Are All Constitutional Rules Created Equal? Substantive Hierarchy in Constitutions in Theory and Practice

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Abstract

This article examines whether all constitutional rules and principles have the same value and occupy the same level of importance within a constitutional system, or is there some kind of hierarchy among them. The significance of these questions arises when constitutional rules come into conflict with one another. In this case, constitutional courts will be in an unenviable position to decide on such conflict, because this conflict is not between rules in different positions within the legal order (e.g., constitutions v normal legislation), but between rules whose values are derived from one source: the constitutional order. This paper suggests a number of mechanisms to overcome this conflict. Firstly, it argues that such a conflict must be characterised as a significant dilemma, and declared as a constitutional problem. Secondly, it argues that the existence of substantive hierarchies within constitutions must be textually and judicially recognised. Finally, it proposes that this conflict cannot be overcome by adopting the power that has been assigned to the constitutional court as a negative legislator. However, there is a need to extend the role of constitutional courts to become positive legislators in order to reconcile the conflicted constitutional provisions without stripping the constitutional values from them. To achieve this end, this article develops a framework for understanding how conflicting constitutional principles should be reconciled by exploring the idea of substantive hierarchies within constitutions.

Keywords: Substantive hierarchy, constitutional rule and principles, conflict of constitutional rights.

I. INTRODUCTION

The United States Declaration of Independence proclaims that "all men are created equal", a sentiment that in modern times is taken to mean that constitutional laws and rights should apply to all citizens equally. Such an ideal is not limited to the U.S; this rule of law is fundamental to liberal democracies the world over. But if all people are created equal, can the same be said of the constitutional laws themselves? Clearly, as Hans Kelsen stated, there is a hierarchy between the constitution and regular legislation,[1] but within the constitution itself, do all rules and principles have the same value and

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[1] H Kelsen, *General Theory of Law and State*, The Lawbook Exchange Ltd,1945, pp. 123-126.

occupy the same level of importance, or is there some kind of hierarchy among them? Which rule(s) or principle(s) could be deemed superior to others? The significance of these questions arises when constitutional rules come into conflict with one another. When two constitutionally enshrined rights collide, constitutional judges must unavoidably favour one principle over another, effectively rewriting the constitutional document itself. This dilemma amplifies general critiques of the law-making abilities of judges; if even elected representatives cannot usually amend a constitution without a referendum of the people, why should unelected judges have such power? Perhaps because of this uncomfortable truth, scholars seem reluctant to acknowledge the existence of substantive hierarchies within constitutions (although it is well accepted that most constitutions have some kind of structure). There are a number of examples of the procedural hierarchy, for example, the procedural hierarchy between the components of the 1958 French Constitution; the Declaration of 1789, the Preamble to the Constitution of 1946, the rights and duties as defined in the Charter for the Environment of 2004, and 1958 constitutional provisions. Another example is the hierarchy between the Canadian Charter of Rights and Freedoms and the 1982 Constitution. This acknowledgement tends to be limited to strictly procedural hierarchies that already exist within the constitutional document. In this article, we argue that hierarchies within the constitutional blocs are not just procedural. Rather, we demonstrate the existence of a substantive hierarchy, one that distinguishes between rules based on their substance instead of their procedural weight, and show how this hierarchy operates in a wide variety of legal systems.

We begin by outlining our theory of substantive hierarchy, explaining the rationale behind viewing constitutions as hierarchically ordered. Importantly, we also reveal how theories of substantive hierarchy are separate from previous notions of procedural constitutional hierarchy, as well as traditional ideas about judicial and constitutional interpretation.

The next part of the article explores how these hierarchies can be structured by proposing four categories into which the works of key scholars in this field can be grouped. This new classification model helps to clarify and understand how academics and judges alike approach the issue, in turn providing greater consistency and certainty to judicial decision making in these types of cases. Finally, the article considers judicial attitudes towards the substantive hierarchy, demonstrating that this issue is not one that exists in a hypothetical world; it is real, and affects the outcomes of cases. In doing so, this article lends new insights into the way constitutions are viewed and interpreted.

II. SUBSTANTIVE HIERARCHY OF CONSTITUTIONAL RULES

The notion that constitutional rules have some kind of internal hierarchy arose after the increase in the extent and scope of 'extra-constitutional rules' – treaties and declarations of human rights that, while external to the constitutional document itself, take on a special significance because of the values, rights and obligations they address. All these rules, in their aggregate, form a "constitutional bloc",[2] which includes all rules that have

[2] *Cantwell v Connecticut* [1940] 310 U.S. 296.

constitutional origins. For example, in some legal orders,[3] the constitutional bloc has been extended to include international treaties, fundamental laws, and declarations of human rights. The constitutional bloc does not consist of rules with the same nature, as they come from different sources.[4] The diversity of rules within a constitutional bloc has prompted some scholars to question whether some rules have a priority or supremacy over others.

The idea of a constitutional hierarchy came to prominence in France 1998 in a symposium held in Paris (the Declaration of the Rights of Man and of the Citizen in the Judiciary). However, the idea was first raised in 1989 by Vedel when he argued that we must ask whether all constitutional rules within the constitutional text have the same constitutional values for the consideration of the constitutional court? Whether it is possible to say that there are rules and principles on the first level and others on the second or third level? [5]

In 1990, Badinter and Genevois added more detail to this hierarchy. They spoke about the hierarchy of the constitutional rules and the protection of the fundamental rights, and argued that there is a hierarchal structure between the constitutional rules.[6] Their paper highlighted the idea of a hierarchy of constitutional rules by arguing that there is a procedural hierarchy within the components of the French constitutional bloc. According to Badinter and Genevois, the constitutional bloc consists of and is hierarchically structured between (1) the constitutional document, (2) the preamble of the 1948 constitution, (3) Declaration of the Rights of Man and of the Citizen 1789, (4) the organic laws, (5) principles and objectives with constitutional value, and (6) international treaties.[7] According to this type of hierarchy, if there is any conflict between the provisions within the constitutional document with another provision inside the preamble of the 1948 constitution or the Declaration of the Rights of Man and of the Citizen 1789, the constitutional judge will give the privilege and priority for the provisions within the constitutional text as the highest one within the constitutional pyramid.[8] The same type of hierarchy can be found in many constitutional systems such as the hierarchy between the Canadian Charter of Rights and Freedoms and the 1982 Constitution.

These procedural hierarchies are also evident in other jurisdictions around the world. A clear example can be found within the Federal Constitution of Malaysia regarding the position and rights granted to the states of Sabah and Sarawak. Many articles of the Federal Constitution, such as 95(D and E), 121(1A), 150(6A), 161A, and 161E(2), have provided special positions for Sabah and Sarawak vis-a-vis the federal government. Under these articles, Sabah and Sarawak enjoy financial, legislative, judicial, and racial

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3 France is one of these countries that have imparted the constitutional value on the institutional treaties and the 1789 declaration by providing that into the 1985 constitutions. See Preamble and section VI, Constitution of 4 October 1958 (France).

4 C Brami, *The Hierarchy in French Constitutional Law: Systemic Analysis Test,*(Doctoral dissertation, Cergy-Pontoise), 2008, p.211(In French).

5 K Gözler, [The question of the hierarchy between constitutional norms]. Annales de la Faculté de Droit d'Istanbul, 1998, pp. 65-92.(In French).

6 *Barron v Baltimore* [1833] 32 U.S. (7 Pet.) 243.

7 *Cantwell v Connecticut* [1940] 310 U.S. 296.

8 Preamble, Constitution of 4 October 1958 (France).

privileges, which give them a superior position inside the Constitution. Incorporating such provisions in the Federal Constitution created a formal or procedural hierarchy between the constitutional rules and principles.

A similar hierarchy exists between the provisions of the Iraqi Constitution, where Article 125 mentions that the fundamental principles listed in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended. This declaration can be seen as clear evidence for the constitutional judges to consider a procedural hierarchy between the principles and rights mentioned in Sections One and Two, as holding greater position compared to others. This kind of procedural hierarchy is not controversial, as it can be easily identified by constitutional courts, and is mandated by the constitutional document itself. In some points, however, both the procedural and substantive hierarchies are overlapping with each other, and might become difficult to make a clear distinction between them. This overlapping and distinction can be easily identified by arguing that the procedural hierarchy is between two or more constitutional components that are separately issued from different powers or at different times.

Our argument in this artice is that the constitutional rules and principles are not only procedurally graded, but rather can also be ranked in a substantive sense. This hierarchy is substantive in the sense that it focuses on the respective contents of the constitution, rather than according to the branch or procedures adopted to issue them.[9] This can be contrasted with a procedural hierarchy, where priority would be assigned based on branch and procedure. Such an approach is controversial because it allows and even relies on judges going beyond the strict text of the constitution, but it is especially useful in cases where the conflict occurs between provisions that have the same origin within the constitutional bloc (e.g. both come from the text itself, or between two treaties), or in places that do not have a codified constitution that would logically take formal precedence. The United Kingdom is one such place, where, although the term is not expressly used, the constitutional bloc is made up of a number of key documents and principles. This was confirmed recently by the Supreme Court in its decision *R. (Buckinghamshire CC) v Secretary of State for Transport*[10], where the Court stated that

> The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law.[11]

We argue that the competence of constitutional courts to reconcile among the conflicted rules, principles, and values within the constitutional bloc has its own nature, which is

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9 Fabbrini, F,"Reasonableness as a Test for Judicial Review of Legislation in the French Constitutional Council". *J. Comp. L.,2009,* 4, p. 39.

10 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

11 *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324 (HS2).

different from their other competences. Thus, it is a mistake to argue that the court, when it ranks the constitutional values in the constitution, exercises it under its jurisdiction as a constitutional interpreter. This confusion must be corrected by recognising that constitutional courts with a distinct role that enables them to create hierarchy between the constitutional values. Ordinarily, the main task of the judge is to fill or reconcile gaps by exercising his or her discretion and to understand exact meanings and intentions and to clarify or remove the ambiguities from constitutional provisions. However, in the cases we focus on in this article, there is no gap to be filled or ambiguity to be clarified; rather, there is a serious conflict between two competing rules that are equally correct, which is resolved by establishing a substantive hierarchy between them. In this paper, we exclude the possibility of considering the constitutional interpretation as one of the approaches to create any kind of substantive hierarchy between the constitutional rules. The idea of the substantive hierarchy of constitutional rules has a significant contribution in public law. It attempts to guarantee the greatest possible constitutional protection for rights and liberties on the one hand, while on the other hand protecting some of the political, constitutional and social principles accepted by citizens, such as protecting certain forms of state order, and avoiding the sudden radical transitions in the approach of governing the state and society.[12]

III. THE TYPES OF SUBSTANTIVE HIERARCHIES

Having demonstrated the significance of the substantive hierarchies within the constitutional bloc, it is important to examine how the constitutional components can be substantively ranked. Crucially, the constitutional components are not only limited by the provisions that are inherent in the constitutional document itself; there are also a number of principles and rights which are located outside of the constitution yet have constitutional value. One of the aims of this article is to investigate the possibility of the substantive hierarchy between these rules and principles. To achieve this end, the substantive hierarchy will be classified into three types, the hierarchy between the constitutional rules only, the hierarchy between constitutional rules and the constitutional rights, and then the hierarchy between the constitutional rules and the fundamental principles.

A. The Hierarchy Between the Constitutional Rules Themselves

The supporters of the trend of substantive hierarchy argue that constitutional rules are vertically classed according to hierarchical structure. Analysing the rules regarding the amendment of constitutional provisions helps to reveal a hierarchical structure in which the constitutional rules are classified according to primary rules and secondary rules. According to proponents of this position, the rules of amending the constitutional structure are considered the main criteria to distinguish between the primary and secondary rules. The supporters of this position distinguish between these two categories to justify the idea of the substantive hierarchy of the constitutional rules according to the criterion

[12] D. Ousseau, P.Y Gahdoun, & J Bonnet, *Constitutional Litigation Law*, LGDJ-Lextenso éditions, 2016, p. 108, (In French).

of the functions performed by the constitutional rules with the secondary level within the constitutional order. They are also based on the criterion of validity regarding the distinction between the secondary rules and the new rules issued according to the secondary rules. This study examines these criteria in the following sections.

(i) The Substantive Hierarchy According to the Criterion of the Functions Performed by the Former Provisions

The first criterion concerns the relationship between the primary and secondary constitutional rules according to the criterion of the functions performed by the former provisions. According to this criterion, the constitutional rules are categorised into two categories. The first one is the constitutional amendment rules, or Basic Structure, which determine the amendment procedures and the period in which the constitutional legislature is able to intervene to annul, amend, and add to the elements of the constitutional texts.[13] The main aim of the constitutional amendment rules is to "to distinguish a constitution from ordinary law, to structure the formal amendment process, to pre-commit future political actors, and to facilitate improvements or corrections to the constitutional text".[14] It has also been argued that the constitutional amendment rules aim to "express basic values".[15] Meanwhile, the second category is the constitutional provisions and values that, pursuant to the constitutional amendment rules, are amended. The significance of the basic rules within the constitutional community is identified by the constitutional amendment rules. These rules are ordered in a constitutional hierarchy by the prevalence of some of them over others within the constitutional bloc. This position distinguishes between these rules based on the distinction between basic and secondary legal rules in the theory of public law, which differentiates between the legal rules that possess a binding character, which are called basic rules, and the legal rules regarding punishment, which is called the secondary rules because they are applied after the basic legal rules have been violated.

According to this mechanism, it is possible to say that the basic constitutional rules are those that include a set of rules regarding the rights and liberties of citizens, or distribution of the authorities of the state branches. By contrast, the rules regarding the amendment of the constitution are considered secondary constitutional rules. These rules are called by a number of names such as constitutional amendment rules,[16] entrenched clause,[17] and basic structure.[18] The reasons for describing these as secondary are according

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13 L. Favoreu, [Constitutional Bloc]. *Dictionnaire Constitutionnel*, 1992, pp.87-89. (In French).

14 R. Albert, "The Expressive Function of Constitutional Amendment Rules", *McGill Law Journal/Revue de droit de McGill,* 2013,Vol. 59**,** 225-281, p.230.

15 S E Finer, V. Bogdanor & B. Rudden, *Comparing Constitutions*, Clarendon Press, 1995, pp.13.

16 R Albert, "Amending Constitutional Amendment Rules". *International Journal of Constitutional Law,* 2015,13**,** 655-685, p. 659. R Albert, "The Expressive Function of Constitutional Amendment Rules", *McGill Law Journal/Revue de droit de McGill,* 2013, Vol. 59**,** pp. 225-281.

17 D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law", 1992, *Isr. L. Rev.,* 26, p. 238.

18 Rateek, S, "Today's Promise, Tomorrow's Constitution: Basic Structure, Constitutional Transformations and the Future of Political Progress in India", *NUJS L. Rev.***,** 2008, 417, V Nayak, "The Basic Structure of the Indian Constitution". *Human Rights Initiative*, G Austin, *Working a Democratic Constitution: A History of the Indian Experience*, Oxford University Press, USA. 2005**.**

to the functions performed by these rules in the constitutional order. From the functional perspective, the rules for amending the constitution are considered the rules of changing the system, which establish new constitutional rules by constitutional organs. They also determine the way these organs operate and stipulate a number of restrictions. In some cases they impose a prohibition, such as prohibiting the changing of the form of the political system. Therefore, as long as these rules regulate the process of enacting the constitutional rules, they are considered as secondary rules and thus they derive their validity from the basic rules. For example, if the basic rules, which are prohibited from alteration, conflicts with the secondary rules which regulate the process of the alteration of the basic rules, the constitutional court will give priority to the basic rules when it decides on this conflict.[19]

This hierarchy is evident in a wide range of countries. For example, India's constitution expressly declares which provision or value hold greater significance than that other. This hierarchy can be clearly seen from the doctrine of the basic structure. For example, Article 368 (3) of the Indian Constitution that reads: "Nothing in Article 13 shall apply to any amendment made under this article." Under the doctrine of basic structure, the Indian Constitution determines the values and provisions set forth in Article 13 hold greater significance than other provisions, thus they prevail over the others within the Indian constitutional order. The provisions and values entrenched in Article 13 are considered basic rules, while the provisions pursuant to which constitutional amendments themselves are made are given a secondary level.

On many occasions, the Indian constitutional judiciary has indicated the role the basic structure doctrine has played in creating a substantive hierarchy between the constitutional rules and principles. The most famous case was *Golaknath v State of Punjab,*[20] which is described as one of the most important decisions ever rendered by the Supreme Court. In this case, the Supreme Court explicitly held that the Fundamental Rights included in Part III of the Constitution would prevail over parliament's jurisdiction to amend the Constitution. The Court granted these fundamental rights a "transcendental position" under the Constitution and stated that they must be kept beyond the reach of the legislature. The Supreme Court examined whether any part of the Fundamental Rights provisions of the constitution could be revoked or limited by amendment of the constitution. Relevantly, Article 13(2) reads, "The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void." The Supreme Court held that an amendment of the Constitution is a legislative process, and that an amendment under Article 368 is "law" within the meaning of article 13 of the Constitution and therefore, if an amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void. The *Koka Subba Rao* Court has played a vital role in Indian jurisprudence by formulating the idea of constitutional hierarchy which has a great contribution in furnishing a model for

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19 G. Alberton, [From the indispensable integration of the bloc of the conventionality to the constitutional bloc]. *op. cit***,** pp263.(In French); N Emiliou, *The Principle of Proportionality in European Law: A Comparative study*, 1996, Kluwer Law Intl.

20 *Golaknath v State Of Punjab* (1967) AIR 1643; 1967 SCR (2) 762.

subsequent courts and encapsulates the most controversial of the new functions assumed by the Court to reconcile between two conflicted constitutional provisions.

The Court of Appeal of Malaysia has also adopted the idea of substantive hierarchy between the constitutional rules and principles, in the recent decision of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & 2 Ors*[21] In this case, the court addressed the conflict between the Westminster principles of separation of powers, rule of law, judicial review and the protection of minorities, with aspects of *Shariah* law provided for under Article 121(1A) of the Constitution. The court resolved this tension by resorting to the mechanism of substantive hierarchy between the constitutional provisions, explicitly. The court noted that "the Federal Constitution is premised on certain underlying principles. In a Westminster model constitution, these principles include the separation of powers, the rule of law, and the protection of minorities," the court considered these principles as part of the basic structure of the Constitution, and held that they cannot be arrogated or removed; where those principles were in conflict with the provisions of Article 121 (1A), the court favoured the basic Westminster principles. Based on this hierarchy, the court declared that "this jurisdiction, which constitutes the judicial power essential in the basic structure of the constitution, is not and cannot be excluded from the civil courts and conferred upon the *Shariah* courts by virtue of article 121 (1A)". Therefore, the principles inherent in the basic structure of the constitution were given a higher position inside the constitutional system. The idea of the basic structure or entrenched clause exemplified in these cases are repeated around the world, and have become an international constitutional doctrine incorporated in a number of constitutional systems such as those in Germany,[22] Malaysia,[23] France, Turkey,[24] Brazil,[25] and Iraq.[26]

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21 *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other* Appeals [2018] 3 CLJ 145.

22 Article 79 (3) of Basic Law for the Federal Republic of Germany states "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

23 Article 4 of Part 1 of the Constitution of Turkey states that the «provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed.

24 Article 60, Paragraph 4 of the Constitution of Brazil which states that "No proposal of amendment shall be considered which is aimed at abolishing:

25 I – the federative form of State;
II – the direct, secret, universal and periodic vote;
III – the separation of the Government Powers;
IV – individual rights and guarantees."

26 Article 126.2 of the 2005 Constitution reads: "The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days". According to this criterion, the provisions set forth in Article 126.2 are deemed a secondary rule and the provisions set forth in section one and two are deemed basic rules.

(ii) The Hierarchy between Constitutional Rules According to the Criterion of the Validity of the Constitution

The second criterion, the validity of the constitution, holds that constitutions have a hierarchical structure, and the validity of each constitutional rule within this structure is based on the rules of constitutional amendment.[27] However, it departs from the criterion of function because this position can only be applied to new constitutional rules (the rules that are produced from the amendment). The hierarchical relationship, according to this criterion, applies only when a new constitutional rule is issued in accordance with the amendment procedures that have been constitutionally enshrined. When the constitutional rules are amended, new constitutional rules are produced; their conditions and procedures are determined by the rules of constitutional amendment.[28] This leads us to say that the constitutional law is the law that regulates its enactment process, at the time in which we admit that the amendment process is only a process to produce actual new constitutional law. Consequently, the validity of these rules is not based on external rules, whether philosophical or ethical, nor on legal rules belonging to another legal order, but are based on their validity, on constitutional rules that exist within the Constitution itself. Therefore, the Constitution consists of a system and rules interrelated with each other according to a hierarchical relationship. The only criterion for this relationship is the criterion of validity. As long as the validity of the constitutional rule (A) derives its validity from the constitutional rule (B), thus rule (B) is superior to the rule (A).[29]

Based on this fact, the most significant technique to confirm the hierarchical relationship is related to the process of enacting the rules. This is because the requirements for determining the validity of the laws are the same requirements for the process of enacting new constitutional rules. According to the concept of this relationship, the constitutional rules that determine the process and the requirements for enacting the new constitutional rules are superior to the rules created under those procedures; thus, there will be a hierarchy according to the production process.[30] According to the above perspective, the relationship between the provisions prohibiting the amendment and the new provisions is a hierarchical relationship. Therefore, the primary constitutional rule occupies the highest apex of the constitutional order, followed by the provisions of the constitution amendment because they are considered secondary rules if these provisions are compared with the basic rules, and then the new constitutional provisions occupy the base of the constitutional pyramid for having derived their validity from the secondary rules which can be described as 'tertiary' rules.

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27 R. Badinter, R. and E. Genevois, [Norms of Constitutional Value and Degree of Protection of Fundamental Rights], *Revue universelle des droits de l'homme*, 1990,2,(6-8),pp. 13. (In French); Béchillon, D.D., [*Hierarchy of norms and hierarchy of normative functions of the State*] (Doctoral Dissertation, Pau), 1993. (In French).

28 *Ibid* at p.67.

29 R Badinter, and E Genevois, [Norms of Constitutional Value and Degree of Protection of Fundamental Rights]. *Revue universelle des droits de l'homme*, 1990, 2,(6-8). (In French)

30 F Gölcüklü, [The hierarchy of constitutional norms and its function in the protection of fundamental rights]. Report submitted to the National Conference of European Constitutional Courts, (Ankara 7-10 May 1990), *Universal Review of Human Rights*, 1990. 299,pp.294.(In French).

Since the Iraqi 2005 Constitution has expressly made it impossible to amend some its text, we can see, according to the above perspective, that the Iraqi Constitution has adopted the idea of a substantive hierarchy of constitutional rules. The constitutional provisions, which regulate the Fundamental Principles and Fundamental Rights and Liberties in Sections One and Two of the Constitution, are considered basic rules because they cannot be amended. Meanwhile, the constitutional provisions that regulate the procedures of Constitution amendment in Article 126 are considered secondary rules. In case the new constitutional provisions are issued, they would occupy the third level. The rules with an unconstitutional nature, which are enshrined in the Constitution, take the base of constitutional pyramid. Meanwhile, the rules, which are inherent in the constitution without constitutional value stay in the fourth level. The final level of the constitutional order is occupied by the rules with the constitutional nature, which stay out of the constitutional document, such as the organic laws.

B. The Hierarchy Between the Constitutional Rules and Fundamental Rights

It is necessary to pose a question, whether the constitutional texts allow for establishing a hierarchy among the fundamental rights and liberties of citizens? In responding to this question, it is important to explain the concept of fundamental rights and liberties, and then distinguish the fundamental rights and liberties from general rights, and finally state the extent to which the hierarchy of constitutional rules could be set up according to the classification of these rights and liberties.

(i) The Concept of Fundamental Rights and Liberties

France and U.S are considered the first countries that acknowledged the existence of 'fundamental' rights and placed constitutional value on them. However, it is clear that both the French and the U.S constitutions have not included any definition for fundamental rights, which prompted constitutional jurisprudence to define this concept to fill this constitutional gap. According to Favoreu, the fundamental rights are defined as a set of rights and guarantees that are approved by constitutional order to individuals in their relationships with the public powers. They are called fundamental because they are concerned with the Human who is considered the base of all rights.[31] This position clearly appears in both the American and French constitutional courts. The US constitutional court has also adopted the same trend by exercising the function of rights protection. This jurisdiction was explicitly granted to the US Supreme Court by incorporating the Bill of Rights (1791) into the fourteenth Amendment (1868).[32] The shift in the role of US Supreme Court clearly appears after this incorporation, for example in *Barron v*

[31] L Favoreu, [The Jurisprudence of the Constitutional Council and the Right of Property proclaimed by the Declaration of 1789, The Declaration of the Rights of Man and Citizen and Jurisprudence], Conference of 25 and 26 May 1989 to the Constitutional Council, 1989, pp.37.(In French).

[32] W.D Graves, "Supreme Court's Subversion of the Constitution through Substantive Due Process of Law and 14th Amendment Judicial Incorporation of the Bill of Rights", *Regent JL & Pub. Pol'y,* 2013, 6**,** p. 249;

Baltimore [33] the position of the Supreme Court was changed to decide that both the Free Excise clause and the Establishment clause were applicable to the State.[34] In France, the Constitutional Council assumed the powers to respect the fundamental rights after the 1958 Constitution incorporated these rights within its provisions: for example, the preamble of the 1958 French Constitution:

> The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946.[35]

Under this incorporation, the Constitutional Council has been charged with the task to protect these rights that derived its supremacy and legitimacy by enshrining them in the Constitution.[36]

However, the attitude of these countries toward constitutional rights was considered 'negative constitutional rights'[37] because these constitutions did not impose an affirmative duty on the constitutional branches to protect the constitutional rights. The only obligation imposed on them was not depriving people of exercising certain things.[38] Judge Posner indicated this position by arguing that "Our Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental service".[39]

The modern theory of constitutional rights as positive rights was founded after the Second World War, especially after the adoption of the current Basic Law of Federal Republic of Germany in 1949. This constitution is considered a collection of basic rights, which binds all three branches to constitutional rights norms as directly applicable law and subjects this obligation to comprehensive review by constitutional courts. Robert Alexy points out "where the constitutional rights catalogue is written, the legal problem of constitutional rights is first and foremost a problem of the interpretation of authoritative formulation of positive law".[40]

Wildenthal, B. H, "The Lost Compromise: Reassessing the Early Understanding in Court and Congress on incorporation of the Bill of Rights in the Fourteenth Amendment", *Ohio State Law Journal,* 2000 ,61**,** p.1051.

33 *Cantwell v. Connecticut* [1940] 310 U.S. 296.

34 R J McKeever, *The United States Supreme Court: A Political and Legal Analysis,* New York; Manchester, Manchester University Press, 1997, p.30.

35 Preamble, *Constitution of 4 October 1958* (France).

36 F Fabbrini, "Reasonableness as a Test for Judicial Review of Legislation in the French Constitutional Council", *J. Comp. L.,* 2009, Vol. 4**,** p.39.

37 D.P Currie, "Positive and Negative Constitutional Rights", *The University of Chicago Law Review,* 1986, 53**,** 864-890, p.864.

38 A. Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, 2012, p.20.

39 *Jackson v City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), cert. denied, 465 U.S. 1049 (1983).

40 R Alexy & J Rivers, *A Theory of Constitutional Rights*, Oxford University Press, USA. 2009, p.20.

By giving rights a positive constitutional position, they become constitutional principles that must be obeyed by all three branches. Constitutional courts, as guardians of the constitution, have an obligation to defend the constitutional rights of an affected individual. The constitutional character of these rights in France has been shaped by the Constitutional Council since its establishment in 1971. Before that time, fundamental rights had a sub-constitutional character. A number of decisions issued by the French Constitutional Council declared expressly the constitutional basis of each right and liberty. However, the term 'fundamental rights' only recently appears in the council's decisions, and even then, with different expressions. In some decisions, they are called 'fundamental rights',[41] while in another decision titled "The Rights and Liberties Constitutionally Guaranteed",[42] they are called "the rights and liberties with constitutional values".[43]

(ii) Distinction between Fundamental Rights and General Rights

The judiciary and jurisprudence sometimes use the term 'general rights', and in other cases they refer to 'fundamental rights'. Does this mean that the term 'general rights' differs from the term 'fundamental rights', or should they be regarded as interchangeable? Some scholars answer this question by arguing that there is a difference between these terms. French scholars in particular confirmed this distinction through defining the theory of 'known rights'.[44] They define the known rights as the rights and liberties that have been regulated by the law, but not by the Constitution. According to Genevois, the known rights are protected from administrative interference, but not from laws, in that new laws may supersede or circumvent these rights.[45] Fundamental rights may be distinguished from general rights according to Favoreu's criteria:

1. the general rights, in a broad sense, are protected from interference from the executive branch, meanwhile the fundamental rights are protected from the interference of all the powers whether executive, legislative or judicial branch;
2. the general rights are in harmony with the administrative legitimacy, while the fundamental rights are in harmony with the constitutional legitimacy;
3. the general rights are based on ordinary legislation and general principles of law, while the fundamental rights are guaranteed by the rules and principles with the constitutional values; and
4. the organ that has power to protect the general rights is an ordinary judge, while the constitutional judge protects the fundamental rights. The rights incorporated inside the constitutional document have constitutional value and occupy the constitutional level as other constitutional provisions. The task to protect them assigned to the constitutional courts as guarantor of the supremacy of the constitution.

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41 C Brami, [*The Hierarchy in French constitutional law: systemic analysis test], (Doctoral dissertation, Cergy-Pontoise*), 2008, p.216, (In French).

42 R J McKeever, *Supra* n. 34.

43 W D Graves, *Supra* n. 32.

44 *Barron v Baltimore* [1833] 32 U.S. (7 Pet.) 243.

45 *Cantwell v Connecticut* [1940] 310 U.S. 296.

(iii) The Substantive Hierarchy According to Classifying the Fundamental Rights and Liberties

The supporters of this position have based their argument on what the French Constitutional Council has adopted to guarantee and protect the fundamental rights by considering their content.[46] They have gone on to say that the fundamental rights and liberties, which are included in the rules and principles with constitutional value, do not share the same degree of protection. This disparity puts these rights in a different position, confirming that a hierarchy between the rules and principles regarding these rights exists. Therefore, the constitutional provisions that regulate the most protected rights are superior to the constitutional provisions which regulate the less protected rights.[47] Some French scholars such as Favoreu[48] and Genevois[49] support this position. Favoreu believes that the hierarchy of fundamental rights has been based on the degree of the protection of these rights by the Constitutional Council,[50] while, Genevois contends that there is a kind of substantive hierarchy of constitutional provisions regulating these rights and liberties.

(iv) Classifying the Fundamental Rights According to Favoreu's Position

Favoreu distinguishes between the rights and liberties included in the provisions and principles with constitutional value according to the degree to which the constitutional judiciary protects them. He states that some of these rights have an absolute protection, others have almost absolute protection, while others still have relative protection. According to Favoreu, the existence of such hierarchy depends on many factors. If these factors are found in a particular right, it would be characterised as a right with 'first position' (absolute protection), while other rights which include only some or none of these factors would be characterised rights in the second and third positions.[51] Favoreu determines these factors as:

1. the right is not subject to the system of the prior permit;
2. two matters must restrict the jurisdiction of the legislator with regard to these rights. On the one hand, the legislator should only interfere in order to increase the effectiveness of the rights. On the other hand, the legislator should seek to reconcile between exercising these rights and other constitutional aims which might be inconsistent with them; and
3. the rule that regulates these rights must be a subject of application in uniform form for the rest of the state.

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46 R J McKeever,*Supra* n 34.

47 K Gözler, [The question of the hierarchy between constitutional norms], Annales de la Faculté de Droit d'Istanbul, 1998. 65-92,pp.78-79. (In French).

48 L Favoreu, [The Jurisprudence of the Constitutional Council and the Right of Property proclaimed by the Declaration of 1789, The Declaration of the Rights of Man and Citizen and Jurisprudence], paper presented to Conference of Constitutional Council, 25-26 May 1989, p 123. (In French).

49 D P Currie, "Positive and Negative Constitutional Rights", *The University of Chicago Law Review,* 1986 , Vol, 53, p.864.

50 A Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, 2012, p. 20.

51 R Alexy & J Rivers, *A Theory of Constitutional Rights*, Oxford University Press, USA, 2009, p.2.

When all these factors are found in the right, it would become a right with first position. Scholars[52] have set up a classification between the rights according to the availability of these conditions. They argue that the rights to freedom of individual, association, publication and education occupy the first position. Some examples of the freedoms that occupy the second position (because they do not have the three previous conditions) are the freedom of expression by radio and television, the right of ownership and the right to strike.

Favoreu went further however and sought to set up a hierarchy between the principles derived from the Declaration of the Rights of Man and of the Citizen in 1789[53] and the principles derived from the preamble of the French 1946 Constitution. He refers to this hierarchy in his comments on the decision of the Constitutional Council, 16 December 1982. He argued that the formula used by the Constitutional Council prompts us to believe that the principles consistent with the present time compete with the principles included in Declaration of the Rights of Man and of the Citizen in 1789, thus the latter enjoy importance over the former. Favoreu did not just reconcile between Articles 2 and 17[54] of the Declaration and Article 9 of the preamble[55], but has gone further by arguing that one of them is superior to the other. He explained why by stating that Article 9 of preamble did not include obligation nor could it be considered a restriction on the legislator and therefore it did not have any legal effect. He also explained that the constitutional judge in France has set up a hierarchy between the principles derived from the Declaration of the Rights of Man and of the Citizen in 1789 and the principles derived from the preamble of the French 1946 Constitution. However, this does not mean that the constitutional judge permanently and absolutely tops the principles derived from 1789 Declaration against the principles derived from the 1946 preamble. The supremacy is limited on some of these principles such as Articles 2 and 17 of the Declaration compared with article 9 of the preamble.

(v) Classifying the Fundamental Rights According to Genevois

Genevois provides a different perspective on they way that the Constitutional Council set up a substantive hierarchy of the fundamental rights and liberties. This hierarchy, according to Genevois, is not inconsistent with the idea of rejecting the procedural hierarchy of the constitutional rules. In other words, although all rights and liberties have the same constitutional value from a formal or procedural perspective, they do not have the same

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52 G Vedel, [The Place of the Declaration of 1789 in the "Constitutional Bloc", in, the Declaration of the Rights of Man and Citizen and Jurisprudence]. *Conseil Constitutionnel, Recherches Politiques*, PUF, 1989, p. 59,(In French).

53 *Declaration of the Rights of Man and of the Citizen of 1789* (France).

54 Article II of the declaration provides that the goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression. Article XVII of the declaration provides that Property being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just and prior indemnity. See Articles 2 and 17, *Declaration of the Rights of Man and of the Citizen of 1789* (France).

55 Article 9 of the preamble of the French 1946 Constitution provides that "All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society".

value from a substantive perspective. The hierarchy depends on the existence of a number of factors regarding the degree of preciseness of the text, and on the possibility to regulate some exceptions to that right. It also depends on the limitations of the constitutional review on legal actions such as the legislations and decisions that regulate that right. If all these factors have been met in one right, this right would be considered to occupy the first level.[56] Genevois also argues that in the case of the Constitution being amended or developing some principles that are inconsistent with a fundamental right occupying this superior level, the constitutional judge's only option is to prefer the rules that include fundamental right.[57] As we can see, from practical respect, it is an acknowledgement that there is a substantive hierarchy between the constitutional rules.

This idea has been expressed by Brami, who argues that the origin of the theory of the substantive hierarchy between the constitutional rules links back to the analysis presented by Badinter & Genevois in which he admits that there is a substantive hierarchy that exists between the principles with the constitutional value. However, other criteria have recently emerged for recognising the hierarchy, by applying the theory that some rights and liberties could be considered superior to others. These criteria are based on the determination that is imposed by the legislator. In order for the rights and liberties to be at a superior position, they must be specified by a goal with constitutional value, otherwise these rights and liberties will only be of a secondary nature, as they are determined by public interest and others.[58] For example, the individual rights and freedoms included in Article 34 of the 1956 French Constitution belongs to the category of the rights with superior level as they meet the conditions previously mentioned. These rights are specified by aim with constitutional value represented by protecting the public order in decision issued on 21 February 2008[59] in which the constitutional judge examined the discretionary authority of the legislature to choose from a number of alternatives to achieve the pursued purpose. By contrast, the principle of equality has been considered a second-level constitutional principle. This is because this principle includes provisions allowing some degree of inequality, if it is for reasons of public interest.[60] The constitutional judge only prohibits the difference in abusive dealing, in other words, only the express inconsistencies with the intended goal will be prohibited. Therefore, the legislature has been granted discretionary powers to regulate the principle of equality.

The idea of the hierarchy of the fundamental rights can also be found within the US constitutional system. Some scholars consider the US Constitution as a document that explicitly declares which rights or principles occupy the superior status than others.[61]

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56 T Di Manno, 1994. *[The Constitutional Council and the means and conclusions raised ex officio]*. Economica-PUAM. (In French).

57 B Genevois, [A Category of Principles of Constitutional Value: the Fundamental Principles Recognized by the Laws of the Republic], RFD adm, 1998, p.294.(In French)

58 Di Manno, T, *[The Constitutional Council and the means and conclusions raised ex officio]*. Economica-PUAM, 1994 . (In French).

59 Turpin, D, [*Constitutional litigation*], Presses Universitaires de France-PUF, 1986 ,pp.74 (In French).

60 Rials, S, [Uncertainties of the notion of Constitution under the Fifth Republic], *Revue du droit public et de la science politique***,** 1984 , p.604. (In French).

61 Albert, R, The expressive function of constitutional amendment rules. *McGill Law Journal/Revue de droit de McGill,* 2013,59**,** pp.240.

Walter Murphy clearly expresses this point by describing 'human dignity' as "the chief value of the American Constitution". Murphy uses human dignity as a standard to measure which rights hold greater significance than others. He states that human dignity "would serve as a useful, if not objectively infallible standard to help determine which rights are most fundamental".[62] Murphy goes further by providing a clear suggestion for the Supreme Court in reasoning that conflicts between the fundamental rights can be solved. He argues that "after stating this general approach, the Court could explain and justify protection of human dignity as the principal value in the American constitutional system and thus reason that because the amendment violates that basic value, it is invalid".[63]

Another clear example of the supremacy of some fundamental rights over others was made by the Federal Constitutional Court of Germany. During the 1950s, the Federal Constitutional Court released a significant decision by which the hierarchy of the fundamental rights is affirmed.[64] This case was Southwest Case (1951) in which the Court declared that the fundamental rights and principles set forth in both Article 1[65] and Article 20[66] from the German Basic Law hold a hierarchically greater significance than others.[67] Under Article 79(3)[68], these fundamental rights and principles are given supremacy and immunity from any moderation or abrogation by any legislative powers. In this decision, the Court noted it agrees with the statement made by the Bavarian Constitutional Court:

> That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional principles that are so fundamental and so much an expression of a law that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.[69]

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62 W F Murphy, "An Ordering of Constitutional Values", *S. Cal. L. Rev.,* 1979 , 53**,** p.754.

63 *Ibid.*

64 K Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*, Ekin, 2008, pp.299.

65 Article 1 [Human dignity – Human rights – Legally binding force of basic rights] (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

66 Article 20 [Constitutional principles – Right of resistance] (1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

67 M De Visser, *Constitutional Review in Europe: A Comparative Analysis*, Bloomsbury Publishing, 2013.

68 Article 79 (3) of Basic Law for the Federal Republic of Germany states "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

69 M De Visser, *Constitutional Review in Europe: A Comparative Analysis*, Bloomsbury Publishing, 2013, p.240; K Gozler, *Judicial Review of Constitutional Amendments: A Comparative Study*, Ekin, 2008, p.84; W F Murphy, "An Ordering of Constitutional Values", *S. Cal. L. Rev.,* 1979, 53**,** p.755.

All of the above, we can conclude that the constitutional rules that regulate the fundamental rights are in ranking order within the constitutional system. Identifying which fundamental rights do prevail helps determine which constitutional rules are most superior within the constitutional bloc.

C. The Hierarchy between the Constitutional Rules and Fundamental Principles

Some constitutional jurisprudence has adopted the idea of substantive hierarchy between the constitutional rules and principles in applying the idea of reconciling between them. This result confirms the idea of a substantive hierarchy between the constitutional rules and principles, sets up substantive bases, and applies them in relation to each right and freedom until each conflict is resolved. These criteria will be regulated by the constitutional text relating to the right or freedom. This manner grants the constitutional judge restricted discretionary power in light of these constitutional regulations, and this leads to the preference between these principles, not excluding some of them on the account of others.[70] As we can see, it indicates the existence of a substantive hierarchy between the constitutional texts. In addition, not excluding the principles when they are inconsistent with each other and adopting the reconcilement not exclusion, confirms rather than denies the idea of substantive hierarchy.

Some scholars have responded with the argument that in cases of conflict and inconsistency between two provisions, the real solution is not by approving one principle and ignoring another. However, by granting the constitutional judge the task of reconciling the conflicted constitutional provisions without stripping the constitutional values from them,[71] it is possible to set up a hierarchy based on the idea of reconciling between the conflicted constitutional rules.

A clear example of the substantive conflict between the constitutional principles in the Constitution is Article 2 of the 2005 Iraqi Constitution. Article 2 reads as follows;

> Islam is the official religion of the State and is a foundation source of legislation:
> A. No law may be enacted that contradicts the established provisions of Islam
> B. No law may be enacted that contradicts the principles of democracy.

This Article imposes an obligation on the legislature to not enact laws that contradict with the principles of both Islam and democracy. However, formulating Article 2 in this form generates a conflict and put both the legislature and constitutional judges in a very difficult position in several respects. First, it is difficult for the legislature to enact laws consistent with the principles of both Islam and democracy at the same time. There are a number of principles which are consistent with democracy and contradict with the Islamic principle, such as the form of the regime, separation of powers, national

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70 R Badinter, and E Genevois, [Norms of Constitutional Value and Degree of Protection of Fundamental Rights]. *Revue universelle des droits de l'homme*, 1990, 2,(6-8), (In French).

71 B Genevois, [A Category of Principles of Constitutional Value: the Fundamental Principles Recognized by the Laws of the Republic], RFD adm, 1998 , p.341(In French).

sovereignty, parliament sovereignty, some political rights, the rights of homosexuals, credit interest, and freedom of religion and belief. Under the established provisions of Islam (for example, that Muslims are not allowed to convert to another religion) however, preventing a person from pursuing their own religious belief contradicts the democratic principle. Such difficulty comes from the general formulation of the principles of Islam and democracy inside the Constitution. Under such conflict, the constitutional courts will be in an unenviable position to decide on such conflict, because this conflict is between two rules that are procedurally given the same position in the Constitution. The main task of the constitutional court is to overcome such conflicts between these two significant principles by giving one of them a superior position over the other. Necessarily, the question arises as to whether unelected judges have authority to give one principle a substantive supremacy over another. Acknowledging that judges make substantive hierarchies between constitutional provisions provides an answer to this question, as it allows judges to resolve the conflict without destroying the value of one of the principles.

In many legal systems, the constitutional legislators have explicitly given the supremacy for some constitutional principles by considering them as basic rules over other constitutional rules. For example, the republican form of government has been considered a fortified principle in many Constitutions. In Italy, Article 139 of the Constitution provides that "The form of Republic shall not be a matter for constitutional amendment." The same attitude has been taken by the French Constitution by stating in Article 189 that "The republican form of government shall not be the object of any amendment." The existence of such limitation on the possibility to amend the form of government gives clear evidence for the constitutional judge that this principle holds a greater position within the constitutional bloc. If any other constitutional principle or rules does conflict with the principle, the decision of constitutional judge will be in favour of the principle. Such a decision would necessarily insist on a hierarchy between the constitutional rules and principles set forth in the constitution. Furthermore, the principle of the republican form of government is not just a restriction on the constitutional judges; rather, it is an impregnable obstruction against future constitutional amendment. All these features give the principle of the republican form of government a superior position over other constitutional rules.

Another clear example of the substantive hierarchy is the principle of national sovereignty. On many occasions, the French Constitution gives the principle of national sovereignty a higher position than others. This fact can be clearly deduced from many Articles. The Preamble of the 1958 Constitution sets forth that "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789…."[72] This fact is interpreted by arguing that the rules of national sovereignty existed before the constitution itself, and the Constitution merely declared them by providing for them within its articles. So, we can argue that these rules restrict the constitutional legislator, and thus they are not

[72] Declaration of the Rights of Man and the Citizen, 26 August 1789, declares that 'The principle of all sovereignty resides essentially in the nation. Nobody nor individual may exercise any authority which does not proceed directly from the nation.'

subjected to the same restrictions as other laws. The constituent branch is not able to amend the rules regarding national sovereignty, because they are central to the existence of the constitution.

Accordingly, reservations of sovereignty cannot occur through constitutional amendment because only an act of sovereignty here can defeat another act of the constituent branch. If the constitutional amendment branch is incapable of removing the obstacle of amending the provisions of the national sovereignty, this is because they must be interpreted as part of the intangible provisions of the French Constitution. Article 3 insists on this by providing that "national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum." According to Article 3, the sovereignty of the State (involved in national sovereignty) can be seen as an autonomous and tacit limitation derived from the reasonable and systematic interpretation of the Constitution. Thus, national sovereignty is considered as an element that can only be amended by the will of the people, as the owner of the powers in accordance with the constitution through direct referendum. This feature gives the principle of national sovereignty a higher position than any amendments made in accordance with Article 89 by forcing both houses of parliament to sit together in a conference form in order to amend the constitution.

IV. Judicial Applications of Substantive Hierarchy

The idea of the hierarchy of constitutional rules is not confined only among the circles of constitutional jurisprudence, but it has expanded to find its resonance in the applications of the constitutional judiciary. In this section, we highlight the judiciary's use of a substantive hierarchy across a range of cases and legal systems to demonstrate that this is not a new or radical idea; rather, we are simply providing a label for what is already practiced, and a framework so that it may be applied more transparently. The position clearly appears in a number of countries – we draw examples here from France, Australia, the United Kingdom and the US. Doing so would normally be methodologically dubious, as we seek to compare across civil and common law systems, with written and unwritten constitutions. However, we argue that in this instance such a wide-ranging comparison is a strength as it showcases the breadth of the idea of a substantive hierarchy.

It is useful to begin discussion with the French constitutional judiciary, as most of the literature focuses on this case. France was one of the first countries in which the constitutional judge expressly or implicitly declared that constitutional rules do not have the same value and level within the constitutional system. Indeed, the Constitutional Council has done so on a number of occasions. The most significant of these decisions was issued on 23 November1977,[73] in a case regarding educational institutions. In this case, the National Assembly claimed that Article 1 of the law of 31 December 1959 amended by the law of 1 June 1971 was unconstitutional.[74] Some articles of this law

[73] Decision n° 77-87 DC of 23 November 1977.

[74] B Genevois, [A Category of principles of constitutional value: the fundamental principles recognized by the laws of the Republic], RFD adm, 1998, pp.318.(In French).

obliged employees, who were teaching in the educational institution, to respect the private policies and aims of these institutions.[75] Some members of National Assembly consider these articles violate the freedom of religion and belief laid down in Article 3 of the 1958 Constitution.[76] The response of the Constitutional Council, in this case, was that there was no inconsistency between the articles with the Constitution, but rather they created restrictions on the legislature. The content of this restriction is that the legislature must reconcile between the freedom of the education represented by respecting the private policies and aims of the educational institutions, and between the necessities of respecting the freedom of belief of the teacher on the other hand.[77] The Constitutional Council reasoned that even the law had to respect the policies and aims of the educational institutions, as the freedom of education is considered a fundamental right recognised by the republic laws.[78] The council indicated that when laws regulate obligations on the teachers, they should not violate the freedom of belief.

The Constitutional Council has adopted this position on other occasions. In decisions on 25 July 1979 [79] and 18 September 1986,[80] the Constitutional Council sought to reconcile between competing constitutional principles. Pursuant to these decisions, the Constitutional Council imposed on the legislature, in regulating the right of the strike, an obligation to not forbid this right or distort it.[81] The Council ruled that the legislature needs to ensure that the exercise of the right to strike must be reconciled and balanced with the principles of the continuity and regularity of public utilities. The Constitutional Council, by adopting this position, refused the claim of the National Assembly which argued that the right to strike, as a constitutional right, should not be restricted in order to continue public utilities. As we can see, the Constitutional Council, by adopting this position, has reconciled between the right to strike and the principle of continuity and regularity of public utilities, and thus it has favoured the latter over the former without denying the right to strike.

The Constitutional Council also confirmed this idea in its decision 16 January 1982,[82] relating to the case of nationalisation. In this case, the Constitutional Council was asked

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75 C Brami, [*The Hierarchy in French constitutional law: systemic analysis test*],(Doctoral dissertation, Cergy-Pontoise), 2008,p 228.(In French).

76 Article 3 of the 1958 constitution provides that" National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof.

77 E Picard, [Towards the extension of the constitutionality bloc in European law], *Revue française de droi! adminis! ratif,* 1993, pp. 47-54 (In French).

78 R Badinter, and E Genevois, [Norms of Constitutional Value and Degree of Protection of Fundamental Rights], *Revue universelle des droits de l'homme*, 1990, 2,(6-8),p.341. (In French).

79 E Picard, *Supra* n. 78.

80 C Brami, *Supra* n. 76, at p.298.

81 D Rousseau, P Y Gahdoun, & J Bonnet, *[Constitutional Litigation Law]*, LGDJ-Lextenso éditions, 2016, p.108. (In French).

82 O Beaud, [State Sovereignty, Constituent Power and the Maastricht Treaty], *Revue française de droit administratif*, 1993,9 (6), pp.1045-1068. (In French).

to decide on the conflict between Article 17 of the 1789 Declaration [83] and Article 9 of the preamble to the 1946 Constitution.[84] The Constitutional Council declared that, in spite of the development of society and law, Article 17 of the 1789 Declaration has complete constitutional value. The Preamble to the Constitution of 1946 came to complete the Declaration of 1789.[85] As we can see, the Constitutional Council gave the Declaration of 1789 constitutional level or hierarchy which outweighed the constitutional level of the preamble to the 1946 Constitution by considering that Article of the 1789 Declaration has complete constitutional value, while the preamble to the 1946 Constitution only has an abstract constitutional value. Therefore, according to the decision, the Constitutional Council has recognised the existence of the hierarchy between the Preamble to the Constitution of 1946 and the Declaration of 1789 and given to the latter the supremacy within the constitutional hierarchy. This has been recognised by a number of scholars[86] by arguing that the principles set forth in the Declaration of 1789 outweigh the principles incorporated in the Preamble to the Constitution of 1946.[87] For example Goguel indicates that the 1789 Declaration has outweighed the political, economic and social principles that have been declared as being especially necessary to our times in the Preamble to the 1946 Constitution. According to him, it follows that the terms of the 1789 Declaration do not claim to be compatible with a given state of development of the history and the evolution of societies.[88] The rights that it declares vest in humans by virtue of their very nature. They are absolute and imprescriptible rights. On the contrary, the principles stated in the Preamble to 1946 are declared expressly 'particularly needed in our time'. Therefore, they could not be necessary in the past, and they might not be in the future. The principles particularly necessary in our time, unlike the rights declared in 1789, are allocated a certain coefficient of contingency and relativity.

The constitutional judiciary in Australia is another country that has implicitly recognised the existence of a substantive hierarchy in its decisions. The most significant of these decisions was issued on 27 Jan 1915, in a case regarding judicial separation of power (*Wheat case*[89]). In this case, the High Court declared that there was conflict between section 101 of the constitution and one of the principles of the separation of

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[83] Article 17 of the Declaration provides that "Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.

[84] Article 9 of the 1946 constitution provides that" All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society L Hamon, [Sovereignty, the constitution ... and the European negotiations in progress], *Recueil Dalloz Sirey de doctrine de jurisprudence et de législation***,** 1991, pp. 222-223 (In French) *Ibid*.
K Gözler, [The question of the hierarchy between constitutional norms], Annales de la Faculté de Droit d'Istanbul, 1998, 78-79 (In French).

[85] L Hamon, [Sovereignty, the constitution ... and the European negotiations in progress], *Recueil Dalloz Sirey de doctrine de jurisprudence et de législation***,** 1991, 223 (In French).

[86] *Ibid*.

[87] K Gözler, [The question of the hierarchy between constitutional norms]. Annales de la Faculté de Droit d'Istanbul, 1998, p.79.

[88] C Brami, [*The Hierarchy in French constitutional law: systemic analysis test*],(Doctoral dissertation, Cergy-Pontoise), 2008, p.211.(In French).

[89] *New South* Wales *v Commonwealth* [1915] HCA 17, 20 CLR 54.

powers. Section 101 provides for an Inter-State Commission "with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder".[90] Meanwhile, while not expressly mentioned, the separation of powers is considered one of the four significant constitutional principles implied in the Australian Constitution, along with federalism, representative government and responsible government. The separation of the legislative, executive and judicial powers of the Commonwealth into Chapters I, II and III respectively has created a clearly understood convention that the constitution implicitly recognises the separation of powers as a key principle within the Australian system.[91]

In this case, the conflict was not between two explicit constitutional provisions or principles within the Australian constitutional order, but between one of the explicit provisions (s.101) and the implicit principle of separation of powers. Such conflicts make the task of the constitutional court more difficult, because the conflict is not between two rules belonging to the different levels (contradicting legislation with the constitution), but, in fact, between two rules and principles that have occupied the same level in the constitution. The difficulty is due to the fact that, while the High Court has jurisdiction to review the constitutionality of ordinary legislation, it cannot rule on the validity of constitutional provisions themselves (as doing so would itself violate the separation of powers and the supremacy of the Constitution). Thus, the Court had no authority to deprive the constitutionality from these provisions and principles, because the main task of the Court was to protect and guarantee the supremacy of these provisions and principle. In the *Wheat* case, the High Court overcame the conflict by holding that the principle of the separation of power is above section 101. This result can be clearly deduced from its decision abolishing the Inter-State Commission and declared that the vesting of judicial power in the Commission was invalid.[92]

The majority of Australian scholars[93] understand the *Wheat* case differently, believing that the High Court exercised its interpretive jurisdiction to resolve the conflict by interpreting Section 92 of the Constitution. We offer a different perspective because we distinguish between interpreting (which seeks to clarify ambiguous provisions) and substantive hierarchies (which clarify the relationship between two equal, unambiguous, provisions). In the *Wheat* case, there was nothing inherently ambiguous, either in the specific wording of section 101, or the implied doctrine of separation of powers. Instead,

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90 S. 101, *Commonwealth of Australia Constitution Act 1900* (Australia).

91 G Airo-Farulla & S White, "Separation of Powers, Traditional Administration and Responsive Regulation", *Macquarie LJ,* 2004, 4**,** p. 57; J M Finnis, "Separation of Powers in the Australian Constitution-Some Preliminary Considerations", *Adel. L. Rev.,* 1967, 3**,** p. 159; J Goldsworthy, "Structural Judicial Review and the Objection from Democracy", *University of Toronto Law Journal,*2010*,* 60**,** pp. 137-154.

92 *New South* Wales *v Commonwealth* [1915] HCA 17, 20 CLR 54.

93 J Goldsworthy, "Structural Judicial Review and the Objection from Democracy", *University of Toronto Law Journal,* 2010 , 60**,** pp. 137-154; J M Finnis, "Separation of Powers in the Australian Constitution-Some Preliminary Considerations", *Adel. L. Rev,* 1967*,* 3**,** p. 159; C Parker, Protection of Judicial Process as an Implied Constitutional Principle, 1994, 16, p. 341; C Howard, "Freedom of Interstate Trade", *Melb. UL Rev.,* 1967, Vol. 6**,** p. 237; P Genrman, "Separation of Powers: Contrasting the British and Australian Experiences", *eLaw J.,* 2006.13**,** p. 141.

the question for the High Court was how these two equal but conflicting provisions related to one another, and the Court answered by establishing a hierarchy between them. We therefore contend that scholars who characterise the High Court's decision as 'interpretation' do so either because they are unaware of the substantive hierarchy theory, or find the idea of a hierarchy between constitutional rules and principles undesirable.

Third, and more recently, the United Kingdom has recognised that there may be a substantive hierarchy between provisions within its constitutional bloc. A clear recent example arose in the HS2 case, where the Court decided on the application of two European Directives within the context of the planned high speed rail link between London and northern cities, commonly referred to as HS2. In this case, Lord Neuberger and Lord Mance provided an important statement in distinguishing the case before them from the previous Metric Martyrs case,[94] stating that

> Important insights into potential issues in this area are to be found in their penetrating discussion by Laws LJ in…The Metric Martyrs case, especially paras 58-70, although the focus there was the possibility of conflict between an earlier "constitutional" and later "ordinary" statute, rather than, as here, between two constitutional instruments, which raises yet further considerations.[95]

Some scholars consider this case as bold step from the Supreme Court toward the recognition of a substantive hierarchy by declaring that there can be a hierarchy between two constitutional rules within the UK constitutional system.[96] The position of Lord Neuberger and Lord Mance has been understood to imply that some constitutional principles, like the one from Art. 9 of the Bill of Rights are more entrenched against abrogation by later constitutional instruments than other constitutional principles in that they require even stronger evidence of legislative intent for repeal. Hence, even if it is not possible to give full effect to supremacy of EU law under the 1972 Act without impinging upon the principle from Art. 9 of the Bill of Rights, this is not enough to prove that the principle has been abrogated by the 1972 Act.[97] Mark Elliott has explained this position as recognition of the idea of the hierarchy of the constitutional rules in the UK system, by stating that "some constitutional measures are more fundamental than others, and that Parliament—in a given constitutional measure, such as the ECA—should not lightly be taken to have intended the abrogation of some other, perhaps more fundamental, constitutional measure."[98] Mikołaj Barczentewicz also supports this idea by arguing

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94 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QBP151.

95 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

96 L Hale, "UK Constitutionalism on the March?", *Judicial Review,* 2014, Vol. 19**,** pp. 201-208; S Sedley, *Lions under the Throne: Essays on the History of English Public Law*, Cambridge University Press 2015; A L Sueur, M Sunkin & J E K Murkens, *Public Law: Text, Cases, and Materials*, Oxford University Press. 2016, p.79.

97 Barczentewicz, M, "Constitutional statutes" still alive. *Law Quarterly Review*, 2014 ,*130*, pp.557-557.

98 Elliott, M, "Reflections on the HS2 Case: A Hierarchy of Domestic Constitutional Norms and the Qualified Primacy of EU Law"*,* 2014, p.79. *UK Constitutional Law Association.* Available from: https://ukconstitutionallaw.org/2014/01/23/mark-elliot-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/ Assessed on 14 May 2018.

that "In HS2 Lord Neuberger and Lord Mance appear to have decided to contribute to changing that situation by not only endorsing Laws L.J.'s distinction between two types of statutes (HS2 at [208]),[99] but also by hinting that constitutional statutes and principles may be in some way entrenched against change by later constitutional statute".[100]

Although the idea of the substantive hierarchy between the constitutional rules found its roots in the constitutional jurisprudence and judiciary of France, Australia, India, and Germany, it has not been paid sufficient attention by legal and political theory. A number of benefits are created as a result of the adoption of the substantive hierarchy. First, the presence of the plurality of the components within the constitutional bloc allows judges to recognise a constitutional value in some rules that is higher than the value granted to others. Thus, the authority of an amendment is obliged to be subordinate to the content of these rules when it exercises its power to amend the constitutional provisions. Therefore, the substantive hierarchy might be considered as a constraint on the function of the constitutional amendment branch. The second benefit that might be produced as a result of adopting the substantive hierarchy is the protection of constitutional rights. Constitutional rights, under the substantive hierarchy, are divided into a number of categories. Some of them are given a post-constitutional value within the constitutional pyramid, thus they are superior to those given a sub-constitutional values. By adopting this hierarchy, constitutional courts will be able to reconcile between the conflicting rights[101] by granting the priority to rights which have the post-constitutional value. Substantive hierarchy also contributes as a real solution to conflicting and inconsistent provisions. The real solution does not rely on approving one principle and ignoring another. Instead, by granting the constitutional judge a new role, (which differs from its other competences) the judge is empowered to reconcile the conflicting constitutional provisions, without stripping the constitutional values from either provision.

V. CONCLUSION

The hierarchy which has been examined in this article is not the classic hierarchy between all the legal norms within the legal order as Hans Kelsen explored in his famous study "Pure Theory of Law".[102] It is a hierarchy between rules and principles belonging to a particular field of the law; constitutional law. In this article, it has been argued that the constitutional rules and principles do not enjoy the same value within the scope of the constitutional bloc, but there is a kind of hierarchy raised between these rules and principles which is substantive hierarchy. The constitutional judges in many countries, such as France, Australia, Germany, India, Malaysia, Iraq and the UK, have clearly adopted the notion of substantive hierarchy between the constitutional rules and principles

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99 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

100 Barczentewicz, M, "Constitutional statutes" still alive. *Law Quarterly Review*, 2014, *130*, pp.557-557.

101 See L Favoreu, [The Jurisprudence of the Constitutional Council and the Right of Property proclaimed by the Declaration of 1789, The Declaration of the Rights of Man and Citizen and Jurisprudence], paper presented to Conference of Constitutional Council, 25-26 May 1989, p 39. (In French).

102 T Di Manno, *[The Constitutional Council and the means and conclusions raised ex officio]*. Economica-PUAM, 1994. (In French).

on many occasions. Under the substantive hierarchy, the constitutional rules are ranked in order. This hierarchy leads to subordinating the constitutional rules with the inferior value to the superior rules within the constitutional hierarchy. The validity of these rules is not based on external rules, whether philosophical or ethical rules, nor on legal rules belonging to another legal order, but they base their validity on constitutional rules that exist within the Constitution itself. Therefore, the Constitution consists of system and rules interrelated with each other according to a hierarchical relationship. In this article, it has been argued there are three criteria pursuant to which the constitutional rules and principles are prevailed. Creating a hierarchal structure between the constitutional rules helps avoid any conflict between the rules and principles with constitutional values as long as each rule or principle derives its validity and efficiency from the rule that topped them. Therefore, the substantive hierarchy is considered the optimum mechanism to address the problem of the conflict between two rules or principles that enjoy the same value and level within the constitutional system. To achieve this end, an important development needs to occur in the character of constitutional courts – a shift from their traditional role as a negative legislator, to a significant role as a positive legislator. This shift enables constitutional judges to highlight the hierarchy between these rights, without excluding some of them on the account of others, nor stripping one of them from its constitutional value and granting another post-constitutional value.