz, Histoire constitutionnelle de la Suisse moderne (…), op. cit., note 24, pp. 358-373.

\textsuperscript{37} Ibid., p. 374.

\textsuperscript{38} Ibid., p. 357.

\textsuperscript{39} Ibid., p. 367.

\textsuperscript{40} Ibid., p. 373.

\textsuperscript{41} Ibid., pp. 362-364.

\textsuperscript{42} The text has been prepared on the basis of two drafts of constitution (1832-1833), which were written at the supra-cantonal level, by an institution called the « Diète fédérale ». The aim was to establish a Federation in place of a Confederation of States. The draft of Pellegrino Rossi provided that individual freedoms would be guaranteed by the cantons. It also mentions the right of petition and freedom of establishment for citizens in all cantons. See Rapport de la Diète aux vingt-deux cantons suisses sur le projet d’acte fédéral par elle délibéré à Lucerne, Genève, 15 December 1832.

\textsuperscript{43} Equality before the law (Article 4), the right of establishment (Article 41), freedom of the press (art. 45), freedom of association (art. 46) the right of petition (art. 47), freedom of Christian worship (art. 44), the right to « natural justice » and the prohibition of extraordinary courts (art. 53). A revision of art. 41 and 48 was adopted in 1866.
allocated to the Confederation. Moreover, cantonal constitutions remained in force unless their provisions were in contradiction with the federal charter. Inside this new state organisation, cantons continued to adopt constitutions and constitutional amendments. Nevertheless, in this new political setup, the federal authority had (and still has) two mechanisms for controlling cantons.

The first one is the federal guarantee. In this case, the Federal Assembly checks that the new cantonal constitution abides by federal provisions, especially the equality principle in elections, the freedom of establishment and religious aspect. The second one is the citizens’ right to appeal not to the federal court but to the federal government and the Federal Assembly based on art. 5 of the Federal Constitution. This appeal is only

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44 Art. 3 Federal Constitution of 1848.
46 For example, we mention constitutions of Uri (1851), Thurgau, Grisons (1853), Valais (1852), Lucerne (1863), Aargau (1864).
47 Art. 5 (« La Confédération garantit aux Cantons leur territoire, leur souveraineté dans les limites fixées par l'article 3, leurs constitutions, la liberté et les droits du peuple, les droits constitutionnels des citoyens, ainsi que les droits et les attributions que le Peuple a conférés aux autorités ») and art. 6 (« A cet effet, les Cantons sont tenus de demander à la Confédération la garantie de leurs constitutions. Cette garantie est accordée, pourvu : a. Que ces constitutions ne renferment rien de contraire aux dispositions de la Constitution fédérale; b.- Qu'elles assurent l'exercice des droits politiques d'après des formes républicaines, — représentatives ou démocratiques ; c. Qu’elles aient été acceptées par le peuple et qu’elles puissent être révisées, lorsque la majorité absolue des citoyens le demande »).
49 For example, appeals against violation of the freedom of the press (art. 45 Federal Constitution and 5 Zurich Constitution) or against the right to participate to elections and the condition of establishment (art. 41§4, 42 and 50 Federal Constitution and art. 17 Vaud constitution): in « Rapport présenté à la haute Assemblée fédérale par le Conseil fédéral suisse sur sa gestion pendant l’année 1861 », FF 1862 II p. 277)
admissible if the citizen is allowed to appeal to the cantonal authority\(^{50}\).

Through these two mechanisms, the federal authority progressively shaped a uniform conception of several individual rights between federal and cantonal levels. For example, in the case of the right to participate in elections and the principle of equality, the federal government said that it first refused to guarantee some provisions of the new constitution of Lucerne due to the financial conditions to be eligible\(^{51}\). On that occasion, it looked at the other constitutions and requested the cantons of Ticino and Aargau to suspend the application of their cantonal provisions. Later, when a citizen of Aargau was refused membership of a communal assembly because he did not prove his financial capacity, the federal government voided the cantonal decision\(^{52}\). In order to reach its decision, the federal government looked at cantonal constitutions to define a common interpretation of the « republican ideas » enshrined in article 6, c) of the Federal Constitution\(^{53}\). It did not mean, however, that the Federal government did not look at the cantonal constitution from a federal perspective:

« les autorités fédérales ont toujours attaché une grande importance à l’interprétation que les autorités cantonales supérieures ont donnée d’une disposition constitutionnelle, sans abandonner le droit de se prononcer sur cette interprétation dans les cas litigieux, droit dont elles n’ont d’ailleurs fait usage que lorsque l’interprétation contestée portait évidemment atteinte à la Constitution (fédérale) »\(^{54}\).

In other words, the federal authority intervened on a subsidiary basis. Nevertheless, it can be noted that the case law of the federal government shows that, at this time, the federal authority was focused on the question of political rights. When citizens appealed directly to it on a violation of the

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\(^{50}\) « Rapport à la haute Assemblée fédérale par le Conseil fédéral sur sa gestion pendant l’année 1868 », FF 1869 I, p. 1007.

\(^{51}\) Another example can be found in the question of equal treatment in the sentence of expulsion of Swiss citizens, which was enshrined in the constitutions of Aargau, Bern and Lucerne (« Rapport présenté à la haute Assemblée fédérale par le Conseil fédéral suisse sur sa gestion pendant l’année 1864 », FF 1865 II, p. 161).


\(^{54}\) « Rapport à la haute assemblée fédérale par le Conseil fédéral suisse sur sa gestion pendant l’année 1872 », FF 1873 II, p. 43.
freedom of the press or the principle of equality of treatment by their own canton, the federal government generally did not conclude to a violation

The full revision of the Constitution on 29 May 1874 brought an important change. To start, it must be said that its first goal was to strengthen the Federation project. Only four freedoms were added to the previous version. They did not yet form a catalogue of individual rights and were spread out across all the sections of the Federal Constitution. Once again, cantonal constitutions still remained in force as long as their provisions are not in contradiction with the federal charter. Individual rights remained thus partly enshrined in the Federal Constitution and guaranteed among cantonal constitutions. The change followed the entry into force of art. 113 the Constitution of 1874. Individuals could appeal to the federal court against a State act that violated their constitutional rights. This notion included individual rights guaranteed by both the Federal Constitution and the cantonal constitutions. In this new framework, the federal court had authority to settle disputes arising out of violations of federal and cantonal constitutions. Litigations were only decided on the basis of constitutional provisions applicable to individuals. For example, in a case of a public demonstration, a citizen of Zurich could not rely on art. 3 of the Zurich constitution, which guarantees the right of assembly. If this person were established in another canton, he/she could only rely on art. 56 of the Federal Constitution, which guarantees the right of association alone. In others words, a Swiss citizen would not have the same constitutional protection according to applicable cantonal constitution and federal provisions.

From a historical point of view, we can thus say that cantonal constitutions have been the formal source of individual rights protection. Cantons existed before the Swiss Confederation. Their constitutions established and establish the political structure and the political and civil

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55 Concerning the freedom of the press (art. 45 Federal Constitution and 5 Zurich constitution), see « Rapport présenté à la haute Assemblée fédérale par le Conseil fédéral suisse sur sa gestion pendant 1861 », FF 1862 II, pp. 255-258.
57 It concerns Freedom of conscience (art. 49), Freedom of trade and industry (art. 31), Freedom of religion and the Right to marry. Political rights are developed as well.
freedom of people. When a Federal Constitution is adopted, some cantonal constitutions still have a broader spectrum of individual rights provisions than that of the Federal Constitution. Furthermore, cantons retain their original function of being the first level of participation of citizens in sovereign power. This being said, analysis of political documents shows that once this double level of state organisation is established, an integration dynamic is discernible. Cantons still exercise constituent power and do develop their constitution. On the other hand, the federal government compares cantonal constitutions and standardises constitutional law, at least in the field of political rights, which appears to be the main topic in societies still marked by political inequality. At this point, cantonal constitutions are thus a source of guarantee for people and a source of interpretation for the federal government. The latter uses them to reinforce and disseminate its own conception of the relationship between state and citizens. In this context, the Constitution of 1874 brings a change: the judicial review in matters of public law has been transferred from the federal government to the Federal Court. The government keeps its function in the procedure of federal guarantee of cantonal constitutions but loses its competence in legal appeals of citizens against cantonal acts. This change has increased the guarantee of judicial proceedings for people who have the assurance of having their case examined by a non-political authority. The Federal Court decides based on constitutional provisions in force. In other words, at this time, the Court does not develop a holistic approach in the application of individual rights provisions.

3. Cantonal Constitutions as Material Sources of Federal Constitutional Law

The idea to adopt a human rights catalogue at the federal level was developed during the 20th century59. This change had been suggested by legal scholars and followed by the Federal Court. This new development in the context of the protection of individuals’ rights had been considered to have a negative impact on cantonal provisions. Therefore, we will first present the context of this development and then evaluate its impact.

Indeed, it is generally admitted that Zaccaria Giacometti, professor of public law at the University of Zurich, is the one who initiated the idea and proposed a legal theory about individual rights. Based on a philosophical analysis of the concept of law and on cantonal constitutions, he considered that Swiss constitutional law had unwritten individual rights guarantees.

59 See M. HERTIG RANDALL contribution in this dossier.
which were in the constitutional order\textsuperscript{60}. He opened a new field for legal academics, which took into account cantonal constitutions\textsuperscript{61}. Nevertheless, it must be added that the proposal of a codification of those informal individual rights in the Federal Constitution was not supported by all academics\textsuperscript{62}. The Federal Court took a step further: without any prior notice, it started, in 1960, to «reveal» unwritten constitutional liberties of the constitutional Swiss order\textsuperscript{63}. For example, in 1963, concerning the personal freedom, the Court said:

While most cantonal constitutions fully guarantee this freedom and lay down specific provisions of a mainly procedural nature, the cantonal constitution of Basel-Stadt does not list personal freedom as such, but provides in § 3 only that arrests and house searches may be carried out only in the cases specified by law and in accordance with the forms thus prescribed. This does not mean however that this personal freedom is guaranteed in the canton of Basel-Stadt only to this limited extent. Personal freedom in the sense of physical freedom, (…), is a prerequisite for the exercise of all other freedoms and thus forms an indispensable part of the constitutional order of the Federation.

\textsuperscript{60} Z. GIACOMETTI, Staatsrecht der Schweizerischen Kantone, Zürich, Polygraphischer Verlag, 1941, \textit{ibid.}, «Die Freiheitsrechtskataloge als Kodifikation der Freiheit», \textit{Revue de Droit suisse} (RDS/ZSR), 1955, I, pp. 149 et seq.


\textsuperscript{62} About the debate in Swiss legal literature about the individual rights codification, see A. KLEY, Geschichte des öffentlichen Rechts der Schweiz, 2. Auflage, Zürich, Dike, 2015, pp. 214-215.

therefore belongs, like the right to property, to the unwritten constitutional law of the Federation.\footnote{64 «Während die meisten Kantonsverfassungen diese Freiheit umfassend gewährleisten und anschliessend besondere Vorschriften vorwiegend prozessualer Art aufstellen, nennt die Kantonsverfassung von Basel-Stadt die persönliche Freiheit als solche nicht, sondern bestimmt in § 3 lediglich, dass Verhaftungen und Hausdurchsuchungen nur in den durch das Gesetz zugelassenen Fällen und in den durch dasselbe vorgeschriebenen Formen erfolgen dürfen. Das bedeutet jedoch nicht, dass die persönliche Freiheit im Kanton Basel-Stadt nur in diesem beschränkten Umfange gewährleistet ist. Die persönliche Freiheit im Sinne der physischen Freiheit, (…), ist die Voraussetzung für die Ausübung aller andern Freiheitsrechte und bildet damit einen unentbehrlichen Bestandteil der rechtsstaatlichen Ordnung des Bundes. Nach der heute herrschenden Auffassung gehört die Garantie der persönlichen Freiheit daher wie die Eigentumsgarantie dem ungeschriebenen Verfassungsrecht des Bundes an. » (Federal Court, decision \textit{Kind X. v. X. und Zivilgericht des Kantons Basel-Stadt}, 20 March 1963 (ATF 89 I 92, pp.96-97)).}

In other words, the argument of the Federal Court to justify such a creative case law was that this freedom is generally guaranteed among cantonal constitutions and that such a principle is an essential element of the constitutional order of the Federation. Through its case law, the Federal Court has thus created formal federal individual rights\footnote{65 J.F. Aubert, \textit{op. cit.}, note 6, pp. 631-632, n°s 1755-1756.}. According to legal scholarship, the case law about unwritten individual rights has enshrined the « implicit catalogue » of fundamental rights, which was missing in the federal charter. It changed the concept of constitution, which was therefore defined through a larger notion: the material constitution. Furthermore, those enshrinements had an impact on cantonal provisions. As the federal constitutional law is progressively provided with an exhaustive catalogue of individual rights, cantonal provisions that cover the same rights were considered as a political « declaration »\footnote{66 J.F. Aubert, \textit{op. cit.}, note 6, p. 632, n°1755.}. Indeed, the development of informal federal individual rights has the effect of cancelling the procedural usefulness of formal cantonal provisions. Due to the principle of supremacy of federal law and its broad interpretation of the concept of law, federal unwritten rights confer a common protection to individuals, notwithstanding the applicable cantonal constitution and eventual individual rights derived from it. From a procedural point of view, it provides the Federal Court with a legal basis from which to appreciate any infringement of a constitutional right, and thus the opportunity to build a common case law on individual rights in Swiss law. Nevertheless, these academic and judicial constructions remain drawn from cantonal constitutions. In this sense, we

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can say that these constitutions have gained the status of material source of federal constitutional law. This does mean that the cantonal constitutions are not considered as formal sources of law: A federal case law does not cancel the binding effect of a constitutional provision, which therefore remains valid. The issue becomes therefore to redefine the cantonal constitutions’ legal utility. As we will see, cantons will not give up their constituent power as it pertains to their Bill of Rights.

4. New Cantonal Constitutions as Formal and Material Sources of Swiss Constitutional Law

Despite the implicit catalogue of fundamental rights in constitutional law, the federal power has enshrined its own in its federal charter. It was during the full constitutional revision of 1999 that a federal Bill of Rights was enshrined. Also, since the 1960s, many cantons have adopted their own new formal Bill of Rights. In other words, neither the informal nor the formal federal Bill of Rights stopped cantons from exercising their constituent power in the area of fundamental rights. More than ever, two levels of rules have to be articulated inside Swiss Law. To illustrate it, we will now focus on preliminary reports of the federal government, which are adopted in the framework of the federal guarantee procedure. We will also briefly outline the constituent procedure to determine whether citizen participation has had a positive impact on the level of protection of individual rights. For that, we must distinguish between the constitutional order before (A) and after (B) the federal codification.

67 H. MARTI, Professor of Public law at University of Bern, considered that individual rights provisions do not have the same object in each case. The scope of the constitutional guarantees thus differs from canton to canton (Die Handels- und Gewerbefreiheit nach den neuen Wirtschaftsartikeln, Bern m 1950, cited by J. F. AUBERT, op. cit., note 6, p. 632). Indeed, his analysis was also expressed in the preliminary report of the federal council regarding the reform of Judicature Act. The analysis was based on the idea that constitutional guarantees are only a principle. These principles are of either political nature or judicial nature. In the case of trade freedom, its scope can be limited by other federal constitutional provisions which have to be executed by cantons (in « Message du Conseil fédéral à l’Assemblée fédérale concernant le projet d’une nouvelle loi sur l’organisation judiciaire fédérale », FF 1892 II, p.195).

68 We thank Janneke Gerards for drawing our attention to this question at the international workshop on Maximisation of added value of Human Rights texts/mechanisms: Do we need a national Bill of Rights? Université Saint-Louis, May 25 2016.
A. Before the Federal Codification of the Bill of Rights

At the outset, it must be said that the question of including fundamental rights in the Federal Constitution had been discussed for a long time before their adoption in 1999. Sometimes new single provisions on fundamental rights were accepted; sometimes they were rejected. For example, the enshrinement of fundamental rights such as the right to housing or the right to education was refused by cantons and citizens. The freedom of language, which had the status of unwritten freedom since 1965, was, too, refused by the Federal Assembly. The failure of those constitutional amendments occurred at the end of the constitutional revision procedure, when people and cantons had to express their consent on the political proposal of the Federal assembly. These failures highlight the difficulty in consolidating fundamental rights at the federal level due to a lack of consensus on certain topics. Moreover, the case law of the Federal court was considered less liberal. In this political and judicial context, eleven cantons adopted new constitutions. Such a development can be considered as a « new cantonal constitutionalism ». Indeed, each of these cantonal constitutions has its own chapter on fundamental rights. This development unfolded in three waves: first, in the cantons of Nidwalden, Obwalden and Jura (1); then in Aargau, Uri, Basel-Landschaft (Basel-Country), Solothurn and Thurgau (2), with full revisions of their respective constitutions; and finally in Bern, Appenzell Ausserrhoden and Ticino (3). As we shall see, all of these new constitutions express the broadening as well

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69 For an historical background, see « Message du Conseil fédéral relatif à la nouvelle constitution fédérale du 20 novembre 1996 », pp. 36-37.
70 Indeed, some rights were enshrined in the Constitution of 1874. It was the Right to property (1969), the Freedom of establishment (1975) and the principle equality between man and woman (1981).
73 J.P. MÜLLER, « Introduction aux droits fondamentaux », in Commentaire de la Constitution fédérale de la Constitution suisse, J.F. Aubert et al. (eds), n°11.
as the dissemination of the idea of protection of fundamental rights under Swiss law, which could then be translated at the federal level (4).

1. The Awakening of Cantonal Constitutions

The first shift in favour of constitutionalism was observed in 1965 in the canton of Nidwalden. At first glance, the revision procedure was underpinned by the project to achieve a collection of cantonal laws. The project was prepared between 1964 to 1965 by the legislative assembly (« Grand Conseil »). The authority intended to undertake « no fundamental innovation »75. Nevertheless, it also stated that the constitution in force did not accommodate « current needs »76. In 1968, it is the canton of Obwalden’s turn to adopt a new constitution. This time, the text is written by a constituent assembly elected by the population (« conseil constitutionnel »). It aims « to bring the people of its constitution to adapt the democratic institutions to contemporary circumstances and create conditions for the development of political and religious harmony and of economic and social progress »77 and, for the first time, individual rights are brought together in a chapter on the rights and duties of citizens. In its preliminary report before the federal guarantee, the Federal government notes that « the place of the citizen within and before the powers that be has been strengthened »78. Inside this brief list of articles, the cantonal constitutions enumerate all the guarantees of the Federal Constitution, the unwritten constitutional rights that have been uncovered by the Federal Court, and some procedural guarantees. In 1977, the new canton of Jura adopted its first constitution. Here, too, the text was prepared by a constituent assembly, which in this case was an original constituent power. It has a constitutional preamble referring to the Universal Declaration of Human Rights and to the European Convention on Human Rights79. The text contains a chapter entitled « Fundamental rights ». From the outset, it

75 It must be added that the constituent power of both Basel included a catalogue of human rights in its constitutional project in 1963. It was finally not adopted. See J. Fr. AUBERT, op. cit., note 6, p. 632, note 2.


78 Ibid., p. 50.

outlines the principle of equality (art. 6) and the principle of human dignity (art. 7). Article 8 is dedicated to the principle of freedom, which is divided into thirteen specific freedoms. Legal protection, the prohibition of censorship and the safeguard of property are enshrined as well. Compared to the first two revisions, the Jura constitution recognises a horizontal direct effect to fundamental rights (Art. 14). Restrictions of fundamental rights must be also provided by law and only in favour of public interest (art. 13). The Jura Bill of Rights not only lists individual rights enshrined in the Constitution, but also includes the application rules to guarantee individuals rights.

These three cantonal constitutions clearly express a progression in the conception of human rights protection. The preliminary reports of the federal government indicate that the federal power takes on the role of witness. For example, in the case of the review of the constitution of Obwalden, the federal government focuses its attention, as it always had in the past, on the question of compatibility between its provision with regard to the right to education and the canton’s provision. Despite the strong commitment in favour of fundamental rights in the Jura constitution, the preliminary report dedicates little time to this point.

2. The Cantonal Constitutional Maturity

After the Jura, a group of six cantons made a full revision: Aargau, Basel-Landschaft (Basel-Country), Uri, Solothurn, Thurgau and Glarus. People voted each time: first, in favour of making a total revision of their constitution and, second, on the final text. However, each cantonal constituent power did not exactly follow the same procedure. Between these two votes, they generally involved their population by the election of a constituent assembly or by a public consultation on the project. Some variations in constitutional procedures can be noted: in Aargau, the constituent assembly was elected and wrote the text (« Message concernant la garantie de la constitution du canton d’Argovie du 15 février 1981 », FF 1981 II, p. 251); in Solothurn, it was a constituent assembly as well. It organised a consultation of the population and federal authority before the final vote (« Message concernant la garantie de la constitution du canton de Soleure du 16 mars 1987 », FF 1987 II, p. 628). In Basel-Landschaft (Basel-Country), the cantonal government had prepared an initial project addressed to the constituent assembly (« Message concernant la constitution du canton de Bâle-campagne du 21 août 1985 », FF 1985 II, p. 1175). In Glaris, the procedure started in 1970. The government wrote a first project in 1977 on which the population gave its opinion between 1982 and 1983. The legislative assembly discussed and adopted the text, which was then voted by the population (« Message concernant la constitution du canton de Glaris du 23 août 1989 », FF 1989 III, p. 708). In Thurgau, the question of a full revision was first discussed in the
these draft constitutions, a chapter was devoted to fundamental rights at the beginning of the text, following a chapter on general provisions. Regarding the substance of these revisions, the cantonal catalogues codify the unwritten federal guarantees. In some cases, as in the canton of Aargau, they broaden human rights guarantees.

This time, the federal government took position on this evolution. First, it indicated that the developments made in the constitutions of Aargau, Basel-Country or Solothurn had already been formulated in the framework of the 1977 draft. In other words, they only translated a general conception about individual rights. Second, it noted that some cantonal provisions had been drafted in vague terms. With regard to these instances, it said that legislation and cantonal law should refer to the Federal Court’s case law. If the cantonal provisions were connected to the federal substantive law, they had to be interpreted in the context of this law. Moreover, the federal government recalled the constitutional principle that a canton cannot regulate an area that falls within the exclusive competence of the confederation. A canton can however legislate in areas that fall under a concurrent competence, which is not limited to the principles, and provided that the confederation has not fully used its competence. In this hypothesis,

**legislative assembly. The government charged a commission. Based on its analysis, the government wrote a project and organized a public consultation. The project was discussed and adopted in the legislative assembly and, finally, voted by the population («Message concernant la constitution du canton de Thurgovie», FF 1989 III, p. 835). In this sense, only the procedure in the canton of Uri does not seem to have implicated the population outside the first and last votes.**

81 It includes the application of human rights in the case of a special relationship with the State (Aargau constitution, Art. 8) and the right to obtain information for the community (Aargau constitution, art. 13, para. 2); («Message concernant la garantie de la constitution révisée du canton de Thurgovie du 23 août 1989», FF 1989 III 840).


the cantonal constitutional norms must be considered in light of the federal law and they may have a more limited scope than suggested by their wording.

3. The Cantonal Constitutional Audacity

In the 1990s, the new constitutions of Bern and Appenzell Ausserrhoden (« Appenzell AR ») went a step further. Strong similarities between the constitution of Appenzell Ausserrhoden and that of Bern underline the large political influence of the latter. In terms of procedure, Bern and Appenzell AR differ with regard to public consultation. Both populations refused to institute a constituent assembly and entrusted the legislative assembly with the drafting process. In Bern, the population was consulted on a first draft. After that, the legislative assembly delegated its power to a constitutional commission. The population was again consulted on this new version. In Appenzell AR, the population only voted at the end of the procedure. Finally, both texts were adopted by the legislative assembly and voted by the population. From a substantial point of view, the Bern constitution this time referred to ECHR law. The list of provisions goes further than Federal constitutional law and echoes the theory of fundamental rights. Indeed, they guarantee rights, which were not in the formal and material federal constitution, such as the right of access to official documents. They broaden the right to demonstrate in public. They extend the right to petition by providing the right to receive a response from the authority within a period of one year or as soon as possible. Several provisions guarantee the essence (« noyau dur ») of fundamental

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88 A. CHABLAIS, « Constitutions cantonales : le point sur les révisions totales », LeGes, 1999, 1, pp. 67-82. The constitution of Ticino was totally modified in 1997. In terms of fundamental rights, it does not express the same audacity than in the Bern constitution.
91 It must be underlined that, since the eighties, the Swiss legal literature published important contributions. See for example J.P. MÜLLER, Elemente einer schweizerischen Grundrechtstheorie, Bern, Stämpfli, 1982.
92 Art. 12 Appenzell AR constitution.
93 Art. 19, para. 2 Bern constitution; article 17, para. 2 Appenzell AR constitution.
94 Art. 20, para. 3 Bern constitution, art. 16, para. 2 Appenzell AR constitution.
Three points serve to illustrate the audacity of cantonal constitutions. The first concerns social rights. In the context in which the Swiss cantons and the population, followed by the federal government and Court, have not voted on the « constitutionalisation » of those rights, the Bern constitution distinguishes social rights from social goals. The second point is about the principles of prohibition of arbitrariness and protection of good faith. This last point covers the guarantee to freely choose other forms of cohabitation than marriage or than family in the traditional sense, whilst federal law only recognises the right to marry.

This time, the federal government still considered that this type of cantonal provisions may have an autonomous scope on the condition that they go beyond the case law defined by the Federal Court. Regarding the choice of other forms of life in common, the federal government directly made it clear that the scope of this provision has to be interpreted in the context of the division of competences. It considered that such an article cannot produce effects on the marriage, but on the exercise of personal rights or in procedural law. Thus, the provision cannot deploy any effect on the relations of civil law and unmarried couples; the effects of marriage cannot be extended to cohabitation. Concerning the principle of prohibition of arbitrariness and protection of good faith, this time it was the Federal Court which limited the scope of the cantonal proposal (September 15, 1995). It considered that it is for the federal power to determine the conditions for filing a public law appeal, and that a canton cannot relax these conditions by creating a fundamental right of protection against arbitrariness.

The innovations made by the constitution of Bern confirm cantonal dynamics in terms of fundamental rights and the power of creativity of the

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95 The federal court has already ruled on the question of the essence of fundamental rights (ATF 99 la 268 et s.).
96 P. MAHON, « Droit sociaux et réforme de la Constitution », in De la Constitution. Études en l’honneur de Jean-François Aubert, op.cit., p. 387.
97 Social goals set a general task for the canton and municipalities. They do not have the same « justiciability » as social rights. Only social rights can be invoked before the courts. About this question in Swiss Law, see L. MADER, « Grundrechte und Sozialziele – ein Brennpunkt der Verfassungsreform », Leges, 1996, pp. 11-28.
98 Until then, courts had held that the two principles were contained in Article 4 of the Federal Constitution in force. On this point, the Bern constituent power goes clearly further than the federal constitutional law, which provides that this principle cannot be evoked when cantonal law does not contain a provision that aims to protect the appellant.
cantonal constituent power in this field. They underline the growing commitment of the cantons to fundamental rights. However, such positive and autonomous dynamics were confronted with the federal power and its substantial conception of fundamental rights. On this point, cantonal innovations were only admitted in so far as that they were connected to the cantonal competences in terms of separation of powers.

4. Cantonal Bills of Rights as Material Source of Federal Constitution

As we have seen, the cantonal dynamic in terms of fundamental rights has progressively increased from 1965 to the 1990s. One can already underline that, due to the diversity of constitutional procedures, the reason of this commitment cannot be clearly linked to a process of popular consultation. Nevertheless, it remains that the first most audacious texts have been adopted when a public consultation was organised\(^\text{100}\). In other words, cantonal commitment had a horizontal impact on others cantons. This dynamic has also spread at the federal level, with the adoption of the Federal Constitution in 1999. In this context, the federal government also expressed its conception of these constitutions’ nature.

Indeed, in its preliminary report, the Federal Council considers that in cases of cantonal revision, their focus is primarily to define the task of the state. Cantonal revisions are considered as ways to « make clear to citizens the tasks assigned to the cantons »\(^\text{101}\). In such circumstances, the role of cantonal constitutions in the field of fundamental rights is minimised. It points out that:

This first list sets out fundamental rights guaranteed by federal law and includes safeguards in case of deprivation of liberty as well as guarantees in judicial matters that have been decisively influenced by the jurisprudence of the ECHR. Accordingly, the new cantonal constitutions contain their own codification of applicable fundamental rights. The cantons go further hat the federal law on the protection of fundamental rights in a few isolated areas (e.g. Article 13, paragraph 2; 17 paragraph 3, 19 and 20, 3rd al cst / be.). Therefore, the list of fundamental rights is largely of an informative character and does not deploy autonomous and current legal effects for certain one-time overruns\(^\text{102}\).

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\(^\text{100}\) See supra, Bern and Appenzell AR constitutional procedures.


\(^\text{102}\) Ibid., p. 62.
In this message to the Federal Assembly, the federal government, however, recognised that the cantonal constitutions had offered the advantage of having more legal certainty because of their formal shape. It indicated that they were the first material source of human rights. It recalled that, at the time of the constitutions of the eighties, the federal government did not fail to outline that the cantonal creativity is ultimately an illusion because it is derived from a report on the revision of the Federal Constitution. Nevertheless, it admitted the positive – but narrow – role of cantons in the protection of fundamental rights. Moreover, at this point, with the codification of human rights in the Federal Constitution, the government clearly expressed the view that cantonal fundamental rights are henceforth useless because, this time, the federal text contains a comprehensive and systematic catalogue of fundamental rights in the Federal Constitution.

B. After the Federal Codification of the Bill of Rights

After 1999 and the announcement that the Federal Constitution finally had its Bill of Rights, eleven cantons adopted a new constitution. Two of them have made the choice to simply refer to the federal chapter (Graubünden and Lucern). The other nine adopted their own Bill of Rights, continuing to expand the guarantee of fundamental rights. This cantonal constitutional activity does not reveal strong changes: In terms of procedure, there is no uniformity and they still codify, enlarge or innovate in terms of model for the full revision of Geneva constitution, see M. HOTTELIER and T. TANQUEREL, « La constitution genevoise du 14 octobre 2012 », SJ, 2014, pp. 345-347.
the substance of fundamental rights. Moreover, the position of the federal authorities with regard to cantonal autonomy on fundamental rights presents little evidence of an evolution.

Indeed, despite federal codification of fundamental rights, the cantons still have the opportunity to consolidate some fundamental rights developed by the Federal Court. This is the case with the prohibition to retroactively apply stricter criminal legislation on individuals\textsuperscript{106}. From the perspective of broadening individual guarantees, many cantons incorporate fundamental rights that have been enshrined in other cantonal constitutions but have not been included in the Federal Constitution\textsuperscript{107}. This is the case for the right of access to official documents without having to demonstrate a legitimate interest, in the absence however of an overriding public or private interest in keeping such documents confidential\textsuperscript{108}, and of the obligation for the authority to respond within a short period, as part of the exercise of the right to petition\textsuperscript{109}. In the field of social rights, cantons are innovative. They go further than the first generation of cantonal revisions and the Federal Constitution. The canton of St. Gallen offers protection that allows children to receive assistance as soon as the school attendance causes disadvantages due to the location of their homes, to disability or for some social reasons\textsuperscript{110}. St. Gallen’s constitution also guarantees the right of persons, having completed their compulsory education, to receive assistance for their education or their development in accordance with their own financial resources and those of their parents. The constitution of the canton of Vaud grants rights in education and training that exceed the federal guarantee for an adequate education\textsuperscript{111}. It guarantees also the right to appropriate emergency housing\textsuperscript{112} and the right of every woman to material security before and after childbirth\textsuperscript{113}. This very brief overview of the new cantonal constitutions brings to the fore three themes with regard to cantonal autonomy on fundamental rights. The first theme is the relationship between individuals and the various authorities of the canton. The second theme clearly concerns social rights. This is where innovations are the most

\begin{itemize}
\item Art. 9, para. 2, Neuchâtel Constitution.
\item http://www.vd.ch/fileadmin/user_upload/themes/etat_droit/lois/constitution/fichiers_pdf/Commentaire.pdf.
\item Art. 18 Neuchâtel Constitution; art. 19 para. 2 Vaud Constitution; art 19 para.2, Fribourg Constitution.
\item Art. 20, para. 2, Neuchâtel Constitution; art. 2, w) St.Gallen Constitution; art. 19, para. 2, Schaffhouse Constitution; art 25, para. 2, Fribourg Constitution.
\item Art. 3 St. Gallen Constitution.
\item Art 36 Vaud Constitution.
\item Art. 33 Vaud Constitution.
\item Equals. art. 35 Fribourg Constitution.
\end{itemize}
numerous. This activity is not a complete surprise. Where the separation of powers is concerned, social politics are a competence shared between cantons and the confederation. In this case, social rights are mainly implemented by cantonal authorities, which can therefore choose to be more generous with the canton’s citizens. The third theme concerns individual choices. Here, however, federal law strongly limits cantons in matters of choice regarding life in common or death.

Facing this continuum in the cantonal dynamic in favour of fundamental rights, the federal government, through its Federal Office of Justice and Police, indicated that its goal is « to strengthen the federal system, especially in areas of human rights, democracy and the rule of law »\(^\text{114}\). In 2005, under the influence of the federal counsellor in charge of Justice, the analysis of the cantonal constitutions was reduced to its formal function, arguing that cantons are exercising their autonomy\(^\text{115}\). Moreover, cantonal constitutions continue to feed in federal legislation. For example, the right to register for same-sex couples in the Constitution of Fribourg has been included in the Federal Law of June 18, 2004 on the registration of partnership for same-sex couple. Federal reform process has also encroached upon the scope of cantonal provisions on procedural safeguards. In other words, cantonal constitutional activity is still a source of development of federal law. However, during the guarantee process of the constitution of Geneva, the federal government added a condition: the cantonal constitutions must also comply with Article 36 of the Constitution. In other words, it added a second material element to the federal guarantee previously mentioned, according to which the scope of cantonal fundamental rights is defined through the lens of the separation of powers and the judicial application of fundamental rights. It also indicates that the cantonal constitutional power has to be used in compliance with the principle of supremacy of federal law. In this framework, cantonal constitutions are therefore considered as binding texts and can be useful for the protection of human rights.

\(^{114}\) Ordinance on the Organisation of the Federal Department of Justice and Police of 17 November 1999, art. 6 al. 1 b): « consolider le système fédéral, notamment dans les domaines des droits de l’homme, de la démocratie et des principes de l’Etat de droit ».

Conclusion

In concluding this comparative constitutional analysis, it must be first underlined that the constitutional preoccupation with fundamental rights – through constitutional writings – varies in intensity from canton to canton. Nevertheless, we can say that cantons appear to be the « experimental laboratories » for Swiss constitutional law. They have created a dynamic in favour of human rights and today they still feed it, responding to the variable intensity of the federal commitment in matters of human rights. In this sense, the evolution of cantonal constitutions illustrates the dialogical model between different levels of political powers in terms of the protection of human rights.

Following the constitutional storyline, we have demonstrated that the cantonal constituent powers have played an active role in the development of fundamental rights in the law. It must be added that this extensive formal guarantee does not mean that their cantonal authority better respected it and that the judge uses it to protect individuals as long as he or she already a federal provision is in place. On this point, the evolution of the Federal Constitution between 1848 and 1874 indicates an institutional change in terms of guarantees. First, the federal government – and, on appeal, the Federal Assembly – was not in charge with the appeals of citizens for the violation of their constitutional rights. Its competence was thus limited to the procedure of the federal guarantee. In 1874, the Federal Court was then charged to guaranty the constitutional rights of citizens. Such a change did not directly appear fruitful for citizens. As previously noted by some Swiss scholars, it only created a positive dynamic in the sixties when the Federal Court began developing its case law on unwritten constitutional rights. This eclipsed cantonal constitutions until the federal context became less favourable to the development of fundamental rights. It also made the timing perfect for the revival of cantonal constitutions. Some cantonal texts had a horizontal influence on other cantonal constitutions. They fuelled the federal constituent power as well. Importantly, they testify to the formation of political consensus in the population for the federal project to adopt a Bill of Rights. In this sense, cantonal constitutions have been and still continue to be a material source for the development of federal law.

Nevertheless, the double standard of protection in Swiss law had to be replaced within the framework of the principle of federal law supremacy. Considering that cantons have a constituent power, their only limit is to

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116 We adopted the expression used in American legal literature, quoted by M. Hottelier, « Le nouveau fédéralisme judiciaire aux États-Unis », op. cit., note 6, p. 518.
develop their fundamental rights catalogue in compliance with federal and international law. On this point, we have seen that the federal authorities – in the case of the federal government – exercise their power of review in full. In this framework, cantons and their citizens can undoubtedly continue to express their creativity. The adoption of the federal Bill of Rights in 1999 has not dampened their willingness to enshrine their own fundamental rights in their own fundamental text. Nevertheless, the « citizen » input in the cantonal constituent procedures does not show a clear connection between citizen participation and high standard of protection or a larger catalogue of fundamental rights. It must be emphasised, however, that this participation may have contributed to the intensity of the process. For example, the canton of Valais is considering a total revision of its constitution\textsuperscript{117}. Others are pondering yet another a total revision\textsuperscript{118}.

As a legal text, cantonal constitutions can also be a formal source for fundamental rights protection. On this point, the Federal Court and cantonal constitutional courts do not seem to use them much. It can thus be said that so far Cantonal constitutions have had a stronger influence from the material point of view than from a formal perspective.

\textsuperscript{117} There is a citizens’ project for a full revision of the constitution: http://www.constituante-valais.ch